

SEVENTEENTH ANNUAL
**Texas Environmental
Superconference**



"A SUPER CONFERENCE"

WELCOME

TO: Attendees

FROM: Planning Committee

DATE: August 4, 2005

On behalf of the Environmental and Natural Resources Law Section of the State Bar of Texas, the Air and Waste Management Association-Southwest Section, the Water Environment Association of Texas, the Texas Association of Environmental Professionals, the Auditing Roundtable, and the American Bar Association Section of Environment, Energy & Resources, welcome to the Seventeenth Annual Texas Environmental Superconference, "A Super Conference." As you know, the conference is an annual event established to create a dialogue among the attendees, who are drawn from the public and private sector and from the legal and technical professions. The conference provides excellent continental breakfasts, lunches and snacks, and plenty of breaks to encourage participants to discuss environmental issues informally, as well as gifts and quizzes and prizes.

As always, there are evaluation forms for the program. We appreciate your taking the time to complete them. The organizers of this program take into account these forms in planning next year's conference. In addition, if you have an interest in having a particular topic presented, or in speaking on a particular topic, the evaluation form is the appropriate place to provide that information. Suggestions for themes for next year also are being solicited. Next year's conference is scheduled for August 3 - 4, 2006. Please mark your calendars. If you would like to receive next year's program electronically, please provide us your e-mail address if you did not include it in your registration.

This year, we added a Wednesday evening session – Environmental 101. Please let us know what you think about this new session. Should we do it again? Each year? Every other year?

If you have any questions or comments, please do not hesitate to contact any member of the Planning Committee at the conference, or, thereafter, Jeff Civins at (512) 867-8477 or Jeff.Civins@haynesboone.com.

AGENDA

SEVENTEENTH ANNUAL TEXAS ENVIRONMENTAL SUPERCONFERENCE

THURSDAY, AUGUST 4, 2005

- TAB 1** **8:40 – 9:00 Welcoming Remarks – *The Incredibles***
Jeff Civins, Texas Environmental Superconference
Charles Jordan, Environmental and Natural Resources Law Section, SBOT
Cindy Smiley, Air & Waste Management Association – Southwest Section
Carolyn Ahrens, Water Environment Association of Texas
Lee Garrett, Texas Association of Environmental Professionals
Michael Byington, The Auditing Roundtable
Danny Worrell, ABA Section of Environment, Energy & Resources
- Moderator:* Gindi Eckel, Pillsbury Winthrop Shaw Pittman L.L.P.
- TAB 2** **9:00 – 9:25 Legislative Update – “*With great power, there must also come great responsibility*”**
Mary Sahs, Sahs & Associates, PC
- TAB 3** **9:25 – 9:50 Key Case Update – “*Truth, justice and the American way*”**
Jeff Hembree, Haynes and Boone, LLP
- TAB 4** **9:50 – 10:10 Effect of New Federal Class Action Statute on Environmental and Toxic Tort Litigation**
“*Teenage Mutant Ninja Turtles*”
David Dukes, Nelson Mullins Riley & Scarborough, LLP
- 10:10 – 10:25 Break**
- Moderator:* Lisa Roberts, Valero
- TAB 5** **10:25 – 10:55 National Air Issues – “*Up, up and away!*”**
Bill Wehrum, Counsel to the Assistant Administrator for Air and Radiation, EPA D.C.
Ralph Marquez, Commissioner, TCEQ
- TAB 6** **10:55 – 11:30 Air Toxics Panel – *Toxic Avenger***
Pam Giblin, Baker Botts, LLP
David C. Schanbacher, P.E., Chief Engineer, TCEQ
Jim Marston, Environmental Defense
- TAB 7** **11:30 – 12:00 New Developments in Title V & Emission Events – *The Flash***
Eric Groten, Bracewell & Giuliani, LLP
Kelly Haragan, Environmental Integrity Project
Steve Hagle, Special Assistant to Air Permits Division Director, TCEQ
- 12:00 – 1:15 Lunch – *Super Heroes***
- Moderator:* Chuck Sheehan, Regional Counsel, EPA Region 6
- TAB 8** **1:15 – 1:45 Keynote Presentation – *Wonderwoman***
Ann Klee, General Counsel, EPA D.C.
- TAB 9** **1:45 – 2:45 Enforcement Issues – “*In brightest day, in blackest night, no evil shall escape my sight. Let those who worship evil’s might, beware my power – Green Lantern’s light!*”**
Paul Sarahan, Director, Litigation Division, TCEQ
Cathy Sisk, Bureau Chief, Environmental and Community Protection
Bureau, Harris County Attorney’s Office
Suzanne Murray, Deputy Regional Counsel for Enforcement, EPA Region 6
John Riley, Vinson & Elkins, LLP
- TAB 10** **2:45 – 3:10 Water Issues – *Aquaman***
Doug Caroom, Bickerstaff, Heath & Smiley, LLP
Renea Ryland, Assistant Regional Counsel, EPA Region 6

3:10 – 3:25 Break

- TAB 11** **3:25 – 3:50** *Moderator:* Drew Miller, Kemp Smith, LLP
Municipal Solid Waste – *The Incredible Hulk*
John Vay, Kelly, Hart & Hallman, P.C.
Rick Lowerre, Lowerre & Kelly
- TAB 12** **3:50 – 4:25** **All Appropriate Inquiry/Due Diligence – *Batman, Masked Detective***
James Bove, Assistant Regional Counsel, EPA Region 6
Mike Nasi, Lloyd Gosselink, PC
Bob Chapin, Weston Solutions, Inc.
- TAB 13** **4:25 – 4:50** **Municipal Setting Designations – *The Thing***
Kathryn Hansen, Regulatory/ Environmental Coordinator, City of Fort Worth
David Whitten, Guida Slavich & Flores, PC
- TAB 14** **4:50 – 5:15** **Reporting Historical Contamination and Beyond– *The Daily Planet***
Dan Eden, Deputy Director, Office of Permitting, Remediation & Registration, TCEQ
Keith Hopson, Brown McCarroll, LLP
- 5:15 – 6:00 Reception**

FRIDAY, AUGUST 5, 2005

Moderator: Bill Newchurch, SOAH

TAB 15 **8:45 – 9:15** **Electronic Discovery – Document Retention and Discovery – *Teen Titans***
David Chaumette, Shook, Hardy & Bacon

TAB 16 **9:15 – 10:15** **Working with an Expert Witness – *The X-Men***
Thomas Dydek, Dydek Toxicology Consulting
Dan Mueller, The Mueller Consulting Group
Jim Harris, Thompson & Knight
Carrick Brooke-Davidson, Andrews Kurth

10:15 – 10:35 **Break**

Moderator: Moderator: Arnoldo Medina, Shell

TAB 17 **10:35 – 11:00** **Detecting and Assessing Contamination: NAPL – A Primer – *Sub-Mariner***
Brad Snow, RMT

TAB 18 **11:00– 11:20** **Use of Interactive 3D and 4D Environmental Data Graphics – *Plastic Man***
Gavin Hudgeons, President, e60 Vision, LLC

TAB 19 **11:20 – 11:45** **New Technology for Enforcement – “*Here I come to save the day!*”**
John Blevins, Director, Compliance Assurance and Enforcement Division, EPA Region 6

11:45 – 1:00 **Lunch – “*Holy Guacamole, Batman!*”**

Moderator: Curt Johnson, Specialty Technical Consultants

TAB 20 **1:00 – 1:40** **Point/Counterpoint – *The Dynamic Duo***
Larry Soward, Commissioner, TCEQ
Larry Starfield, Deputy Regional Administrator, EPA Region 6

TAB 21 **1:40 – 2:20** **Sarbanes-Oxley – “*Who knows what evil lurks in the hearts of men*”**
Kathryn Pavlovsky, Deloitte & Touche LLP
Heather Corken, Fulbright & Jaworski L.L.P.

TAB 22 **2:20 – 3:20** **Up for Debate – *The Justice League***
Mark R. Vickery, Deputy Executive Director, TCEQ
Tom “Smitty” Smith, Director of Public Citizen, Texas office
Scott Sherman, Associate General Counsel, EPA DC
Doug Deason, Exxon Mobil

3:20 **Closing Remarks/ Ice Cream Sundaes – *Mr. Freeze***



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Areas of Experience:
Environmental Law
Transactions
Counseling
Litigation
Administrative Law

Jeff Civins

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Mr. Civins heads the firm's Environmental Practice Group and has practiced all aspects of environmental law since 1975. He advises clients on regulatory requirements, he assists them in the evaluation and negotiation of corporate transactions, and he represents them in environmental and toxic tort litigation.

As an adjunct professor at the University of Texas School of Law, Mr. Civins taught a seminar on Environmental Law Concerns to Business in 1987, and has taught a seminar on Environmental Litigation each Spring since 1992. He is co-editor of the Thomson West Texas Practice 2-volume treatise on Texas Environmental Law (1997 and 2005 editions).

Honors

- Top tier environmental lawyer in Texas -- Chambers USA America's Leading Lawyers (2003-2004, 2004, 2005)
- Best Lawyers in America (1989-present)
- Texas Super Lawyer -- Texas Monthly (2003, 2004, 2005)
- One of top 50 lawyers in Central and West Texas -- Texas Monthly (2003, 2004, 2005).

Education

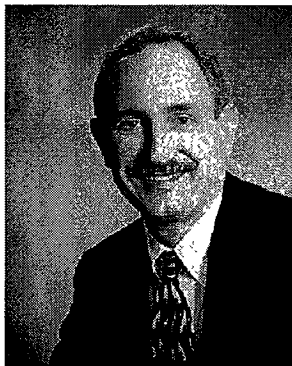
J.D., University of Texas, 1975, with honors; Order of the Coif
M.S., in Chemistry, Pennsylvania State University, 1970
A.B., in Chemistry, Brandeis University, 1967

Memberships

Environmental and Natural Resources Law Section, State Bar of Texas, Past Chair, and Chair, Annual Texas Environmental Superconference; Administrative Law and Litigation Sections, State Bar of Texas; American Bar Association, Section of Environment, Energy, and Resources and of Litigation; Air and Waste Management Association, Central Texas Chapter, Past Chair; American Chemical Society -- Environment Division; Environmental Law Institute; Texas Law Foundation; University of Texas Law School Alumni Association Executive Board, Keeton Fellow, and Dean's Roundtable; President-elect, Communities-In-Schools, Central Texas Chapter

Selected Recent Publications

- "Transactional Environmental Due Diligence -- What diligence is due?" with Mary Mendoza, to be published in Natural Resources & Environment, ABA Section of Environment, Energy, and Resources (SEER)
- "The Third Party and Transaction-Related Defenses," with M. Mendoza and C. Fernandez, ABA-SEER Environmental Litigation & Toxic Torts Committee Newsletter (July 2005)
- "Environmental Management Systems," with A. Strong and C. Fernandez, Chapter 31, Volumes 45-46, Thomson West Texas Practice (2005)
- "Environmental Aspects of Business Transactions," with B. Phillippi, Chapter 32, Volumes 45-46, Thomson West Texas Practice (2005)
- "Fundamentals of Environmental Law," State Bar of Texas Ten Minute Mentor
- "Cleanup Help Not Avail-able," with J. Eldridge, Texas Lawyer (Jan. 10, 2005)
- "Proper environmental due diligence should be part of a stock acquisition," Austin Business Journal (Dec. 3-9, 2004), Dallas Business Journal, Birmingham Business Journal
- "Who's Liable Now? New Federal Brownfields Legislation," with B. Phillippi, Texas Bar Journal (Dec. 2002), reprinted in Real Estate Issues (Winter 2003-2004)
- "Practical Advice for Defense Counsel in Mass Toxic Tort Cases," with M. Mazzone and E. Kohn, Texas Lawyer (Nov. 2001)
- "Water Issues for Oil & Gas Producers," Southwest Legal Foundation (2001)



CARRINTON COLEMAN SLOMAN & BLUMENTHAL LLP

CHARLES C. JORDAN

Partner, Transactional
Environmental
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Education

Emory University (B.A.,
summa cum laude, 1974).
Harvard Law School (J.D.,
1978). Phi Beta Kappa.

Memberships

Member: American Bar
Association Natural
Resources, Energy, and
Environmental Law Section
and Real Property, Probate,
and Trust Law Section; State
Bar of Texas Environmental
and Natural Resources Law
Section and Real Estate,
Probate, and Trust Law
Section; Dallas Bar
Association Environmental
Law Section and Real
Property Section.

Offices

Past Chair: Dallas Bar
Association Environmental
Law Section; Chair,
Environmental and Natural
Resources Law Section, State
Bar of Texas (2004-2005);

Admitted to Practice

Texas, 1978.

Mr. Jordan serves as the head of the firm's environmental law section, and has an active real estate practice, as well, integrated with his environmental law work. His environmental practice is based in contaminated facilities and emphasizes Brownfields development, legal defense and counseling in site- and facility-related enforcement, remediation, and compliance matters. Mr. Jordan has been involved on behalf of his clients in defense of Superfund cost recovery and contribution claims; property damage claims arising out of facility contamination, fuel and waste storage tanks, fires, and product releases; public law disputes involving governmental responsibility for contaminated federal facilities; landfill closures; and toxic tort cases involving allegations of personal injury attributable to industrial contamination of the environment. On occasion, Mr. Jordan has served on arbitration panels and arbitrated property damage and breach of contract claims arising out of environmental conditions.

Mr. Jordan also has an active docket of compliance counseling matters arising out of (i) enforcement actions, which frequently expose the need for compliance systems; (ii) capital transactions (mergers, land transfers, and debt refinancing); or (iii) voluntary environmental audits.

Mr. Jordan's real estate practice real estate practice particularly complements his environmental practice in the area of interpreting and advising on environmental site assessments and the evaluation of environmental contingencies, which play a major role in most purchase, sale, merger, recapitalization, and debt transactions.

Representative engagements:

- Represent major municipality in landfill closure involving implementation of cap remedy
- Represent real estate developer in development and sale of major industrial park on VCP-processed methane site
- Successfully qualify client under EPA's self-audit/disclosure policy in storm water regulation compliance context at development sites
- Represent municipality in dispute with federal government over closed military base with demonstrated environmental contamination

Cynthia C. Smiley

Cynthia C. Smiley joined Kelly, Hart & Hallman, P.C. as a Director in 2004 and is a member of the firm's Environmental and Administrative Law Practice Group. Ms. Smiley received a B.A. in Plan II (the liberal arts honors program) from the University of Texas at Austin in 1978, and her J.D. from the University of Texas School of Law in 1981. After beginning her legal career in an oil and gas exploration division at Exxon Company U.S.A. in Houston, Ms. Smiley served as an attorney at the Texas Department of Water Resources and its successor agency, the Texas Water Commission (now the Texas Commission on Environmental Quality), in Austin. In 1988, Ms. Smiley entered private practice, working at the Austin offices of Jones Day and then Baker Botts. Her practice focuses on water quality, water rights, waste characterization and waste management, assessment of potential environmental liabilities associated with transactions, and other environmental and regulatory matters at the federal, state and local levels. Cindy is active in the Air & Waste Management Association and in the Industry Council on the Environment.

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BIOGRAPHICAL INFORMATION

CAROLYN AHRENS WIELAND practices law primarily in the areas of water, utility and environmental law. She also has been active in representing clients on water issues before the Texas Legislature. Carolyn has been a speaker and author on the subject of water and legislative issues on many occasions. She is a dedicated participant in professional associations that are focused on water resources for public water supply. Carolyn serves on the Board of Trustees of the Water Environment Federation, an association dedicated to the preservation and enhancement of the global water environment. She also is a director of the national WaterReuse Association; a Director and former Water Laws Chair of the Texas Water Conservation Association (TWCA); and the Chair of the American Water Works Association Water Allocation and Regulation Committee. Among her special projects as a member also of the Executive Board of the Water Environment Association of Texas (WEAT), is convening the Texas Water Forum, a network of Texas associations that share perspectives on legislative and regulatory issues facing water suppliers.

Carolyn is a past recipient of the TWCA President's Award for outstanding dedication, contribution and service to the water resources of the State of Texas, of the WEAT President's Service Award, and of two Watermark awards for raising the public's level of understanding of Texas water issues.

Lee Garrett, P.G. has served as President of the Texas Association of Environmental Professionals (TAEP) since January 2005 and has served on the Board of Directors since January 2004. Under Mr. Garrett's leadership, the TAEP has initiated a Young Environmental Professionals (YEP) group in an effort to provide a forum for young professionals to interact with one another, challenge each other to grow technically and professionally, and provide an environment for mentoring of young professionals. The TAEP has also initiated a program to select an Environmental Professional of the Year and a Young Environmental Professional of the Year to recognize those individuals who make significant contributions to the environmental profession, their community, and to the TAEP.

Mr. Garrett is a Senior Project Manager with Terracon Consultants, Inc. (Terracon) and is manager of Terracon's Site Investigation/Remediation Group in Houston, Texas. Mr. Garrett has 18 years of consulting experience in the environmental field and has experience working on site impacted by petroleum hydrocarbons, chlorinated solvents, metals, and pesticides/herbicides. Mr. Garrett has closed numerous sites under the Texas Commission on Environmental Quality's Voluntary Cleanup Program (VCP), Innocent Owner/Operator Program (IOP) and Petroleum Storage Tank Program (PST). Mr. Garrett also has experience with the Railroad Commission of Texas (RRC) VCP and is currently managing several sites in that program.

Professional Profile

Principal of Byington & Genuise since 1990. With over 25-years of experience in environmental regulatory compliance, permitting, auditing and project management; experience includes corporate coordinator and project manager for environmental regulatory compliance, permitting, and auditing in conjunction with solid waste, water, and air.

Areas of Expertise

Environmental Regulatory Compliance	Acquisition Due Diligence	Research/Development
Environmental Auditing	Environmental Site Assessments	Public Relations
Environmental Permitting	Health and Safety	Implementation

Professional Experience and Responsibilities

- Currently (2003 thru 2005) assisting in all environmental compliance programs and EMS implementation project at a major federal installation in Texas. This involves all aspects of implementation from design and development through full system implementation leading to third party registration.
- Corporate coordinator and project manager for environmental regulatory compliance, permitting and auditing in conjunction with waste, water, and air; in response to U.S. EPA and State regulatory requirements. Developed corporate environmental auditing policies and procedures. Additional audit overviews of operational activities pertaining to MSHA and OSHA requirements.
- Conducted numerous Acquisition Due Diligence and Environmental Site Assessment activities and reporting; including asbestos sampling and reporting. Involved with several Asbestos Maintenance Plans.
- Performed numerous environmental compliance audits of industrial operations and third-party waste disposal facilities.
- Managed various operational issues regarding solid waste, water, and air permitting compliance and reporting. Issues included waste disposal, Hazard Materials Communication Plans, Spill Prevention and Storm Water.
- Oversee corporate technical consultant requirements and coordinated efforts with Fortune 100 companies with a wide array of technical and industry requirements.

Environmental Consultant - Byington & Genuise, LLC	2000-Present
Environmental Consultant - J. McNutt and Associates	1998-2000
Senior Environmental Specialist - The North American Coal Corporation	1991-1997
Senior Environmental Engineer - Texas Municipal Power Agency	1984-1991

Education & Training

B.S. Zoology, Texas A&M University, 1977

Graduate Studies (MBA), Texas A&M University

Numerous regulatory seminars and training classes for Regulatory Compliance and Environmental Auditing

Professional Certifications and Affiliations

Level 5 Federal Security Clearance

Certified Professional Environmental Auditor (CPEA)

The Auditing Roundtable - Chairman, South Central Region

Previous Certifications Include:

Certified Hazardous Material Manager (CHMM)

Visible Emissions Evaluation Certification

Certified Asbestos Inspector

DANNY G. WORRELL

DANNY G. WORRELL is a partner with the law firm of Brown McCarroll, L.L.P. in Austin, Texas. His practice is concentrated in the areas of environmental permitting and enforcement, remediations, Superfund liability, and regulatory compliance involving hazardous and municipal solid waste, underground storage tanks, injection wells, and air quality. He has a B.S. in geology from the University of Texas at Austin, an M.S. in geology from Louisiana State University in Baton Rouge, and a J.D. from the University of Houston Law Center.



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Ms. Eckel joined Pillsbury Winthrop Shaw Pittman LLP in May of 2005 as a senior associate in the Houston office. Her practice focuses on environmental, with a specialty focus in regulatory air matters, enforcement and compliance. Ms. Eckel also has extensive litigation experience, both general and environmental.

Prior to joining the firm, Ms. Eckel was an associate with a boutique environmental law firm. She has represented petrochemical plants, refineries, energy companies, land owners, dry cleaners, airports, and the food and beverage industry in a variety of matters including permitting, enforcement with the state, local and federal government, Title V, compliance solutions and auditing, environmental litigation.

Education

J.D., Vanderbilt University (Executive Justice, Moot Court Board; Jessup International Moot Court Team), 1998

Study Abroad: Oxford University, Magdalen College, Oxford, England

B.A., Ouachita Baptist University (magna cum laude), 1995

Study Abroad: Moscow State University, Moscow, Russia

Professional

Texas Young Lawyers Association

Chair – Elect (2005 – 2006)

Treasurer (2004 – 2005)

Director (2002 – 2004)

The President's Award (2003)

President's Award of Merit (2001)

Texas Bar Association, Fellow

Houston Young Lawyers Association

Director (2003 – 2005)

Co-Chair Arts & Entertainment Committee (2003 – 2005)



Pillsbury
Winthrop
Shaw
Pittman^{LLP}

Outstanding Committee Chair (2004)
Houston Young Lawyer Foundation, Fellow

Houston Bar Association, Environmental Law Section
Director (2004 – 2005)

Fort Worth Young Lawyers Association
President (2002)
Vice-President (2001)
Secretary (2000)
Director (2000)

Tarrant County Bar Association, Environmental Section, Chair (2001 – 2002)

American Bar Association
Associate Editor, The Affiliate (2004 – 2005)
Assembly Delegate (2000 – 2005)

Young Audiences of Houston, Director (2004 – 2006)

The Hobby Center's Supporting Cast, Steering Committee (2004 – 2006)

Society of Performing Arts, NOW, Advisory Committee (2005 – 2006)

Texas Monthly, Rising Star (2004, 2005)

Northside Inter Church Agency
Vice President (2002)
Director (2001)

Affiliations

Admitted to practice: State of Texas (1998); U.S. District Courts for the Southern, Northern, Eastern and Western Districts of Texas

**LEGISLATIVE UPDATE:
ENVIRONMENTAL AND
NATURAL RESOURCE LAW**

Presented at the
The Seventeenth Annual
Texas Environmental Superconference

"WITH GREAT POWER, THERE MUST ALSO COME GREAT RESPONSIBILITY"

August 4 - 5, 2005

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ACKNOWLEDGEMENTS

Where I relied on information from a specific source, I have cited to that source. Otherwise, the information contained in this paper came from reviewing numerous tracking lists, news articles, bills, and bill analyses. I would like to thank and acknowledge the following sources and individuals for providing information.

Claire Arenson, Saitas and Arenson.

Dr. Barney N. Austin, Director, Surface Water Resources Division, Texas Water Development Board.

Darcy Frownfelter, Kemp Smith Law Firm, outside counsel for the Edwards Aquifer Authority.

Jace Houston, General Counsel, Harris-Galveston Coastal Subsidence District.

James Kowis, James Kowis Consulting.

Steve Minick, Legislative Liaison, Texas Commission on Environmental Quality.

Sierra Club Lone Star Chapter website.

Texas Water Conservation Association website.

I would also like to thank and acknowledge my assistant, Elizabeth Cancellare Ferrer for her invaluable assistance gathering information, checking citations, and producing the final product.

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What this Paper Covers

There have been legislative changes to state environmental and natural resource law since last year's Superconference. This paper discusses the most significant of those changes. Additionally, changes to Texas administrative law and water and wastewater utility law are discussed. With regard to federal legislation, as of the date this article was written, there have been no significant changes to federal environmental statutes since last year's conference.

79th Regular Session of the Texas Legislature

By all comparisons, the 79th regular session of the Texas legislature was a busy session. There were 3,592 House Bills filed and 1,892 Senate Bills filed. That's an average of 91.4 bills per day. Of those, 875 House Bills and 513 Senate Bills passed.¹ According to Steve Minick, TCEQ's legislative liaison, the agency tracked about 700 bills. No major environmental or natural resource bills were passed. Permit reform was left unaddressed in spite of a few bills filed on this issue. House Bill 86 concerning compliance histories also failed to pass.² At the end of the day, approximately 104 bills passed that will require TCEQ implementation. Forty to forty-five of those will require rulemaking.³

Other bills affecting environmental and natural resource laws that did not pass were legislation restricting the ability of local governments to adopt water pollution control measures and legislation weakening enforcement actions against rock crushers and concrete plants.⁴ Also defeated were "efforts to weaken regulation of uranium mining and restrict changes in the laws affecting open burning of trash and discharge of oil into water."⁵

¹ Stacey Schiff, "The 79th Legislative Session," presented to the Administrative Law Section of the Austin Bar Association (June 15, 2005).

² Steve Minick, Legislative Liaison, TCEQ, speaking at the June 24, 2005 Austin Industry Environmental Counsel luncheon. Compliance history legislation has been resurrected during the special session as HB 39. At the time this paper was written, it had been reported favorably out of the House Environmental Regulation Committee.

³ Steve Minick speech.

⁴ SIERRA CLUB, "State Capitol Report," Vol. 23, No. 4 (June 10, 2005) at p. 7.

⁵ Id. Radioactive waste disposal legislation has been introduced as SB 39 in the special session and had been voted favorably out of committee at the time this paper was written. The bill also addresses streamlining uranium mining permitting. SENATE RESEARCH CENTER, BILL ANALYSIS, Tex. S.B. 39, 79th Leg., 1st C.S. (2005).

During the regular session, the Legislature also failed to enact the environmental flow recommendations of an interim Study Commission. These provisions introduced as part of Senate Bill 3 have been resurrected as SB 15/HB 40 during the first called session. At the time this paper was written both had been reported favorably out of committee. Because the Governor's charge for the session includes only education and tax relief, it is unclear whether this bill will be considered on the floor.

"The major water conservation and land stewardship recommendations of an interim Water Conservation Task Force, all of which had widespread support from diverse interests and basically no opposition" also failed during the regular session.⁶ Likewise, bills on parkland acquisition and renewable energy goals did not pass.⁷

BUDGET

When considering the effect of this year's legislation on our clients, the effects of a tightened budget cannot be ignored. The budget for the upcoming biennium (Fiscal Years 2006 and 2007) reduces funds for the 10 natural resource agencies by four percent.⁸ Budgetary cuts of this magnitude, which are expected to include reduction in agency work force, have the potential for increasing the cost of any project requiring agency review or intervention.

WATER RESOURCES

Everyone interested in water issues followed closely the rise and fall of Senate Bill 3. As introduced, the legislation would have addressed a variety of major water issues including environmental flows, water conservation, groundwater management, and the cap on withdrawals from the Edwards Aquifer. Although the environmental flows⁹ and water conservation provisions were not considered to be controversial because of major work during the interim, the other provisions held the legislation back and ultimately it failed.

While the SB 3 water conservation provisions died, the following water conservation measures did pass. House Bill 1224 requires the Texas Water Development Board ("TWDB") to conduct an interim study to determine what effect, if any, take-or-pay water sales contracts have on

⁶ SIERRA CLUB (June 10, 2005) at p. 7.

⁷ Id.

⁸ Id. at p. 1.

⁹ See discussion above.

water conservation efforts. The TWDB must submit a report to the legislature by January 1, 2007.¹⁰

House Bill 1225 amends Texas Water Code Chapter 11 to exempt from cancellation for 'nonuse' a water right that is not being used as a result of demonstrated water conservation efforts. The demonstration will be by "implementation reports" submitted by the water rights holder. According to Bill Billingsley, TCEQ, the bill that would have required submittal of annual implementation reports to the TWDB did not pass during the regular session.¹¹ HB 1225 became effective on June 18, 2005 and will require a TCEQ rule change.

House Bill 2428 "establish[es] water efficiency standards for commercial pre-rinse spray valves used in restaurants to wash dishes and utensils."¹²

Under HB 2430, the TWDB must establish a Rainwater Harvesting Evaluation Committee to study the use of rainwater as a water supply. A report to the legislature is due by December 1, 2006. The bill also amends Texas Health & Safety Code Chapter 341 and requires the TCEQ to establish standards for domestic use of rainwater.¹³

Another provision included in the failed SB 3 sought to address management of the Edwards Aquifer by amending the Edwards Aquifer Authority Act to increase the maximum permitted withdrawals and critical period management of the Aquifer and address other operation and oversight issues of the Authority. This has been re-introduced at SB 24/HB 41 during the first called session and at the time this paper was written, had already been reported favorably out of committee.

Water resource planning issues were addressed as well. House Bill 578 amends Texas Water Code Chapter 16 to require each regional planning group to identify existing major water infrastructure facilities that may be used for interconnections in the event of an emergency shortage of water. The information is exempt from disclosure under the Public Information Act.¹⁴

¹⁰ SIERRA CLUB, "State Capitol Report," Vol. 23, No. 3 (May 19, 2005) at pp. 1-2 and TEXAS WATER CONSERVATION ASSOCIATION, "TWCA Legislative News, Bill Status Report" (June 13, 2005) ["TWCA"] at p. 3.

¹¹ July 1, 2005 telephone conversation with Bill Billingsley, TCEQ, Water Rights Permitting and Availability Section, Resource Protection.

¹² TWCA at p. 4.

¹³ TWCA at p. 8.

¹⁴ TWCA at p. 2.

House Bill 1763 amends Chapters 36 and 16, Water Code, regarding groundwater conservation district rulemaking, permitting, joint planning, and groundwater management plans.

Further, HB 1763 addresses the relationship among the regional water plans, the State water plan, and groundwater conservation district management plans. The bill strengthens requirements for joint planning and more consistent groundwater management by districts within the same management area. It establishes various mechanisms and opportunities for appeal of planning decisions and conflicts between estimated available groundwater.

For example, the legislation requires an annual joint planning meeting for all GCDs in each groundwater management area. Such planning meetings are subject to the Open Meetings and Public Information Acts. By September 1, 2010, the meetings must result in establishment of the “desired future condition of relevant aquifers.” Once this condition is established, it must be used and considered in each groundwater management plan, each district’s rules, and in the State water planning process. Some believe that these changes “should help to set the stage for advocating for the protection of spring flows and for sustainable aquifer-wide management.”¹⁵

House Bill 1763 also establishes procedures for addressing conflicts between an approved groundwater management plan and the State Water Plan, providing for appeal to District Court of Texas Water Development Board decision in such conflict cases. The legislation adds and further defines Issues that a groundwater management plan must address. The bill limits the scope of rules that a GCD may adopt prior to approval of its groundwater management plan, basically prohibiting permits with production limits unless they are deemed interim or temporary. The deadline for approval of groundwater management plans is increased to three years after a District’s confirmation election.

In addition to the planning issues discussed above, procedural standards were set for groundwater conservation districts in HB 1763. The bill establishes minimum notice and hearing requirements for GCD rulemaking and authorizes emergency rules under certain circumstances.

¹⁵ NATIONAL WILDLIFE FEDERATION, e-mail dated June 23, 2005.

House Bill 1763 also establishes due process requirements for GCDs that base production on historic or existing use; establishes other limits on how a GCD can set production limits; and establishes procedural notice and hearing requirements for all permitting. All GCDs are required to adopt rules to implement the permitting subchapter and may adopt additional notice and hearing procedures.

House Bill 2423 amends Chapter 36 so that “a rule promulgated by a district may not discriminate between owners of land that is irrigated for production and owners of land . . . whose land . . . production is enrolled or participating in a federal conservation program.” The bill is prospective in effect except for its applicability to Hudspeth County Underground Water Conservation District No. 1. Any of that District’s rules voided by the bill must be brought into compliance within 90 days of the effective date.

SB 343 amends Local Government Code Chapter 240 to allow Tarrant, Dallas and Harris Counties (counties with 1.4 million or more population) to regulate placement of private water wells. A county that decides to exercise this authority must adopt rules. The bill requires that specified private water wells would be exempt from such regulations.¹⁶

The South Texas Watermaster Program will serve as watermaster for the Concho River under HB 2815. A referendum must be held on or after September 1, 2009 to determine whether this arrangement will continue.¹⁷

HB 2019 continues the non-substantive revision of special districts, including numerous water districts, into a Special District Local Laws Code.

A number of bills making changes to the enabling legislation of various other water districts were enacted during the regular session. These include:

- HB 1229 expands the power of the Menard County Underground Water District to permit certain domestic and livestock wells.¹⁸
- HB 1981 increases the groundwater production fee charged by the Pineywoods Groundwater Conservation District.¹⁹
- HB 3478 modifies the authority of the Trinity Groundwater District to impose fees or taxes on certain entities.²⁰

¹⁶ TWCA at pp. 12 – 13.

¹⁷ TWCA at p. 10.

¹⁸ TWCA at p. 4.

¹⁹ TWCA at p. 6.

²⁰ TWCA at p. 11.

- HB 3539 converts the appointed Board of the Saratoga Water Conservation District, located in Lampasas County, to an elected Board.²¹
- HB 2362 extends the authority of Cow Creek Groundwater Conservation District in Kendall County to assess an annual well fee on all domestic and livestock wells regardless of exemption from permitting status under Texas Water Code Chapter 36.
- SB 986 designates how directors of the Wes-Tex Groundwater Conservation District are elected after county commissioners' precincts are redrawn.²²
- SB 1537 makes comprehensive changes to the enabling legislation of the Harris-Galveston Coastal Subsidence District and the Fort Bend Subsidence District including making them no longer subject to the requirements of Texas Water Code Chapters 36.²³
- SB 1604 restricts the assessment of fees against domestic, agricultural, and wildlife wells located in the Neches and Trinity Valley Groundwater District.²⁴
- SB 1799 makes Bee Groundwater Conservation District no longer subject to the requirements of Texas Water Code Chapter 49.²⁵
- HB 2639 modifies various provisions of the Tarrant Regional Water District's enabling legislation and repeals the creation of the Lower Rio Grande Authority, which was created last session.²⁶

A number of bills passed creating various water districts. These include:

- HB 3423 creates the Victoria County Groundwater District, which must be confirmed by September 1, 2010. The District has taxing authority.
- HB 3513 and SB 1831 create the Corpus Christi Aquifer Storage and Recovery Conservation District co-extensive with the city limits of Corpus Christi, including property in Nueces, Kleberg, and San Patricio Counties owned or under contract to the City. No confirmation election is required. Texas Water Code Chapter 36 applies to the District.
- HB 3568 creates San Patricio County Groundwater District, which must be confirmed by September 1, 2007.
- SB 967 creates Central Texas Groundwater Conservation District in Burnet County, which must be confirmed by an election by September

²¹ TWCA at p. 12.

²² TWCA at p. 15.

²³ Jace Houston, "The Subsidence District Bill Status Report" (June 7, 2005).

²⁴ TWCA at pp. 16 – 17.

²⁵ TWCA at p. 17.

²⁶ TWCA at p. 9.

1, 2007. The District is given powers to regulate various groundwater activities and export, in addition to those powers granted by Texas Water Code Chapter 36. In making permit decisions, the District must consider if the proposed well “unreasonably affects surrounding landowners.” The District has taxing authority and may assess production fees.

- SB 1017 creates the Lower Trinity Groundwater Conservation District in Liberty, Polk, and San Jacinto Counties, which must be confirmed by election by September 1, 2007, and provides for funding through production fees. The District may purchase groundwater rights only if the rights are acquired for conservation purposes and held in trust permanently.
- SB 1847 creates the Duval County Groundwater Conservation District, which must be confirmed by September 1, 2007.
- SB 1848 creates Starr County Groundwater Conservation District, which must be confirmed by September 1, 2007.

WATER QUALITY

As mentioned above, “[t]wo bills that . . . raised concerns about their impacts on local government water pollution control programs,” H.B. 2833 and S.B. 1858²⁷ failed. “HB 2833 would [have] require[d] any local government seeking to limit impervious cover or regulate lot or building size on land under development to pay the land owners for what owners might claim to be a reduction in value resulting from those requirements.” The argument was made that the bill was “so broadly applicable that it could [have] undermine[d] local government regulations in a variety of areas,” not just water quality.²⁸

Senate Bill 1858 “would [have] prohibit[ed] a local government from having independent authority to regulate water quality, issue water quality permits, or establish standards or practices for water quality. All local water pollution control and abatement programs would have to be approved by TCEQ and only be for the purpose of compliance with TCEQ standards (nothing more stringent than TCEQ requirements). County government programs could trump municipal programs even if the county program was less protective. . . .”²⁹

Chapter 366 of the Health & Safety Code is amended by HB 2510 which allows the owner of a single-family residence to maintain its on-site

²⁷ SIERRA CLUB (May 19, 2005) at p. 2.

²⁸ Id.

²⁹ Id. at p. 5.

sewage disposal system and requiring the owner to receive specified OSSF maintenance training.

SB 1354 establishes a pilot project for regulating the water quality aspects of quarries. It applies to the portion of the Brazos River watershed between Possum Kingdom Reservoir in Palo Pinto and Parker Counties. This area is named the “John Graves Scenic Riverway.” The bill establishes specific permitting and enforcement programs by developing a pilot permitting program requiring individual or general permits for quarries, depending on their proximity to the river. It requires reclamation and restoration plans, as well as financial assurance. The program ends in 2025.

WATER AND WASTEWATER UTILITIES

Water and sewer utility regulation is changed significantly under HB 2876. The impetus for this legislation came from a rulemaking petition at the TCEQ by the Greater Houston Builders Association seeking changes in the CCN rules. The bill requires CCN applicants to provide greater notice to landowners who will be included in the CCN, provide a more specific service area description, establish timelines for construction of facilities, and show financial ability. Certain landowners may elect out of the CCN. A city may not maintain or extend a CCN beyond its ETJ without landowner consent. An expedited process is provided for allowing a landowner to withdraw from a CCN. When a CCN is issued, the holder must record the service area in the county real property records.

An additional bill changing water and wastewater utility law is HB 1208, which prohibits a municipal utility district from exercising eminent domain outside district boundaries to acquire property for specifically listed facilities such as water and wastewater treatment plants, water storage facilities, wastewater disposal plant, parks, and swimming pools, and others.³⁰

Under HB 1358, the TCEQ was granted jurisdiction over water supply or sewer service corporations if they are operating improperly and other findings are made.³¹ Under HB 1673, the TCEQ, in considering a petition for a special utility district, must now limit the district’s authority to purposes requested and found to be necessary.³²

³⁰ TWCA at p. 3.

³¹ TWCA at p. 4.

³² TWCA at p. 6.

House Bill 2301 amends Texas Water Code Chapter 13 “to authorize a city having original jurisdiction over an investor owned utility to suspend the effective date of the IOU’s proposed rate change for longer than 90 days in certain circumstances.”³³

AIR

One of the few air program bills to pass was SB 1740. This bill allows construction to begin before an air quality permit amendment is issued. The applicant assumes responsibility for proceeding before receiving approval of the permit amendment and prohibits the TCEQ from considering the construction efforts when evaluating whether to issue the amendment.

House Bill 2481 extends to 2010 the Texas Emissions Reduction Plan (TERP), which was set to expire in 2008.

Chapter 375 of the Health & Safety Code was amended by HB 2793, which addresses removal of convenience switches from end-of-life vehicles. These switches contain mercury and are subject to Environmental Protection Agency regulations under the federal Clean Air Act. The bill does not require scrap metal recycling facilities or vehicle recyclers to remove these switches or maintain records about switches they have not removed. The TCEQ is required to provide regulatory incentives for those facilities that implement the switch removal and recordkeeping provisions of this bill. The bill imposes annual reporting requirements on the TCEQ and manufacturers.

Among other provisions, HB 2129 simplifies reporting requirements for emission events. An emission event caused by one incident only has to be reported as one event rather than one for each source of emission.³⁴

PETROLEUM STORAGE TANKS

House Bill 1987 and SB 485 extended the petroleum storage tank program. Under current law, remediation of a petroleum storage tank site is required to be completed by September 2005 to be eligible for reimbursement from the fund. Because many sites will not be able to meet that deadline, the legislation changes the deadline for submittal of site closure requests to September 1, 2007 and extends from 2006 to 2008 the

³³ TWCA at p. 7.

³⁴ Minick speech.

corrective action reimbursement program for those already participating in it. Additionally, the legislation removes the requirement that transporters of motor fuel be held responsible for depositing motor fuel into underground tanks that do not have a TCEQ delivery certificate and makes only the owner responsible.

WASTE

Environmental regulation of dry cleaners was addressed in the 78th legislature in HB 1366. This session, HB 2376 modified the Dry Cleaner Remediation Program by amending Health & Safety Code Chapter 374. Among other provisions, the bill redefines “chlorinated dry cleaning solvent,” “dry cleaning drop station,” and “dry cleaning facility”; requires the TCEQ to adopt rules requiring certain dry cleaners to implement specified performance standards; changes the registration fee schedule; requires registration of persons distributing dry cleaning solvent; authorizes facilities to opt not to participate in fund benefits; and adds certain enforcement powers.

Under HB 580, a county may provide hazardous materials services including response actions when there is an incident involving hazardous material that has been leaked, spilled, released, or abandoned on any property. According to TCEQ’s Steve Minick, the legislation expands the definitions of hazardous material and responsible parties. It is unclear what TCEQ involvement will be with the counties.³⁵ See also HB 2120, Section 33.

Under HB 1609, public meetings for a new municipal solid waste permit, for a new hazardous waste management facility, and for a Class 3 modification or major amendment to an existing hazardous waste permit, are made optional. The bill does not affect contested case hearings. The bill also adds flexibility for arid landfills in West Texas regarding the amount of waste they are allowed to accept.

Senate Bill 1281 amends Texas Health & Safety Code Chapter 361 by prohibiting a commercial industrial solid waste facility from receiving industrial solid waste for discharge into a publicly-owned treatment works facility without first obtaining a permit from the TCEQ under Chapter 361.

Senate Bill 1413 gives local governments the authority to establish a fund to invest in Brownfield redevelopment, through a tax or fee

³⁵ Minick speech.

assessment. The bill sets out required procedures and standards of a Brownfield cleanup and economic development program. It adds Subchapter X to Chapter 361 of the Health & Safety Code: County Programs for Cleanup and Economic Redevelopment of Brownfields.

MISCELLANEOUS ENVIRONMENTAL

The legislature positioned Texas to secure the U.S. Department of Energy's FutureGen project, "an integrated carbon sequestration and hydrogen research proposal," by passing HB 2201.³⁶ The purpose of the bill is "to ensure predictable and timely permitting and construction of the components that will make up the FutureGen project" and to create financial incentives for location in Texas.³⁷ The bill has been referred to as the "clean coal project bill" and defines such a project as "a coal-based electric generating facility in partnership with the U.S. Department of Energy's FutureGen project."³⁸ Under the bill, the TCEQ has jurisdiction for clean coal projects "when carbon dioxide injection is into a zone below the base of usable quality water and is not productive of oil, gas, or geothermal resources."³⁹ The Texas Railroad Commission has jurisdiction if the injection is into zones productive of oil, gas, or geothermal resources. The Texas Water Development Board is required to give the regional water planning groups flexibility in amending their regional water plans to provide for a water supply for the project. The bill provides various funding mechanisms and incentives for location of the project in Texas.⁴⁰

Under HB 2949, the TCEQ can issue emergency orders for the repair or replacement of roads, bridges, or other infrastructure in cases of natural disaster and emergencies.

³⁶ SENATE RESEARCH CENTER, BILL ANALYSIS, Tex. C.S.H.B. 2201, 79th Leg., R.S. (2005).

³⁷ Id.

³⁸ FISCAL NOTE, Tex. H.B. 2201, 79th Leg., R.S. (2005).

³⁹ Id.

⁴⁰ Id.

OPEN GOVERNMENT

Although not environmental or natural resource legislation, open government bills are relevant to many who practice in the environmental and natural resource field.

Senate Bill 286, which amends Chapters 551 and 552 of the Texas Government Code, has been called the open government training bill. It requires elected or appointed officials of a governmental body to complete Open Meetings Act training. The Office of the Attorney General will provide training opportunities, including a free video course. Deadlines are provided for the training depending on when the member took office. The training must be taken every two years. Additionally, someone from each governmental body must receive training about the Public Information Act.

SB 1133 and HB 2381 require certain local governmental bodies and economic development corporations that maintain websites to post notice of meetings, and in some cases, post the entire agenda packet, on their website.

Senate Bill 690 “expressly permits a governmental body to continue a meeting to the next business day (current law is next calendar day).”⁴¹ SB 1485 allows a governmental entity to redact the Social Security number of a living person from any information it provides under the Public Information Act.

⁴¹ Stacey Schiff, “The 79th Legislative Session,” presented to the Administrative Law Section of the Austin Bar Association (June 15, 2005).

MARY K. SAHS is currently in solo practice as Sahs & Associates, P.C. Her practice focuses on environmental, water and administrative law. Ms. Sahs, an honors graduate of the University of Texas School of Law, has practiced in the fields of environmental, water and administrative law for twenty years. She served as a hearings examiner and the Public Interest Counsel at the Texas Water Commission. For several years she was an assistant city attorney for a number of small municipalities in central Texas. She is licensed to practice in Texas and is admitted to practice in the Northern and Western Districts of Texas.

Ms. Sahs served for many years as an officer of the Environmental and Natural Resources Law Section of the State Bar of Texas, including serving as a co-editor of the Environmental Law Journal. She has been a member of the College of the State Bar of Texas since 2001. She is one of three co-editors of West's Texas Practice Series, Environmental Law volumes. For a number of years, she served as program chair of the Central Texas Chapter of the Air & Waste Management Association.

Her recent water law practice includes serving as general counsel for the Blanco-Pedernales, Hill Country, Cow Creek, Kenedy County, and Hays Trinity groundwater conservation districts, as well as for the Bandera County River Authority and Groundwater District. She also successfully represented non-profit organizations in Wood and Blanco counties, who petitioned for creation of the Lake Country and Blanco-Pedernales groundwater conservation districts.

Ms. Sahs participated in the Mesa Group permit application hearing before the Panhandle Groundwater Conservation District, representing the interests of adjacent landowners opposing the permit. In addition, she represented in a preliminary hearing before the State Office of Administrative Hearings a group of landowners in McCulloch County who petitioned the Texas Commission on Environmental Quality for a watermaster on the San Saba River.

Mary Sahs has written and spoken extensively on water and environmental issues, most recently focusing on groundwater issues. Mary Sahs frequently serves on planning committees for water and environmental law CLE programs, including the long-running and very popular Environmental Superconference sponsored by the Environmental and Natural Resources Law Section of the State Bar of Texas.

ENVIRONMENTAL CASE LAW UPDATE

Truth, Justice, and the American Way

by

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**17th Annual Texas Environmental Superconference
Austin, Texas
August 4-5, 2005**

Environmental Case Law Update

by

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August 4-5, 2005

Several Court decisions having significant impact on environmental law have been handed down over the past year or so. This paper addresses several of the more significant decisions.

I. FEDERAL

- **CERCLA**

The past year has witnessed several interesting decisions interpreting the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601, et seq. ("CERCLA"). The most important decision was the U.S. Supreme Court's decision in *Cooper Industries, Inc. v. Aviall Services, Inc.*, 125 S. Ct. 577 (2004), *rev'g* 312 F.3d 677 (5th Cir. 2002). The main issue in *Cooper* was whether a plaintiff that conducts a voluntary cleanup action can maintain a CERCLA § 113(f)(1) contribution claim in the absence of a civil action against it under either § 106 (an abatement action) or § 107 (a cost recovery action). In holding that a CERCLA § 113(f)(1) contribution claim cannot be maintained in the absence of a § 106 or § 107 action, the Supreme Court overturned case law of not only the Fifth Circuit but also eight other circuit courts that have addressed the issue (including the Second, Third, Fourth, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits).

***Cooper Industries, Inc. v. Aviall Services, Inc.*, 125 S. Ct. 577 (2004)**

In 1981, Aviall Services Inc. acquired from Cooper Industries Inc. properties in Texas that were later found to be contaminated by hazardous substances. Aviall voluntarily cleaned up the properties without the state or the federal government taking any administrative or judicial enforcement action. Aviall argued that it undertook those cleanups because the Texas Natural Resource Conservation Commission had threatened to sue it if it did not. After cleaning up the properties, Aviall sued Cooper to recover the costs of cleanup.

In the district court, defendant Cooper moved for summary judgment arguing that Aviall could not maintain a § 113 claim because a cause of action under § 113(f)(1) arises *only after* a person has been subjected to an action under CERCLA § 106 or § 107, and Aviall had not. *See Aviall Services, Inc. v. Cooper Industries, Inc.*, 312 F.3d 677, 679 (5th Cir. 2002). The district court agreed and granted defendant summary judgment on the § 113(f)(1) claim. *See id.* Aviall appealed, and a divided panel of the Fifth Circuit affirmed, holding that "a PRP seeking contribution from other PRPs under § 113(f)(1) must have a pending or adjudged § 106 administrative order or § 107(a) cost recovery action against it." *Aviall Services, Inc. v. Cooper Industries, Inc.*, 263 F.3d 134, 145 (5th Cir. 2001).

On rehearing *en banc*, a divided Fifth Circuit reversed and held that a PRP can seek contribution from another PRP under § 113(f)(1) even when no suit has been brought against the plaintiff under § 106 or § 107. *Aviall Services, Inc. v. Cooper Industries, Inc.*, 312 F.3d 677, 690 (5th Cir. 2002). The *en banc* court reviewed the plain language of the statutory provision, the structure of CERCLA, the legislative history and policy concerns, and concluded that “the most reasonable interpretation of the provision” is that the first sentence of § 113(f)(1) does not require the existence of a previous § 106 or § 107 action against a § 113 plaintiff. *Id.*

The *en banc* court paid particular attention to the purposes of CERCLA and concluded that a contrary finding would frustrate the objectives of CERCLA by slowing reallocation of cleanup costs from less culpable parties to more culpable parties, by discouraging voluntary expenditure of funds for cleanups, and by reducing incentives for parties to report contamination. The *en banc* court also noted that its interpretation was consistent with all of the other eight circuit courts that had ruled on the issue.

In a seven-to-two decision, the Supreme Court reversed the decision by the Fifth Circuit. *Cooper Industries, Inc. v. Aviall Services, Inc.*, 125 S. Ct. 577 (2004). More precisely, the Supreme Court held that § 113(f)(1) provides a plaintiff with a contribution cause of action only if it has been the subject of a § 106 or a § 107(a) civil action first. The majority of the Court read § 113(f)(1) as specifically requiring companies to be the subject of a § 106 or § 107 civil action in order to seek money from other PRPs. In doing so, the Court focused on the meaning of three parts of § 113(f):

- “may” in “may seek contribution . . .” in the first sentence;
- “during or following” in “during or following any civil action . . .” in that same sentence; and
- “in the absence of a civil action” in the final sentence, which reads: “Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action . . .”

On each point, the Court rejected the Fifth Circuit’s interpretation of § 113(f)(1).

Regarding the first sentence of § 113(f)(1), the Court stated, “[t]here is no reason why Congress would bother to specify conditions under which a person may bring a contribution claim, and at the same time allow contribution actions absent those conditions.” 125 S. Ct. at 583. “The natural meaning of this sentence is that contribution may only be sought subject to the specified conditions, namely, ‘during or following’ a specified civil action.” *Id.* The Court rejected a reading of the word “may” that would interpret “during or following [civil action]” as merely one of several options. Such an interpretation would render other language in CERCLA superfluous, the Court said. *Id.*

Indeed, the court noted, ignoring the “during or following” requirement would write out of the statute any conditions for bringing a § 113(f)(1) contribution claim. Such a reading would, the Court said, render unnecessary § 113(f)(3)(B), which provides a separate basis for a contribution action, i.e., a suit after entry of an administrative or judicially approved settlement. *Id.*

The Court was equally unconvinced by the Fifth Circuit's interpretation of the final sentence, which provides that "Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under [§§ 106 or 107]." The Fifth Circuit had read this sentence to allow a contribution action before a civil action. The Supreme Court disagreed.

"The sole function of the sentence is to clarify that § 113(f)(1) does nothing to 'diminish' any cause(s) of action for contribution that may exist independently of § 113(f)(1)," the Court stated. *Id.* at 583-84. It "does not itself establish a cause of action; nor does it expand § 113(f)(1) to authorize contribution actions not brought 'during or following' a § 106 or § 107(a) civil action nor does it specify what causes of action for contribution, if any, exist outside § 113(f)(1)." *Id.* at 584.

As additional support for its interpretation of § 113(f)(1), the Court discussed its interpretation of other parts of § 113, including § 113(f)(3)(B), which provides another avenue for contribution. Section 113(f)(3)(B) provides a right of contribution to any person who has resolved its liability to the government "in an administrative or judicially approved settlement". Because Aviall had not entered into such a settlement, the Court did not have before it the issue of whether a person who enters into such a settlement can seek contribution under § 113(f)(3)(B). Nonetheless, the Court's discussion clearly supports the view that § 113(f)(3)(B) provides a right of contribution to a CERCLA responsible party who has settled with the government.

The Court found additional support for its interpretation of § 113(f)(1) in CERCLA's limitations provisions. Section 113(g)(3) includes two three-year limitations periods covering actions under § 113(f)(1) and § 113(f)(3)(B), respectively. The first begins at the date of judgment, the other at the date of settlement. The Court observed that "Notably absent from § 113(g)(3) is any provision for starting the limitations period if a judgment or settlement never occurs, as is the case with a purely voluntary cleanup." *Id.* at 584.

As an alternative to a § 113(f)(1) contribution suit, Aviall had argued that it could recover costs under § 107(a), even though it is a liable party. The Court declined to address the claim, finding it "well beyond the scope" of the briefing and the question presented. The Court also declined to decide whether Aviall has an implied right to contribution under § 107.

Because Aviall had not received a § 106 unilateral administrative order, the court did not answer the question whether a private party who complies with such an order can seek contribution under § 113(f)(1). The United States, as *amicus*, argued that such a party would not be entitled to contribution under § 113(f)(1) because a § 106 order is not a "civil action." Aviall and *amici* argued that the government's position would lead to illogical results: a party who refuses to obey a unilateral administrative order and undertakes a cleanup only after being sued under § 106 or § 107 is entitled to contribution, but a party who complies with the government's order has no right to contribution under § 113(f)(1).

The United States District Court for the Eastern District of Texas has issued an opinion concerning whether parties conducting voluntary cleanups can file suit under CERCLA after the Supreme Court decision in *Aviall*.

***Vine Street LLC v. Keeling*, 362 F.Supp.2d 754 (E.D. Tex. 2005)**

In this district court case, the plaintiff, Vine Street LLC (“Vine Street”), owned certain property in Tyler, Texas. *Vine Street LLC v. Keeling*, 362 F.Supp.2d 754, 757 (E.D. Tex. 2005). From 1961 until 1975, the property at issue was leased to Keeling who operated a laundromat on the property, including coin-operated dry-cleaning machines. *Id.* Testimony indicated that these machines caused perchloroethylene contamination on the subject property and on adjacent lots. *Id.* Vine Street applied to the TCEQ’s (then the TNRCC’s) voluntary cleanup program (“VCP”) to address the site. Vine Street subsequently sued Keeling as the operator of the site, the manufacturer of the dry-cleaning machines, and Dow who allegedly manufactured and sold the perchloroethylene that was used at the site and included claims for recovery under CERCLA and the Texas Solid Waste Disposal Act. *Id.* at 758.

Dow filed a motion to dismiss on several grounds, including that: (1) Vine Street cannot sustain a claim for recovery under § 107 of CERCLA because Vine Street is itself a potentially responsible party under CERCLA and (2) because Vine Street has not been subject to a civil or administrative action under either § 106 or § 107 of CERCLA, Vine Street cannot sustain a claim for contribution pursuant to § 113(f)(1). *Id.* at 760. The district court concluded that, under the *Aviall* decision, Vine Street could not state a claim for contribution under CERCLA § 113(f)(1) because Vine Street had not been sued under either § 106 or § 107 of CERCLA. *Id.* at 760 - 61. However, the court held that, despite being a potentially responsible party under CERCLA, Vine Street could state a claim under § 107. *Id.* at 761 - 64.

In holding under the circumstances in this case that Vine Street could bring an action under CERCLA § 107, the court distinguished prior decisions reviewing the issue of whether a particular party has a claim under § 113(f) or § 107. *Id.* at 762 - 63. In those cases, the district court stated, the issue was whether a potentially responsible party could concurrently bring claims under both § 113(f) and § 107. *Id.* The court found that those cases did not address the issue of whether a potentially responsible party that is precluded from bringing a § 113(f) claim may bring a claim under § 107. *Id.*

To decide this issue, the court looked at the *In re Hemingway* case in which the First Circuit Court of Appeals suggested that § 107 may enable two types of claims, one by truly innocent plaintiffs, and a second by plaintiffs such as Vine Street in this case. *Id.* at 763 (citing *In re Hemmingway Transp., Inc.*, 993 F.2d 915, 931 (1st Cir. 1993)). Further, the court compared the provisions of § 113(f) with § 107 and the history leading to the amendment of CERCLA that created the specific contribution provisions under § 113(f). *Id.* at 763 - 64. In looking at the history of the created on § 113(f), the court stated that § 113(f) did not create contribution actions under CERCLA “as contribution actions have existed ever since CERCLA was first enacted in 1980.” *Id.* at 763. Rather, § 113(f) merely establishes an alternate “regime of pro rata or divisible liability, in contrast to the joint and severable liability of Section 107.” *Id.* Thus, the court concluded, in circumstances akin to those here for Vine Street where § 113(f) does not

apply, nothing prevents Vine Street from seeking to recover under the joint and several liability provisions of § 107. *Id.* at 764.

- **CLEAN AIR ACT**

The past year also saw several significant legal developments under the Clean Air Act (42 U.S.C. §§ 7401, et seq.) (“CAA”). For instance, CAA litigation involving new source review (“NSR”) continued to move forward setting the stage for several expected decisions in 2005, including the challenge to the Environmental Protection Agency’s (“EPA’s”) NSR reform regulations in the U.S. Court of Appeals for the District of Columbia Circuit and the Fourth Circuit’s consideration of EPA’s NSR enforcement initiative against electric utilities

New York v. EPA, --- F.3d ---, No. 02-1387, 2005 WL 1489698 (D.C. Cir. June 24, 2005)

In 1977, Congress amended the CAA to increase the standards in protection of the nation’s air quality. One of these amendments provided that major stationary sources that undertake modifications must obtain preconstruction permits, similar to major new sources, through the New Source Review (NSR) process. The CAA, even before these 1977 amendments, included definitions of when a “modification” occur. The EPA has interpreted this definition in numerous rules including those issued in 1980, 1992, and recently in 2002. It was these 2002 rules by the EPA that initiated the challenges addressed in this case. *New York v. EPA, --- F.3d ---, No. 02-1387, 2005 WL 1489698 at *1 (D.C. Cir. June 24, 2005).*

The court rejected challenges to certain portions of EPA’s 2002 rule, finding that these were permissible interpretations of the CAA and were not otherwise arbitrary and capricious, including:

- using past emissions and projected future actual emissions rather than potential emissions in measuring emissions increases;
- using a ten-year lookback period in selecting the two-year baseline period for measuring past actual emissions;
- using a five-year unrelated demand growth from the measurement of projected future actual emissions; and
- the Plantwide Applicability Limitations (“PAL”) program.

Id.

The court did hold that two aspects of the 2002 rule were based on impermissible interpretations of the CAA. *Id.* As such, the court determined that EPA had erred in promulgating the Clean Unit Applicability test, measuring emissions increases by looking to whether emissions limitations have changed when Congress had directed EPA to measure emissions increases in terms of changes in actual emissions. *Id.* The court also found that EPA erred in exempting from the New Source Review certain Pollution Control Projects that were determined to decrease emissions of some pollutants but causing collateral increases in others since the statute authorizes no such exemptions. *Id.*

Further, the court found that EPA had acted arbitrarily and capriciously in determining that sources making changes need not keep records of their emissions if they see no reasonable possibility that these changes constitute modifications under NSR. *Id.*

Finally, the court determined that industry challenges to passages in the preambles of the 2002 and 1992 rules, as well as governmental challenges to the implementation of the 2002 rule, are unripe for review. *Id.* at *2.

***U.S. v. Duke Energy Corp.*, --- F.3d ---, No. 04-1763, 2005 WL 1398658 (4th Cir. June 15, 2005)**

In this case, the United States brought an enforcement action against Duke Energy Corporation (“Duke”), maintaining that Duke modified its electricity generation plants numerous times without first obtaining the appropriate permits in violation of the CAA. *U.S. v. Duke Energy Corp.*, --- F.3d ---, No. 04-1763, 2005 WL 1398658 (4th Cir. June 15, 2005) (page references are not currently available for this document). Between 1988 and 2000, Duke engaged in several projects, most of which consisted of replacing and/or redesigning the boiler tube assemblies in its coal fired generating units (units that were originally placed in service between 1940 and 1975). *Id.* These projects extended the life of the generating units and allowed the units to increase the daily hours of operation for the units. *Id.* Duke did not apply for or acquire permits from the EPA to conduct these projects. *Id.*

The EPA maintained that these projects conducted by Duke were “major modifications” under the PSD statute and regulatory provisions of the CAA. *Id.* Thus, the EPA maintained that Duke was required to obtain permits for those projects. *Id.* In arguing this point, the EPA contended that Duke was required to measure the net emissions increase by using an actual-to-projected-actual test, comparing the actual pre-project emissions to the projected post-project emissions, taking into account a unit’s ability to operate more hours. *Id.* Duke maintained that an increase in emissions under the PSD program would result only if there is an increase in the hourly emissions rate. *Id.* Since there was no increase in the hourly emissions rates due to its projects, Duke’s position was that no permits were necessary. *Id.*

In reviewing the statutory and regulatory framework regarding these provisions, the court determined that Congress had mandated that the PSD statute incorporate the NSPS statutory definition of “modification.” *Id.* The NSPS regulations define the term “modification” so that only a project that increases a facility’s hourly rate of emissions constitutes a “modification.” *Id.* The court held that EPA must interpret its PSD regulations defining “modification” consistent with this definition. *Id.* Thus, no permits were required for Duke to conduct the projects involved in the complaint. *Id.*

- **CLEAN WATER ACT**

As under the CAA, there were a number of noteworthy decisions under the Clean Water Act (33 U.S.C. §§ 1251, *et seq.*) (“CWA”) handed down by various courts in the past year. Several important cases are discussed in detail below.

South Florida Water Management District v. Miccosukee Tribe, 124 S. Ct. 1537 (2004)

In 2004 the U.S. Supreme Court decided *South Florida Water Management District v. Miccosukee Tribe*, 124 S. Ct. 1537 (2004), which addressed the question of whether a National Pollutant Discharge Elimination System (“NPDES”) permit is required under the CWA for a pump station that merely conveys polluted water from one navigable waterway to another.

The *Miccosukee Tribe* case involved a citizen suit under the CWA contending that a water management district in the Everglades required an NPDES permit to pump water containing phosphorous from a canal into an impounded water conservation area. *Id.* at 1540-41. The question for the courts was whether the operation of the pump station constituted a “discharge of a pollutant” under the CWA such that a permit would be required. The parties filed cross-motions for summary judgment on this issue, and the district court granted the Tribe’s motion. On appeal, the Eleventh Circuit affirmed. *See Miccosukee Tribe v. South Florida Water Management District*, 280 F.3d 1364 (11th Cir. 2002).

The Supreme Court granted certiorari and heard oral argument in the case in January 2004. The water management district had contended that an NPDES permit is only required for a point source when a pollutant originates from the point source, and not when a pollutant simply passes through the point source. However, the Court rejected this argument, emphasizing the definition of a “point source” as a “conveyance,” which “need not be the original source of the pollutant; it need only convey the pollutant to ‘navigable waters. . . .’” *Id.* at 1543. The Court also noted the CWA’s goal of imposing NPDES permitting requirements on municipal wastewater treatment plants, and reasoned that this goal would be undermined by an interpretation of the CWA that exempted facilities that treat and discharge pollutants added to water by others. *Id.* Accordingly, the Court held that the definition of “discharge of a pollutant” in the CWA “includes within its reach point sources that do not themselves generate pollutants.” *Id.*

Despite this conclusion, the Court ultimately vacated and remanded the case for additional development of the factual record. Specifically, the water management district, and the federal government as amicus, had contended that the canal and water impoundment area at issue were not separate and distinct water bodies, but rather “two hydrologically indistinguishable parts of a single water body.” *Id.* at 1545. The Tribe did not dispute that if the canal and impoundment area are part of the same water body, no permit would be required because pumping water from one area to another would not amount to an “addition” of pollutants. *Id.* However, the Tribe disagreed with the water management district’s view of the facts, and the Court determined that further development of the record was necessary on remand. *Id.* at 1545-47.

In addition, the federal government had advanced a “unitary waters” argument before the Court. The essence of this approach is that to determine whether there has been an addition of a pollutant to navigable water from a point source, all water bodies that fall within the definition of “navigable waters” should be viewed on a unitary basis for NPDES permitting. In other words, an NPDES permit is required only when there is an addition of a pollutant to navigable waters, and a permit would not be required when water from one navigable water body is discharged

unaltered into another navigable water body. However, the Court declined to consider the unitary waters” argument in its opinion, indicating that it had not been raised previously, and that it would be open to the parties on remand.

Riverkeeper, Inc. v. EPA, 358 F.3d 174 (2d Cir. 2004)

In 2004, the U.S. Court of Appeals for the Second Circuit addressed petitions for review of EPA’s final rule to regulate cooling water intake structures at new industrial facilities pursuant to the CWA. *Riverkeeper, Inc. v. EPA*, 358 F.3d 174 (2d Cir. 2004). Congress had directed EPA to regulate such structures to “minimiz[e] adverse environmental impact,” 33 U.S.C. 1326(b), and, pursuant to a consent decree, EPA issued the first phase of these regulations (the “Phase I Rule”) in December 2001. The Phase I Rule applies to facilities constructed after the promulgation of the Rule that withdraw over 2 million gallons of water per day and use at least 25 percent of such water for cooling. *Riverkeeper*, 358 F.3d at 181. The Phase I Rule provides that an affected facility can comply with the Rule by limiting water intake capacity, velocity, and proportionality, and by implementing measures to reduce the adverse effects on aquatic organisms if such limits are insufficient (“Track I”). *Id.* at 182. In the alternative, a regulated facility can abide by proportional flow requirements and opt to show in a demonstration study that the technologies employed will reduce the level of adverse environmental impact to a level comparable to the application of Track I capacity and velocity measures (“Track II”). *Id.* at 183. One of the suggested ways that a facility could meet the Track II requirement of a “comparable” reduction in environmental impact was to employ “restoration measures,” such as restocking fish and creating habitat, to maintain a level of aquatic organisms in the water body that would be “substantially similar” to the level achieved under Track I. *Id.*

Both environmental and industry groups challenged various aspects of the Phase I Rule. *Id.* The Second Circuit upheld the majority of the Rule, but stated that EPA had exceeded its authority under the CWA by allowing facilities to comply with the Rule by using restoration measures. *See Id.* at 189-91. The court indicated that restoration measures as suggested in the Rule “are inconsistent with Congress’s intent that the design of intake structures be regulated directly, based on the best technology available, and without resort in the first instance to water quality measurements. *Id.* at 190. The court also noted that CWA language provided additional support for the view that restoration measures were not an acceptable means to minimize adverse environmental impact, and that Congress rejected a proposed amendment to § 316(b) of the CWA that would have explicitly permitted the use of restoration measures. *Id.* Accordingly, the court remanded this aspect of the Rule to EPA. *Id.* at 205. In response to the court’s partial remand of the Phase I Rule, EPA Regions have been directed not to employ restoration measures in permits as a compliance method.

Riverdale Mills Corp. v. Pimpare, 392 F.3d 55 (1st Cir. 2004)

In December 2004, the U.S. Court of Appeals for the First Circuit decided *Riverdale Mills Corp. v. Pimpare*, 392 F.3d 55 (1st Cir. 2004), which addressed the question of whether a facility has an expectation of privacy in its wastewater such that EPA investigators must obtain a warrant prior to taking samples of the wastewater. In this case, Riverdale Mills and its owner (collectively “Riverdale”) sued the United States and EPA inspectors for damages for alleged

violations of the Fourth Amendment right to be free of unreasonable searches and seizures. *Id.* at 56. Specifically, Riverdale claimed that the EPA agents violated the Fourth Amendment when they sampled Riverdale's wastewater from a manhole beneath Riverdale's property without obtaining either a warrant or Riverdale's consent. *Id.* The EPA inspectors defended based on qualified immunity for public officials, but the federal district court denied the inspectors' motions for summary judgment on qualified immunity grounds. *Id.* The inspectors filed an interlocutory appeal. *Id.*

The First Circuit analyzed the case with regard to the three-prong test for qualified immunity: (1) taken in the light most favorable to Riverdale, whether the facts show that the inspectors' conduct violated a constitutional right; (2) whether the right was clearly established at the time of the alleged violation such that a reasonable inspector would be on notice that his conduct was unlawful; and (3) whether a similarly-situated, reasonable inspector would understand that his conduct violated the clearly-established constitutional right at issue. *Id.* at 60-61.

Under the first prong, the court noted that "threshold issue is whether there was a 'search' at all for Fourth Amendment purposes. [The inspectors'] actions were only a 'search' if Riverdale had a reasonable expectation of privacy in the wastewater. . . ." *Id.* at 63. Considering the facts of the case, the particular question for the court was "whether a company has a reasonable expectation of privacy in industrial wastewater that is on a private street and underneath a 171-pound manhole cover but 300 feet away from and flowing irrevocably into the public sewer system." *Id.*

Significantly, the court declined to adopt a per se rule that there is never a reasonable expectation of privacy in wastewater and acknowledged that "there may be fact situations where wastewater is entitled to constitutional protection." *Id.* The court noted that a variety of factors are relevant, including the location of the manhole on private property (which would support an expectation of privacy) and the commercial context of the facility (which may reduce the expectation of privacy somewhat). *Id.* at 63-64. Ultimately, the court found the controlling factor to be that the wastewater is flowing irretrievably to a public sewer only a few hundred feet away, and once it reaches that point, any member of the public can take a sample. *Id.* at 64. Without any cutoff valve or another way to stop the flow to the public sewer, the court indicated that "Riverdale has abandoned any reasonable expectation of privacy in the wastewater by allowing it to flow irretrievably to a place where it will be 'exposed ... to the public.'" *Id.*

As an alternative ground for its decision, the court also determined, under the second prong of the qualified immunity test, that the right the inspectors allegedly violated was not clearly established at the time of the sampling such that it would have been clear to the inspectors that their conduct was unlawful. *Id.* at 66. The court noted that prior case law did not give the inspectors reasonable notice that their conduct was unlawful under the facts of the case. *Id.* Thus, on the basis of both the lack of a reasonable expectation of privacy in wastewater under the circumstances, as well as a lack of notice to the EPA inspectors that their conduct was unlawful, the court of appeals reversed the district court's denial of qualified immunity.

- RCRA

U.S. v. Lockheed Martin Energy Systems, No. Civ. A. 5:OOCV-39-M, 2004 WL 2403114 (W.D. Ky. Sept. 30, 2004)

The federal district court for the Western District of Kentucky recently addressed the statute of limitations issue and corporate parent liability under RCRA in a lawsuit that also involved *qui tam* claims under the False Claims Act against Lockheed Martin and its subsidiaries. In *U.S. v. Lockheed Martin Energy Systems*, No. Civ. A. 5:OOCV-39-M, 2004 WL 2403114 (W.D. Ky. Sept. 30, 2004), the federal district court found that, while many of the RCRA claims predated the federal statutory five year limitations period, the limitations period could be tolled for fraudulent concealment due to false compliance reporting. As a result, the court held that certain government claims survived dismissal. In addition, the court held that because the parent companies, Lockheed Martin and Martin Marietta, had guaranteed performance under the contracts between certain subsidiaries and the government, the parent companies could be liable under RCRA. The court concluded that the contracts committed the subsidiaries, and the parents through their guarantees, to comply with RCRA.

With respect to the statute of limitations issue, the court disagreed with the government's arguments that the federal discovery rule should apply, as it has in many CWA cases. *Id.* at *18-*19. The government had contended that "where the duty to monitor and report regulatory compliance is placed on the regulated entity by statute or regulation, the statute of limitations begins to run when the violations are discovered." *Id.* at *17. However, the court distinguished the RCRA claims at issue from CWA cases, noting that the enforcement of the CWA is largely dependent on self-reporting, whereas RCRA requires regular government inspections. *Id.* at *19.

Furthermore, the court was persuaded by the analysis in *3M Company v. Browner*, 17 F.3d 1453 (D.C. Cir. 1994), which addressed whether the federal discovery rule applied to claims under another environmental statute, the Toxic Substances Control Act ("TSCA"). *Id.* at *18. In *3M*, the court had stated that "nothing in the language of [the general federal statute of limitations] even arguably makes the running of the limitations period turn on the degree of difficulty an agency experiences in detecting violations." *3M*, 17 F.3d at 1461. Finding that this reasoning also applied in the present case, the court in *Lockheed Martin* held that "an action to assess or impose a civil penalty for a RCRA violation 'must be commenced within five years of the date of the violation giving rise to the penalty.'" *Lockheed Martin* at *18 (quoting *3M*, 17 F.3d at 1462).

Although the government could not avail itself of the discovery rule for the RCRA claims in the *Lockheed Martin* case, the court nevertheless recognized the doctrine of equitable tolling for fraudulent concealment (submitting false RCRA reports). *Id.* at *22-*23. Under this doctrine, the statute of limitations is tolled if the defendant conceals the existence of a cause of action from the plaintiff. *Id.* at *22. Ultimately, the court was persuaded that the government had alleged the elements necessary to establish fraudulent concealment such that defendants' motion to dismiss certain government RCRA claims was denied. *Id.* at *23.

Further, in review of the parent liability issue in this case, the court found Lockheed Martin's arguments that it was never an operator of the facility nor a generator of hazardous waste to be irrelevant. *Id.* at *28-*29. In denying Lockheed Martin's motion to dismiss the RCRA claims, the court found that the guarantee of their subsidiaries' performance provided by the parent companies was more than a mere financial guarantee under a contract. Instead, the parents agreed to guarantee "the full, prompt, and faithful performance" of "each of the provisions and conditions" of the contracts. *Id.* at *28. Accordingly, the court found that "to the extent the subsidiaries filed to comply with the RCRA provisions and conditions contained in the underlying contracts, the parent [] [companies] are liable." *Id.* at *29.

- **FIFRA**

Bates v. Dow Agrosciences LLC, 125 S. Ct. 1788 (2005)

The United States Supreme Court recently decided whether and to what extent the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") preempts Texas common law claims for defective design, defective manufacture, negligent testing, breach of express warranty, violation of the Texas Deceptive Trade Practices Act, fraud, and failure to warn. *Bates v. Dow Agrosciences LLC*, 125 S. Ct. 1788 (2005). In this case, the petitioners, Texas peanut farmers, allege that their crops were severely damaged by the application of respondent's (Dow's) "Strongarm" pesticide, which the Environmental Protection Agency (EPA) registered pursuant to its authority under FIFRA. *Id.* at 1792-93. In response, Dow sought a declaratory judgment asserting that FIFRA pre-empted petitioners' claims. *Id.* at 1793. The petitioners counterclaimed, raising several state-law claims sounding in strict liability, negligence, fraud, and breach of express warranty. *Id.*

Under FIFRA, a manufacturer must obtain permission to market a pesticide by submitting a proposed label and supporting data to EPA, which will register the pesticide if it is efficacious, it will not cause unreasonable adverse effects on humans and the environment, and its label complies with the statute's misbranding prohibition. *Id.* at 1794-95. A pesticide is "misbranded" if its label, for example, contains a statement that is "false or misleading," or lacks adequate instructions or warnings. *Id.* at 1795. A State may regulate the sale and use of federally registered pesticides to the extent that regulation does not permit any sales or uses prohibited by FIFRA, but "[s]uch State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under [FIFRA]." *Id.* at 1795-96. Although tort litigation against pesticide manufacturers was a common feature in 1972, after the Supreme Court held in *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608 (1992) that the term "requirement" in the Public Health Cigarette Smoking Act of 1969 included common-law duties, and therefore pre-empted certain tort claims against cigarette companies, courts began holding that FIFRA pre-empted claims such as the petitioners. *Id.* at 1796-97.

In analyzing FIFRA's provisions, the Supreme Court decided that FIFRA's pre-emption provision applies only to state-law "requirements for labeling or packaging." *Id.* at 1798. While holding that the Fifth Circuit was correct that "requirements" embraces both positive enactments and common-law duties, it erred in supposing that petitioners' defective design, defective manufacture, negligent testing, and breach of express warranty claims were premised

on requirements for labeling or packaging. *Id.* Thus, the Court held, none of the common-law rules upon which these claims are based requires that manufacturers label or package their products in any particular way. *Id.*

However, the Court found that petitioners' fraud and negligent-failure-to-warn claims were based on common-law rules that qualify as "requirements for labeling or packaging," since these rules set a standard for a product's labeling that Dow was alleged to have violated. *Id.* at 1799-1800. Further, the Court stated that, while these common-law rules are subject to FIFRA, it does not automatically follow that they are pre-empted. *Id.* at 1800. FIFRA prohibits only state-law labeling requirements that are "in addition to or different from" FIFRA's labeling requirements. *Id.* Thus, FIFRA pre-empts any statutory or common-law rule that would impose a labeling requirement that diverges from those set out in FIFRA and its implementing regulations. *Id.*

Therefore, under FIFRA, a state-law labeling requirement must be equivalent to its federal counterpart to avoid pre-emption. *Id.* at 1803-04. State law need not, however, explicitly incorporate FIFRA's standards as an element of a cause of action. *Id.* at 1804. Because the Court did not receive sufficient briefing on whether the Texas law governing petitioners' fraud and failure-to-warn claims were equivalent to FIFRA's misbranding standards and any relevant regulations, the Court remanded the case to the Fifth Circuit to resolve the issue. *Id.* at 1803-04.

- **OTHER SIGNIFICANT FEDERAL DECISIONS**

Kelo v. New London, 125 S. Ct. 2655 (2005)

Although this case does not directly involve environmental issues, the decision could have an impact on future cases involving eminent domain or other takings related to environmental issues. The *Kelo* case involved the city of New London, Connecticut, which in 2000 approved of an integrated development plan designed to revitalize the ailing economy in the economically stressed city. *Kelo v. New London, 125 S. Ct. 2655, 2658-59 (2005)*. Through its development agent, New London purchased most of the property earmarked for the project from willing sellers. *Id.* It then initiated condemnation proceedings against the rest of the property owners that had refused to sell. *Id.* These parties, the petitioners in this case, brought a state court action claiming that the taking of their properties violated the "public use" restriction in the Fifth Amendment of the U.S. Constitution. *Id.* at 2660.

Before reviewing this particular case, the Supreme Court identified the existence of two established, polar propositions in takings cases: (1) it is well accepted that the sovereign may not take property for the sole purpose of transferring it to another private property even though they are paid just compensation and (2) it is equally clear that a State may transfer property from one private party to another if future "use by the public" is the purpose (e.g., condemnation of land for a railroad with common-carrier duties). *Id.* at 2661. However, the Court determined that this case did not fit squarely into either of these situations. The takings here were part of a "carefully considered" development plan and there was no evidence of an illegitimate purpose. *Id.* at 2661-62. Likewise, this was not a case in which the city was planning to open all of the condemned land to use by the general public. *Id.* at 2662. Thus, the Court looked toward those cases

interpreting the Fifth Amendment in which it had “embraced the broader and more natural interpretation of public use as ‘public purpose.’” *Id.*

The concept of whether a particular taking serves a public purpose has been defined broadly and reflects the Court’s “longstanding policy of deference to legislative judgments in this field.” *Id.* at 2663. Thus, because the City had determined that the area was sufficiently distressed to justify a program of economic rejuvenation, the program was comprehensive, and it received thorough deliberation prior adoption, the Court thought the program entitled to deference and reviewed the plan not on a piecemeal basis, but rather in its entirety. *Id.* at 2664-65. Thus, finding that the plan “unquestionably serves a public purpose,” the takings satisfied the public use requirement of the Fifth Amendment. *Id.* at 2665.

The Court further provided that it would not adopt a bright-line rule that economic development does not qualify as a public use. *Id.* In fact, the Court cited several decisions upholding takings under the Fifth Amendment which included, at least in part, economic considerations. *Id.* at 2665-66.

II. TEXAS

- **TSWDA**

Recently in 2005, the Texas Supreme Court issued an opinion on the Texas Solid Waste Disposal Act (“TSWDA”), the state statutory version of CERCLA.

***R.R. Street & Co. Inc. v. Pilgrim Enter., Inc.*, --- S.W.3d ---, No. 02-0758, 2005 WL 1366511 (Tex. 2005)**

This case involves Pilgrim Laundry & Cleaners (“Pilgrim”) who, over a span of five decades beginning in 1945, operated dry-cleaning facilities in Houston and San Antonio which used perchloroethylene (“PCE”). *R.R. Street & Co. Inc. v. Pilgrim Enter., Inc.*, --- S.W.3d ---, No. 02-0758, 2005 WL 1366511, at *1 (Tex. June 10, 2005). In 1994, in the course of selling its assets, Pilgrim conducted an environmental assessment that revealed certain soil and groundwater contamination (contaminated with PCE) at several of its facilities. *Id.* Pilgrim entered the Texas VCP to remediate the sites. *Id.*

Pilgrim purchased PCE and related equipment from R.R. Street & Co. Inc. (“Street”), which designed, manufactured, and distributed dry-cleaning equipment and products. *Id.* From 1958 until 1997, Pilgrim’s principal contact at Street was Harold Corbin. *Id.* Corbin had complete access to Pilgrim’s facilities, and Pilgrim dealt almost exclusively with him. *Id.* One of the products Corbin sold Pilgrim was equipment that recycled dirty PCE for reuse. *Id.* One piece of such equipment, a filter, circulated dirty PCE through cartridge filters, which had to be replaced periodically. *Id.* Following common industry practice at that time, Pilgrim disposed of the used cartridge filters that had collected PCE by discarding them in dumpsters located on the premises. *Id.* Another piece of equipment Street manufactured and sold to Pilgrim was called a still. *Id.* Dirty PCE was heated in the bottom of the still until it evaporated and rose to the top along with some water. *Id.* The soils and unevaporated PCE that remained at the bottom were

also discarded by Pilgrim in dumpsters. *Id.* The evaporated PCE was partially separated from the water and reused. *Id.* Corbin advised Pilgrim to dispose of the remaining PCE-contaminated “separator water” by pouring it down the drain, which Pilgrim did. *Id.* Corbin also advised Pilgrim to dispose of PCE-contaminated separator water that remained after the clothes-drying process in the same way. *Id.*

On his visits to Pilgrim's facilities, Corbin also conducted titration tests to determine the concentration of the plant's detergent. *Id.* at *2 He performed the tests by combining a 1.25-cc sample of PCE, taken from a dry-cleaning machine, with other chemicals. *Id.* Corbin used the results of these tests to evaluate the plant's level of success in using PCE efficiently and to make any needed suggestions. *Id.* When finished with the test vial, Corbin testified that he would dump the approximately 40 cc's of waste fluid down the sink or toilet. *Id.* According to Corbin, he likely did so on thousands of occasions. *Id.* There was disputed evidence at trial that at least some of the facilities' sewage pipes had leaked, creating a potential source of contamination from the test-vial fluid and separator water. *Id.*

After Pilgrim discovered the contamination and entered into the voluntary cleanup agreement with the TNRCC (now the TCEQ), Pilgrim sued Street and several other PCE and PCE-equipment manufacturers and distributors under the TSWDA and other common law claims. *Id.* All defendants but Street settled with Pilgrim before trial. *Id.*

The key issue addressed by the Texas Supreme Court under the TSWDA in this case was whether Street could be a person who “arranged” for the disposal of solid waste. In reviewing the issue, the Texas Supreme court found that “Texas law is bereft of cases discussing the scope of arranger liability under SWDA.” *Id.* at *5. Thus, the court reviewed federal case law regarding CERCLA for guidance on this issue. *Id.* The Court noted that merely “sell[ing] a product containing a hazardous substance that is ultimately disposed of does not in itself constitute an arrangement for disposal.” *Id.* Moreover, the Court concluded that the test for arranger status should be based on the “totality of the circumstances” to determine whether the “requisite causal nexus” between the defendant’s conduct and the disposal of the waste exists. *Id.* at *7. Thus, in examining the facts of each case, the courts should take into consideration whether a defendant: (1) owned or possessed the solid waste in question; (2) had the authority to make disposal decisions; (3) had the obligation to make disposal decisions; (4) exercised control over decisions regarding the waste's disposal; or (5) actually disposed of the solid waste. *Id.* The Court noted that any single factor may or may not be dispositive, depending upon the circumstances presented. *Id.* However, the Court declined to hold that actual involvement in waste disposal is never sufficient to be an arranger without the authority to control the disposal. *Id.*

Recognizing the difficulty of uniformly applying a test based on “the totality of the circumstances,” the Court emphasized as guidance the “actual control” line of decisions. *Id.* at *7-*8. In applying its principles, the Court held that Street was not liable under the TSWDA as an arranger by providing technical services and advice to Pilgrim related to waste disposal because Street “had neither the authority nor the obligation to control such disposal.” *Id.* at *9-*11. The Court decided that Street might be liable as an arranger for the disposal of solid waste for the PCE mixture that Corbin actually poured down the drains at Pilgrim’s facilities depending

on the resolution of facts issues concerning whether the PCE mixture qualifies as solid waste subject to regulation under the TSWDA. *Id.* at *15.

- **NUISANCE/STATUTE OF LIMITATIONS**

Schneider National Carriers, Inc. v. Bates, 147 S.W.3d 264 (Tex. 2004)

This case was one of several multi-party suits filed by residents living near the Houston Ship Channel. *Schneider National Carriers, Inc. v. Bates*, 147 S.W.3d 264, 267-68 (Tex. 2004). The plaintiffs were homeowners and renters that had resided in the area for at least two years and who complained that air contaminants, odors, lights, and noise from the nearby plants interfered with their use and enjoyment of their properties. *Id.* at 268. The issue in this case was whether the plaintiffs' claims for nuisance were barred by the applicable statute of limitations.

In reviewing this issue, the Texas Supreme Court reviewed the principles of nuisance and the corresponding statute of limitations in Texas. A critical determination in this case, as in many nuisance cases, was whether the claims of nuisance were permanent or temporary. *Id.* at 270. In Texas, the test used to make this distinction between temporary and permanent nuisance is "fairly unique." *Id.* at 271. A nuisance in Texas is permanent if it is "constant and continuous" and if "injury constantly and regularly occurs." *Id.* at 272. A nuisance is temporary if it is of "limited duration," if it is "uncertain that any future injury will occur," if a future injury is "liable to occur only at long intervals," or if it is "occasional, intermittent or recurrent," or "sporadic and contingent upon some irregular force such as rain." *Id.* Other factors can also be considered when determining the type of nuisance. *Id.* The problem, the Court decided, is where to draw the line depending on the circumstances of each case. *Id.* at 271.

In an effort to help define this distinction, the Court issued the following guidelines: (1) "a nuisance should be deemed temporary only if it is so irregular or intermittent over the period leading up to filing and trial that future injury cannot be estimated with reasonable certainty" and (2) "a nuisance should be deemed permanent if it is sufficiently constant or regular (no matter how long between occurrences) that future impact can be reasonably evaluated." *Id.* at 281. The Court also held that claimants cannot elect whether to assert temporary or permanent nuisances. *Id.* Although claimants can assert alternative theories where they are uncertain, the facts will determine the nature of the claims. *Id.* at 218-82. A nuisance will also be considered permanent when either the offending operations or the resulting injuries make it permanent. *Id.* at 282. Further, the characterization of a nuisance should not depend on whether it can be abated. *Id.* at 284. Applying these principles to the case at hand, the Court determined that the alleged nuisances were permanent as a matter of law and that the respective complaints were barred by the applicable statute of limitations. *Id.* at 290-92 .

- **PROPERTY VALUATION/DAMAGES**

Primrose Operating Co. v. Senn, 161 S.W.3d 258 (Tex.App.—Eastland 2005)

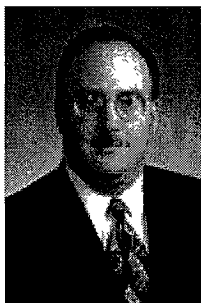
This case involved claims made by the Senn family that various oil companies caused contamination of the Senns' real property. *Primrose Operating Co. v. Senn*, 161 S.W.3d 258,

260 (Tex.App.—Eastland 2005). The only defendant remaining in the case at the time of trial was Primrose Operating Company (“Primrose”). *Id.* The evidence showed that the Senns purchased its ranch which comprised of 23,013 acres in June of 1997 for \$3,164,000. *Id.* at 261. Primrose owned an oil and gas lease that covered approximately 3,000 acres of the Senns’ ranch which it operated from 1992 until December of 1999. *Id.* After the Senns purchased the ranch, it photographed leaks and/or spills from Primrose’s flow lines and took samples of those spill sites that indicated a presence of petroleum hydrocarbons and/or chlorides from oil or saltwater. *Id.* The Senns’ expert indicated that approximately 10 acres spread across the area needed to be remediated by excavating the contaminated dirt, hauling it to a land farm, and replacing the contaminated dirt with clean soil. *Id.* at 262. The cost of this remediation would have been \$2,110,000. *Id.*

Various witnesses testified at trial regarding the value of the Senns’ ranch. *Id.* The Senns’ appraisal experts appraised the property as if it were unaffected by environmental hazards at between \$4 million and \$5 million. *Id.* They then testified that, if the property was contaminated and if the cost to clean up the contamination was \$2,110,000, then the fair market value of the ranch would be diminished by the cost to cure (i.e., \$2,110,000). *Id.*

In evaluating this case, the court first stated that, in a case in which a surface property owner makes a claim for damage to his land cause by another’s negligence, the type of compensation will depend on the nature of the injury. *Id.* at 261. If the injury is temporary and able to be remedied at reasonable expense, the damages will be measured by the cost to restore the land to its pre-injury condition. *Id.* For permanent injuries to land, the property measure of damages is the diminution in fair market value. *Id.* If the cost to restore the property is excessive or not economically feasible, the injury may be deemed to be permanent in nature. *Id.* The concepts of temporary and permanent injury to property are mutually exclusive and damages for both may not be recovered in the same action. *Id.*

Following these principles, the court held as a matter of law that the cost to restore the land to its condition prior to the leaks was not reasonable and, thus, the repairs were not economically feasible. *Id.* at 261, 263. Thus, regardless of whether the damages were temporary or permanent, the court held that the proper measure of damages was the diminution in fair market value. *Id.* at 263. The only evidence submitted at trial concerning the diminution in value to the Senns’ ranch was the cost to remediate the property (i.e., \$2,110,000). *Id.* However, since the cost to cure was excessive and not economically feasible and, thus, was an improper measure of damages, the court held that it was barred from considering that evidence. *Id.* Therefore, the court held that the Senns had failed to produce any evidence that their ranch had diminished in value due to the negligence of Primrose. *Id.* at 264



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- Defending refining companies against claims by employees and independent contractors alleging injury from benzene related exposure.
- Pursuing lessors for breach of lease and related environmental liabilities.
- Drafting site participation agreements for multi-party remediation projects.
- Pursuing TCEQ closure of commercial properties following removal of underground storage tanks.
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**The Class Action Fairness Act and its
Affect on Environmental Litigation in Texas**

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I. INTRODUCTION

On February 18, 2005, President Bush signed into law the Class Action Fairness Act of 2005 (“CAFA”).¹ According to President Bush, the “act will help ensure justice by making two essential reforms. First, it moves most large, interstate class-actions into federal courts. . . . Second, the bill provides new safeguards to ensure that plaintiffs and class-action lawsuits are treated fairly.”² However, the legislation has left attorneys, including environmental litigators, wondering how the CAFA will affect their practice. This paper will examine the CAFA, the purpose behind its passage, and some of the areas of procedure effected. This paper will also discuss how the application of CAFA will affect the law of evidence and damages in class actions.

II. PURPOSE OF THE CAFA

The CAFA states its purpose is three-fold: (1) to assure fair and prompt recoveries for class members with legitimate claims; (2) to restore the intent of the framers of the United States Constitution by providing for federal court consideration of interstate cases of national importance under diversity jurisdiction; and (3) to benefit society by encouraging innovation and lowering consumer prices.³ In addition, both the legislative history of the CAFA and the text of the Act explain that these purposes arise from perceived abuses involving class action lawsuits.

¹ Pub. L. No. 109-2, 119 Stat. 4-14 (codified in scattered sections of 28 U.S.C.).

² President Signs Class Action Fairness Act of 2005, East Room (Feb. 18, 2005), at <http://www.whitehouse.gov/news/releases/2005/02/20050218-11.html#> (last visited June 30, 2005).

³ § 2 of Pub. L. No. 109-2, which appears at 28 U.S.C. §1711 note.

Clearly, as courts interpret and apply the CAFA, their decisions will likely be shaped, at least in part, by the purposes of the CAFA and the perceived abuses that the CAFA attempts to resolve.

The CAFA explains that while Congress determined that “[c]lass action lawsuits are an important and valuable part of the legal system,” the abuses that have occurred in class-action lawsuits have harmed legitimate class members and defendants who have acted responsibly, harmed interstate commerce, and damaged public opinion of the judicial system.⁴ The purported abuses fall within two groups: (1) where “class members receive little or no benefit from class actions” because counsel receive large fees, certain plaintiffs receive unjustified awards at the expense of others, or confusing notices are published that prevent class members from fully understanding their rights; and (2) where “class actions undermine the national judicial system, the free flow of interstate commerce, and the concept of diversity jurisdiction.”⁵

The Report of the Senate Judiciary Committee provides further insight into these abuses that the CAFA intended to remedy. The Report focuses on five areas where abuse of the class action device occurs: (1) excessive fee collection by class action attorneys with little or no recovery by the class members themselves⁶; (2) “judicial blackmail” whereby corporate defendants are forced to settle frivolous lawsuits because of the “unbounded leverage” that a class attorney has, particularly in plaintiff-friendly jurisdictions⁷; (3) potential abuse of an out-of-state defendant’s due process rights⁸; (4) differing standards between states with regard to the certification of class actions⁹; and (5) the existence of duplicate lawsuits being filed in various

⁴ *Id.*

⁵ *Id.*

⁶ S. REP. 109-14, at 14-20 (2005), *available at* 2005 WL 627977. Notably, none of the nearly thirty examples of excessive fee collection involve environmental actions. *Id.*

⁷ *Id.* at 20-21

⁸ *Id.* at 21-22.

⁹ *Id.* at 22-23.

states, which clogs the courts, leads to forum shopping, and wastes judicial resources.¹⁰ In addition to these perceived abuses, the Senate Report explains that diversity and removal statutes are being abused because class actions are being kept out of federal court and “plaintiffs’ attorneys who prefer to litigate in state court [can] easily ‘game the system’ and avoid removal of large interstate class actions to federal court.”¹¹ Thus, the report argues that under federalism principles, national class actions belong in federal court.¹²

III. HOW THE CAFA CHANGES OLD LAW

A federal court can only hear a class action if it either meets the requirements for federal diversity jurisdiction or a federal question exists. However, for putative class action lawsuits, the CAFA expanded the diversity jurisdiction by changing the diversity of citizenship requirements, the aggregation rules for reaching the minimum jurisdictional amount, and the removal statutes.¹³ These core provisions of the CAFA expand the jurisdiction of federal courts over class action lawsuits and make it more likely for class action lawsuits to be heard in federal court. However, as described below, there are also several types of class action lawsuits that are excluded from these provisions.

A. Jurisdictional Changes

In *Supreme Tribe of Ben Hur v. Cauble*,¹⁴ the United States Supreme Court interpreted Section 1332 to require complete diversity; every named class member had to be from a different state from the defendant. With regard to putative class actions, the CAFA changed this long-standing rule, and now, a federal court can hear a class action lawsuit where only minimal

¹⁰ *Id.* at 23.

¹¹ *Id.* at 10.

¹² *Id.* at 24.

¹³ For an extended discussion of the CAFA’s changes to old law, and the new exceptions created under it, see Scott L. Nelson, *The Class Action Fairness Act of 2005: An Analysis*, available to ABA Members at <http://www.abanet.org/litigation/committee/classact/legislation.html>

¹⁴ 255 U.S. 356, 366-67 (1921).

diversity exists; only one class member (named or unnamed) must be domiciled in a different state than the defendant.¹⁵

In addition, the CAFA changed the aggregation rules for a class action lawsuit. Traditionally, as defined in *Zahn v. International Paper Co.*,¹⁶ class members could not aggregate their claims (or defendants could not request such aggregation) to meet the jurisdictional minimum. Now, under the CAFA, the amount in controversy requirement is met if there are aggregated claims worth \$5 million or more.¹⁷

B. Removal Changes

The CAFA made substantial changes to the removal statutes as they pertain to class actions. Specifically, the CAFA eliminated the one-year absolute bar for removing a case after filing.¹⁸ In contrast to prior law, the CAFA also permits remand decisions to be appealed if certain requirements are met.¹⁹ Finally, removal of class actions no longer requires the assent of all defendants²⁰; any single defendant can remove without the consent of the other defendants.²¹

C. Exceptions

1. General Exceptions

The CAFA allows several types of class action lawsuits to remain in state court. For example, a federal court cannot exercise diversity where at least two-thirds of class members and the primary defendants are citizens of the forum state.²² Similarly, a federal court cannot exercise diversity jurisdiction where: (1) greater than two-thirds of the class members are

¹⁵ § 4 of Pub. L. No. 109-2, which appears at 28 U.S.C. §1332(d)(2).

¹⁶ 414 U.S. 291, 301 (1973) *superseded by statute as stated in Exxon Mobil Corp. v. Allapattah Servs.*, 2005 U.S. Lexis 5015 (U.S. June 23, 2005).

¹⁷ § 4 of Pub. L. No. 109-2, which appears at 28 U.S.C. §1332(d)(2).

¹⁸ § 5 of Pub. L. No. 109-2, which appears at 28 U.S.C. §1453(b).

¹⁹ § 5 of Pub. L. No. 109-2, which appears at 28 U.S.C. §1453(c).

²⁰ *Cf.* 28 U.S.C. §1441.

²¹ § 5 of Pub. L. No. 109-2, which appears at 28 U.S.C. §1453(b).

²² § 4 of Pub. L. No. 109-2, which appears at 28 U.S.C. §1332(d)(4)(B).

citizens of the forum state; (2) at least one defendant is a citizen of the forum state and that defendant is one from whom significant relief is sought and whose conduct forms a significant basis of the class members' claims; (3) the principal injuries were incurred in the forum state; and (4) during the three-years before the filing of the class action, no similar class action had been filed.²³ Further, a federal court *may*, in the interest of justice, decline diversity jurisdiction over a class action when between one-third and two-thirds of class members and the primary defendants are from the forum state, and various equitable factors warrant such a result.²⁴ The CAFA also prohibits the following class actions to be filed in or removed to federal court: (1) where the primary defendants are state governments or officials²⁵; (2) where there are less than one hundred class members (and there is no federal question)²⁶; and (3) where it involves the internal affairs or governance of a corporation, such as securities claims.²⁷

2. Environmental Exception

The CAFA also contains specific provisions regarding the removal of mass actions that are particularly significant for environmental litigators.²⁸ In general, mass actions will be treated as a class action and, therefore, are removable, if they otherwise meet the CAFA's jurisdictional requirements described above.²⁹ However, the CAFA also contains exceptions to the rule and specifically carves out an exception applicable to environmental torts. Notably, this mass action

²³ § 4 of Pub. L. No. 109-2, which appears at 28 U.S.C. §1332(d)(4)(A).

²⁴ § 4 of Pub. L. No. 109-2, which appears at 28 U.S.C. §1332(d)(3). Factors to be considered are: (1) whether the claims involve a national or state interest, (2) whether the claims would be governed by the state law of the forum state, whether the class action was pled to avoid Federal jurisdiction, (3) whether the forum state has a distinct nexus with the action, (4) whether the number of class members from the forum state is substantially larger than those from other states, and (5) whether any similar class actions have been filed within a three-year period. *Id.*

²⁵ § 4 of Pub. L. No. 109-2, which appears at 28 U.S.C. §1332(d)(5)(A).

²⁶ § 4 of Pub. L. No. 109-2, which appears 28 U.S.C. §1332(d)(5)(B).

²⁷ § 4 of Pub. L. No. 109-2, which appears 28 U.S.C. §1332(d)(9).

²⁸ § 4 of Pub. L. No. 109-2, which appears 28 U.S.C. §1332(d)(11).

²⁹ *Id.*

provision will not apply to cases certified as class actions under Federal Rule of Civil Procedure 23.³⁰

The CAFA defines a mass action as “any civil action . . . in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the [\$75,000] jurisdictional amount requirements under subsection (a).”³¹ By definition, a mass action does not include an action in which “all of the claims in the action arise from an event or occurrence in the State in which the action was filed, and that allegedly resulted in injuries in that State or in States contiguous to that State.”³² The report of the Senate Judiciary Committee explains that this exception *only* applies to a “truly local single event” and its purpose was to “allow cases involving environmental torts such as a chemical spill to remain in state court if both the event and the injuries were truly local, even though there are some out-of-state defendants.”³³ Thus, where an environmental action arises in-state, and the injuries are in-state, as long as the action is not filed under Texas Rule of Civil Procedure 42, but simply as a “mass action,” it cannot be removed.

Intense lobbying by environmental organizations criticizing the CAFA may have led to this exception. Several major environmental organizations, including the Sierra Club and the Natural Resources Defense Council, issued a joint statement against the 2004 version of the CAFA, arguing that state environmental harm should be specifically excluded from the bill.³⁴

³⁰ *Id.* at 28 U.S.C. § 1332(d)(11)(C)(ii)(I).

³¹ § 4 of Pub. L. No. 109-2, which appears 28 U.S.C. § 1332(d)(11)(B)(i).

³² § 4 of Pub. L. No. 109-2, which appears 28 U.S.C. § 1332(d)(11)(B)(ii)(I). Other exceptions to the mass action definition are where: (1) claims are joined upon the defendant's motion; (2) all of the claims in the action are asserted on behalf of the general public, and not the class members, pursuant to a state statute authorizing such an action; or (3) the claims have been consolidated or coordinated solely for pretrial purposes. *See id.* at (d)(11)(B)(ii).

³³ S. REP. 109-14, at 47.

³⁴ Letter read into the Congressional Record, *available at* <http://thomas.loc.gov/cgi-bin/query/R?r108:FLD001:S57686>.

Because many environmental actions alleged negligence or nuisance, these organizations argued that state courts are the most efficient venue for such claims. The environmental lobbyists were also supported by the United States Judicial Conference. In a 2003 letter to the Senate expressing opposition to wide-ranging class action jurisdiction for federal courts, the Judicial Conference asked that Congress leave behind class actions “in which plaintiff class members suffered personal injury or personal property damage within the state, as in the case of a serious environmental disaster.”³⁵

These criticisms of the CAFA continue despite the mass tort exception, presumably because the language of the CAFA does not specifically carve out environmental torts. For example, the Report of the Senate Judiciary Committee states:

By removing many important environmental class actions from state to federal court, [the CAFA] not only denies to state courts the opportunity to interpret their own state's environmental protection laws, it hampers and deters plaintiffs from pursuing important environmental litigation. The well-documented backlog in the federal courts and the need for attorneys to engage in choice of law debates will significantly increase the time and cost of environmental litigation. *Ultimately, environmental class actions may not get litigated and the incentive polluters have to keep our environment clean will be reduced.*³⁶

Despite these criticisms, it is difficult to see how a traditional environmental mass tort action would not fall within the language of the exception because most, if not all, would likely constitute an action arising from an event or occurrence in Texas, and that allegedly resulted in injuries in Texas.

IV. AFFECT ON TEXAS ENVIRONMENTAL ACTIONS

If Texas environmental actions are heard in federal courts under the CAFA, the ultimate result of such litigation may be different if federal law, rather than state law, applies to determine issues such as class certification, the admissibility of scientific evidence, and punitive damages.

³⁵ *Id.*

³⁶ S. REP. 109-14, 89 (emphasis added).

A. Class Certification

In a series of relatively recent cases, Texas courts redefined the class certification requirements for class certification under Texas Rule of Civil Procedure 42 and limited the ability of state court judges to certify a class in particular circumstances. The first in this line of cases was *Intratex Gas v. Beeson*,³⁷ where the Texas Supreme Court clarified that representative plaintiffs are required to demonstrate “not only that an identifiable class exists, but that it is susceptible to precise definition.”³⁸ Otherwise, the class is not clearly ascertainable and could not be certified.³⁹ Subsequently, in *Ford Motor Co. v. Sheldon*,⁴⁰ the court held that any class that “impermissibly requires a determination of the merits before the court can ensure” its existence cannot be certified.⁴¹ Finally, on the same day as *Sheldon*, the court in *Southwest Refining Co. v. Bernal*,⁴² recognized that “the class action will rarely be an appropriate device for resolving” personal injury claims brought as a result of a “mass accident,” or any other situation in which individual issues of causation and damages would predominate.⁴³

Although the CAFA does not specify a class certification standard, the Fifth Circuit’s standards will apply to many class actions brought in Texas courts if they are removed to federal court under the CAFA. While the Fifth Circuit does not provide clear standards for class certification, the Circuit’s certification standard appears to be less stringent than that provided by Texas state courts. For example, the Fifth Circuit has stated that: “The test for commonality is

³⁷ 22 S.W.3d 398 (Tex. 2000).

³⁸ *Id.* at 403.

³⁹ *Id.* at 404-05.

⁴⁰ 22 S.W.3d 444 (Tex. 2000).

⁴¹ *Id.* at 454.

⁴² 22 S.W.3d 425.

⁴³ *Id.* at 436.

not demanding and is met where there is *at least one issue*, the resolution of which will affect all or a significant number of the putative class members.”⁴⁴

B. Scientific Evidence

Although the admissibility of scientific evidence is a procedural issue, in practice, the result can have far-reaching implications in litigation. In many states, cases heard in federal court under the CAFA, where Federal Rule of Evidence 702 and *Daubert* will be applied, may significantly impact the outcome of class action lawsuits. However, in Texas, where the scientific evidence standard is similar to *Daubert*, the ultimate impact will likely be less significant.

The Texas Supreme Court has adopted the *Daubert* standard for reliability of scientific evidence.⁴⁵ However, Texas’ interpretation of *Daubert* in *Merrell Dow Pharmaceuticals v. Havner*⁴⁶ appears to be more stringent than that of some federal courts. In *Havner*, the court required that to prove legal causation, epidemiological evidence must demonstrate at least a doubling of the risk of the illness or disease (while also noting that others factors should be considered to take into account the whole landscape of causation).⁴⁷ In contrast, *Daubert* does not require any such odds ratio. Therefore, it is unlikely that the scientific evidence standards applied by federal courts in Texas under the direction of the CAFA will provide any greater benefit to the interests Congress had hoped to advantage.

C. Punitive Damages

Several areas of punitive damages law indicate the ineffectiveness of the CAFA to change standards in Texas. Again, there is similarity between federal and Texas state standards

⁴⁴ *Mullen v. Treasure Chest Casino, L.L.C.*, 186 F.3d 620, 625 (5th Cir. 1999)(emphasis added).

⁴⁵ *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549 (Tex. 1996).

⁴⁶ 953 S.W.2d 706 (Tex. 1997).

⁴⁷ *Id.* at 718.

for punitive damages. For example, the Texas Supreme Court has specifically adopted the standards from *BMW v. Gore*⁴⁸ in determining the excessiveness of punitive damage awards.⁴⁹ Texas courts have also adopted the United States Supreme Court's holding in *State Farm v. Campbell*⁵⁰ that punitive damages awards must be limited to punishing unlawful conduct with a nexus to the specific harm suffered by plaintiff.⁵¹ These holdings apply equally to class actions.

Standards for punitive damages may also include a ratio between the actual damages awarded and the amount of punitive damages. The United States Supreme Court, in both *BMW v. Gore* and *State Farm v. Campbell*, refused to adopt a specific multiplier that can be used in every case to determine the constitutionality of the amount of damages. Texas state courts, while noting this refusal, have essentially mandated such a standard, stating that *Campbell*: “establish[ed] a single digit multiple range when it states that in most cases due process will be violated if the punitive award is more than nine times the amount of the compensatory award.”⁵²

In sum, Texas state courts have adopted the Supreme Court's recent line of reasoning regarding punitive damage awards, and, therefore, the CAFA's transfer of class actions from state to federal court may make little or no difference to the determination of punitive damages.

VI. CONCLUSION

The CAFA is an aggressive piece of legislation that attempts to curb potential abuses of the class action device. The primary purpose and result of the CAFA is the expansion of federal court jurisdiction over many class actions. However, the CAFA's affect on environmental actions in Texas will be hampered by two factors. First, the CAFA carves out an exception for environmental mass actions that permits certain state-based actions to remain in state courts.

⁴⁸ 517 U.S. 559 (1996).

⁴⁹ See, e.g., *North Am. Refractory Co. v. Easter*, 988 S.W.2d 904 (Tex. Ct. App. 1999).

⁵⁰ 538 U.S. 408, 423 (2003).

⁵¹ See *Bunton v. Bentley*, 153 S.W.3d 50 (Tex. 2004); *Harris v. Archer*, 134 S.W.3d 411 (Tex. Ct. App. 2004).

⁵² *Cass v. Stephens*, 156 S.W.3d 38, 76 (Tex. Ct. App. 2004).

Based on the statutory language, it appears that this exception would apply to most traditional environmental actions. Second, Texas state law regarding certification, scientific evidence, and punitive damages is comparable to that of federal law and, therefore, it is unclear if the ultimate result of any such litigation will differ under the CAFA.

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Natural **OUTLOOK**

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

The following articles on air quality are excerpts from the Spring 2005 issue of *Natural Outlook*, which is published quarterly by the Texas Commission on Environmental Quality. The newsletter examines important environmental topics and programs of the TCEQ.

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The Houston Air Quality Challenge

Rapid economic and population growth create a potent blend for the region's environment

The air quality in Houston is monitored more closely and analyzed with more intensity than perhaps anywhere in the country—possibly the world.

That's because the factors contributing to the region's ozone and air toxics problems are numerous and complicated. As the 4.7 million people living and working in the metropolitan statistical area know, Houston is sunny and hot for much of the year.

The factors of climate and a large, sprawling urban population are enough to bring air quality issues to a simmer. Stir in one of the largest industrial complexes in the world, and the kettle boils over with contributing sources of air pollution.

Addressing these conditions gets more complicated thanks to a complex meteorology influenced by an ever-changing land-and-sea breeze driven by the Gulf of Mexico.

The region's air quality is moni-

tored daily—even hourly—by a total of 141 air pollution monitors and sampler instruments owned by the TCEQ, private industry, and local governments. These monitors screen for 138 chemical compounds, including ozone precursors and toxic air pollutants.

Even with all of its challenges, the Houston region has made significant improvements in air quality over the last two decades. The TCEQ commissioners have adopted a plan that demonstrates attainment with the federal 1-hour ozone standard in 2007.

Yet a deadline of 2010 looms for reaching compliance with the 8-hour standard, as established by the Environmental Protection Agency.

The TCEQ has developed a host of strategies for addressing the wide range of sources contributing to air pollution in Houston and the surrounding area. More recently, the agency has fine-tuned its approach and ramped up enforcement efforts.

Initiatives Unfold

The state strategy for improving air quality—a blueprint called the State Implementation Plan (SIP)—contains a number of programs designed to deal with the complexities of the Houston region.

"The State Implementation Plan was crafted using cutting-edge science," said TCEQ Chairman Kathleen Hartnett White. "The programs designed for the Houston area are supported by the most robust modeling ever performed for an

attainment demonstration, using improved meteorological and pollutant measurements, chemistry data, and findings from in-depth scientific studies."

For several years, the SIP concentrated primarily on finding ways to lower nitrogen oxide (NO_x) emissions, said White. But with better information, continued analysis, and the advent of more sophisticated monitoring tools, the emphasis has shifted to highly reactive volatile organic compounds (HRVOCs), she said.

Studies indicate that HRVOC emissions, which are prevalent along the industrialized Texas coastline, contribute to the rapid formation of ozone. In Houston, the four compounds of interest are 1,3-butadiene, ethylene, propylene, and the butenes. As a result, the most recent control strategies detailed in the SIP are a combination of point source HRVOC and NO_x reductions.

This year, the TCEQ embarked on two new enforcement initiatives, both designed to reduce the emissions of HRVOCs and NO_x. The agency is concentrating its resources around the Houston Ship Channel to search for industrial operations that do not have the proper emissions authorizations and for operations that have authorization but are not in compliance with those requirements.

With the HRVOC High Emitters Initiative, TCEQ investigators in February began examining 28 industrial plants that reported unauthorized

Ground-level ozone, a component of smog, is formed when pollutants emitted by cars, power plants, refineries, chemical plants, trees, and other sources react chemically in sunlight. Nitrogen oxides (NO_x) and volatile organic compounds are the leading ozone precursors.

HRVOC emission events last year of 1,200 pounds or more. At these on-site compliance investigations, the TCEQ also has looked closely at "fugitive" emissions—a multitude of equipment leaks, many of which are too small to be detected individually.

The agency, with assistance from the Houston Bureau of Air Quality Control, is reviewing overall compliance with state and federal air regulations, and determining whether adequate safeguards are in place to minimize future HRVOC emissions.

In the Diesel Engine Initiative, the TCEQ has focused on large stationary diesel engines that are plentiful along the ship channel, performing duties such as driving the cranes that unload ships and providing emergency electrical power generation. This initiative is so labor-intensive that the TCEQ has called on many of its other field offices to assist the Houston Region 12 Office.

The TCEQ commissioners also have revised the rules designed to obtain reductions in both short-term and annual HRVOC emissions from four key industrial sources: fugitive emissions, flares, process vents, and cooling towers.

Beginning on Dec. 31, 2005, the agency will require Houston-area facilities to monitor or test equipment having the potential to emit HRVOCs. The rules also create a cap on annual emissions from the key industrial sources, requiring companies to reduce their routine HRVOC emissions, and an

hourly do-not-exceed limit to curb the magnitude of releases.

By January 2007, Harris County companies must be in compliance with the HRVOC cap-and-trade program, which limits HRVOC emissions on an area-wide basis. Sites that stay under the cap may sell their excess allowances to other sites in the area. This allows reductions to occur in the most cost-effective manner.

monitoring equipment immediately upwind and downwind of facilities to determine potential sources of air contaminants. These vans also go into residential areas to measure communities' exposure to 1,3-butadiene and other toxic air pollutants.

The Houston regional office has been on call 24 hours a day to conduct investigations when mobile monitoring detects elevated concentrations.

Investigators from the agency's Houston regional office and other field operations staff have attempted to correlate elevated concentrations of emissions to specific sources.

Health Concerns

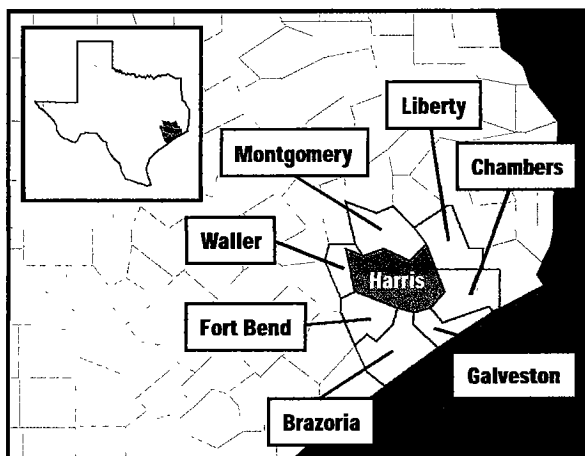
State and local air monitoring equipment in the Houston area provides valuable information on air toxics, as well as the formation and movement of ozone, but these monitoring results are not designed to be a risk assessment of individual health concerns. Rather, the data show state and local officials where potential

health risks might be higher as a consequence of long-term exposure to emissions.

During the TCEQ's most recent evaluation in 2003, there were 109 chemicals reviewed. Of those, three were shown to exceed the state's health-effects screening levels. Agency toxicologists have determined that these measurements are not an immediate health threat. Texas has the most comprehensive health-based guideline levels in the country. The TCEQ is in

Monitoring for HRVOCs

In Harris County, the TCEQ is monitoring for four highly reactive volatile organic compounds, which are thought to contribute to rapid ozone formation. Two of those HRVOCs are being tracked in the surrounding counties.



In Harris County, these rules apply to the four HRVOC compounds; of these, only ethylene and propylene emissions are affected in the counties of Brazoria, Chambers, Fort Bend, Galveston, Liberty, Montgomery, and Waller.

Mobile Monitoring

In early 2005, the TCEQ stepped up its mobile monitoring of specific industrial facilities in southeast Houston.

With mobile monitoring, the agency places vans equipped with air

the process of updating the methods for deriving those levels, and a peer review is under way by an independent contractor.

Houston residents living near industrial facilities along the ship channel have voiced concerns about the consequences of long-term exposure.

In recent months, the TCEQ has conducted 14 public information sessions to explain the findings from the agency's 2003 air monitoring report and to take questions from residents of east Houston neighborhoods.

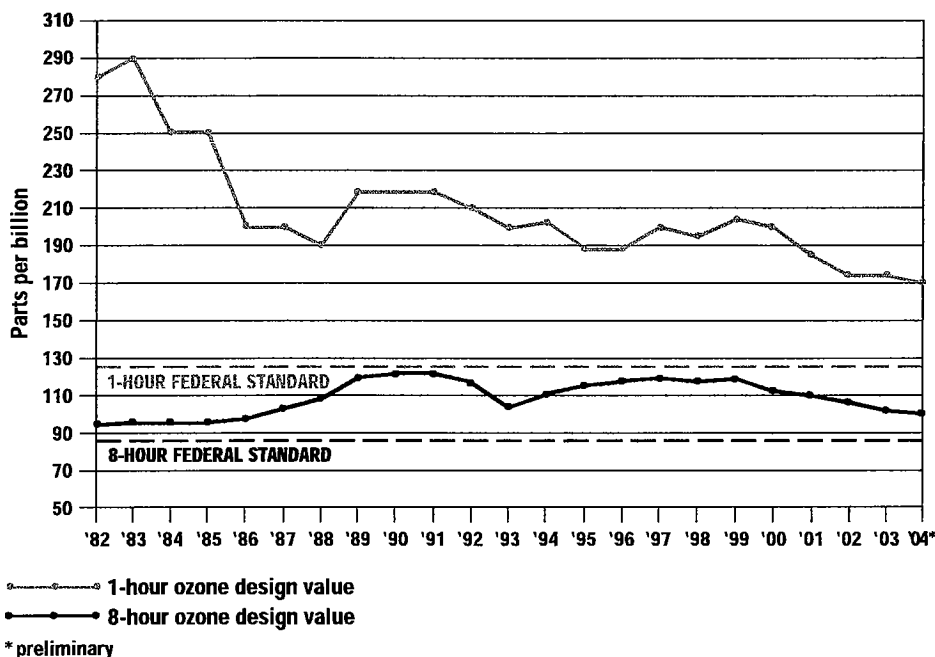
"We are attempting to respond to the public with information based on science," said Michael Honeycutt, manager of the TCEQ toxicology section. "Many of the questions we get are about increased cancer risks. We tell people that when cancer is found in

a community, it's impossible to isolate what, if any, role a nearby chemical plant may have played. That's because **cancer is a disease with many different causes, including lifestyle choices.**"

Honeycutt said no studies have shown evidence of elevated levels of cancer or specific types of respiratory disease in Houston, compared to other areas of Texas or the United States. Cancer cluster studies conducted by the state health department did not find elevated cancer rates in east Houston, he added.

Honeycutt said the TCEQ is continuing to work with state health

1-Hour and 8-Hour Ozone Design Values Houston Region 1982-2004



Note: The term "design value" is an indicator of pollution levels—in this case, for ozone—and is a statistic calculated from observed pollutant concentrations. For the 1-hour ozone standard, the design value is the fourth highest daily maximum 1-hour ozone concentration in a three-year period (the standard allows one exceedance a year, on average). For the 8-hour standard, the design value is the average of the fourth highest 8-hour daily maximum ozone concentration for three consecutive years. The design value is used to determine an area's attainment status.

officials to help identify any potential health risks or patterns.

Other Initiatives Take Shape

In a quest to detect pollution as it occurs, the TCEQ has experimented with infrared technology developed by the military. In February, state and local investigators tried out an infrared leak survey camera that visually detects escaping hydrocarbon vapors and captures the emissions on video. The camera was used in Houston during visits to industrial facilities. In one visit, a sizeable hydrocarbon leak was discovered at a flange on a heat ex-

changer, equipment that company representatives said they thought was out of service.

The TCEQ will evaluate the infrared technology and determine how it could be used in future investigations.

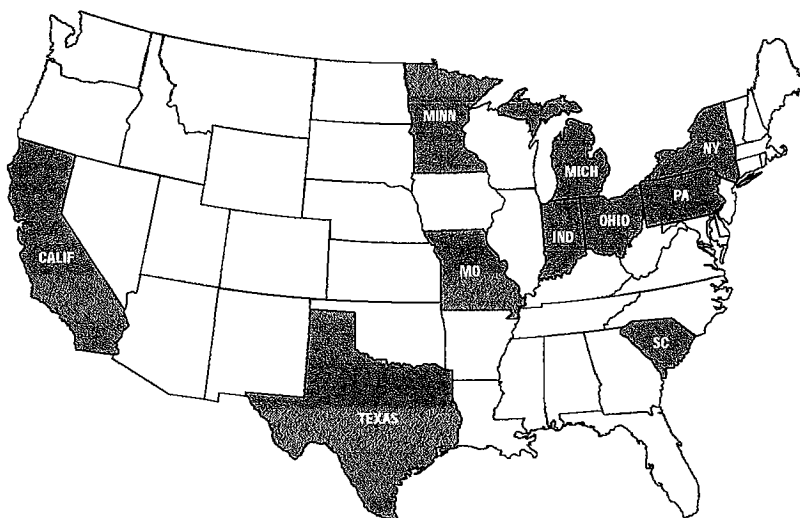
The agency also wants to expand its monitoring network in Houston to detect ozone precursors and air toxics. Doing so would cost about \$3.2 million, in addition to \$750,000 in annual operating costs, if approved by the Legislature.

The TCEQ already has used its existing network to conduct a pilot project of the Environmental Monitor

Monitoring for Toxic Air Pollutants

Texas outpaces all other states in monitoring for air toxics (of the state's 74 monitors, 17 are in Harris County). Almost all states have these monitors, but the largest networks are in these highlighted states.

States with most monitors	
Texas	- 74
Ohio	- 43
California	- 37
Pennsylvania	- 29
South Carolina	- 28
Missouri	- 24
New York	- 23
Minnesota	- 23
Indiana	- 22
Michigan	- 20



Source: Environmental Protection Agency, Office of the Inspector General, 2004

ing and Response System for near real-time air monitoring of emissions along the ship channel (see "On the Track of Air Pollution," page 10). A second phase of the project, operating on a broader scale, will begin this summer.

Also, the TCEQ has formed a stakeholder group to explore improvements to the inventory of volatile organic compound emissions. Improving the reliability and completeness of inventory data would help the agency determine which emissions should be the focus of future control strategies. After the 2000 Texas Air Quality Study of Southeast Texas, analysis indicated a discrepancy between the reported emissions inventory data and the concentrations of air contaminants measured during the study.

The next air quality study, which will focus on all of East Texas, gets under way in May and continues until October 2006. As in 2000, the comprehensive research project will include experts from universities; agencies at the state, federal, and local levels; private industry; and environmental organizations.

"The first step in reducing air pollution is to understand its causes, how it is formed, and how it travels," said White. "This study will look at a larger area over a longer time. We expect even greater participation by researchers from around the country in this important scientific endeavor." 🌱

Diesel Rule Change

The TCEQ has extended the compliance date for the low-emission diesel-fuel standards. The Texas Low Emission Diesel rule applies to diesel fuel producers, importers, common carriers, distributors, transporters, bulk terminal operators, and retailers. Diesel fuel produced for delivery and ultimate sale—for both onroad and nonroad use in 110 East Texas counties—must contain less than 10 percent by volume of aromatic hydrocarbons and have a cetane number of 48 or greater. Alternatives for compliance with these specifications are allowed.

The goal is to lower the emissions of nitrogen oxides (NO_x) and other pollutants from diesel-powered motor vehicles and nonroad equipment. The affected area includes the ozone nonattainment areas of Houston-Galveston-Brazoria, Dallas-Fort Worth, and Beaumont-Port Arthur.

The agency extended compliance from April 1, 2005, to Oct. 1, 2005, for producers and importers. Compliance is required for bulk plant distribution facilities beginning Nov. 15, 2005, and for retail fuel-dispensing outlets, wholesale bulk purchasers, and consumer facilities beginning Jan. 1, 2006.

Information on the rule revision is available at www.tmrcc.state.tx.us/oprd/sips/cleandiesel.html.

On the Track of Air Pollution

Agency fine-tunes monitoring project along Houston Ship Channel

Having tested a rapid-response system to detect and address air pollution formation around the Houston Ship Channel, the TCEQ is studying the results of the six-month pilot project and preparing to make improvements.

The air quality project, carried out under the Environmental Monitoring and Response System (EMRS), was aimed at industries working with highly reactive volatile organic compounds (HRVOCs). The compounds of interest were ethylene, propylene, 1,3-butadiene, and the butenes, which are believed to contribute to the fast formation of ozone.

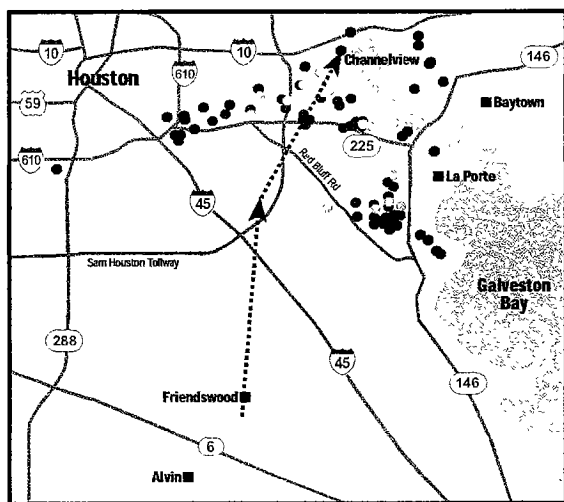
The goal was to find pollution in the early stages, then notify upwind industrial facilities when concentrations of



Gov. Rick Perry, left, helped roll out the Environmental Monitoring and Response System at its debut last year in Houston. State and local officials were treated to a computer demonstration of how the air monitoring network tracks the speed and direction of pollution events. To the right of the governor are Commissioner R.B. "Ralph" Marquez, a local reporter, State Sen. Mario Gallegos Jr., TCEQ Monitoring Operations Director Steve Spaw, and TCEQ Houston Regional Director Don Thompson.

The Path of Pollution

Once released, air contaminants move with the wind. In this case, a release of propylene was identified at 1 a.m. on June 19, 2004, at an air monitor near Channelview. All industrial facilities within a 10-mile, 90-degree wedge of the monitor were notified to check their operations.



- EMRS participants in the wedge
- Non-participants in the wedge
- Facilities outside the wedge
- ▲ Path of emissions over six hours

contaminants exceeded certain thresholds at monitoring sites. Alerted to the need for quick action, the facilities would then check their internal operations and, upon finding a problem, initiate corrective action. Within two days, the TCEQ receives a report on the cause of the emissions problem and the solution that was undertaken.

Running from June to November 2004, the EMRS project drew upon data collected from monitors owned by the TCEQ, the city of Houston, and private industry.

"We wanted to learn from experience what works and what doesn't work," said Commissioner R.B. "Ralph" Marquez.

"This project demonstrated that industry and the TCEQ can work together to try and address pollution problems faster and more effectively—much more than if the TCEQ alone tries to address these issues," he said.

Industry participation was voluntary and started with a small group—about 30 facilities signed up initially to receive the auto-alert notifications.

What Set Off the Triggers?

During the EMRS air quality pilot project in 2004, the TCEQ asked participating companies to submit operational reports every time air monitors detected certain levels of highly reactive volatile organic compounds (HRVOCs). An analysis of those reports found a variety of industry actions that triggered the 160 alerts. (About half of the triggers were attributed to more than a single action, which accounts for the total exceeding 100 percent.)

Actions at facilities preceding an alert	Percent
Loading <ul style="list-style-type: none">• moving the chemical compound or a product containing the compound to or from tanks (loading or offloading a railcar, tank truck, or barge)	40%
Cooling towers with high HRVOCs <ul style="list-style-type: none">• may occur due to a heat exchanger leak	31
Clearing <ul style="list-style-type: none">• compounds being evacuated from process equipment	27
Routine maintenance <ul style="list-style-type: none">• activities such as repairing valves and replacing parts	16
Reportable upsets <ul style="list-style-type: none">• unauthorized emissions of air contaminants	13
Scheduled startup, shutdown, and maintenance of equipment	5
Unknown <ul style="list-style-type: none">• nothing unusual was determined to have occurred	37

By the end of the project, more than 60 facilities had joined.

In all, about 90 companies in the ship channel area either produce or use one or more HRVOCs.

During the six-month project, automatic alerts were triggered 160 times. Of those, 116 triggers occurred at two monitors west of the ship channel.

Overall, the project raised awareness among participants to the potential impact of their daily maintenance and operations, said Marquez. As a result, there were more efforts to address concerns related to HRVOC spikes and other emissions problems.

"We believe data analysis from this project has the potential to focus attention on the companies responsible for the majority of HRVOC emissions," he said.

Based on a survey of participants, the TCEQ will consider revising the notification thresholds, the checklist that facilities complete after each auto-alert, and the types of facilities asked to respond. If a facility does not handle the compound detected by a monitor, it probably does not need to receive the alert.

Another proposal is to focus attention on the more significant HRVOC spikes.

The TCEQ wants to identify the activities having the greatest potential of releasing HRVOCs, said Marquez, and to find best management practices that serve as examples of pollution prevention.

The next phase of the EMRS air quality pilot project will begin in June, he said, with one goal being increased industry participation. ☛

R. B. "Ralph" Marquez



Ralph Marquez of Texas City was appointed by Governor 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 first term expired August 31, 1999, and he was reappointed for a second term that expires August 31, 2005. The Texas Senate confirmed his second appointment on Feb. 21, 2001.

Prior to his appointment, 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, 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 in Future Studies from the University of Houston-Clear Lake.

Since joining the commission, Marquez has served on the U.S. Environmental Protection Agency's Clean Air Act Advisory Committee and the Governmental Advisory Committee to the U.S. Representative to the North American Commission for Environmental Cooperation. He also has served as chair of the Environmental Council of States Regulatory Reinvention Work Group. Marquez has been heavily involved in air, Mexico border, and regulatory innovation issues during his terms on the commission.

PAMELA M. GIBLIN

Pamela Giblin is a senior partner in the Austin office of Baker Botts and chairs the firm's Environmental Department. She has practiced environmental law since 1970 and has had extensive experience in advising clients on a broad array of environmental issues. She is listed in the Environmental Law section of *The Best Lawyers in America* and is the first woman to receive the Distinguished Lawyer Award from the Travis County Bar Association.

In 1967 she received her B.A. with honors from the University of Texas and her J.D. in 1970 from the University of Texas School of Law. She is certified in Administrative Law by the Texas Board of Legal Specialization, and is a member of the State Bar of Texas (Environmental and Natural Resources Law Section).

Ms. Giblin, whose maternal grandfather was one of the signers of the Mexican Constitution and a former Mayor of Mexico City, has lived in Mexico and South America and is fluent in Spanish.

Ms. Giblin served as General Counsel of the Texas Air Control Board and chaired the first City of Austin Commission on Electric Rates. She is a frequent speaker at seminars and conferences on environmental law issues. She is one of five Texas members of the Federal Clean Air Act Advisory Committee, a diverse group that advises EPA on national air quality issues. Ms. Giblin has been active in the Austin community and serves on the Board of Mexic-Arte Museum, one of four Hispanic museums in the country. She is also a member of the Board of the Seton Hospital Fund and served on that group's Task Force for the Poor.

Air Toxics

David C. Schanbacher, P.E.

Chief Engineer

Texas Commission on Environmental Quality



Air Toxics

- 1970 Clean Air Act identified eight HAPs
- 1990 CAA amendments identified 189 HAPs
- Currently 188 HAPS
 - Diverse set of chemicals, including metals and VOCs
 - ~70% of HAPS are VOCs
- No federal ambient air standards
 - Technology-based standards for reducing HAP emissions
 - Some states have developed their own standards/guidelines, such as TCEQ's Effects Screening Levels (ESLs)

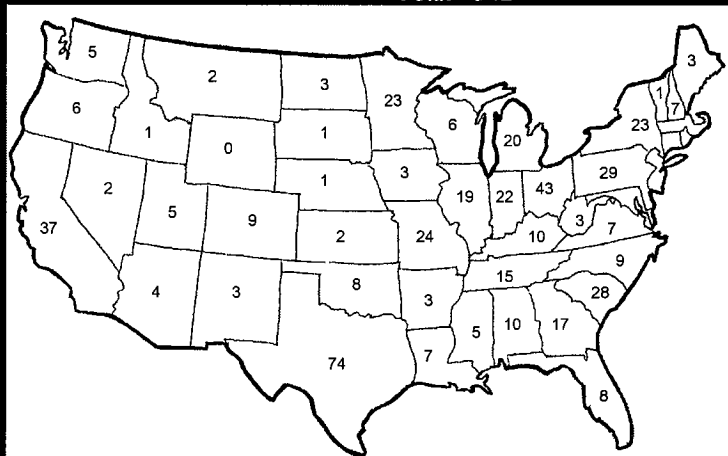
Ambient Air Toxics Levels

- Two ways to estimate ambient (i.e. outdoor) concentrations for air toxics
 - Modeling: input emissions data into model that simulates atmospheric fate & transport to estimate ambient levels
 - Monitoring: instrument collects samples which are then analyzed to determine ambient levels

Monitoring Sites Reporting Air Toxics Data to EPA

1/1/03 – 9/15/04

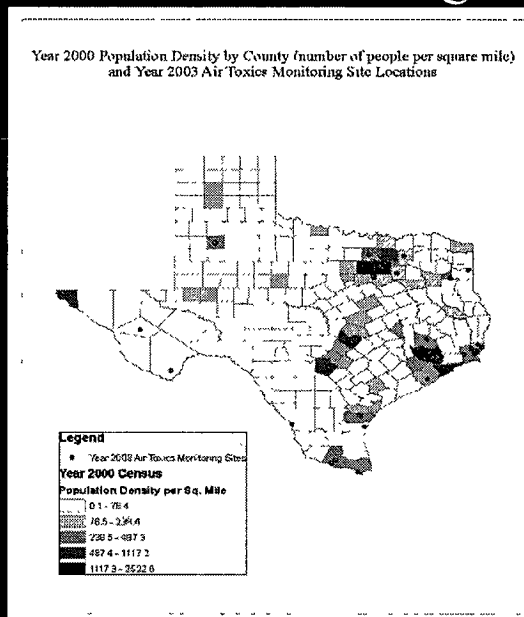
Total - 542



MA - 4
CT - 5
RI - 6
NJ - 5
DE - 6
MD - 3
DC - 1
AK - 1
HI - 1
PR - 1
VI - 1

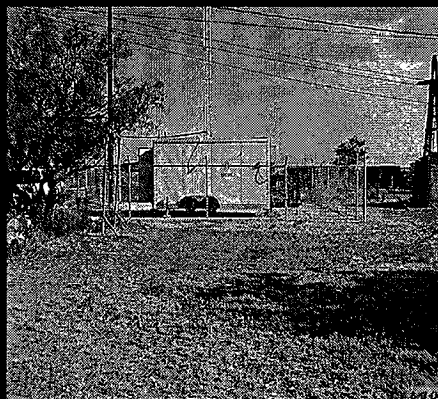
Source: EPA Office of the Inspector General

Air Toxics Monitoring Sites



Types of Air Toxics Monitoring

- Different monitoring networks
- Different target chemicals
- Different sampling duration
- Different sampling frequency



Houston: Monitor up to 133 Chemicals



autoGC & canister VOCs		additional canister VOCs		carbonyls	metals
1,2,3-Trimethylbenzene	Isopropylbenzene	1,2,3-Trimethylbenzene	Isobutane	2,5-Dimethylbenzaldehyde	Arsenic
1,2,4-Trimethylbenzene	Methylcyclohexane	1,2,4-Trimethylbenzene	Isopentane	Acetaldehyde	Beryllium
1,3,5-Trimethylbenzene	Methylcyclopentane	1,3,5-Trimethylbenzene	Isoprene	Acetone	Cadmium
1,3-Butadiene	Propane	1,3-Butadiene	Isopropylbenzene	Benzaldehyde	Chromium
1-Butene	Propylene	1-Butene	m-Diethylbenzene	Butyraldehyde	Lead
1-Pentene	Styrene	1-Pentene	m-Ethyltoluene	Crotonaldehyde	Manganese
2,2,4-Trimethylpentane	Toluene	2,2,4-Trimethylpentane	Methylcyclohexane	Formaldehyde	Nickel
2,2-Dimethylbutane	c-2-Butene	2,2-Dimethylbutane	Methylcyclopentane	Heptaldehyde	Mercury
2,3,4-Trimethylpentane	c-2-Pentene	2,3,4-Trimethylpentane	n-Butane	Hexanaldehyde	
2,3-Dimethylbutane	m-Diethylbenzene	2,3-Dimethylbutane	n-Decane	Isovaleraldehyde	
2,3-Dimethylpentane	m-Ethyltoluene	2,3-Dimethylpentane	n-Heptane	m-Tolualdehyde	
2,4-Dimethylpentane	n-Butane	2,4-Dimethylpentane	n-Hexane	MEK/Methacrolein	
2-Methylheptane	n-Decane	2-Methylheptane	n-Nonane	o-Tolualdehyde	
2-Methylhexane	n-Heptane	2-Methylhexane	n-Octane	p-Tolualdehyde	
2-Methylpentane	n-Hexane	2-Methylpentane	n-Pentane	Propionaldehyde	
3-Methylheptane	n-Nonane	3-Methylheptane	n-Propylbenzene	Valeraldehyde	
3-Methylhexane	n-Octane	3-Methylhexane	n-Undecane		
3-Methylpentane	n-Pentane	3-Methylpentane	o-Ethyltoluene		
Acetylene	n-Propylbenzene	Acetylene	o-Xylene		
Benzene	n-Undecane	Benzene	p-Diethylbenzene		
Cyclohexane	o-Ethyltoluene	c-2-Butene	p-Ethyltoluene		
Cyclopentane	o-Xylene	c-2-Pentene	Propane		
Ethane	p-Diethylbenzene	Cyclohexane	Propylene		
Ethyl Benzene	p-Ethyltoluene	Cyclopentane	Styrene		
Ethylene	p-Xylene + m-Xylene	Ethane	t-2-Butene		
Isobutane	t-2-Butene	Ethyl Benzene	i-2-Pentene		
Isopentane	t-2-Pentene	Ethylene	Toluene		



What does the air monitoring data tell us?

- Data not adequate for full-fledged risk assessment (no actual personal exposure level)
- Shows where health risks could be higher compared to other areas
- Helps the agency focus resources (inspections, enforcement) on areas with higher concentrations of air toxics

What kind of effects?

- Human Health Effects
 - Acute (e.g. eye irritation) 
 - Chronic (e.g. lung disease, cancer) 

- Odor 

- Vegetation Effects 

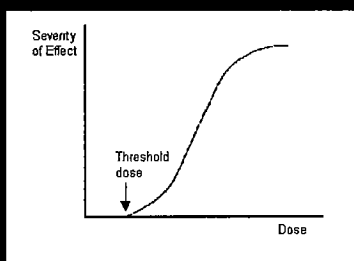
Effects Screening Levels (ESLs)

- Guidelines, not standards
 - Why not standards?
- Safe levels of exposure
- Screening levels – not effects levels
- Short-term and Long-term



How We Develop ESLs

- Review of Scientific Literature
 - Occupational Studies
 - Epidemiology Studies
 - Case Studies
 - Animal Studies

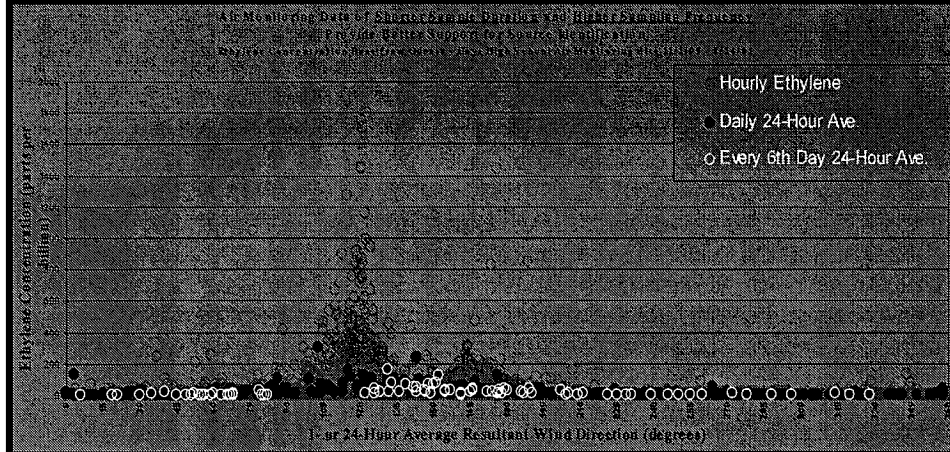


ESL Development Document

- Toxicology Section has written a draft ESL Development Document
- Third party non-profit organization has recently conducted an expert scientific peer review (Toxicology Excellence for Risk Assessment)
- More information at http://www.tceq.state.tx.us/comm_exec/tox/ESLMain.html#meth

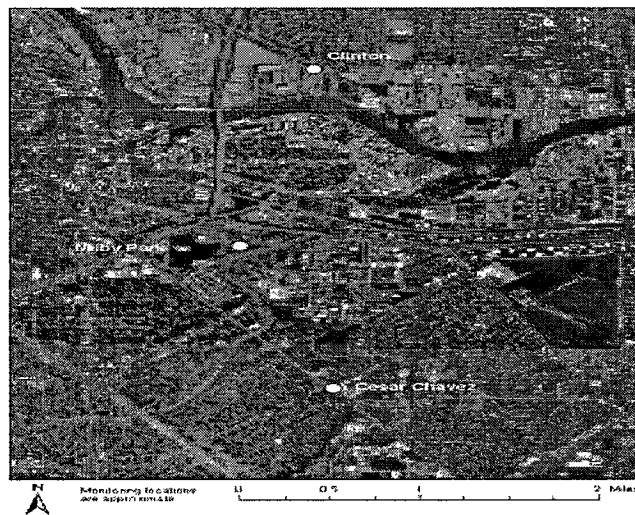
Frequent short-term data provides more information for

- Source identification using wind direction
- Short-term exposure, acute health effects, odor



Year 2003 Air Monitoring Milby Park site

- All 99 measured chemical concentrations were acceptable, except for 1,3-butadiene
- *1,3-Butadiene* levels higher than we want
- Not an immediate health threat. Why not?
 - Large margin of safety
 - Excess cancer risk estimates are over-predictive
- Calling for reductions to achieve large margin of safety



What are we doing to reduce 1,3-butadiene levels?

1. New Rules

- HRVOC Rules adopted December 2004
- Reduce 1,3-butadiene levels
- Require point source monitoring beginning January 2006



What are we doing to reduce 1,3-butadiene levels?

2. The Environmental Monitoring and Response System (EMRS)

- Companies are notified when higher levels are monitored so they can investigate/reduce emissions
- Pilot project in 2004 along Houston ship channel included 2 monitors in the Milby area



What are we doing to reduce 1,3-butadiene levels?

3. Air Pollutant Watch List

- 1,3-butadiene and benzene in Houston area
- Special review of air permit applications that request authorization to emit these chemicals
- Generally, allow no net increases

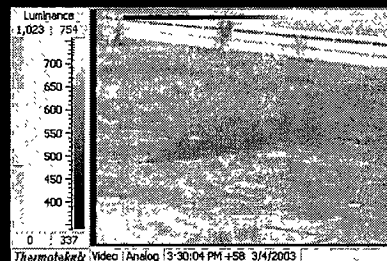
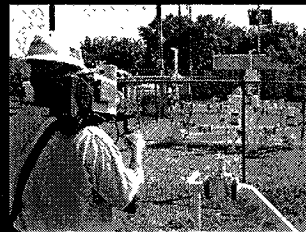


What are we doing to reduce 1,3-butadiene levels?

4. Enforcement Initiative to Target 1,3-butadiene emitters
5. Mobile Air Monitoring
6. Added Manchester Monitoring Site
7. Auto-GC at Milby Park
8. Assistance from Texas Dept. of State Health Services

What are we doing to reduce 1,3-butadiene levels?

9. Contract with company that uses camera based on military technology that allows a person to see VOC plumes in real time



Conclusions:

Extensive air toxics monitoring

- Texas has a very extensive air toxics monitoring network.
- Texas posts near real-time air quality information (e.g., ozone, fine particulate matter) on the Internet
- Texas is working to post near real-time monitoring of air toxics from autoGC on Internet

Conclusions:

Most monitored air toxics levels are safe

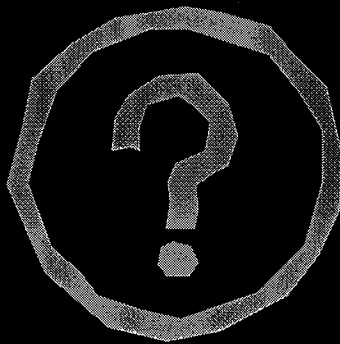
- Many air toxics are rarely detected or are detected in very low concentrations
- Almost all air toxics are measured at levels well below acute and chronic health effects
- Very few chemicals/locations of potential concern

Conclusions:

Some air toxics levels are not low enough

- Rare one-hour level of formaldehyde could cause respiratory irritation in some people
- A few chemicals in industrial areas are measured at odorous levels; no health effects
- A few chemicals may pose relatively higher health risk, such as 1,3-butadiene in the Milby Park area of Houston

Questions?



David C. Schanbacher, P.E.

Texas Commission on Environmental Quality Office of the Executive Director

David C. Schanbacher serves as the Chief Engineer for the Texas Commission on Environmental Quality, providing oversight and guidance on engineering standards of the agency and coordinating major engineering initiatives and studies. He has received certification as a registered professional engineer in the State of Texas.

The Chief Engineer also serves as Deputy Director of the Chief Engineer's Office, which consists of technical experts in engineering, biology, and toxicology.

Mr. Schanbacher has served as special assistant to the Office of Air Quality at the TCEQ and as a permit engineer in the New Source Review Program before joining the Office of the Executive Director. Mr. Schanbacher previously spent several years in various engineering positions in the chemical industry and the oil and gas industry before joining the Texas Air Control Board, a predecessor agency of the TCEQ, in 1992.

Mr. Schanbacher received a Bachelor of Science Degree in Chemical Engineering from the University of Missouri and a Master's Degree in Engineering from the University of Texas at Austin.

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Email: dschanba@tceq.state.tx.us



THE POWER OF RENEWABLES

Why should we increase the Renewable Portfolio Standard (RPS)?

Renewable energy faces a “chicken and egg” problem not unlike that faced in the early days of the natural gas industry. Pipeline companies were reluctant to build new lines in the absence of producing wells, and wildcatters were reluctant to drill wells in the absence of a delivery system. Their solution: Long-term contracts guaranteeing a sure supply to pipeline owners and a sure cash flow to producers. Today, however, market and regulatory pressures favor spot pricing of electricity rather than long-term, fixed-price contracts that assure cash flow for the generator. An adequate RPS will help the market overcome this challenge.

- 1. Attracting investment.** Renewable energy is a multi-billion dollar industry with growth topping 25% annually. Neighboring states are offering better incentives (higher RPS or tax breaks) that may attract development there first, costing Texas billions in investment.
- 2. Good planning can save money.** Inadequate transmission could mean that clean, low-cost, renewable energy sources—including wind-generated power—cannot get to market. An RPS sets a long term goal. Planning for growth increases the capability of the grid, reduces congestion and can lower the per-unit cost of electricity.
- 3. Ensuring Clean Air credits.** The state can receive credit for emissions reductions in State Implementation Plans (SIPs) required under the Clean Air Act for an RPS, thus lessening the reductions required of other industries. Such credits cannot be obtained on “hoped-for renewable energy projects” that are not part of a legally adopted RPS.
- 4. Providing fuel diversity/price stability.** A minimum goal for fuel diversity promotes use of local resources and new technologies, hedging against volatile fossil fuel prices.
- 5. Increasing tax revenues.** Renewable energy is capital-intensive, which means more local property tax revenues. For instance, every 1,000 MW of wind power plants brings \$10 million per year in new school funding, plus millions for local governments.
- 6. Bringing jobs to Texas.** An extended RPS provides market stability for growing companies that build renewable energy plants, manufacture components or service projects.
- 7. Protecting public health.** An extended RPS assures the public that a small but certain percentage of the electricity in Texas will be non-polluting, thus reducing Texans’ —and especially our children’s—exposure to unhealthy air pollution.
- 8. Increasing energy & homeland security.** An RPS will lead to more local electric generating resources that are dispersed and pose little risk from terrorism.
- 9. The public wants it.** Polls show that an overwhelming majority of Texans favor generating a significant portion of our electricity using renewable energy sources.*

* 80% of Texans from all regions and all political stripes favor requiring that by 2019 10% of the electricity in Texas be generated from renewable energy. [POLL. 2002 American Viewpoint, Inc.]

SATURDAY, MAY 7, 2005

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State Edition

www.MySanAntonio.com

THE VOICE OF SOUTH TEXAS SINCE 1865

50¢

Bill could bring big problems to small Texas towns

BY ROBERT HANCOCK

COMMENT

Everyone claims to be for local control of cities and schools. But in the Texas Legislature, local control is under assault.

And as the mayor of one small town where local control has allowed us to preserve our

unique heritage, I'm worried.

Just 20 minutes west of San Antonio, Castroville was founded by

French Alsatian colonists in the

mid-1800s, when Texas was still a republic. Today, with 97 historic European-style homes, inns and churches, Castroville is both a national and state historic district, and we enjoy a thriving tourist trade. And it's a

great place to work and raise a family.

Unfortunately, a bill in the Legislature could severely impact the things that make our town unique.

If House Bill 2833, by Rep. Robby Cook, D-Eagle Lake, or its near-twin Senate Bill 1647, by Sen. Todd Staples, R-Paestine, passes and is signed into law, our town will be faced with large new administrative and legal costs and could be forced to make enormous cash payoffs to landowners who simply disagree with the land use rules we believe are necessary to preserve the unique character of Castroville.

Most Texas cities and towns have land use restrictions to preserve their safety and char-

acter. They protect historical districts and structures, and they protect property values in residential neighborhoods by specifying minimum lot sizes or requiring setbacks from the street and neighbors' homes. They limit impervious cover to ensure greenery or keep moderate rainstorms from turning into raging floods.

In our town, as in many others, we restrict where less desirable businesses like landfills, junkyards and liquor stores locate.

If HB 2833 or SB 1647 becomes law, local restrictions against such ventures could entitle a landowner to sizable compensation from our city's limited treasury. It could subject us to lawsuits by any property owner, even out-of-town speculators who don't like local rules.

Since we have a budget of

just \$7.1 million and only 41 town employees, we may simply have to repeal the regulations that have protected the unique character of our community.

Dozens of unique communities across the state would be similarly vulnerable: Anyone with a piece of property and an outrageously out-of-place business plan could demand compensation when a city says no. And he wouldn't have to prove any actual losses — only that the restriction prevents him from making more.

In the Senate hearing on these "takings" bills, Maxine Erinson of Texas Neighborhoods Together, the largest coalition of homeowners in Texas, said the bill would hamstring redevelopment in older urban areas by allowing landowners to sue for compensation for any land use restrictions added

since 1836.

The assistant city attorney of Arlington testified HB 2833 and SB 1647 are so broad that they would even require towns and cities to pay compensation when we try to enforce regulation of sexually oriented businesses.

Because of the cost of compensation to landowners — and fighting lawsuits and doing detailed "takings" risk assessments on all proposed zoning changes — the Legislative Budget Board warns: "The financial impact on cities is anticipated to be substantial, especially in fast-growing areas of the state."

The people behind these bills are developers who stand to make a killing off the law's passage. Texas already has a law that requires reasonable compensation for land actually taken from a landowner under the

right of eminent domain.

But for the first time, the bills would require incorporated cities, making use of their traditional powers, to compensate landowners for land use restrictions enacted for the good of the community as a whole.

Local land use planning is not "taking" a person's property or freedom. These zoning and land use restrictions almost always end up raising the value of property in affected areas. These bills would make taxpayers pay compensation for setting rules that improve communities and increase property values.

Unless the citizens of Texas stop these bills, the unique character of towns like Castroville could be lost forever.

Robert Hancock is mayor of Castroville.

BIOGRAPHICAL INFORMATION

JIM MARSTON

Jim Marston is the Director of the Texas Office of the Environmental Defense located in Austin. He is the former chair of the U.S. Good Neighbor Environmental Board, Presidential Advisory Committee. Mr. Marston served as Vice-Chairman of the Texas Ethics Commission from 1992 to 1994. He has served on numerous other advisory boards for the State of Texas, the City of Austin, electric utilities and a university. He currently serves on the board of directors of Texas Observer, Texas Environmental Research Consortium, Texas League of Conservation Voters and the Central Texas Clean Air Force. He has had a variety of positions in many political campaigns. Before coming to Environmental Defense, Mr. Marston was a partner in the law firm of Doggett, Jacks, Marston, and Perlmutter and an Assistant Attorney General of Texas.

He is a member of the State Bar of Texas and the Federal Bar Association for the Western District of Texas.

Mr. Marston received his doctor of jurisprudence from New York University School of Law, where he was a Root-Tilden Scholar and served on the Journal of International Law and Politics. He received his bachelors degree from Texas Christian University where he was selected Phi Beta Kappa.

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Profile
Eric Groten represents industrial clients in environmental matters, principally in the air quality area.

Administrative: Representation in state and federal rulemakings; negotiating issuance of construction and operating permits and representation in contested case hearings and related proceedings; defense of administrative enforcement actions.

Litigation: Challenging state and federal rulemakings; defending civil enforcement proceedings brought by state and federal agencies and citizens' groups; representation in environmental tort cases.

Legislative: Review and negotiation of proposed state and federal environmental statutes.

Office Practice: Counseling on state and federal environmental legal obligations; preparing permit applications; environmental audits and investigations; client training programs on environmental compliance.

Experience:
Partner, Brown McCarroll & Oaks Hartline, Austin, Texas, 1989-1998.

Associate, Evans, Kitchel & Jenckes, P.C., Phoenix, Arizona, 1985-1989.

Professional Honors or Appointments
Chambers USA: America's Leading Lawyers for Business, Environment, 2005 and 2004
Texas Super Lawyer, Environmental/Land Use, 2004 and 2003
de Novo Magazine, Legal Innovator, 2003
Austin Monthly, Best in Environmental Law, 2002
Fellow, Texas State Bar College, 1993-present
Fellow, Texas Bar Foundation, 1998-present
Director, Texas Lyceum Association, 1991-1996

Editor, *Journal of the Texas Lyceum Association*, 1992-1995
Director, Air and Waste Management Association, Arizona Chapter, 1988-1989

Publications

Creating Emission Banks in Urban Nonattainment Areas (or "How I Learned to Stop Worrying and Enjoy Industrial Growth"), Urban Lawyer, Fall 1998

Dealing with the Credible Evidence Rules, TCC News, April 1997

Single Property Petitions Under the Texas Clean Air Act, TCC News, March 1997, reprinted in ABA Air Quality Committee Newsletter, May 1997

Groten Goes to the Movies: A Viewer's Guide to New "Air Releases", Proceedings of the Eighth Annual Texas Environmental Superconference, Austin, Texas, 1996

Title V Status Report, TCC News, Feb. 1996

New Growth in the PSD Forest: A Trail Map, 4 Natural Resources & Environment 33, Co-Author, 1989, reprinted in The Environmental Law Manual 320 (T. Garrett, Ed.), 1992

A Clean Air Glossary, Journal of the Texas Lyceum, 1990

New Directions in the Regulation of Air Emissions, Proceedings of the American Bar Association Section of Natural Resources, Energy and Environmental Law Workshop on Recent Developments in Environmental Issues Facing the Mining Industry, co-author, 1989

PM-10 Standards and Implementation: An Industry Perspective, PM-10: Implementation of Standards 41-54, Transactions of an APCA/EPA International Specialty Conference, co-author, 1988

Speeches

From My Desk..., "Recent Developments in Implementation of the Texas Audit Act," Remarks at The Auditing Roundtable South Central Regional Meeting, Austin, Texas, 2003

NOx Controls: The Future is Now, Address at 15th Annual NOx Control Conference, Council of Industrial Boiler Owner, Houston, Texas, 2002

State of the Clean Air Act: Past, Present and Future, Remarks at Greater Houston Partnership Conference, Houston, 2001

NOx Controls in Texas: Past, Present and Future, Keynote Address at 13th Annual NOx Control Conference, Council of Industrial Boiler Owners, Arlington, Texas, 2000.

The "General Duty" and Other Section 112(r) Issues, Process Plant Safety Symposium, American Institute of Chemical Engineers, Houston, 1998

Credible Evidence, "Hot Air Topics" Conference, Air & Waste Management Assn., Houston, 1997

Clean Air Act Developments, Texas Chemical Council Environmental Law Seminar, Austin, 1997

Dealing with the "Any Credible Evidence" Rules, Remarks at the Eighth Annual Environmental Law Superconference, Austin, 1997

Understanding the Clean Air Act, Executive Enterprises Environmental Regulation Course,

Houston and Austin, 1995

Federal Clean Air Act Nonattainment Issues, Annual Meeting of Association of Chemical Industry of Texas, Corpus Christi, Texas 1994

Getting Ready for Title V Operating Permits, Seminar on Critical Issues in Environmental Law Facing East Texas Businesses, Longview, 1994

Recent and Forthcoming Changes to Federal and State Air Quality Programs, Environmental and Legislative Development Seminar, Austin, 1994

Environmental Contingency Planning, Guest Lecture at University of Texas Graduate Course in Mineral Economics, Austin, 1993

Air Quality Permitting Pitfalls and Practice Pointers, Environmental and Legislative Developments Seminar, Austin, 1993

How Environmental Policy is Reflected in Environmental Law, Guest Lecture at University of Oklahoma Graduate Course in Energy Policy, Norman, Oklahoma, 1991

The Structure of the Clean Air Act, Guest Lecture at University of Oklahoma School of Law, Norman, Oklahoma, 1991

The Regulation of Air Emissions After 1990: An Overview of the Federal Clean Air Act Amendments of 1990, International Conference of the Semiconductor Safety Association, Phoenix, Arizona, 1991

Enforcement Proceedings and Contested Case Hearings Before Texas Environmental Agencies, Texas Chemical Council Seminar on Environmental Law and Regulations, Austin, 1990

Community Involvement

Vice President, Board of Directors, Zachary Scott Theatre

Board of Directors, Ballet Austin

Board of Directors, Austin Lyric Opera

Board of Directors, Wimberly Lane Homeowner's Association

Affiliations

American Bar Association - (Natural Resources, Energy and Environmental Law Section, 1986-2004; Administrative Law and Regulatory Practice Section 1986-present); Chair of Local Program, Annual Clean Air Act Update, Satellite Seminars, Austin, 1991-1999

State Bar of Arizona - (Environmental and Natural Resources Law Section) 1985-present
Austin Bar Association, 1989-present

NEW DEVELOPMENTS IN TITLE V AND EMISSION EVENTS

Kelly Haragan, Counsel
Environmental Integrity Project

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I. EMISSION EVENTS

A. WHAT ARE EMISSION EVENTS AND WHY DO THEY MATTER?

Emission events are upsets or unscheduled startup, shutdown or maintenance activities that cause unauthorized emissions in excess of facility authorizations. These emissions are usually not included in health impacts analyses or facility or State Implementation Plan (SIP) modeling. An Environmental Integrity Project (EIP) study found 30 Texas facilities reported emitting more than 45 million extra pounds of pollution in 2003 due to emission events and scheduled startup, shutdown and maintenance.¹ Emissions from emission events alone at one Port Arthur facility made it the sixth largest emitter of butadiene and the twelfth largest emitter of benzene in the country.

Studies, including those conducted in the Houston area, have identified emission events as a significant source of “unaccounted for” VOC pollution in the ambient air.² Emissions from these events often escape regulatory and reporting requirements. For example, “Gaming the System” found that more than half of the states have illegal SIP provisions that excuse some emission event and/or startup, shutdown or maintenance

¹ Environmental Integrity Project, “Gaming the System” available at <http://www.environmentalintegrity.org/pub240.cfm>.

² See e.g., Mid-Atlantic Regional Air Management Association, *Evaluation Petroleum Industry VOC Emissions in Delaware, New Jersey and Southeastern Pennsylvania* (Oct. 2003).

emissions from compliance with pollution limits.³ Similarly, of the 25 states responding to a survey, only 13 reported that emissions from emission events and startup, shutdown or maintenance were regularly included in their emission inventories. Only nine of the states reported that sources were required to pay emission fees on such emissions.⁴

It is important that states take action to control and accurately account for emissions from emission events in order to protect the public health, to develop realistic emission budgets and SIPs and to ensure that facilities are paying their fair share of emission fees.⁵

B. WHAT DOES THE CLEAN AIR ACT REQUIRE?

The Clean Air Act (CAA) requires SIPs to provide for attainment and maintenance of the National Ambient Air Quality Standards (NAAQS) through enforceable emission limits.⁶ EPA is prohibited from approving a SIP revision that would interfere with attainment or any other applicable requirement of the Act.⁷

Because broad exclusions from compliance with SIP limits during upsets (often called malfunctions), startups, shutdowns or maintenance are inconsistent with the mandate that the NAAQS be achieved and maintained, EPA has consistently interpreted such exclusions as illegal under the Act.⁸ The Sixth Circuit affirmed EPA's determination that "SIPs cannot provide broad exclusions from compliance with emission limitations during SSM [Startup, Shutdown and Malfunction] periods."⁹

While state SIP provisions that exempt SSM emissions from compliance with SIP limits are illegal, EPA guidance allows states to craft limited affirmative defenses for SSM events as an exercise of state enforcement discretion.¹⁰

³ A number of these states have completed or are in the midst of rulemakings to amend their SIP provisions to make them consistent with the Clean Air Act and EPA's policies, as outlined below.

⁴ "Gaming the System" at Appendix A.

⁵ Of course in those states with emission fee caps, large sources will still likely avoid paying fees for their emission event and SSM emissions.

⁶ 42 U.S.C. §7410(a)(2).

⁷ 42 U.S.C. §7410(l).

⁸ Memorandum re. *State Implementation Plans: Policy Regarding Excess Emissions During Malfunctions, Startup and Shutdown* from Steven Herman, EPA Asst. Administrator for Enforcement and Compliance Assurance, (Sept. 20, 1999) ("EPA 1999 Guidance") ("[B]ecause excess emissions might aggravate air quality so as to prevent attainment or interfere with maintenance of the ambient air quality standards, EPA views all excess emissions as violations of the applicable emission limitation.").

⁹ *Michigan Manufacturers Association v. Browner, et al.*, 230 F.3d 181, 185 (6th Cir. 2000) (affirming EPA's determination that such broad exemptions "jeopardize ambient air quality ... because the rules excuse compliance from applicable emission limitations and provide no means for the state to enforce the NAAQS.").

¹⁰ Memorandum from Kathleen Bennett, Assistant Administrator for Air, Noise and Radiation, *Policy on Excess Emissions During Startup and Shutdown* (Sept. 28, 1982); Memorandum from Kathleen Bennett, EPA Assistant Administrator for Air, Noise and Radiation, *Policy on Excess Emissions During Startup, Shutdown, Maintenance, and Malfunctions* (Feb. 15, 1983); Memorandum from Steven Herman, EPA Asst. Administrator for Enforcement and Compliance Assurance, *State Implementation Plans: Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown* (Sept. 20, 1999); Memorandum from Eric Schaeffer, Director Office of Regulatory Enforcement, *Re-Issuance of Clarification – State Implementation*

The guidance notes that states may always use their enforcement discretion in deciding whether or not to take enforcement action for a particular violation. It also allows states to adopt SIP provisions providing an affirmative defense to monetary penalties for excess emissions resulting from malfunctions or from certain startups or shutdowns meeting the conditions in Table 1. Because the affirmative defense is not an exemption from compliance but is only a defense to actions for penalties, states, EPA and citizens may still bring enforcement actions for injunctive relief for the violations.

Table 1: EPA Affirmative Defense Requirements	
For Malfunctions:	For Startup and Shutdown:
The excess emissions were caused by sudden, unavoidable breakdown of technology beyond the control of the owner/operator	The periods of excess emissions were short and infrequent and could not have been prevented through careful planning and design
The excess emissions did not stem from any activity or event that could have been foreseen and avoided, or planned for	The excess emissions were not part of a recurring pattern indicative of inadequate design, operation or maintenance
The excess emissions could not have been avoided by better operation and maintenance practices	If excess emissions were caused by an intentional diversion of control equipment, that diversion must have been unavoidable to prevent loss of life, personal injury, or severe property damage
The excess emissions were minimized to the extent practicable using air pollution control equipment or processes consistent with good practices	At all times, the facility must have been operated in a manner consistent with good practice for minimizing emissions
Repairs were made in an expeditious fashion, including the use of off-shift labor and overtime	The frequency and duration of operation in startup or shutdown mode must have been minimized to the extent practicable
Emissions were minimized, both in terms of quantity of emissions and duration of the event, to the extent practicable	All possible steps must have been taken to minimize the impact of the excess emissions on ambient air quality
All possible steps were taken to minimize the impact of the excess emissions on ambient air quality	All emission monitoring systems must have been kept in operation if at all possible
All emissions monitoring systems were kept in operation if at all possible	The owner/operator's actions during the period of excess emissions must have been documented by a properly signed, contemporaneous logs or other relevant evidence
The owner/operator's response to the excess emissions was documented by properly signed, contemporaneous operating logs, or other relevant evidence	The owner/operator properly and promptly notified the appropriate regulatory authority
The excess emissions were not part of a recurring pattern indicative of inadequate design, operation or maintenance	
The owner/operator properly and promptly notified the appropriate regulatory authority	

Plans (SIPs): Policy Regarding Excess Emissions During Malfunction, Startup, and Shutdown (Dec. 5, 2001).

The guidance also clarifies those circumstances where even the limited affirmative defense may not apply.

EPA can approve a SIP revision that creates an affirmative defense to claims for penalties in enforcement actions regarding excess emissions caused by malfunctions as long as the defense does not apply to SIP provisions that derive from federally promulgated performance standards or emission limits, such as new source performance standards (NSPS) and national emissions standards for hazardous air pollutants (NESHAPS). In addition, affirmative defenses are not appropriate for areas and pollutants where a single source or small group of sources has the potential to cause an exceedance of the NAAQS or PSD increments. Furthermore, affirmative defenses to claims for injunctive relief are not allowed. ...¹¹

While the guidance allows a limited affirmative defense for excess emissions due to certain startup and shutdown conditions, it also states:

In general, startup and shutdown of process equipment are part of the normal operation of a source and should be accounted for in the planning, design, and implementation of operating procedures for the process and control equipment. Accordingly, it is reasonable to expect that careful and prudent planning and design will eliminate violations of emission limitations during such periods.¹²

Recent decisions in citizen suits seeking enforcement for excess emissions have generally interpreted state SIP rules and permit provisions consistent with EPA's guidance. For example, in a citizen suit against Chalmette Refining in Louisiana, the court found that "[a]lthough a state's implementation plan may provide an affirmative defense for permit violations caused by circumstances beyond the control of the owner or operator, that defense will apply only to 'malfunctions,' which are 'sudden and unavoidable breakdown[s] of process or control equipment.'"¹³ Likewise, in a suit against Georgia Power, a court noted that "EPA's policy is clear that while certain malfunctions are unavoidable, 'startup and shutdown of process equipment are part of the normal operation of a source' for which sources may plan and, thus, avoid excess emissions."¹⁴

¹¹ *EPA 1999 Guidance* at Attachment p. 3 (emphasis added). See also, 70 Fed.Reg. 16129, 16132 (March 30, 2005) (noting that a SIP affirmative defense applies only to SIP limits and that "all of the federally promulgated performance or technology-based standards, and other federal requirements ... remain in full effect ...").

¹² *EPA 1999 Guidance*. at Attachment p. 5.

¹³ *St. Bernard Citizens for Env'tl. Quality Inc., v. Chalmette Ref., L.L.C.*, 354 F.Supp.2d 697, 706 (E.D. La., 2005) (citing EPA 1999 Guidance).

¹⁴ *Sierra Club v. Georgia Power Co.*, 365 F.Supp. 2d 1297, 1305 (N.D. Ga. 2004) (citing *EPA 1999 Guidance*).

C. WHAT DO TEXAS' SIP RULES REQUIRE?

1. Background: 1972 through 2001

Texas' original upset rules were approved into the SIP in the early 1970s.¹⁵ These rules provided that emissions during "major upsets" might not be required to meet allowable emission levels if they were properly reported and the state determined that the upset conditions were "unavoidable and that a shutdown or other corrective actions were taken as soon as practicable." For emissions during startup and shutdown, the rules provided that sources might not be required to meet allowable emission levels if "so determined by the Executive Director upon proper notification."

A number of changes were made to the rules between 1972 and 1997, but were not approved into the SIP. In July 1997, Texas amended its rules to add a "reportable quantity" (RQ) threshold based upon CERCLA and EPCRA reporting requirements.¹⁶ Unauthorized emissions above the reportable quantity had to be reported, while those below the reportable quantity could be recorded on site.¹⁷ These rules were submitted to EPA as a SIP revision.

In November 1998, EPA notified Texas that it would disapprove the proposed SIP revisions because (1) the failure to require reporting of emissions below the RQ failed to provide the public with sufficient access to such information and (2) the rules did not place a clear burden of proof on the owner or operator to establish that the event was "reasonably unavoidable." Texas adopted revised rules in July 2000, which listed specific criteria that sources must meet to qualify for the upset and startup, shutdown or maintenance exemptions and clarified that the owner/operator bore the burden of proof for demonstrating that the criteria had been met. The revised rules also required facilities to keep an on-site final record of both reportable and nonreportable upsets. Additionally, if the initial reports of reportable upsets contained information that needed correction, facilities were required to submit the final report to the Texas Commission on Environmental Quality (TCEQ). On November 2000, EPA approved these rules into the Texas SIP through a direct final approval.¹⁸

In 2001, the Texas legislature added two new sections to Chapter 382 of the Health and Safety Code to address upsets, maintenance, startups and shutdowns.¹⁹ The new sections define an "emissions event" as an upset or unscheduled startup, shutdown or maintenance event that results in unauthorized emissions.²⁰ The legislation also created the following requirements:

¹⁵ 37 Fed.Reg. 10895 (May 31, 1972).

¹⁶ Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. §9602 (40 CFR §302.4); Emergency Planning and Community Right-To-Know Act of 1986, 42 U.S.C. §11002 (40 CFR §355, Appendix A).

¹⁷ The rules established RQs for certain air contaminants significant to Texas' industries, relied on the CERCLA and RCRA RQs for other contaminants, and set a default of RQ of 100 lbs.

¹⁸ 65 Fed.Reg. 70792 (Nov. 28, 2000).

¹⁹ House Bill 2912.

²⁰ Tex.Health & Safety Code §382.0215(a).

Reporting requirements: The legislation codified slightly modified TCEQ requirements for reporting emissions events and required:

- TCEQ to centrally track information regarding inspections and enforcement actions in response to emission events and the number of events and quantity of emissions from each event in each region;
- Electronic reporting of emission events to a centralized database accessible by the public; and
- Emission inventories to include total annual emissions from emission events.

Requirements regarding excessive and chronic emission events: HB2912 created two new categories of emission events: excessive and chronic events. TCEQ was required to establish criteria, for determining when emissions events were excessive. Facilities with excessive emission events were required to take action to reduce emissions from such events, either by filing and following a corrective action plan or by obtaining authorization for the emissions. In addition, TCEQ was required to consider chronic excessive emission events and events for which TCEQ had initiated enforcement in facility compliance histories.

Enforcement requirements: HB2912 allowed TCEQ to establish an affirm defense to a TCEQ enforcement action for emission events, but not for scheduled maintenance, startup and shutdown. The statute places the burden of proof on persons claiming the defense and states that the defense cannot be claimed if the emission event resulted from failure to take corrective action under a corrective action plan. In addition, the legislation requires the TCEQ to take enforcement action against facilities for failure to report an emissions event.

Also in 2001, Rider 30 to Article IV of Senate Bill 1 required that upset, maintenance, startup and shutdown emissions – both reportable and non-reportable – be included in the total emissions used for calculating emission fees.

In September 2002, TCEQ adopted revised rules to address the 2001 legislative changes.²¹

2. 2002 Title V Notice of Deficiency

On January 7, 2002, in response to comments filed by local environmental, public health and community groups, EPA issued a Notice of Deficiency (NOD) identifying six flaws in the Texas' Title V program.²² One of the identified deficiencies involved Texas' upset

²¹ 27 Tex.Reg. 8499 (Sept. 6, 2002).

²² The NOD was published at 67 Fed.Reg. 732 (Jan. 7, 2002). The comments were filed by Public Citizen, American Lung Association of Texas, Environmental Defense, the law firm of Henry, Lowerre & Frederick, Lone Star Chapter Sierra Club, Texas Center for Policy Studies, Sustainable energy and

rules. To correct the deficiency, EPA informed the state that it would need to amend and obtain SIP approval of its emission event rules. Such approval would require Texas to amend the rules to eliminate any appearance that the rules created an exemption, rather than affirmative defense to penalties.

Pursuant to Title V, once an NOD is issued, a state must correct the identified deficiencies within 18 months or EPA is required to apply CAA §179(b) sanctions and to promulgate, administer and enforce a Title V program for the state within two years of the finding.²³ The legal deadline for correction of Texas' NODs was July 7, 2003. Texas did not adopt revised emission event rules by that date, yet EPA did not implement the required sanctions. On July 9, 2003 EPA issued a Federal Register notice proposing to find that, upon final SIP approval of revisions to Texas' emission event and maintenance, startup and shutdown rules, Texas' NOD would be corrected.²⁴

3. Current rules

In response to EPA's NOD, TCEQ amended its rules in January 2004. These rules clarified that all unauthorized emissions were violations. They also created a limited affirmative defense to monetary penalties for excess emissions resulting from emission events if certain conditions were met.²⁵

Additionally, the rules stated that: (1) emissions from scheduled maintenance, startup or shutdown were "required to be included in a permit...unless the owner or operator proves" that listed conditions were met and (2) that excess opacity resulting from scheduled maintenance, startup, or shutdown activities was subject to the opacity requirements of 30 Tex. Admin. Code §111.111(a) unless the owner or operator proved that listed conditions were met.²⁶ The rules included a sunset date of June 30, 2005.

Texas submitted these rules as a SIP revision on January 5, 2004. On March 30th, EPA granted a limited approval of Texas' revised rules, but found it could not fully approve the rules because:

[T]hese rules appear to exempt sources from certain applicable SIP requirements. This is inconsistent with the statutory definition of emission limitations. And, if unaccounted for in the SIP, these emissions could

Economic Development Coalition, Texas Campaign for the Environment, Galveston-Houston Association for Smog Prevention, neighbors for Neighbors and Texas Impact.

²³ 42 U.S.C. §7661a(i). *See also*, 40 CFR §70.10(b)(3). CAA §179 provides for highway sanctions and increasing offset requirements.

²⁴ 68 Fed.Reg 40871, 40875 (July 9, 2003). The notice also addressed Texas' correction of other NOD deficiencies.

²⁵ Texas maintained that its prior rules were never intended to create an exemption. "[T]he commission has never considered that applicable emissions and opacity limits are automatically suspended during emissions events or scheduled maintenance, startup, and shutdown activities; rather, the commission has historically exercised discretion in the method of addressing those exceedances when the regulated entity demonstrated it met the criteria for the event." 29 Tex.Reg. 118 (Jan. 2, 2004).

²⁶ 30 Tex.Admin.Code §§101.222(c) & (e).

interfere, among other things, with the ability of areas within the State to attain and maintain the NAAQS.²⁷

EPA further explained that the rules regarding scheduled startup, shutdown and maintenance:

(1) are ambiguous and unclear as to whether they address only State enforcement discretion, (2) might be interpreted to provide exemptions to SIP permitting requirements, and (3) might be interpreted to provide an affirmative defense for excess emissions from scheduled maintenance activities.²⁸

Thus, although EPA found that Texas' rules did not comply with the Clean Air Act, because the rules were an improvement over the existing illegal rules and because they would expire by their own terms in June 2005, EPA granted limited approval.²⁹

In June 2005 TCEQ adopted new rules that extended the June 2005 sunset date. The new rules will expire on January 15, 2006 unless TCEQ submits a revised version of the rules to EPA for SIP approval, in which case the rules will expire on June 30, 2006.

On May 9, 2005, EPA proposed limited SIP approval of the Texas rule revisions through parallel processing. As of June 30th, however, EPA had not finally approved TCEQ's revised rules. Because Texas SIP rules expired on June 30th, as of that date, the Texas SIP contained no affirmative defense or exemption for emission events or for scheduled startup, shutdown or maintenance.

D. WHAT'S NEXT FOR TEXAS' RULES?

1. Current rulemaking proposal

On June 29, 2005, TCEQ proposed new rules to address legislation adopted in 2005 that: (1) slightly changed the definition of "emissions event," (2) required that emissions from each emissions event be reported to TCEQ in a single report, and (3) allowed pipelines, gathering lines, and flowlines to treat all facilities under common ownership or control in a county as a single regulated entity for emission events.³⁰ The proposed rules also:

- Revise certain RQs,
- Amend reporting requirements,

²⁷ 70 Fed.Reg. at 16130.

²⁸ *Id.* at 16131.

²⁹ On March 30, 2005, EPA also published final "Notice of Resolution of Deficiency for Clean Air Act Operating Program" noting "[w]e are today approving the revised rule as a revision to Texas' Title V program and find that, together with the final SIP approval published elsewhere in this Federal Register, the revisions satisfy Texas' requirement to correct the program deficiency identified in the January 7, 2002, NOD." 70 Fed.Reg. 16134 (March 30, 2005).

³⁰ House Bill 2129.

- Require the method used for estimating emissions to be consistent with the methods used in the applicable permit, rule or order,
- Require annual emissions event reporting,
- Delete language requiring emissions from scheduled maintenance, startup, and shutdown activities to be included in permits except in certain circumstances,
- Create an affirmative defense for scheduled startup and shutdown emissions,
- Create an affirmative defense for emissions from maintenance activities that would be phased out over time, and
- Delete the sunset dates from the rules.

The rules do not, however, appear to be SIP approvable for reasons including the following:

- The rules continue to include an affirmative defense for maintenance emissions;³¹
- The rules include a broad affirmative defense applicable to scheduled startup and shutdown;³²
- The rules do not clarify that any affirmative defenses apply only to violations of SIP standards and not to violations of other federal requirements;³³ and
- The rules allow certain excess emissions -- emissions other than opacity from boilers and turbines -- to qualify for an affirmative defense without being reported.³⁴

Public hearings are scheduled in Austin, Arlington, Houston, Corpus Christi and Midland from August 2 to August 8, 2005. The public comment period on the rules closes on August 8, 2005.

³¹ See, 70 Fed.Reg. at 16131 (“EPA has determined it is inappropriate to provide an affirmative defense for excess emissions resulting from scheduled maintenance, and to excuse these excess emissions from a penalty action.”).

³² See, *EPA 1999 Guidance* (“In general, startup and shutdown of process equipment are part of the normal operation of a source and should be accounted for in the planning, design, and implementation of operating procedures for the process and control equipment.”); EPA Region 6 Letter re. *Comments on Draft Chapter 116 Rules*, from David Neleigh, U.S. EPA Region 6, Chief Air Permits Section to John Steib, TNRCC, Director Air Permits Division (May 1, 2002)(“it is EPA’s policy that all potential to emit (PTE) emissions including quantifiable MSS, be included in both NSR and PSD applicability determination sand air quality permits”); and EPA Region 6 *EPA Comment on Excess Emissions at TCEQ Stakeholders Meeting March 4, 2005* (quoting section of EPA’s 1999 Guidance cited above).

³³ See, 70 Fed.Reg. at 16132 (“Chapter 101 addresses violations of SIP requirements caused by periods of excess emissions due to SSM activities. For clarification and public record purposes, all of the federally promulgated performance or technology-based standards, and other Federal requirements remain in full effect, and are independent of today’s limited approval of the Texas excess emissions rule into the Texas SIP. ... [T]oday’s limited approval may not, under any circumstances, be construed as rescinding, replacing, or limiting applicable Federal requirements regardless of the source’s category or locality.”)

³⁴ EPA guidance requires the owners and operators, in order to qualify for an affirmative defense, to have “properly and promptly notified the appropriate regulatory authority.” *EPA 1999 Guidance* at p. 7.

2. Permitting scheduled startup, shutdown and maintenance

A survey indicates that at least half of the states currently include specific startup or shutdown requirements in some NSR permits. Few of these states, however, have permitting rules or guidance indicating how these emissions are to be permitted.³⁵ Environmental Appeals Board decisions and EPA permit objections and guidance set the following guidelines for Nonattainment New Source Review (NNSR) and Prevention of Significant Deterioration (PSD) permitting of startup, shutdown and maintenance emissions.

a. Scheduled startup, shutdown and maintenance emissions must be included in sources' potential to emit and baseline emission estimates. Sources must include all emissions, including startup, shutdown and maintenance emissions, in their potential to emit (PTE) for purposes of federal applicability. Federal requirements, including NSR, National Emission Standards for Hazardous Air Pollutants, New Source Performance Standards and Title V, must be complied with if incorporation of startup, shutdown and maintenance emissions into PTE causes a facility to exceed major source thresholds.³⁶

Likewise, pursuant to the new NSR rules, projected actual and baseline actual emissions must include emissions associated with startup, shutdown and malfunction.³⁷ For projected actual emissions, the rules require a facility's historic startup, shutdown and malfunction emissions to be considered.³⁸ A facility should not be allowed to project future startup, shutdown and malfunction emissions to be less than actual historic emissions without justification.

b. Sources must comply with permit limits during maintenance. Sources must comply with regular permit limits, including BACT/LAER limits, during maintenance.³⁹

³⁵ Thanks to Kim Logue, Environmental Integrity Project law clerk, for surveying states regarding their permitting procedures for startup and shutdown emissions.

³⁶ See, Letter re. *Comments on Draft Chapter 116 Rules*, from David Neleigh, U.S. EPA Region 6, Chief Air Permits Section to John Steib, TNRCC, Director Air Permits Division (May 1, 2002) ("it is EPA's policy that all potential to emit (PTE) emissions including quantifiable MSS, be included in both NSR and PSD applicability determination and air quality permits"); EPA Region 6 Letter re. *LDEQ's Draft Permitting Guidance on Authorization and Regulation of Emissions from Startup and Shutdown Events*, from David Neleigh, U.S. EPA Region 6, Chief Air Permits Section to Michael Vince, Louisiana Dept. of Envir. Quality, Administrator Permits Division (guidance must "[e]nsure that federal requirements ... are triggered in permits where incorporation of S/S emissions cause the facility to exceed major source thresholds.").

³⁷ 40 C.F.R. §§ 51.165(a)(1)(xxxv)(B) & (xxxviii)(B).

³⁸ 40 C.F.R. § 51.165(xxxviii)(B)(1).

³⁹ See, 70 Fed.Reg. at 16131 ("scheduled maintenance activities are predictable events that are subject to planning to minimize releases ...").

c. *If startup or shutdown emissions are subject to separate permit requirements, compliance with BACT/LAER limits during startup or shutdown must be infeasible.* Permits cannot include generic exemptions for excess emissions resulting from startup or shutdown.⁴⁰ If the permit includes separate limits or requirements for emissions during startup or shutdown, the permit record must demonstrate that compliance with the otherwise applicable BACT/LAER limits during those events is not possible.⁴¹

d. *If compliance during startup or shutdown is infeasible, the permit must establish the conditions under which the permittee can exceed otherwise applicable limits and the permit record must establish that such conditions constitute BACT or LAER.* If a permittee has established that compliance with otherwise applicable BACT/LAER limits is infeasible during startup and shutdown, the permit must include conditions or limits which constitute BACT or LAER for the permitted unit during startup and/or shutdown. In addition, the permit must clearly establish those conditions under which the alternative conditions/limits apply.⁴²

e. *The permit record must establish that the permit complies with all applicable CAA requirements.* For example, the startup and shutdown provisions of a permit must comply with all SIP limits, offset requirements, and PSD increment provisions. In addition, startup and shutdown emissions must be subject to short term limits that are protective of the NAAQS.⁴³

⁴⁰ See, U.S. EPA memo re. *Automatic or Blanket Exemptions for Excess Emissions During Startup and Shutdowns Under PSD*, from John Rasnic, U.S. EPA, Chief Stationary Source Compliance Division to Linda Murphy, U.S. EPA Region I, Director Air, Pesticides and Toxics Management Division (“Although we concur with Region I that PSD permits cannot contain automatic exemptions which allow excess emissions during startup and shutdown, we do not believe that EPA’s policy concerning this issue under PSD is somewhat vague. The exemptions granted under some New Source Performance Standards (NSPS) are not applicable to this issue under PSD. The NSPS are technology based standards that are not directly required for meeting ambient standards.”). See also, *In re. Rockgen Energy Center*, PSD Appeal No. 99-1 (Aug. 25, 1999); *In re: Tallmadge Generating Station*, PSD Appeal No. 02-12 (May 21, 2003) and U.S. EPA Region 6 comments re. *Proposed Air Quality Permit Number 70492 and PSD-TX-1037 City Public Service, J.K. Spruce Plant on Calveras Lake, Bexar County, Texas*.

⁴¹ See, *In re. Rockgen Energy Center*; *In re: Tallmadge Generating Station*; U.S. EPA Region 6 comments re. *Proposed Air Quality Permit Number 70861 and PSD-TX-1039 Sandy Creek Energy Associates, L.P., McLennan County, Texas*; and U.S. EPA Region 6 comments re. *Proposed Air Quality Permit Number 70492 and PSD-TX-1037 City Public Service, J.K. Spruce Plant on Calveras Lake, Bexar County, Texas*.

⁴² See, U.S. EPA Region 6 comments re. *Proposed Air Quality Permit Number 70861 and PSD-TX-1039 Sandy Creek Energy Associates, L.P., McLennan County, Texas*; U.S. EPA Region 6 Letter re. *LDEQ’s Draft Permitting Guidance on Authorization and Regulation of Emissions from Startup and Shutdown Events*, from David Neleigh, U.S. EPA Region 6, Chief Air Permits Section to Michael Vince, Louisiana Dept. of Envir. Quality, Administrator Permits Division; *In re. Rockgen Energy Center*; and *In re: Tallmadge Generating Station*.

⁴³ See, U.S. EPA Region 6 Letter re. *LDEQ’s Draft Permitting Guidance on Authorization and Regulation of Emissions from Startup and Shutdown Events*; U.S. EPA Region 6 comments re. *Proposed Air Quality Permit Number 70861 and PSD-TX-1039 Sandy Creek Energy Associates, L.P., McLennan County, Texas*; and *In re. Rockgen Energy Center*.

*f. Startup and shutdown emissions must be included in the air quality analysis, impacts analysis and air toxics review. If a source is allowed to exceed otherwise applicable BACT/LAER limits during startup or shutdown, the effect of the resulting extra emissions must be considered in all air quality, health and other impact analysis and modeling.*⁴⁴

*g. The controls required for startup and shutdown emissions must be defined as part of the permitting process subject to normal public participation requirements. Requirements applicable to startup and shutdown emissions must be specified in the permit and cannot be developed post permit issuance through a startup/shutdown plan. Such an extra-permit process would constitute an illegal modification to the NSR/PSD permit without required public participation and opportunities for review.*⁴⁵

In 2001, TCEQ held stakeholder meetings to consider how to account for scheduled startup, shutdown and maintenance emissions in permits. At that time, the agency proposed that planned maintenance, startup and shutdown emissions should be included in permits – and not subject to a defense – if they met certain predictability and frequency criteria.⁴⁶ Rules were drafted and scheduled to be adopted by August 2002. That rulemaking was, however, dropped. In the spring of 2005, TCEQ again began holding stakeholder meetings on the permitting of scheduled maintenance, startup and shutdown emissions. Proposed rules have not yet been released.

II. TITLE V: MONITORING

Much of the recent national debate over the Title V air permitting program involves what level of monitoring is required in Title V permits. Title V requires permits to include monitoring and reporting requirements “to assure compliance” with permit terms and conditions.⁴⁷ Title V also grants EPA authority to “prescribe procedures and methods for determining compliance and for monitoring” by rule.⁴⁸ Similarly, section 114 of the CAA requires “enhanced monitoring” for all major sources.⁴⁹

⁴⁴ See, U.S. EPA Region 6 comments re. *Proposed Air Quality Permit Number 70861 and PSD-TX-1039 Sandy Creek Energy Associates, L.P., McLennan County, Texas* and U.S. EPA Region 6 Letter re. *LDEQ’s Draft Permitting Guidance on Authorization and Regulation of Emissions from Startup and Shutdown Events*.

⁴⁵ See, *In re. Rockgen Energy Center*.

⁴⁶ Memo re. “Permitting Upset/Maintenance Emissions” from John Steib, TCEQ Director Air Permits Division (Jan. 25, 2001).

⁴⁷ 42 U.S.C. §7661c(a) & (c).

⁴⁸ 42 U.S.C. §7661c(b).

⁴⁹ 42 U.S.C. §7414.

A. FEDERAL REGULATIONS

Federal rules include two provisions addressing monitoring requirement of Title V permits. The first provision states that permits should include:

where the applicable requirement does not require periodic testing or instrumental or noninstrumental monitoring (which may consist of record-keeping 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.⁵⁰

The second provision states that Title V permits shall include “consistent with paragraph (a)(3) of this section, ... monitoring, reporting, and recordkeeping requirements sufficient to assure compliance with the terms and conditions of the permit.”⁵¹

B. JUDICAL DECISIONS/SETTLEMENTS

The monitoring requirements of Title V and EPA's rules have been, and continue to be, the subject of much litigation. The major decisions are summarized below.

NRDC v. EPA: NRDC challenged EPA's Compliance Assurance Monitoring (CAM) rule alleging that the rule failed to meet CAA section 114's requirement for enhanced monitoring at all major stationary sources because the CAM rule did not apply to all major sources. The court found the CAM rule, together with the Part 70 monitoring rules, were sufficient to meet section 114's requirement because Part 70's monitoring rules – sections 70.6(a)(3) and 70.6(c)(1) – required that all major source's “must undertake monitoring ... sufficient to assure compliance.” Where CAM did not apply to require enhanced monitoring at a major source, the court found that the Part 70 monitoring rules would require enhanced monitoring. *NRDC v. EPA*, 194 F.3d 130 (D.C. 1999).

Appalachian Power v. EPA: Industrial petitioners challenged EPA's 1998 “Periodic Monitoring Guidance” as an illegal amendment of 40 C.F.R. §70.6(a)(3)(i)(B)(the periodic monitoring rule). The D.C. Circuit found the guidance did constitute an illegal amendment in violation of rulemaking procedures and set aside the guidance. The court stated:

State permitting authorities therefore may not, on the basis of EPA's Guidance or 40 C.F.R. §70.6(a)(3)(i)(B), require in permits that the regulated source conduct more frequent monitoring of its emissions than that provided in the applicable State or federal standard, unless the standard requires no periodic testing, specifies no frequency, or requires only a one-time test.

⁵⁰ 40 C.F.R. §70.6(a)(3).

⁵¹ 40 C.F.R. §70.6(c)(1).

The court did not address the statutory requirements of Title V, or the rules at 40 C.F.R. §70.6(c)(3). *Appalachian Power v. EPA*, 208 F.3d 1015 (D.C. Cir. 2000)

UARG v. EPA I: After the *NRDC* and *Appalachian Power* decisions, EPA issued several Title V permit objections holding that while §70.6(a)(3) could only be used to supplement monitoring if there was no “periodic” monitoring, Title V itself and §70.6(c)(1) required monitoring in addition to existing “periodic” monitoring if such monitoring was necessary to assure compliance.⁵²

The Utility Air Regulatory Group (UARG) filed suit in 2001 challenging EPA’s interpretation of Title V’s monitoring requirements. UARG claimed that EPA’s permit objections, together with its “Instruction Manual for Permit Application Forms,” constituted an amendment to the Part 70 rules without notice and comment. Additionally, UARG alleged that the EPA’s interpretation was unauthorized under the CAA.

While the case was pending, EPA published interim final and proposed rules affirming EPA’s interpretation that Title V and §70.6(c)(1) required all permits to supplement periodic monitoring as necessary to assure compliance.⁵³

The D.C. Circuit dismissed UARG’s petition for lack of standing and ripeness. The court said UARG should either wait and challenge EPA’s final rule or, if EPA’s interpretation was specifically applied to UARG, challenge that application in the appropriate local Circuit Court. *UARG v. EPA*, 320 F.3d 272 (D.C. Cir. 2003).

UARG v. EPA II: Later in 2003, UARG, together with the Clean Air Implementation Project, Counsel for National Environmental Development Assoc. Clean Air Regulatory Project, Counsel for Air Permitting Forum and Alliance of Automobile Manufacturers, again challenged EPA’s monitoring interpretation in the D.C. Circuit. This time the organizations challenged the interpretation as manifest in EPA’s interim final rule, which expired in November 2002.⁵⁴

EPA settled the case and agreed to announce a new interpretation of its monitoring rules. Pursuant to EPA’s new interpretation, Title V permits must include “periodic” monitoring, but need not include additional monitoring, even if such additional monitoring is necessary to assure compliance. A coalition of over 50 health, environmental and community groups filed comments objecting to the settlement, as did the states of New York, Illinois, Vermont, and Massachusetts, the New Jersey Department of Environmental Protection, and the Commonwealth of Pennsylvania Department of Environmental Protection.

⁵² See for example, *In re PacifiCorp’s Jim Bridger and Naughton Elec. Util. Steam Generating Plants*, Petition No. VIII-00-1, EPA Administrator Order Responding to Petitioner’s Request that the Administrator Object to Issuance of State Title V Operating Permits (November 16, 2000).

⁵³ 67 Fed.Reg. 58561 (Sept. 17, 2002) (proposed rule); 67 Fed.Reg. 58529 (Sept. 17, 2002)(interim rule - in effect for 60 days).

⁵⁴ UARG also alleged a “grounds arising after” challenge pursuant to CAA §307(b)(1) to EPA’s original federal operating permit rules.

C. EPA'S 2004 RULE REVISION

In January 2004 EPA published a final rulemaking, consistent with the UARG settlement, declining to adopt its 2002 proposed rule and announcing instead its new interpretation of §70.6(c)(1).⁵⁵ EPA's revised interpretation took effect February 23, 2004.

D. ONGOING LITIGATION

In March 2004, a coalition of environmental and public health groups challenged EPA's January 2004 rule in the D.C. Circuit Court of Appeals arguing EPA's new rules were contrary to the CAA Title V requirement that each Title V permit include monitoring to assure compliance with all applicable requirements and to the CAA Section 114 requirement for enhanced monitoring at all major stationary sources.⁵⁶ This case has been briefed and oral argument is scheduled for September 12, 2005.

E. WHAT'S NEXT?

In its January 2004 final rule, EPA announced its intent to engage in a "four-step strategy" for improving existing monitoring through rulemaking actions.⁵⁷ The first step of the strategy was adoption of the 2004 rule. Three additional steps were as follows:

- "Encourage states to improve possibly inadequate monitoring in certain SIP rules,"
- "Identify and consider possibly improving inadequate monitoring in certain federal rules," and
- Publish a proposed rule addressing what constitutes "periodic" monitoring.

On February 16, 2005, EPA published an Advanced Notice of Proposed Rulemaking seeking comment on monitoring inadequacies in existing pre-1990 federal rules and in state SIP rules. That comment period closed on June 17th. It is unclear what EPA plans to do with the comments received, how it proposes to systematically review the adequacy of monitoring in all federal rules and state SIP rules, what procedures it would follow to improve monitoring in state SIPs that lack monitoring sufficient to assure compliance, or how it intends to address the adequacy of monitoring in federal permits.

⁵⁵ 69 Fed.Reg. 3202 (Jan. 22, 2004).

⁵⁶ *Environmental Integrity Project, et al. v. EPA*, Case No. 04.1083.

⁵⁷ 69 Fed.Reg. at 3204.

KELLY HARAGAN

Kelly Haragan is Counsel at the Environmental Integrity Project (EIP) in Washington, DC. EIP is a nonprofit, started in March of 2002, to advocate for more effective enforcement of environmental laws. The organization was founded by the former director of the U.S. Environmental Protection Agency's Office of Regulatory Enforcement. Kelly works with local and national environmental and community groups to improve environmental monitoring and compliance at industrial facilities, including:

- Writing and publishing "Gaming the System," a report that analyzes SIP upset provisions in 50 states and the effects of such provisions on Clean Air Act compliance and community health;
- Bringing Clean Air Act citizen suits for excess emissions;
- Challenging EPA's recent revisions to its Title V monitoring rules; and
- Serving as a public interest representative on EPA's Title V Task Force.

Prior to working at EIP, Kelly was Counsel for Public Citizen's Texas office where she worked on Clean Air Act citizen suit enforcement. In addition, Kelly was actively involved in Texas' development of its Title V program and filed program comments that resulted in the issuance of a Notice of Deficiency to Texas and in subsequent program improvements.

Kelly also worked at the law firm of Henry, Lowerre, Johnson, Hess & Frederick in Austin representing environmental and community groups in permit and rule challenges, and environmental citizen suits.

Kelly received her B.A. in 1991 and her J.D. in 1995 and from the University of Texas at Austin.

***New Developments in Title V
and Emission Events
"The Flash"***



***Steve Hagle
Special Assistant
TCEQ Air Permits Division***



Title V Task Force

- Established by Federal Clean Air Act Advisory Committee
- Charge – What's working well and what's not working so well
- 18 Members plus EPA staff
- 3 Public Meetings, 2 national conference calls, written comments



Title V Task Force

Partial List of Issues


- Monitoring
- Public Access to Documents
- Incorporation of Applicable Requirements
- Response to Comments
- Public Notice/Participation



Title V Task Force


Partial List of Issues

- Insignificant Activities/Emission Units
- Deviation Reporting
- Compliance Certifications
- Startup, Shutdown, and Malfunction




Title V Task Force

- Began summaries and discussion in May
- First draft of report late 2005 / early 2006
- Although not specifically in our charge, the task force will make some recommendations
- <http://www.epa.gov/air/caaac/titlev.html>



Emission Events

- Allows reporting of any emission event as a single event
- Makes several changes to Reportable Quantity
- If reasonably able to provide notice, but do not, will lose affirmative defense



Emission Events

- Applicable for all subject to EI and in NA, RQ areas with at least one emissions event
- Could not have been reasonably avoided by technically feasible design, operation, and maintenance practices consistent with good engineering practice
- Actual emissions more than RQ over estimate will be emissions events



Emission Events

- Allows affirmative defense for scheduled MMS emissions if meet the demonstration criteria
- Phase out affirmative defense for routine maintenance activities
 - Begin including in permits at renewal or amendment
 - For those not permitted, lose affirmative defense two years after effective date of rule



Emission Events


- Comment period closes Monday at 5:00 PM
- Consideration for adoption November 30, 2005
- Hearings this week and Monday



Emission Events

Air Permits Plan


- QUAN/MSS Permit by Rule
- Standard Permit???
- Policy/Regulation changes to address workload



"The Flash"

Questions?

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Steve Hagle, P.E.

Texas Commission on Environmental Quality

Steve Hagle is a Special Assistant in the Air Permits Division at the Texas Commission on Environmental Quality. Steve has also worked as a Technical Specialist in the Technical Program Support Section of the Air Permits Division, in the Office of Air Quality Deputy's office, and the New Source Review Permits Division as a permit engineer and manager of the Chemical and Technical Specialist Sections. He joined the Texas Air Control Board in 1987. Prior to 1987 he worked for NL Industries conducting laboratory evaluation of enhanced oil recovery prospects and field work with Measurement-While-Drilling well logging tools. He graduated from Oklahoma State University with a B.S. Degree in Chemical Engineering.

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CHARLES J. SHEEHAN
REGION 6 REGIONAL COUNSEL

Chuck has served as Regional Counsel since August, 2003. He manages the seventy-three person office responsible for handling administrative and judicial challenges to regional decisions on air, waste and water permits, for reviewing state programs and plans for legal sufficiency, and for civil and criminal enforcement, hazardous waste cleanups, and compliance with agency grants and procurement regulations.

With Region 6 having such a large share of the nation's refining capacity, Chuck has been personally involved in many of the global refinery settlements to date. His regional perspective, moreover, has given him particular insights into the role of states in the refinery initiative, and ways in which the states and federal government can most effectively partner in achieving their environmental objectives.

He came to the Region in March, 1999, as Deputy Regional Counsel for Enforcement, overseeing the legal arm of the Region's civil and criminal, administrative and judicial regulatory enforcement program. In April 2002, he became Acting Regional Counsel. In the six months prior to assuming this position, he was on detail from the Region to EPA Headquarters, in the Office of Enforcement and Compliance Assurance, Office of Site Remediation Enforcement, Regional Support Division, as Acting Deputy Director. There he helped manage national Superfund enforcement, in coordination with the Regions.

Prior to joining Region 6, he was an attorney in the U.S. Department of Justice, Environment and Natural Resources Division. He litigated cases in the federal district and appellate courts, with EPA as the principal client, in all Regions, and under all major pollution and natural resources protection statutes. During his fifteen years at the Department of Justice, Chuck also served terms as an Assistant U.S. Attorney, bringing criminal prosecutions in the District of Columbia, and with the Legal Adviser's Office of the U.S. Department of State.

Between his Department of Justice service and Region 6, Chuck was the first General Counsel to the U.S.-Mexico Border Environment Cooperation Commission, located in Ciudad Juarez, Chihuahua, Mexico.

He received his B.A. from Boston College in 1976, and his J.D. from the Georgetown University Law Center in 1979.

ANN R. KLEE

General Counsel Environmental Protection Agency

Ann Klee was appointed by the President to be General Counsel of the United States Environmental Protection Agency in May 2004. As General Counsel, she is responsible for providing legal advice to Administrator Steve Johnson and the Agency's program office. The Office of the General counsel has 350 lawyers and support staff in D.C. Headquarters and 10 regional offices across the country.

Prior to joining EPA, Ann served as Counselor to the Secretary of the Department of the Interior coming on board in January 2001 with Secretary Gale Norton. She was responsible for advising the Secretary and developing policy options on major issues pending before the Department on matters ranging from the Endangered Species Act, resource protection and Everglades to Indian water rights and mining.

Ann was the Chief Counsel to the Senate Environment and Public Works Committee where she was responsible, among other things, for developing legislative strategies for the Chairman on the Clean Water Act, hazardous waste issues, NEPA, the Endangered Species Act, general oversight and enforcement issues. She previously served as Counsel to Senator Dirk Kempthorne's Subcommittee on Drinking Water, Fisheries and Wildlife. She joined Senator Kempthorne's staff in 1995 and, as his environmental counsel, worked on his legislation to reauthorize the Safe Drinking Water Act. In the 105th Congress, she was one of the principal staff responsible for drafting and negotiating Senator Kempthorne's Endangered Species Recovery Act of 1997.

Prior to joining Senator Kempthorne's staff, Ann was a partner and Chair of the Environmental Group in the D.C. office of the law firm of Preston Gates & Ellis. Her practice covered all aspects of environmental law and policy, including legislation, regulatory developments, general counseling and legislation under the Endangered Species Act, the Clean Water Act, Superfund, and the Resource Conservation and Recovery Act ("RCRA"). She has represented transportation, mining and timber trade associations, as well as individual companies in the mining, timber, engineering, high tech, and waste management industries.

Ann received her J.D. from the University of Pennsylvania in 1986, and her B.A. with High Honors from Swarthmore College in 1983. She and her husband live on a farm in the Shenandoah Valley with their five dogs and a bunch of cows.

TCEQ's Enforcement Review: Making our Green Lantern Shine More Brightly, More Efficiently, and With Greater Focus

By Paul Sarahan, Director, Litigation Division, TCEQ¹

On December 5, 2003, the TCEQ's Executive Director announced that the agency would undertake a comprehensive review of its enforcement functions to ensure that the agency is enforcing environmental laws fairly, effectively, and swiftly. A steering committee of agency staff oversaw the review and made recommendations for changes to current agency processes.

The review focused on: (1) the agency's criteria for initiating enforcement; (2) consistency across regions and programs; (3) compliance history; (4) maximizing compliance; and (5) maximizing benefit to the environment in the agency's enforcement policies.

The committee established priorities and goals for the agency's enforcement program and identify issues with current enforcement practices. Three broad categories were identified for review: compliance history; the enforcement process; and penalties and corrective action. Additional topics were identified through agency staff and public input. The committee categorized the issues and provided discussion for commission consideration on priority and significance of the issues identified.

Staff met regularly with the executive director and commissioners at commission work sessions to discuss progress of the review, issues raised at public meetings, and other enforcement-related topics of interest to the commissioners.

The agency encouraged participation by the public and other parties interested in this review to help ensure that a full and fair discussion of the issues occurs. Obtaining a variety of perspectives improved the quality of the recommendations provided to the executive director and the commission. The agency collected public comments through public meetings in Arlington, Midland, Harlingen and Houston; sought comments through existing advisory committees and by letter; and collected comments at commission work sessions and through a questionnaire. The agency collected comments on the recommendations contained in the Enforcement Process Review Report.

¹ This paper was adapted in large part from material produced by the TCEQ's Agency Communications Division in conjunction with the agency's personnel responsible for coordinating the implementation of the recommendations arising from the agency's Enforcement Review. This team is comprised of members of the Office of Compliance and Enforcement, the Office of Permitting, Remediation and Registration, the Financial Administration Division, the Small Business and Environmental Assistance Division, and the Litigation Division.

Staff prepared a report that includes specific recommendations for action for consideration by the executive director and commission. The recommendations focused on six overarching issues: (1) focusing the agency's resources on preventing and reducing the risk of harm to human health and the environment; (2) strengthening TCEQ's enforcement program by making the process faster and more predictable; (3) streamlining the enforcement process; (4) simplifying and clarifying the process; (5) addressing resource and training needs; and (6) improving public outreach and public access to enforcement information.

The following recommendations have been implemented:

Enforcement Initiation Criteria, Investigation Prioritization, Notices of Violation and Notices of Enforcement

Recommendation: Provide an opportunity for post-investigation/pre-enforcement fact-finding meetings in the TCEQ regional offices.**Action:** Staff have been trained to communicate the opportunity for post-investigation/pre-enforcement meetings in their exit interviews at the conclusion of an investigation. This has been incorporated into the Enforcement Division SOP and posted on the employee Web site.

Recommendation: Use of verbal NOV's should be discontinued.**Action:** The verbal NOV policy was rescinded and is no longer being used. This has been communicated to staff.

Recommendation: Do not establish a formal appeal process for NOEs. NOE letter should clarify this opportunity and include an Enforcement Division point of contact.**Action:** Language describing the appeal process has been incorporated into the NOE letter with an Enforcement Division point-of-contact. Modifications have been communicated to staff and incorporated into the Enforcement Division's Standard Operating Procedures (SOP).

Recommendation: Better communication to the regulated entity, that a matter has been referred to the Enforcement Division for enforcement.**Action:** Modifications to the NOE letter describing the appeal process and a Enforcement Division point-of-contact have been incorporated into the NOE letter. Modifications have been communicated to staff and incorporated into the Enforcement Division SOP.

Complaint Procedures

Recommendation: Implement the Guidance Document for Field Operations Investigation of Complaints.**Action:** Guidance has been implemented and field staff have been trained. Enhancements to the Guidance Document for Field Operations Investigation of Complaints have been incorporated and are published on the agency's employee Web site.

Recommendation: Implement the odor complaint investigation procedures (nuisance odor protocol). **Action:** These procedures have been implemented and staff have been trained. The procedures and FIDO chart are posted on the TCEQ Web site and will be reviewed annually.

Recommendation: Improve the complaint receiving process and 24-hour accessibility. **Action:** Direct links on the agency Web site have been created to file a complaint online, provide information on Citizen Collected Evidence, obtain assistance for the water utilities consumer, and to provide and explain the Nuisance Odor Protocol. The Environmental Complaints Hot Line and 24-Hour Spill Reporting numbers with explanation on how calls are handled after hours have been also been posted on the TCEQ Web site.

Enforcement Process/Agency Coordination

Recommendation: Streamline the existing enforcement process.

Action: Enforcement Division has streamlined the enforcement process time line (with Settlement achieved) to 185 days.

Recommendation: Streamline the financial inability to pay process. **Action:** Enforcement Division staff will enforce a 30-day deadline, from the respondent's receipt of the proposed draft order, to submit documentation supporting a financial inability to pay. This has been communicated to staff, added as a new discussion in the Enforcement Division SOP, and posted on the agency's employee Web site.

Recommendation: Streamline the Supplemental Environmental Project (SEP) process. **Action:** The extension letter has been modified to include two time frame options (i.e., 30-days for pre-approved SEP and 90-days for an original "off-the-list" SEP). Modifications have been communicated to staff and incorporated into the Enforcement Division's SOP.

Recommendation: Achieve better trained investigative and enforcement staff.

Action: Field Operations Division has utilized distance learning methods by contracting with a community college to fulfill some training needs for their staff. The agency's Human Resources Division plans to align Enforcement Coordinator and Natural Resource Specialist tracks with the Environmental Investigator Career Ladder to encourage equitable and cross-division staff development opportunities. The Office of Compliance and Enforcement also recognizes senior agency staff serving as mentors in their employees appraisals. All TCEQ employees are able to remotely access their computer, the TCEQ network, and connect to the TCEQ Consolidated Compliance and Enforcement Database System (CCEDS).

Ordering Provisions

Recommendation: Additional information should be required from respondents to achieve compliance with orders prior to closing out the orders. **Action:** Enforcement

Division staff will continue to require the respondent to certify compliance. Standard technical ordering provisions (including documentation needed for each type of certification) will be re-written. This has been communicated to staff, added as a new discussion in the Enforcement Division SOP, and posted on the agency's employee Web site.

Recommendation: Allow different consideration for small businesses and local governments from larger entities in the documentation required to close out an order.

Action: Enforcement Division staff will allow small entities a longer time frame to implement corrective action on ordering provisions, depending on the violation. No special consideration to a small entity that is a repeat violator or if there is an imminent threat to the environment. This has been communicated to staff, added as a new discussion in the Enforcement Division SOP, and posted on the agency's employee Web site.

Recommendation: Determine where appropriate monitoring by the agency or the respondent is necessary to demonstrate compliance prior to order close-out.

Action: Enforcement Division staff have reviewed examples of past cases and have developed criteria to determine the need for additional monitoring based on compliance history, type of violations, environmental harm, etc. Example base language has also been developed in requiring additional monitoring requirements in the order.

Recommendation: Improve communication of consequences of failure to comply with the provisions of an order.

Action: The shell orders have been revised. Modifications have been communicated to Enforcement Division staff and posted on the agency's employee Web site.

Recommendation: No different consideration should be given for small businesses and small government in establishing additional language changes in an order.

Action: The shell orders have been revised to include a provision in orders to communicate to the respondent of the consequences of failure to comply with the provisions of order regardless of the business size. Modifications have been communicated to Enforcement Division staff and posted on the agency's employee Web site.

Recommendation: Improve the internal communication with Enforcement Division and other areas of the agency during order development.**Action:** Enforcement and Litigation Division Directors have established a forum after the monthly Directors/Deputies Meeting to discuss orders under development and evaluate standard conditions and processing procedures, as well as conferring on specific cases as needed to ensure comprehensive requirements that do not conflict with permit requirements or time frames. Division directors were notified March 15, 2005.

Recommendation: Include special provisions in the permit for an entity with permit applications and enforcement actions occurring at the same time.**Action:** These

situations are handled on a case-by-case basis to accommodate Commission recommendation to use the permit as a compliance tool and in some circumstances include provisions addressing an enforcement issue.

Recommendation: Improve communication to the respondent and other interested parties in ordering provisions stating what is necessary to achieve compliance.**Action:** Added specific compliance criteria beyond the certification of compliance in the ordering revisions and simplified ordering provision language. Standard technical ordering provisions (including documentation needed for each type of certification) will be re-written. This has been communicated to staff, added as a new discussion in the Enforcement Division SOP, and posted on the agency's employee Web site.

Recommendation: Identify appropriate additional monitoring and/or other restrictions, other than to correct the specific violation.**Action:** Enforcement Division staff have reviewed past cases for examples and have developed criteria to determine the need for additional monitoring based on compliance history, type of violations, environmental harm, etc. Example base language has also been developed in requiring additional monitoring requirements in the order.

Recommendation: Allow different consideration for small businesses or small local governments from larger entities in development of ordering provisions.**Action:** Enforcement Division staff will contact the respondent to discuss achievable time frames associated with any technical requirements for cases that involve a small business or local government. This has been communicated to staff, added as a new discussion in the Enforcement Division SOP, and posted on the agency's employee Web site.

Collections/Financial Inability to Pay

Recommendation: Identify sufficient resources to aggressively collect delinquent fees and penalties.**Action:** Contractors have been assisting in the collections of delinquent accounts. Reports on collections recovered by the contractor have been added to the monthly delinquent report.

Recommendation: Address inability to pay issues of small local governments.**Action:** The Financial Administration Division is utilizing the EPA's MUNIPAY system to determine whether governments are financially able to pay a penalty. The use of this system has been communicated to staff and incorporated into Financial Administration Division's SOP and is currently in use.

Recommendation: Establish criteria for payment plans.**Action:** Criteria include a maximum payment term of 36 months and a minimum payment of \$100. The criteria has been conveyed to staff, incorporated into the enforcement and Financial Assurance

Division's SOP, and posted on the agency's employee Web site.

Recommendation: Assessing an interest charge for delinquent penalties on payment plans.**Action:** The Financial Administration Division began assessing an interest charge for delinquent penalties on payment plans. This has been communicated to staff.

Recommendation: Texas Water Code amendment to eliminate the restriction prohibiting payment plans following a contested case hearing.**Action:** S.B.739 passed during the regular session and was signed by the Governor.

Penalty Policy

Recommendation: Offer deferrals for expedited settlements but not for culpable respondents.**Action:** We continue to prohibit deferrals for culpable respondents, offering a 20 percent deferral in all eligible cases as an incentive to settle, and only giving the deferral when agreement is reached within a specific time frame. This has been communicated to staff, incorporated into the Enforcement Division SOP, and posted on the agency's employee Web site.

No Action Required

The following is a listing of items that do not require any action:

- * Do not develop separate EIC for small businesses and small local governments.
- * Do not eliminate the (category) of NOE.
- * Do not change rule or current protocol for citizen collected evidence.
- * Do not develop proposals for statewide public awareness campaign.
- * Do not modify the role of Small Business and Local Government Assistance Section during the development of an order with a respondent and Enforcement Division.
- * Do not establish revocation of a current permit if the entity owes fees or penalties to the agency.
- * Do not assess interest charges on payment plans to encourage payment.
- * Do not develop bank account levies or wage garnishment to collect delinquent accounts.
- * Do not change current consideration for investment in pollution prevention technology as a factor in calculating penalties for violations or economic benefit.
- * Maintain current statutory administrative penalties as they apply to programs administered within the agency.
- * Do not develop special provisions for petroleum storage tank (PST) certification and fuel distribution violations within the Penalty Policy.

TCEQ continues to implement recommendations arising from the review. Remaining topics include the Enforcement Initiation Criteria, the Field Citation program, SEPs, and the Penalty Rule. The agency is providing periodic updates on the status of its implementation at http://www.tceq.state.tx.us/comm_exec/enf_rev/implement_recc.html.

Paul Sarahan

Litigation Division Texas Commission on Environmental Quality

Paul Sarahan has been the Director of the Litigation Division since 1998. He received his Bachelor of Business Administration in Finance from the University of Texas in 1987; his law degree from UT in 1990; and an advanced legal degree specializing in environmental law from the University of Houston in 1993.

Paul practiced employment and commercial litigation in Houston from 1990-1994, prior to joining the TCEQ in July 1994. His work with the TCEQ has been focused on environmental enforcement, particularly in dealing with air, industrial and hazardous waste and multi-media cases.

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Cathy Sisk
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Attachment A – Environmental Enforcement Case Summaries

Attachment B – 1953 News Article on Harris County Pollution Authority

Local Government Enforcement of State Environmental Laws and Regulations

Cathy Sisk
Chief, Environmental Division
Harris County Attorney's Office

The Texas Legislature has afforded local governments the authority to enforce state environmental laws and regulations since the passage of the three major environmental statutes governing air, water, and solid waste in the 1970's. The provisions granting local government enforcement authority once were part of the substantive statutes governing each of the different media, since each was overseen by a separate agency. When state regulatory authority over air, water, and waste was consolidated under what is now the Texas Commission on Environmental Quality (TCEQ), the provisions allowing local governments to file civil enforcement actions were consolidated into Texas Water Code, Subchapter H, Sections 7.351 – 7.358. The provisions giving local governments authority to enter and inspect property and to investigate violations remain in each media-specific statute.

A. Local Government Civil Enforcement Actions

Section 7.351 of the Texas Water Code states:

(a) **If it appears that a violation or threat of violation of Chapter 16, 26 [water pollution], or 28 of this code, Chapter 361 [solid waste], 371, 372, or 382 [air] Health and Safety Code, a provision of Chapter 401, Health and Safety Code, under the commission's jurisdiction, or Chapter 1903, Occupations Code, or a rule adopted or an order or a permit issued under those chapters or provisions has occurred or is occurring in the jurisdiction of a local government, the local government or, in the case of a violation of Chapter 401, Health and Safety Code, a person affected as defined in that chapter, may institute a civil suit under Subchapter D in the same manner as the commission in a district court by its own attorney for the injunctive relief or civil penalty, or both, as authorized by this chapter against the person who committed, is committing, or is threatening to commit the violation.**

(b) If it appears that a violation or threat of violation of Chapter 366, Health and Safety Code, under the commission's jurisdiction or a rule adopted or an order or a permit issued under that chapter has occurred or is occurring in the jurisdiction of a local government, an authorized agent as defined in that chapter may institute a civil suit under Subchapter D in the same manner as the commission in a district court by its own attorney for the injunctive relief or civil penalty, or both, as authorized by this chapter against the person who committed, is committing, or is threatening to commit the violation.

Texas Water Code, Section 7.351 (emphasis added).

Put simply, the Water Code authorizes any local government to file a civil enforcement action against any person (defined broadly to include entities) violating or

threatening to violate state statutes, rules, or permits in most cases. The most important enforcement areas tend to be air, water, and waste.

There are certain requirements that a local government must meet in order to pursue an action. For example, Section 7.352 of the Texas Water Code requires, in the case of air and water violations (but not waste), that the governing body of the local government adopt a resolution authorizing the action. Section 7.353 requires that the TCEQ be brought into the suit as a “necessary and indispensable” party, and any civil penalty that is ultimately assessed is equally divided between the state and the local government under Section 7.107. In these actions, the TCEQ is ably represented by the Natural Resources Division of the Office of the Attorney General.

Because local government lawsuits are brought in the same manner as state actions, they are governed by the provisions of Texas Water Code, Subchapter D, Sections 7.101 – 7.111. Those sections provide that upon proving a violation, the state and local government are entitled to injunctive relief and civil penalties, plus costs and attorneys fees. Section 7.354 also specifically authorizes attorneys fees for local governments. Section 7.102 provides that for air, water, and solid waste violations, the penalty range is \$50 to \$25,000 per act and day of violation. Any agreed judgment resulting from such an action must be published in the Texas Register, just as they are in state-initiated actions.

Case summaries of the more important enforcement-related appellate decisions are attached at the end of the paper for your convenience. (Note: a few of the cases do not specifically involve environmental violations, but are informative on issues of consequence in environmental cases.)

Finally, in addition to civil enforcement through the district courts, some local governments contract with the TCEQ to provide enforcement services. Cases stemming from investigations undertaken by a local government under contract with the TCEQ typically go through the TCEQ’s administrative enforcement program, just as if the agency had initiated the investigation.

B. Local Government Investigation Authority

Each media-specific statute contains a provision granting investigative authority to local governments. In the Texas Clean Air Act, the provision is found in Section 382.111 of the Texas Health and Safety Code, which states:

(a) A local government has the same power and is subject to the same restrictions as the commission under Section 382.015 to inspect the air and to enter public or private property in its territorial jurisdiction to determine if:

(1) the level of air contaminants in an area in its territorial jurisdiction and the emissions from a source meet the levels set by:

(A) the commission; or

(B) a municipality's governing body under Section 382.113; or

(2) a person is complying with this chapter or a rule, variance, or order issued by the commission.

(b) A local government shall send the results of its inspections to the commission when requested by the commission.

Similar provisions covering waste and water may be found in Section 361.032 of the Texas Health and Safety Code (waste) and Sections 26.171 and 26.173 of the Texas Water Code (water).

C. History of Environmental Enforcement in Harris County

Harris County is probably unique among Texas counties in that it has been very active in environmental matters for decades. In fact, the predecessor to the current Harris County Pollution Control Division was established in the 1950's, long before state environmental statutes were on the books. A copy of a local newspaper article chronicling the establishment of the Harris County Stream and Air Pollution Authority in 1953 is attached. The Department was headed for many years by Dr. Walter Quebedeaux, who is memorialized to this day by a park near the courthouse complex bearing his name.

In the early days, the county used the threat of common law nuisance actions to cajole some of the dirtiest companies in the eastern part of the county to clean up their act. Then in the 1970's the state's major environmental laws (The Texas Clean Air Act, the Texas Water Code, and the Texas Solid Waste Disposal Act) were passed and the legislature institutionalized local governments' ability to file environmental enforcement actions.

Unlike some local governments, Harris County does not contract with the TCEQ, but funds its own enforcement. The county does, however, work closely with the TCEQ regional office in responding to complaints and conducting some sampling through informal agreements. The county hopes that in some small way it is assisting the state by freeing up resources the TCEQ may then concentrate elsewhere.

D. Areas of Practice in the Environmental Division Harris County Attorney's Office

The areas of practice for lawyers in the environmental division of the Harris County Attorney's Office are set forth below. Besides the traditional enforcement under the air, waste and water rules (see the first heading), the county enforces other regulations related to public health and safety and also participates in public processes with public health or safety implications. The county attorney's practice includes:

Enforcement of State Environmental Statutes and Regulations

Represent the County/Harris County Pollution Control Division in enforcement actions for civil penalties and injunctive relief stemming from violations documented by Pollution Control of the various state environmental statutes, including:

- (1) Air quality/emissions** (Health & Safety Code, Ch. 382);
- (2) Water quality/discharges** (Water Code, Ch. 26);
- (3) Hazardous Waste** (Health & Safety Code, Ch. 361);
- (4) Other Solid Waste** (Health & Safety Code, Ch. 361); and
- (5) Drinking Water Systems/Sewage** (Health & Safety Code, Ch. 341).

On-Site Sewage Facility Enforcement

Represent the County/Pollution Control and Engineering in enforcement actions for civil penalties and injunctive relief to enforce the Revised Rules of Harris County, Texas for On-Site Sewerage Facilities, which were promulgated pursuant to the local authority granted in Health and Safety Code, Ch. 366.

Storm Water Quality Enforcement

Represent the County/Pollution Control and Engineering in enforcement for civil penalties and injunctive relief to enforce the Regulations of Harris County, Texas for Storm Water Quality Management. Those regulations address storm water controls at construction sites and permanent developments.

Flood Plain Construction Enforcement

Represent the County/Engineering in enforcement actions for civil penalties and injunctive relief to enforce the Harris County Flood Plain Regulations (obtain permit, comply with standards and/or remove construction).

Driveway and Culvert Construction Regulation Enforcement

Represent the County/Engineering in enforcement actions for injunctive relief (construct properly/remove) to enforce County Driveway and Culvert Construction Regs.

Texas One-Call/No Dig Violations

Represent the State One-Call Board in civil enforcement of statute regulating excavation near underground pipeline facilities.

Environmental Permit Evaluation, Opposition

Help evaluate permit applications for proposed facilities of concern to Commissioners Court. If Commissioners oppose a permit, represent the County as a "protestant" in the administrative proceeding before the permitting agency.

Environmental Permitting for County Departments, Compliance Oversight

Advise County departments on compliance issues and regulatory requirements; Assist as necessary in obtaining permits, representing the County before the TCEQ.

Environmental Defense

Represent the County when sued for failure to comply with state or federal environmental laws (usually NEPA or CWA Section 404 wetlands violations, but occasionally things like asbestos abatement as well).

TCEQ Rulemaking and State Environmental Legislation

Participate formally in rulemaking at the agency level on behalf of the County, and develop and respond to proposed legislation.

County Regulation

Assist County departments with the development, drafting, and implementation of their regulations. Most recently this has included the Subdivision Regulations and Storm Water Quality Regulations.

Environmental Policy, Statutory Interpretation, Liability Issues

Advise the County on environmental policy, statutory interpretation, and liability issues. Assist on special projects (e.g., Bayou Posse, Pct. 3 Environmental Training Course).

ENVIRONMENTAL ENFORCEMENT

CASE SUMMARIES

I. PLEADINGS

A. SPECIFICITY OF PLEADINGS; AMOUNT IN CONTROVERSY; SERVICE OF PROCESS; DEFECT IN PARTIES

- Peek v. Equipment Service Co. of San Antonio, 779 S.W.2d 802 (Tex. 1989). The failure of plaintiff to state jurisdictional amount in controversy in its petition, without more, will not deprive the trial court of jurisdiction.
- Smith v. Chapman, 897 S.W.2d 399 (Tex. App.—Eastland 1995, no writ). Jurisdiction of county courts at law shall not be defeated by the aggregation of counterclaims by multiple defendants which exceed the amount in controversy limits for county courts at law.
- Standard Fire Ins. Co. v. Stigger, 635 S.W.2d 667 (Tex. Civ. App.—Dallas 1982, no writ). Statutory limitation on amount in controversy is not a limitation on the court's power to render judgment.
- State Farm Fire & Casualty Co. v. Griffin, 888 S.W.2d 150 (Tex. App. -Houston [1st Dist] 1994, no writ). So long as the original amount in controversy is within the jurisdictional limit, a county court of law may render judgment for an amount in excess of the statutory jurisdictional limit.

B. JURISDICTION; VENUE

- Bell Stations, Inc. v. State, 590 S.W.2d 227 (Tex. Civ. App. —Austin 1979, writ dismissed). Statutory venue provision is jurisdictional in nature.
- Cook v. Cameron, 753 S.W.2d 137 (Tex. 1987). Judgment entered by a court in the absence of proper jurisdiction is void.
- Nix v. Nix, 797 S.W.2d 64 (Tex. App. —Corpus Christi 1990, no writ). Once jurisdiction has been properly acquired, no subsequent fact serves to defeat it.
- Padgett v. Mutual Building & Loan Assoc., 504 S.W.2d 535 (Tex. Civ. App.-Fort Worth 1971, no writ). In instances where no appeal bond, if required, or affidavit in lieu thereof, has been filed in the trial court, the appellate court never acquires jurisdiction.

II. INJUNCTIONS

C. LIMITS OF COURT POWER AND MANDATORY INJUNCTION

- Breithaupt v. Navarro County, 675 S.W.2d 335 (Tex. App.-Waco 1984, writ ref'd n.r.e.). To comply with the requirements of T.R.C.P. 163, an order granting an injunction or restraining order must specify why the violator is being enjoined. However, the Rule may be relaxed where public interest is involved and any doubt concerning compliance should be decided in favor of the public.
- City of Shoreacres v. State, 582 S.W.2d 211 (Tex. Civ. App.-Houston [1st Dist] 1979, writ ref'd n.r.e.). Court may impose civil penalties, mandatory and prohibitory injunctions, but may not direct municipality as to specific method or manner of performing action.
- Kiellander v. Smith, 652 S.W.2d 595 (Tex. App.-Tyler 1983, no writ). Mere fact that relief granted by temporary injunction would be same as on final hearing is not basis for refusing to grant the temporary injunction. If the law is being violated, the trial court has a duty to restful the violation.
- Priest v. Texas Animal Health Comm'n., 780 S.W.2d 874 (Tex. App.-Dallas 1989, no writ). Courts have a duty to enjoin violations of substantive law when those violations are conclusively established. Jury does not determine expediency, necessity or propriety of equitable relief.
- Rhodia, Inc. v. Harris County, 470 S.W.2d 415 (Tex. Civ. App.-Houston [1st Dist.] 1971, no writ). Water pollution is irreparable injury justifying temporary mandatory injunction before hearing on the merits.
- State v. Associated Metals & Minerals Corp., 635 S.W.2d 407 (Tex. 1982). Trial court lacks jurisdiction to modify or suspend agency permit.

D. BALANCING OF THE EQUITIES NOT REQUIRED WHERE VIOLATIONS ARE SHOWN

- City of Corpus Christi v. Lone Star Fish & Oyster Co., 335 S.W.2d 621 (Tex. Civ. App.—San Antonio 1960, no writ). Oyster shucking plant in daily violation of zoning ordinance -- the rule with respect to the balancing of equities or hardship does not apply.

- State v. Texas Pet Foods, Inc., 591 S.W.2d 800 (Tex. 1979). Poultry plant rendering operator in violation of Clean Air Act, Water Quality Act, etc. "The Doctrine of Balancing the Equities has no application to this statutorily authorized injunctive relief."

E. IMMINENT INJURY/IRREPARABLE INJURY NOT REQUIRED

- Gulf Holding Co. v. Brazoria County, 497 S.W.2d 614 (Tex. Civ. App.—Houston [14th Dist. 1973, writ ref'd n.r.e.). Open Beaches Act violated by beachfront owner's barrier. Held, owner enjoined against interfering with removal of barrier by county, without necessity of showing irreparable injury and without balancing of equities.
- Houston Compressed Steel v. State, 456 S.W.2d 768 (Tex. Civ. App.—Houston [1st Dist] 1970, no writ). Injunction, without hearing, against outdoor burning of wood from old boxcars held valid, "...without the necessity of proving toxicity or injury or harm of any kind."
- Magnolia Petroleum v. State, 218 S.W.2d 555 (Tex. Civ. App.-Austin 1949, writ ref'd n.r.e.). Salt water from oil wells flowing into Guadalupe River was statutory and common law nuisance. No defense of imminent injury, irreparable injury, balancing of equities. Status quo was unpolluted river.
- Scott v. Rheudasil, 614 S.W.2d 626 (Tex. App.-Fort Worth 1981, no writ). "Status quo" to be preserved by mandatory injunction was removal of trailer house to conform to restrictive covenant.
- State v Texas Pet Foods, Inc., 591 S.W.2d 800 (Tex. 1979) Settled course of conduct continuing to or near time of trial, court "may assume that it will continue absent clear proof to the contrary" and issue the injunction.

F. ROLE OF JURY

- Citizens State Bank v. Caney Investments, 746 S.W.2d 477 (Tex. 1988). Parties to a hearing on a permanent injunction are entitled to a jury.

III. CIVIL PENALTIES

G. SCIENTER NOT REQUIRED

- American Plant Food v. State, 587 S.W.2d 679 (Tex. Crim. App. 1979). Criminal prosecution under Chapter 26 of the Water Code —no scienter required.
- City of Galveston v. State, 518 S.W.2d 413 (Tex. Civ. App.-Houston [14th Dist] 1975, no writ). Discharges of sewage into bay...failure to complete chlorination facilities.
- Exxon v. State, 646 S.W.2d 536 (Tex. App.-Houston [1st Dist.] 1982, pet. ref'd). Considering the risks to public health posed by air pollution, to require anything other than a strict liability standard would deny the public the right to be protected from hazardous activities.
- State v. Houdaille Indus., Inc., 632 S.W.2d 723 (Tex. 1982). Uncertified motor carrier...knowledge and intent not elements of cause of action.
- State Bd. of Dental Examiners v. Friedman, 666 S.W.2d 363 (Tex. App.-Houston [14th Dist.] 1984, writ ref'd n.r.e.). Knowledge or intent may be required for civil penalties depending on the particular legislative history and wording of the statute.

H. CONTINUING VIOLATIONS

- State v. City of Greenville, 726 S.W.2d 162 (Tex. App.-Dallas 1986, writ ref'd n.r.e.). Expert testimony that eleven inspections of a landfill over about four years and conclusion after each that a violation existed was evidence of a continuing violation.
- State v. Harrington, 407 S.W.2d 467 (Tex. 1966) *cert, denied*, 386 U.S. 944 (1967). Civil penalties for drilling a slant hole oil well, each day well was "maintained and operated" so that it could produce on a moment's notice, regardless of whether it produced on a moment's notice, regardless of whether it produced oil on each day in the period. Knowledge or intent not relevant.
- State v. Texas Pet Foods, Inc., 591 S.W.2d 800 (Tex. 1979) Cooker was "available and operable," full time "capable" of operating and producing; therefore, continuous violation. Where the record discloses that violations were continuing up to or near the date of trial, the court may conclude the violation will continue in the near future unless there is convincing evidence shown to the contrary.

I. RANGE OF PENALTY — RELEVANT EVIDENCE

- Alamo Nat'l Bank v. Kraus, 616 S.W.2d 908 (Tex. 1981). Factors for determining exemplary damages include: nature of the wrong, character of conduct, degree of culpability, public sense of justice and propriety.
- City of Galveston v. State, 518 S.W.2d 413 (Tex. Civ. App.- Houston [14th Dist] 1975, no writ) Contamination in other areas not relevant as to whether violation has occurred; refusal to admit pollution reports is within court's discretion (may be admissible as to mitigation of damages only - but was not requested for that purpose).
- Harrington v. State, 385 S.W.2d 411 (Tex. Civ. App.--Austin 1964) *rev'd on other grounds*, 407 S.W.2d 467 (Tex. 1966) *cert, denied*, 386 U.S. 944 (1967). The court, in assessing civil penalties, considered factors traditionally used in assessing exemplary damages, such as: the nature of the wrong, character of conduct and culpability of wrongdoer.
- Lloyd Frye Roofing Co. v. State, 524 S.W.2d 313 (Tex. Civ. App.-Dallas 1975, writ ref'd n.r.e.). Evidence of revenues and profits from particular plant causing pollution relevant to show gravity of violation and penalty needed to deter, only if such revenues and profits are directly related to violation.
- Ragsdale v. Progressive Voters League, 790 S.W.2d 77 (Tex. App.--Dallas 1990) *rev'd on other grounds*, 801 S.W.2d 880 (Tex. 1990) "Actual damages" as it relates to monetary damages generally have no relevance in an action to recover statutorily liquidated civil penalties.
- Southwestern Inv. Co. v. Neely, 452 S.W.2d 705 (Tex. 1970). Frequency of the wrong and amount to deter similar wrongs in the future.
- State v. City of Greenville, 726 S.W.2d 162 (Tex. App.- Dallas 1987, writ ref'd) The statutory language "... is subject to..." is mandatory and intends every violator to pay a civil penalty within the range stated in that section. The minimum and maximum civil penalties are mandatory, therefore leaving the trial court no discretion to go above or below the specified range.

IV. CORPORATIONS

J. LIABILITY

- Jonnet v. State, 877 S.W.2d 520 (Tex. App.-Austin 1994, writ denied). Officers and directors of a corporation whose charter has been forfeited by the Secretary of State are jointly and severally liable for administrative and civil penalties assessed during period of forfeiture regardless of when violation giving rise to penalties occurred.
- Light v. Wilson, 663 S.W.2d 813 (Tex. 1983) (Spears, concurring). Liability of

- Ex parte Werblud, 536 S.W.2d 542 (Tex. 1976). Witness may not refuse to take the stand in civil case; but may refuse to answer individual questions. Attorney may interpose the privilege on behalf of witness in criminal contempt cases only.
- U.S. v. Ward, 448 U.S. 242, 100 S.Ct. 2636, 65 L.Ed.2d 742 (1980). Civil penalty for discharge of oil into navigable waters. Held, self-reporting does not violate Fifth Amendment; proceeding is not "quasi-criminal."

D. LACHES/LIMITATIONS/ESTOPPEL

- Capitol Rod & Gun Club v. LCRA, 622 S.W.2d 887 (Tex. App.-Austin 1981, writ ref'd n.r.e.). Unit of government exercising its governmental powers is not subject to estoppel or laches.
- City & County of Dallas Levee Improvement Dist. v. Carroll, 263 S.W.2d 307 (Tex. Civ. App.-Dallas 1953, writ ref'd n.r.e.). Municipal corporations immune.
- Clear Lake City Water Authority v. Winograd, 695 S.W.2d 632 (Tex. App.--Houston [1st Dist.] 1986, writ ref'd n.r.e.).
- Lancaster v. Gray County, 127 S.W.2d 385 (Tex. Civ. App.-El Paso 1939, no writ). Counties immune.
- Lewis Cox & Son, Inc. v. High Plains Underground Water Conservation District No. 1, 538 S.W.2d 659 (Tex. Civ. App.—Amarillo 1976 writ ref'd n.r.e.). State immune.
- McNutt v. Cox, 133 Tex. 409, 129 S.W.2d 626 (1939). Where a suit in the name of a government entity is brought for the use and benefit of a private citizen or creditor, the statute of limitation applies in the same manner as a suit brought by a "real party at interest."
- State v. Durham, 860 S.W.2d 63 (Tex. 1993). State in its sovereign capacity, unlike ordinary litigants, is not subject to defenses of limitations, laches or estoppel.

E. DISCRIMINATORY ENFORCEMENT

- Entex Oil & Gas Co. v. State, 560 S.W.2d 494 (Tex. Civ. App.-Texarkana 1977, writ ref'd n.r.e.) appeal dism'd, 439 U.S. 961 (1978) (for want of a substantial federal question). Fact that law may not be enforced against others does not affect its constitutionality.
- State v. Malone Service Co., 829 S.W.2d 763 (Tex. 1992). Defendant must show that selection for prosecution was invidious or in bad faith based upon impermissible

corporate officers, etc. for individual participation in wrongful acts.

- Sema v. State, 877 S.W.2d 516 (Tex. App.-Austin 1994, writ denied). Debts need not be knowingly and consensually created by an officer for that officer to be held liable.
- State v. Malone, 853 S.W.2d 82 (Tex. App.—Houston [14th Dist] 1993, writ denied). President and plant manager held liable for environmental permit violation based on personal participation regardless of whether they were "owner" of permit.

V. DEFENSES

A. AFFIRMATIVE DEFENSES

- Williams v. State, 514 S.W.2d 772 (Tex. Civ. App.--Beaumont 1974, writ ref'd n.r.e.). Violation of Water Well Drillers Act. Held, Act is a valid delegation of authority by the legislature. Not penal-only injunctive relief and civil penalties. Knowledge or intent not required. Burden of proof is on defendant to establish statutory exclusion of liability (declaration of drought disaster area).

B. FIFTH AMENDMENT DEFENSES: DUE PROCESS, BURDEN OF PROOF

- Jackson County Vacuum Truck Service, Inc. v. Lavaca-Navidad River Authority, 701 S.W.2d 12 (Tex. App.-Corpus Christi 1985, writ ref'd). State and local governments have authority to enter private land to investigate for water pollution.
- Lamb Co. Appraisal Dist. v. South Plains Hospital-Clinic, Inc., 688 S.W.2d 896 (Tex. App.-Amarillo 1985, writ ref'd n.r.e.). Texas recognizes only three standards of proof - beyond a reasonable doubt, clear and convincing evidence, and preponderance of the evidence.

C. FIFTH AMENDMENT DEFENSES: SELF INCRIMINATION, CRIMINAL JURISDICTION

- Ex parte Butler, 522 S.W.2d 196 (Tex. 1975). Civil penalties in Solid Waste Disposal Act case are not quasi-criminal in nature. However, defendant may refuse to testify if answer would tend to incriminate him another law.

considerations such as race, religion or desire to prevent exercise of constitutional rights. Must show actual and purposeful discrimination against individual or suspect category; not merely that others have escaped enforcement. Discriminatory purpose is never presumed. Clear showing of intentional discrimination is required.

- U.S. v. Rice, 659 F.2d 524 (5th Cir. 1981). Tax protester case. Defendant must make prima facie showing that he has been singled out while others similarly situated have not, and that the selection is invidious or in bad faith, by resting on such impermissible considerations as race, religion or the desire to prevent the exercise of constitutional rights.

F. VAGUENESS/CONSTITUTIONALITY

- National Ass'n of Independent Insurers v. Texas Dept. of Insurance, 888 S.W.2d 198 (Tex. App.-Austin 1994, no writ). Statute is fatally vague only when men of common intelligence must guess at what is required or when there is substantial risk of miscalculation. *See also* Texas Alcoholic Beverage Comm'n v. Mini, Inc., 832 S.W.2d 147 (Tex. App.-Houston [14th Dist] 1992, writ denied).
- Ex Parte Milton Dick Elliot, (Tex. Civ. App.—Austin, 1998). Trial court properly held sections of Texas Solid Waste Disposal Act are constitutional and do not constitute an unconstitutional delegation of legislative authority.

VI. NUISANCE

G. PUBLIC NUISANCE DEFINED

- Ellen v. City of Bryan, 410 S.W.2d 463 (Tex. Civ. App.-Waco 1967, writ ref'd n.r.e.). "Public nuisance" disturbs entire community or considerable portion thereof. Recurring temporary nuisance may be enjoined.
- Goldsmith v. State, 159 S.W.2d 534 (Tex. Civ. App.-Dallas 1942, writ ref'd). Pollution of a public watercourse is a "public nuisance," and may be enjoined regardless of other remedies.
- Maranatha Temple, Inc. v. Enterprise Prod. Co., 893 S.W.2d 92 (Tex. App.-Houston [1st Dist] 1994, writ denied).
- Parker v. City of Fort Worth, 281 S.W.2d 721 (Tex. Civ. App.-Fort Worth 1955, no writ). City may have injunction against fireworks stand outside but near city limits. "Public nuisance" need not affect whole community.

H. LIABILITY OF CREATOR OF NUISANCE

- Hindman v. Teas Lime Co., 305 S.W.2d 947 (Tex. 1957). Landowner remains liable for damages despite subsequent leasing if he created nuisance, otherwise not.
- Lance v. City of Mission, 308 S.W.2d 546 (Tex. Civ. App.--San Antonio 1921, writ ref'd n.r.e.). City leased land to federal government, which built drainage ditch and created nuisance. The city did not alter ditch and plaintiff did not request abatement. Held, city not liable for nuisance. (Statute of limitations for injury to property is two years.)
- New Jersey v. Exxon Corp. and ICI America, Inc., 376 A.2d 1339 (N.J. Super. Ct. Ch. Div. 1977). Massive oil spills onto land over many years caused continuous migration of oil into state waters. Land sold to innocent purchaser. Held, migration is not "discharge." Mere ownership not enough; causation must be proved (no strict liability). Statute not effective retroactively. Usage in industrial area not a nuisance. Thus, purchaser not liable.
- New York v. Ole Olsen Ltd., 38 A.D. 967 (NY App. Div. 1972). Public nuisance from inadequate sewer systems in recreational homes adjacent to lake. Held, developers liable for damages and abatement; purchasers of homes can be compelled to cooperate.
- Wilkerson v. Garrett, 229 S.W. 666 (Tex. Civ. App.-San Antonio 1921, writ ref'd). Dam diverted water onto adjacent land. Creator of nuisance sold property. Held, both creator and purchaser liable for damages and abatement.

VII. EVIDENCE

I. SCIENTIFIC EVIDENCE / HEARSAY

- Missouri-Kansas-Texas R.R. Co. v. May, 600 S.W.2d 755 (Tex. 1980). Blood analysis admissible as business record even if it does not identify person taking blood or security measures to protect the chain of custody.
- Thomas v. Hogan, 308 F.2d 355 (4th Cir. 1962). Records routinely made of diagnoses and scientific tests done in regular course of business are entitled to admission under a presumption of trustworthiness. Expert may then draw conclusions from the records.
- Thomas v. State, 493 S.W.2d 832 (Tex. Crim. App.-1973). Lab report of heroin sample admissible as business record, even though custodian did not recall receipt of sample.

J. CHAIN OF CUSTODY/BUSINESS RECORDS

- Beck v. State, 651 S.W.2d 827 (Tex. App. —Houston [1st Dist] 1983, no writ). Testimony showed beginning and end of chain of custody Gap in chain because doctor could no remember who took blood test. Held, admissible as business record.
- Jones v. State, 611 S.W.2d 64 (Tex. Crim. App. 1980). Lab test held inadmissible where supervisor did not perform the test and did not know if it was performed correctly.
- Norris v. State, 507 S.W.2d 796 (Tex. Crim. App. 1974). Supervisor of chemists may testify as to lab results. Custodian of records may explain contents. Both methods are available to the state.
- Missouri-Kansas-Texas R.R. Co. v. May, 600 S.W.2d 755 (Tex. 1980). Blood analysis admissible as business record even if it does not identify person taking blood or security measures to protect the chain of custody.

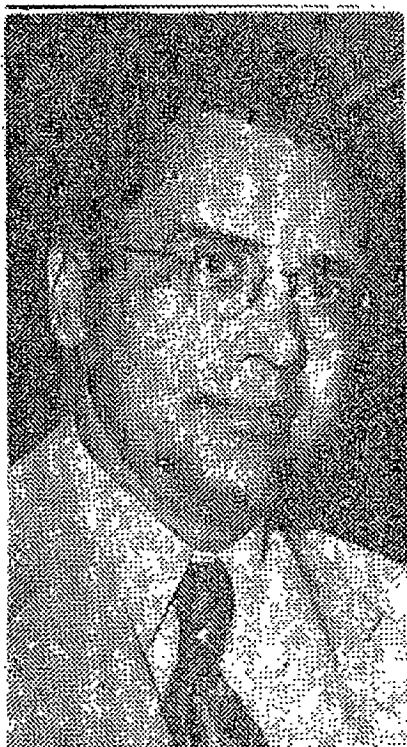
K. DEMONSTRATIVE EVIDENCE/SUMMARIES OF TESTIMONY

- Speier v. Webster College, 616 S.W.2d 617 (Tex. 1981). Chart summarizing oral testimony may be admitted into evidence if it aids jury in recalling testimony.

VIII. CHARGE TO THE JURY

M. SPECIAL ISSUE

- Charge to the Jury, Trice v. State, 712 S.W.2d 842 (Tex. App.-- Waco 1986, no writ).
- Charge to the Jury, State v. City of Freeport.



WALTER A. QUEBEDEAUX
He'll fight pollution

Quebedeaux to Head Pollution Authority

Walter A. Quebedeaux, Jr. was hired Monday as director of the Harris County Stream and Air Pollution Authority and immediately announced two primary targets of his office.

The new job pays \$9000 a year.

Four packing houses near the University of Houston, and serious air pollution in the Clover Leaf community, Monday were put at the top of the list by Mr. Quebedeaux.

Dr. L. D. Farragut, county health officer, made the announcement. The Air Pollution Authority was approved by Commissioners Court last week and allotted a \$43,000 operating budget.

Mr. Quebedeaux, 39, has been director of stream and air pollution for Champion Paper and Fibre Company since February this year. Prior to that he was director of industrial health for the state health department in Austin.

He lives at 5707 Glenhurst Drive.

Mr. Quebedeaux said he expects to meet within a few days

with the operators of the packing houses in the University of Houston area.

He described the Clover Leaf pollution as "extremely serious." The new air pollution director said he knew of a recent instance where fumes released from a plant nearly suffocated a 14-year-old boy. He explained that the boy had heart trouble, and under certain circumstances the fumes could have affected a healthy person.

He said the early work of the new unit, which is part of the Harris County health unit, will be to check the bayous and the Ship Channel to reduce contamination in those streams caused by sanitary sewage and industrial waste.

Mr. Quebedeaux said most of the laboratory equipment has been ordered and will be ready for use when the new unit goes into operation December 1. The offices of the unit are to be located in the Harris County health unit, and the lab will be located at the Jefferson Davis Hospital, 1225 Elder Street.

Cathy Sisk

Ms. Sisk is the Chief of the Environmental Division for the Harris County Attorney's Office, where she has served since July 1991. Her duties include responsibility for the civil enforcement of state environmental and nuisance laws as well as various county regulations, including the Harris County Subdivision Regulations, the Floodplain Management Regulations and the Regulations for Storm Water Quality Management.

Ms. Sisk is also the Legislative Liaison to the Texas Legislature for the Harris County Attorney's Office. Her responsibilities at the legislature include drafting and securing passage of the county's legislative platform during the biennial legislative sessions.

From 1989-1991, Ms. Sisk served as General Counsel for the Harris-Galveston Coastal Subsidence District. From 1984-1989, Ms. Sisk was an Assistant Attorney General in the Environmental Protection Division of the Attorney General's Office, except for an 18-month period spent assisting the Texas Department of Agriculture in expanding its pesticide enforcement program.

Ms. Sisk is an honors graduate of the University of Texas at Austin and the University of Texas School of Law. She received her Bachelor of Arts Degree in Economics in 1981 and her Juris Doctor in 1984.

**U.S. Environmental Protection Agency
Office of Enforcement and Compliance Assurance
FY2006 National Program Managers' Guidance, February 2005**

Executive Summary

I. Program Office

Office of Enforcement and Compliance Assistance (OECA) - Draft FY 2006 Update to the National Program Managers' Guidance.

II. Introduction/Context

EPA's national enforcement and compliance assurance program is characterized by its multi-media scope and breadth. The national program is responsible for maximizing compliance with 10 distinct federal environmental statutes dealing with prevention and control of air pollution, water pollution, hazardous waste, toxic substances, and pesticides. Most of these statutes have multiple program elements, and OECA carries out compliance and enforcement activities in a total of 28 separate program areas. The statutory and regulatory requirements of these programs apply to approximately 41 million regulated entities, an enormous and diverse universe which needs to achieve and maintain compliance.

The draft OECA National Program Manager's (NPM) guidance sets forth national program priorities and activities for the enforcement and compliance regulatory programs for a three year cycle. The performance expectations and activities outlined in the guidance are the starting point from which headquarters and the regional offices engage to discuss the management of program activities and the distribution of resources. These discussions result in the regions committing to specific program activities which nationally constitute the agreed upon approach between the regions and the national program managers for achieving performance expectations in both the core program and the national priorities for the fiscal year.

FY 2006 Update to the FY2005 - 2007 NPM Guidance

The FY2005 - 2007 NPM guidance issued in April 2004 incorporated changes and recommendations adopted by the Agency to improve the planning process as a whole and to continue to integrate program planning with performance-based results. Additionally, the development and issuance of the NPM guidance was timed to engage the states earlier and more directly to allow them a greater role in EPA's planning and priority setting processes.

One of the most significant changes to the FY 2005 - 2007 planning process was the introduction of the online commitment system (OLCS). The OLCS replaced the paper memorandum of agreement (MOAs) that OECA had previously required from each of the ten

regions. Starting in FY2005, the regions entered their annual program commitments into the OLCS. Regions were required to enter commitments for both the core and national priority areas. Headquarters and the regions negotiated and finalized acceptable commitment levels prior to the start of FY2005.

For FY2006, OECA has eliminated a number of the commitments in the OLCS. After completing the commitment process for 2005, OECA senior managers established a workgroup to review the existing commitments and make recommendations for reducing the number of commitments in the system. The purpose for this was twofold. The first was to reduce the overall number of commitments to alleviate the reporting burden on the regions. The second was to respond to the regions' feedback that a number of the commitments needed clarification, better definitions, clearer delineation between federal and state responsibility, or were duplicative of other media programs' commitments. The workgroup, composed of regional and headquarters staff, reviewed all of OECA's OLCS commitments. A set of principles was developed to provide the group with a consistent rationale and framework for deciding which commitments should be deleted, which commitments should be reworked or redefined, and which commitments could remain unchanged. The final result of the workgroup's recommendation is that the number of commitments has been reduced from 168 to XXX. Additionally, some commitments' language has been clarified to provide the regions with a better understanding of the program activities to which they are committing. Both the core and national priorities have fewer commitments in FY2006.

Another addition to the FY2006 planning cycle will be the development and implementation of a strategy for the financial assurance priority. Last year OECA recommended that this issue be evaluated during FY 2005 to determine whether it should be pursued as a priority beginning in FY 2006. After consulting with our program partners and others, OECA has decided to pursue this priority for FY2006 -FY2007. A more detailed explanation on the priority's selection rationale and OECA's approach to for addressing this priority area can be found in Section I - National Priorities for Enforcement and Compliance Assurance below.

III. Program Priorities

OECA selected the following national priorities for the FY 2005 - 2007 planning cycle:

- Clean Air Act - Air Toxics;
- Clean Air Act - New Source Review / Prevention of Significant Deterioration (NSR/PSD);
- Clean Water Act - Wet Weather, which includes Combined Sewer Overflows (CSOs), Concentrated Animal Feeding Operations (CAFOs), Sanitary Sewer Overflows (SSOs) and Stormwater;
- Resource Conservation and Recovery Act - Mineral Processing; and
- Tribal
- Financial Responsibility

In the remaining months of FY 2005, OECA will be evaluating the petroleum refinery priority for a return to the core program in FY 2006.

- **Tracking Progress**

The accurate and timely tracking of program performance and activities has been a high priority for OECA for many years. OECA has worked to establish and refine a data collection and verification process that requires the attention of both senior managers and staff to ensure that performance and program results data is of the highest caliber possible. OECA distributes monthly management reports to ensure management attention to meaningful program metrics and makes ad hoc analysis capabilities available through the Online Targeting Information System (OTIS).

- **Program Contacts**

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SECTION I.

NATIONAL PRIORITIES FOR ENFORCEMENT AND COMPLIANCE ASSURANCE

OECA selected its national priorities for the FY2005 - FY2007 planning cycle at the beginning of last year. Strategy implementation plans have been developed for all of the priorities and activities are fully underway to meet the priorities' goals. This section of the NPM guidance is still being updated and a completed section will be available in the final NPM guidance scheduled for issuance in April. Below are short summaries of the priority topic areas. For more information on the priorities, priority-specific goals, and the national priority selection process go to www.epa.gov/compliance/planning/priorities/index.html

Financial Responsibility

Selection Rationale: Financial responsibility protects public health and the environment by providing an incentive for the proper and safe handling of hazardous materials and protecting against a liable party defaulting on closure or clean-up obligations. These benefits are lost unless there is **compliance** with the financial responsibility requirements and **enforcement** where there is a failure to maintain sufficient financial responsibility. Absent financial assurance, protection of human health and the environment would depend on available governmental financial resources. Consistent with EPA's mandate to ensure compliance with the law and the Agency's long standing "polluter pays" principle, an enforcement strategy for obtaining full compliance with financial assurance requirements prevents improper handling of hazardous materials and the shifting of the costs from the responsible parties to state and federal taxpayers.

OECA is concerned that entities are not providing adequate financial responsibility in accordance with their obligations under federal laws. OECA's concerns in this area are shared by the Association of State Territories Solid Waste Management Organizations (ASTSWMO) who urged OECA to adopt financial responsibility as an FY2006-2007 enforcement priority. Recent events have revealed that there are significant issues related to compliance with the financial responsibility obligations under current environmental laws.

EPA has decided to phase in its approach in the examination of compliance and enforcement issues under the federal laws. OECA has initiated its review by looking at RCRA Subtitle C closure/post-closure, RCRA corrective action and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) in FY05. OECA then plans to evaluate the Toxics Substance and Control Act (TSCA), the Safe Drinking Water Act (SDWA) and RCRA Subtitle I in late FY2005 and FY2006 to determine if the financial assurance programs under these laws should be included in this priority. This phased approach will help OECA refine its efforts to address identified non-compliance and resource issues as well as help in the development of a strategy with measurable goals and outputs for all environmental laws requiring financial responsibility that are part of this priority.

Performance-Based Strategy Goal: By FY2007, reduce harm to human health and the environment by addressing noncompliance and optimize EPA's financial protection and resources. EPA is currently developing procedures and measures to carry out this goal by creating a screening process to assess risks caused by a failure to have financial responsibility so that high-risk entities are identified on a priority basis and ensuring that all inspected entities are in compliance or on a path to compliance.

Wet Weather

Selection Rationale - Discharges from wet weather events are the leading causes of water quality impairment as documented in Clean Water Act (CWA) Section 305(b) reports and represent significant threats to public health and the environment. The discharges come from overflows from combined sewers or sanitary sewers, concentrated animal feeding operations (CAFO) discharges and run-off, and storm water run-off. The main pollutants in sewer overflows are fecal coliform (raw sewage), bacteria, pathogens, nutrients, untreated industrial wastes, toxic pollutants such as oil and pesticides, and debris washed into the sewer system. Discharges of nitrogen, phosphorous and fecal coliform from CAFOs to water bodies can occur through poor maintenance of waste lagoons, improper storage of animal waste, excessive and improper application of manure to crops, and excessive rainfall resulting in spills and leaks of manure management areas. Storm water runoff can carry high levels of pollutants such as sediment, oil and grease, suspended solids, nutrients, heavy metals, pathogens, toxins, and trash into sewer systems and ultimately into our streams, rivers, lakes, estuaries, wetlands, and oceans. Pollutants in sewer overflows, storm water discharges and CAFO's can cause a variety of diseases in humans, ranging from dysentery to hepatitis. Wet weather compliance problems have been prioritized by looking at regulated facilities contributing to the impairment of watersheds, beaches and other recreational areas, shellfish beds, source water protection areas, environmental justice areas, and other sensitive areas.

Performance-Based Strategy Wet Weather Goal Statement: Protect public health and water quality in our nation's watersheds where CSO's, SSO's, CAFO's, and Stormwater sources may adversely impact sensitive areas, environmental justice communities, or have the potential to cause other significant risks to the environment or human health.

Air Toxics - Maximum Achievable Control Technology (MACT)

Selection Rationale: MACT standards are promulgated under Section 112 of the CAA to regulate the most hazardous air pollutants (HAPs) and those posing the highest degree of risk to human health and the environment. By ensuring compliance with MACT standards, the Agency reduces public exposure to toxic air emissions. By the end of 2004, EPA will have promulgated approximately 90 MACT standards. After MACT standards are established, the regulated community has several years before the compliance date takes effect to learn about and prepare for the new standards. Emphasis on MACT standards over several years, both before and after the compliance dates, can ensure that the requirements are clearly understood and that guidance and compliance assistance tools are developed for regulatory agencies and the regulated

community.

The Air Toxics program first became an OECA priority in FY 2000. Since that time, the objective of the priority has been to distribute the substantial MACT implementation workload between headquarters and the regions through a regional Adopt-a-MACT program. Through the program, the regions adopted MACT standards for which they developed compliance monitoring and compliance assistance tools. This approach has resulted in the availability of a wide array of MACT implementation tools such as inspector check lists, applicability flowcharts and compliance timelines. Now that compliance dates are in place for more than 40 MACT standards, and implementation tools are available for the majority of these standards, the focus of the Air Toxics priority will shift from primarily a compliance assistance and tool development effort to compliance monitoring and enforcement will continue in FY 2006.

Performance-Based Strategy Goal: The general goal of this strategy will be to protect public health and the environment from the release of harmful emissions of air toxic pollutants. An important component of meeting this general goal will be to implement the Performance-Based Air Toxics Enforcement Strategy; key provisions will include:

- Identification and addressing of high risk pollutants of concern;
- Focus on major Maximum Achievable Control Technology (“MACT”) sources while maintaining regional flexibility to target all MACT source categories for investigation, including area sources;
- Consideration of Environmental Justice (EJ) in targeting MACT source investigations;
- Utilization and further development of targeting tools which identify and prioritize high risk sources of concern and substantive areas of noncompliance with MACT standards;
- Identification of data gaps and ways to gather such data;
- Coordination of enforcement efforts with states and tribes as appropriate.

The primary goal of the Air Toxics Enforcement Strategy will be to:

Achieve an annual reduction of approximately 12,000 pounds of air emissions regulated by the MACT standards during the priority period through the investigation and enforcement of strategically chosen MACT standards. Such air emissions, which include known carcinogens, mutagens, teratogens, etc., are the most toxic air pollutants regulated under the Clean Air Act. Over the FY 2005-2007 period, approximately 36,000 pounds of air emissions regulated by the MACT standards will be reduced from these MACT sources. Sources identified as violating the emission requirements of applicable MACT standards will be placed on federally enforceable compliance schedules, or will have had appropriate enforcement action taken, to reduce their excess emissions to zero, in accordance with EPA’s enforcement response policy.

NSR/PSD

Selection Rationale - New Source Review (NSR) requirements in the CAA are intended to

ensure that the construction of new sources or modification of existing sources does not jeopardize the attainment of National Ambient Air Quality Standards (NAAQS) in non-attainment areas. Prevention of Significant Deterioration (PSD) requirements ensure that areas with relatively clean air are not significantly degraded by the influx of new air pollution sources. The NSR and PSD programs directly control emissions of criteria air pollutants, and the PSD program requires sources to address a number of toxic air pollutants. Avoidance of the required review results in inadequate control of emissions, thereby contributing thousands of unaccounted tons of pollution each year, particularly of NO_x, VOC, SO₂ and PM₁₀. These emissions worsen problems in non-attainment areas and threaten to drive attainment areas into non-attainment. Investigations conducted by EPA at many coal-fired utility companies, refineries, and other industrial facilities reveal that many of them made modifications that were subject to NSR or PSD but failed to obtain the required permits or install necessary controls. Some sources may have unintentionally violated those requirements due to misunderstandings of the applicable law. EPA has attempted through its Equipment Replacement Rule to reform NSR rules to provide greater clarity, but the D.C. Appellate Court has placed a stay on final implementation of the rule.

While EPA will vigorously pursue the new rules through the courts, compliance with current NSR provisions remains our objective and we will continue to use enforcement to meet that objective. We will pursue all filed cases and decisions to bring new cases will be guided by several factors including available resources and desired environmental benefits. NSR is an important tool and one component of our comprehensive national strategy to achieve cleaner air.

Performance-Based Strategy Goal:

Through the NSR/PSD priority, EPA will protect human health and the environment by investigating the compliance status of companies representing 75% of the nation's coal-fired power generating capacity by 2007. The companies found to be in noncompliance will be subject to an enforceable order by the end of FY 2007. Such orders will ultimately result in the reduction in air emissions of 700 million pounds. Further, EPA will identify additional sectors where significant environmental benefit can be derived from the resolution of NSR/PSD noncompliance by the end of FY2007.

Mineral Processing

Selection Rationale: The mishandling of mineral processing wastes has caused significant environmental damage and resulted in costly cleanups. These highly acidic wastes have caused fish kills and the arsenic and cadmium that these wastes often contain have been found in elevated levels in residential wells. Evidence gathered in recent inspections indicates that mineral processing facilities are failing to obtain the necessary permits and adequately manage their wastes.

Mining produces significant amounts of waste and byproducts, ranging from 10% to over 99.99% of the total material mined. Wastes include overburden and waste rock, which are

primarily disposed of in piles near the mine site. Waste rock dumps are generally constructed on unlined terrain, with underlying soils stripped, graded, or compacted depending on engineering considerations. Tailings contain a mixture of impurities, trace metals, and residue of chemicals used in the beneficiation process. Specific types of environmental impacts include: acid mine drainage, acid leaching operations, fugitive dust emissions, erosion and sedimentation, habitat modification, disruption of surface and groundwater, and mining subsidence, the creation of sinkholes or troughs as a result of collapsing overlying strata into mined out voids. These sinkholes interrupt surface water drainage, affecting ponds and streams.

Performance-Based Strategy Goal:

By FY 2007, reduce harm to human health and the environment by selecting a screening model to assess human health exposure and environmental risks caused by wastes from mineral processing and mining¹, so that high-risk facilities are identified and inspected on a priority basis. By FY 2007, ensure that all inspected facilities are in compliance or on a path to compliance and that X% of the remaining facilities are aware of the best management practices appropriate for the sector.

Tribal

Selection Rationale: Significant human health and environmental problems, associated with several media programs, are present in Indian country and other tribal areas. There are currently 562 federally-recognized Indian tribes in the United States responsible for almost 77 million acres of land in Indian country. The tribal priority will focus on a variety of environmental issues and will also address adjacent noncomplying facilities impacting Indian country and other tribal areas, including those in Alaska.

Performance-Based Strategy Goal: The primary goal of the tribal strategy is to significantly improve human health and the environment in Indian country and other tribal areas through EPA working with tribes on compliance assistance, compliance monitoring and enforcement activities. Through building tribal capacity and direct implementation, EPA will initially focus national attention on three areas: drinking water, schools and waste management.

Petroleum Refineries

Petroleum Refining, a current national priority, will be evaluated at the end of FY 2005 for potential return to the Core Program.

Selection Rationale: The Petroleum Refining Sector was selected as a national priority in FY 1996. An integrated national strategy was developed that built upon individual Regional investigative efforts in this sector in the early 1990s, and sought to assemble and focus regional,

¹ Mining is here defined as the extraction of mineral commodities excluding coal, sand, gravel, and aggregate.

headquarters and state refinery expertise in a National effort to engage this industry, on a company-wide basis, in resolving the most environmentally significant, crosscutting air pollution violations at their facilities.

Through this effort, EPA initiated scores of investigations at refineries and embarked on a series of multi-facility negotiations with major refining companies. At this time, global settlements have been reached with refiners representing approximately 40 percent of the domestic petroleum refining capacity. Subsequent to FY 2002, the emphasis in the petroleum refining strategy shifted to completing the investigation and settlement work that was in progress. Beyond concluding negotiations with those facilities we have already engaged, the regions will have a continuing resource commitment to implementing Federal consent decrees. Ultimately, EPA must assure that the states have sufficient capacity to both investigate and return to compliance, refiners that have not been the subject of Federal enforcement, and to secure the benefits of the Federal settlements through permitting, once the settlements have expired.

SECTION II. CORE PROGRAM ACTIVITIES

These activities are conducted to implement required elements of environmental laws and to maintain a credible presence to deter noncompliance. This section begins with a discussion of those aspects of national guidance which apply across all core program areas, then provides a discussion about individual program elements under various environmental statutes.

The performance expectations and required regional responses defined in this core guidance represent national program expectations and do not cover all of the enforcement and compliance assurance efforts conducted in the regional offices. Flexibility is a key component of the national enforcement and compliance assurance program planning process and there is the understanding that, while regions are expected to support national program core and priority activities, there are very real, credible reasons for a region's nonparticipation. There are many factors that can influence the level of a region's participation. For example, geographic or sector initiatives, the presence/absence of a regulated sector in a region, regional resources, and high priority regional initiatives can all directly impact the regions' contributions to national core and priority activities. To ascertain the full array of a region's activities for a given fiscal year, the region's response to the core program guidance must be considered along with their Regional Plan. In particular, the regional plans provide more information on the region's use of compliance assistance and compliance incentive tools to achieve results. A region's performance is based on the effective use of all the enforcement and compliance assistance tools and program activities. The core guidance activities laid out below, in conjunction with the regional plans, provide the best context for a regions' contribution to the national program and to program activities in areas unique to the region. To access the regional plans, go to <http://www.epa.gov/ocfo/regionplans/regionplans2.html>.

Accessing Supplemental Environmental Project (SEP)Information

- www.epa.gov/region6/sep
- SEP Policy and Guidance Documents can be found at
<http://cfpub.epa.gov/compliance/resources/policies/civil/seps/>
- Potential SEP Projects list maintain on-line at
<http://www.epa.gov/compliance/resources/policies/civil/seps/projectsideas42004.pdf>



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
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Bio for Suzanne Beaudette Murray

Suzanne graduated from Trinity University in San Antonio in 1990, and the University of New Mexico School of law in 1994. After graduation, she was an intern for two federal judges in the Eastern and Southern Districts of New York and then joined the in-house environmental group at AIG. In 1996, she became associated with the firm of Rosenman & Colin in New York in the Environmental and Land Use section.

Suzanne moved to Dallas in 1998 and joined EPA. At EPA she has primarily been involved in enforcement actions under the CAA and TSCA, and spent a year on a detail to the Air Permitting and SIP group for the Office of Regional Counsel. In January of 2004, she became the Deputy Regional Counsel for Enforcement, where she manages a group of about 22 attorneys who handle the civil prosecution of federal administrative and judicial claims under the CAA, CWA, RCRA, TSCA, FIFRA and EPCRA for Region 6.

BIOGRAPHY NOT SUBMITTED

THE INTERSECTION OF WATER RIGHTS, WATER QUALITY REGULATION, AND RUNOFF CONTROLS

**Douglas G. Caroom & Susan M. Maxwell
Bickerstaff, Heath, Smiley, Pollan,
Kever & McDaniel, L.L.P.**

**Texas Environmental Superconference
Austin, Texas
August 4-5, 2005**

- I. INTRODUCTION
- II. RUNOFF AND NON-POINT SOURCE POLLUTION CONTROL
 - A. Background
 - B. Surface Water Permitting Requirements
 - 1. General doctrine – state ownership of surface water
 - 2. Diffuse surface water – an exception to state ownership
 - 3. Domestic and livestock use – an exemption from permitting
 - 4. Obtaining a state water rights permit
 - C. Permitting Requirements Applicable to Runoff Control
 - 1. Storm water detention ponds
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- III. WATER QUALITY CONSIDERATIONS IN WATER RIGHTS PERMITTING
- IV. RIGHTS IN TREATED WASTEWATER EFFLUENT
 - A. Background
 - B. Competing Approaches to Indirect Reuse of Treated Wastewater Effluent
 - C. *City of San Marcos v. TCEQ*
- V. CONCLUSION

THE INTERSECTION OF WATER RIGHTS, WATER QUALITY REGULATION, AND RUNOFF CONTROLS *

I. INTRODUCTION

In 1977 the Texas Legislature abolished the Texas Water Quality Board and the Texas Water Rights Commission, consolidating the two agencies into the Texas Department of Water Resources.¹ The theory was that consolidation of both functions in the same agency might allow closer coordination of water quality and water rights regulation, and possibly even result in “one-stop permitting.” Although an interesting experiment, it did not work. Water quality and water rights functions of the agency remained largely independent.

Through its various subsequent incarnations as the Texas Natural Resources Conservation Commission and, now, the Texas Commission on Environmental Quality (the “TCEQ” or the “Commission”), with the addition of solid waste, hazardous waste, and air pollution control regulatory authority, the goal of “one-stop permitting” for water quality and water rights has come no closer to reality.

Nevertheless, the connection between the two functions is becoming increasingly clear. The volume of water available undeniably impacts instream uses, the concentration of pollutants, and, hence, achievement of water quality standards.² Similarly, the ability to obtain legal authorization to divert, impound, and store water is essential to controlling storm water and non-point source pollution.

This paper examines two examples of activities requiring coordination of traditional water rights regulatory authority with water quality regulation and runoff controls that may be associated with non-point source pollution control.

II. RUNOFF AND NON-POINT SOURCE POLLUTION CONTROL

A. Background

“Non-point source pollution” is pollution from diffuse sources that do not have a single point of origin or are not introduced into receiving water from a specific outlet. As the TCEQ defines the term in its rules for its monitoring and assessment program for watershed/basin water quality:

*The authors acknowledge and rely on the background discussion and practical agency perspective on these issues set out in a recent seminar paper by the head of the TCEQ’s Water Rights Permitting and Availability Section, Todd Chenoweth.

¹ Act of May 17, 1977, 65th Leg., R.S., ch. 870, 1977 Tex. Gen. Laws 2207.

² See PUD No.1 of Jefferson County v. Washington Dep’t of Ecology, 511 U.S. 700 (1994).

Nonpoint source pollution – Generally results from land runoff, precipitation, atmospheric deposition, drainage, seepage, or hydrologic modification. Any source of pollution that is not subject to regulation as a “point source.”³

Non-point source pollutants may originate from rural/agricultural activities (e.g., pesticides), effluent from septic tanks, and various wastes from urban activities (e.g., road salts, oily wastes). Such pollutants are commonly carried off the land by storm water runoff; non-storm water flows occur from sources other than rainwater (e.g., car washing, street cleaning). These types of non-point source pollution can significantly affect surface water quality. For this reason, various types of water quality restrictions may influence a landowner’s choice and use of management practices designed to control storm water runoff.⁴

Local, state, and federal regulations frequently impose requirements designed to control non-point source pollution, and a frequently required control mechanism is detention ponds. Whether a detention pond requires a state water rights permit is a fact-specific question. Similarly, both non-point source pollution control and management of runoff frequently involve modification of natural flow patterns. Such modifications of natural flow patterns implicate both statutory and common law standards regarding the obligation of the upland property owner not to increase the natural flow on his downstream neighbors. The application of state water rights law to both of these areas is discussed below.

B. Surface Water Permitting Requirements

1. General doctrine – state ownership of surface water

The first issue to resolve is ownership. Depending upon who owns the water, different standards apply. As a general matter, surface water is owned by the State and available for use pursuant to the statutory appropriation process. Texas Water Code § 11.021(a) provides:

The water of the ordinary flow, underflow, and tides of every flowing river, natural stream, and lake, and of every bay or arm of the Gulf of Mexico, and the storm water, floodwater, and rainwater of every river, natural stream, canyon, ravine, depression, and watershed in the state is the property of the state.⁵

Section 11.021(a) appears to assert state ownership over every type of surface water. “[S]torm water, floodwater, and rainwater of every . . . watershed in the state” leaves very little for private ownership. The provision has not, to date, been construed by either the courts or the state agencies as broadly as its express terms. Nevertheless, given the breadth of the “state water” definition, it is both conservative and reasonable to assume that the water involved in a

³ 30 T.A.C. § 220.2(3) (West 2005).

⁴ See generally U.S. Environmental Protection Agency, *Eight Tools of Watershed Protection in Developing Areas*, found at: <http://www.epa.gov/watertrain> (visited July 3, 2005).

⁵ TEX. WATER CODE ANN. § 11.021(a) (Vernon 2000); 30 T.A.C. § 297.1(50).

project is state water, and that a permit will be required unless (a) an exception to the state ownership rule exists, or (b) an exemption from the state permit requirement applies.

2. Diffuse surface water – an exception to state ownership

Diffused surface water is water on the surface of the land that has not yet entered a watercourse. Generally, this water is rainfall runoff, although water left in upland areas after a flood recedes may also qualify. The TCEQ's rules define "diffused surface water" as

Water on the surface of the land in places other than watercourses. Diffused water may flow vagrantly over broad areas coming to rest in natural depressions, playa lakes, bogs, or marshes. (An essential characteristic of diffused water is that its flow is short-lived.)⁶

Diffused surface waters are the property of the owner of the soil, not the State, until they enter a watercourse and become state water or riparian water.⁷ Consequently, the definition of a "watercourse" assumes some significance.

In some instances, determining the existence of a watercourse is relatively straightforward. Navigable streams are generally considered watercourses. Any stream retaining an average width of thirty feet from its mouth, measured from cut bank to cut bank, is considered legally navigable.⁸ The State holds the waters of navigable streams in trust for the public and, therefore, they are subject to appropriation.⁹ The State also owns the lands underlying navigable streams.¹⁰ Although the State does not own the lands underlying non-navigable water, it does have the right to transport water through watercourses, including non-navigable streams, for a public purpose without seeking permission from riparian landowners.¹¹ As discussed below in the context of water reuse, the State must grant authorization for use of the bed and banks of a flowing stream to convey water from one point to another.

In other instances, determining the existence of a watercourse is less clear. A watercourse has three characteristics: (a) a channel, with a well-defined bed and banks, (b) a current of water, and (c) a permanent source of supply.¹² Application of these criteria, however, can be challenging. The bed and banks may be "slight, imperceptible, or absent" in some instances without the stream losing its character as a watercourse.¹³ However, a watercourse is

⁶ 30 T.A.C. § 297.1(16).

⁷ Turner v. Big Lake Oil Co., 128 Tex. 155, 96 S.W.2d 221 (1936); Motl v. Boyd, 116 Tex. 82, 286 S.W. 458 (1926). It should be noted that the State's jurisdiction over water for purposes of pollution control is broader than "state water" for water rights purposes. Section 26.121 of the Texas Water Code, enacted as an exercise of the police power, extends to "water in the state," whether surface or groundwater. TEX. WATER CODE ANN. § 26.001(5).

⁸ See TEX. NAT. RES. CODE ANN. § 21.001(3) (Vernon 2001).

⁹ In re Adjudication of the Water Rights of the Upper Guadalupe Segment of the Guadalupe River Basin, 642 S.W.2d 438 (Tex. 1982); Motl v. Boyd, 116 Tex. 82, 286 S.W. 458 (1926).

¹⁰ See State v. Bradford, 121 Tex. 515, 50 S.W.2d 1065 (1932).

¹¹ See Domel v. City of Georgetown, 6 S.W.3d 349 (Tex. App.—Austin 1999, pet. denied).

¹² Hoefs v. Short, 114 Tex. 501, 273 S.W. 785 (1925).

¹³ *Id.*

more than a low area in a pasture or a typical west Texas draw.¹⁴ The channel should be the result of the action of flowing water over an extended period of time.¹⁵ The requirement of a current is also flexible. The current “need not be continuous and the stream may be dry for long periods of time.” (The watercourse at issue in the *Hoefs* case usually ran for a day or two after a big rain, and from one to twenty-two times annually.)¹⁶ Similarly, it is not necessary that water always be present to satisfy the “permanent source of supply” requirement; the determinative question is whether the conditions occur with sufficient regularity for the utility of the water supply for agriculture and other beneficial purposes.¹⁷ The distinction between an “unnamed intermittent tributary” and a “low area of the pasture” can be largely in the eyes of the beholder, and it is precisely this distinction that will determine whether the water involved is state water or diffused surface water.

If the area collecting water is a watercourse, and almost anything that shows up on a USGS topographic map could be, then a state water rights permit will be required for impoundment of water, unless an exemption from the permitting requirement is applicable. Prior to addressing permit exemptions, however, one requirement applicable to diffused surface water should be noted. Texas Water Code § 11.086 states, in part:

- (a) No person may divert or impound the natural flow of surface waters in this state, or permit a diversion or impounding by him to continue, in a manner that damages the property of another by the overflow of the water diverted or impounded.
- (b) A person whose property is injured by an overflow of water caused by an unlawful diversion or impounding has remedies at law and in equity and may recover damages occasioned by the overflow.¹⁸

“Surface waters” as used in this section refers to diffused surface waters. Until this statute’s predecessor was adopted in 1915, land granted under the common law was subject to the “common enemy doctrine,” which allowed a landowner to divert excess water from his land onto his neighbor’s on the theory that it was a common enemy. The adoption of Section 11.086’s predecessor in 1915 made the civil law rule, under which a landowner may not burden adjacent lands with any greater burden than would occur under natural flow conditions, applicable to all property in Texas.¹⁹ Thus, to the extent a project or property development modifies the natural flow patterns of diffused surface water, the possibility of liability to adjacent property owners is raised. That this is a serious possibility is demonstrated by the fact that Section 11.086 is the most litigated, or at least most annotated, provision of the Texas Water Code.

¹⁴ *Turner v. Big Lake Oil Co.*, 62 S.W.2d 491 (Tex. Civ. App.—El Paso 1933), *aff’d* 128 Tex. 155, 96 S.W.2d 221 (1936).

¹⁵ *International-Great N. R.R. Co. v. Reagan*, 121 Tex. 233, 49 S.W.2d 414 (1932).

¹⁶ *See Domel*, 6 S.W.3d at 354.

¹⁷ *Hoefs*, 273 S.W.2d at 788.

¹⁸ TEX. WATER CODE ANN. § 11.086.

¹⁹ *See Kraft v. Langford*, 565 S.W.2d 223, 228-29 (Tex. 1978).

3. Domestic and livestock use – an exemption from permitting

If a watercourse exists, and an impoundment is necessary for either runoff control or treatment of non-point source pollution, the most frequently applied exemption from the permitting requirement is found in Texas Water Code § 11.142, which provides:

(a) Without obtaining a permit, a person may construct on the person's own property a dam or reservoir with normal storage of not more than 200 acre-feet of water for domestic and livestock purposes. . . . This exemption does not apply to a commercial operation.

< Text of subsec. (b) as inserted by Acts 2001, 77th Leg., ch. 966, § 2.09 >

(b) Without obtaining a permit, a person may construct on the person's property a dam or reservoir with normal storage of not more than 200 acre-feet of water for fish and wildlife purposes if the property on which the dam or reservoir will be constructed is qualified open-space land, as defined by Section 23.51, Tax Code. This exemption does not apply to a commercial operation.

< Text of subsec. (b) as inserted by Acts 2001, 77th Leg., ch. 1427, § 1 >

(b) Without obtaining a permit, a person may construct on the person's property in an unincorporated area a dam or reservoir with normal storage of not more than 200 acre-feet of water for commercial or noncommercial wildlife management, including fishing, but not including fish farming.

* * *

(d) Without obtaining a permit, a person may construct or maintain a reservoir for the sole purpose of sediment control as part of a surface coal mining operation under the Texas Surface Coal Mining and Reclamation Act (Article 5920-11, Vernon's Texas Civil Statutes).

The most significant limitation of the domestic and livestock exemption is that it does not apply to commercial activities. An impoundment that is part of a commercial operation must obtain a water rights permit. Similarly, ponds that are amenities of a residential subdivision, owned by the property owners' association, have been required to obtain permits. Note also that the exemption for sediment control structures is limited to strip mining operations.

4. Obtaining a state water rights permit

If a structure impounds state water, and does not qualify under Section 11.142's domestic and livestock exemption, it must obtain a permit to appropriate state water. It is unlawful to willfully take, divert, or appropriate any state water for any purpose without first complying with all applicable requirements of Chapter 11 of the Texas Water Code. Violators are also subject to

civil and administrative penalties.²⁰ To make matters worse, in many parts of the state, obtaining a permit can be challenging.

A person desiring to appropriate state water must obtain a permit from the TCEQ.²¹ The permit may be granted only if, after filing of a proper application, payment of the required fees, and notice and hearing, the applicant shows that: (1) unappropriated water is available in the source of supply; (2) the proposed appropriation: is intended for a beneficial use, does not impair existing water rights or vested riparian rights, is not detrimental to the public welfare, considers various environmental and water quality assessments required by statute, and addresses a water supply need in a manner consistent with the state water plan and the relevant approved regional plan(s); and (3) reasonable diligence will be used to avoid waste and achieve water conservation.²²

In addition to the regular appropriation permit issued under Section 11.121, the Commission issues several types of more restrictive permits authorized by the Texas Water Code, including: temporary permits,²³ contractual permits or amendments that authorize use by a third party not expressly authorized under the base permit,²⁴ permits authorizing the conversion of an exempt domestic and livestock reservoir to other beneficial uses,²⁵ emergency authorizations to appropriate or use state water,²⁶ and term permits.²⁷

C. Permitting Requirements Applicable to Runoff Control

As outlined by the EPA's watershed protection materials, the general goals of storm water management practices include maintaining groundwater quality and recharge, reducing storm water pollutant loads, protecting stream channels, preventing increased overbank flooding, and safely conveying extreme floods.²⁸ Among the common structural techniques for controlling storm water quantity and quality, the use of storm water detention ponds and techniques to divert or re-route the flow of runoff may trigger water rights permitting requirements under Texas law, if state water is appropriated, diverted, or stored.²⁹ As discussed above, the key distinction is that between diffused surface water and water that has reached a defined watercourse (state water).

1. Storm water detention ponds

The crucial factor in whether a water rights permit will be required for a storm water detention pond is whether the pond is on a watercourse. If it is not, no Chapter 11 permit is

²⁰ See TEX. WATER CODE ANN. §§ 11.081, 11.082, 11.0842, 11.0843.

²¹ *Id.* § 11.121.

²² *Id.* § 11.134(b) (Vernon Supp. 2004-05); 30 T.A.C. §§ 297.41-.50.

²³ TEX. WATER CODE ANN. § 11.138 (Vernon 2000); 30 T.A.C. § 297.13.

²⁴ 30 T.A.C. §§ 297.14, 297.101 *et seq.*

²⁵ TEX. WATER CODE ANN. § 11.143 (Vernon Supp. 2004-05); 30 T.A.C. § 297.15.

²⁶ TEX. WATER CODE ANN. § 11.139 (Vernon 2000); 30 T.A.C. § 297.17.

²⁷ TEX. WATER CODE ANN. § 11.1381; 30 T.A.C. § 297.19.

²⁸ See *supra* note 4 at 16-17.

²⁹ See Todd Chenoweth, *Water Rights and Non-Point Source Pollution Control*, Texas Water Law Institute (Nov. 4-5, 2004).

required if only diffused surface water is being collected. Even if the detention pond is on a watercourse, in practice the TCEQ is not likely to require a Chapter 11 permit if the pond is designed to detain the water only for a short period of time, that is, a pond designed to “attenuate” or slow down the rate of flow of the runoff. (Any beneficial *use* of the water, however, would require a water rights permit.) On the other hand, a storm water retention pond (on a watercourse) designed to permanently capture and hold some volume of storm water must be permitted under Chapter 11 provisions and TCEQ rules.

2. Routing storm water runoff

For the technique of re-routing the flow of storm water runoff, the critical definition of a “watercourse” again comes into play. A permit will generally be required if the water to be re-routed has reached a watercourse, that is, has become state water. The TCEQ’s Water Right Section, however, notes that it has recognized an exception to this general requirement where “the re-routing of the watercourse is totally on the owner’s own property and the altered watercourse will leave the property at the same point that it did naturally.”³⁰

3. Water supply options

As described above, if the circumstances surrounding a particular application of a storm water management technique so require, the landowner must obtain a water rights permit under Section 11.121. However, in a fully appropriated watershed (which is the case with many of the river basins in Texas), it will not be possible to obtain such authorization because no unappropriated water is available for appropriation by the new permit. Thus, for the project to go forward, some source of water must be found to offset evaporation losses that occur during dry periods.

In such cases several options are available to supply the water to offset losses and allow issuance of the permit. One alternative is inclusion of a condition that the permittee make up for water lost to evaporation by pumping groundwater as necessary to maintain the structure at its full capacity when evaporation would otherwise cause the level to decline. A similar requirement can be implemented by purchasing surface water to offset losses from a supplier with a senior water right. Another alternative, if a permanent authorization for the facility is not required, is obtaining a “term permit” from the TCEQ.³¹ The Commission normally issues term permits when unappropriated water is not available on a permanent basis. Such a permit may be issued, if other appropriators are not currently making full use of their appropriations, for a term of years until the water is needed by senior appropriators. Often such term permits are renewable at the expiration of the initial term.

³⁰ *Id.* at 4-5.

³¹ See TEX. WATER CODE § 11.1381; 30 T.A.C. § 297.19.

III. WATER QUALITY CONSIDERATIONS IN WATER RIGHTS PERMITTING

Just as water rights regulatory requirements impinge upon what may be primarily a water quality related project, water quality and environmental requirements are playing an increasingly large role in water rights permitting.

Water rights permitting statutes themselves contain various provisions requiring the TCEQ to consider environmental and conservation oriented impacts of any application to store, take, or divert surface water. The Commission must consider the effects, if any, on groundwater or groundwater recharge.³² It must assess the effects, if any, of the issuance of the permit on the bays and estuaries of Texas.³³ Finally, it must include, to the extent practicable in light of all public interests, permit conditions that it considers necessary to maintain existing instream uses,³⁴ the water quality of the river or stream to which the permit would apply,³⁵ and fish and wildlife habitats.³⁶

One area in which water quality criteria come into play directly in water rights permitting is the establishment of instream flow requirements, which are normally contained in new permits and which normally require that a minimum flow be present at a defined point of the watercourse before water may be stored or diverted under the permit. In establishing the instream flow requirement, the TCEQ now requires as a minimum that the seven-day, two-year low flow (7Q2) be maintained. This is the flow level normally used in computing of effluent discharge limitations and in determining whether instream water quality criteria are satisfied.

IV. RIGHTS IN TREATED WASTEWATER EFFLUENT

In part because of the good job municipalities and others have done fulfilling their obligations with regard to water quality, a controversy has developed regarding water rights in treated sewage effluent. It is centered upon the question of ownership rights in treated wastewater effluent following its discharge into a watercourse.

A. Background

The TCEQ now has pending before it numerous applications to authorize the reuse of treated wastewater effluent, including several competing applications in the Colorado and Trinity River Basins.³⁷ The interests competing for rights to reuse the water generally include (1) the

³² TEX. WATER CODE ANN. § 11.151.

³³ *Id.* § 11.147(b) (Vernon Supp. 2004-05).

³⁴ *Id.* § 11.147(d).

³⁵ *Id.* (conditions to maintain water quality of the river or stream to which the permit would apply); *see also id.* § 11.150 (required assessment of effects on water quality in the state).

³⁶ *Id.* § 11.147(e). For a proposed water right in excess of 5,000 acre-feet per year, the TCEQ must assess the impact of the permit on fish and wildlife habitats, and may require the applicant to take reasonable actions to mitigate adverse impacts. *Id.* § 11.152 (Vernon 2000).

³⁷ The TCEQ's rules define "reuse" as "[t]he authorized use for one or more beneficial purposes of use of water that remains unconsumed after the water is used for the original purpose of use and before that water is either disposed

municipalities or other entities treating and discharging the wastewater, (2) the holders of the base water rights, from which the treated effluent is derived, and (3) other, frequently senior, water rights holders in the basin. Although various aspects of the issue have been addressed by both the legislature and the TCEQ, its current resolution is far from clear.

The Texas Legislature addressed reuse of water in Senate Bill 1 in 1997 (“S.B. 1”).³⁸ “Direct reuse” of municipal effluent, e.g., piping the effluent to a park or golf course for irrigation prior to its discharge into a state watercourse, has long been recognized. Texas Water Code § 11.046(c), adopted as part of S.B. 1, provides for such reuse as follows:

Except as specifically provided otherwise in the water right, water appropriated under a permit, certified filing, or certificate of adjudication may, prior to its release into a watercourse or stream, be beneficially used and reused by the holder of [that water right] for the purposes and locations of use provided in the [water right]. Once water has been diverted . . . and then returned to a watercourse or stream, however, it is considered surplus water and therefore subject to reservation for instream uses or beneficial inflows or to appropriation by others unless expressly provided otherwise in the [water right].³⁹

The TCEQ’s “municipal use” definition now includes not only the initial use of treated water from the municipal supply system, but also irrigation and other uses of reclaimed water in lieu of treated water.⁴⁰ Thus, unless a water right contains a restriction requiring the water right holder to discharge some portion of the water diverted back to the stream, a water right holder may make direct reuse of the entire volume of water diverted prior to discharging it back into a watercourse.

B. Competing Approaches to Indirect Reuse of Treated Wastewater Effluent

Proponents of the municipal/discharger interest argue that if the discharger does not intend to abandon its ownership interest upon discharge, it ought to be able to obtain a “bed and banks” authorization from the TCEQ that allows it to divert an equivalent amount of water downstream of the discharge point, less any amounts deducted by special conditions to protect the environment and other water rights holders.⁴¹ Existing senior water right holders, on the other hand, point to Section 11.046(c) as recognizing that the discharger loses its ownership interest upon discharge into a watercourse, making the water available either for new appropriation or for existing appropriators. Holders of the base water right, from which the effluent was derived, point to the final phrase of Section 11.046(c) and argue that, with an

of or discharged or otherwise allowed to flow into a watercourse, lake, or other body of state-owned water.” 30 T.A.C. § 297.1(44).

³⁸ See generally Act of June 2, 1997, 75th Leg., R.S., ch. 1010, 1997 Tex. Gen. Laws 3610 (codified in scattered sections of the Texas Water Code, the Texas Government Code, the Texas Agriculture Code, the Texas Tax Code, and the Texas Health & Safety Code).

³⁹ TEX. WATER CODE ANN. § 11.046(c); 30 T.A.C. § 297.49(a).

⁴⁰ 30 T.A.C. § 297.1(32).

⁴¹ See TEX. WATER CODE ANN. § 11.042; 30 T.A.C. § 297.16.

amendment of the base water right, the loss of ownership upon discharge can be avoided making the appropriation for reuse theirs.

Additionally, the situation is further complicated because rights vary depending upon the source of water from which the effluent is derived. Another S.B. 1 addition, Texas Water Code § 11.042(b),⁴² specifically addresses and authorizes the indirect reuse of groundwater-based effluent or return flows. It states:

A person who wishes to discharge and then subsequently divert and reuse the person's existing return flows derived from privately owned groundwater must obtain prior authorization from [TCEQ] for the diversion and the reuse of these return flows. The authorization may allow for the diversion and reuse by the discharger of existing return flows, less carriage losses, and shall be subject to special conditions if necessary to protect an existing water right that was granted based on the use or availability of these return flows. Special conditions may also be provided to help maintain instream uses and freshwater inflows to bays and estuaries. A person wishing to divert and reuse future increases of return flows derived from privately owned groundwater must obtain authorization to reuse increases in return flows before the increase.⁴³

Note that historically discharged groundwater-based effluent, upon which other water rights and instream uses may have come to depend, is subject to a different standard than new or increased discharges of groundwater-based effluent. Reuse of developed surface water, imported from outside the river basin, would presumably be subject to this same standard because it, like groundwater, represents a new source of supply to the basin, impacting other water rights and environmental flow requirements in the receiving basin in the same manner as a groundwater source.

Section 11.042(c), also added by S.B. 1, is the provision primarily relied upon by advocates of the discharger's continuing right of reuse of surface water. It states in relevant part:

Except as otherwise provided in Subsection (a) of this section, a person who wishes to convey and subsequently divert water in a watercourse or stream must obtain the prior approval of the commission through a bed and banks authorization. The authorization shall allow to be diverted only the amount of water put into a watercourse or stream, less carriage losses and subject to any special conditions that may address the impact of the discharge, conveyance, and diversion on existing permits, certified filings, or certificates of adjudication, instream uses, and freshwater inflows to bays and estuaries.⁴⁴

⁴² Prior to these amendments, Section 11.042 simply authorized the use of the bed and banks of natural streams to deliver stored or conserved water. That provision remains, only slightly modified, as current Section 11.042(a).

⁴³ TEX. WATER CODE ANN. § 11.042(b).

⁴⁴ *Id.* § 11.042(c).

This provision clearly allows the TCEQ to authorize the use of bed and banks to convey water, but does not expressly indicate the type of water addressed, or whether reuse is involved.

The key question that has emerged from consideration of the competing interests is whether a new authorization for indirect reuse amounts to and should be treated as a new appropriation of water, with a new priority date. The question can arise either in the context of a discharger, asserting a right of continuing ownership, that seeks only a “bed and banks” authorization for downstream diversion and use, or in the context of an existing water rights holder that seeks an amendment to add reuse as part of the existing priority of the water right. In either case, existing water right holders will assert that the indirect reuse authorization should only be considered as a new appropriation with a new priority date.

Prior to S.B. 1, it was relatively clear that a new indirect reuse authorization would amount to a new appropriation. Although TCEQ practice and precedent appears to be following this course for authorization of indirect reuse of surface water, the issue is far from clear – and the stakes are very high considering the cost of alternative new sources of water supply.⁴⁵

C. *City of San Marcos v. TCEQ*

A recent opinion of the Third Court of Appeals regarding the bed and banks permit application of the City of San Marcos, while based on an analysis of pre-S.B. 1 law, sheds some interesting light on the legal status of indirect reuse rights to discharged wastewater effluent.⁴⁶ In that case, the court held that there is no common-law right by which the City can retain ownership over its groundwater-derived wastewater effluent after discharging it into a state watercourse.⁴⁷ Narrowly construing the City’s ownership interest under the rule of capture, the court concluded that the City can not discharge groundwater-derived effluent down a state watercourse and then subsequently divert the water downstream “without having obtained an appropriative right over that state water.”⁴⁸

The opinion also touches on the water quality implications of indirect reuse of this treated effluent. The City’s reuse project “depends on mixing its effluent with the spring-fed waters of the San Marcos River,” and the effluent is not fungible with the State’s water in the river.⁴⁹ Thus, notwithstanding the City’s declared intention to reuse its effluent, the court concluded that its discharge of effluent into a state watercourse “constitutes abandonment as a matter of law.”⁵⁰ The appellate court reversed the district court and rendered judgment that the Commission’s

⁴⁵ In the authors’ opinion, a new indirect reuse (unless it is based on groundwater, or developed/imported surface water, that has not been historically discharged) can only be authorized as a new appropriation, junior to all existing water rights.

⁴⁶ See *City of San Marcos v. TCEQ*, 128 S.W.3d 264 (Tex. App.–Austin 2004, pet. denied).

⁴⁷ *Id.* at 266, 279.

⁴⁸ *Id.* at 279.

⁴⁹ *Id.* at 275-76.

⁵⁰ *Id.* at 276-77. In rejecting the City’s and the Commission’s intent argument, the court relied on the principle, implicit in another of its recent cases, that “[i]ntent does not trump physical reality in water law.” *Id.* at 275 (citing *Domel v. City of Georgetown*, 6 S.W.3d 349, 353-54, 360 (Tex. App.–Austin 1999, pet. denied)).

order granting the City's permit be vacated and the City's application be denied.⁵¹ Although a different result would likely be dictated for a groundwater-based discharge under post-S.B. 1 law, the court's ruling may provide guidance for reuse of surface water-based discharges and groundwater-based discharges that have been historically discharged.

V. CONCLUSION

The interaction between water rights law in the field of water quality regulation and the impact of water quality regulation in the field of water rights can only increase in the future. As many entities increasingly compete for a dwindling resource, attorneys in the water quality area must pay more attention to water rights and attorneys in the water rights area must pay more attention to water quality.

⁵¹ *Id.* at 278-79.

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1 UNITED STATES COURT OF APPEALS

2 FOR THE SECOND CIRCUIT

3
4 August Term, 2004

5 (Argued: December 13, 2004 Decided: February 28, 2005)

6 Docket Nos. 03-4470 (L), 03-4621 (C), 03-4631 (C), 03-4641 (C), 03-4849 (C),
7 04-40199 (C), 03-40229 (C)
8

9 WATERKEEPER ALLIANCE, INC., AMERICAN FARM BUREAU FEDERATION, NATIONAL CHICKEN
10 COUNCIL, NATIONAL PORK PRODUCERS COUNCIL, AMERICAN LITTORAL SOCIETY, SIERRA CLUB,
11 INC., NATURAL RESOURCES DEFENSE COUNCIL, INC.,

12 *Petitioners/Intervenors,*

13 —v.—

14 UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, MICHAEL O. LEAVITT, Administrator,
15 United States Environmental Protection Agency

16 *Respondents.*
17

18 B e f o r e :

19 OAKES, KATZMANN, and WESLEY, *Circuit Judges.*
20

21
22 The petitioners challenge an administrative rule promulgated by the United States Environmental
23 Protection Agency in order to regulate the emission of water pollutants by concentrated animal
24 feeding operations. *See* National Pollutant Discharge Elimination System Permit Regulation and
25 Effluent Limitation Guidelines and Standards for Concentrated Animal Feeding Operations, 68
26 Fed. Reg. 7176, 7179 (Feb. 12, 2003) (codified at 40 C.F.R. Parts 9, 122, 123 and 412). The
27 petitions for review are granted in part and denied in part.
28

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30 *Network*;

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32
33 KATZMANN, *Circuit Judge*:

34 In this consolidated petition, we review various challenges to a regulation promulgated by
35 the United States Environmental Protection Agency under the Clean Water Act in order to abate

1 and control the emission of water pollutants from concentrated animal feeding operations.
2 While we deny many of the challenges here brought, we find that several aspects of the
3 regulation violate the express terms of the Clean Water Act or are otherwise arbitrary and
4 capricious under the Administrative Procedure Act. Accordingly, we grant the petitions in part
5 and deny the petitions in part.

6 BACKGROUND

7 A. Statutory Background

8 The Clean Water Act (the “Act”) is a cornerstone of the federal effort to protect the
9 environment. “[D]esigned to ‘restore and maintain the chemical, physical, and biological
10 integrity of the Nation’s waters,’” *No Spray Coalition, Inc. v. City of New York*, 351 F.3d 602,
11 604 (2d Cir. 2003) (PNL, RDS, Korman, D.J.) (quoting 33 U.S.C. § 1251(a)), the Act is the
12 principal legislative source of the EPA’s authority – and responsibility – to abate and control
13 water pollution. *See* 33 U.S.C. §§ 1311(a), 1342, 1362.

14 By way of very brief overview, the Act formally prohibits the “discharge of a pollutant”¹
15 by “any person”² from any “point source”³ to navigable waters except when authorized by a

¹ The term “discharge of a pollutant” is defined to mean, *inter alia*, “any addition of any pollutant to navigable waters from any point source.” 33 U.S.C. § 1362(12)(A).

² The term “person” is defined to mean “an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body.” 33 U.S.C. §1362 (5).

³ The term “point source” is defined to mean “any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged.” 33 U.S.C. § 1362 (14). Notably, the Act includes “concentrated animal feeding operation” as an example of a point source. *Id.*

1 permit issued under the National Pollutant Discharge Elimination System (“NPDES”). *See* 33
2 U.S.C. §§ 1311(a), 1342. This means, as a practical matter, that the EPA primarily advances the
3 Act’s objectives – including the ambitious goal that water pollution be not only reduced, but
4 eliminated, *see* 33 U.S.C. § 1251(a)(1) – through the use of NPDES permits that, while
5 authorizing some water pollution, place important restrictions on the quality and character of that
6 licit pollution.

7 NPDES permits are issued either by the EPA, itself, or by the states in a federally
8 approved permitting system. *See* 33 U.S.C. § 1342. Regardless of the issuer, every NPDES
9 permit is statutorily required to set forth, at the very least, “effluent limitations,” that is, certain
10 “restriction[s] ... on [the] quantities, rates, and concentrations of chemical, physical, biological,
11 and other constituents which are discharged from point sources into navigable waters.” *S.*
12 *Florida Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 158 L.Ed.2d 264, 124 S.
13 Ct. 1537, 1541 (2004) (“Generally speaking, the NPDES requires dischargers to obtain permits
14 that place limits on the type and quantity of pollutants that can be released into the Nation’s
15 waters.”).

16 The specific effluent limitations contained in each individual NPDES permit are dictated
17 by the terms of more general “effluent limitation guidelines” (“ELGs”), which are separately
18 promulgated by the EPA. *Cf. EPA v. California, ex rel. State Water Res. Control Bd.*, 426 U.S.
19 200, 205 (1976) (“An NPDES permit serves to transform generally applicable effluent limitations
20 and other standards including those based on water quality into the obligations . . . of the
21 individual discharger.”). ELGs, and the effluent limitations established in accordance with them,

1 are technology-based restrictions on water pollution. They are technology-based, because they
2 are established in accordance with various technological standards that the Act statutorily
3 provides and that, pursuant to the Act, vary depending upon the type of pollutant involved, the
4 type of discharge involved, and whether the point source in question is new or already existing.
5 We will discuss these with greater detail below. For now, we note simply that the technology
6 standards for already existing point sources include (1) the best available technology
7 economically achievable, *see* 33 U.S.C. § 1311(b)(2)(A); (2) the best conventional pollutant
8 control technology, *see* 33 U.S.C. § 1314(b)(2)(A); and (3) the best practicable control
9 technology currently available, *see* 33 U.S.C. § 1314(b)(1)(A). The technology standard for new
10 point sources, which is commonly referred to as a new source performance standard, is based on
11 the best available demonstrated control technology, *see* 33 U.S.C. § 1316.

12 We also note that where effluent limitations prove insufficient to attain or maintain
13 certain water quality standards, the Act requires NPDES permits to include additional water
14 quality based effluent limitations. *See* 33 U.S.C. §§ 1311(b)(1), 1312(a). Overall, we hope to
15 make clear that the NPDES permit is critical to the successful implementation of the Act because
16 – by setting forth technology-based effluent limitations and, in certain cases, additional water
17 quality based effluent limitations – the NPDES permit “defines, and facilitates compliance with,
18 and enforcement of, a preponderance of a discharger’s obligations under the [Act].” *California,*
19 *ex rel. State Water Res. Control Bd.*, 426 U.S. at 205.

20 B. Regulatory Background

1 In the consolidated petitions before us, we are asked to review, *inter alia*, the permitting
2 requirements and effluent limitation guidelines promulgated by the EPA in its attempt to regulate
3 the emission of water pollutants from so-called concentrated animal feeding operations
4 (“CAFOs”). Before reviewing these challenges, however, a few introductory words about
5 CAFOs themselves are in order.

6 CAFOs are the largest of the nation’s 238,000 or so “animal feeding operations” –
7 “agriculture enterprises where animals are kept and raised in confinement.” National Pollutant
8 Discharge Elimination System Permit Regulation and Effluent Limitation Guidelines and
9 Standards for Concentrated Animal Feeding Operations, 68 Fed. Reg. 7176, 7179 (Feb. 12, 2003)
10 (codified at 40 C.F.R. Parts 9, 122, 123 and 412) [hereinafter “Preamble to the Final Rule”].⁴
11 Such “agriculture enterprises” are not, however, of a kind the Founding Fathers likely would
12 have envisioned populating America’s “yeoman republic.” *See generally*, STANLEY ELKINS AND
13 ERIC MCKITRICK, *Jefferson and the Yeoman Republic*, THE AGE OF FEDERALISM 195-208 (1972).
14 On the contrary, CAFOs are large-scale industrial operations that raise extraordinary numbers of

⁴Under 40 C.F.R. 122.23(b)(1), an animal feeding operation (“AFO”) is defined to mean:

a lot or facility (other than an aquatic animal production facility) where the following conditions are met:

- (i) Animals (other than aquatic animals) have been, are, or will be stabled or confined and fed or maintained for a total of 45 days or more in any 12-month period, and
- (ii) Crops, vegetation, forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility.

1 livestock.⁵ For example, a “Medium CAFO”⁶ raises as many as 9,999 sheep, 54,999 turkeys, or

⁵ The CAFO Rule defines a concentrated animal feeding operation as “an AFO [animal feeding operation] that is defined as a Large CAFO or as a Medium CAFO by the terms of this paragraph, or that is designated as a CAFO in accordance with paragraph (c) of this section.” 40 C.F.R. § 122.23(b)(2). Paragraph (c) provides that an appropriate authority (either a state director, the EPA administrator or both) may designate an AFO as a CAFO upon a determination that the AFO is “a significant contributor of pollutants to waters of the United States.” 40 C.F.R. § 122.23(c).

⁶ According to 40 C.F.R. § 122.23(b)(6), the term Medium CAFO includes:

... any AFO with the type and number of animals that fall within any of the ranges listed in paragraph (b)(6)(i) of this section and which has been defined or designated as a CAFO. An AFO is defined as a Medium CAFO if:

(i) The type and number of animals that it stables or confines falls within any of the following ranges:

- (A) 200 to 699 mature dairy cows, whether milked or dry;
- (B) 300 to 999 veal calves;
- (C) 300 to 999 cattle other than mature dairy cows or veal calves. Cattle includes but is not limited to heifers, steers, bulls and cow/calf pairs;
- (D) 750 to 2,499 swine each weighing 55 pounds or more;
- (E) 3,000 to 9,999 swine each weighing less than 55 pounds;
- (F) 150 to 499 horses;
- (G) 3,000 to 9,999 sheep or lambs;
- (H) 16,500 to 54,999 turkeys;
- (I) 9,000 to 29,999 laying hens or broilers, if the AFO uses a liquid manure handling system;
- (J) 37,500 to 124,999 chickens (other than laying hens), if the AFO uses other than a liquid manure handling system;
- (K) 25,000 to 81,999 laying hens, if the AFO uses other than a liquid manure handling system;
- (L) 10,000 to 29,999 ducks (if the AFO uses other than a liquid manure handling system); or
- (M) 1,500 to 4,999 ducks (if the AFO uses a liquid manure handling system); and

(ii) Either one of the following conditions are met:

- (A) Pollutants are discharged into waters of the United States through a man-made ditch, flushing system, or other similar man-made device; or
- (B) Pollutants are discharged directly into waters of the United States which

1 124,999 chickens (other than laying hens).⁷ “Large CAFOs”⁸ raise even more staggering
2 numbers of livestock – sometimes, raising literally millions of animals in one location.

3 Economically, these CAFOs generate billions of dollars of revenue every year.⁹ The EPA

originate outside of and pass over, across, or through the facility or otherwise come into direct contact with the animals confined in the operation.

⁷ However, the animal feeding operation raising the chickens must use something “other than a liquid manure handling system.” *See* 40 C.F.R. 122.23(b)(6)(J).

⁸ 40 C.F.R. § 122(b)(3) classifies an animal feeding operation as a Large CAFO if it:

... stables or confines as many as or more than the number of animals specified in any of the following categories:

- (i) 700 mature dairy cows, whether milked or dry;
- (ii) 1,000 veal calves;
- (iii) 1,000 cattle other than mature dairy cows or veal calves. Cattle includes but is not limited to heifers, steers, bulls and cow/calf pairs.
- (iv) 2,500 swine each weighing 55 pounds or more;
- (v) 10,000 swine each weighing less than 55 pounds;
- (vi) 500 horses;
- (vii) 10,000 sheep or lambs;
- (viii) 55,000 turkeys;
- (ix) 30,000 laying hens or broilers, if the AFO uses a liquid manure handling system;
- (x) 125,000 chickens (other than laying hens), if the AFO uses other than a liquid manure handling system
- (xi) 82,000 laying hens, if the AFO uses other than a liquid manure handling system;
- (xii) 30,000 ducks (if the AFO uses other than a liquid manure handling system);
- or
- (xiii) 5,000 ducks (if the AFO uses a liquid manure handling system).

⁹ *See, e.g.,* EPA, DEVELOPMENT DOCUMENT FOR THE FINAL REVISIONS TO THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM REGULATION AND THE EFFLUENT GUIDELINES FOR THE CONCENTRATED ANIMAL FEEDING OPERATIONS, 4-35 (Dec. 2002) (noting that “[b]y 1997, the value of poultry production exceeded \$21.6 billion, and much of the poultry output was generated by corporate producers on large facilities producing more than 100,000 birds.” (citations omitted)).

1 has focused on the industry because CAFOs also generate millions of tons of manure every
2 year,¹⁰ and “when improperly managed, [this manure] can pose substantial risks to the
3 environment and public health.” Preamble to the Final Rule at 7179.

4 Animal waste includes a number of potentially harmful pollutants. According to the
5 EPA, the pollutants associated with CAFO waste principally include: (1) nutrients such as
6 nitrogen and phosphorus; (2) organic matter; (3) solids, including the manure itself and other
7 elements mixed with it such as spilled feed, bedding and litter materials, hair, feathers and animal
8 corpses; (4) pathogens (disease-causing organisms such as bacteria and viruses); (5) salts; (6)
9 trace elements such as arsenic; (7) odorous/volatile compounds such as carbon dioxide, methane,
10 hydrogen sulfide, and ammonia; (8) antibiotics; and (9) pesticides and hormones. *See* National
11 Pollutant Discharge Elimination System Permit Regulation and Effluent Limitations Guidelines
12 and Standards for Concentrated Animal Feeding Operations, 66 Fed. Reg. 2960, 2976-79
13 (proposed Jan. 12, 2001) [hereinafter “Proposed Rule”]; *see also* Preamble to the Final Rule at
14 7181.

15 These pollutants can infiltrate the surface waters in a variety of ways including spills and
16 other dry-weather discharges, overflows from storage “lagoons,” and discharge to the air coupled
17 with subsequent redeposition on the landscape. *See* Preamble to the Final Rule at 7181. Perhaps
18 the most common way by which pollutants reach the surface waters is through improper “land

¹⁰ The USDA estimates that operations that confine livestock and poultry generate about 500 million tons of animal manure each year – over three times more raw waste than humans generate in the United States, according to the EPA. Preamble to the Final Rule at 7180.

1 application.” Land application, the predominant means by which CAFOs dispose of animal
2 waste,¹¹ is a process by which manure, litter, and other process wastewaters are spread onto
3 fields controlled by CAFOs. As all parties here agree, when properly land-applied, manure,
4 litter, and other process wastewaters can act as a fertilizer, because “land application of CAFO
5 waste fosters the reuse of the nitrogen, phosphorus, and potassium in these wastes for crop
6 growth.” EPA, STATE COMPENDIUM: PROGRAMS AND REGULATORY ACTIVITIES RELATED TO
7 ANIMAL FEEDING OPERATIONS 13 (May 2002). However, when waste is excessively or
8 improperly land-applied, the nutrients contained in the waste become pollutants that can and
9 often do run off into adjacent waterways or leach into soil and ground water. *See id.*; Preamble
10 to the Final Rule at 7180-81.

11 In light of these environmental threats, the EPA first promulgated regulations for CAFOs
12 in 1974 and 1976 – regulations that, very generally speaking, defined the types of animal feeding
13 operations that qualify as CAFOs, set forth various NPDES permit requirements, and established
14 effluent limitation guidelines for CAFOs. *See* 41 Fed. Reg. 11,458 (Mar. 18, 1976); 39 Fed. Reg.
15 5704 (Feb. 14, 1974). After having been sued, in 1989, for failing to publish a plan to revise
16 existing effluent limitations for the industry pursuant to 33 U.S.C. § 1314(m),¹² the EPA, on

¹¹“Several estimates indicate that 90% of CAFO-generated waste is land applied.” EPA, STATE COMPENDIUM: PROGRAMS AND REGULATORY ACTIVITIES RELATED TO ANIMAL FEEDING OPERATIONS 13 (May 2002).

¹² That suit, brought by the NRDC and Public Citizen, was resolved by a consent decree in which the EPA agreed to propose new effluent limitation guidelines for the swine, poultry, beef and dairy subcategories of CAFOs. *See* Consent Decree, as amended, *NRDC v. Reilly*, modified sub. nom., *NRDC v. Whitman*, No. 89-2980 (D.D.C. 1/31/1992).

1 January 12, 2001, proposed to “revise and update” the first set of CAFO regulations. *See*
2 Proposed Rule at 2960. The EPA explained, in proposing its revisions, that the new rule aimed to
3 address not only inadequate compliance with existing policy, but also the “changes that have
4 occurred in the animal production industries.” Proposed Rule at 2972. Specifically, the EPA pointed
5 to the “continued trend toward fewer but larger operations, coupled with greater emphasis on more
6 intensive production methods and specialization,” a trend that – along with “increased reports of
7 large-scale discharges from these facilities” and “continued runoff” – had contributed to “the
8 significant increase in nutrients and resulting impairment of many U.S. waterways.” *Id.*

9 The EPA received approximately 11,000 public comments on the proposed rule, *see*
10 Preamble to the Final Rule at 7187, as well as an additional 450 or so comments following the
11 publication, in November 2001 and July 2002, of Notices of Data Availability (documents that
12 summarized new data and information presented to the EPA). *See id.* at 7187-88. Ultimately, on
13 February 12, 2003, the EPA promulgated its Final CAFO Rule (“CAFO Rule” or “Rule”). *See* 40
14 C.F.R. §§ 9, 122, 123, 412; *see also* Preamble to the Final Rule at 7176.

15 The aspects of the Rule most relevant to the petitions before us are as follows:

16 (1) The Duty to Apply for an NPDES Permit

17 The Rule requires that all CAFO owners or operators must apply for an individual NPDES
18 permit or submit a notice of intent for coverage under an NPDES general permit. *See* 40 C.F.R. §
19 122.23(d)(1). There is, however, an exception: Section 122.23(d)(2) provides, in effect, that an
20 owner or operator of a Large CAFO need not seek coverage under an NPDES permit if the owner

1 or operator secures a determination from the director of the relevant permitting authority that the
2 Large CAFO has “no potential to discharge” manure, litter or process wastewater. *See* 40 C.F.R. §
3 122.23(d)(2); *see also id.* at § 122.23(f) (describing the process by which a Large CAFO may secure
4 a determination that it has “no potential to discharge”).

5 (2) NPDES Permit Requirements

6 The Rule includes the requirement that each CAFO develop and implement a nutrient
7 management plan. Such a nutrient management plan must, under the Rule:

- 8 (i) Ensure adequate storage of manure, litter, and process wastewater, including
9 procedures to ensure proper operation and maintenance of the storage facilities;
- 10 (ii) Ensure proper management of mortalities (i.e. dead animals) to ensure that they
11 are not disposed of in a liquid manure, storm water, or process wastewater storage
12 or treatment system that is not specifically designed to treat animal mortalities;
- 13 (iii) Ensure that clean water is diverted, as appropriate, from the production area;
- 14 (iv) Prevent direct contact of confined animals with waters of the United States;
- 15 (v) Ensure that chemicals and other contaminants handled on-site are not disposed
16 of in any manure, litter, process wastewater, or storm water storage or treatment
17 system unless specifically designed to treat such chemicals and other contaminants;
- 18 (vi) Identify appropriate site specific conservation practices to be implemented,
19 including as appropriate buffers or equivalent practices, to control runoff of
20 pollutants to waters of the United States;
- 21 (vii) Identify protocols for appropriate testing of manure, litter, process wastewater,
22 and soil;
- 23 (viii) Establish protocols to land apply manure, litter or process wastewater in
24 accordance with site specific nutrient management practices that ensure appropriate
25 agricultural utilization of the nutrients in the manure, litter or process wastewater;
26 and
- 27 (ix) Identify specific records that will be maintained to document the implementation
28 and management of the minimum elements described [above].

29
30 40 C.F.R. § 122.42(e)(1)(i)-(ix). Additionally, the effluent limitation guidelines for CAFOs (which

1 we will describe in a moment) further require that each Large CAFO develop and implement a
2 nutrient management plan that, *inter alia*, includes a waste “application rate” that “minimize[s]
3 phosphorus and nitrogen transport from the field to surface waters.” 40 C.F.R. § 412.4(c)(2).

4 (3) The Discharges Subject to NPDES Requirements

5 The Rule provides, in § 122.23(e), that all land application discharges from a CAFO are
6 subject to NPDES requirements, i.e., any discharge of manure, litter, or process wastewater that
7 results from the land application of these materials by a CAFO is a discharge that is regulable and
8 subject to NPDES permit requirements. 40 C.F.R. § 122.23(e). Where, however, CAFOs land-apply
9 waste in accordance with site-specific nutrient management practices that ensure appropriate
10 agricultural utilization of the nutrients in that waste, any subsequent “precipitation-related” discharge
11 is considered to be an “agricultural stormwater discharge” that is, under the Act, exempt from
12 regulation. *See id.*; 33 U.S.C. § 1362(14).

13 (4) Effluent Limitation Guidelines

14 The Rule establishes effluent limitation guidelines (“ELGs”) that apply to land application
15 discharges by Large CAFOs and to the “production areas”¹³ of Large CAFOs.¹⁴ Two general

¹³ 40 C.F.R. § 122.23(b)(8) defines production area as:
that part of an AFO that includes the animal confinement area, the manure storage area, the raw materials storage area, and the waste containment areas. The animal confinement area includes but is not limited to open lots, housed lots, feedlots, confinement houses, stall barns, free stall barns, milkrooms, milking centers, cowyards, barnyards, medication pens, walkers, animal walkways, and stables. The manure storage area includes but is not limited to lagoons, runoff ponds, storage sheds, stockpiles, under house or pit storages, liquid impoundments, static piles, and composting piles. The raw materials storage area includes but is not limited to feed

1 comments about these ELGs are in order. First, although the EPA usually establishes quantitative
2 or numerical ELGs, the EPA here promulgated “best management practices,” which are qualitative
3 or non-numerical ELGs for Large CAFOs, but which, we note, are still technology-based because
4 they are based on the technology standards prescribed by the Act. *See* 40 C.F.R. § 412.4; *see also*
5 40 C.F.R. § 122.44(k) (describing the circumstances in which the EPA may promulgate “best
6 management practices” in the place of numerical ELGs). Second, because the EPA here decided to
7 organize Large CAFOs into four subcategories (depending upon the types of animals present), the
8 ELGs are also organized into four subcategories. *See* Preamble to the Final Rule at 7208.
9 Additionally, we note that, with respect to land application, best management practices include, most
10 importantly, the requirement that Large CAFOs “develop and implement a nutrient management
11 plan” that, *inter alia*, sets an application rate that minimizes the transport of phosphorus and nitrogen
12 from the land application field to surface waters. 40 C.F.R. §§ 412.4(c)(1)-(2). The land application
13 best management practices also provide for manure and soil sampling, inspection of land application
14 equipment and various setback requirements. *See* 40 C.F.R. § 412.4(c)(3)-(5). With respect to the
15 ELGs for production areas, best management practices include various requirements designed to
16 minimize the possibility of overflows, such as mandatory inspections of relevant equipment and the

silos, silage bunkers, and bedding materials. The waste containment area includes but is not limited to settling basins, and areas within berms and diversions which separate uncontaminated storm water. Also included in the definition of production area is any egg washing or egg processing facility, and any area used in the storage, handling, treatment, or disposal of mortalities [dead animals].

¹⁴ The ELGs promulgated by the CAFO Rule apply only to *Large* CAFOs. *See* Preamble to the Final Rule at 7208.

1 installation of depth markers in surface and liquid impoundments (e.g., lagoons, ponds, and tanks).
2 *See* 40 C.F.R. § 412.37; Preamble to the Final Rule at 7214-21.

3 DISCUSSION

4 Two sets of petitioners bring challenges to the CAFO Rule: the “Environmental
5 Petitioners” (Waterkeeper Alliance, Inc., Sierra Club, Natural Resources Defense Council, Inc.,
6 and the American Littoral Society) and the “Farm Petitioners” (American Farm Bureau
7 Federation, National Chicken Council, and the National Pork Producers Council).¹⁵ *Amici*
8 *curiae*, who represent various environmental and public health interests, join the Environmental
9 Petitioners in some of their challenges.

10 All the challenges we here consider – most of which are brought by the Environmental
11 Petitioners – can be divided into three general categories: (1) challenges to the permitting scheme
12 established by the CAFO Rule; (2) challenges to the types of discharges subject to regulation
13 under the CAFO Rule; and (3) challenges to the effluent limitation guidelines established by the
14 CAFO Rule.¹⁶ We will address each category in turn.

¹⁵ We refer to both sets of petitioners as they refer to themselves.

¹⁶ The Farm Petitioners also challenge the CAFO Rule for impermissibly assuming jurisdiction over all “surface waters,” when the Clean Water Act confers upon the EPA the authority to regulate only “navigable waters,” a term defined by the Act to mean “waters of the United States, including the territorial seas.” 33 U.S.C. § 1362(7). The EPA has clarified, however, that the CAFO Rule employs the term “surface waters” only in an effort to distinguish surface water from groundwater and that the Agency fully recognizes that its regulatory authority encompasses only the “waters of the United States, including the territorial seas.” Given these clarifications, we deny the Farm Petitioners’ challenge as moot.

1 To the extent we are asked to review whether some aspect of the CAFO Rule violates the
2 Clean Water Act, our inquiry is governed by the standards set forth in *Chevron U.S.A. Inc. v.*
3 *Natural Resources Defense Council, Inc.* See 467 U.S. 837 (1984). See also *Public Citizen, Inc.*
4 *v. Mineta*, 340 F.3d 39, 53 (2d Cir. 2003). If Congress has “directly spoken to the precise
5 question at issue” and “the intent of Congress is clear, that is the end of the matter; for the court,
6 as well as the agency, must give effect to the unambiguously expressed intent of Congress.”
7 *Chevron*, 467 U.S. at 842-43 (footnote omitted). If, however, we determine that the statute is
8 silent or ambiguous with respect to the specific question at issue, then we consider “whether the
9 agency’s answer is based on a permissible construction of the statute.” *Id.* at 843.

10 To the extent we are asked to review whether some aspect of the CAFO Rule violates the
11 Administrative Procedure Act because it is “arbitrary, capricious, an abuse of discretion, or
12 otherwise not in accordance with law,” 5 U.S.C. § 706(2)(A), our inquiry is governed by the
13 standard set forth in *Motor Vehicle Manufacturers’ Association of the United States, Inc. v. State*
14 *Farm Mutual Automobile Insurance Company*. See 463 U.S. 29 (1983). See also *Public*
15 *Citizen*, 340 F.3d at 53. To determine whether an agency has acted in an arbitrary and capricious
16 fashion, we ask whether the agency has “examine[d] the relevant data and articulate[d] a
17 satisfactory explanation for its action including a rational connection between the facts found and
18 the choice made.” *State Farm*, 463 U.S. at 42. Then, “[i]n reviewing that explanation, we must
19 consider whether the decision was based on a consideration of the relevant factors and whether
20 there has been a clear error of judgment.” *Id.* Normally, we must deem arbitrary and capricious
21 an agency rule where “the agency has relied on factors which Congress has not intended it to

1 consider, entirely failed to consider an important aspect of the problem, offered an explanation
2 for its decision that runs counter to the evidence before the agency, or is so implausible that it
3 could not be ascribed to a difference in view or the product of agency expertise.” *Id.* at 43
4 (internal quotations and citations omitted).

5 With this background in mind, we turn now to the various challenges.

6 A. Challenges to the CAFO Rule Permitting Scheme

7 1. Failure to Regulate

8 The Environmental Petitioners broadly indict the CAFO Rule as countenancing the
9 creation of an “impermissible self-regulatory permitting regime.” More precisely, the
10 Environmental Petitioners argue that the CAFO Rule is unlawful because: (1) it empowers
11 NPDES authorities to issue permits to Large CAFOs in the absence of any meaningful review of
12 the nutrient management plans those CAFOs have developed; and (2) it fails to require that the
13 terms of the nutrient management plans be included in the NPDES permits. We agree with the
14 Environmental Petitioners on both counts.

15 a. Failure to Require Permitting Authority Review

16 The Clean Water Act demands regulation in fact, not only in principle. Under the Act,
17 permits authorizing the discharge of pollutants may issue only where such permits *ensure* that
18 every discharge of pollutants will comply with all applicable effluent limitations and standards.
19 Section 1342(a)(1) of Title 33 provides, for example, that when the EPA is, itself, issuing
20 NPDES permits, the EPA may issue a permit for the discharge of any pollutant or combination of

1 pollutants “upon condition that such discharge will meet ... all applicable requirements [including
2 the effluent limitations statutorily required by 33 U.S.C. § 1311].” The Act further provides that
3 the EPA “shall prescribe conditions for such permits *to assure compliance with* [all applicable
4 requirements, including effluent limitations].” 33 U.S.C. § 1342(a)(2) (emphasis added).
5 Similarly, 33 U.S.C. § 1342(b) allows states to distribute NPDES permits only where, *inter alia*,
6 the state permitting programs “*apply, and insure compliance with*, any applicable [effluent
7 limitations and standards].” 33 U.S.C. § 1342(b) (emphasis added).¹⁷

8 By failing to provide for permitting authority review of the nutrient management plans,
9 the CAFO Rule plainly violates these statutory commandments and is otherwise arbitrary and
10 capricious under the Administrative Procedure Act. The requirement to develop and implement
11 a nutrient management plan is, after all, one of the “best management practices” that constitute
12 the effluent limitation guidelines for land application by Large CAFOs. *See* 40 C.F.R. §
13 412.4(c)(1). But not just *any* nutrient management plan suffices under the Rule. On the contrary,
14 the effluent limitation guidelines expressly require that Large CAFOs develop and implement a
15 nutrient management plan that:

16 incorporates the requirements of paragraphs (c)(2) through (c)(5) of this section
17 based on a field-specific assessment of the potential for nitrogen and phosphorus
18 transport from the field and that addresses the form, source, amount, timing, and
19 method of application of nutrients on each field to achieve realistic production
20 goals, while minimizing nitrogen and phosphorus movement to surface waters.

21 *Id.* Accordingly, in order to comply with the effluent limitations for land application of manure,

¹⁷ We note that the EPA has authorized 45 States and the Virgin Islands to administer the NPDES program. *See* Preamble to the Final Rule at 7185.

1 litter, and process wastewater, Large CAFOs must, *inter alia*, develop and implement nutrient
2 management plans that, pursuant to paragraph(c)(2), include “application rates” that “minimize
3 phosphorus and nitrogen transport from the field to surface waters in compliance with the
4 technical standards for nutrient management established by the Director.” *See* 40 C.F.R. §
5 412.4(c)(2).

6 As presently constituted, the CAFO Rule does nothing to *ensure* that each Large CAFO
7 has, in fact, developed a nutrient management plan that satisfies the above requirements. The
8 CAFO Rule does nothing to ensure, in other words, that each Large CAFO will comply with all
9 applicable effluent limitations and standards. This is because, most glaringly, the CAFO Rule
10 fails to require that permitting authorities review the nutrient management plans developed by
11 Large CAFOs before issuing a permit that authorizes land application discharges.

12 A recent decision of the Ninth Circuit supports the conclusion we here reach. In
13 *Environmental Defense Center, Inc. v. EPA* (“EDC”), the Ninth Circuit considered a challenge to
14 a “Phase II” EPA rule for municipal storm sewer systems. *See* 344 F.3d 832 (9th Cir. 2003),
15 *cert. denied*, *Texas Cities Coalition on Stormwater v. EPA*, 124 S.Ct. 2811 (2004). Among other
16 things, the Phase II Rule allowed small municipal storm sewer systems to seek permission to
17 discharge pollutants by submitting an individualized set of best management practices designed
18 by each municipal storm sewer system (“stormwater management plans”), either in the form of
19 an individual permit application or in the form of a notice of intent to comply with a general
20 permit. *See EDC*, 344 F.3d at 842. So long as a notice of intent included a stormwater
21 management plan, the EPA deemed a municipal storm sewer system to be in compliance with the

1 relevant standards of the Clean Water Act, including the standard that municipal stormwater
2 pollution be reduced to the “maximum extent practicable.” *See id.* at 855; 33 U.S.C. §
3 1342(p)(3)(B)(iii); 40 C.F.R. § 123.35. The Phase II Rule did not require NPDES authorities to
4 review the stormwater management plans themselves.

5 The Ninth Circuit held, however, that the failure to require permitting authority review of
6 the stormwater management plans violated the Clean Water Act.¹⁸ While the Ninth Circuit was
7 quick to laud “[i]nvolving regulated parties in the development of individual stormwater
8 pollution control programs,” it emphasized that “programs that are designed by regulated parties
9 must, in every instance, be subject to meaningful review by an appropriate regulating entity to
10 ensure that each such program reduces the discharge of pollutants to the maximum extent
11 practicable [i.e., the relevant statutory standard].” *EDC*, 344 F.3d at 856. The Phase II Rule, by
12 contrast, failed to require that the relevant permitting authorities review the stormwater
13 management plans to “ensure that the measures that any given operator of a [small municipal
14 storm sewer system] has decided to undertake will *in fact* reduce discharges to the maximum
15 extent practicable.” *Id.* at 855 (emphasis in original). Accordingly, the Phase II Rule provided no

¹⁸ Admittedly, the Ninth Circuit predicated its holding on a violation of a statutory provision different from the provisions at issue in this case. To wit, the Ninth Circuit held that the Phase II Rule violated 33 U.S.C. § 1342(p)(3)(B)(iii), a provision that specifically pertains to municipal storm sewer discharges and that allows permits for such discharges to issue only where the permits “require controls to reduce the discharge of pollutants to the maximum extent practicable.” 33 U.S.C. § 1342(p)(3)(B)(iii). *See EDC*, 344 F.3d at 855-56. This is, however, a distinction without a difference. The demand that permits authorizing municipal storm sewer discharges must “require controls” is, in sum and substance, identical to the demand that permits authorizing discharges from *other* point sources must “assure compliance with” applicable effluent limitations. Both provisions require regulation of discharges *in fact*.

1 safeguard against a municipal storm sewer system’s “misunderstanding or misrepresenting its
2 own stormwater situation and proposing a set of minimum measures for itself that would reduce
3 discharges by far less than the maximum extent practicable.” *Id.*

4 Like the Phase II Rule, the CAFO Rule does not require that NPDES permitting
5 authorities review the nutrient management plans to ensure that the nutrient management plans
6 designed by the Large CAFOs will *in fact* reduce land application discharges in a way that
7 “achieve[s] realistic production goals, while minimizing nitrogen and phosphorus movement to
8 surface waters.” 40 C.F.R. § 412.4(c)(1). Like the Phase II Rule, the CAFO Rule does not
9 adequately prevent Large CAFOs “from misunderstanding or misrepresenting” their specific
10 situation and adopting improper or inappropriate nutrient management plans, with improper or
11 inappropriate waste application rates.¹⁹

12 The EPA offers two principal arguments in defense of the permitting scheme, neither of
13 which we find to be persuasive. First, the EPA argues that the nutrient management plan does
14 not, itself, constitute an effluent limitation guideline but is, instead, “simply a planning tool” to

¹⁹ There may well be reason to fear that Large CAFOs may misunderstand their specific situation and prepare inadequate nutrient management plans as a result. Even the EPA has acknowledged that crafting proper waste application rates is a complicated task – that is why the EPA expressly recommended, but notably did not require, that waste application rates be prepared by those who are “competent in or have an understanding of a number of technical areas, including soil science and soil fertility, nutrient application and management, crop production, soil and manure testing and results interpretation, fertilizer materials and their characteristics, BMPs [best management practices] for the management of nutrients and water, and applicable laws and regulations.” Preamble to the Final Rule at 7213. Tellingly, the EPA also specifically recognized, in the Preamble to the CAFO Rule, that “USDA, and other organizations such as the American Society of Agronomy, Crop Science Society of America, Soil Science Society of America, and a number of land grant universities, recommend that nutrient management plans be prepared by trained and certified specialists.” *Id.*

1 help CAFOs comply with the effluent limitations. Accordingly, EPA contends that it is not
2 statutorily compelled to require permitting authority review of the plans. We reject this
3 argument. For one thing, we believe that the terms of the nutrient management plans are
4 *themselves* effluent limitations, for reasons we state in Section A.1.b, *infra*. By failing to require
5 permitting authority review of nutrient management plans, the CAFO Rule thus allows permits to
6 issue that do not assure compliance with all applicable effluent limitations. Even assuming,
7 *arguendo*, that EPA is correct and the nutrient management plan is not, itself, an effluent
8 limitation, EPA’s argument still fails on its own terms. For while EPA denies that the nutrient
9 management plan is itself an effluent limitation, even the EPA concedes, as it must, that the
10 requirement to develop and implement a nutrient management plan *is* an effluent limitation; this
11 requirement is, after all, one of the “best management practices” required by the CAFO Rule.
12 *See* 40 C.F.R. § 412.4 (c)(1). The CAFO Rule – by failing to provide for permitting authority
13 review – still does not *ensure* that each Large CAFO has, in fact, developed and implemented a
14 nutrient management plan that satisfies the requirements of 40 C.F.R. § 412(c)(1).

15 Second, the EPA argues that there is no *need* for permitting authority review because the
16 Rule provides Large CAFOs with little room for discretion – and thus little room for error – in
17 setting their waste application rates. This is true, the EPA argues, because the Rule requires
18 states to develop “technical standards” based on certain “field-specific assessment[s]” and further
19 requires Large CAFOs to adopt application rates that comply with those technical standards. *See*
20 40 C.F.R. § 412.4(c)(2); 40 C.F.R. § 412.4(c)(1). However, while state technical standards will
21 reduce discretion on the part of the Large CAFOs, they will not eliminate it. State technical

standards are based on *field*-specific assessments. But Large CAFOs ultimately set application rates based on *site*-specific assessments of the relevant field conditions, as the EPA concedes in the Preamble to the Rule. *See* Preamble to the Final Rule at 7209 (“Today’s rule requires Large CAFOs to determine and implement *site-specific* nutrient application rates that are consistent with the technical standards for nutrient management established by the permitting authority.”) (emphasis added); *see also id.* at 7213 (“The nutrient management plan is the tool CAFOs must use to assess soil and other field conditions at their operation . . . to determine the *site-specific* nitrogen or phosphorus-based rate at which manure, litter, and other process wastewaters are to be applied.”) (emphasis added).²⁰ By not providing for permitting authority review of these application rates, the CAFO Rule fails to adequately prevent Large CAFOs from “misunderstanding or misrepresenting” the application rates they must adopt in order to comply with state technical standards. The CAFO Rule does not ensure that the Large CAFOs will, in fact, develop nutrient management plans – and waste application rates – that comply with all applicable effluent limitations and standards.

b. Failure to Require that the Terms of the Nutrient Management Plans be

²⁰ On its face, the Rule requires CAFOs – like state permitting authorities – to develop nutrient management plans based on “field-specific assessments.” 40 C.F.R. § 412.4(c)(1). However, it is clear that each CAFO must make such “field-specific assessments” on a site-by-site basis; that is, each CAFO must determine what the relevant field conditions are at its site in order to determine its site-specific waste application rate. *See* Preamble to the Final Rule at 7209 (“Today’s rule requires Large CAFOs to determine and implement *site-specific* nutrient application rates that are consistent with the technical standards for nutrient management established by the permitting authority.”) (emphasis added); *see also id.* at 7213 (“The nutrient management plan is the tool CAFOs must use to assess soil and other field conditions at their operation . . . to determine the *site-specific* nitrogen or phosphorus-based rate at which manure, litter, and other process wastewaters are to be applied.”) (emphasis added).

1 Included in the NPDES Permits

2 The Clean Water Act unquestionably provides that all applicable effluent limitations must
3 be included in each NPDES permit. *See* 33 U.S.C. §§ 1311(a), 1311(b), 1342(a); *see also Am.*
4 *Paper Inst., Inc. v. EPA*, 996 F.2d 346, 349 (D.C. Cir. 1993) (noting that the Clean Water Act
5 “mandates that every permit contain [*inter alia*] effluent limitations that reflect the pollution
6 reduction achievable by using technologically practicable controls”). What the parties here
7 dispute is whether the terms of the nutrient management plans, themselves, constitute effluent
8 limitations that must be included in the NPDES permits.

9 As we have already stated, rather than setting forth *numerical* effluent limitations for land
10 application of manure, the CAFO Rule establishes *non-numerical* effluent limitations in the form
11 of best management practices. *See* 40 C.F.R. § 412.4. Among these best management practices
12 is the requirement that CAFOs “develop and implement a nutrient management plan” that, *inter*
13 *alia*, sets application rates that minimize phosphorus and nitrogen transport. *See* 40 C.F.R. §
14 412.4(c)(1). The EPA readily acknowledges that the requirement to *develop and implement* a
15 nutrient management plan is a non-numerical effluent limitation, but argues that – under the
16 wording of this requirement – the terms of the nutrient management plans themselves do not
17 constitute the non-numerical effluent limitations. Accordingly, EPA argues that the terms of the
18 nutrient management plans need not be included in the NPDES permits.

19 We believe that the EPA’s argument is foreclosed by the statutory definition of effluent
20 limitation. The Clean Water Act defines effluent limitation to mean “any *restriction* established
21 by a State or the Administrator on quantities, *rates*, and concentrations of chemical, physical,

1 biological, and other constituents which are discharged from point sources . . .” 33 U.S.C. §
2 1362(11) (emphasis added). There is no doubt that under the CAFO Rule, the only restrictions
3 actually imposed on land application discharges are those restrictions imposed by the various
4 terms of the nutrient management plan, including the waste application *rates* developed by the
5 Large CAFOs pursuant to their nutrient management plans. Indeed, the requirement to develop a
6 nutrient management plan constitutes a restriction on land application discharges only to the
7 extent that the nutrient management plan actually imposes restrictions on land application
8 discharges. To accept the EPA’s contrary argument – that *requiring* a nutrient management plan
9 is itself a restriction on land application discharges – is to allow semantics to torture logic.

10 Because we believe that the terms of the nutrient management plans constitute effluent
11 limitations, we hold that the CAFO Rule – by failing to require that the terms of the nutrient
12 management plans be included in NPDES permits – violates the Clean Water Act and is
13 otherwise arbitrary and capricious in violation of the Administrative Procedure Act.

14 2. Lack of Public Participation

15 _____The Environmental Petitioners also argue, and we here find, that the permitting scheme
16 established by the CAFO Rule violates the Clean Water Act’s public participation requirements
17 and is otherwise arbitrary and capricious under the Administrative Procedure Act.

18 Congress clearly intended to guarantee the public a meaningful role in the implementation
19 of the Clean Water Act. The Act unequivocally and broadly declares, for example, that “[p]ublic
20 participation in the development, revision, and enforcement of any regulation, standard, effluent
21 limitation, plan, or program established by the Administrator or any State under this Act shall be

1 provided for, encouraged, and assisted by the Administrator and the States.” 33 U.S.C. § 1251(e).
2 Consistent with this demand, the Act further provides that there be an “opportunity for public
3 hearing” before any NPDES permit issues, *see* 33 U.S.C. §§ 1342(a), 1342 (b)(3); that a “copy of
4 each permit application and each permit issued under this section [1342] shall be available to the
5 public,” *see* 33 U.S.C. § 1342(j); and that “any citizen” may bring a civil suit for violations of the
6 Act, *see* 33 U.S.C. § 1365(a).

7 The CAFO Rule deprives the public of the opportunity for the sort of regulatory
8 participation that the Act guarantees because the Rule effectively shields the nutrient
9 management plans from public scrutiny and comment. Admittedly, the Preamble to the Rule
10 indicates that the “EPA *expects* that the permitting authority will make this information available
11 to the public upon request,” *see* Preamble to the Final Rule at 7233 (emphasis added); however,
12 the Rule provides no assurance that EPA’s expectations will be satisfied. Not only does the
13 CAFO Rule fail to require that the terms of the nutrient management plans be included in the
14 NPDES permits, it also fails to provide the public with any other means of access to them. After
15 all, the Rule provides only that a “copy of the CAFO’s site-specific nutrient management plan
16 must be maintained on site and made available to the Director [of the state permitting authority]
17 upon request.” 40 C.F.R. § 122.42(e)(2)(ii). The Rule does not similarly require that copies of
18 the nutrient management plans be made available to the *public* by the CAFOs.

19 This scheme violates the Act’s public participation requirements in a number of respects.
20 First and foremost, in light of our holding that the terms of the nutrient management plans
21 constitute effluent limitations that should have been included in NPDES permits, the CAFO Rule

1 deprives the public of its right to assist in the “development, revision, and enforcement of ... [an]
2 *effluent limitation*.” 33 U.S.C. § 1251(e) (emphasis added). More specifically, the CAFO Rule
3 prevents the public from calling for a hearing about – and then meaningfully commenting on –
4 NPDES permits before they issue. *See* 33 U.S.C. §§ 1342(a), 1342 (b)(3). The CAFO Rule also
5 impermissibly compromises the public’s ability to bring citizen-suits, a “proven enforcement
6 tool” that “Congress intended [to be used...] to both spur and supplement government
7 enforcement actions.” Clean Water Act Amendments of 1985, Senate Environment and Public
8 Works Comm., S. Rep. No. 50, 99th Cong., 1st Sess. 28 (1985). Under the CAFO Rule, as
9 written, citizens would be limited to enforcing the mere requirement to develop a nutrient
10 management plan, but would be without means to enforce the terms of the nutrient management
11 plans because they lack access to those terms. This is unacceptable.

12 And even assuming, *arguendo*, that the nutrient management plans did not themselves
13 constitute effluent limitations, we would still hold that the CAFO Rule violates the Act’s public
14 participation requirements. Nutrient management plans are, even under the EPA’s own theory of
15 the CAFO Rule, a critical indispensable feature of the “plan, or program established by the
16 Administrator or any State” in order to regulate Large CAFO land application discharges. 33
17 U.S.C. § 1251(e). The EPA itself has stated in the Preamble to the Rule that “the only way to
18 ensure that non-permitted point source discharges of manure, litter, or process wastewaters from
19 CAFOs do not occur is to require . . . [land application] in accordance with site specific nutrient
20 management practices.” Preamble to the Final Rule at 7198. Since nutrient management plans
21 embody all the relevant “site specific nutrient management practices,” it is clear that, even

1 according to the EPA, nutrient management plans are a *sine qua non* of the “regulation, standard,
2 plan, or program” it established to regulate land application discharges. 33 U.S.C. § 1251(e).

3 Given that the CAFO Rule forestalls – rather than “provid[es] for, encourag[es], and
4 assist[s]” – public participation in the development and enforcement of nutrient management
5 plans, and given that nutrient management plans are an important “regulation, standard, effluent
6 limitation, plan or program” established by the EPA to regulate land application discharges, the
7 CAFO Rule violates the plain dictates of 33 U.S.C. § 1251(e).

8 3. The Duty to Apply

9 The Farm Petitioners also challenge the permitting scheme established by the CAFO
10 Rule. They contend that the EPA has exceeded its statutory jurisdiction by requiring all CAFOs
11 to either apply for NPDES permits or otherwise demonstrate that they have no potential to
12 discharge. We agree and grant their petition in this regard.

13 The Clean Water Act authorizes the EPA to regulate, through the NPDES permitting
14 system, only the discharge of pollutants. The Act generally provides, for example, that “Except
15 as in compliance [with all applicable effluent limitations and permit restrictions,] the *discharge*
16 *of any pollutant* by any person shall be unlawful.” 33 U.S.C. § 1311(a) (emphasis added).
17 Consistent with this prohibition, the Act authorizes the EPA to promulgate effluent limitations
18 for – and issue permits incorporating those effluent limitations for – the discharge of pollutants.
19 Section 1311 of Title 33 provides that “[e]ffluent limitations ... shall be applied to all point
20 sources of *discharge of pollutants*,” *see* 33 U.S.C. § 1311(e). Section 1342 of the same Title then
21 gives NPDES authorities the power to issue permits authorizing the *discharge of any pollutant or*

1 *combination of pollutants. See* 33 U.S.C. § 1342 (a)(1) (“the Administrator may, after
2 opportunity for public hearing, issue a permit for *the discharge of any pollutant, or combination*
3 *of pollutants*”) (emphasis added); *see also* 33 U.S.C. § 1342(b) (authorizing states to administer
4 permit programs for “discharges into navigable waters”). In other words, unless there is a
5 “discharge of any pollutant,” there is no violation of the Act, and point sources are, accordingly,
6 neither statutorily obligated to comply with EPA regulations for point source discharges, nor are
7 they statutorily obligated to seek or obtain an NPDES permit.

8 Congress left little room for doubt about the meaning of the term “discharge of any
9 pollutant.” The Act expressly defines the term to mean “(A) any addition of any pollutant to
10 navigable waters from any point source, [or] (B) any addition of any pollutant to the waters of the
11 contiguous zone or the ocean from any point source other than a vessel or other floating craft.”
12 33 U.S.C. § 1362(12). Thus, in the absence of an actual addition of any pollutant to navigable
13 waters from any point, there is no point source discharge, no statutory violation, no statutory
14 obligation of point sources to comply with EPA regulations for point source discharges, and no
15 statutory obligation of point sources to seek or obtain an NPDES permit in the first instance.

16 The CAFO Rule violates this statutory scheme. It imposes obligations on all CAFOs
17 regardless of whether or not they have, in fact, added any pollutants to the navigable waters, i.e.
18 discharged any pollutants. After all, the Rule demands that every CAFO owner or operator either
19 apply for a permit – and comply with the effluent limitations contained in the permit – or
20 affirmatively demonstrate that no permit is needed because there is “no potential to discharge.”
21 *See* 40 C.F.R. §§ 122.23(d) and (f). In the EPA’s view, such demands are appropriate because all

1 CAFOs have the *potential* to discharge pollutants. *See* Preamble to the Final Rule at 7202 (“The
2 ‘duty to apply’ provision is based on the presumption that every CAFO has a potential to
3 discharge.”). While we appreciate the policy considerations underlying the EPA’s approach in
4 the CAFO Rule, however, we are without authority to permit it because it contravenes the
5 regulatory scheme enacted by Congress; the Clean Water Act gives the EPA jurisdiction to
6 regulate and control only *actual* discharges – not potential discharges, and certainly not point
7 sources themselves. *See National Resources Defense Council v. EPA*, 859 F.2d 156, 170 (D.C.
8 Cir. 1988) (noting that “the [Act] does not empower the agency to regulate point sources
9 themselves; rather, EPA’s jurisdiction under the operative statute is limited to regulating the
10 discharge of pollutants”). To the extent that policy considerations do warrant changing the
11 statutory scheme, “such considerations address themselves to Congress, not to the courts.” *MCI*
12 *Telecommunications Corp. v. AT&T, Co.*, 512 U.S. 218, 234 (1994) (citation omitted).

13 EPA’s other arguments are also unavailing. The EPA principally attempts to derive
14 support for its “duty to apply” provision from the statutory definition of point source. EPA
15 argues that point source is defined to mean not only “any discernible, confined and discrete
16 conveyance” from which pollutants “are” discharged, but also “any discernible, confined and
17 discrete conveyance” from which pollutants “*may be*” discharged. 33 U.S.C. § 1362(14). The
18 EPA cannot, however, point to any provision of the statute that gives operational effect to the
19 “may be” language in the manner in which the EPA seeks to do so here. The EPA points, for
20 example, to 33 U.S.C. § 1311(e). Yet that section provides not that effluent limitations shall be
21 applied to all point sources, end of story, but that effluent limitations shall be applied “to all point

1 sources of *discharge of pollutants* in accordance with the provisions of this chapter.” 33 U.S.C. §
2 1311(e) (emphasis added). Thus, while point sources are statutorily defined to include potential
3 dischargers, effluent limitations can, pursuant to 33 U.S.C. § 1311(e), be applied only to “point
4 sources of *discharge of pollutants*,” i.e. those point sources that are *actually* discharging.²¹ *Id.*

5 The EPA also argues that the “duty to apply” provision is consistent with the Act’s goal
6 of not just reducing, but eliminating water pollution. It is true that the duty to apply provision is
7 consistent with the broad goal of eliminating water pollution. However, the duty to apply flatly
8 contravenes the statute’s text, which more specifically defines – and circumscribes – the powers
9 that Congress conferred upon the EPA in order to effectuate the Clean Water Act’s goals.
10 Principles of statutory construction forbid us from sanctioning EPA conduct that is plainly
11 inconsistent with a statute’s specific text. *See Caminetti v. United States*, 242 U.S. 470, 485
12 (1917) (“It is elementary that the meaning of a statute must, in the first instance, be sought in the
13 language in which the act is framed, and if that is plain . . . the sole function of the courts is to
14 enforce it according to its terms.”).

15 For all these reasons, we believe that the Clean Water Act, on its face, prevents the EPA
16 from imposing, upon CAFOs, the obligation to seek an NPDES permit or otherwise demonstrate
17 that they have no potential to discharge. *See Chevron U.S.A. Inc. v. Natural Resources Defense*
18 *Council, Inc.*, 467 U.S. 837, 842-43 (1984) (where Congress has “directly spoken to the precise

²¹ We also point out that our reading of 33 U.S.C. § 1311(e) does not render superfluous the “may be” language included in the statutory definition of point source. In our view, the “may be” language can be read to clarify the reach of the EPA’s power to seek injunctive relief. *See* 33 U.S.C. § 1319(b); *see generally Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982).

1 question at issue” and “the intent of Congress is clear, that is the end of the matter; for the court,
2 as well as the agency, must give effect to the unambiguously expressed intent of Congress.”)
3 (footnote omitted).²²

4 B. Challenges to the Types of Discharges Regulated

5 1. Regulatory Exemption for “Agricultural Stormwater” Discharges

6 _____As stated in the background section, *supra*, the CAFO Rule generally provides that
7 discharges from a land application area under the control of a CAFO are subject to NPDES
8 requirements. *See* 40 C.F.R. § 122.23(e). However, the Rule, like the Clean Water Act itself,

²² Because we find that the EPA lacks statutory authorization to require potential dischargers to apply for NPDES permits, we need not consider whether the record here supports the EPA’s determination that Large CAFOs may reasonably be presumed to be such potential dischargers. We hasten to note, however, that if Congress were to amend the Clean Water Act to permit the imposition of a duty-to-apply, we believe the EPA would have ample reason to consider imposing this duty upon Large CAFOs. In our view, the EPA has marshaled evidence suggesting that such a prophylactic measure may be necessary to effectively regulate water pollution from Large CAFOs, given that Large CAFOs are important contributors to water pollution and that they have, historically at least, improperly tried to circumvent the permitting process. *See, e.g.*, Proposed Rule at 2976-77 (noting that, according to the 1998 National Water Quality Inventory, the agricultural sector was the leading contributor to identified water quality impairments in the nation’s rivers and lakes); *id.* at 3008 (“since the inception of the NPDES permitting program in the 1970s, a relatively small number of larger CAFOs has actually sought permits); *see also* Preamble to the Final Rule at 7180 (describing a rise in the excess manure nutrients produced by animal feeding operations); *id.* at 7181 (detailing the ecological and human health impacts caused by CAFO manure and wastewater), *id.* at 7237 (noting the pollutants present in manure and other CAFO wastes and describing how they contribute to the impairment of water quality).

We also note that the EPA has not argued that the administrative record supports a regulatory presumption to the effect that Large CAFOs *actually* discharge. As such, we do not now consider whether, under the Clean Water Act as it currently exists, the EPA might properly presume that Large CAFOs – or some subset thereof – actually discharge. *See generally NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775 (1990); *National Mining Ass’n v. Babbitt*, 172 F.3d 906 (D.C. Cir. 1999).

1 carves out an exception where the discharge in question is “an agricultural storm water
2 discharge,” *id.* – a category of discharges that the Act exempts from regulation via the statutory
3 definition of “point source.” *See* 33 U.S.C. § 1362(14). More specifically, the Rule classifies, as
4 agricultural stormwater, any “precipitation-related discharge of manure, litter, or process
5 wastewater from land areas under the control of a CAFO” where the “manure, litter or process
6 wastewater has [otherwise] been applied in accordance with site specific nutrient management
7 practices that ensure appropriate agricultural utilization.” 40 C.F.R. § 122.23(e).

8 _____The Environmental Petitioners contend that this approach violates the Clean Water Act
9 and is otherwise arbitrary and capricious in violation of the Administrative Procedure Act
10 because the Clean Water Act’s definition of “point source” requires regulation of *all* CAFO
11 discharges, notwithstanding the fact that agricultural stormwater discharges are otherwise
12 deemed exempt from regulation. We disagree.

13 The Act defines the term “point source” as follows:

14 “[P]oint source” means any discernible, confined, and discrete conveyance,
15 including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete
16 fissure, container, rolling stock, *concentrated animal feeding operation*, or vessel
17 or other floating craft, from which pollutants are or may be discharged. *This term*
18 *does not include agricultural stormwater discharges* and return flows from
19 irrigated agriculture.

20 33 U.S.C. § 1362(14) (emphasis added). Contrary to the views of the Environmental Petitioners,
21 we find that this provision is self-evidently ambiguous as to whether CAFO discharges can ever
22 constitute agricultural stormwater. Here, the Act expressly defines the term point source to
23 *include* “concentrated animal feeding operations;” the Act expressly defines “point source” to

1 *exclude* “agricultural stormwater;” and the Act makes absolutely no attempt to reconcile the two.
2 Congress has not addressed the precise issue the Environmental Petitioners put before us, and, as
3 a result, the operative question we must consider becomes, pursuant to *Chevron*, whether the
4 CAFO Rule’s exemption for “precipitation-related” land application discharges is grounded in a
5 “permissible construction” of the Clean Water Act. *Chevron U.S.A. Inc. v. Natural Resources*
6 *Defense Council, Inc.*, 467 U.S. 837, 843 (1984).

7 The EPA reads the Act’s definition of “point source” as generally authorizing the
8 regulation of CAFO discharges, but exempting such discharges from regulation to the extent that
9 they constitute agricultural stormwater. We think this is a reasonable construction in light of the
10 legislative purpose of the agricultural stormwater exemption and given precedent from this
11 circuit. With respect to legislative purpose, we believe it reasonable to conclude that when
12 Congress added the agricultural stormwater exemption to the Clean Water Act, it was affirming
13 the impropriety of imposing, on “any person,” liability for agriculture-related discharges
14 triggered not by negligence or malfeasance, but by the weather – even when those discharges
15 came from what would otherwise be point sources. There is no authoritative legislative history
16 to the contrary. The Environmental Petitioners, for example, cite legislative history from 1972 in
17 support of their position; however, the agricultural stormwater exemption was not added to the
18 Clean Water Act until a full fifteen years later, when Congress passed the Water Quality Act of
19 1987. *See* Water Quality Act of 1987, Pub. L. No. 100-4 § 503, 101 Stat. 7 (1987). It would be
20 improper for us to rely on statements from 1972 in order to resolve an ambiguity that was not
21 created until 1987. In our view, prior legislative history is a hazardous basis for inferring the

1 intent of a subsequent Congress, in the same way that “*subsequent* legislative history is a
2 hazardous basis for inferring the intent of an *earlier* Congress.” *Pension Benefit Guaranty Corp.*
3 *v. LTV Corp.*, 496 U.S. 633, 650 (1990) (emphasis added) (citation omitted). And, in any event,
4 none of the legislative history from 1972 comes close to casting doubt on the construction we
5 permit here.²³

6 Precedent from this circuit also supports the construction that the EPA advances and we
7 here permit. In *Concerned Area Residents for the Environment v. Southview Farm*, this Court
8 considered the agricultural stormwater exemption and its statutory relationship to point source
9 discharges, specifically CAFO discharges. 34 F.3d 114 (2d Cir. 1994). The essence of the
10 Court’s holding was not, as Environmental Petitioners contend, that discharges from an area
11 under the control of a CAFO can *never* qualify for the agricultural stormwater exemption.
12 Rather, the Court held that a discharge from an area under the control of a CAFO can be
13 considered *either* a CAFO discharge that is subject to regulation *or* an agricultural stormwater
14 discharge that is not subject to regulation. Whether or not a discharge is regulable turned, in the

²³ For example, the Environmental Petitioners substantially rely on a statement from Senator Robert Dole acknowledging the environmental threat posed by “[p]recipitation runoff” from areas storing animal and poultry waste. 2 A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, Committee Print Compiled for the Senate Committee on Public Works by the Library of Congress, Ser. No. 93-1, p. 1295 (1973). Senator Dole did not at all suggest that the Act aimed, in fact, to regulate precipitation runoff. His statement about precipitation runoff was merely part of a larger discussion about the general environmental threat posed by animal and poultry waste. To wit, he stated that: “In these modern facilities, the use of bedding and litter has been greatly reduced; consequently, the manure which is produced remains essentially in the liquid state and is much more difficult to handle without odor and pollution problems. Precipitation runoff from these areas picks up high concentrates of pollutants, which reduce oxygen levels in receiving streams and lakes and accelerate the eutrophication process.” *Id.*

1 Court's view, on the primary cause of the discharge. That is why the Court wrote that a
2 discharge could be regulated, and liability imposed, where "the run-off was primarily caused by
3 the over-saturation of the fields rather than the rain and that sufficient quantities of manure were
4 present so that the run-off could not be classified as 'stormwater.'" *Id.* at 121.

5 We believe that the CAFO Rule comports both with Congress' intent in enacting the
6 agricultural stormwater exemption and with our holding in *Southview Farm*. So far as Congress'
7 intent is concerned, while the Rule holds CAFOs liable for most land application discharges, it
8 prevents CAFOs from being held liable for "precipitation-related discharge[s]" where "manure,
9 litter or process wastewater has [otherwise] been applied in accordance with site specific nutrient
10 management practices that ensure appropriate agricultural utilization." 40 C.F.R. § 122.23(e). In
11 other words, like the Clean Water Act itself, the CAFO Rule seeks to remove liability for
12 agriculture-related discharges primarily caused by nature, while maintaining liability for other
13 discharges. So far as our holding in *Southview Farm* is concerned, discharges from land areas
14 under the control of a CAFO can and should generally be regulated, but where a CAFO has taken
15 steps to ensure appropriate agricultural utilization of the nutrients in manure, litter, and process
16 wastewater, it should not be held accountable for any discharge that is primarily the result of
17 "precipitation."

18 We also find unpersuasive the only other significant complaint the Environmental
19 Petitioners lodge against the CAFO Rule's agricultural stormwater exemption – namely that it is
20 unreasonable, and hence improper, for the EPA to construe the term "agricultural" as
21 encompassing any stormwater discharge from a land area under the control of a CAFO. The

1 Environmental Petitioners contend that CAFOs must be viewed as industrial, not agricultural.
2 We disagree. Dictionaries from the period in which the agricultural stormwater exemption was
3 adopted define “agriculture” or “agricultural” in a way that can permissibly be construed to
4 encompass CAFOs. For example, Webster’s New World Dictionary defined the term
5 “agriculture” to include, *inter alia*, “work of cultivating the soil, producing crops, and raising
6 livestock.” WEBSTER’S NEW WORLD DICTIONARY OF AMERICAN ENGLISH 26 (3rd College Ed.
7 1988). The Oxford English Dictionary similarly defined agriculture to include, *inter alia*,
8 “cultivating the soil,” “including the allied pursuits of gathering in the crops and rearing live
9 stock.” I THE OXFORD ENGLISH DICTIONARY 267 (2d Ed. 1989). Here, there is no question that
10 CAFOs “rais[e]” or “rear” livestock and, because land-applied manure is used as fertilizer,
11 “cultivat[e] the soil” as well. *Cf.* Preamble to the Final Rule at 7197 (“When manure or process
12 wastewater is applied in accordance with practices designed to ensure appropriate agricultural
13 utilization of nutrients, it . . . fulfills an important agricultural purpose, namely the fertilization of
14 crops . . .”). As a result, we cannot say that the EPA has impermissibly treated CAFOs as
15 agricultural in character.

16 Additionally, we note again that the CAFO Rule classifies precipitation-related
17 discharges as agricultural stormwater only where CAFOs have otherwise applied “manure, litter
18 or process wastewater . . . in accordance with site specific nutrient management practices that
19 ensure appropriate *agricultural* utilization.” 40 C.F.R. § 122.23(e) (emphasis added). Thus,
20 even the CAFO Rule’s application of the agricultural stormwater exemption is expressly tethered

1 to agricultural endeavors.²⁴

2 Accordingly, for all these reasons, we reject the Environmental Petitioners' challenge to
3 the CAFO Rule's exemption for agricultural stormwater discharges because we believe that the
4 exemption is premised on a permissible construction of the Act.

5 2. Regulation of "Uncollected" Discharges

6 _____The Farm Petitioners contend that the CAFO Rule violates the Clean Water Act because
7 it regulates "uncollected" discharges from land areas under the control of a CAFO; in effect, the
8 Farm Petitioners claim that runoff from land application areas, unless "collected" or
9 "channelized" at the land application area itself, does not constitute a point source discharge. We
10 reject this claim because, in our view, regardless of whether or not runoff is collected at the land
11 application area, itself, any discharge from a land area under the control of a CAFO is a point
12 source discharge subject to regulation because it is a discharge from a *CAFO*.

13 To evaluate the Farm Petitioners' claim we turn, once again, to the statutory definition of
14 point source. The term "point source" is defined to mean, in relevant part, "any discernible,
15 confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel,

²⁴ We note, moreover, that while the EPA had previously classified CAFO discharges as industrial, rather than agricultural, the Agency has here adequately justified that change on the ground that "[w]hen manure or process wastewater is applied in accordance with practices designed to ensure appropriate agricultural utilization of nutrients, it... fulfills an important agricultural purpose, namely the fertilization of crops..." Preamble to the Final Rule at 7197. *Cf. Motor Vehicle Manufacturers' Association of the United States, Inc. v. State Farm Mutual Automobile Insurance Company*, 463 U.S. 29, 42 (1983) (where an agency has changed course it is "obligated to supply a reasoned analysis for the change."). Because the EPA also put the public on notice of the substantive change, *see* Proposed Rule at 3029-32, it has complied with all applicable procedural requirements.

1 conduit, well, discrete fissure, container, rolling stock, *concentrated animal feeding operation*, or
2 vessel or other floating craft, *from which pollutants are or may be discharged*. 33 U.S.C. §
3 1362(14) (emphasis added). Given that the Act expressly defines “point source” to include
4 concentrated animal feeding operations, the Farm Petitioners can prevail on their challenge only
5 if we find that the Act prohibits classifying a land application discharge as a discharge “*from*” a
6 CAFO. We believe, however, that the Act not only permits, but demands, that land application
7 discharges be construed as discharges “from” a CAFO to the extent that they are not otherwise
8 agricultural stormwater.

9 As this Court previously held in *Catskill Mountains Chapter of Trout Unlimited, Inc. v.*
10 *City of New York*, the term point source refers to “the proximate source from which the pollutant
11 is directly introduced to [a] destination water body.” *See* 273 F.3d 481, 493 (2d Cir. 2001).²⁵
12 Here, CAFOs are unquestionably “the proximate source” of any discharge of pollutants from
13 land application areas under their control to the surface waters (again, except where those
14 discharges are agricultural stormwater). But for the application of manure by the CAFO to the
15 land, there could never be a discharge of pollutants from the land to the surface waters. Thus, any
16 land application discharge that is not agricultural stormwater is, definitionally, a discharge

²⁵ We note that, in this respect, *Catskill Mountains* is in complete accord with *Southview Farm*. Implicit in *Southview Farm* is the idea that when a discharge from a land application area under the control of a CAFO is primarily caused by rain, such a discharge is not subject to regulation because the rain – not the CAFO – is the proximate source of the discharge; but when “run-off [is] primarily caused by the over-saturation of the fields rather than the rain and [there are] sufficient quantities of manure . . . present,” *Southview Farm*, 34 F.3d at 121, such a discharge *is* subject to regulation because the CAFO – not the rain – is the proximate source of the discharge.

1 “from” a CAFO that can be regulated as a point source discharge.

2 Contrary to the contentions of the Farm Petitioners, whether the land application run-off
3 has been “collected” or “channelized” at the land application area is irrelevant to the
4 determination regarding whether such run-off constitutes a CAFO discharge. To be sure, the Act
5 does generally contemplate that discharges be “channelized” in order to fall within the EPA’s
6 regulatory jurisdiction; that is why the term “point source” is defined as “discrete, discernible,
7 conveyances.” However, a CAFO is, itself, a “channel” under the Act – it is, of course, expressly
8 included in the list of examples of the types of “point sources” the EPA may regulate. Thus, any
9 discharge “from” a CAFO is already a point source discharge. Requiring that manure, litter, or
10 process wastewater be separately channelized at the land application site before any runoff could
11 be considered a “point source discharge” would be, in effect, to impose a requirement not
12 contemplated by the Act: that pollutants be channelized not once but twice before the EPA can
13 regulate them.

14 Even assuming that the Act did not plainly require that land application discharges
15 generally be regulated as point source discharges, we would find that the EPA has permissibly
16 construed the statute in defining, as a “discharge from a CAFO,” the “discharge of manure, litter
17 or process wastewater to waters of the United States from a CAFO as a result of the application
18 of that manure, litter or process wastewater by the CAFO to land areas under its control.” 40
19 C.F.R. § 122.23(e). Land application areas are, after all, an integral and indeed indispensable
20 part of CAFO operations. CAFOs depend on them to receive the volumes of manure their
21 animals generate; as we noted in the background section above, “[s]everal estimates indicate that

1 90% of CAFO-generated waste is land applied.” EPA, STATE COMPENDIUM: PROGRAMS AND
2 REGULATORY ACTIVITIES RELATED TO ANIMAL FEEDING OPERATIONS 13 (May 2002). Given
3 this fact and given that, under the Rule, only discharges from land application areas “under [the]
4 control” of a CAFO are subject to regulation, *see* 40 C.F.R. § 122.23(e), the EPA could quite
5 reasonably conclude that runoff from a land application area is runoff from a CAFO.

6 Thus, we reject the challenge to the CAFO Rule’s regulation of land application
7 discharges, including “uncollected” discharges.

8 C. Challenges to the CAFO Rule Effluent Limitations

9 The Environmental Petitioners bring a host of challenges to: (1) the CAFO Rule’s
10 technology-based effluent limitation guidelines; and (2) the CAFO Rule’s failure to promulgate
11 additional water quality based effluent limitations.

12 Again, we note that the specific effluent limitations contained in each individual NPDES
13 permit are dictated by the terms of more general “effluent limitation guidelines” (“ELGs”), which
14 are separately promulgated by the EPA. *Cf. EPA v. California, ex rel. State Water Res. Control*
15 *Bd.*, 426 U.S. 200, 205 (1976) (“An NPDES permit serves to transform generally applicable
16 effluent limitations and other standards including those based on water quality into the
17 obligations . . . of the individual discharger.”). ELGs, and the effluent limitations established in
18 accordance with them, are technology-based restrictions on water pollution; they are technology-
19 based because they are established in accordance with various technological standards that the
20 Act statutorily provides and that, pursuant to the Act, vary depending upon the type of pollutant
21 involved, the type of discharge involved, and whether the point source in question is new or

1 already existing. *See* 33 U.S.C. § 1311. For existing facilities, the Act requires that ELGs be
2 based on standards that include: (1) the best available technology economically achievable
3 (“BAT”), *see* 33 U.S.C. § 1311(b)(2)(A); (2) the best conventional pollutant control technology
4 (“BCT”), *see* 33 U.S.C. § 1314(b)(2)(A); and (3) the best practicable control technology
5 currently available (“BPT”), *see* 33 U.S.C. § 1314(b)(1)(A). The technology standard for new
6 point sources, which is commonly referred to as a new source performance standard, is based on
7 the best available demonstrated control technology. *See* 33 U.S.C. § 1316.

8 The EPA here established non-numerical ELGs for the production areas of CAFOs, and
9 did so on a sub-category by sub-category basis. Of these, two are relevant: the subcategory for
10 dairy cows and cattle (other than veal calves), grouped together under Part 412, Subpart C of
11 EPA’s regulations (“Subpart C CAFOs”), *see* 40 C.F.R. § 412.30-37, and the subcategory for
12 swine, poultry and veal calves, grouped under Part 412, Subpart D, (“Subpart D CAFOs”), *see* 40
13 C.F.R. § 412.40-47. The EPA, which was required to set BAT, BPT and BCT standards for the
14 production areas of Subpart C and Subpart D CAFOs, here determined that the identical
15 “technologies” satisfy these standards, and accordingly promulgated ELGs based on the same
16 technologies. Generally speaking, these ELGs, whether based on BAT, BCT or BPT standards:
17 (1) set forth a prohibition on discharges from the production area of a CAFO (except insofar as
18 the discharges are caused by “precipitation”); (2) require best management practices for the
19 production area, including the installation of depth markers in manure lagoons and storage tanks,
20 daily inspections of water lines, and weekly inspections of animal waste storage structures and of
21 equipment used for channeling stormwater or runoff; (3) require additional best management

1 practices for land application areas; and (4) provide an opportunity for alternative performance
2 standards based upon “site-specific alternative technologies that achieve a quantity of pollutants
3 discharged from the production area equal to or less than the quantity of pollutants that would be
4 discharged under the baseline.” *See* 40 CFR § 412.31(a)(2).

5 The Environmental Petitioners present several challenges to the technology-based ELGs
6 promulgated by the EPA. Specifically, they challenge the BAT-based ELGs, the BCT-based
7 ELGs for pathogens, and the new source performance standard adopted for Subpart D CAFOs.
8 The Environmental Petitioners also challenge the EPA’s decision not to impose additional water
9 quality based effluent limitations. We address each set of challenges in turn.

10 1. Challenges to the BAT Standards

11 The Environmental Petitioners contend that the CAFO Rule’s BAT-based ELGs – i.e. the
12 ELGs reflecting the best available technology economically achievable (“BAT”), *see* 33 U.S.C. §
13 1311(b)(2)(A) – violate the Clean Water Act, or are otherwise arbitrary and capricious, in three
14 respects. To wit, the Environmental Petitioners claim that: (a) in establishing the BAT standards,
15 EPA failed to consider the best-performing technologies in the CAFO industry; (b) EPA
16 improperly abandoned a more suitable option as BAT for beef and cattle CAFOs (Subpart C
17 CAFOs); and (c) the EPA improperly rejected a more suitable option for swine, poultry and veal
18 CAFOs (Subpart D CAFOs). We deny all these challenges.

19 a. Failure to Consider the Best Performing Technologies

20 The Environmental Petitioners sweepingly contend that, in developing its BAT standards,

1 the EPA failed to consider the single-best performing or optimally operating CAFO in each
2 category or subcategory and then adopt BAT standards that reflect the respective performances of
3 those CAFOs. We reject this summary challenge. The record reflects that EPA extensively
4 surveyed available technologies, narrowed the list of potential BAT candidates to seven options,
5 and subsequently found, within the bounds of its discretion, that “Option 2” – described below –
6 was the best candidate for BAT, because all the other options considered either did not perform
7 better than “Option 2,” were not adequately supported in science, or were not economically
8 achievable.

9 The EPA engaged, here, in extensive data collection. The EPA conducted more than 116
10 site visits to CAFOs in over 20 states. It obtained information regarding the operational
11 characteristics, waste management systems, and financial situations of CAFOs from several
12 agencies within the USDA such as the National Agricultural Statistics Service, the Animal and
13 Plant Health Inspection Service, and the Economic Research Service. EPA also attended
14 conferences, obtained research from the land grant university system, met with several trade
15 associations, and conducted extensive literature reviews. It received and considered
16 approximately 11,000 public comments on the proposed CAFO Rule, *see* Preamble to the Final
17 Rule at 7178, as well as an additional 450 or so comments following the publication, in
18 November 2001 and July 2002, of Notices of Data Availability (documents that summarized new
19 data and information presented to the EPA). *See id.* at 7187-88. On the basis of this data
20 collection, the EPA ultimately found that the BAT standards it adopted – which generally require
21 improved operation and maintenance – would significantly reduce CAFO discharges as well or

1 better than any other available, economically achievable technologies. And it generally justified
2 this decision within the bounds of its discretion. *See, e.g., id.* at 7215 (“One recent study from
3 Iowa State University suggested 76 percent of earthen manure structures lacked appropriate
4 accompanying management and maintenance activities. Another study in North Carolina stated
5 more than 90 percent of violations were attributed to operation and management deficiencies.”).

6 To be sure, the CAFO Rule does not *explicitly* identify the single, existing best-
7 performing CAFO in each category or subcategory of the Rule. However, it is obvious that the
8 CAFO Rule *substantively* establishes standards that make “reference to the best performer in any
9 industrial category” – and nothing in the Act or the legislative history indicates that any more was
10 required of the EPA. *See* 1 A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT
11 AMENDMENTS OF 1972, Committee Print Compiled for the Senate Committee on Public Works
12 by the Library of Congress, Ser. No. 93-1, p. 170 (1973). We believe that in all BAT
13 subcategories, the EPA has either adopted the technology employed by the best performers or
14 declined to do so for permissible reasons. Indeed, the Environmental Petitioners cannot identify
15 any specific performance standard that the EPA failed to consider or rejected for impermissible
16 reasons in adopting its BAT standards. Thus, the EPA has complied with its statutory duties in
17 setting the BAT standards, and we consequently reject the Environmental Petitioners’ challenge
18 to them.

19 b. BAT for Beef and Cattle CAFOs (“Subpart C CAFOs”)

20 The Environmental Petitioners also challenge the BAT standards on the narrower ground
21 that the EPA improperly abandoned a more suitable option as BAT for beef and cattle (Subpart

1 C) CAFOs. Specifically, the Environmental Petitioners contend that EPA should have selected
2 what EPA had called “Option 3,” rather than “Option 2” as BAT for Subpart C CAFOs.

3 By way of brief background, after reviewing an array of various pollution control
4 technologies and best management practices, the EPA – as we previously stated – narrowed the
5 list of potential BAT candidates to seven options. Those seven options can be generally
6 summarized as follows:

7 Option 1 would require controls on land application of manure, based on the ability of the
8 soil to assimilate the nitrogen content of the manure, plus inspection and recordkeeping
9 requirements for the production area;

10
11 Option 2 would require the same controls as Option 1, but would restrict the rate of
12 manure application instead to a (generally lower) phosphorus-based application rate
13 where necessary, depending on site-specific soil conditions;

14
15 Option 3 would require the same controls as Option 2, but would also require ground
16 water monitoring and discharge controls, unless the CAFO could show that the
17 groundwater beneath manure storage areas or stockpiles do not have a direct hydrologic
18 connection to surface waters;

19
20 Option 4 would require the same controls as Option 3, but would also require sampling of
21 surface waters adjacent to the production area and/or land under control of the CAFO to
22 which manure is applied;

23
24 Option 5 would require – at least for Subpart D CAFOs – the same controls as Option 2,
25 but would also establish a zero discharge requirement that does not allow overflows from
26 the production area under any circumstances;

27
28 Option 6 would require the same controls as Option 2, but would also require that swine
29 and dairy operations install and implement anaerobic digestion and gas recovery to treat
30 manure; and
31

1 Option 7 would require the same controls as Option 2, but would also prohibit manure
2 application to frozen, snow-covered, or saturated ground.

3 *See* EPA, PROPOSED RULE DEVELOPMENT DOCUMENT 10-14 to 10-21 (Jan. 2001).

4 The EPA initially proposed adopting Option 3 as BAT for Subpart C CAFOs, *see*
5 Proposed Rule at 3061-62, but ultimately adopted Option 2. *See* Preamble to the Final Rule at 7215-
6 16. That is to say, the EPA initially proposed that various groundwater-related requirements be
7 uniformly imposed on CAFOs, but ultimately decided that groundwater-related requirements be
8 implemented, as necessary, on a case-by-case basis. *See id.*; Proposed Rule at 3062.²⁶ The
9 Environmental Petitioners claim that the rejection of Option 3's groundwater requirements is
10 unsupported in the record. The EPA argues, in opposition, that it reasonably determined that Option
11 2 is better technology than Option 3, and that Option 3 would impose prohibitive economic costs on

²⁶ As the EPA explained in the Preamble to the Proposed Rule and reaffirmed in its brief in this consolidated petition,

even under Option 2, permit writers [are] required to consider whether a facility is located in an area where its hydrogeology makes it likely that the ground water underlying the facility is hydrologically connected to surface water and whether a discharge to surface water from the facility through such hydrologically connected ground water may cause or contribute to a violation of State water quality standards. In cases where such a determination was made by the permit writer, he or she would impose appropriate conditions to prevent discharge via a hydrologic connection [and that these conditions] would be included in the permit.

Proposed Rule at 3062. It is thus clear that when the EPA stated, in the Preamble to the Final Rule, that "requirements limiting the discharge of pollutants to surface water via groundwater ... are beyond the scope of today's ELGs," Preamble to the Final Rule at 7216, the EPA meant only that uniform national requirements are beyond the scope of today's ELGs. The EPA did not, in other words, mean to suggest that NPDES authorities lacked the power to impose groundwater-related requirements on a case-by-case basis, where necessary.

1 the CAFO industry. We believe that the record adequately supports EPA's determinations and
2 accordingly defer to the Agency's selection of Option 2.

3 The EPA principally claims that Option 2 is better technology than Option 3 because
4 groundwater-related requirements are highly dependent on site-specific variables and that,
5 accordingly, such requirements are more effectively evaluated and implemented on a case-by-case
6 basis, rather than imposed uniformly. The record adequately supports this claim. Studies do show
7 that variability in topography, climate, distance to surface water, and geologic factors influence
8 whether and how pollutant discharges at a particular site enter surface water via groundwater. *See*
9 EPA, PROPOSED RULE DEVELOPMENT DOCUMENT 12-12 (Jan. 2001). For example, a study by
10 Clapp and Hornberger demonstrates that variability in soil types significantly affects the rates at
11 which water flows through them; indeed, Clapp and Hornberger "reported that water flowed through
12 sand about 100 times faster than through clayey [sic] soils and about 10 times faster than through
13 silty soils." *Id.* Given that there is sufficient record support for EPA's determination that
14 groundwater-related requirements are better imposed on a case-by-case basis, and given that Option
15 2 requires CAFOs to consider whether such requirements are needed, *see* Proposed Rule at 3062,
16 we find that EPA has adequately justified its finding that Option 2 constitutes better technology than
17 Option 3. *See Nat'l Wildlife Fed'n v. EPA*, 286 F.3d 554, 566 (D.C. Cir. 2002) (upholding the
18 EPA's determination to regulate "color discharges" from pulp and paper mill process on a case-by-
19 case basis where such discharges were dependent on site-specific conditions).

20 The record also supports the EPA's decision to reject Option 3 as economically prohibitive
21 and not likely to result in any significant reduction in groundwater pollution. *See Am. Petroleum*

1 *Inst. v. EPA*, 787 F.2d 965, 972 (5th Cir. 1986) (“EPA would disserve its mandate were it to tilt at
2 windmills by imposing BAT limitations which removed de minimis amounts of polluting agents
3 from our nation’s waters, while imposing possibly disabling costs upon the regulated industry.”).
4 EPA’s final economic analysis showed a nearly six-fold increase in the number of beef, dairy, and
5 heifer CAFOs projected to close under Option 3, were that Option, rather than Option 2, adopted.
6 This amounted to a potential facility closure rate under Option 3 of 29% for heifer CAFOs, 19% for
7 beef, and 12% for the subcategory as a whole. *See* EPA, FINAL RULE ECONOMIC ANALYSIS 3-22
8 (Dec. 2002). At the same time, the EPA found that while it was difficult to quantify on an industry-
9 wide basis the pollutant reduction that would be associated with nationally-applicable ELGs for
10 groundwater controls, its pollution reduction models showed a difference of less than 1% difference
11 between the nitrogen load reduction achieved under Option 3 as opposed to Option 2. *See* EPA,
12 PROPOSED RULE DEVELOPMENT DOCUMENT 12-15 (Jan. 2001).

13 In light of all the above, we deny the Environmental Petitioners’ challenge to the selection
14 of Option 2 as BAT for Subpart C CAFOs.

15 c. BAT for Swine, Poultry and Veal CAFOs (“Subpart D CAFOs”)

16 Although the EPA initially proposed Option 5 as BAT for Subpart D CAFOs, *see* Proposed
17 Rule at 3063-64, the EPA ultimately determined that the costs of Option 5 would not be
18 economically achievable and, accordingly, adopted Option 2. *See* Preamble to the Final Rule at
19 7218-19. The Environmental Petitioners here challenge the EPA’s rejection of Option 5 on the
20 grounds that: (1) the EPA gave undue consideration to cost; (2) the EPA’s economic modeling is
21 flawed; and (3) even assuming the reasonableness of the EPA’s economic models, the Agency has,

1 in other contexts, deemed “economically achievable” technologies that produced the same or worse
2 economic costs. We reject all of these challenges and uphold the EPA’s selection of Option 2 as
3 BAT for Subpart D CAFOs.

4 As a preliminary matter, we note that Environmental Petitioners are correct that cost is only
5 one of the factors that EPA is supposed to consider in establishing BAT standards. *See* 33 U.S.C.
6 § 1314(b)(2)(B) (specifying that the EPA should consider “the age of equipment and facilities
7 involved, the process employed, the engineering aspects of the application of various types of control
8 techniques, process changes, the cost of achieving such effluent reduction, non-water quality
9 environmental impact (including energy requirements), and such other factors as the Administrator
10 deems appropriate”). However, the Clean Water Act “does not state what weight should be accorded
11 to the relevant factors; rather, the Act gives EPA the discretion to make those determinations.” *BP*
12 *Exploration & Oil, Inc. v. EPA*, 66 F.3d 784, 802 (6th Cir. 1995). And as this Court previously
13 indicated in *Riverkeeper, Inc. v. EPA*, the Administrator is obligated to “inquire into the initial and
14 annual costs of applying the technology and make an affirmative determination that those costs can
15 be reasonably borne by the industry.” 358 F.3d 174, 195 (2d Cir. 2004). Thus, if the EPA
16 determines, with adequate support in the record, that a given set of costs cannot reasonably be borne
17 by a given industry, courts must defer to that determination.

18 We believe that the EPA has here determined, with adequate support in the record, that
19 Subpart D CAFOs cannot reasonably bear the costs associated with Option 5, because the EPA –
20 after conducting extensive economic analysis, involving numerous economic tests and modeling –
21 determined that Option 5 would render 17% of swine CAFOs and 11% of Subpart D CAFOs, on the

1 whole, vulnerable to closure. *See* EPA, FINAL RULE ECONOMIC ANALYSIS at 3-19 to 3-22 (Dec.
2 2002).²⁷

3 Environmental Petitioners challenge the probity of the EPA’s economic modeling, because,
4 in their view, the EPA should have assumed that CAFOs could offset their compliance costs by
5 obtaining state and federal funding (“cost-share assistance”) and by passing the costs on to
6 consumers (“cost passthrough”). In evaluating this challenge, we wish to make clear, at the outset,
7 that the EPA’s determinations about costs, as well as the methodology that the EPA employs in
8 making such determinations, are entitled to deference.²⁸ “While EPA must take seriously its
9 statutory duty to consider cost, courts of review should be mindful of the many problems inherent
10 in an undertaking of this nature and uphold a reasonable effort made by the Agency.” *Nat’l Wildlife*
11 *Fed’n v. EPA*, 286 F.3d 554, 563 (D.C. Cir. 2002) (quoting *FMC Corp. v. Train*, 539 F.2d 973, 979
12 (4th Cir. 1976)). A reviewing court can neither “second-guess EPA’s analysis nor ‘undertake [its]
13 own economic study’; rather, the court must ‘uphold the regulations if EPA has established in the
14 record a reasonable basis for its decision.’” *Id.* at 565 (citation omitted); *see also Chem. Mfrs. Ass’n*
15 *v. EPA*, 870 F.2d 177, 250 (5th Cir. 1989) (“a ‘court’s inquiry will be limited to whether the Agency
16 considered the cost of technology, along with the other statutory factors, and whether its conclusion

²⁷ Because the Clean Water Act “imposes no obligation on EPA to subdivide industries so that each point-source category contains identical producers,” *BASF Wyandotte Corp. v. Costle*, 598 F.2d 637, 655 (1st Cir. 1979), we reject the Environmental Petitioners’ claim that EPA should segregate poultry CAFOs out of Subpart D and separately consider the costs of imposing Option 5 on them.

²⁸ We agree with the Environmental Petitioners that the EPA’s economic determinations are not – as the EPA puts it – entitled to “heightened deference.” Deference, not “heightened” deference, is due.

1 is reasonable” (citation omitted)).

2 We believe that the EPA has reasonably justified its decision not to consider either cost-share
3 assistance or cost passthrough in promulgating the final CAFO Rule. First, with respect to cost-share
4 assistance, the EPA determined, within the bounds of its discretion, that there were too many
5 uncertainties regarding the extent to which any such assistance would mitigate compliance costs and
6 that, accordingly, it would be inappropriate to consider cost-share assistance as a reliable offset to
7 compliance costs. In its proposed economic analysis, EPA determined, for example, that although
8 the USDA’s Environmental Quality Incentives Program (“EQIP”) could theoretically ease the
9 economic strain that Option 5 might impose, the EQIP program should not be relied upon because
10 it might not cover all new applications from CAFOs, might limit the eligibility of CAFOs through
11 various requirements, and might delay distributing funds to CAFOs given various waiting lists and
12 geographic priorities. *See* EPA, PROPOSED RULE ECONOMIC ANALYSIS 4-55 to 56 (Jan. 2001). And
13 while certain legislation passed by Congress in 2002 eliminated some restrictions on EQIP
14 participation and substantially increased funding for EQIP, EPA still believed, at the time it
15 conducted its final economic analysis, that the benefits of the EQIP program were still too
16 speculative to count on because it remained unclear what the actual funding levels would be, what
17 limits might be placed on the types of waste management practices covered, and what share of
18 dollars would be allocated to confinement facilities – as opposed to other agricultural operations –
19 and to larger-sized operations. *See* EPA, FINAL RULE ECONOMIC ANALYSIS 2-66 to 2-68 (Dec. 2002).
20 We cannot say that the EPA unreasonably determined that federal allocations were too uncertain to
21 rely upon.

1 Second, with respect to cost passthrough, we believe that EPA determined, within the bounds
2 of its discretion, that the possibility of passing costs on to consumers was also too uncertain to rely
3 upon. The EPA explained in its proposed rule economic analysis that farmers are at the bottom of
4 a long food marketing chain, subject to imperfect market conditions characterized by “local
5 oligopsony conditions, or ‘few buyers’.” *See* EPA, PROPOSED RULE ECONOMIC ANALYSIS 4-60 (Jan.
6 2001), citing Rogers and Sexton, *Assessing the Importance of Oligopsony Power in Agricultural*
7 *Markets*, 76 AMER. J. AGR. ECON. 1143-50, Dec. 1994. Given the limited bargaining power of those
8 who raise and confine animals, *see id.* at 2-25 to 2-26, the EPA thus concluded that “[i]ndividual
9 farmers generally have a limited ability to pass on increased costs associated with regulations” and
10 that, as a result, it would be a mistake to rely on cost passthrough. *See id.* at 4-60. We cannot say
11 that the EPA acted unreasonably in making these determinations.²⁹

12 Having rejected the challenges to the soundness of the EPA’s economic models, we move
13 finally to Environmental Petitioners’ claim that, even assuming the reasonableness of the EPA’s
14 economic modeling, the results do not support a finding that Option 5 was economically
15 unachievable because the Agency has, in other contexts, deemed “economically achievable”
16 technologies that produced the same or worse economic costs. We reject this claim as well. The
17 EPA here estimated that Option 5 would expose up to 11% of Subpart D CAFOs to financial stress
18 sufficient to create a risk of closure. *See* EPA, FINAL RULE ECONOMIC ANALYSIS at 3-22 (Dec.

²⁹ We also uphold, as reasonable, EPA’s decision not to rely on “long-run market adjustments,” given that these, too, are inherently uncertain and difficult to predict and that, in any event, adjustments for the long-run might “mask severe financial effects at regulated CAFOs in the short-run.” *See* EPA, FINAL RULE ECONOMIC ANALYSIS 2-64 (Dec. 2002).

1 2002). While the EPA – and courts – have treated more substantial risks of closure as nonetheless
2 supporting a finding of economic achievability, *see, e.g., Chem. Mfrs. Assoc. v. EPA*, 870 F.2d at 202
3 (upholding BAT where 14% of facilities would be forced to close), it is also true that the EPA – and
4 courts – have treated less substantial risks of closure as supporting a finding of economic
5 unachievability. For example, the D.C. Circuit has upheld an EPA determination that a projected
6 closure rate of less than 7% could support a finding of economic unachievability. *See Nat'l Wildlife*
7 *Fed'n v. EPA*, 286 F.3d 554, 563 (D.C. Cir. 2002). In the end, economic achievability is a
8 determination the EPA must make on an industry-by-industry basis because each industry has its
9 own special attributes and requires an individual assessment of appropriate financial criteria. And
10 we must defer to such determinations unless they are unreasonable. *See id.*, 286 F.3d at 565.

11 Thus, we reject the Environmental Petitioners' claim that the EPA unlawfully selected Option
12 2, rather than Option 5, as BAT for Subpart D CAFOs.

13 2. Challenge to the BCT Standard for Pathogens

14 The Environmental Petitioners next claim that the EPA's failure to adopt any requirements
15 specifically designed to reduce pathogen discharges violates the Clean Water Act and is otherwise
16 arbitrary and capricious in violation of the Administrative Procedure Act.³⁰ We agree with the

³⁰ We find that, contrary to the EPA's argument, the Environmental Petitioners are not barred from bringing this claim, because one comment expressly addressed the inadequacy of the Agency's pathogen reduction measures, *see* Excerpt Number CAFO201424-27 in EPA, RESPONSE TO COMMENTS ON THE NPDES PERMITTING REQUIREMENTS AND EFFLUENT LIMITATIONS GUIDELINES FOR CONCENTRATED ANIMAL FEEDING OPERATIONS at 9-81 (Dec. 2002) and because, in any event, the Agency clearly considered its statutory obligation to impose pathogen reduction measures in the course of promulgating the CAFO Rule. *See Nat'l Resources Def. Council, Inc. v. EPA*, 824 F.2d 1146, 1151 (D.C. Cir. 1987).

1 Environmental Petitioners in part.

2 The EPA does not dispute that it is required, under the Clean Water Act, to promulgate BCT-
3 based effluent guidelines for at least one pathogen, namely fecal coliform. *See* 33 U.S.C. §
4 1314(a)(4) (listing fecal coliform as a conventional pollutant subject to regulation); 33 U.S.C. §
5 1311(b)(2)(E) (requiring the promulgation of BCT standards for pollutants). That is to say, the EPA
6 does not dispute that it is required to promulgate a technology standard for achieving pathogen
7 reductions that reflects the *best* conventional pollutant control technology. The EPA also does not
8 here dispute that there is a more than *de minimis* presence of pathogens in the animal waste regulated
9 by the CAFO Rule. In the Preamble to the CAFO Rule, for example, the EPA expressly
10 acknowledges “the presence of pathogens in animal wastes and the potential risk they pose to human
11 health and the environment.” Preamble to the Final Rule at 7217. *See also* EPA, RESPONSE TO
12 COMMENTS ON THE NPDES PERMITTING REQUIREMENTS AND EFFLUENT LIMITATIONS GUIDELINES
13 FOR CONCENTRATED ANIMAL FEEDING OPERATIONS A-8 (Dec. 2002) (“EPA recognizes the presence
14 of pathogens in animal wastes and the potential risk they pose to human health and the
15 environment”); Proposed Rule at 2977 (noting that livestock manure “contains countless
16 microorganisms, including bacteria, viruses, protozoa, and parasites,” that “[m]ultiple species of
17 pathogens may be transmitted directly from a host animal’s manure to surface water” and that
18 “[o]ver 150 pathogens found in livestock manure are associated with risks to humans”).

19 The EPA argues that, notwithstanding the above, its failure to impose any BCT-based ELGs
20 specifically designed to achieve pathogen reductions is justified. Principally, the EPA argues that:
21 (1) the pathogen controls it did evaluate, most of which appear to relate to the use or potential use

1 of anaerobic digestion technology, would not necessarily lead to significant pathogen reduction, but
2 would impose significant costs, *see* Preamble to the Final Rule at 7217; and (2) the ELGs otherwise
3 adopted by the CAFO Rule may “incidentally” achieve some reductions of the pathogens in CAFO
4 discharges. *See* Brief of Respondents United States Environmental Protection Agency, et al. at 196;
5 *see also* Preamble to the Final Rule at 7217 (“Although the ELG requirements in this rule are not
6 specifically designed to reduce the pathogens in animal wastes, today’s rule may achieve some
7 reductions of pathogens in CAFO discharges . . .”).

8 In our view, however, the CAFO Rule violates the Clean Water Act because the EPA has not
9 made an affirmative finding that the BCT-based ELGs adopted in the CAFO Rule do *in fact*
10 represent the best conventional pollutant control technology for reducing pathogens. The EPA may
11 well determine, within the bounds of its discretion, that the ELGs otherwise adopted by the CAFO
12 do in fact represent the best conventional pollutant control technology for reducing pathogens. It
13 may well be the case, to put it slightly differently, that the EPA determines, after considering all the
14 relevant factors, that the ELGs otherwise adopted by the CAFO Rule will directly – not just
15 incidentally – reduce pathogens and do so better than any other pollutant control technology. But
16 we cannot, consistent with the Act, allow the EPA to avoid imposing any other pollutant control
17 technology without an express finding in this regard. The Act requires that the EPA select the best
18 pollutant control technology for reducing pathogens, and we must enforce that requirement.³¹

³¹ Because the EPA never made an affirmative finding that the other ELGs adopted by the CAFO Rule constitute the *best* conventional pollutant control technology, we need not address whether EPA reasonably rejected other pathogen controls. The rejection of those controls is not properly before this Court.

1 Accordingly, we grant the petition to the extent that Environmental Petitioners challenge the
2 EPA’s failure to impose ELGs specifically designed to reduce pathogens in CAFO discharges as a
3 violation of the Clean Water Act.

4 3. Challenge to the New Source Performance Standard for Swine, Poultry, and Veal

5 The Environmental Petitioners claim that the EPA’s “new source performance standard” for
6 the production areas of swine, poultry, and veal CAFOs is arbitrary and capricious and that – because
7 the EPA introduced a change to the standard that was not subject to public comment – the new
8 source performance standard for the production areas of swine, poultry, and veal CAFOs violates
9 the Clean Water Act’s public participation requirements. We agree with them in part.

10 The Clean Water Act requires the EPA to promulgate “New Source Performance Standards”
11 (“NSPS”) for new, as opposed to already existing, sources of pollution. *See* 33 U.S.C. § 1316. The
12 Act provides that these standards must “reflect the greatest degree of effluent reduction which the
13 Administrator determines to be achievable through application of the best available demonstrated
14 control technology, processes, operating methods, or other alternatives, including, where practicable,
15 a standard permitting no discharge of pollutants.” 33 U.S.C. §1316(a)(1). The Act further requires
16 that the EPA “take into consideration the cost of achieving such effluent reduction, and any non-
17 water quality, environmental impact and energy requirements.” 33 U.S.C. § 1316(b)(1)(B). And we
18 note that the EPA is given “considerable discretion to weigh and balance the various factors required
19 by statute to set [NSPS].” *Riverkeeper, Inc. v. EPA*, 358 F.3d 174, 195 (2d Cir. 2004) (citation
20 omitted).

21 The EPA initially proposed that the NSPS for the production areas of swine, poultry and veal

1 CAFOs include various groundwater-related requirements, *see* Proposed Rule at 3144, and also
2 proposed that the NSPS for the production areas of swine, poultry, and veal CAFOs include a total
3 prohibition on production area discharges. *See id.* (“There must be no discharge of process
4 wastewater pollutants into U.S. waters, including any pollutants discharged to ground water which
5 have a direct hydrological connection to surface waters.”). In the Final Rule, however, the EPA
6 changed course in several respects: (1) The NSPS did not include the groundwater-related
7 requirements; (2) the NSPS still barred all production area discharges, but provided that a CAFO
8 could comply with this requirement by designing, constructing, operating and maintaining
9 production areas that could “contain all manure, litter, and process wastewater including the runoff
10 and the direct precipitation from a 100-year, 24-hour rainfall event;” and (3) the NSPS empowered
11 permitting authorities to establish alternative performance standards that allow production area
12 discharges, so long as such discharges were accompanied by “an equivalent or greater reduction in
13 the quantity of pollutants released to other media” by the CAFO. *See* 40 C.F.R. § 412.46. The
14 Environmental Petitioners here challenge all three aspects of the final NSPS.

15 We reject the challenge to the extent that it concerns the EPA’s failure to include
16 groundwater-related requirements as part of the NSPS. The EPA’s decision not to include such
17 requirements as part of the NSPS was predicated on the same findings underlying its decision not
18 to include groundwater-related requirements as part of the BAT for “Subpart C CAFOs.” And as
19 we have already explained, we believe that these findings are supported in the record. *See* discussion
20 *supra*.

21 However, we agree with the Environmental Petitioners that there is not adequate support in

1 the record for either: (1) the EPA’s decision to allow CAFOs to comply with the “total prohibition”
2 requirement by designing, operating, and maintaining a facility to contain the runoff from a 100-year,
3 24-hour rainfall event; or (2) the EPA’s decision to allow CAFOs to comply with the “total
4 prohibition” requirement through alternative performance standards.

5 With respect to the former, the EPA claims that the “100-year, 24-hour rainfall event” design
6 standard is functionally equivalent to or a logical outgrowth of a total prohibition standard. The EPA
7 has not, however, adequately substantiated this claim. For example, the EPA never modeled the
8 potential overflows and pollutant loads from a system with a 100-year, 24-hour storm event design
9 capacity; so far as we can tell, the EPA modeled only the potential overflows and pollutant loads
10 from a system with a 25-year, 24-hour storm event. And while certain studies may have shown that
11 the production area BMPs adopted by the CAFO Rule would have substantially prevented the
12 production area discharges documented in the record, we think it obvious that *substantially*
13 *preventing* discharges is not the same as prohibiting them outright.

14 With respect to the latter, the EPA has not justified in any way – let alone with adequate
15 support in the record – its decision to allow a CAFO to comply with the total prohibition standard
16 through an alternative standard permitting production area discharges so long as the CAFO’s
17 aggregate pollution is equivalent to or lower than what it would have been without the production
18 area discharges.

19 Additionally, because the EPA did not indicate, until the adoption of the final rule, that it was
20 considering either the 100-year, 24-hour rainfall event option or the possibility of alternative
21 performance standards, we find that the EPA’s decision to adopt such provisions as part of the NSPS

1 for swine, poultry, and veal violates the Clean Water Act’s public participation requirements. *See*
2 33 U.S.C. § 1251(e) (“Public participation in the development, revision, and enforcement of any
3 regulation, standard, effluent limitation, plan, or program established by the Administrator or any
4 State under this Act shall be provided for, encouraged, and assisted by the Administrator and the
5 States”).

6 4. Challenge to the EPA’s Failure to Impose Water Quality Based Effluent Limitations

7 We now consider the final challenge brought in this consolidated petition, namely, whether
8 the CAFO Rule violates the Clean Water Act and is otherwise arbitrary and capricious under the
9 Administrative Procedure Act because the Rule fails to promulgate water quality based effluent
10 limitations (“WQBELs”) and also bars states from doing so. We agree with the Environmental
11 Petitioners that it does, at least in part.

12 As stated above, the Clean Water Act not only requires that the EPA promulgate technology-
13 based effluent limitations, but also provides that additional WQBELs “shall be established” – either
14 by the EPA, *see* 33 U.S.C. § 1312(a), or by the states, *see* 33 U.S.C. § 1314(l) – where “discharges
15 of pollutants from a point source or group of point sources . . . would interfere with the attainment
16 or maintenance of that water quality in a specific portion of the navigable waters which shall assure
17 protection of public health, public water supplies, agricultural and industrial uses, and the protection
18 and propagation of a balanced population of shellfish, fish and wildlife, and allow recreational
19 activities in and on the water.” 33 U.S.C. § 1312(a). The Act authorizes the imposition of such
20 WQBELs because “[t]he limitations necessary to achieve a given level of water quality in one reach
21 of a waterway may require more control of effluents than that attainable through application of the

1 best available technology.” 2 A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT
3 AMENDMENTS OF 1972, Committee Print Compiled for the Senate Committee on Public Works by
4 the Library of Congress, Ser. No. 93-1, p. 1464 (1973).

5 The CAFO Rule does not, here, promulgate any WQBELs. This much is clear. And this
6 does not present a problem to the extent that the Rule fails to promulgate – and bars the states from
7 promulgating – WQBELs for any “agricultural stormwater discharge,” as that term is defined in 40
8 C.F.R. § 122.23(e).³² Agricultural stormwater discharges are, after all, statutorily exempt from any
9 effluent limitations, including WQBELs, because they are not point source discharges. See 33
10 U.S.C. § 1362(14).

What is fully unclear is: (1) why the CAFO Rule exempts discharges other than agricultural

³² The Environmental Petitioners argue that the Preamble to the Final Rule can be construed to give the term “agricultural stormwater discharge” a broader definition than the one provided in 40 C.F.R. § 122.23(e). Because the Preamble at one point states that where a CAFO has developed site specific practices to ensure appropriate agricultural utilization of nutrients, “[a]ny remaining discharge ... would be covered by the agricultural storm water exemption,” the Environmental Petitioners claim that the agricultural stormwater exemption might be read to include even “dry weather discharges,” i.e., discharges not caused by rain. Preamble to the Final Rule at 7198. We disagree. First and most importantly, the CAFO Rule itself provides that only a “precipitation-related discharge” can be classified as agricultural stormwater. 40 C.F.R. § 122.23(e). Dry-weather discharges are, by definition, not precipitation-related. Second, the Preamble expressly states – in the paragraph preceding the statement that the Environmental Petitioners construe as suggesting a broader definition of agricultural stormwater – that “any dry weather discharge of manure or process wastewater resulting from its application to land area [sic] under the control of a CAFO would not be considered an agricultural storm water discharge and would thus be subject to Clean Water Act requirements.” Preamble to the Final Rule at 7198. Thus, the agricultural stormwater exemption encompasses only those discharges that the CAFO Rule defines as agricultural stormwater, that is, a “precipitation-related discharge of manure, litter, or process wastewater from land areas under the control of a CAFO” where the “manure, litter or process wastewater has [otherwise] been applied in accordance with site specific nutrient management practices that ensure appropriate agricultural utilization.” 40 C.F.R. § 122.23(e).

1 stormwater discharges from WQBELs, and (2) whether the CAFO Rule bars the states from
2 promulgating WQBELs for discharges other than agricultural stormwater discharges, and, if so, why.
3 With regard to the former, the EPA has here indicated its intention not to promulgate any WQBELs
4 whatsoever; the Preamble to the Final Rule states, after all, that the “EPA does not expect that water
5 quality-based effluent limitations will be established for CAFO discharges resulting from the land
6 application of manure, litter or process wastewater.” Preamble to the Final Rule at 7207. The EPA
7 has, however, only justified its determination not to impose WQBELs, only insofar as agricultural
8 stormwater discharges are concerned. *See id.* The EPA has not attempted, in any way, to explain
9 its failure to promulgate WQBELs for CAFO discharges other than agricultural stormwater
10 discharges as that term is defined in 40 C.F.R. § 122.23(e). The EPA sidesteps the issue completely
11 on appeal, and the Preamble to the CAFO Rule similarly fails to explain, let alone justify, its
12 decision. Since there is otherwise evidence in the record suggesting that the EPA’s technology-based
13 effluent limitation guidelines may not, on their own, “assure protection of public health,” *see, e.g.*,
14 Memorandum from Laurel J. Staley, Chief, Treatment and Destruction Branch, Land Remediation
15 & Pollution Control Division, EPA, Re: Assessment of the Necessity for Controlling Potentially
16 Infectious Microorganisms in Animal Wastes (Jan. 16, 2002), we find that the EPA’s failure to
17 justify the lack of WQBELs for CAFO discharges other than agricultural stormwater discharges
18 violates 33 U.S.C. § 1312(a) and is arbitrary and capricious in violation of the Administrative
19 Procedure Act.³³ Accordingly, on remand, we direct the EPA to explain whether or not, and why,

³³ To be clear, we are not asked to consider – and we accordingly do not consider – whether EPA is statutorily required, in the first instance, to investigate the propriety of imposing WQBELs. Here, we hold only that where the EPA has made a determination, one way or the

1 WQBELs are needed to assure that CAFO discharges will not “interfere with the attainment or
2 maintenance of that water quality in a specific portion of the navigable waters which shall assure
3 protection of public health, public water supplies, agricultural and industrial uses, and the protection
4 and propagation of a balanced population of shellfish, fish and wildlife, and allow recreational
5 activities in and on the water.” 33 U.S.C. § 1312(a).

6 Additionally, we find that the Preamble to the Rule is ambiguous about whether states may
7 promulgate WQBELs for discharges other than agricultural stormwater discharges as that term is
8 defined in 40 C.F.R. § 122.23(e). On the one hand, the Preamble does, at one time, seem to suggest
9 that states may promulgate WQBELs; it provides that “[a]lthough, as noted above, manure and
10 process wastewater discharges from the land application area are not directly subject to water
11 quality-based effluent limits, EPA encourages States to address water quality protection issues in
12 their technical standards for determining appropriate land application practice.” Preamble to the
13 Final Rule at 7198. On the other hand, the Preamble elsewhere says that where a CAFO has
14 implemented site-specific practices designed to ensure appropriate agricultural utilization of
15 nutrients, it is free from *any* further regulation. To wit, the Preamble states:

16 In explaining how the scope of CAFO point source discharges is limited by the agricultural
17 storm water exemption, EPA intends that this limitation will provide a “floor” for CAFOs
18 that will ensure that, where a CAFO is land applying manure, litter or process wastewater in
19 accordance with site specific practices designed to ensure appropriate agricultural utilization
20 of nutrients, *no further effluent limitations will be authorized, for example, to ensure*
21 *compliance with water quality standards.*

other, about the propriety of imposing WQBELs, that determination must be reasonable and supported in the record, i.e., not arbitrary and capricious.

1 *Id.* (emphasis added). Given the ambiguity in the Preamble, and given the fact that at least one state
2 has expressed concern that the Rule prevents the imposition of any state WQBELs, *see* Wisconsin
3 Dep't of Natural Res. Comments on U.S. EPA's Proposed Rule Revisions for Concentrated Animal
4 Feeding Operations at 1 (July 27, 2001), we believe it necessary for the EPA to explain more clearly,
5 on remand, whether in fact states may promulgate WQBELs for discharges other than agricultural
6 stormwater discharges as the term is defined in 40 C.F.R. § 122.23(e) and, if not, why.

7 Accordingly, we grant the Environmental Petitioners' challenge to the extent that they claim
8 that the CAFO Rule is arbitrary and capricious under the Administrative Procedure Act because the
9 EPA has not sufficiently justified its decision not to promulgate WQBELs for discharges other than
10 agricultural stormwater discharges, as that term is defined in 40 C.F.R. § 122.23(e). Additionally,
11 we grant the Environmental Petitioners' petition to the extent that it seeks clarification of whether
12 the CAFO Rule bars the states from promulgating WQBELs.³⁴

13 CONCLUSION

14 For the foregoing reasons, the petitions are granted in part and denied in part. We hereby
15 vacate those provisions of the CAFO Rule that: (1) allow permitting authorities to issue permits
16 without reviewing the terms of the nutrient management plans; (2) allow permitting authorities to

³⁴ The Environmental Petitioners moved to clarify and/or supplement the administrative record on appeal to include certain documents exchanged between the EPA and the Office of Management and Budget. They so moved because, in their view, the EPA-OMB documents supported their challenges to (a) the EPA's failure to promulgate WQBELs and (b) the CAFO Rule's new source performance standard for swine, poultry, and veal. Because we have granted both these challenges without even considering the EPA-OMB documents, we deny the Environmental Petitioners' motion as moot.

1 issue permits that do not include the terms of the nutrient management plans and that do not
2 provide for adequate public participation; and (3) require CAFOs to apply for NPDES permits or
3 otherwise demonstrate that they have no potential to discharge. We also remand other aspects of
4 the CAFO Rule to the EPA for further clarification and analysis. Specifically, we direct the EPA
5 to: (1) definitively select a BCT standard for pathogen reduction; and (2) clarify – via a process
6 that adequately involves the public – the statutory and evidentiary basis for allowing Subpart D
7 CAFO’s to comply with the new source performance standard by either: (a) designing,
8 constructing, operating and maintaining production areas that could contain all manure, litter and
9 process wastewater including the runoff and the direct precipitation from a 100-year, 24-hour
10 rainfall event; or (b) complying with alternative performance standards that allow production
11 area discharges, so long as such discharges are accompanied by an equivalent or greater
12 reduction in the quantity of pollutants released to other media. Additionally, we direct the EPA
13 to clarify the statutory and evidentiary basis for failing to promulgate water quality based effluent
14 limitations for discharges other than agricultural stormwater discharges, as that term is defined in
15 40 C.F.R. § 122.23(e), and also direct the EPA to clarify whether states may develop water
16 quality based effluent limitations on their own. We uphold the CAFO Rule in all other respects.

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***Recent Developments in the Regulation of
Municipal Solid Waste Landfill Facilities***

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Recent Developments in the Regulation of Municipal Solid Waste Landfill Facilities

The Texas Commission on Environmental Quality (TCEQ) recently embarked on a substantial series of revisions to the State's regulations governing the management of municipal solid waste (MSW). The current rulemaking activities represent the TCEQ's most comprehensive rewrite of the MSW regulations since jurisdiction over the program was transferred to the agency from the Texas Department of Health (TDH) in the early 1990s.

This paper generally focuses on three rulemaking projects of the TCEQ, each of which will substantially affect the permitting and operation of landfills and other MSW facilities in Texas. Several of the controversial aspects of each rulemaking project will be highlighted. In addition, recently enacted legislation affecting the permitting of MSW facilities is briefly discussed.

I. Phase I Rulemaking 30 TAC Chapter 330, Subchapter F (MSW Site Operating Plans)

A. Background. The first phase of TCEQ rulemaking involves amendments to Subchapter F of 30 Texas Administrative Code (TAC) Chapter 330 relating to site operating plans (SOPs) for MSW facilities. Pursuant to 30 TAC §§ 330.51 and 330.114, an application for a Type I (*e.g.*, household solid waste) or Type IV (*e.g.*, construction and demolition debris) landfill must contain an SOP sufficient to enable site management and personnel to conduct daily operations at the site in an environmentally protective manner. The SOP regulations were targeted by TCEQ at the outset to address recurring issues arising from the day-to-day operation of some landfills (*e.g.*, complaints regarding

odor, noise, windblown trash, etc.) as well as in response to a judicial decision of the Third Court of Appeals in Austin concerning the requisite degree of specificity in such SOPs.¹

B. Call-in procedure. Under the amended SOP rules, which became effective on December 2, 2004, existing landfill permit holders (permittees) must apply for a publicly-noticed permit modification to incorporate the new requirements of Subchapter F into the existing SOP.² The

¹ See *BFI Waste Systems of North American, Inc. and Texas Natural Resource Conservation Commission v. Martinez Environmental Group, City of China Grove, and Don McKenzie*, Case No. 03-02-00218-CV (November 21, 2002). The Third Court of Appeals affirmed in part, and reversed and rendered in part, a decision of the Travis County District Court setting aside the agency's decision approving a permit amendment for a landfill in Bexar County, Texas. In pertinent part, the Court held that:

"There are no detailed general rules to guide the daily operation of a municipal solid waste plant. The Commission has rejected a one-size-fits-all approach to regulation, in favor of individual site operating plans tailored to meet specific locations. Each site operating plan must therefore provide specific, enforceable procedures to govern the daily operation of a specific landfill. *The exact level of detail required of each individual section of a plan is a matter of agency discretion -- but, at a minimum, a plan must set out enforceable procedures and be more detailed than the general rules that it implements.* We affirm the district court's ruling that BFI's site operating plan does not comply with chapter 30, section 330.114 of the Texas Administrative Code." (Emphasis added).

² A "noticed" permit modification involves the issuance of mailed notice to potentially affected persons in accordance with 30 TAC § 305.70(k). The rules do not provide a right to a contested case hearing on a permit modification, but the Executive Director's approval or disapproval of the application is subject to a motion to overturn which may be heard by the TCEQ's Commissioners.

TCEQ Executive Director is responsible for establishing a schedule for existing permittees to submit their permit modifications. Timely submission of an application will enable a permittee to continue operating under existing permit requirements until a final decision is made on the application for a permit modification.³

The so-called “call-in” schedule for existing facilities is organized along regional lines, with the first group consisting of approximately sixteen (16) landfills located within the North Central Texas Council of Governments region (*e.g.*, Dallas, Denton, Ellis, Hunt, Johnson and Parker counties). The second group consists of approximately thirteen (13) facilities located within the Houston-Galveston Area Council and Southeast Texas Regional Planning Commission. There are a total of six call-in groups representing the 79 largest Type I landfill facilities (based on waste acceptance rates). Other types of facilities (*e.g.*, medium/small Type I facilities, Type IV facilities, etc.) will in similar fashion be called-in by region. Type V facilities (*e.g.*, transfer stations) and registered facilities will be not be called-in. A copy of the TCEQ’s call-in criteria, map and listing of affected facilities are included in Attachment ‘A’.

C. Rule applicability. Despite the TCEQ’s establishment of a call-in schedule for existing facilities, the question of applicability to pending applications stirred controversy that resulted in a consolidated series of certified questions from the State Office of Administrative Hearings (SOAH) to the TCEQ’s Commissioners. The certified questions involved four pending landfill applications scheduled for contested case hearings on or about the effective date

of the SOP rule amendments.⁴ The TCEQ had previously determined that any application for a new landfill or major amendment to an existing permit received on or after December 2, 2004, would be processed under the amended SOP rules. Despite the call-in approach incorporated into Subchapter F, interested parties argued 30 TAC § 305.127(4)(B) independently requires that any regulations taking effect before final adjudication must be applied to the pending applications.

The Commissioners formally considered the contested matters on April 13, 2005, during which it was announced that one of the certified questions had been withdrawn and two applicants had opted to modify their SOPs and proceed under the amended rules. Various alternatives were discussed by the Commissioners, including a permit provision requiring an SOP update by a date certain (if not otherwise called-in)⁵ and a provision conditioning the acceptance of waste upon approval of a revised SOP. It was ultimately determined by the Commissioners that the fourth application *could* continue to be processed under the SOP regulations in effect when the application was filed. The effect of such decision on the remaining applications (approximately 10) pending on the effective date of the amended rules is not entirely clear.

Although the Executive Director is not requiring *non-landfill* facilities (*e.g.*, MSW transfer stations) to initiate a permit or registration modification to comply with the newly amended SOP rules (*i.e.*, no call-in schedule), permits and registrations issued

³ 30 TAC § 330.11(b) (December 2, 2004).

⁴ The four permit applications were filed by Waste Management of Texas, the City of Anson, Tan Terra Environmental Services, Inc., and Regional Land Management Services, Ltd.

⁵ See, *e.g.*, 30 TAC § 305.127(3).

on and after December 2, 2004, will be subject to the new regulations. Applications for *modification* of permits and registrations which request changes to the SOP and are approved after the same date are similarly subject to the amended rules.

D. Selected issues. Several controversial or noteworthy aspects of the amended SOP regulations include (i) waste acceptance rates, (ii) facility operating hours, and (iii) access road maintenance.

1. Waste acceptance rates. Amid industry concerns that the TCEQ was for the first time broadly seeking to impose quantitative limits on the rate at which MSW could be accepted at landfill facilities (*e.g.*, flow control), the final rulemaking clarified that the requirement to set forth an estimated waste acceptance rate is not intended to establish a limiting parameter in the permit. Rather, the estimated waste acceptance rate is a forecasting device to help maintain the correct balance of on-site personnel, equipment and operating procedures relative to the amount of waste being received at the facility.⁶ If the annual waste acceptance rate (rolling four quarter average) exceeds such estimate and is not due to a temporary occurrence, the permittee is required to file an application within ninety (90) days to modify the SOP to further ensure proper management.⁷

⁶ According to TCEQ guidance, the elements of site operation that are related to the waste acceptance rate include number of personnel, necessary equipment, compaction, odor control and related procedures (unloading, screening, windblown waste, daily cover, etc.).

⁷ It is noted that permittees may establish an incremental series of estimated waste acceptance rates and associated equipment, personnel and procedures (*e.g.*, table/matrix) to reduce the need to file a successive series of applications.

2. Operating hours. In an effort to address potential off-site nuisance conditions, including those *not* related to the protection of water, soil or air, TCEQ incorporated provisions limiting the hours during which MSW may be accepted at or transported from the facility and the hours when heavy equipment may operate at the site. In general, the standard hours of operation are 7:00 a.m. to 7:00 p.m., Monday through Friday, unless otherwise approved by the TCEQ through appropriate permit amendment or modification procedures. Also, a general “blackout” period has been established between the hours of 9:00 p.m. and 5:00 a.m., unless otherwise authorized by the Executive Director. If a facility can demonstrate historic operating hours outside the standard time periods established in the rule, such hours may be authorized during the call-in process. Alternate operating hours for up to five (5) days per year may be approved to accommodate special occasions or as otherwise necessary to address natural disasters or emergency conditions. These provisions has been a source of concern to the MSW industry because facilities have historically relied on off-hours to use heavy equipment (*e.g.*, earth-moving when constructing new cells, interior roads, etc.) and such noise abatement provisions are beyond the TCEQ’s core regulatory jurisdiction.

3. Access Road maintenance. The amended regulations require litter pickup, not only on and about the landfill site but at least daily on all public access roads serving the facility for a distance of two (2) miles from each site entrance used by waste delivery vehicles. The permittee must consult with the Texas Department of Transportation (TxDOT), county and local governments having road maintenance authority. The Executive Director may

approve an alternate clean-up frequency and distance during the call-in process. In addition, tracked mud and associated debris at the entrance to the facility and on the public roadway at the entrance must be removed. Permittees are further required to regrade certain access roadways as necessary to minimize depressions, ruts and potholes at a frequency specified in the SOP. These provisions are controversial inasmuch as permittees are being directed by TCEQ, in the absence of any statutory directive, to undertake road maintenance activities far from their facilities to correct deficiencies that are not necessarily or entirely attributable to the landfill operations.

E. Guidance Document. In April of 2005, the TCEQ released its *Guide for Preparing Site Operating Plans for Municipal Solid Waste Facilities* (RG-420). The purpose of the guide is to assist owners and operators of MSW facilities in the preparation of new or revised SOPs in conformance with the amended regulations. A copy of the TCEQ's guidance document for preparing site operating plans can be viewed at:

http://www.tceq.state.tx.us/comm_exec/forms_pubs/pubs/rg/rg-420_541280.pdf

F. Status: The amendments to 30 TAC Chapter 330, Subchapter F, were formally proposed on August 13, 2004, and adopted of November 10, 2004. The rules became effective on December 2, 2004, a copy of which can be viewed at:

[http://www.tnrcc.state.tx.us/permitting/wasteperm/mswperm/msw_sop_adop_29texreg11054-11094\(20041126\).pdf](http://www.tnrcc.state.tx.us/permitting/wasteperm/mswperm/msw_sop_adop_29texreg11054-11094(20041126).pdf)

II. Phase II Regulations 30 TAC Chapter 330, Subchapters A - Y (Remaining MSW Regulations)

A. Background. The second phase of TCEQ rulemaking involves substantial amendments to the remaining subchapters of 30 TAC Chapter 330 including the siting and design of new landfills and amendments to existing facilities. The TCEQ's broader rulemaking commenced in 2004, immediately following adoption of the revised SOP regulations (discussed above). The amendments are scheduled for formal proposal in the *Texas Register* during August of 2005, with final adoption expected in the Fall. In advance of such formal proposal, TCEQ staff issued three iterative rulemaking packages for review and comment by stakeholders.⁸

The current draft rules, issued on May 27, 2005, span in excess of 400 pages and are too voluminous and detailed to discuss in their entirety. Attachment 'B' hereto includes an outline of the most significant provisions developed by TCEQ staff during the initial rulemaking phase. A review of the outline reveals the sweeping nature of the current draft amendments to Chapter 330.

B. Selected issues. Several of the most controversial and noteworthy aspects of the draft amendments to Chapter 330 include (i) expanded buffer zones for new and amended facilities, (ii) vertical expansions over historical disposal areas, (iii) monitor well spacing, (iv) county licensing and the role of COGs in MSW permitting, and (v) rule applicability.

1. Buffer zones. Perhaps the most controversial and significant proposal by TCEQ is the establishment of expanded buffer zones for landfill facilities. The current minimum on-site buffer for landfills

⁸ TCEQ staff issued draft regulations on or about November 23, 2004, March 15, 2005, and May 27, 2005.

is fifty feet (50'), which is ostensibly intended to provide for the safe passage of firefighting and other emergency vehicles and equipment around the facility. Initially, TCEQ suggested a revised buffer zone of fifty feet (50') plus three times (3X) the maximum height of the landfill. Significantly, the expanded buffer zone was made applicable not only to new landfills, but to both lateral and vertical expansions of existing landfills. By way of example, an existing landfill seeking to increase its height from 100' to 200' (*i.e.*, not moving any closer to off-site receptors) would have been required to expand its buffer zone by 600' around the perimeter of the above-grade areas of the landfill. Alternatives to such expanded buffer zones could be approved upon demonstrating to the Executive Director that such standard is not feasible and there is a specific engineered design alternative that affords, among other things, equivalent screening and buffering protection.⁹ The precise objectives of such expanded "buffering" (aside from aesthetics) were not clearly articulated in the initial draft rule.

In a subsequent draft of the proposed rules, TCEQ revised the buffer zone requirement to a fixed distance of 250' around the perimeter of those portions of the landfill that would change as a result of the expansion.¹⁰ The agency also added specific references to the control of windblown waste and odors to the provisions for alternatives to the fixed buffer distance, thereby establishing objectives beyond mere aesthetics.

In the most recent draft, the fixed buffer distance was reduced to 125' and made applicable only to Type I landfills.

However, it is now unclear whether the buffer is still to be measured from the discrete portion of the landfill that would change (*i.e.*, the newly authorized airspace) or from all waste disposal areas at existing facilities. As noted by one industry commenter, such interpretation could preclude the future expansion of any existing landfill that currently has waste located within 125' of the facility boundary – which are many in number because of the preexisting 50' buffer zone requirement – thereby potentially interfering with long-term MSW disposal capacity and planning in Texas.¹¹

Industry commenters have also recommended additional provisions for allowing facilities to demonstrate "control" over real property in order to qualify those areas as buffers, such as easements or agreements with adjacent landowners (*e.g.*, restrictive covenants, settlement agreements, written waivers, etc.). Environmental organizations, on the other hand, have criticized the 125' buffer zone as wholly inadequate to address potential off-site nuisance conditions such as landfill odors and noise.¹²

In the final rulemaking, TCEQ will need to more fully resolve (i) the underlying purposes for expanding the buffer zones, (ii) the appropriateness of applying such expanded buffers to lateral and vertical expansions of existing facilities, (iii) the manner in which buffer distances are to be calculated, and (iv) the methods by which control over property can be demonstrated to satisfy the buffer requirements.

⁹ 30 TAC § 330.541(b) (November 23, 2004).

¹⁰ 30 TAC § 330.541(b) (March 15, 2005 and May 27, 2005).

¹¹ See comments by Lone Star Chapter of the Solid Waste Association of North America (TxSWANA) filed June 10, 2005.

¹² See comments by Texas Campaign for the Environment (TCE) filed June of 2005.

2. Vertical expansions. The draft rules currently provide that vertical expansions over landfill cells that do not have Subtitle D compliant liner systems (e.g., historical waste disposal areas) must either incorporate a composite liner and leachate collection system or otherwise ensure that listed concentration values will not be exceeded in the uppermost aquifer at the relevant point of compliance (e.g., an alternative liner system). The construction of a composite liner and leachate collection system over existing waste disposal areas presents significant challenges, due to the potential for differential settlement of the waste, and the means by which a facility might demonstrate compliance with the performance-based alternative liner standard is not specified in the rule.

At least one industry commenter has questioned whether the draft rule will effectively preclude future expansions over pre-Subtitle D cells, thereby potentially impacting long-term MSW disposal capacity and planning.¹³ Prior industry comments advocated a more flexible leachate *management* system that minimizes the infiltration of water through the expansion area and into the pre-Subtitle D cells, thereby providing greater site-specific design flexibility.¹⁴ At the same time, environmental organizations have questioned whether vertical expansions over pre-Subtitle D cells should ever be allowed, short of permitting such an expansion in the same manner as a new facility.¹⁵

¹³ See comments by Lone Star Chapter of the Solid Waste Association of North America (TxSWANA) filed June 10, 2005.

¹⁴ See comments jointly filed by Waste Management of Texas, Inc., Allied Waste Industries, IESI Corporation, and TxSWANA on April 18, 2005.

¹⁵ See comments by Texas Campaign for the Environment (TCE) filed June of 2005.

3. Monitor well spacing. Preexisting TCEQ guidance specifies a maximum well spacing of 600 feet for groundwater monitoring at landfills to determine the quality of groundwater passing the point of compliance in the uppermost aquifer beneath the facility. The initial draft rules sought to limit monitor well spacing to no greater than 300 feet, which was criticized by the MSW industry as an unjustified and inflexible departure from existing practices. In the most recent draft, TCEQ staff removed the 300-foot spacing requirement but required a multi-dimensional, numerical fate-and-transport flow model to justify any proposed spacing. Industry's concern is that the amount of data necessary to perform such modeling with any degree of accuracy will require significantly more site characterization than has been historically required or is economically justified, and other site specific analysis might be sufficient to properly establish such spacing.¹⁶ In other words, the use of modeling may be necessary or appropriate in some instances, but not in all cases. Environmental organizations have filed comments supporting such a modeling requirement.¹⁷ This requirement, if maintained, may substantially increase the technical and economic burdens on landfill operators and generate numerous issues during the application and hearing process concerning the modeling data and assumptions.

4. County Licensing and the Role of COGs. Counties are authorized to issue MSW permits and other approvals pursuant to locally adopted regulations. During the rulemaking, TCEQ staff expressed an intent

¹⁶ See comments by Lone Star Chapter of the Solid Waste Association of North America (TxSWANA) filed June 10, 2005.

¹⁷ See comments by Texas Campaign for the Environment (TCE) filed June of 2005.

to encourage more counties to develop programs to authorize lower priority MSW facilities (e.g., small rural transfer stations) using such local authority. TCEQ's current draft requires that such local rules be "consistent" with State regulations for permitted facilities and "compatible" for other types of approvals. Some industry commenters have suggested that local rules must be the *same* as the TCEQ's regulations (i.e., no more or less stringent) in order to maintain compliance with federal Subtitle D requirements and/or ensure a statewide level playing field.¹⁸

Additionally, the role of COGs in the TCEQ's permitting process has been a matter of growing controversy over the past several years.¹⁹ Nearly all of the 24 COGs amended their regional solid waste management plans (RSWMPs) during the 2002/2003 grants biennium. Public and private solid waste management activities are required to conform to the RSWMPs following the approval of such plans by TCEQ.

By law, TCEQ is required to adopt rules relating to RSWMPs, and the RSWMPs must conform to the State's solid waste management plan.²⁰ Although the determination of land use compatibility by COGs is not required by the applicable rules, TCEQ's Strategic Plan – Solid Waste Management in Texas (2001-2005) indicates

that COGs *should* address land use compatibility and local facility siting concerns in their RSWMPs, and that the factors addressed should correspond to those listed in the regulations for consideration by the TCEQ during the MSW permitting process.

On the heels of such suggestion, some COGs have sought to require MSW permit applicants to submit substantial technical and other information concerning the facility and its current and future operations in order to support the COG's review and determination of conformance with the RSWMP.²¹ By way of example, some COGs have desired information concerning compliance history, the potential use of alternate daily cover, landscaping/visual screening, odor and nuisance controls, traffic analyses, the maximum geometrically feasible height that the landfill could ever reach in the future, plans to help curtail illegal dumping in the area, and the facility's willingness to contribute cash or in-kind donations to address regional solid waste management problems. Representatives of the MSW industry have expressed concerns to the COGs and the TCEQ that such requirements exceed the legal authority of COGs, do not provide objective standards against which to evaluate MSW applications for conformance with RSWMPs, invade the TCEQ's primary regulatory jurisdiction and result in inappropriate duplication of effort.²²

¹⁸ See comments by Lone Star Chapter of the Solid Waste Association of North America (TxSWANA) filed June 10, 2005.

¹⁹ COGs are regional planning commissions created under the authority of Chapter 391, Local Government Code.

²⁰ Subchapter D of Chapter 361, Texas Health & Safety Code, sets forth the statutory requirements applicable to regional solid waste management plans. 30 TAC Chapter 330, Subchapter O, further specifies the required and recommended content of such RSWMPs.

²¹ See, e.g., Capital Area Planning Council (CAPCO) Regional Solid Waste Management Plan (2002-2022) and drafts of CAPCO's related *Solid Waste Plan Conformance Checklist* (2004-2005); North Central Texas Council of Governments (NCTCOG) *Regional Conformance Evaluation Process* and *Regional Conformance Evaluation Form* and associated *County Solid Waste Facility Siting and Service Need Study* (2004-2005).

²² See, e.g., Comments of Lloyd Gosselink, dated July, 2004, and Associated Consulting Engineers,

TCEQ's current draft regulations do not expressly resolve these issues. The amended rules provide that the content of RSWMPs are as specified in Texas Health and Safety Code § 363.064,²³ yet the provisions setting forth plan content simply require that COGs commit to developing a guidance document to review MSW applications to determine conformance with the goals and objectives outlined in applicable *Regional Solid Waste Management Plan Implementation Guidelines*.²⁴ The provisions governing implementation plans, in turn, merely require COGs to identify the process that will be used to evaluate whether a proposed facility will be in conformance with the RSWMP.²⁵ It is noted, however, that TCEQ staff has reordered the required content of MWS permit applications by moving the land-use-only components into Parts I and II of the application, and the rules require applicants to simply furnish Parts I and II to the COGs.²⁶ The facility must then submit documentation to TCEQ that a review letter was requested from the COG to document compliance with the RSWMP.²⁷

5. Rule applicability. The current draft rules set forth a series of implementation dates. Based on the certified questions and debate concerning the applicability of recent amendments to Subchapter F, it may be necessary for TCEQ to proactively resolve any implementation issues potentially arising from 30 TAC § 305.127(4)(B). As referenced above, various interests had

argued that § 305.127(4)(B) required the TCEQ to fully impose upon pending and subsequently filed applications all of the amendments to Subchapter F, notwithstanding the "call-in" approach established in the amended rules. TCEQ should affirmatively address whether or to what extent a permit modification or other application that is pending or filed after adoption triggers full implementation of the Chapter 330 revisions prior to the applicability dates established in the amended rules.

C. Other Issues. In response to the March 15, 2005, draft regulations, representatives of the MSW industry, including TxSWANA, Waste Management, Allied Waste Industries and IESI Corporation, filed joint comments identifying the landfill industry's twelve (12) top industry concerns. Rather than reiterating each of those concerns herein, the joint comments are attached hereto as Attachment 'C'. They address such issues as buffer zones, applicability to pending applications, use of solid waste data, land use analysis, consistency with regional planning, leachate collection systems, groundwater monitoring, duration and limits of authorizations, closure and post-closure cost estimates, regulation of testing laboratories, noise pollution controls, and surface water quality standards.

D. Status: The current draft amendments to 30 TAC Chapter 330 were released to stakeholders on May 27, 2005. The comment period expired on June 10, 2005, and the amendments are tentatively scheduled for consideration by the TCEQ Commissioners in August of 2005 (*i.e.*, approval to formally propose the rules). Copies of the draft rules can be viewed at:

http://www.tnrcc.state.tx.us/permitting/wasteperm/mswperm/msw_ch330_advdp.html#draft_rule

Inc., dated July 6, 2004, filed with the TCEQ's Strategic Assessment Division, Waste Planning Team, in regard to the CAPCO plan; and comments of Waste Management of Texas, Inc., dated April 21, 2005, filed with NCTCOG.

²³ See 30 TAC § 330.631(a) and (c) (May 27, 2005).

²⁴ See 30 TAC § 330.635(a)(2)(b) (May 27, 2005).

²⁵ See 30 TAC § 330.643(o) (May 27, 2005).

²⁶ See 30 TAC § 330.57(e)(2) (May 27, 2005).

²⁷ See 30 TAC § 330.59(p) (May 27, 2005).

III. Phase III Rulemaking 30 TAC Chapter 305, Subchapter D (MSW Permit and Registration Modifications)

A. Background. The third phase of TCEQ rule amendments will involve revisions to 30 TAC §§ 305.70 and 305.62 to establish a new category of *major* modifications to MSW permits (distinguishable from *minor* modifications) and address “Subtitle D” upgrades.

B. Major Modifications. The new category of major modifications will allow more significant changes to MSW facilities and their operations without triggering the requirement to secure a major *amendment* under 30 TAC § 305.62. A primary purpose of the rules is to limit the scope of contested proceedings to the specific modifications requested in the permit application. Historically, significant changes to MSW facilities have triggered major amendment proceedings in which virtually all aspects of the facility and its operations were subjected to challenge. Although certain statutory provisions and associated rules expressly mandate major amendments for specific types of applications (*e.g.*, Subtitle D upgrades), the revisions to § 305.70 will otherwise dispense with the need for MSW facilities to obtain major amendments under § 305.62.

C. Subtitle D Upgrades. The amendments to Chapter 305 would also further tighten the circumstances in which the modification procedures of 30 TAC § 305.70 can be utilized by permitted landfill facilities to upgrade to the requirements of 40 Code of Federal Regulations (CFR) Part 258 (*i.e.*, federal Subtitle D regulations). In the early to mid-1990s, the TCEQ freely enabled previously permitted landfills to

upgrade their design and operations to meet new federal Subtitle D regulations through Class I permit modifications, rather than permit amendments, thereby dispensing with the need for contested case hearings. In 2001, the TCEQ amended its permit modification rules to address situations in which closed or inactive landfills and previously permitted landfills that never received any waste could utilize modification procedures to upgrade an entire facility to meet Subtitle D requirements.²⁸ Such rulemaking did not expressly address, however, situations in which landfills may have previously submitted Subtitle D upgrade requests, received conditional and/or partial approvals from the TCEQ, and then continuously operated the landfill in accordance with Subtitle D while pursuing additional modifications for previously permitted but undeveloped portions of the facility.²⁹ The current draft rules would now specifically preclude the use of modification procedures to upgrade any facility that previously submitted an upgrade application.

D. Status: The current draft amendments to 30 TAC §§ 305.70 and 305.62 were released to stakeholders on June 8, 2005. The initial comment period expired on July 8, 2005, and the rule is tentatively scheduled for consideration by

²⁸ The rules were adopted in response to statutory changes and agency policies flowing from the Henderson Landfill project in Rusk County, Texas. In 2000, the TCEQ authorized IESI TX Landfill, L.P. to upgrade the facility to meet Subtitle D requirements through permit modification procedures.

²⁹ The ability of such a facility to pursue a series of discrete permit modifications for undeveloped areas, rather than obtain a major amendment, was presented in the matter of IESI TX Landfill, L.P.’s application for the Weatherford Landfill project in Parker County, Texas. On January 26, 2005, the TCEQ denied motions to overturn the Executive Director’s approval of the permit modifications.

the TCEQ Commissioners on November 30, 2005 (*i.e.*, approval to formally propose the rule amendments). The rules would be fully adopted in early 2006. A copy of the initial draft amendments can be viewed at:

http://www.tnrcc.state.tx.us/permitting/wasteperm/mswperm/msw_majormod_advdp_drafrule.pdf

IV. Recent Legislation

During the recent regular session of the Texas Legislature, House Bill (H.B.) 1609 was passed, which dispenses with the mandatory requirement to conduct a public meeting on certain applications for MSW landfills. The TCEQ now has the *discretion* to require a public meeting unless requested by the State Senator or Representative from the area. H.B. 1609 was supported by TCEQ because interested persons did not attend some public meetings, resulting in unnecessary notification, travel and staffing expenditures, and because some meetings were held too early in the application process to enable meaningful participation by agency personnel (*e.g.*, requirement to hold a public meeting within 45 days after filing an application). Opponents of the legislation believe the requirement to conduct a public meeting should not be discretionary with the TCEQ and that a meeting should be required in all cases. A copy of H.B. 1609 is included in Attachment 'D' and can be viewed at:

<http://www.capitol.state.tx.us/cgi-bin/tlo/textframe.cmd?LEG=79&SESS=R&CHAMBER=H&BILLTYPE=B&BILLSUFFIX=01609&VERSION=5&TYPE=B>

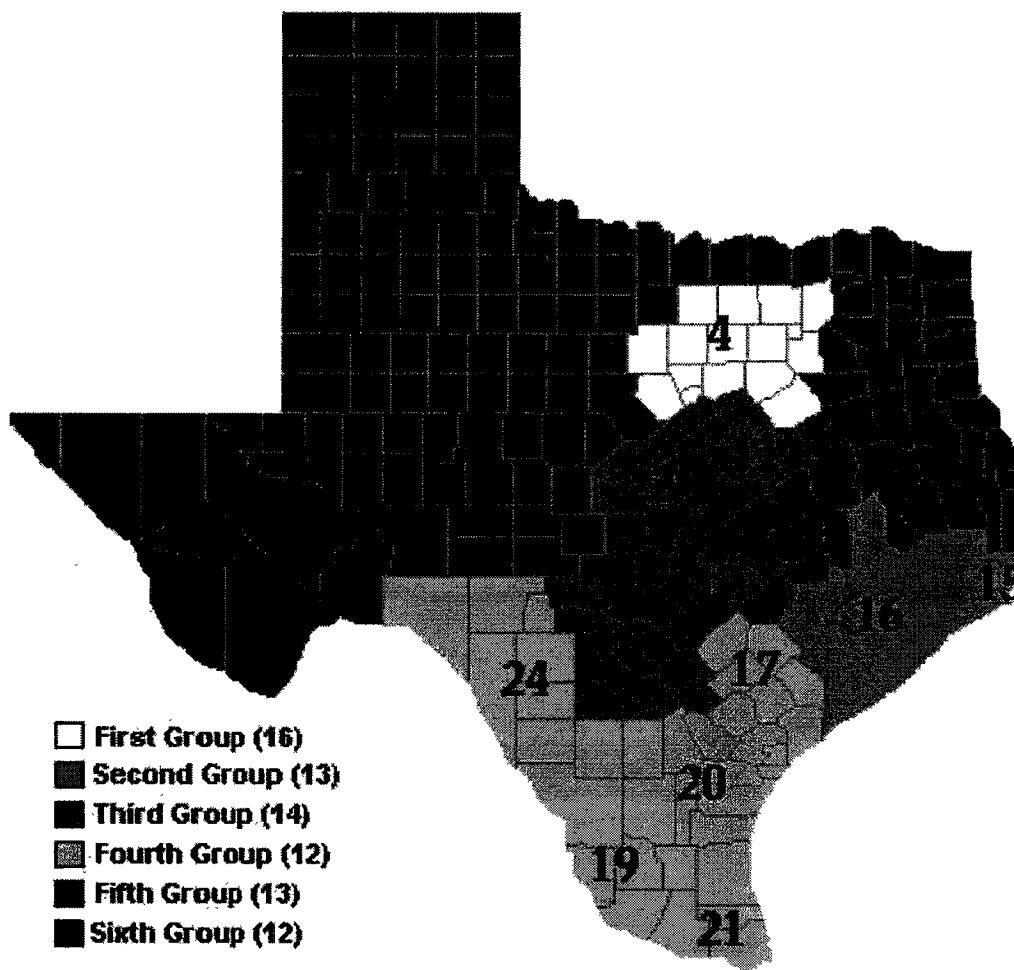
V. Conclusion

The above-referenced rulemaking projects and legislation include several controversial and noteworthy provisions that will substantially affect the manner in which new and existing landfills and other MSW facilities will be operated and permitted in the State of Texas and should be closely followed.

Attachment 'A'

**Site Operating Plan Call-In Map,
Listing of Type I Landfill Facilities and
Implementation Plan Speaking Points**

SOP Call-In Map



Attachment A
Type 1 MSW Landfill Facilities
Facilities to be Called-in
Mod Call-in

Organized by COG and permit number

Database codes used:

2002TONS = Total tons landfilled in 2002
 REMYDS = Remaining landfill capacity in cubic yards
 REMTONS = Remaining landfill capacity in equivalent tons (based on landfill compaction rate)
 REMYRS = Remaining landfill capacity in years (for the amount disposed of in 2002)

Type 1 AE and Type IV Landfills do not appear on this table.

PERMIT	PERMITEE	COUNTY	TYPE	2002TONS	REMYDS	RATE	REMTONS	REMYRS
Group 1								
4 NORTH CENTRAL TEXAS COUNCIL OF GOVERNMENTS								
✓ 42	WASTE MANAGEMENT OF TEXAS, INC.	ELLIS	1	741,400	46,708,000	1400	33,152,000	44.7
✓ 27	CITY OF WINTERFORD	PARKER	1	17,260	2,413,040	1220	1,484,040	86.0
✓ 62	CITY OF DALLAS	DALLAS	1	1,537,145	118,362,201	1320	98,132,201	51.0
✓ 216	CITY OF FORT WORTH	TARRANT	1	73,142	5,610,400	650	2,384,430	31.6
✓ 358	CITY OF ARLINGTON	TARRANT	1	370,000	2,652,363	1250	1,801,427	4.6
✓ 434	CITY OF CLEBURNE	JOHNSON	1	5,473	45,165	2020	45,165	7.8
✓ 555	CITY OF GRAND PRAIRIE	DALLAS	1	151,812	7,478,930	1250	4,407,358	29.0
✓ 1020	WASTE MANAGEMENT OF TEXAS, INC.	DENTON	1	1,677,659	28,800,000	1800	23,920,000	24.0
✓ 1295	REPUBLIC/VALLEY LANDFILL & SAN.	HUNT	1	129,554	8,654,642	1000	4,322,321	33.4
✓ 1288	REPUBLIC WASTE SERVICES OF TX	ELLIS	1	253,513	37,307,930	1655	26,658,812	106.5
✓ 1212	CITY OF FARMERS BRANCH	DENTON	1	387,164	31,410,284	1100	6,305,456	16.3
✓ 1594	CITY OF IRVING	DALLAS	1	67,762	10,350,120	800	4,140,048	61.0
✓ 1417	TURKEY CREEK LANDFILL TX LP	JOHNSON	1	627,027	16,239,819	1026	8,231,027	13.3
✓ 1590	CITY OF DENTON	DENTON	1	197,771	34,100,787	1278	9,010,409	83.6
✓ 1745	ELLIS COUNTY LANDFILL TX LP	ELLIS	1	148,774	42,738,957	1115	23,826,968	160.2
✓ 1895	CITY OF GRANLAND	DALLAS	1	154,628	33,338,368	1500	16,869,784	202.0

PERMIT	PERMITEE	COUNTY	TYPE	1991 TONS	REMYDS	RATE	REMTONS	REMYRS
16								
Group 2 (Composite of 2 regions)								
16 HOUSTON-GALVESTON AREA COUNCIL								
	261	BFI WASTE SYSTEMS N. AMER. INC.	HARRIS	1	1,840,458	6,649,343	1633	5,430,119 2.9
✓	1149	BFI WASTE SYSTEMS N. AMER. INC.	GALVESTO N	1	339,078	7,610,257	1342	5,106,482 17.0
✓	1193	BFI WASTE SYSTEMS N. AMER. INC.	HARRIS	1	108,627	11,894,554	1057	6,286,272 57.9
✓	1307	WASTE MANAGEMENT OF TEXAS, INC.	HARRIS	1	937,296	7,870,000	1200	4,722,000 5.0
✓	1502	CHAMBERS COUNTY	CHAMBERS	1	21,891	757,435	1000	378,718 19.7
✓	1505	BFI WASTE SYSTEMS N. AMER. INC.	FORT BEND	1	557,346	17,762,600	1359	12,069,686 21.7
✓	1535	USA WASTE OF TX LANDFILLS INC	CHAMBERS	1	449,509	15,353,000	1200	9,211,800 20.5
✓	1539	REPUBLIC WASTE SVCS. OF TEXAS	BRAZORIA	1	952,984	6,357,666	1600	5,086,133 5.3
✓	1721	WASTE MANAGEMENT OF TEXAS, INC.	GALVESTO N	1	641,452	22,837,000	1200	13,702,200 21.4
✓	1752	WASTE MANAGEMENT OF TEXAS, INC.	MONTGOME RY	1	278,828	3,162,000	1200	1,897,200 6.8
10								
15 SOUTH EAST TEXAS REGIONAL PLANNING COMMISSION								
	1486	CITY OF BEAUMONT	JEFFERSO N	1	173,733	4,181,616	1250	2,613,510 15.0
✓	1815	CITY OF PORT ARTHUR	JEFFERSO N	1	79,793	4,193,862	1000	2,096,938 26.3
✓	2027	BFI WASTE SYSTEMS N. AMER. INC.	JEFFERSO N	1	300,911	10,956,331	1076	5,894,506 19.6
3								
Group 3 (Composite of 4 regions)								
18 ALAMO AREA COUNCIL OF GOVERNMENTS								
	66	WASTE MANAGEMENT OF TEXAS, INC.	COMAL	1	308,289	877,305	1220	535,156 1.7
✓	1410	BFI WASTE SYSTEMS N. AMER. INC.	BEXAR	1	864,271	116,732,878	1185	69,164,230 80.0
	1506	CITY OF KERRVILLE	KERR	1	49,941	1,680,037	1031	866,059 17.3
	2093	WASTE MANAGEMENT OF TEXAS, INC.	BEXAR	1	1,321,047	43,060,840	1460	31,434,413 23.8

PERMIT	PERMITEE	COUNTY	TYPE	2002 TONS	REMYDS	RATE	REMTONS	REMYRS
4								
12 CAPITAL AREA PLANNING COUNCIL								
✓ 249	WASTE MANAGEMENT OF TEXAS, INC.	TRAVIS	1	487,083	9,084,070	1320	5,995,486	12.3
360	CITY OF AUSTIN	TRAVIS	1	19,201	2,622,120	1000	1,311,060	68.3
✓ 1405	WILLIAMSON COUNTY	WILLIAMS ON	1	160,616	9,139,336	1300	5,940,568	37.0
✓ 1447	BFI WASTE SYSTEMS N. AMER. INC.	TRAVIS	1	905,592	9,388,414	1169	5,487,528	6.1
✓ 2123	TEXAS DISPOSAL SYSTEMS LANDFILL	TRAVIS	1	576,653	35,797,500	1259	22,534,526	39.1
5								
23 CENTRAL TEXAS COUNCIL OF GOVERNMENTS								
✓ 692	CITY OF TEMPLE	BELL	1	237,022	13,885,540	1150	7,984,186	33.7
1								
11 HEART OF TEXAS COUNCIL OF GOVERNMENTS								
✓ 241	SLACK LANDFILL TX LP	BELL	1	106,439	36,723,090	1073	19,532,387	184.0
✓ 946	CITY OF WACO	MCLENNAN	1	225,006	12,169,665	991	6,028,852	26.8
✓ 1558	BFI WASTE SYSTEMS OF N. AMER.	LIVINGSTON	1	45,347	7,982,137	1016	4,054,926	89.4
✓ 1646	CITY OF LACY-LABVIEW	MCLENNAN	1	89,759	3,747,599	1150	2,154,869	24.0
4								
Group 4 (Composite of 5 regions)								
20 COASTAL BEND COUNCIL OF GOVERNMENTS								
✓ 242	BFI WASTE SYSTEMS N. AMER. INC.	SAN PATRICIO	1	98,887	155,542	791	61,516	0.6
✓ 423	CITY OF CORPUS CHRISTI	NUECES	1	369,801	2,237,517	1200	1,342,510	3.6
✓ 2267	TEXAS ECOLOGISTS, INC.	NUECES	1	139,018	18,175,954	1232	11,196,388	80.5
✓ 2263	CITY OF CORPUS CHRISTI	NUECES	1	0	130,495,000	1000	65,247,500	
597	CITY OF FORT WORTH	NUECES	1			400	0	
4								

[illegible]

PERMIT	PERMITEE	COUNTY	TYPE	2003 TONS	REMYDS	RATE	REMTONS	REMYRS
6 EAST TEXAS COUNCIL OF GOVERNMENTS								
1249	IESI TX CORPORATION	RUSK	1	62,717	3,655,654	1100	2,010,610	32.1
1327	PINE HILL FARMS LANDFILL TX LP	GREGG	1	159,739	17,609,934	1861	16,386,044	102.6
1614	PINE HILL FARMS LANDFILL TX LP	CHEROKEE	1	61,310	3,761,003	1209	2,273,526	37.1
1972	LAIDLAW WASTE SYSTEMS	SMITH	1	153,649	6,779,203	1305	4,423,430	28.8
4								
5 ARK-TEX COUNCIL OF GOVERNMENTS								
576	WESTERN WASTE, INC.	BOWIE	1	103,962	52,000	1300	42,350	0.4
797	CITY OF MOUNT PLEASANT	TITUS	1	53,919	6,325,794	1422	4,497,640	83.4
1454	WASTE MANAGEMENT OF TEXAS, INC.	LAMAR	1	171,093	3,980,000	1400	2,790,000	16.3
1898	LONE STAR ARMY AMMUNITION PLANT	BOWIE	1	993	2,050,388	1098	1,125,705	1,133
4								
22 TEXOMA COUNCIL OF GOVERNMENTS								
523	WASTE MANAGEMENT OF TEXAS, INC.	GRAYSON	1	150,402	2,700,000	1300	1,755,000	11.7
1								
13 BRAZOS VALLEY COUNCIL OF GOVERNMENTS								
1444	BRAZOS VALLEY SWMA	BRAZOS	1	271,146	365,891	1200	219,534	0.8
1								
Group 6 (Composite of 7 regions)								
1 PANHANDLE REGIONAL PLANNING COMMISSION								
73	CITY OF AMARILLO	POTTER	1	219,902	29,963,000	820	12,285,000	56.0
1663	SOUTHWEST LANDFILL TX, LP	RANDALL	1	183,790	6,683,945	1080	3,609,330	19.6
2								

PERMIT	PERMITEE	COUNTY	TYPE	2002 TONS	REMYDS	RATE	REMTONS	REMYRS
2 SOUTH PLAINS ASSOCIATION OF GOVERNMENTS								
2252	CITY OF LUBBOCK	LUBBOCK	1	246,032	111,759,930	1086	50,684,917	246.0
1								
3 NORTEX REGIONAL PLANNING COMMISSION								
1428	CITY OF WICHITA FALLS	WICHITA	1	116,682	7,708,163	800	3,083,265	26.4
1571	IESI TX LANDFILL LP	WICHITA	1	199,336	32,875,853	1100	18,081,719	90.7
2								
7 WEST CENTRAL TEXAS COUNCIL OF GOVERNMENTS								
1469	ABILENE LANDFILL TX LP	JONES	1	245,087	41,140,207	1120	23,038,516	94.0
1								
8 RIO GRANDE COUNCIL OF GOVERNMENTS								
729	CITY OF EL PASO	EL PASO	1	168,233	18,511,266	1000	9,255,633	55.0
1482	CITY OF EL PASO	EL PASO	1	162,962	696,933	960	139,536	0.9
2								
9 PERMIAN BASIN REGIONAL PLANNING COMMISSION								
288	CITY OF BIG SPRING	HOWARD	1	38,591	760,841	1848	703,017	18.2
1605	CITY OF MIDLAND	MIDLAND	1	118,655	37,191,347	1065	19,804,392	167.0
2158	REPUBLIC WASTE SERVICES	ECTOR	1	223,323	38,329,487	1170	22,422,749	100.4
3								
10 CONCHO VALLEY COUNCIL OF GOVERNMENTS								
79	CITY OF SAN ANGELO	TOM GREEN	1	125,473	9,522,909	1000	4,761,455	38.0
1								

**Speaking Points
Site Operating Plans**

**Implementation Plan
1 /20/05**

- Authorizations for landfill permits *pending* as of 12/2/04 will be issued under the former SOP rules until called in by Executive Director. Landfill permit applications filed on or after 12/2/04 will be processed under the new rules.
- Authorizations for non-landfills (permits and registrations) issued after 12/1/04 must comply with the new SOP rules.

PROCESSING PLAN:

- Applications for *new* landfill permits and major amendments received on or after 12/02/04 are being processed under the new SOP rules.
- Applications for *non-landfill* permits and registrations issued after 12/01/04 are being processed under the new SOP rules.
- Applications for *modification* of permits and registrations requesting a change to the site operating plan issued after 12/01/04 will be processed under the new SOP rules.

CALL-IN PLAN:

- The top 79 largest operating Type I landfills will be called-in beginning in early April 2005. The first permit modification application will be due 90 days after the call-in date is announced. The call-in will be by region as shown on the attached Texas map.
- Criteria for selection:
 1. The largest operating Type 1 landfills in each region.
 2. Landfills with more than 2 years of life left.
 3. Size is determined by waste acceptance rate.
- The call-in of these 79 facilities will be done in consecutive phases with the first phase requiring approximately 8 weeks. The subsequent phases will immediately follow on a similar schedule with an effort to reduce the time between call-ins to approximately 6 weeks between subsequent phases.
- This call-in will be to update Site Operating Plans for existing permitted facilities.

- The update will be to ensure conformance with new SOP rules.
- The update will be performed by a noticed permit modification level of authorization.
- Medium and small landfills will be called-in following completion of large landfill SOPs on a rotating schedule by region based on the attached map.
- Type IV landfills and Type IV-AE landfills will be the last type of landfills called-in.
- Type V facilities will not be called-in as part of this call-in schedule.
- Registered facilities will not be called-in as part of this call-in schedule.

Attachment 'B'

Briefing Points
Chapter 330 Revisions

Chapter 330 Revisions

Briefing Points

Overall Topical Reorganization.

- The TCEQ proposes to address the overall organization of Chapter 330. Current regulations are primarily based on landfill facilities, with all other storage and processing requirements referencing the requirements as appropriate. New regulatory requirements have been continually added to the original rule structure with no major rule writing effort being completed in over ten years.
- There is a need to restructure the rules from a predominantly landfill basis to a more general solid waste management facility basis having multiple solid waste management unit types.
- Existing Chapter 330 can be confusing and contains redundancies. Chapter 330 is proposed to be reorganized to clearly state which waste management activities are subject to permitting, registration, notification, or no authorization at all.

Streamline low risk waste authorizations.

- The streamlining of low risk waste activities can be done by lowering agency authorizations through permit-by-rule (PBR), registration-by-rule (RBR), and notifications. [old 30 TAC 330.4 and 330.8/ new 330.7, 330.9, and 330.11]
- This streamlining would reduce unnecessary burdens on the regulated community and make more efficient use of limited staff resources.
- Examples of streamlining:
 - (1) change Type IV AE landfills from a full permit to PBR, [old 30 TAC 330.4, 330.14, and 330.41(e)/ new 330.5(a)(2), 330.5(b), and 330.7(f)]
 - (2) change methane recovery (Type IX) from registration to RBR, [old 30 TAC 330.4(n) and 330.70/ new 330.9(k)]
 - (3) allow counties to have municipal solid waste authority delegated to them without having adopt all TCEQ regulatory requirements, [30 TAC 330.12/ new 330.27]
 - (4) allow small rural transfer stations to be authorized through a notification. [new 30 TAC 330.3(84) and 330.11(g)]

Streamlining of Reports.

- The TCEQ recognizes a need to reduce or combine reporting requirements while improving overall data quality submitted to the commission.
- An example of this is the proposal to combine the 45 day groundwater report with the 60 day groundwater report and only require a single annual report to be submitted **OR** within 7 days of detecting a problem. [old 30 TAC 330.234(c) and (d)/ new 330.407(b)]
- Eliminate agency ballast and liner evaluation report approvals. [old 30 TAC 330.203(f)/ new 330.337(j)]
- Eliminate soil boring plan approvals. [old 30 TAC 330.56(d)(5)(A)(iv) and 330.416(f)]

Streamline or clarify medical waste management.

- Medical waste regulations need to be updated to recognize current practice and to accommodate the decentralization of medical treatment.
 - Of particular concern is the inability of a clinic associated with a hospital to send medical waste to that hospital for storage, unless the hospital has a permit to receive and store medical waste. Few hospitals have a permit since hospitals may store medical waste generated on-site without a permit. This requirement for a permit does not serve a useful purpose and may actually hinder appropriate medical waste management. [old 330.1005(p)/ new 330.1211(a)(1) and (2)]
 - Expand medical waste definition of “on-site” to property controlled by the generator within 50 miles of point of generation. [old 330.1005(p)(3)/ new 330.1205(b)]
- Current regulations require all medical waste to be refrigerated after specified time-frames. New rules are proposed to require all persons who are not the generator to refrigerate to 45 °F putrescible, untreated medical waste transported or stored for longer than 72 hours after receipt from the generator. [old 330.1009(d)/ new 330.1209(b) and 330.1211(d)(2)(F)]
- Seek comments on whether to add pathological, infectious, potentially infectious, or other types of special waste from health care related facilities to be refrigerated after this 72 hour time-frame.
- Allow medical waste to be sent to authorized, instead of permitted, medical waste management facilities. [old 330.1005(l), (m), (n), 330.1006, 330.1008(c)(5) / new 330.1211(i), (j), and (k), 330.1213, 330.1217(e)]

Buffer Zones.

- Establish a rule for a variable buffer zones around all municipal solid waste landfills. [old 330.121(b)/ new 330.541(b)]
- Current rules require a 50 foot buffer zone that may not be adequate in many instances.
- Seek comment on the adequacy of an expanded buffer zone requirement.
- Establish that the easement protection applies to all MSW facilities. [old 330.121 / new 330.541(a)]

Landfill Gas Measurement.

- Remove from current rules regarding subsurface landfill gas migration that monitoring be performed “in air.” These draft rules propose a more clearly defined compliance standard for subsurface landfill gas migration to make the rules more enforceable. [old 330.56(n)(1) / new 330.371(1)]

Sampling and Laboratory Analysis QA/QC Subchapter.

- A new Subchapter will establish acceptable field sampling and laboratory procedures and protocols. [new 330.261-330.287]

Commercial Industrial Nonhazardous Waste Landfill (CINWL) rule harmonization.

- Ensure that Chapter 330 rules regarding the disposal of industrial solid waste at MSW permitted landfills are consistent with the newly adopted rules regarding commercial industrial nonhazardous waste landfills. [existing 335 Subchapter T / new 330.179, 330.331(e)(3), and 330.559]
- **Items of concern for CINWL harmonization are:**
 - the distance between waste and the uppermost aquifer, [from 335.584(b) / new 330.331(e)(3)]
 - above-grade waste placement, and [old 330.137(d) deleted]
 - percent limitations of industrial solid waste in a municipal solid waste landfill cell. [old 330.137(e) / new 330.173(f)]

Clarify the construction activities allowed prior to authorization.

- Current regulations do not specify which activities constitute physical construction. [current 330.4]
- Adopt a definition for pre-construction activities consistent with the one currently in the air program. [new 330.3(26) and (108)]

Trench Burners at MSW facilities.

- Current regulations prohibit trench burners at an MSW landfill facility. [current 330.5(d)]
- This issue will be harmonized with new Air Permits rules on trench burners. [old 330.5(d) / new 330.17(d)]

Air Authorizations by Rule.

- The TCEQ proposes to add a Subchapter U to specify the MSW landfill operational requirements for claiming the standard MSW air permit under 30 TAC §116.601 and 116.621, [old 30 TAC 330.59(b)(4) / new 330.53(a), Subchapter U (330.981-330.997)]
- industrial solid waste units, except if permitted by §335 or that manage regulated hazardous waste under the authority of the commission. [new 330.1(a) and Subchapter U (330.981-330.997)]

Add Appropriate Geoscientist Language.

- By new law, Geologists may now be licensed in Texas as Professional Geoscientists. These professionals may certify as to the adequacy of certain geotechnical and geological reports. [old 30 TAC.51(d) / new 330.55(f) and 330.953]
- Accordingly, MSW rule requirements for application and report submittal will be changed to reflect the Geologists statutory requirements. [new 330.55(f) and 330.953]

Council of Governments application reviews.

- Chapter 330 will be revised to be consistent with new grant requirements regarding application reviews by Councils of Governments. [old 330.563(a)(3) / new 330.635(a)(3)(P)]
- Requirements such as application copy distribution and timing of reviews may need to be proposed.
- Require the owner or operator furnish Parts I and II of a permit application to the regional solid waste Council of Governments to help the Council of Governments in their review of the application. [new 330.55(e)(2)]

Liquid Waste.

- Liquid waste and sludge management are now regulated in both Chapter 312 and Chapter 330.
- There has been confusion as to what portions of both chapters apply to persons who transported or managed liquid wastes and sludges.
- Need to harmonize Chapter 312 issues with 330, regarding grease trap, grit trap definitions, sludge transportation. [new 330.1(d), 330.3(59) and (60)]

Harmonize with stormwater rules/ incorporate by reference.

- Ensure that Chapter 330 is consistent with and appropriately refers to all necessary stormwater regulations. [old 330.51(b)(5) and (6)(A), 330.53(b)(11)/ new 330.59(k)(3) and (4)]
- Non-point source discharge consistency.
- This issue is being coordinated with the Water Quality Division.

Federal fees for MSW facilities.

- Added language and seeking comment on the commission practice of charging a reduced tipping fee rate for federal facilities with MSW permits to reconcile with Section 6001 of the Federal Resource Conservation Recovery Act requiring the payment of only reasonable service charges and not include state taxes. [old 330.602 / new 330.673(a)(7)(B)]
- This issue was cited in the State Auditors report.

Mineral Rights.

- Address the requirement that lease agreements must contain specific provisions delineating mineral rights attached to the property and the rights to any recoverable material that may be buried on the property or landfill gases that may be produced. Mineral rights attached to the property and the rights to any recoverable materials that may be buried on the property or landfill gases are no longer requested to be submitted with an application since the TCEQ has no jurisdiction over mineral rights. [old 330.62(c) / new 330.65(c)]

Whole Tire Bailing.

- Allow whole scrapped tires to be disposed if processed in an approved, secure manner before disposal, such as tire bailing. [old 330.5(e)(4) / new 330.17(e)(4)]
- To recognize this technology that allows tires to be disposed of in a landfill. [old 330.5(e)(4) / new 330.17(e)(4)]

Application Fee.

- Change 330 rules to allow a charge of \$150 for application fees for permits, registrations, amendments, modifications, and temporary authorizations as currently allowed by 30 TAC 305.53. [new 330.57(h)(1)]
- This fee change would gain approximately \$33,000 per year in new fees collected.

EMS.

- Allow a facility to be exempt from having a site operating plan if the facility has an environmental management system as approved by the executive director. [old 330.57 / new 330.63(b)]

Alternative Liner Design.

- For Type IV landfills, allow alternative liner designs. This provides flexibility for Type IV landfill operators. [old 330.41(e) / new 330.5(a)(2)]

Preapplication Meeting.

- Repeal the requirement for a mandatory preapplication meeting for landfill mining applications. [old 330.403(10) / new 330.601]

Location Compatibility.

- Allow population density and proximity to residences and other uses to be considered in the assessment of compatibility. [old 330.53(b)(8)(D) / new 330.59(h)(4)]
- Allow unincorporated areas to be considered during the assessment. [old 330.53(b)(8)(D) / new 330.59(h)(4)]
- Allow well density to be considered for assessment of compatibility. [old 330.53(b)(8)(E) / new 330.59(h)(5)]

Bioreactors.

- Add the definition of bioreactor. [old 330.2 / new 330.3(15)]

Stakeholder Input.

- Six preliminary meetings with public and stakeholders were held in the form of Public Outreach Meetings during the summer of 2004.
- These Public Outreach Meetings were held May 24 - June 10, 2004 at the following locations:
 - Houston – May 25, 2004
 - Arlington – May 27, 2004
 - Tyler – June 3, 2004
 - Austin – June 8, 2004
 - Lubbock – June 8, 2004
 - Harlingen – June 10, 2004

Next Stakeholder Meetings:

- MSWAC – meeting will be December 16, and 17, 2004
- Stakeholder meetings will be January 18, and 19, 2005
- A second MSWAC meeting will be held on January 20 and 21, 2005

Timing:

- May 25, 2005 – Commission Agenda for approval to publish a proposal
- June, 2005 – 30 day comment period starts
- July, 2005 – public comment period ends
- Summer-Fall, 2005 – Commission Agenda for Adoption

Attachment 'C'

Joint Industry Comments
Chapter 330 Revisions

April 18, 2005

Richard C. Carmichael, Ph.D., P.E., CIH
Manager
Municipal Solid Waste Permits Section
Waste Permits Division
Texas Commission on Environmental Quality
12100 Park 35 Circle, Bldg. F (MC-124)
Austin, TX 78753

VIA FACSIMILE


Re: Comments on March 15, 2005 draft of the Chapter 330 Rules

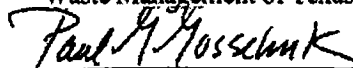
Dear Dr. Carmichael:

Enclosed please find joint comments of Waste Management of Texas, Inc., Allied Waste Industries, Inc., IESI, Inc., and the Texas Lone Star Chapter, Solid Waste Association of North America ("TXSWANA"), to the March 15, 2005 revision to the Chapter 330 rules. These comments address key issues which we have discussed in previous meetings with TCEQ staff.


We commend the Commission in its efforts to create the second revision and urge your favorable consideration of these joint comments. Please be advised that each of us may be filing separate comments on other aspects of the second revision. If you have any questions or comments regarding the enclosed, please do not hesitate to contact any of the undersigned.

Sincerely,


John A. Riley
Vinson & Elkins, L.L.P., Attorneys for
Waste Management of Texas, Inc.


Paul G. Gosselink
Texas Lone Star Chapter
Solid Waste Association of
North America


Lee Kuhn
Allied Waste Industries, Inc.


Tom Brown
Senior V.P. and C.O.O.
IESI Corporation

CH. 330 REWRITE

MARCH 15, 2005 PRE-PROPOSAL DRAFT

12 TOP INDUSTRY COMMENTS

Please note that, in these comments, the suggested revisions to the text of the rules suggest revisions to the text of the draft regulations as they appear verbatim in TCEQ's March 15, 2005 draft rewrite. Proposed deletions appearing in the agency's March 15th draft rewrite as strikethrough text (i.e., ~~strikethrough~~) appear in these comments as double strikethrough text (i.e., ~~~~double-strikethrough~~~~).

1. Buffer Zones – § 330.541(b)(2)-(4)

- **Requirement(s):** Requires a 250-foot buffer zone for “new landfills and vertical or lateral expansions of existing landfills.”
- **Issue(s):** The TCEQ's 250-foot buffer zone proposal is infeasible for all but a few existing landfills and it will dramatically increase the cost of locating future landfills. Landfills serving metropolitan areas will be most significantly impacted. The cost of the extra land to accommodate the buffer will preclude future sites in proximity to urban areas.

The overall effect of the agency's proposal would be the closure of many small and medium-sized landfills and the creation of large regional landfills in rural counties to serve the waste needs of the state. This approach will increase costs to the consumer and will negatively impact air quality by increasing the miles that trucks will have to transport the waste for disposal. To accommodate the increased distances, new transfer stations will have to be located closer to population centers and many of the same issues concerning landfills will accompany the permitting of these transfer stations.

The basis for the 250-foot buffer zone proposal is not provided in the TCEQ proposal. In the various stakeholder and Municipal Solid Waste Advisory Council meetings held to date, agency representatives have stated only that the current 50-foot buffer zone requirement *may* not be adequate at *some* landfills. We are not aware of any instance where the current 50-foot buffer zone has endangered human health or the environment and there has been no showing that an increased buffer zone will have a commensurate increase in environmental protection. There has been no demonstration that the agency's 250-foot buffer zone proposal will address the concerns voiced by residents near landfills with the current 50-foot buffer.

In proposed § 330.541(b)(3)(B)(i), TCEQ indicates that the intended “goal” of the agency's increased buffer zone proposal is to provide “a visual buffering of solid waste processing and disposal activities to enhance the aesthetics of surrounding communities and neighborhoods.” If visual screening is the concern, it is unclear

how the agency's proposal will resolve this concern. A 250-foot buffer without any visual screening is less aesthetically pleasing than a smaller buffer with visual screening.

If the goal of the agency's buffer zone proposal is to provide visual screening, prior to proposing a buffer zone requirement that will result in the closure of a substantial number of landfills and the development of large tracts of rural greenfields, TCEQ should consider a buffer zone that has a less dramatic, yet still significant, impact on the existing landfills in the state. We are confident that any concerns regarding the adequacy of a 50-foot buffer at *some* landfills can be addressed through less drastic means. To this end, we propose below a 50-foot buffer zone for Type IV landfills and a 125-foot buffer zone for new Type I landfills and vertical or lateral expansions of existing Type I landfills, subject to our further suggestions below for demonstrating control of property, allowable alternatives, and applicability to pending applications. Within the 125-foot buffer, facilities can construct, maintain, and operate sedimentation structures to control storm water run-on and run-off; construct and maintain screening to control windblown litter; meet emergency response, maintenance, and monitoring requirements otherwise applicable to the facility; and provide sufficient visual buffering of solid waste processing and disposal activities in light of the surrounding environment.

- o **Suggested Revision(s) to Text of Rule:** We suggest that the agency make the following changes to this proposed rule:

(2) For existing Type I landfills and existing, expanded, or new Type IV landfills, the owner or operator shall establish and maintain a buffer zone that extends a minimum of 50 feet from the design boundary of waste placement to the facility boundary. For new Type I landfills and vertical or lateral expansions of existing Type I landfills, the owner or operator shall establish a 250 125 foot buffer zone. For vertical or lateral expansions of existing Type I landfills, the 250 125 foot buffer zone will circumscribe the perimeter extend from the design boundary for additional waste placement resulting from the vertical or lateral expansion onto existing portions of the landfill to the facility boundary. ~~of the portions of the landfill which will change as a result of the vertical or lateral expansion.~~ When a transition from an existing 50 foot buffer zone to a 125 foot buffer zone is required by this Section, the transition from the existing 50 foot buffer zone to a 125 foot buffer zone shall be gradual and consistent with sound engineering principles. Easements or rights-of-way that cross the facility and are subject to the protections of Paragraph (a) of this Section may constitute all or part of the buffer zone area that is required by this Paragraph.

(3) All buffer zones must be within property owned or controlled by the operator. The owner or operator may demonstrate control of property for purposes of establishing the buffer zone requirements through agreements with adjacent landowners, including but not limited to written easements, restrictive covenants, settlement agreements, or waivers. Notwithstanding the method demonstrating

ownership or control of property, the requirements of subsections (a) and (b)(1) must be satisfied.

(34) Alternatives Allowed. The executive director may consider variances or alternatives to the buffer zone requirements in paragraph (2). Alternatives shall ~~only be approved~~ where the owner or operator demonstrates that:

(A) the prescribed buffer zone standard is not feasible; and necessary to meet the performance goal of providing visual screening of solid waste processing and disposal activities in light of the surrounding area; or

(B) there is a specific engineered design alternative that:

(i) is incorporates native earth and vegetation consistent with the surrounding area and is otherwise consistent with the performance goal of providing a visual buffering screening of solid waste processing and disposal activities to enhance the aesthetics of surrounding communities and neighborhoods by incorporating native earth and vegetation consistent with the surrounding environment;

(ii) affords ready access for provides sufficient area to meet emergency response, maintenance, and monitoring requirements otherwise applicable to the facility; and

(iii) affords equivalent visual screening and buffering protection from odors and windblown waste as the prescribed buffer zone;

(iv) is of provides sufficient dimensions area to control meet the site drainage and sediment transport from the site control requirements applicable to the facility.

2. *Applicability to Pending Applications – § 330.1(a)(2)*

- **Requirement(s):** Applies revised rules to permit applications which are not administratively complete and registration applications for which the executive director has not completed a technical review as of the effective date of the revised rules.
- **Issue(s):** Significant time, effort, and expense is required to prepare a permit application. Applying the revised rules to applications that have been prepared but have yet to be declared administratively complete would require an applicant to essentially rewrite the application with the associated additional expenditure of time, effort, and money to bring the application into conformance with the new rules.

- **Suggested Revision(s) to Text of Rule:** We suggest that the agency make the following changes to this proposed rule:

(a) . . . Furthermore, these regulations apply to any person who by contract, agreement, or otherwise arrange to process, store, or dispose of, or arrange with a transporter for transport to process, store, or dispose of, solid waste owned or possessed by the person, or by any other person or entity. To the extent that a requirement has been changed by this chapter:

(1) facilities may continue to operate under requirements contained in previously issued authorizations, except as further provided by this subsection;

(2) ~~permit applications which are not administratively complete and registration applications for which the executive director has not completed a technical review as of the effective date of this chapter shall conform to the requirements of this chapter~~ the rules adopted as part of the comprehensive re-write of Chapter 330 in 2005 shall have an effective date of one year from the date of adoption and applications declared administratively complete after that one year date shall be considered and governed under the rules adopted in the 2005 comprehensive re-write, except that an applicant or permittee may elect, in writing, to be governed under rules adopted in the 2005 comprehensive re-write prior to the effective date defined in this subsection;

3. *Solid Waste Data – § 330.59(b)(1)(A)*

- **Requirement(s):** Requires Part II of an application to include “the maximum amount of solid waste to be received daily and annually projected for five years, the maximum amount of solid waste to be stored, the maximum and average lengths of time that solid waste is to remain on the site, and the intended destination of the sold waste received at [the] site.”
- **Issue(s):** This provision appears to depart from the provision in the new SOP rules that a facility's waste acceptance rate is not intended to be a limiting parameter of a facility's permit. As required in the SOP rules, waste acceptance rate information is strictly for obtaining the correct balance of on-site equipment, personnel, and other site operating plan provisions relative to the amount of waste being received. *See* 29 Tex. Reg. at 11065. The principle in the SOP rules – that estimates of waste acceptance rates are not intended to be limiting permit parameters – should be carried forward in this subsection.
- **Suggested Revision(s) to Text of Rule:** We suggest that the agency delete § 330.59(b)(1)(A) or, in the alternative, make the following changes to text of the proposed rule:

(A) ~~the maximum amount of solid waste to be received daily and annually~~ estimated maximum annual waste acceptance rate for the site projected for five years, the estimated maximum amount of solid waste to be stored, the estimated

maximum and average lengths of time that solid waste is to remain on the site (if the solid waste will not be disposed of on-site), and the intended destination of the solid waste received at this the site. This subsection is not intended to establish volume restrictions or make any of the foregoing estimates limiting parameters of a permit.

4. Land Use Analysis – § 330.59(h)

- **Requirement(s):** Requires the owner/operator to “provide information regarding the potential impacts of the facility on cities, communities, groups of property owners, or individuals by analyzing the compatibility of land use, zoning in the vicinity, community growth patterns, and other factors associated with the public interest.”
- **Issue(s):** The rules should make it clear that the analysis of potential impacts on cities, communities, groups of property owners, or individuals by analyzing the compatibility of land use, zoning in the vicinity, community growth patterns, and other factors associated with the public interest of the facility for purposes of permit issuance is limited to areas within one mile of the permit boundary.
- **Suggested Revision(s) to Text of Rule:** We suggest that the agency revise this proposed rule as follows:

(h)(~~8~~) Impact on surrounding area ~~Land-use~~. A primary concern is that the use of any land for an MSW site not adversely impact human health or the environment. ~~The owner or operator shall provide information regarding the potential impacts of the facility site on upon a cities, communities, groups of property owners, or individuals by analyzing the must be considered in terms of compatibility of land use, zoning in the vicinity, community growth patterns, and other factors associated with the public interest.~~ To assist the ~~executive director~~ commission in evaluating the impact of the site on the surrounding area, the owner or operator ~~applicant~~ shall provide the following:

(1)(~~A~~) information about zoning at the site proposed facility and ~~in the vicinity within one mile of the permit boundary of the proposed facility~~. If the site facility requires approval as a nonconforming use or a special permit from the local government having jurisdiction, a copy of such approval shall be submitted;

(2)(~~B~~) information about the character of surrounding land uses within one mile of the proposed facility;

(3)(~~C~~) information about growth trends ~~of the nearest community within one mile of the proposed facility~~, with directions of major development;

(4)(~~D~~) the proximity to residences and other uses (e.g., schools, churches, cemeteries, historic structures and sites, archaeologically significant sites,

sites having exceptional aesthetic quality, etc.) within one mile of the proposed facility. Give the approximate number of residences and commercial ~~business~~ establishments within one mile of the proposed facility including the distances and directions to the nearest residences and commercial establishments ~~businesses; and~~. Population density and proximity to residences and other uses described above may be considered for assessment of compatibility;

(5)(E) a description and discussion of all known wells within 500 feet of the proposed facility ~~site~~. Well density may be considered for assessment of compatibility; and

(6) any other information requested by the executive director.

5. Consistency with Regional Planning – § 330.59(p)

- **Requirement(s):** Requires owner/operator to “submit documentation that a review letter from the regional solid waste Council of Governments and as appropriate any local governments was requested to document compliance with regional and local solid waste plans.”
- **Issue(s):** The COGs’ role in the permitting process should be clarified. In some regions, the COGs have required applicants to submit technical information (e.g., Parts III and IV of the application) or to answer technical questions regarding the site. These COGs routinely provide statements regarding aspects of the application that are unrelated to land use issues or conformance with the regional or local waste plan. The role that the COGs play in the permitting process may be a contentious issue in contested case hearings.
- **Suggested Revision(s) to Text of Rule:** We suggest that the agency make the following changes to this proposed rule:

(p) The owner or operator shall submit documentation that a review letter from the regional solid waste Council of Governments (COG) and, as appropriate, any local governments was requested to document compliance with regional and local solid waste plans. A review letter from the COG or local government is not a prerequisite to issuance of the permit. Review of an application by a COG or local government is for purposes of providing the agency with a recommendation regarding conformance with regional and local solid waste plans. Any recommendation provided by a COG or local government is advisory; the agency may consider the COG recommendations when making determinations on consistency with regional and local solid waste planning.

6. *Leachate Collection Systems – § 330.333(a)(3), (b)*

- **Requirement(s):** Requires leachate management systems for vertical expansions over Type I landfills that do not have existing leachate collection systems.
- **Issue(s):** The proposed rule should clarify that the leachate management system required by the rule may be comprised solely of a design that minimizes the infiltration of water through the expansion area and into the part of the existing landfill that does not have a leachate collection system.
- **Suggested Revision(s) to Text of Rule:** We suggest that the agency make the following changes to this proposed rule:

(3) designed and operated to function through the scheduled closure and post-closure care period of the landfill. The owner or operator shall provide design information regarding the following:

(A) estimated rate of leachate removal;

(B) capacity of sumps;

(C) pipe material and strength;

(D) pipe network spacing and grading;

(E) collection sump materials and strength;

(F) drainage media specifications and performance; and

(G) demonstration that pipes and perforations will be resistant to clogging and can be cleaned ~~maintained or rehabilitated~~.

(b) Vertical expansions of Type I landfills over landfills which do not have existing leachate collection systems will have leachate management systems designed to promote leachate management ~~and removal from~~ with regard to the vertically expanded portions of the landfills. Any means by which infiltration of water into the landfill section that does not have a leachate collection system is minimized (e.g., a leachate management system that is comprised solely of a final cover design that minimizes the infiltration of water into the expansion area and the landfill section that does not have a leachate collection system) can satisfy this requirement. This subsection will also apply to existing type IAE landfills that subsequently no longer satisfy the conditions specified in §330.5(b)(1).

7. Groundwater Monitoring Well Spacing – § 330.403(a)(2)

- **Requirement(s):** Requires groundwater monitoring wells installed with a well spacing no greater than 300 feet.
- **Suggested Revision(s) to Text of Rule:** “The point of compliance ~~downgradient~~ monitoring system must include monitoring wells installed with a well spacing ~~no greater than 300 feet~~ to allow determination of the quality of groundwater passing the ~~relevant~~ point of compliance as defined in §330.32 of this title and ~~The downgradient monitoring system must be installed~~ to ensure the detection of groundwater contamination in the uppermost aquifer. ~~Other w~~Well spacings may be justified by using an applicable multi-dimensional numerical flow model.”

8. Duration and Limits of Authorizations – § 330.69

- **Issue(s):** The applicability of this section should not be restricted to registrations. It should also apply to permits. Current § 330.63, upon which this proposed rule is based, is currently the principal regulatory provision specifying that the normal duration of municipal solid waste permits is for the operating life of the site. This current section has been interpreted by the Texas courts and should be retained in the revised Chapter 330 rules.
- **Suggested Revision(s) to Text of Rule:** We suggest that the agency revise this proposed rule as follows:

§ 330.69. Duration and Limits of Registrations and Permits

(a) The executive director shall, after review of any application for registration, approve or deny an application in whole or in part. This action shall be based on whether the application meets the requirements of this chapter.

(b) Except as provided in paragraph (e) and (f) of this section for demonstration facilities, a registration or permit is normally issued for the life of the facility ~~site~~ but may be revoked at any time if the operating conditions do not meet the minimum standards set forth in this chapter or for any other good cause.

(c) When deemed appropriate by the executive director a registration or permit may be issued for a specific period of time. When an owner or operator has made timely and sufficient application for the renewal of a registration or permit, the existing registration or permit does not expire until the application has been finally determined by the commission.

(d) A registration or permit is issued to a specific person (see definition for person contained in §330.32 of this title (relating to Definitions)) and may not be transferred from one person to another without complying with the transfer approval requirements of the commission.

(e) Except for transporters and mobile treatment units, a registration or permit is attached to the realty to which it pertains and may not be transferred from one facility site to another.

9. Closure and Post-Closure Cost Estimates – §§ 330.503(a) and 330.507(a)(1)

- **Issue(s):** TCEQ has interpreted its rules on the development of closure cost estimates to allow these estimates to be based on the waste fill area potentially open in the following year. This approach realistically models the impact of forced closure and/or post-closure of a facility and is consistent with and acknowledges the requirement for annual updates of these estimated amounts. These sections should be revised to reflect the alternative of annual estimated closure costs based on the waste fill area potentially open in the following year.
- **Suggested Revision(s) to Text of Rules:** We suggest that the agency revise this proposed rules as follows:

- **§ 330.503(a):**

(a) A detailed written cost estimate shall be provided showing, in current dollars, ~~showing~~ the cost of hiring a third party to close either the largest area of the landfill ever requiring a final closure at any time during the active life of the unit or the waste fill area potentially open in the year to follow in accordance with the final closure plan. For any landfill this means the completion of the final closure requirements for either alternative. The cost estimate for financial assurance shall be submitted with any new permit application, with any application for a permit transfer, and as a modification for all existing municipal solid waste permits that remain in effect after October 9, 1993.

(1) The cost estimate shall equal the cost of closing the largest area of all landfill units ever requiring a final cover at any time during the active life when the extent and manner of its operation would make closure the most expensive or the waste fill area potentially open in the year to follow, as indicated by its closure plan.

(2) An increase in the closure cost estimate and the amount of financial assurance provided under subsection (b) of this section shall be made if changes to the final closure plan or the landfill conditions increase the ~~maximum estimated~~ cost of closure ~~at any time during the remaining active life of the unit as described in paragraph (1) of this section~~.

(3) A reduction in the closure cost estimate and the amount of financial assurance provided under subsection (b) of this section may be approved if the cost estimate exceeds the ~~maximum~~ cost of closure at any time during the remaining life of the unit and the owner or operator has provided written notice to the executive director of the situation that includes a detailed

justification for the reduction of the closure cost estimate and the amount of financial assurance. The owner or operator may request ~~a~~ reduction in the cost estimate and the financial assurance ~~as shall be considered a permit modification and shall be handled as such.~~

▪ § 330.507(a)(1):

(1) The cost estimate for post-closure care shall be based on the most expensive costs of post-closure care during the post-closure care period using either closure alternative identified in § 330.503(a) of this title (relating to Closure Cost Estimates for Landfills).

10. Lab Regulation - § 330.261(a)

- **Requirement(s):** Require owners and operators to ensure that laboratories meet certain quality assurance and quality control criteria.
- **Issue(s):** Such assurances are beyond the owner or operator's control because the owner or operator has no authority over the laboratory. The proposed rule should be amended to provide that the owner or operator will notify the laboratory of these requirements as a means to demonstrate compliance.
- **Suggested Revision(s) to Text of Rule:** We suggest that the agency revise this proposed rule as follows: "This subchapter applies to owners and operators of municipal solid waste facilities submitting laboratory data and analyses for use in commission decisions regarding any matter under the commission's jurisdiction relating to permits or other authorizations, compliance matters; enforcement actions, or corrective actions. To the extent that this subchapter requires the owner or operator to provide assurances involving the laboratory's handling, analytical, reporting, or recordkeeping procedures, the owner or operator may demonstrate compliance with these requirements by providing a written notification to the laboratory of the specific requirements of this subchapter. The owner or operator must place a copy of this notification in the site operating record."

11. Noise Pollution Controls – §§ 330.61(b)(2)(I) and 330.237

- **Issue(s):** Recent amendments to the SOP rules restrict landfill operating hours, which has the effect of reducing noise impacts from landfill operations. Accordingly, the requirement to provide "designs for noise pollution control" should be applicable only to transfer stations. In addition, § 330.237 is a newly added operational standard for storage and processing units. For consistency with § 330.61(b)(2)(I), the applicability of § 330.237 should be similarly limited to transfer stations.
- **Suggested Revision(s) to Text of Rules:** We suggest that the agency revise this proposed rule as follows:

- ~~§ 330.61(b)(2)(I): Noise Pollution.~~ Provide designs for noise pollution control at transfer stations.
- ~~§ 330.237:~~ The owner or operator of a transfer station shall provide screening or other measures to minimize ~~the~~ noise pollution and adverse visual impacts.

12. Discharges in Violation of Texas Surface Water Quality Standards – § 330.17(i)(5)

- **Issue(s):** This provision is not found in current § 330.55(b)(1), which is the source of § 330.17(i). The Texas Surface Water Quality Standards (30 Tex. Admin. Code Ch. 307) are not self-implementing but are implemented through individual TPDES permits. The Commission's rules provide that provisions for implementing the water quality standards are described in *Procedures to Implement the Texas Surface Water Quality Standards*. That document in turn provides that the TCEQ applies the standards "when issuing permits for wastewater discharges or other authorized discharges to the surface waters of the state." Because the Texas Surface Water Quality Standards are implemented through individual TPDES permits, their compliance is assured by directing compliance with Texas Water Code § 26.121, which prohibits discharges into or adjacent to any water in the state except as authorized by rule, permit, or order of the Commission. Section 330.17(i)(1) requires compliance with § 26.121. Accordingly, because § 330.17(i)(5) is redundant and confusing it should be deleted.
- **Suggested Revision(s) to Text of Rule:** We suggest that the agency delete § 330.17(i)(5).

Attachment 'D'

House Bill 1609
(relating to Public Meetings)

AN ACT

relating to the allowed wastes and exemptions applicable to certain municipal solid waste landfill units in arid areas and to public meetings held by the Texas Commission on Environmental Quality on permit applications regarding hazardous or municipal solid waste or landfill development permits.

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

SECTION 1. Section 361.0666(a), Health and Safety Code, is amended to read as follows:

(a) An applicant for a permit under this chapter for a new facility that accepts municipal solid wastes may ~~[shall]~~ hold a public meeting in the county in which the proposed facility is to be located. ~~[The meeting must be held before the 45th day after the date the application is filed.]~~

SECTION 2. Sections 361.0791(a) and (b), Health and Safety Code, are amended to read as follows:

(a) Notwithstanding other law, the commission may ~~[shall]~~ hold a public meeting on an application for a new hazardous waste management facility in the county in which the proposed hazardous waste management facility is to be located. The commission may ~~[on request of a person affected or as otherwise required by commission rule, shall]~~ hold a public meeting on an application for a Class 3 modification or a major amendment to an existing facility's hazardous waste permit.

1 (b) Notwithstanding other law, the commission may ~~[shall]~~
2 hold a public meeting on an application for a new municipal solid
3 waste management facility in the county in which the proposed
4 municipal solid waste management facility is to be located.

5 SECTION 3. Section 361.082(d), Health and Safety Code, is
6 amended to read as follows:

7 (d) In addition to the hearing held under this section, the
8 commission may ~~[shall]~~ hold a public meeting and the applicant
9 shall give notice as provided by Section 361.0791.

10 SECTION 4. Subchapter C, Chapter 361, Health and Safety
11 Code, is amended by adding Section 361.123 to read as follows:

12 Sec. 361.123. ALLOWED WASTES AND EXEMPTIONS FOR CERTAIN
13 SMALL MUNICIPAL SOLID WASTE LANDFILLS IN ARID AREAS. (a) In this
14 section:

15 (1) "Construction or demolition waste" means any
16 material waste that is the byproduct of a construction or
17 demolition project, including paper, cartons, gypsum board, wood,
18 excelsior, rubber, and plastics.

19 (2) "Small municipal solid waste landfill unit" means
20 a discrete area of land or an excavation that:

21 (A) receives municipal solid waste or other solid
22 wastes allowed by law; and

23 (B) disposes of less than 20 tons of municipal
24 solid waste daily based on an annual average.

25 (b) This section applies only to a small municipal solid
26 waste landfill unit that is permitted as an arid exempt landfill
27 under commission rules.

1 (c) A small municipal solid waste landfill unit daily may
2 dispose of less than 20 tons of construction or demolition waste in
3 addition to the municipal solid waste the unit normally receives.

4 (d) The commission, in accordance with state and federal
5 solid wastes laws, may, under rules adopted by the commission,
6 grant a small municipal solid waste landfill unit an exemption from
7 the requirements for groundwater protection design and operation
8 and groundwater monitoring and corrective action if there is no
9 evidence of groundwater contamination from the unit.

10 (e) The commission shall adopt rules as are necessary to
11 implement this section in a manner that maintains compliance with
12 and state program authorization under Section 3006 of the federal
13 Solid Waste Disposal Act, as amended by the Resource Conservation
14 and Recovery Act of 1976 (42 U.S.C. Section 6901 et seq.).

15 SECTION 5. Section 361.534, Health and Safety Code, is
16 amended to read as follows:

17 Sec. 361.534. PERMIT PUBLIC MEETING ~~[HEARING]~~. (a) The
18 commission may hold a public meeting on ~~[shall set a hearing to be~~
19 ~~held not later than the 30th day after the date that the commission~~
20 ~~receives]~~ an application under this subchapter.

21 (b) The commission shall hold a public meeting on an
22 application under this subchapter:

23 (1) on the request of a member of the legislature who
24 represents the general area in which the development is proposed to
25 be located; or

26 (2) if the executive director determines that there is
27 substantial public interest in the proposed development.

1 (c) The commission by mail shall notify the applicant of the
2 date, time, and place of the public meeting [~~hearing not later than~~
3 ~~the 15th day before the date of the hearing~~]. The commission shall
4 require the applicant to publish notice of the public meeting
5 [~~hearing~~] in a newspaper that is generally circulated in each
6 county in which the property proposed for development is located.
7 The published notice must appear at least once a week for the two
8 weeks before the date of the public meeting [~~hearing~~].

9 SECTION 6. The changes in law made by this Act to Sections
10 361.0666(a), 361.0791(a) and (b), 361.082(d), and 361.534, Health
11 and Safety Code, apply only to an application that is filed on or
12 after the effective date of this Act. An application that was filed
13 before the effective date of this Act is governed by the former law,
14 and that law is continued in effect for that purpose.

15 SECTION 7. Section 361.123, Health and Safety Code, as
16 added by this Act, applies only to operations of a small municipal
17 solid waste landfill unit, as defined by that section, on and after
18 January 1, 2006.

19 SECTION 8. This Act takes effect September 1, 2005.

H.B. No. 1609

President of the Senate

Speaker of the House

I certify that H.B. No. 1609 was passed by the House on April 27, 2005, by a non-record vote; and that the House concurred in Senate amendments to H.B. No. 1609 on May 24, 2005, by a non-record vote.

Chief Clerk of the House

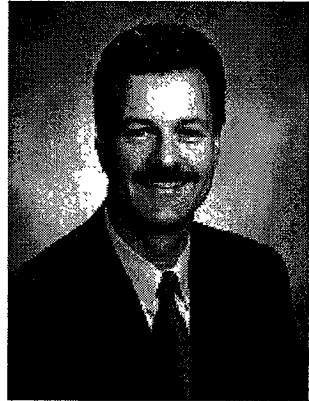
I certify that H.B. No. 1609 was passed by the Senate, with amendments, on May 23, 2005, by the following vote: Yeas 31, Nays 0.

Secretary of the Senate

APPROVED: _____

Date

Governor



**John J. Vay, Esq.
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John J. Vay is a Director and heads the Environmental and Administrative Law Practice Group of Kelly, Hart & Hallman, P.C. Mr. Vay received a B.A. in Economics and Political Science (double major) from Susquehanna University in Selinsgrove, Pennsylvania, and a J.D. from St. Mary's University in San Antonio, Texas, where he also served on the staff of St. Mary's Law Journal. For nearly 20 years, Mr. Vay's law practice has focused on environmental, natural resource, water and administrative law matters before a variety of state and federal regulatory agencies including, among others, the Texas Commission on Environmental Quality (TCEQ), Railroad Commission of Texas, Texas Department of Health, U.S. Environmental Protection Agency and U.S. Army Corps of Engineers, and before various state and federal courts. Prior to entering the private sector, Mr. Vay served in a variety of positions with the Texas Water Commission (predecessor to the TCEQ) including General Counsel to the Commissioners, Director of Legal Services, and Assistant Chief Hearings Examiner. Mr. Vay also served as a Special Agent with the Federal Bureau of Investigation, U.S. Department of Justice. Mr. Vay is a past Chair of both the Administrative and Public Law Section of the State Bar of Texas and the Administrative Law Section of the Travis County Bar Association.

MUNICIPAL SOLID WASTE LANDFILLS (TYPE 1): TCEQ'S PENDING DECISIONS - WHETHER TO TAME THE INCREDIBLE HULKS?

By Richard Lowerre & Eric Allmon

- I. Introduction
- II. Ending the Grandfathering of Old Landfills
- III. Locations and Buffers
- IV. Site Operations
- V. Amendments, Modifications and Renewals of Permits
- VI. Public Notice and Protection of Property Interests

- Attachment 1: Initial Review of Other States' Approaches to MSW Permit Expirations, Renewals and Duration
- Attachment 2: Agency Memos on Vertical Expansions Over Unlined Landfills
- Attachment 3: Letter from Travis County on Public Meetings
- Attachment 4: TCEQ Summary of Five-Year Review Process, With One Example
- Attachment 5: Excerpts from *Juliff Gardens* Proposal for Decision

I. INTRODUCTION

A. A Little History:

1. First Appearance by the Hulk: First issue in May 1962.
2. First Texas Law for Garbage: May 1963 Article 696a Annotated Penal Code of Texas § 2. Directed TSDH to promulgate standards.
3. 42 Years Later: Hulk and garbage are still out of control.

B. Texas Landfills of Today: Major commercial industrial facilities that are bigger, uglier and living longer than ever before.

1. Size: Texas has some of the largest in the nation: For example, Dallas' McCommas Landfill is the 9th largest in nation with 2,000 permitted acres. City of Lubbock landfill is 1237 acres.
2. Height: Highest points now in many counties. WMI's McCarthy Road landfill proposed for 315 feet high. North Texas MWD's new landfill is permitted to go to 300 feet above surface in Collin County. Corpus Christi landfill at 256 feet.
3. Type: Not just municipal wastes. A number of Type 1 landfills take more industrial wastes than municipal wastes, one apparently with 80% of total waste being industrial. At least one landfill takes a large percentage of Class 1 Industrial Waste, BFI Itasca Landfill apparently takes 14% Class 1 Industrial Waste.
4. Life: Projected life of many landfills is over 50 years, with the landfills in Lubbock, Corpus Christi and other parts of the state having more than 500 years of projected life, some over 1000 years.
5. Average Life Expectancy Left: Over 30 years for Texas Landfills.

B. Landfills in Texas, Different than in Many Other States:

1. Permit duration: See Attachment 1.
2. Little Local Control: Texas hulks are not often subject to local control such as zoning, siting boards, land use planning, etc.

C. TCEQ Recent Evaluation of Rules for Type 1 MSW Landfills:

1. SOPs Rules: Rejecting industry's proposal and moving forward with new rules: Adopted amendment to rule, published November 26, 2004, 29 TR 11055,

effective December 2, 2004. (See TCEQ website for more information:
http://www.tnrc.state.tx.us/permitting/wasteperm/mswperm/msw_sop_advdp.html#timeline)

2. Chapter 330 Rules: Solid waste rules. TCEQ's proposal and history of rulemaking (See: http://www.tnrc.state.tx.us/permitting/wasteperm/mswperm/msw_ch330_advdp.html , For "Open Participation Advisory Group on Rulemaking to Revise Municipal Solid Waste Rules"
3. Chapter 305 Rules: Amendment and modification rules TCEQ's Draft Proposal: (See http://www.tnrc.state.tx.us/permitting/wasteperm/mswperm/msw_majormod_advdp.html#draft_rule for Advisory Group on Rulemaking for Municipal Solid Waste Permit and Registration Modifications.)

F. The Most Significant Issues Facing TCEQ:

1. Vertical Expansions: Will TCEQ continuing to grandfather old landfills?
2. Future Locations: Will TCEQ continue to allow large industrial operations in residential and agricultural areas?
3. Buffers: Will TCEQ continue to allow landfills near homes, schools, churches, etc?
4. Amendments, Modifications and Renewals: Will TCEQ further "streamline" permitting of landfills?
5. Public Notice and Protection of Property Rights: Will TCEQ further reduce the role of the public and the protections afforded under state law?

II. ENDING THE GRANDFATHERING OF OLD LANDFILLS

A. Vertical Expansions - 1990's Decisions:

1. Subtitle D: Although not addressed explicitly in EPA's rules, the agency's explanations of its rules and the law clearly did not envision such expansions. In effect, EPA left the decision to states.
2. Texas' Decisions:
 - a. Policy Decision: See Attachment 2 for history of flip-flop on policy.
 - b. Permit Decisions: Even if old landfill may be contaminating ground water, vertical expansions are approved: BFI Canyon where one TCEQ Commissioner says that TCEQ will simply make BFI dig up the old waste and that waste added on top, if BFI cannot solve the ground water contamination problem in the Ogallala.

B. Impact of Decisions: Reduced costs and, thus, increased size, height, and life for existing landfills. Expectations of surrounding communities regarding the life, height, etc. were changed dramatically.

C. A New TCEQ Decision?

1. Environmental Community Position: Prohibit vertical expansions on top of old landfills or impose Subtitle D requirements on future vertical expansions, i.e. TCEQ's 1992 position.
2. Positions of Some With Regulated Industry: Vertical expansions do not create problems and are needed to deal with drainage and final cover.
3. TCEQ's Draft Proposal: Allow vertical expansions with Subtitle D liners but not with all Subtitle D requirements, such as Subtitle D leachate collection and management systems

III. LOCATIONS AND BUFFERS

- A. Locations for New Landfills: A greater role for local governments and COGs or decisions to remain with TCEQ?
1. TCEQ's proposal: Establishes a two-volume system, where Volume I is the Regional Solid Waste Management Plan, set forth in general terms, and Volume II is a set of implementation guidelines for the plan. Volume I would require approval by the Commissioners, but changes to Volume II would require only ED approval. The requirement that an advisory committee (termed advisory council in the new rules) include members representing a broad range of interests has been removed, and the requirement that a report by a local review committee be given the legal consideration merited in a hearing on the application has also been removed.
 2. Potential Impacts: The lack of approval by the Commission of Volume II could raise questions as to the legal status of this document. Further, one COG has noted that under the structure established neither document would truly contain a plan of adequate detail to be of any real use in a region's planning process. Local influence over solid waste planning will be further eroded by the removal of the requirement that advisory committees be representative, and removal of the current allowance in the rules for consideration of local review committee reports during hearings on an application.
- B. Buffers: Distance Requirements for New or Expanded Landfills:
1. TCEQ's Rules:
 - a. Existing: 50 feet – mainly to assure firefighting equipment can move around site. 30 TAC § 330.121(b).
 - b. Draft Proposal: 125 feet to provide better separation between landfill and other properties. But no limit on location near schools, churches, day care centers, etc. May 27, 2005, Draft 30 TAC § 330.543(b)(2).
 2. Position of Environmental Community: Encourage proper siting: i.e. designated industrial areas. If not, the higher up, the greater the buffer, with a minimum of 1/2 mile from residents, schools, churches, etc.
 3. Examples of buffer requirements in other TCEQ programs:
 - a. Hazardous Waste facilities: "The commission by rule shall prohibit the issuance of a permit for a new commercial hazardous waste management facility or the subsequent aerial expansion of such a facility or unit of that facility if the boundary of the unit is to be located within one-half of a

mile (2,640 feet) of an established residence, church, school, day care center, surface water body used for a public drinking water supply, or dedicated public park." TEX. HEALTH & SAFETY CODE § 361.103.

- b. CAFOs: One-half mile from any occupied residence or business structure, school (including associated recreational areas), permanent structure containing a place of worship, or public park. 30 TAC § 341.23(j)(2).
- c. Class B sludge application fields: 750 feet from any school, institution, business, or occupied residential structure. 30 TAC § 312.44(d).
- d. Concrete operations:
 - i. Standard permits for concrete plants: "The central baghouse must be located at least 440 yards [1/4 mile] from any building used as a single or multifamily residence, school, or place of worship at the time the application to use the permit is filed with the commission if the plant is located in an area that is not subject to municipal zoning regulation." TEX. HEALTH AND SAFETY CODE § 382.05198, E.
 - ii. Concrete Crushing Facility: The commission by rule shall prohibit the operation of a concrete crushing facility within 440 yards [1/4 mile] of a building in use as a single or multifamily residence, school, or place of worship at the time the application for a permit to operate the facility at a site near the residence, school, or place of worship is filed with the commission. TEX. HEALTH AND SAFETY CODE § 382.065.
- e. Lead Smelting Plants: "The commission may not grant a construction permit for a lead smelting plant at a site . . . located within 3,000 feet of an individual's residence" TEX. HEALTH AND SAFETY CODE § 382.053.
- f. Anaerobic lagoons at wastewater treatment plants: 500 feet from nearest property line. 30 TAC § 309.13(e)(1).

C. Floodplains

- 1. TCEQ's Rules:
 - a. Existing:
 - i. Defined: A flood that has a 1.0% or greater chance of recurring in any given year or a flood of a magnitude equaled or exceeded once in 100 years on the average over a significantly long period. 30

TAC §330.2(1) (not limited to Federal Emergency Management Agency (FEMA) flood map.)

- ii. Requirements to identify: **Identify whether the site is located within a 100-year floodplain.** Indicate the source of all data for such determination and include a copy of the relevant FEMA flood map, if used, or the calculations and maps used where a FEMA map is not available. Information shall also be provided identifying the 100-year flood level and any other special flooding factors (e. g., wave action) that must be considered in designing, constructing, operating, or maintaining the proposed facility to withstand washout from a 100-year flood... If the site is located within the 100-year floodplain, the applicant shall provide information detailing the specific flooding levels and other events (e.g., design hurricane projected by Corps of Engineers) that impact the flood protection of the facility. 30 TAC § 330.56(f)(3) (emphasis added.)

2. TCEQ's Interpretations:

- a. 1993 Draft Location Handbook: If the facility is located outside the floodplain of the (FEMA) studied area but is evident that the 100 year floodplain extends through the permit boundaries, then it is the responsibility of the facility owner/operator to submit the appropriate analysis to demonstrate that the waste disposal areas are not located in the floodplain.
 - b. Current: Applicant can rely upon FEMA mapping of floodplain even if both applicant's and protestants' modeling shows that the floodplain (as defined by TCEQ rules) is different .
3. Draft Proposal: Make it easier to ignore floodplains by relying on FEMA maps and using a definition of floodplain different from that in other TCEQ programs and different than the definition in EPA's RCRA rules at 40 CFR § 258.11(b)(1).
4. Position of Environmental Community: Scientists and FEMA agree that FEMA maps are often wrong. FEMA's Technical Mapping Advisory Council itself has indicated that FEMA maps do not always correctly delineate areas prone to flooding,¹ fewer than 40 percent of the areas mapped by FEMA have been mapped using detailed study methods,² and there are a large number of flood

1 FEMA Technical Mapping Advisory Council, Final Report, 2000, p. 1.

2 Id., p. 9.

hazard areas that have not been delineated.³ No significant burden to the applicant would result from requiring proper analysis of flood potential at the landfill site and downstream. Moreover, TCEQ's proposal to limit floodplain evaluation to locations that have a drainage area greater than one square mile, which was used in the past by FEMA, is not favored by FEMA. It was used originally to allow FEMA to focus its resources on the most serious problems. In 2000, FEMA's Technical Advisory Council itself identified the lack of flood hazard maps at such locations as a problem.⁴

5. Requirements in other programs: For examples, in both the rules for CAFOs and Wastewater Treatment Plants, a "floodplain" is any land area that is subject to a 1.0% or greater chance of flooding in any given year from any source.⁵ That definition is consistent with the definition of "base flood" set forth in FEMA regulations at 44 CFR § 9.4.

3 Id., p. 10.

4 Id., p. 34.

5 See 30 TAC §§ 321.32(36), 309.11(7).

IV. SITE OPERATIONS

- A. Starting the New TCEQ Review Process: Local opposition to large expansions has led to political pressure and court decisions, such as *BFI Waste Systems of North America v. Martinez Environmental Group*, 93 S.W.3d 570, 579 (Tex. App. Austin, 2002) pet. denied. Previously, much less attention than those for site design.
1. Activities have resulted in new SOP rules.
 2. Also led to effort to amend 330 rules, which then led to changes in 305 rules.
- B. Petitions by Waste Management of Texas, Inc. and a group of permittees consisting of the City of Dumas, North Texas Municipal Water District, Texoma Area Solid Waste Authority, Republic Waste Services of Texas, Ltd., and Regional Land Management Services, Ltd.: Sought changes to SOP rules to reinstate historic practice of meaningless SOPs. Rejected by the Commission on March 24, 2004, after Commission initiated rulemaking.
- C. New Rules:⁶ New rules (effective December 2, 2004), enacted with some improved requirements for SOPs and some reduction in the requirements. Only implementation and efforts to enforce will determine the impacts.
- D. TCEQ Implementation:
1. Issues unresolved - Examples
 - a. Role of SOPs: Operating plans or general guidance for operators?
 - b. How modifications of SOP provisions will be treated in the future.
 - c. Failure to address waste blown from landfill to private property.
 - d. Failure to address uncertainties due to the lack of a rule or policy on the role of the permit boundary.
 - e. Impact of significant changes in waste acceptance rates.
 2. Call-in process. See discussion by John Vay in related paper for TCEQ's policy.
 3. When do new rules apply?

6 http://www.tnrcc.state.tx.us/permitting/wasteperm/mswperm/msw_sop_advdp.html#timeline

- a. Applications filed after rules were effective. Subject to new rules.
- b. Applications filed before new rules were in effect and issued after effective date. Certified questions filed by ALJs for four applications pending in hearings after the rules were effective.⁷
 - i. Position of ALJs: Joint referral by four ALJs with statement that the ALJs would apply new rules in all cases unless the Commission ruled otherwise.
 - ii. Position of Commission: The Applicants get to decide. Those who want to use the new rules, may do so. Those that do not, do not need to do so.
 - iii. Result: Hearings on two application of Regional Land Management and Anson proceeding under new rules at the request of applicant and agreement of opponents. One case (WMT) settled without resolution. Hearing on application of Tan Terra apparently proceeding under old SOP rules, but issue is still to be resolved.

⁷ SOAH Docket No 582-04-0975, TCEQ Docket No. 2003-0729 MSW, Application of Regional Land Management Services Ltd, for MSW Permit No 2286.

SOAH Docket No 582-05-0868 TCEQ Docket No. 2004-0743 MSW, Application of Tan Terra Environmental Services, Inc. MSW Permit No 2305

SOAH Docket No 582-04-3642 TCEQ Docket No. 2004-0118 MSW, Application of Waste Management of Texas, Inc. for MSW Permit No 523-B

SOAH Docket No 582-04-5745, TCEQ Docket No. 2004-0054-MSW, Application of the City of Anson, MSW Permit No 2301

V. AMENDMENTS, MODIFICATIONS AND RENEWALS OF PERMITS

A. Amendments versus Modifications:

1. TCEQ's Draft Proposal: 30 TAC Chapter 305 (See Overview of June 8, 2005 Stakeholders Draft.)⁸
2. TCEQ's Apparent Goals:
 - a. Clarification: Reduce problem of determining whether a permit change should be treated as a modification or an amendment.
 - b. Eliminate most amendments: Create a major modification process and convert almost all substantive permit amendments to major modifications.
 - c. Limit review and hearings: New procedure for major modifications limits review to only those issues directly related to the change requested by applicant.
 - d. Revise the public comment process for major mods: Require applicant to hold the public meeting with no TCEQ representatives required to attend or respond to comments.
 - e. Clarify process for remaining Subtitle D upgrades, if any: To be processed as major amendments.
 - f. Create temporary authorization for major mods: Allow them for both minor and major modifications.
 - g. Transfer of permits/ownership: Provide transfers of permit will be accomplished through a minor modification with notice.
3. Potential Problems With TCEQ's Proposals
 - a. Compliance history: May remove the ability of the ED or Commission to review compliance history during evaluation of a major amendment.
 - b. Full review of landfill: May remove or limit the ability of the ED or Commission to review other aspects of a facility or permit (not related to

8 http://www.tnrc.state.tx.us/permitting/wasteperm/mswperm/msw_majormod_advdp.html#draft_rule

the amendment) which are creating problems and would otherwise never be reevaluated given no renewal process.

c. Conflicts with the use of the term "amendment" in a number of laws and rules: TCEQ may have to revise other rules if it redefines most amendments to be major modifications.

i. Chapter 361 Tex. Health and Safety Code uses the terms amendment, major amendment, and modification, for example:

- a) § 362.120.⁹
- b) § 361.118.¹⁰
- c) § 361.0895.¹¹
- d) § 361.137.¹²

ii. TCEQ's rules use the same terms, for example:

9 NOTICE OF HEARING AND REQUIREMENTS FOR REOPENING OF CLOSED OR INACTIVE LANDFILLS. (a) This section applies to any municipal solid waste landfill facility permitted by the commission or any of its predecessor or successor agencies that have either stopped accepting waste ...

(c) Except as provided in Subsections (d) and (e), the reopening of any such facility shall be considered a **major amendment** as such is defined by commission rules and shall subject the permittee to all of the procedural and substantive obligations imposed by the rules applicable to **major amendments**.

(d) This section shall not apply to any municipal solid waste landfill facility that has received an approved **modification** to its permit as of the effective date of this section. (emphasis added.)

10 REMEDIAL ACTION REGARDING INDUSTRIAL SOLID WASTE DISPOSED OF IN MUNICIPAL SOLID WASTE LANDFILL FACILITY. (a) This section applies only to a municipal solid waste landfill facility:

(1) for which the commission has issued a permit; and

(2) a portion of which:

(A) has been used for the disposal of more than 15,000 barrels of industrial solid waste;

(B) is closed. . . .

(c) If the commission requires the owner of the facility to remediate under Subsection (b), the owner shall develop a remedial action plan and must obtain a **major amendment** to the permit for the facility approving the plan. (Emphasis added.)

11. FACILITIES REQUIRED TO OBTAIN FEDERAL APPROVAL. ...a permit or other authorization issued to the facility under this chapter is not subject to cancellation, amendment, **modification**, revocation, or denial of renewal because the permit holder has not commenced construction or operation of the facility. . (Emphasis added.)

12 PERMIT APPLICATION FEE. (a) A permit application fee is imposed on each applicant for an industrial solid waste or hazardous waste permit. . .

(c) The commission may also establish a fee rate for approval of applications or petitions other than new permits, including but not limited to **minor amendments, modifications**, and closure plans, which fee may be less than \$2,000. (Emphasis added.)

- a) Major amendments during hearings. 30 TAC § 281.23
- b) Potential conflicts in Chapter 305 rules, in which the term amendment is defined to exclude modifications under Section 305.70.¹³ Many sections in Chapter 305 rely upon the term "amendment," and the term modification is not included.
- d. May conflict with federal requirements such as:
 - i. Role of public comments & public meetings and need for written responses.
 - ii. Prohibition on temporary authorizations that immunize violators.
- e. May encourage the use of a number of minor modifications to avoid one major modification.
- f. May reduce public understanding of TCEQ's processes: With the elimination of staff and OPIC at public meetings.
- g. May further erode public trust in agency: if an applicant proceeds with a major change (temporary authorization) before a hearing is held and final decision made and with the Applicant holding the public meetings.
- h. Appears to allow creation of new landfill by modification: such as an expansion from a few acre landfills to a landfill with hundreds or thousands of acres.

B. Renewals of Permits

- 1. Texas MSW Law:
 - a. The Texas Solid Waste Disposal Act: Permits must to include terms and provisions, "including the duration of the permit,"¹⁴ and indicates need for renewals, but no specific duration.

13 **§305.62. Amendment.** (a) Amendments generally. A change in a term, condition, or provision of a permit requires an amendment, except under §305.70 of this title (relating to Municipal Solid Waste Class I Modifications)...

14 Tex. Health & Safety Code § 361.087(3).

- b. TCEQ Rules: Duration is the life of the facility, unless agency decides to limit. 30 TAC 305.127(1)(B)(II)& (F) & 330.65(a)&(b). TCEQ has apparently never limited the duration of an MSW permit to less than life.
 - c. Texas Courts: The Austin Court of Appeals recognized that the lack of periodic review for MSW permits creates challenges in the oversight of these facilities.¹⁵
2. Other Texas Permits:
- a. Hazardous waste: 10 years renewal with 5 year review. § 361.087, Tex. Health & Safety Code, 30 TAC § 305.127(1)(B).
 - b. Wastewater discharges: 5 years. § 26.029, Tex. Water Code, 30 TAC § 305.127(1)(C).
 - c. Injection wells: 10 years. § 27.011, Tex. Water Code, 30 TAC § 305.127(1)(A).
 - d. Air emissions: 5 to 10 years. §§ 382.0541(a)(5), .0543(a) & .055(a), Tex. Health & Safety Code.
3. Other States: (See Attachment 1) Suggests that industry argument that need life of facility permit for planning and financing is not true.
4. Purpose for Expiration and Renewal: To evaluate:
- a. Implementation of changes in laws and rules: For example, the recent changes to the SOP rules, which with a five year renewal process could be better implemented in an orderly fashion – at renewal.
 - b. Changes in circumstances:
 - i. Major changes in waste acceptance rates.
 - ii. A significant number of minor modifications.
 - c. Changes in technologies.
 - d. Compliance history.

¹⁵ *BFI Waste Systems of North America v. Martinez Environmental Group*, 93 S.W.3d 570, 579 (Tex. App. Austin, 2002) pet. denied

5. TCEQ's 5-year review process: No Substitute for a renewal process.

"The commission shall review a permit issued under this chapter every five years to assess the permit holder's compliance history." (TEXAS HEALTH & SAFETY CODE § 361.088(g), added in 2001 Sunset Bill for TCEQ.)

- a. No public notice or public input.
- b. A limited review: Only compliance problems, and only facilities rated "poor" are scrutinized. See Attachment 4.

V. PUBLIC NOTICE AND PROTECTION OF PROPERTY INTERESTS

A. Public Notice

1. New law: HB 1609 amended § 361.0666(a) to remove the mandatory public meeting required for new landfill or other new MSW facility. Does not create any criteria or guidance to help TCEQ determine when the agency should hold such a meeting.

- a. Guidance from APA rulemaking:

Sec. 2001.029. PUBLIC COMMENT. (a) Before adopting a rule, a state agency shall give all interested persons a reasonable opportunity to submit data, views, or arguments, orally or in writing.

(b) A state agency shall grant an opportunity for a public hearing before it adopts a substantive rule if a public hearing is requested by:

- (1) at least 25 persons;
- (2) a governmental subdivision or agency; or
- (3) an association having at least 25 members.

- b. Proposal from Travis County (See Attachment 3.)

2. Current written notice requirements ignored:

- a. Law and rules

- i. 30 TAC §§ 330.52(b)(4)(D) & 330.52(b)(5), requiring that land ownership maps include all adjacent properties *and* all potentially affected landowners.
- ii. TEXAS HEALTH & SAFETY CODE § 361.089, requiring notice of hearings on new or amended permits.

- b. Issues:

- i. Persons beyond 500 feet may be potentially affected by an application. This was the case in the application by IESI for the change of a landfill near Weatherford.
- ii. Although they are potentially affected, the TCEQ does not currently require notice to easement holders. In the case of the application by Tan Terra Environmental Services, an irrigation district which owned an easement for an irrigation ditch running through the site was not provided notice.

- iii. Although they are potentially affected, the TCEQ does not require notice to mineral interest holders.

3. TCEQ's Draft Proposals

- a. No Significant Change in Notice Requirements, including no change to requirement to include potentially affected landowners.
- b. Environmental Community Position: TCEQ's proposal is not adequate and good notice is cheap and easy:
 - i. Signs – as with Air permits
 - ii. Written notice to those potentially affected, up to ½ mile and including easement holders and mineral owners.
 - iii. Electronic notices and documents: Applications should be required to be submitted in electronic format and be required to be publicly posted on the internet by the applicant

B. Protection of owners of mineral interests:

1. Current law and rules:

- a. When the mineral estate and the surface estate are severed, the mineral estate becomes the dominant estate. *Acker v. Guinn*, 464 S.W. 2d 348, 352 (Tex. 1971).
- b. The owner of the severed mineral estate and its lessee have reasonable rights to use the surface to develop and produce the minerals. *Robinson v. Robbins Petroleum Corp.*, 501 S.W. 2d 865, 867 (Tex. 1973).
- c. The owner of the severed mineral estate cannot be limited by subdivision restrictions or other such limitations imposed by the owner of the surface estate. *Property Owners of Leisure Land, Inc. et al. v. Woolf & Magee, Inc.*, 786 S.W. 2d 757, 760 (Tex. Ap. – Tyler 1990).
- d. 30 TAC § 330.62(a), requires that an owner or operator possess or acquire a sufficient interest in or right to the use of the property for which a permit is issued.

- e. 30 TAC § 330.62(c), requires that applicant delineate mineral rights attached to the property and the rights to recoverable materials that may be buried.
- f. 30 TAC §§ 330.52(b)(4)(D) & 330.52(b)(5), require that land ownership maps include all adjacent properties *and* all potentially affected persons.
- g. 30 TAC § 330.131 requires that applicant provide notice to the executive director of all on-site crude oil or natural gas wells. Producing crude oil or natural gas wells that do not affect or hamper landfill operations may be operated within the facility boundary, if identified in the permit for the facility or in a written notification to the executive director.

2. Agency decisions – Mineral Interests

- a. Juliff Gardens (See Attachment 5.)
 - i. ALJs found that an applicant must demonstrate sufficient property interest, and recommended denial based in part on the applicant's failure to demonstrate that the environment would be protected if mineral interest holders exercised their rights.
 - ii. Commissioners were divided on the relevance of the question, and denied the permit based on other grounds.
- b. City of Anson – In the case of the application by the City of Anson for an arid exempt landfill, requesters sought a hearing on the impact of the landfill on surface and subsurface mineral rights. Copper deposits are known to exist near the surface of the site, and the rights to these deposits are held by protesting parties. The Commission declined to refer the issue of impacts on surface or subsurface mineral rights for a hearing, but at the preliminary hearing persons were admitted as affected persons based on their status as mineral interest owners.
- c. Tan Terra - Owners of mineral interests came forward at the preliminary hearing and were recognized as affected persons. Of note, two natural gas wells have been completed on-site since the preliminary hearing and are now in production, with one being within the proposed waste footprint. This change in conditions is not accounted for in any way during the permitting process, nor is the applicant required to show how the environment will be protected in consideration of these circumstances.

3. TCEQ's draft proposal: The requirement to delineate mineral interests in the lease of a site is removed in the new rules. Draft 30 TAC § 330.67(c). Inclusion of potentially affected landowners on land ownership maps is still required by draft section 330.59(C)(3). Section 330.131 remains unchanged.
 4. Potential Problems: With surface minerals, such as caliche and lignite, or with minerals such as oil and gas. May create conflicts with land use and concurrent mining can create threats to the integrity of landfills and violations of limitations on access to landfill.
 5. Simple Solution for New Green Field Landfills: Make mineral interest issues part of the siting decision, by requiring
 - a. Notice to all owners of mineral interests within the proposed permit boundary of the landfill.
 - b. Application: To include proof of ownership of all minerals or proof of an agreement from the mineral owners that they will not oppose the application.
- C. Protection of Easement Holders: Almost same problems of notice and desire of TCEQ to allow conflicts to be resolve outside the hearing process and after TCEQ and the public have spent time and money on the application review and hearing process.

Attachment “1”

Attachment 1

Initial Review of Other States' Approaches to MSW Permit Expirations, Renewals and Duration

Summary

A quick review of other states, based on the laws, rules or discussions with regulators, indicates:

12 are like Texas with no permit duration other than the life of the facility.

35 issue MSW permits for a fixed term or duration:

24 states require renewal at least every five years.

10 states require renewal at least every ten year terms.

One state, New Mexico, has permit terms of no more than 20 years.

Massachusetts and Kansas set the permit term based on the facts.

Review: State by State

Alabama: Solid waste disposal permits obtained under compliance with this Division shall be valid for the design life of the facility or as otherwise determined by the Department, **but no longer than a period of five years.** Permits, however, are subject to revocation under 335-13-5-.05 of this Division. Alabama Department of Environmental Management Admin. Code R. 335-13-5-.02(2).

Alaska: Permits issued for fixed term, **not to exceed five years.** 18 ALASKA ADMINISTRATIVE CODE 15.100(a), see also 18 AAC 60.250.

Arizona: **No time limit.** (Per conversation with Dick Jeffries of MSW plan review team of Arizona Department of Environmental Quality, 4/25/05).

Arkansas: **No specific time limit.** Authorization ceases when landfill reaches approved elevation. Arkansas Department of Environmental Quality, Regulation 22, at 22.309.

California: MSW facility permits shall be reviewed, and if necessary revised, **at least once every five years.** California Public Resources Code § 44015.

Colorado: **Duration life of facility.** Department of Public Health and Environment, Hazardous Materials and Waste Management Division 6 CCR 1000-2, Part 1.

Connecticut: **No specific time limit.** Duration based on capacity.
<http://dep.state.ct.us/pao/weedfact/solidwst.htm>

Delaware: Permits shall be for a term of **no greater than 10 years**. Delaware Department of Natural Resources and Environmental Control, Regulations Governing Solid Waste, 4(A)(5).

Florida: MSW permitting rules specifically provide that permits **shall be renewed at least once every five years**, and applicants for renewal must show how they meet any new rules or statutes. FAC 62-701.320(10)(b).

Georgia: **No time limit.** Duration based on capacity of facility. Comprehensive Solid Waste Management Act (last updated 2004) 12-30 to 12-41.

Hawaii: Permits may be issued for terms **not to exceed five years**, with renewals up to five years. Hawaii Administrative Rules §11-58.1-04(e)(1).

Idaho: Operating plan required to be recertified **at least every three years**. Title 39 Health and Safety Chapter 74 Idaho Solid Waste Facilities Act section 39-7419.

Illinois: **No permit shall have a term of greater than five years.** Title 35 Illinois Administrative Code, § 813.108.

Indiana: **A permit including a renewal permit must be issued for a fixed term not to exceed five years.** 329 IAC 10-13-3.

Iowa: Various types of permits (IAC 567-102.2):

Sanitary Disposal Project Permits - **3 years, renewable**

Temporary Permit - **1 year, renewable**

Development Permit - **3 years, renewable**

Closure Permit (must be no longer accepting waste) - 30 Years

Kansas: State may specify either condition or date on which permit will expire. Kansas Administrative Regulations (KAR) 28-29-7. Permit must be renewed through filing of fee and report annually by anniversary of permit date. KAR 28-29-84.

Kentucky: Permits issued for fixed terms of **not more than 10 years**, and agency is to **review permit after five years** to judge whether modification is needed. 401 KAR 47:130, § 6.

Louisiana: **Permit for life of facility.**

Maine: Solid Waste License remains **in effect until modified**, revoked or suspended. Chapter 400 § 3(E).

Maryland: Permits are **valid for a period of up to 5 years** from the date of issue unless suspended or revoked by the approving authority. Permits are automatically renewed every 5 years upon written approval from the approving authority, provided that the permit holder is in compliance with Environment Article, § 9-204, Annotated Code of Maryland. COMAR § 26.04.07.04.B.

Massachusetts: Regulations require a specified duration in permit. 310 Code of Massachusetts Regulations (CMR) § 19.043(1), Rules **include process for the renewal of permits.** § 19.042(4).

Michigan: Construction permits expire in 1 year. Michigan Statutes Part 115, § 324.11511(1). Operating License **expires after 5 years.** Michigan Statutes Part 115, § 324.11516.

Minnesota: Permit issued for term **not to exceed five years.** Minnesota Rules § 7001.0150 § 1.

Mississippi: Permits may be issued for terms **not to exceed ten years.** Mississippi Commission on Environmental Quality, Regulation SW-2, § II (J).

Missouri: Operating permits issued for the **life of the disposal area.** 10 Code of State Regulations (CSR) 80-2.020(2)(B) (4)(B). Rules explicitly provide that at any time during the life of the facility or disposal area, the department may review the permit and require that the operator comply with current statutory and/or regulatory requirements. 10 CSR 80-2.020(1)(E).

Montana: Facilities must be constructed within five years of permitting, and licenses to operate must be **renewed annually.** Administrative Rules of Montana § 17.50.515.

Nebraska: Permits for **disposal areas shall expire not more than 5 years after issuance,** subject to renewal, and permits for disposal **facilities shall expire not more than 10 years** after issuance, subject to renewal. Nebraska Department of Environmental Quality Regulations, Title 132, Chapter 2, § 007.01.

Nevada: Permits must be issued for **design life** of the site. Nevada Administrative Code § 444.643

New Hampshire: Permits may include an expiration date. NH Code of Administrative Rules Env-Wm 305.04(a)(4)(b). Generally, however, permits will be **continuous in duration.** NH Code of Administrative Rules Env-Wm 305.05(d).

New Jersey: Permits effective for a **fixed term not to exceed five years,** subject to administrative extension with renewal application. N.J.A.C. § 7:26-2.7(a)

New Mexico: Permit active for **life of facility or 20 years, whichever is less.** New Mexico Administrative Code Title 20, Chapter 9, Part 1, § 212(A).

New York: Permit duration for fixed term **not to exceed ten years.** New York State Department of Environmental Conservation Regulations Subpart 360-1.11(d)

North Carolina: Permits **shall be reviewed every five years.** Title 15A Subchapter 13B of the North Carolina Administrative Code - Solid Waste Management, § .0201(e)

North Dakota: Permits issued for up to ten (10) year terms. Section 23-29-07 of the N.D. Century Code

Ohio: Installation permits must be renewed **annually.** Ohio Revised Code § 3734.05(A)(1). **Every ten (10) years, operator of facility must submit a design demonstration** showing that

the facility is in compliance with currently applicable design requirements, except for siting requirements. OHIO ADMINISTRATIVE CODE § 3745-27-19(N).

Oklahoma: Permits issued for the **life of the site**. Oklahoma Administrative Rules § 252:515-3-5(a).

Oregon: Disposal site permits issued for a **maximum term of 10 years**, subject to renewal. ORS § 459.245(2).

Pennsylvania: Permits issued for **terms not to exceed ten (10) years**, but applicants may seek demonstration of need for longer term based on financing requirements. 25 Pennsylvania Code § 271.211, see also 25 Pa. Code § 271.223. Regardless of permit term, **Department is statutorily required to review permits at least once every five years** to “evaluate the permit to determine whether it reflects currently applicable operating requirements, as well as current technology and management practices” Department may require modification of the permit if considered necessary.

Rhode Island: Licenses must be renewed every **three year terms**. Rhode Island Solid Waste Regulation No. 1.6.01.

South Carolina: Permit "review" at least **once every five years**, unless otherwise specified by Department. Regulation 61-107.258 at § 258.130(b)(1). The Department may modify the permit if it finds a change in operations or a change in the applicable regulatory requirements. 258.130(b)(2)

South Dakota: MSW Permits **initially valid for up to two years and may be renewed for up to five years**. South Dakota Codified Law 34A-6 § 1.16.

Tennessee: Permits effective for the **operating life of the facility**. T.C.A. § 1200-1-7-.02 (4)(c)

Utah: Permits may be issued for **up to five years**. R315-311-1.

Vermont: Certification of an MSW facility **shall not be for a period longer than five (5) years**. Vermont Solid Waste Management Rules 6-303(c).

Virginia: Permits shall be **reviewed** by the director **once every ten years**. 9VAC20-80-105 Director may revoke permit based on operations, and/or may change the permit terms to comply with currently applicable requirements. Id.

Washington: MSWLF permit duration **not to exceed ten (10) years**. WAC 173-351-750(3)

West Virginia: MSW permits shall have a fixed term **not to exceed five (5) years**. WV Code § 22-15-10(c).

Wisconsin: Department Natural Resources may issue a permit for a period of **one year or more**. Wisconsin Statutes § 289.31(1).

Wyoming: Type I permits issued for four (4) year terms, and Type II permits issued for eight (8) year terms. Wyoming Solid Waste Rules at Chapter 2, § 2(e).

Attachment “2”

Attachment 2

Approved 10/23/92

By Ph Bond

Policy Statement
Municipal Solid Waste Division

Subject: Aerial fills over existing landfills.

Background: Because of the impending implementation of Subtitle D requirements for new landfill units and lateral expansions, there has been a flurry of interest in extending landfills vertically. This has resulted in uncertainty about what is allowable and what rules apply to these cases.

Purpose: To establish a uniform policy to be followed by all permit review personnel.

Policy:

- I. Subtitle D liner requirements will apply to all closed MSWLF units and all lateral expansions after October 9, 1993. A closed MSWLF unit is one for which final closure has been requested and approved. They will also apply to any units existing on October 9, 1993, which do not have waste covering the bottom of the unit. Operators will be required to follow past practices in placing waste, i.e. they cannot spread a thin layer of waste over the entire MSWLF unit, if they have not followed this practice in the past.
- II. Subtitle D liner requirements will not apply to unclosed units which are expanding vertically, to existing permitted heights, as of Oct. 9, 1993.
- III. No new permits or permit amendments for vertical expansion of MSWLF units which have reached permitted heights will be approved after October 9, 1993, unless they are lined in accordance with new rules.
- IV. Current state lining requirements, including in-situ consideration, will apply to all new permits and amendments, including those for vertical expansions, until new rules take effect.

- V. Subtitle D final cover requirements apply to all units which were not closed, as of October 9, 1991.

Application: There are three basic cases in which the polices will be applied. They are described as follows:

Case 1: An existing un-closed MSWLF unit is proposed to be expanded vertically, over existing waste, to permitted height as of October 9, 1993.

Guidance: (a) Subtitle D liner requirements will not apply, now or after October 9, 1993.

(b) Current regulations governing liners do apply. If existing unit was lined, or approved for an in-situ liner under current regulations, no additional liners will be required. Liner must be continuous.

(c) No spill-over of waste to adjacent areas will be allowed.

(d) Current aerial slope stability and gradient rules will apply.

(e) Upon closure, unit must be covered with material having a permeability equal to the existing liner, or 1×10^{-5} cm./sec. whichever is less.

(f) These permit/amendments should be processed in the normal manner.

Case 2: A closed unit is proposing aerial fill over existing waste.

(a) Until October 9, 1993, Case 1 guidance will apply.

(b) After October 9, 1993, a closed unit which has not been re-permitted for additional aerial fill will require liners and leachate collection systems per new Subtitle D rules.

Case 3: Aerial fill is proposed over a combination of existing, unclosed units, closed units, and new areas.

- Guidance: (a) For areas over existing fill which are unclosed, Case 1 guidance will apply.
- (b) For areas over a closed unit, Case 2 guidance will apply.
- (c) New areas will require liners as required by current rules, or, after October 9, 1993, new Subtitle D rules. There must be a physical separation between new and existing areas after October 9, 1993.

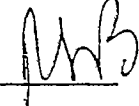
ALL CASES: Applicants should be advised of the general applicability of Subtitle D rules to all landfills open on October 9, 1993, in all cases. It is realized that Case 3 can result in a hodge-podge of lined/unlined areas that make little practical sense. However, this seems to be in accordance with EPA's intentions. We will not require liners over an existing, unclosed unit, even if it immediately adjoins a closed or new unit which will require Subtitle D liners after October 9, 1993, provided it was approved under current regulations. See the following sketches for examples.

All lined areas must have leachate collection systems after October 9, 1993, unless demonstration is made that leachate will not exceed 30 cm above the top of the liner.

Texas Water Commission

INTEROFFICE MEMORANDUM

TO: All Permitting and Groundwater Section Staff

FROM: Ronald L. Bond, P.E., Director
Municipal Solid Waste Division 

DATE: May 21, 1993

SUBJECT: Policy Statement on Aerial Fills Over Existing Municipal Solid Waste Landfills
Dated October 23, 1992/Revised December 14, 1992

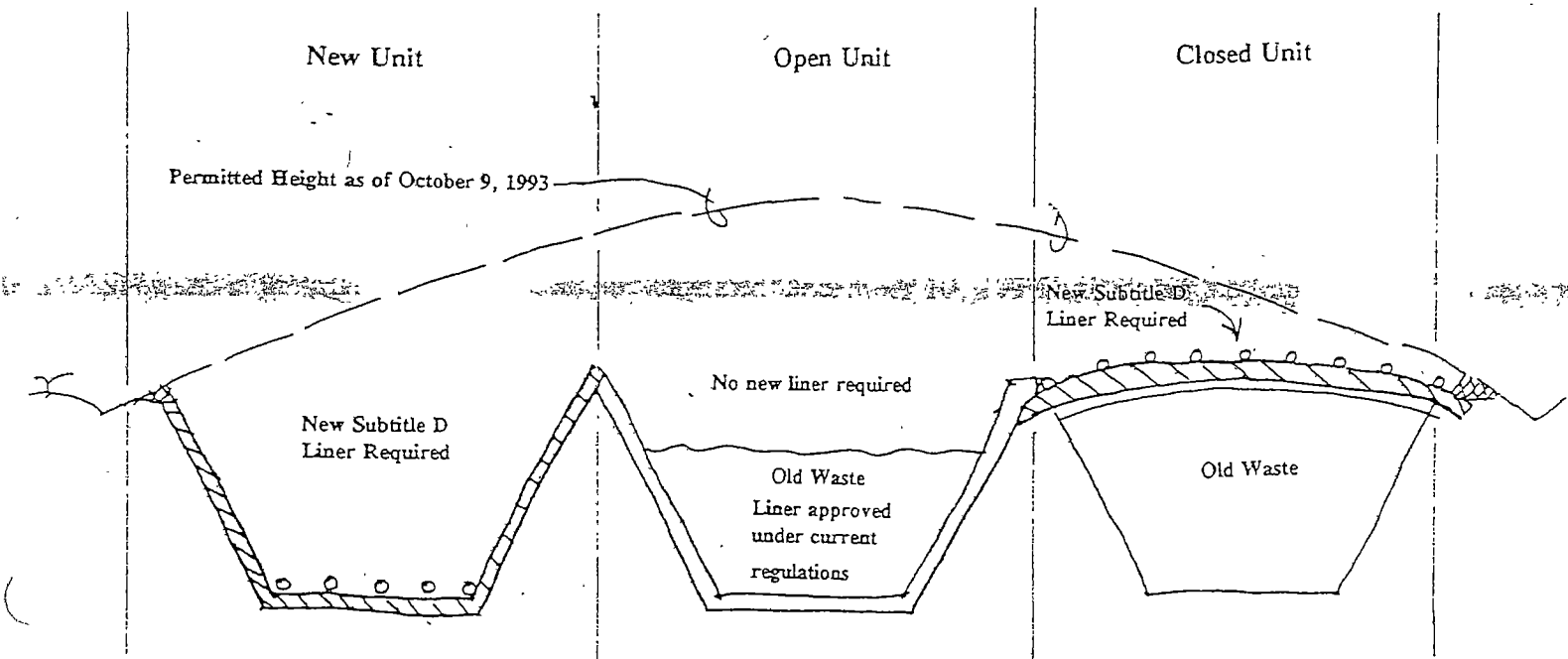
Subject policy was issued, while we were in the process of finalizing Subtitle D rules. Now that the rules are ready for approval by the Commissioners, this policy is no longer applicable or appropriate, and it is hereby rescinded.

The proposed rules, which will be available in final form after May 26, 1993, will govern the aerial filling over existing municipal solid waste landfills, after October 9, 1993.

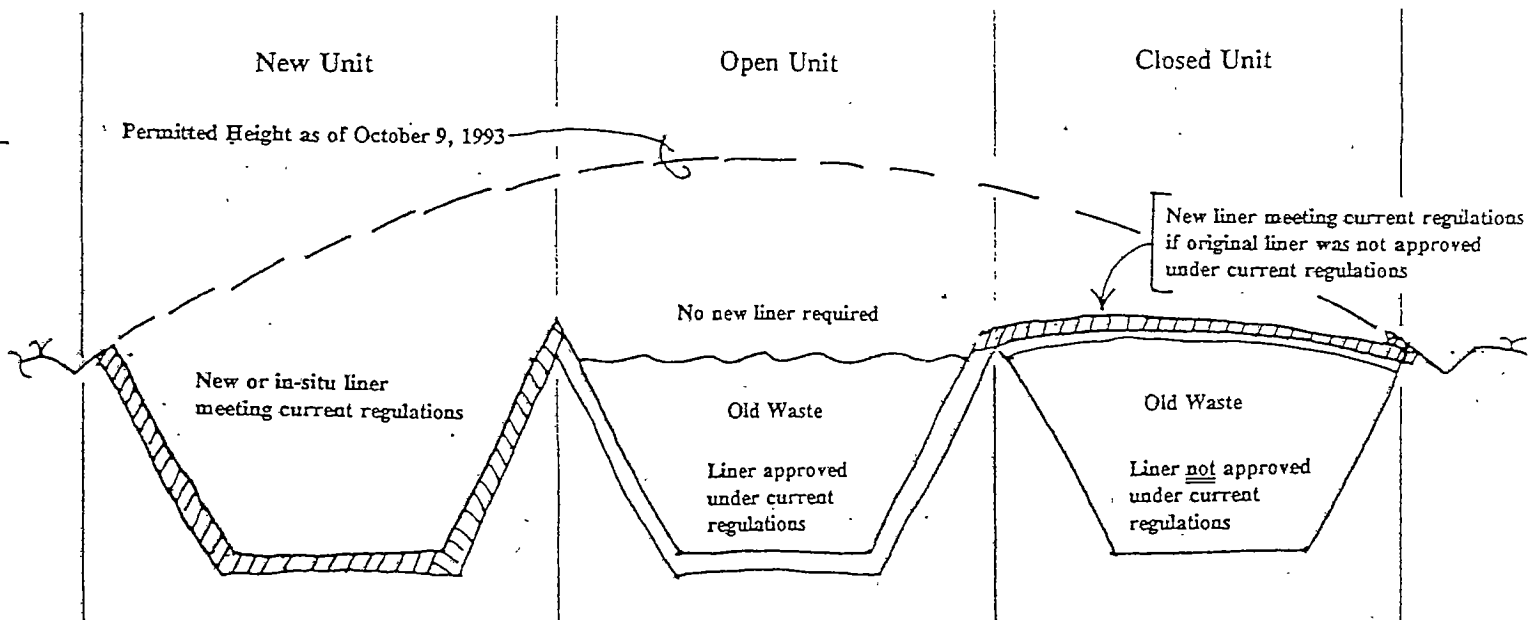
We will discuss the exact application of the new rules to aerial fills at an upcoming meeting of the Subtitle D Review Committee.

Policy Statement
Municipal Solid Waste Division - - Texas Water Commission

Aerial Fills Over Existing Landfills - Example Sketches - October 23, 1992



Permit/Amendment Approval After October 9, 1993



Permit/Amendment Approval Before October 9, 1993

TEXAS WATER COMMISSION

Interoffice Memorandum

TO: Ronald L. Bond, P.E., Director
Municipal Solid Waste Division

FROM: Nicholas W. Classen, P.E.
Municipal Solid Waste Permits Section

SUBJECT: Current Permit Applications Proposing New Waste Fill Over
Old Waste Fill (Aerial)

In accordance with your request, I have reviewed our current list of permit applications and determined that four (4) applications fall into the same category as the application for City of San Antonio, P.A. No. MSW 1237-A, in that they meet the following conditions:

- (1) The P.A. was administratively complete on October 23, 1992 (the date of our policy statement on Aerial Fills Over Existing Landfills;
- (2) The applicant, in all likelihood will not get a permit before October 9, 1993;
- (3) The P.A. proposes to deposit new solid waste over a section of closed landfill (old solid waste). The "closed landfill section" refers to a section of completed landfill that has had final cover applied, but the entire landfill is not closed officially by having an Affidavit To The Public filed at the courthouse.
- (4) Although this may not have been one of the criteria you specifically asked me to include in my research, we did discuss whether or not they planned to install a Sub-title D liner (composite w/leachate collection system) on top of the old waste.

The four (4) other applications that fall into this category are:

- (1) P.A. No. MSW 1307-B, Waste Mgmt. (Atascocita), assigned to Nick Classen (NWC).
- (2) P.A. No. MSW 1394-A, City of Irving, assigned to NWC.
- (3) P.A. No. MSW 1535-A, Hazelwood Enterprises, assigned to Dale Pound (DAP).
- (4) P.A. No. MSW 42-C, Waste Mgmt. (Skyline), assigned to DAP.

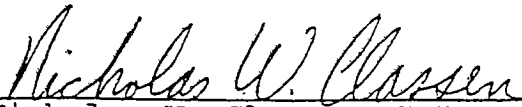
Memorandum
New Fill Over Old Fill
Page 2

NOTES: 1307-B: If the effective date of Subtitle D is moved ahead six months (April 9, 1994) as EPA is proposing, this P.A. could get a permit prior to that time. In fact, there is a chance that they could get a permit by 10/9/93 if there is no opposition. They have been advised of the requirement to place a Subtitle D liner over the old waste.*

1394-A: They will not be able to get a permit by 10/9/93, but could get it by 4/9/94. Opposition is not expected. They have been advised of the requirement for placing a Subtitle D liner on top of old waste.*

~~1535-A and 42-C: Dale Pound told me he was not concerned about the new regulations at this point and was proceeding to process his applications under the current regulations. I explained to him what you, Mary Adrian, and I discussed*, and I suggested that he talk to you or Mary. He did not seem to feel -- as I do -- that we need to advise applicants of the requirement should they receive a permit after the effective date of Subtitle D.~~

* If a permit is issued before the effective date of Subtitle D, be it 10/9/93 or 4/9/94, the "closed landfill section" in question suddenly becomes an unclosed section under the permit amendment, and a new permitted height is created. The applicant can then fill up to that new permitted height without having to place a Subtitle D liner over the old waste. The applicant cannot, however, fill over new (lateral) areas up to the new permitted height -- after the effective date of Subtitle D -- without a Subtitle D liner under the new waste. If the permit amendment is issued after the effective date of Subtitle D, the "closed landfill section" must have a Subtitle D liner over it (including leachate collection system) before aerial filling can continue over the old waste.

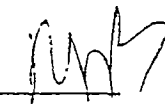

Nicholas W. Classen, P.E.
May 18, 1993

cc: Mary B. Adrian, P.E. ✓

Texas Water Commission

INTEROFFICE MEMORANDUM

TO: Permits, Groundwater Protection, and Enforcement Section Staff

FROM: Ronald L. Bond, P.E., Director
Municipal Solid Waste Division 

DATE: June 4, 1993

SUBJECT: Subtitle D Rules Interpretation Decision #2

The Subtitle D Rules Review Committee met on Thursday, June 3, 1993, to consider several issues raised by Municipal Solid Waste Division staff regarding interpretations of the new Subtitle D TWC rules. These issues, and the subsequent decisions are as follows:

1. Questions were raised as to how a Type I, II, or III landfill could be converted to Type IV, with respect to separation, and overlapping of Type I and Type IV wastes.

Decision: After considerable discussion, it was determined that, in order for an operator to be considered a closed unit, and consequently be excused from meeting Subtitle D rules after October 9, 1993, a physical separation between currently operating Types I, II, or III landfills and proposed Type IV landfills must be made. It was decided that Type IV wastes could not be overlain over a Type I, II, or III landfill which had received final cover, but that there must be a distinct vertical separation between the Type IV and the previously operated putrescible waste landfills, which must be clearly marked. This vertical separation could take the shape of a pyramidal cross-section of soil, or a vertical column of soil, slurry wall, etc., so long as the liner requirements for both be old use and the new Type IV use are met.

2. Suggestions were made by some staff that any alternative liner would require a test pad and a field demonstration of the complete proposed liner design.

Decision: There was general agreement that any significant departure from the current regulatory standard of a three foot clay liner with a permeability no greater than 1×10^{-7} should trigger consideration of requiring a test pad to be constructed and evaluated in the field, under real construction conditions. However, it was also agreed that a rigid rule requiring that all alternative designs would require a test pad might be unreasonable. For example, rainfall amounts might be a consideration in requiring field test pads for liner designs in West Texas, and other alternative designs might use different technologies which would not lend themselves to field evaluation and testing.

Accordingly, it was determined that we would interpret the language in the current rules as written, i.e. the Executive Director will determine on a case by case basis whether a field test pad will be required. This will be done by the project engineers, with input from other Division professionals as necessary, based on the specific design proposed, and the existing site conditions. For example, a proposal to use an 18" thick clay liner with a permeability of 1×10^{-6} in Central Texas would probably trigger a requirement for test pad construction and evaluation.

3. The question was brought up as to whether or not there was a requirement for a minimum side slope for trench excavations.

Decision: This was thoroughly discussed during the review of the concept paper, and it was agreed that there would be no minimum requirements specified, but rather this would be done on a site specific basis, based upon the particular soil characteristics, and on safety considerations. Again, each permit engineer should review proposals for side slopes for trenches, and determine (a) if the design appears safe for the personnel constructing it and operating within it, and (b) can the design be constructed?. Three to one side slopes is the general rule, but this could vary depending on particular site specific conditions.

4. Permitting Section staff indicated that they had received a number of questions concerning earthquake designs within those zones where a demonstration is required under Subtitle D rules.

Decision: After considerable discussion, it was agreed that this was a matter for the consulting engineer to address specifically in his design, i.e. the design engineer must certify that the design he proposes meets the requirements specified in Subtitle D and our regulations. MSW Division will not develop additional criteria. It will be incumbent upon the design engineer to educate himself or herself as to the design requirements, if a landfill is proposed in one of the restricted locations with respect to seismic activity.

5. It was pointed out that the previous policy regarding aerial fills had been rescinded, since the TWC Subtitle D rules had been approved.

Decision: The net effect of rescinding this policy will be that existing units which have not been closed can be extended vertically without installing a Subtitle D liner over the old waste. This will apply to existing units which have currently permitted air space, and to existing units which request amendments to extend the permitted air space. For example, a landfill which currently has permitted air space above existing waste to last for several years, could continue to fill to permitted height, without installing Subtitle D liners over the existing waste. In addition, this landfill could request a vertical extension amendment to their permit, following normal permit amendment

Permits, Groundwater Protection, and Enforcement Section Staff

June 4, 1993

Page 3

procedures, after the effective date of Subtitle D, and, if approved, could continue to fill to that amended permit height without installing a Subtitle D liner over the existing waste, provided the unit had not been closed. It was decided that a unit would be considered closed, if it generally met the closure criteria specified in CFR 258.60. In general terms, a unit will be considered closed if it has received a final cover system meeting either the current regulations or future Subtitle D requirements, and the operator has indicated, through his actions, or through other notifications, that he intended to close the unit. It is not necessary for the affidavits and deed recordations to have been completed in order for a unit to be considered closed.

As a reminder, this would not apply to permitted new units, lateral expansions of existing units, or that portion of existing units not covered with waste on October 9, 1993.

All personnel who are involved in the review of permits and/or in the provision of information to the regulated community or the districts should maintain this memorandum in a notebook and ensure that all information disseminated on this subject is consistent with the guidance contained herein.

Attachment “3”

Travis County Commissioners Court

SAMUEL T. BISCOE
County Judge

RON DAVIS
Commissioner, Pct. 1

KAREN SONLEITNER
Commissioner, Pct. 2

GERALD DAUGHERTY
Commissioner, Pct. 3



MARGARET J. GÓMEZ
Commissioner, Pct. 4

Travis County Administration Building, 314 W. 11th, Commissioners Courtroom, 1st Floor, Austin, Tx 78701

June 28, 2005

Mr. Richard Carmichael, Ph.D., P.E. CIH
Manager, MSW Permits Section (MC-124)
Waste Permits Division
Office of Permitting, Remediation and Registration
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

RE: Comments on Proposed Revisions to 30 TEX. ADMIN. CODE Chapter 39, 330, 305.70 and
General Public Notice of Solid Waste Applications wherever applicable

Dear Dr. Carmichael:

The Travis County Commissioners Court requested that Governor Perry veto HB 1609. Since he did not, we feel compelled to provide comments for incorporation into the overall rule revision processes ongoing at your agency.

Our understanding is that this bill will essentially make public hearings and meetings held for hazardous waste disposal sites, landfills and other solid waste facilities optional for your agency. While we understand the need for agency flexibility and efficiency, we feel this change threatens the credibility of what should be a very publicly accountable process. The threshold for making the decision to hold or not hold public hearings or meetings seems to turn on two requirements: 1) the request of a legislator from the project area; or, 2) if the executive director determines that there is *substantial public interest* in the proposed development. Since the bill has passed and this threshold will be the guidance as to whether public involvement proceeds, we focus our comments on these two areas.

Elected Official Notification

In our experience, state legislators tend to request public hearings or meetings when their constituents or local elected officials request them. Therefore, notification of the citizenry and local officials becomes even more paramount in this situation. We all know of projects where existing notification requirements failed to generate sufficient public notice and entire segments of the community are caught off guard. To remedy this problem, two simple improvements could be:

1. Send notice to the affected county judge immediately upon receipt of an application, as opposed to after the executive director determines that the application is administratively complete. This same courtesy could be extended to affected municipalities. This gives local officials a jumpstart on the process to enhance public notification.
2. In addition to existing mailed notice requirements, require applicants to send notice to closest neighborhoods within 1-2 miles. Current rules require notice to residential or business addresses and property owners within ½ mile of the facility. The intent of this requirement is good but it can actually result in leaving out established subdivisions that might be just outside of that boundary. This expanded mailing to neighborhoods could even be accomplished through recognized Home or Property Owner's Association contacts versus the entire neighborhood, door to door flyers, or through appropriate signage requirements.

Substantial Public Interest

The term of art *substantial public interest* lacks specificity and should perhaps be defined by your agency. A simple set of defining requirements for the executive director to use to determine what constitutes substantial public interest might include:


1. A local elected official requests a public meeting;
2. A Council of Government requests a public meeting;
3. A Homeowner's or Property Owner's Association requests a public meeting; or,
4. More than six residents and/or businesses request a public meeting.

We are thankful the TCEQ is taking a look at revising and improving solid waste rules and appreciate the opportunity to comment on the process. We trust that you will consider these suggestions as respectful improvements with the public good in mind.

Sincerely,

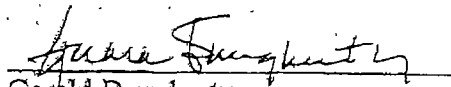


Ron Davis
Commissioner, Precinct One

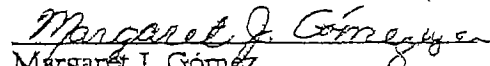


Samuel T. Biscoe
Travis County Judge

Karen Sonleitner
Commissioner, Precinct Two



Gerald Daugherty
Commissioner, Precinct Three



Margaret J. Gomez
Commissioner, Precinct Four

cc:

Honorable Gonzalo Barrientos
Honorable Jeff Wentworth
Honorable Todd Baxter
Honorable Dawna M. Dukes
Honorable Terry Keel
Honorable Elliott Naishtat
Honorable Eddie Rodriguez
Honorable Mark Strama

Attachment “4”

Attachment 4

WASTE PERMITS DIVISION 5 YEAR COMPLIANCE HISTORY REVIEW PROCEDURES

Background:

The Texas Health and Safety Code Section 361.088(g) requires that the commission review a permit issued under Chapter 361 of the Health and Safety Code every 5 years to assess the permit holder's compliance history.

Applicability:

The review of permits every 5 years in order to assess compliance history will be performed for the following permits:

- municipal solid waste permits
- industrial solid waste permits
- hazardous waste permits
- underground injection control permits

The requirement does not apply to municipal solid waste registrations or underground injection control registrations.

These procedures will be applicable to both the Industrial and Hazardous Waste Permits Section and the Municipal Solid Waste Permits Section.

Those facilities which are ranked average or higher will be presumed to have permits with adequate provisions to ensure compliance with the state's environmental regulations. Those facilities which are ranked as poor will have their compliance histories and permits reviewed in an effort to determine if enhancement of the permits through revised provisions might increase compliance.

Process:

1. Compliance history rankings are developed each September by the Office of Compliance and Enforcement beginning in September 2003.
2. By October 1 of each year the Industrial and Hazardous Waste Permits Section and the Municipal Solid Waste Permits Section shall obtain a listing of poor performers from the Office of Compliance and Enforcement.
3. The list of poor performers shall be evaluated by staff in each section to identify the permitted facilities from the program area on the poor performers list.
4. For any permitted facility which is identified as a poor performer, the program area will check with the Office of Compliance and Enforcement to determine whether the facility has appealed the compliance history ranking. If the facility has appealed the ranking, further action regarding the review of the compliance history will wait until the appeals

process is completed. Once the appeal is completed, if the facility remains ranked as a poor performer, then the procedures for review of the compliance history and permit shall be resumed. The appeal process is set out in 30 TAC 60.3.e(6). Time frames for filing an appeal and the commission decision on an appeal are included in the rule.

5. A compliance history will be obtained for each permitted facility in the program area which is listed as a poor performer.
6. For permitted facilities which are listed as poor performers, the permit will be reviewed in conjunction with the compliance history to determine whether changes should be made to the permit which may improve performance. The following shall be considered by the staff reviewing the permit and compliance history:
 - Note the statutory or regulatory basis for any violation or enforcement action identified on the compliance history.
 - Determine whether the noted violations are applicable to the waste program.
 - Evaluate whether permit provisions or revisions can be made which may improve the performance of the permittee.
7. Determine whether changes can be made to the permit which may improve the performance of the permittee. Contact the permittee and discuss these changes and the submission of a permit modification or amendment to incorporate the changes.

If the permittee indicates they will not modify the permit the following options for processing the changes are to be explored:

- A. Coordinate with the Enforcement Division to determine if the requirement to submit a permit amendment can be added to an order which is under development to require submission of a permit amendment; or
 - B. Process and ED initiated amendment to the identified changes.
8. If the criteria for revocation of a permit are met then revocation of the permit will be initiated. 30 TAC §60.3(a)(6) identifies the criteria under which a permit may be revoked. For a repeat violator classified as a poor performer the commission may revoke a permit for cause, including:
 - a criminal conviction classified as major under §60.2(c)(1)(E);
 - an unauthorized release, emission, or discharge of pollutants classified as major under §60.2(c)(1)(C);
 - repeatedly operating without authorization; or
 - document falsification.
9. For each permit reviewed the staff conducting the review shall prepare a memo to the facility's file in Central Records documenting the review which was conducted of the compliance history ranking for the facility, the review which was conducted of the permit. A discussion of the basis for any actions which are taken as a result of the review is to be included in the memo. If no action is taken as a result of the review, the basis for not taking any action shall be discussed in the memo. The memo to the file shall be from the

staff conducting the review through the Division Director of the Waste Permits Division, to the facility's file in Central Records. A copy of the compliance history will be attached to the memo.

10. Copies of the memo documenting the review and the compliance history will be maintained at the Division level.

EXAMPLE MEMO TO THE FILE

Originator _____
Supervisor _____
Section Manager _____
Division Director _____

Wadé M. Wheatley, P.E., Director
Waste Permits Division

[Section Manager's Name], Section Manager
[XXX] Permits Section

[Team Leader's Name], Supervisor
[Team XX]
[XXX] Permits Section

[Staff Name], Project Manager
[XXXX] Section, Waste Permits Division

[XXX Company - Location]
[Permit No. XXXXX]
[Industrial Solid Waste Registration No. [30000/50000]]

[XXXX] Company has a compliance ranking of [insert ranking classification] based on the compliance history ranking conducted [insert the date of the ranking] by the Texas Commission on Environmental Quality's Office of Compliance and Enforcement. This ranking results in the company being designated as a poor performer.

The compliance history for the facility has been reviewed in conjunction with the permit. A copy of the compliance history for the facility is attached. The compliance history identifies violations regarding [provide a brief description of the violations].

Based on the review of the compliance history and the permit it is recommended [provide a recommendation and justification for the recommendation. The recommendation can be:

IOM: XXXXX Company

- a) no changes to the waste permit are recommended;
- b)
 - i. an Executive Director initiated amendment to the permit is recommended to revise and/or change permit provisions;
 - ii. the permittee has agreed to submit a permit amendment/modification to make changes to the permit which may enhance the performance of the permittee; or
 - iii. coordination has occurred with the Enforcement Division and changes will be addressed through an order being processed by the Enforcement Division; or
- c) revocation of the permit is recommended.]

[Staff Name], Project Manager

XXX/xxx

Attachment

cc: Judy Martins, Administrative Assistant, Waste Permits Division

Texas Commission on Environmental Quality

INTEROFFICE MEMORANDUM

To: File **Date:** March 23, 2004

Thru: Wade M. Wheatley, P.E., Director *WMB for 5/19/04*
Waste Permits Division

Thru: Richard C. Carmichael, Ph.D., P.E., CIH *REC 3/23/04*
Manager
MSW Permits Section


From: Jeff Holderread, Team Leader
Team I
MSW Permits Section

Subject: City of Weslaco - Hidalgo County
Municipal Solid Waste Permit No. 258 - Municipal Solid Waste Landfill

The City of Weslaco Landfill has a Regulated Entity classification of poor and a Customer classification of average based on the compliance history ranking conducted on December 29, 2003 by the Texas Commission on Environmental Quality's Office of Compliance and Enforcement. This ranking results in the company being designated as a poor performer.

The compliance history for the facility has been reviewed in conjunction with the permit. A copy of the compliance history for the facility is attached. The compliance history identifies violations addressed in an administrative order issued 01/08/01 regarding the following: failure to meet final closure requirements for MSW landfill that received waste on or after 10/9/93; failure to complete final cover for the landfill in accordance with the facility's Site Closure Plan; failure to conduct groundwater monitoring according to the operational requirements in the facility's approved Site Development Plan; failure to conduct erosion repairs of the intermediate cover as needed on the north slopes of cells 3, 4 and 6; failure to conduct methane monitoring and failure to number existing methane gas probes in accordance with the facility's Landfill Gas Management Plan; and failure to comply with Subtitle D requirements regarding the installation of a final landfill cover cell 6 at the facility. No other violations are noted.

Based on the review of the compliance history and the permit it was found that a change in the permit would not have affected the violations. No changes to the waste permit are recommended.



Jeff Holderread, P.E.
MSW Permits Section

JDH/fef

Attachment

cc: Judy Martins, Executive Assistant, Waste Permits Division

Regulated Entity Detail

Number: RN102118841

Name: CITY OF WESLACO LANDFILL

Street Address

Delivery:

City:

State:

Zip:

Customer and Mailing Addresses

Historical Customer

Customer			RE Mailing Address				Begin Date	End Date	Regulated Entity Compliance History Classification
Name	Number	Role	Delivery	City	State	Zip			
CITY OF WESLACO	CN600520969	OWNER OPERATOR							POOR

Geographic Location

Physical Location Description: 4.5 MILES N OF MISSION ON E SIDE OF BRYAN ROAD NEXT TO SE ALTON CITY

Nearest City: MISSION

County: HIDALGO

State: TX

Location Zip:

Latitude: 0-0-0

Longitude: 0-0-0

Industry Types

Code	Classification System	Name	Primary Flag
------	-----------------------	------	--------------

Electronic Communications

Attachment “5”

State Office of Administrative Hearings



Shelia Bailey Taylor
Chief Administrative Law Judge

June 24, 2004

Duncan Norton
General Counsel
Texas Commission on Environmental Quality
PO Box 13087
Austin Texas 78711-3087

Re: SOAH Docket No. 582-02-1595; TCEQ Docket No. 2002-0117-MSW; In Re: Application of Juliff Gardens, L.L.C. for New Permit to Operate a Type IV Municipal Solid Waste Landfill Facility


Dear Mr. Norton:


The above-referenced matter will be considered by the Texas Commission on Environmental Quality on a date and time to be determined by the Chief Clerk's Office in Room 2018 of Building E, 12118 N. Interstate 35, Austin, Texas.

Enclosed are copies of the Proposal for Decision and Order that have been recommended to the Commission for approval. Any party may file exceptions or briefs by filing the original documents with the Chief Clerk of the Texas Commission on Environmental Quality no later than July 14, 2004. Any replies to exceptions or briefs must be filed in the same manner no later than July 26, 2004.

This matter has been designated TCEQ Docket No. 2002-0117-MSW; SOAH Docket No. 582-02-1595. All documents to be filed must clearly reference these assigned docket numbers. Copies of all exceptions, briefs and replies must be served promptly on the State Office of Administrative Hearings and all parties. Certification of service to the above parties and an original and eleven copies shall be furnished to the Chief Clerk of the Commission. Failure to provide copies may be grounds for withholding consideration of the pleadings.

Sincerely,


Craig R. Bennett
Administrative Law Judge


Tommy L. Broyles
Administrative Law Judge

CRB/TLB:s
Enclosures
cc: Mailing List

William P. Clements Building
Post Office Box 13025 • 300 West 15th Street, Suite 502 • Austin Texas 78711-3025
(512) 475-4993 Docket (512) 475-3445 Fax (512) 475-4994
<http://www.soah.state.tx.us>

SOAH DOCKET NO. 582-02-1595
TCEQ DOCKET NO. 2002-0117-MSW

APPLICATION OF JULIFF GARDENS, L.L.C. FOR NEW PERMIT TO OPERATE A TYPE IV MUNICIPAL SOLID WASTE LANDFILL FACILITY; (PERMIT NO. MSW-2282)	§ § § § §	BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS
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SOAH DOCKET NO. 582-02-1595
TCEQ DOCKET NO. 2002-0117-MSW

APPLICATION OF JULIFF GARDENS,	§	BEFORE THE STATE OFFICE
L.L.C. FOR NEW PERMIT TO	§	
OPERATE A TYPE IV MUNICIPAL	§	OF
SOLID WASTE LANDFILL FACILITY;	§	
(PERMIT NO. MSW-2282)	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

I. INTRODUCTION AND OVERVIEW

Juliff Gardens, L.L.C. (Juliff or Applicant) applied to the Texas Commission on Environmental Quality (TCEQ or the Commission) for Permit No. MSW-2282 to construct a Type IV municipal solid waste landfill (Landfill or Facility) in Brazoria County, Texas. The Landfill site is located on the east side of Farm-to-Market Road 521, approximately 2,500 feet south of the intersection with County Road 56 (the proposed Landfill site is referred to as the "Site"). When completed, the Facility would encompass approximately 253 acres with an aerial height of 140 feet.¹

The following were designated as the parties to this proceeding: (1) Applicant; (2) Citizens Against the Dump (CAD); (3) the Office of Public Interest Counsel (OPIC); (4) Brazoria County; (5) Sienna Point Homeowner's Association (Sienna Point); (6) Brazoria County Drainage District No. 5 (BCDD #5); (7) Joe W. Stuckey; (8) Maurice Angly; (9) David Grissom; (10) Ramone Bingham; (11) Don R. Irvin; (12) John Craig and (13) Chocolate Bayou Water Company (Chocolate Bayou). Prior to the hearing, Chocolate Bayou withdrew as a party. Numerous other parties failed to participate after being granted party status. In fact, only Applicant, CAD, OPIC, and Brazoria County participated in the hearing and filed post-hearing written arguments.

After considering the issues and evidence presented, the Administrative Law Judges (ALJs) recommend that the Commission deny the requested permit. This recommendation is based on numerous grounds, which are set forth in detail below in this Proposal for Decision (PFD).

¹ Ex. A-2, at 8; Transcript (Tr.) at 228.

the environmental purpose behind TEX. HEALTH & SAFETY CODE § 361.122—i.e., to protect such features which are more susceptible to harm from pollution—logically extends to the draw in this case, which appears to have the identified characteristics of concern.

The definition used by NRCS for field irrigation ditches is not persuasive because the evidence is conflicting on whether the draw's capacity is actually 25 cfs or less, even if the definition were helpful to the issue at hand.¹⁵ Moreover, even Applicant's expert conceded that reasonable experts could disagree on whether a feature would be considered a ditch simply because it's flow was less than 25 cfs.¹⁶ Therefore, the ALJs do not find the NRCS definition helpful.

Ultimately, the ALJs believe that the draw in question would qualify as a canal within the meaning of TEX. HEALTH & SAFETY CODE § 361.122, given the environmental concerns addressed by the statute and the lack of a meaningful difference between a "ditch" and a "canal" when both are used for irrigation of crops used for human or animal consumption and are tied into a mainline canal. If the Commission agrees with this conclusion, then the Landfill is prohibited by TEX. HEALTH & SAFETY CODE § 361.122.

B. Does Applicant have a Sufficient Interest in the Property?

Numerous protesting parties have also challenged the Application on the basis that Applicant does not own a sufficient interest in the property at the Site, as required by 30 TEX. ADMIN. CODE

¹⁵ Mr. Kowis did not actually conduct an independent analysis, but merely used another witness's testimony about the daily capacity (35 acre-feet) of the draw to determine what the flow rate would be. When questioned in detail, Mr. Kowis admitted he did not understand how the other person determined the 35-acre feet and he conceded that there were a lot of factors that would affect the capacity and flow rate—none of which he looked at. Moreover, some of those factors, such as the size of the pipe supplying the draw and the capacity of the irrigation equipment to pull water out of the draw are conditions that are easily changed and that do not actually effect the size of the draw itself. Ultimately, because of the ambiguous testimony he relied on, and his failure to conduct a detailed underlying analysis, the ALJs simply cannot find Mr. Kowis' testimony to be reliable. Tr. 920-928.

¹⁶ Tr. at 920.

§ 330.62(a). As set out in more detail below, the ALJs recommend that the Commission find that Applicant has not shown that it has a sufficient interest in the property in issue. However, the ALJs also conclude that this issue hinges on the interpretation of a rule not previously addressed by the Commission and, thus, the Commission may decide the matter differently as a matter of policy.

1. Parties' Arguments

The Commission's rules provide that "it is the responsibility of an owner or operator to possess or acquire a sufficient interest in or right to the use of the property for which a permit is issued."¹⁷ No parties dispute that Applicant (or its related entities) owns the surface estate in the property at the Site. Similarly, the parties agree that the surface estate and the mineral estate have been severed. Applicant has a waiver of surface use by 58% of the mineral estate owners.¹⁸ As to the other 42% of the mineral estate owners, Applicant has not acquired their consent or any waiver by them allowing Applicant's intended use of the property.

Given these facts, Protestants contend that Applicant has not shown that it has a "sufficient interest in or right to the use of the property" at the Site. Protestants note that the well-settled law in Texas is that the mineral estate is the dominant estate, and the mineral estate owner has the right to use so much of the surface as is reasonably necessary for activity related to exploration and development of minerals.¹⁹ Therefore, Protestants contend that the mineral estate owners can come in and demand the use of the surface for mineral development, and Applicant would be relatively powerless to stop them.

¹⁷ 30 TEX. ADMIN. CODE § 330.62(a).

¹⁸ See *Applicant's Response to Order No. 24 Regarding the Scope of Contested Issues*, at 1.

¹⁹ *Getty Oil Co. v. Jones*, 470 S.W.2d 618 (Tex. 1971); *Santana Oil Co. v. Henderson*, 855 S.W.2d 888 (Tex.App.-El Paso 1993).

In response, Applicant asserts there is no requirement or precedent establishing that a landfill operator must own 100% of the mineral estate in the property at which the landfill will be located. Applicant points out that the Commission has not addressed this in its extensive rules regarding landfills, nor has the Legislature required this in regard to this type of landfill. Applicant asserts that, if the Legislature intended such a requirement to exist, it could have clearly included such a statutory requirement. Applicant cites to other permit statutes containing language regarding the protection of mineral interests. Specifically, Applicant notes that TEX. HEALTH & SAFETY CODE § 401.204, related to low-level radioactive waste facilities, requires (1) the applicant to own the mineral estate, (2) the applicant to obtain a surface waiver from the mineral estate owners, or (3) the TCEQ to have the Attorney General condemn the mineral interest in fee simple. Further, in regard to disposal well permits and shaft permits, the Water Code requires the applicant to show that mineral rights will not be impaired.²⁰ In light of this, Applicant argues that the absence of any similar requirement is tantamount to a determination by the Legislature and the TCEQ to not impose such a requirement on landfill permit applicants.

Further, Applicant contends there is no regulatory mechanism to decide mineral interest owners' claims in contested cases; rather, because private property rights are involved, the protection of such ownership interests are properly addressed through civil court actions addressing property rights and the law of accommodation. In such actions, Applicant points out that, although the mineral estate is dominant, the mineral estate rights must be exercised with due regard for the rights of the surface owner.²¹ Because Applicant owns the property adjacent to the Site, it asserts it could accommodate any mineral owner's efforts to drill or otherwise explore under the surface of the Site, through directional drilling or other methods.

²⁰ TEX. WATER CODE §§ 27.015(c) and 28.031(a)(2).

²¹ *Tarrant County Water Control and Improvement Dist. No. 1 v. Haupt*, 854 S.W.2d 909, 911 (Tex. 1993); *Getty Oil Co.*, 470 S.W.2d at 621.

Finally, Applicant points out that no mineral owners have participated in this proceeding or challenged the Application. Given the waiver by 58% of the mineral estate owners, and the "economic realities of oil and gas exploration," Applicant argues it is unlikely that any mineral owners will seek to engage in mineral exploration in the area. Thus, Applicant asserts it has a "sufficient interest in or the right to the use of the property" at the Site.

2. ALJs' Analysis

After considering these arguments, the ALJs conclude that Applicant has not met its burden of proving it has a sufficient interest in or right to the use of the property. At the outset, the ALJs note they have been unable to locate any direct precedent on this issue. The law regarding mineral interests is clear, though, in establishing that the mineral estate is the dominant estate and that, if there is only one means by which to access minerals, the mineral estate owner may use that means even if it damages the surface estate.²² If there is more than one means to explore and obtain the minerals, the accommodation doctrine applies and resolves any dispute between the surface estate owner and the mineral estate owner. Under the accommodation doctrine, the courts look to whether a reasonable alternative that is not destructive to the surface estate is available to the mineral owner to use in producing minerals under the surface of the land.²³ When the accommodation doctrine is invoked, the burden of proof is on the *surface owner* to show that the mineral interests can be explored and developed through alternate means.²⁴

In regard to 30 TEX. ADMIN. CODE § 330.62(a), the Commission has not given guidance on what constitutes a "sufficient interest in or the right to the use of" the property. In looking at this issue in the context of this case, the ALJs find the accommodation doctrine to be a persuasive test

²² *Tarrant Co. Water Control & Improvement Dist. No. 1 v. Haupt*, 854 S.W.2d 909, 911-912 (Tex. 1993); *Getty Oil Co. v. Jones*, 470 S.W.2d 618, 622-623 (Tex. 1971).

²³ *Id.*

²⁴ *Tarrant Co. Water Control & Improvement Dist. No. 1*, 854 S.W.2d at 911.

to use in analyzing the question. Essentially, the ALJs believe that if an applicant does not establish its complete ownership interest in both the surface and mineral estates, or a waiver or other contractual agreement by the owners of those estates allowing development of the landfill, then it should present evidence sufficient to allow the Commission to determine that the integrity of the environment and the landfill permit requirements will not be adversely impacted if the mineral estate owners demanded their legal right to use the surface estate to develop minerals. Such may consist of evidence, consistent with the accommodation doctrine, showing that the mineral estate owners have alternative means to engage in mineral exploration and development that would not affect the landfill's operation and the integrity of the environment.

In this case, Applicant has made allegations that the mineral estate interests can be accommodated, but has not presented persuasive evidence showing this to be true. Rather, Applicant argues that such issues cannot be decided by this Commission, but can be addressed only through an action in the civil courts of the state. Applicant misses the point on this, though. The ALJs agree that the Commission cannot determine property rights *per se*. But, that is not what the Commission would be doing. Rather, if an applicant does not own the entirety of the mineral and surface estates at the site, it is important to look at the interplay between the mineral and surface estates in order to determine whether the applicant's interest in or right to the use of the property is "sufficient" as required by the Commission's rules. In conducting such an analysis, the Commission is not conclusively deciding private property rights, but simply determining a prerequisite (*i.e.*, the "sufficiency" of the interest or right to the use of the property) established by the Commission's own rules.

Applicant would essentially have the Commission turn a blind eye to the 42% mineral interest owners who have not executed a surface waiver or given any consent to Applicant's proposed use of the site. The ALJs cannot recommend such a course of action, particularly in light

of precedent from Oklahoma holding that mineral interest owners have a federal constitutionally-protected property interest that requires they be given notice and opportunity for a hearing before a landfill permit can be granted on the property subject to their mineral interest.²⁵

In *Dulaney v. Oklahoma Dept. of Health*, the Oklahoma Department of Health issued a landfill permit after denying the request by mineral interest owners and adjacent landowners for an evidentiary hearing. The Oklahoma Supreme Court held the permit was not lawfully issued, and found that the right to enter land to prospect for and to take minerals is a property right. After discussing the interplay between mineral rights and surface rights and the potential problems a landfill could create for mineral exploration, the court stated:

The permit granted by the Department of Health allows the use of the surface estate in a manner which may impair recognized and well-defined property rights of the mineral interest owner. Due process requires that the mineral interest owner be given notice and an opportunity to contest the permit at the administrative level. The due process clauses of the United States and the Oklahoma Constitutions provide that certain substantive rights—life, liberty, and property—cannot be deprived except by constitutionally adequate procedures. . . . The due process clauses of both the federal and Oklahoma constitutions require at a minimum *notice and a hearing* prior to the issuance of the permit *in the case of mineral interest owners*.²⁶

The ALJs recognize that in Texas, under TEX. HEALTH & SAFETY CODE § 361.081, landfill permit applicants are not required to provide direct, mailed notice to mineral interest owners. Rather, that type of notice must only be sent to:

[E]ach residential or business address located within one-half mile of a new solid waste management facility and to each owner of real property located within one-half mile of a new

²⁵ *Dulaney v. Oklahoma Dept. of Health*, 868 P.2d 676 (Okla. 1993). The ALJs have been unable to find any authority from Texas on this issue. Given the similarity between Texas and Oklahoma in the application of oil and gas law and property rights, and the fact that federal Constitutional protections are not limited by state, the ALJs find the Oklahoma precedent to be persuasive. Moreover, the ALJs have not found any authority from other jurisdictions reaching decisions contrary to this Oklahoma precedent.

²⁶ *Id.* at 681 (emphasis added).

solid waste management facility listed in the real property appraisal records of the appraisal district in which the solid waste management facility is sought to be permitted as of the date the commission determines the permit application is administratively complete.²⁷

In following this statute, the ALJs did not require direct, mailed notice to mineral interest owners in this case. However, this does not diminish the Oklahoma Supreme Court's acknowledgment of significant, federal Constitutional property rights that mineral interest owners have in the property at which the site will be located, nor does it relieve Applicant from showing that it has a "sufficient interest in or right to the use of the property for which a permit is issued." Moreover, in light of the fact that Applicant was not required to show proof of direct, mailed notice to mineral estate owners, Applicant's contention that none of the mineral estate owners have opposed the permit is of little consequence. Ultimately, the ALJs do not know whether such mineral estate owners are even aware of this proceeding.

Given the analysis presented above, the ALJs conclude that Applicant has not established that it has a sufficient interest in or the right to the use of the property at the Site. Because this is a case of first impression, the ALJs might ordinarily recommend a remand of this case to allow Applicant to address this issue more fully with some guidance from the Commission. However, because there are other significant reasons discussed in this PFD for denying the Application, the ALJs do not make such a recommendation. If, however, the Commission were to find that this is the only factor preventing issuance of the requested permit, then it might be appropriate to remand for further proceedings.

V. FLOODING AND DRAINAGE ISSUES

TCEQ rules require an applicant to determine drainage and flooding characteristics at a landfill site, including whether a site is located in a 100-year floodplain. CAD asserts that Applicant

²⁷ TEX. HEALTH & SAFETY CODE § 361.081(a).

LOWERRE & FREDERICK

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Austin, Texas 78701

(512) 469-6000 / 482-9346 [facsimile]

RICHARD W. LOWERRE

Richard Lowerre is a partner in the firm of Lowerre & Frederick. He has been in private practice with this or similar law firms since 1980, with the exception of 1986-1989 when he was with the Texas Department of Agriculture. With the law firms, he has represented clients before federal and state agencies, U.S. and Texas Courts and the Texas Legislature. His cases have involved air and water pollution, land use, hazardous, radioactive and municipal waste, pesticides, surface mining, oil and gas production, fish, wildlife and endangered species, ground water regulation and surface water rights. His clients have included local governments, national, state and local citizen organizations, labor unions and individuals.

Richard Lowerre has degrees in chemical engineering and law. He has served as a staff attorney at the National Academy of Sciences from 1975 - 1977, an Assistant Attorney General of Texas from 1978 - 1980, and the Assistant Commissioner for Regulatory Programs, the Texas Department of Agriculture from 1986-1988. Preparatory education, Rice University (B.Ch.E., 1970; M.Ch.E., 1971); University of California, Berkeley (Graduate Work, Chemical Engineering, 1971 & 1972); Legal Education, University of Texas at Austin (J.D. 1975).

ERIC M. ALLMON

Eric Allmon is an associate with the firm of Lowerre & Frederick. He has been in private practice with this firm since January 2005. Mr. Allmon was previously with the Office of Public Interest Counsel at the Texas Commission on Environmental Quality (TCEQ) from 2001 to 2005. Mr. Allmon, representing either the Public Interest Counsel or clients of Lowerre & Frederick, has participated in contested case hearings involving the permitting of air, wastewater, landfill, and injection well facilities, and the consideration of CCN amendments and water rate increases. He has also participated in rulemakings regarding CAFOs, Environmental Management Systems, solid waste, public participation, air concentration standards, and the Edwards Aquifer Authority. Prior to his work at the TCEQ Office of the Public Interest Counsel, Mr. Allmon clerked for Henry, Lowerre & Frederick, and for the Chief Counsel to the United States Treasury Inspector General for Tax Administration.

Eric Allmon has degrees in Civil Engineering, Liberal Arts and Law. Preparatory education, University of Texas (B.C.E. 1998, B.A. Plan II 1998); Legal Education, Vermont Law School (coursework 2000), University of Texas at Austin (J.D. 2001).

ALL APPROPRIATE INQUIRY/DUE DILIGENCE

August 4, 2005

Texas Environmental Superconference

Jim Bove, EPA Region 6
Assistant Regional Counsel

1

Small Business Liability Relief and Brownfields Revitalization Act

- Congress mandated that EPA promulgate regulations establishing federal standards for all appropriate inquiries
- Statute lists ten criteria EPA must include in regulations
- Statute establishes interim standard
- Signed into law January 11, 2002

2

What is "All Appropriate Inquiry"?

- "All Appropriate Inquiry", sometimes called due diligence, is the process of evaluating a property for potential environmental contamination and assessing potential liability for any contamination present at the property

3

Why is "All Appropriate Inquiry" Important?

■ Threshold criteria under CERCLA for:

- asserting certain defenses to liability
- seeking certain Brownfields grants

4

AAI Interim Standard

- Current AAI standard is the "interim standard"
- Two standards, based on date of purchase
- Purchased prior to May 31, 1997: look to totality of information about purchase price, commonly known information, etc.
- Purchase on or after May 31, 1997: ASTM Phase I, Standards E1527-97, E1527-00

5

Status of Federal Rule

- Proposed rule published August 26, 2004
- Comment period ended November 30, 2004
- EPA considering public comments and developing Final rule
- Anticipate publication of final rule December 2005 / January 2006

6

Highlights of Proposed Rule

- Structured around 10 statutory criteria
- Objectives and performance standards
- Definition of Environmental Professional
- Report of findings

7

Proposed Rule: Objectives of AAI

- Identify conditions indicative of releases or threatened releases
- Identify particular information:
 - Uses and occupancies of property
 - Uses of hazardous substances
 - Waste management activities
 - Corrective actions and response activities
 - Institutional and engineering controls
 - Nearby and adjoining properties with environmental conditions

8

Proposed Definition of Environmental Professional

- Recognizes P.E., P.G. and other state-certified or licensed environmental professionals with 3 years experience as environmental professional; OR
- Education and experience qualifications for others
 - Degree in relevant discipline of science or engineering, plus
 - Five years of relevant full time experience; OR
- Persons with any degree and 10 years experience grandfathered

9

Proposed Rule: AAI Report of Findings

- Results of AAI must be documented in report that is signed by EP
- Report must include:
 - Opinion regarding conditions
 - Identification of releases or threatened releases of hazardous substances
 - Data gaps and their significance
 - Signature of EP
 - Declaration of EP qualifications

10

Proposed Rule: Timing and Shelf Life

- AAI must be conducted within one year prior to date of acquisition.
- Some aspects of AAI must be updated if previously-conducted AAI is more than 180 days old (e.g., visual inspection, interviews, records search).
- AAI may be conducted on part of purchaser by third party.
- Any prior AAI may be used as a source of information.

11

Proposed Rule: Interviews

- Must interview current owner and occupant
- Additional interviews of past owners and occupants as necessary to meet objectives and performance factors
- Must interview owners or occupants of neighboring properties, if purchasing an abandoned property

12

Proposed Rule: On-site Visual Inspection

- Must conduct on-site visual inspection
- Limited exemption from "on-site" inspection, if good faith efforts result in no access to property
 - Must document efforts taken
 - Must conduct inspection from nearest vantage point
 - Must document impacts of limited access

13

Proposed Rule: Purchase Price versus Value of Property

- Persons must consider whether the purchase price reflects the fair market value of the property, if not contaminated
- No requirement for formal appraisal – but information from appraisal may be useful
- If price does not reflect value, persons should consider whether differential is due to presence of contamination
- Statutory requirement

14

Proposed Rule: Commonly Known or Reasonably Ascertainable Information

- Must consider information that is commonly known within the local community and reasonably ascertainable information
- Information may be obtained from:
 - Current owners or occupants
 - Local and state government officials
 - Other sources (e.g., newspapers, local libraries, historical societies)

15

Proposed Rule: Specialized Knowledge

- Specialized knowledge of property held by the purchaser is relevant to the inquiry.
- Courts have held that the professional or personal experience of the defendant may be taken into account when determining whether the defendant made "all appropriate inquiries."

16

Proposed Rule: Sampling and Analysis

- No requirements to conduct sampling and analysis – AAI is conducted prior to purchase
- AAI must include documentation of data gaps
- Sampling and analysis may be used to address data gaps – not required
- Sampling and analysis may be needed to ensure compliance with continuing obligations after purchase

17

Significant Comments on Proposed Standards

- Definition of Environmental Professional
 - Many commenters say definition is too stringent; many practicing EPs do not have college degrees
 - Other commenters applaud the proposed definition; say quality will improve
- Some commenters raised concerns regarding the role of the EP in conduct of AAI

18

Significant Comments on Proposed Standards

■ Performance-based Approach

- Most commenters supported
- Some commenters expressed preference for more prescriptive or “checklist” based approach
- Some said proposal allows for too much discretion (or judgment) on part of environmental professional

19

Significant Comments on Proposed Standards

■ Comparing Purchase Price to Value of Property

- Many commenters said AAI should not include such a comparison
- Other commenters said AAI should require formal appraisal of property

20

Significant Comments on Proposed Standards

■ Data Gaps

- Some commenters think sampling and analysis should be required
- Some commenters stated that data gaps will lead to inaccurate assessments and may result in contamination not being addressed

21

Who Must Perform All Appropriate Inquiry?

- The All Appropriate Inquiry standards apply to:
 - Property owners asserting CERCLA liability protections
 - Persons receiving brownfields grants for site characterization and assessment under CERCLA 104(k)(2)(B)

22

Municipalities/Government Entities & AAI

- Subject to AAI requirements when property taken voluntarily
- When property taken involuntarily, not subject to AAI if involuntary acquisition defense under CERCLA 101(35)(A)(ii) is satisfied

23

When must AAI be performed?

- To be eligible for liability protection or Brownfields grants for site characterization and assessment under CERCLA 104(k)(2)(B), you must perform All Appropriate Inquiry **before** you take title to the property.

24

CERCLA Liability

- The Brownfields Amendments provide liability protections for landowners who qualify as:

- contiguous property owners,
- bona fide prospective purchasers, or
- innocent landowners.

25

Contiguous Property Owners

- Protects parties from neighbor's actions
- Available when property contaminated solely by release from contiguous property owned by someone else
- Cannot know or have reason to know of contamination at time of purchase (AAI)
- Must satisfy continuing obligations

26

Innocent Landowners

- Purchase without knowledge, or reason to know, of contamination (AAI)
- Show that release or threatened release is not by someone in employment, agency, or contractual relationship with innocent landowner
- Must satisfy continuing obligations

27

Bona Fide Prospective Purchasers

- Must purchase property **after** January 11, 2002 to qualify
- BFPPs and their tenants are exempt from liability
- Can purchase with knowledge of contamination
- Must satisfy continuing obligations
- Must perform AAI prior to purchase

28

Continuing Obligations

- Comply with land use restrictions
- Do not impede effectiveness or integrity of institutional controls
- Take “reasonable steps”
- Provide cooperation, assistance and access
- Comply with CERCLA information requests and subpoenas

29

What are “Reasonable Steps”?

- Stop continuing releases
- Prevent threatened future releases
- Prevent or limit human, environmental, or natural resource exposure to earlier hazardous substances
- Not intended to create response obligations that exist for a CERCLA liable party

30

Additional Liability Protection

Bar on Federal Enforcement:

- "Eligible Response Sites" at which there has been a release of a hazardous substance and a person
 - is conducting or has completed a response action regarding the release, and
 - is in compliance with a state response program
- State must maintain, update at least annually, and make available to public, list of sites enrolled in state response program
- AAI not necessary, unless required by state response program

31

Additional Information

- Website: www.epa.gov/brownfields
- Guidance: www.epa.gov/compliance/resources/policies/cleanup/index.html
- e-mail: bove.james@epa.gov
- Brownfields 2005 Conference: Denver, Colorado; November 2 -4

32

Jim Bove

Jim Bove joined the Environmental Protection Agency in 2002. He currently serves as an Assistant Regional Counsel in the Superfund Branch of the Office of Regional Counsel, Region 6. Jim also serves as the Brownfields Coordinator for the Superfund Branch of the Office of Regional Counsel. Jim received his J.D. from Vanderbilt University and his LL.M. in Environmental Law from George Washington University.

THE RESHAPING OF CERCLA LIABILITY— *ARE LANDOWNERS REALLY BETTER OFF?*

By:

**MICHAEL J. NASI
and
ALI ABAZARI**

**Presented at the Seventeenth Annual Environmental Superconference
August 4-5, 2005
Austin, Texas**



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I. INTRODUCTION

On January 11, 2002, the "Small Business Liability Relief and Brownfields Revitalization Act"¹ was signed into law. This law offered the most comprehensive amendments to the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), commonly referred to as Superfund,² since the 1986 Superfund Amendments and Reauthorization Act ("SARA"). As the name suggests, this legislation was passed with declarations to protect small businesses from the burdens created by CERCLA liability (during the past 20 years) and to make environmentally impaired properties (referred to as "brownfields") easier to sell and more attractive to developers. This long-awaited legislation came after 20 years of litigation spurred by the ambiguities and inconsistencies of CERCLA, which passed in the last days of a lame-duck session by the 96th United States Congress.

While the Brownfields Act does provide significant funding and other incentives for the remediation and reuse of brownfields, it contains ambiguous provisions that could create liabilities for unsuspecting landowners and developers. If these ambiguities are not resolved by additional statutory refinement, judicial interpretation, or EPA guidance, landowners could find themselves wondering whether they are better off than before these "reforms" were enacted.

Although environmental liabilities for landowners can originate from numerous sources other than CERCLA, the focus of this paper is on the federal Superfund law. Of course, it is foreseeable that changes to the federal scheme could have an impact on similar provisions in state programs, including the

Texas Superfund law.³ We will examine some of the key features of the Brownfields Act and point out issues that could prove to be of particular concern to property owners and developers. We will next explain the key differences between the existing due diligence standard and the new AAI standard. We ultimately conclude that the federal legislation may create more questions than answers about landowner liability under CERCLA.

II. BACKGROUND ON CERCLA

CERCLA was enacted in 1980 in response to the discovery in the 1970s of numerous abandoned hazardous waste disposal sites to address the unregulated historic disposal of hazardous substances. To fund the investigation and remediation of these disposal sites, and because the responsible party was often long gone, CERCLA cast a liability net that captured numerous parties, including the current owner of the property, whether or not the current owner was involved in the activities that resulted in the disposal of the contaminants.⁴ Under this theory, courts often construed CERCLA liability liberally to insure EPA's ability to meet CERCLA's implementation costs "at the primary expense of private responsible parties rather than taxpayers."⁵

³ TEX. HEALTH & SAFETY CODE Chapter 361, Subchapter I. However, there are critical differences between the two statutes, so the changes in federal law discussed in this paper should not be assumed to have direct relevance to the Texas scheme.

⁴ *Id.* at §9607. The following are responsible parties under CERCLA: (1) current owners and operators of a facility where there has been a release or threatened release of hazardous substances; (2) former owners and operators of a facility who owned or operated the facility at the time of disposal; (3) those who arrange for the treatment or disposal of hazardous substances; and (4) those who accept or accepted any hazardous substances for transportation to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or threatened release which causes the incurrence of response costs.

⁵ *Mobay Corp. v. Allied-Signal, Inc.*, 761 F. Supp. 345, 349 (D.N.J. 1991); *See also* *Uniroyal Chem. Co., Inc. v. Deltech Corp.*, 160 F.3d, 238, 257 (5th

¹ Title II of the Act is entitled the "Brownfields Revitalization and Environmental Restoration Act" (hereinafter, "Brownfields Act") and is the subject of this paper. P.L. No. 107-118, 115 Stat. 2356.

² 42 U.S.C. §9601 *et seq.*

The liability under CERCLA is strict, and although not mandated, it often imposes joint and several liability for the costs of remediation of the contaminated property on the responsible party(ies).⁶

Although CERCLA provides certain limited defenses to its strict liability scheme, historically, it has been quite difficult for current owners to maintain any of the defenses.

The limited defenses offered to a current owner of contaminated property include a showing that the contamination was solely caused by an act of god, act of war, or the act of a third party. Since act of god and act of war are rarely invoked and are irrelevant to this discussion, they will not be discussed here.

To claim the third party defense, a property owner must establish that (1) the releases of hazardous substances was caused solely by a third party; (2) the owner does not have a contractual relationship with the third party that caused the contamination; (3) the owner took reasonable precautions against the acts or omissions of third parties; and (4) the owner exercised due care regarding hazardous substances at the property.⁷

The "third party defense" turned out to be inadequate for a person that wanted to invest in brownfields redevelopment projects because the real estate transaction in which the property was acquired constituted a "contractual relationship" between the buyer and seller. Congress first recognized this problem with CERCLA in 1986 when it introduced the "innocent landowner

defense" as part of the Superfund Amendments and Reauthorization Act ("SARA"). SARA did not eliminate the "contractual relationship" language, but instead added new language that created a defense despite the existence of a "contractual relationship." Under the defense, a prospective purchaser could gain innocent landowner status as long as, after conducting a due diligence inquiry, he *had no reason to know* that any hazardous substances were disposed of on the facility.

This language set the stage for prospective purchasers who sought protection from CERCLA liability to perform an "all appropriate inquiry" (or due diligence) investigation before taking title to property.

Although the innocent landowner defense provided protection to the developer who, after appropriate inquiry, did not detect contamination on the property, it did not solve the problem of liability at sites with known contamination. It also did not provide immunity to the prospective purchaser from a potential contribution action alleging that the due diligence inquiry had not adequately been performed,⁸ or even that the prospective purchaser had contributed to the contamination. Accordingly, CERCLA remained a significant obstacle to brownfields redevelopment. This set the stage for the Brownfields Act of 2002.

III. THE BROWNFIELDS ACT

The Brownfields Act was signed into law on January 11, 2002. The Brownfields Act modifies CERCLA to encourage brownfields redevelopment by providing liability relief to certain qualified individuals, and by providing funding to state brownfields programs and to

Cir.1998); *See also* General Elec. Co. v. AAMCO Transmission, Inc., 962 F.2d 281, 285 (2d Cir. 1992).

⁶ Bell Petroleum Services Inc., v. Sequa Corp., 3 F. 3d 889, 897, 901 (5th Cir. 1993). Courts have held that CERCLA defendants will be jointly and severally liable for the response costs unless they can show that the harm is divisible. *Id.* at 903. In most multi-defendant cases it is quite difficult to make the demonstration that the harm is divisible due to the commingling of wastes.

⁷ 42 U.S.C. 9607(b).

⁸ If the "all appropriate inquiry" reveals the existence of contamination, one does not qualify for the defense. Often, even if the "all appropriate inquiry" did not reveal the existence of contamination on the property, and it was later determined that contamination did, in fact, exist, courts set out to determine whether the inquiry was really "appropriate." Most often, the answer was "no."

local governments who seek to return contaminated properties to productive use. Title II of the Brownfields Act codified certain defenses to CERCLA liability for current owners of property contaminated with hazardous substances. These defenses included the innocent landowner, bona fide prospective purchaser ("BFPP"), and contiguous property owner defenses.⁹

These defenses contain certain common elements. Some of the elements are prerequisites to the defense (e.g. performing an appropriate inquiry into the history and use of the property), while other provisions relate to the person's conduct during the ownership of the site. The defenses, and the elements required to establish the defenses, are discussed below.

A. Innocent Landowner Defense

The innocent landowner defense, as previously discussed, allows a purchaser of property to be eligible for the third party defense notwithstanding the real estate contractual relationship with the person that is a responsible party under CERCLA. This defense is available only if the person undertook "all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability," and did not know or have reason to know of the presence of the hazardous substances.¹⁰

The Brownfields Act establishes standards for what constitutes "all appropriate inquiry,"¹¹ which are discussed at length in the next section of this paper. According to the Brownfields Act, a person must not only conduct a due diligence inquiry under criteria established under the

Brownfields Act,¹² but must also take "reasonable steps" to stop any continuing release, prevent any threatened future release, and prevent or limit any human, environmental or natural resource exposure to any previously released hazardous substance.¹³

The Brownfields Act creates additional obligations that a person must comply with after to preserve its status as an innocent owner. The continuing obligations include:

- Cooperate, assist, and provide access to persons who are authorized to conduct response actions or natural resource restoration at the property.
- Comply with any land-use restrictions established or relied on in connection with the response action at a vessel or facility and not impede the effectiveness or integrity of any institutional control employed at the vessel or facility in connection with a response action.
- Provide access to persons authorized to conduct response actions at the facility to operate, maintain, or otherwise ensure the integrity of land-use controls that may be a part of a response action.¹⁴

Thus, a person may qualify for the innocent landowner defense up-front, but must perform certain acts to remain qualified for the defense.

B. Bona Fide Prospective Purchaser Defense

As noted above, prior to the Brownfields Act, the dilemma of the prospective purchaser was this: for a landowner to successfully assert the innocent landowner defense, it had to demonstrate that he did not know, nor have reason to know, that the property was contaminated. This defense was of no use,

⁹ The Brownfields Act does not provide protection for a bona fide prospective purchaser, innocent landowner, or contiguous property owner from EPA actions brought under RCRA 7003, citizen suits brought under RCRA 7002, and RCRA corrective action orders.

¹⁰ 42 U.S.C. 9601(35).

¹¹ *Id.* at 9601(35) (B).

¹² *Id.* at 9601(35)(B)(ii) and (iv).

¹³ *Id.* at 9601(35)(i)(II).

¹⁴ *Id.* at 9601(35) (B).

therefore, to a prospective purchaser who wanted to redevelop a brownfields site with known or suspected contamination. Because no statutory defenses were available to such a prospective purchaser, the transaction would often stall in the absence of other means to shift environmental risk (e.g., environmental insurance, contractual indemnities, and/or additional assessment and cleanup).¹⁵

To remove this hurdle, the Brownfields Act created the bona fide prospective purchaser defense. According to this defense, a landowner can knowingly acquire contaminated real property and avoid CERCLA liability.¹⁶

To successfully assert this defense, the BFPP must be able to demonstrate the following:

- All disposal of hazardous substances occurred before the purchaser acquired the facility.
- The purchaser conducted “all appropriate inquiry.”
- The purchaser provided all legally required notices with respect to the discovery or release of any hazardous substances.

¹⁵ In practice, the EPA afforded a defense to prospective purchasers by means of a Prospective Purchase Agreement (“PPA”). The PPA contained a covenant not sue under CERCLA in favor of the prospective purchaser, and provided protection against third party contribution actions, if certain conditions were met. See “Guidance on Settlements with Prospective Purchasers of Contaminated Property.” 60 Fed. Reg. 34,732 July 3, 1995. These PPAs were subject to public comment, and were heavily scrutinized by the EPA. This resulted in significant transaction costs and delays, which served as deterrents to prospective purchasers.

¹⁶ The Brownfields Act creates a windfall lien in favor of the EPA for property owned by the BFPP. 42 U.S.C. 9607(r). The lien becomes effective when EPA incurs response costs or when it notifies the owner of its potential liability, whichever is later, however, the lien is subject to the rights of holders of previously perfected security interests. *Id.* at 9607(l)(2) and (3).

- The purchaser took appropriate care by taking reasonable steps to stop any continuing release, prevent any threatened future release, and prevent or limit human, environmental, or natural resource exposure to any previously released hazardous substance.
- The purchaser provided full cooperation, assistance, and access to persons conducting response actions.
- The purchaser complied with land use restrictions that are part of the response action and does not impede the effectiveness or integrity of any institutional control used at the sites
- The purchaser complies with any request for information or administrative subpoena issued under CERCLA.
- The purchaser established that it is not a liable party or affiliated with any other potentially liable parties through any direct or indirect familial relationship, any contractual or corporate relationship, or as a result of a reorganization of a business entity that as a potentially liable party.¹⁷

Similar to the innocent landowner defense, the BFPP defense requires overcoming certain hurdles and complying with continuing obligations in order to remain qualified for the defense.

For example, the BFPP will have to exercise “appropriate care” to “take reasonable steps” to stop existing releases and prevent any threatened future releases. These requirements are in addition to taking “all appropriate inquiry” and are, in fact, *after* the buyer takes title to the land. Thus, it is obvious that under the current scheme, a due diligence inquiry is only half of the story. The continuing obligations created by

¹⁷ 42 U.S.C. 9601(40).

the statute are the other half of the story, and they are vaguely defined in the statute.¹⁸

The continuing obligations of the landowner after taking title are important to understand in order to maintain the liability defense and reduce environmental risks, and are, therefore, discussed at greater length below.

C. Contiguous Property Owner Defense

Prior to the Brownfields Act, a liberal interpretation of CERCLA exposed to liability an owner of property contaminated by the subsurface migration of contamination from an off-site source. This theory of liability was based on the fact that CERCLA defines the term “facility” to include any area where there are hazardous substances. As such, any property owner that sits on property contaminated by hazardous substances, even if those substances migrated onto their property from an adjoining parcel, could arguably be held liable under CERCLA.

In 1995 EPA published the Contaminated Aquifers Policy (the “Aquifers Policy”),¹⁹ which provided that such contiguous property owners would not be pursued for the cost of contamination as a result of the migration. The Aquifers Policy set out eligibility requirements that found their basis in the third-party defense articulated in CERCLA. There were, however, no affirmative obligations on the part of the property owner to qualify for this “defense.”

¹⁸ On March 6, 2003, the EPA issued the Interim Guidance Regarding Criteria Landowners Must Meet In Order to Qualify for Bona Fide Prospective Purchaser, Contiguous Property Owner, or Innocent Landowner Limitations on CERCLA Liability (Common Elements Guidance). This document set out to clarify the criteria created under the Brownfields Act to qualify, and remain qualified for the landowner defenses, but it leaves many questions unanswered.

¹⁹ Policy Towards Owners of Property Containing Contaminated Aquifers, 60 Fed. Reg. 34, July 3, 1995.

The Brownfields Act codified most of the elements of the 1995 Aquifers Policy. The defense, in short, provides that a person owning property that is contiguous to a contaminated site and that is or may be contaminated by a release or threatened release of a hazardous substance from that contaminated site, is not liable under CERCLA solely by the reason of the contamination, if it can satisfy certain requirements. The requirements are essentially those which are set out in the BFPP discussion, above.

The fact that affirmative obligations are contained within these eligibility requirements (i.e. taking reasonable²⁰ steps to stop any releases, or complying with land use restrictions among others) has prompted many, including the authors here, to suggest that the Act expands the liability risks of the contiguous property owner beyond the practical risks that existed before the Brownfields Act.²¹

IV. COMMON ELEMENTS OF THE DEFENSES

On March 6, 2003, the EPA issued the Interim Guidance Regarding Criteria Landowners Must Meet In Order to Qualify for Bona Fide Prospective Purchaser, Contiguous Property Owner, or Innocent Landowner Limitations on CERCLA Liability (referred to as the “Common Elements Guidance” because of the common elements present in all three of the defenses). This document set out to clarify the criteria

²⁰ Note that unlike the BFPP requirement, which provides that the purchaser must exercise “appropriate care...by taking reasonable steps,” the contiguous property owner defense merely states that the person must take “reasonable steps to....” In other words, the “appropriate care” language is non-existent in the contiguous property owner defense provisions. Exactly what this omission means is unclear.

²¹ Note that this possible practical expansion of liability risk under federal law does not carry over to the broad protection of contiguous landowners that exists under state law. Tex. Health & Safety Code Chapter 361, Subchapter V (the Texas Innocent Owner/Operator defense).

created under the Brownfields Act to qualify, and remain qualified for the landowner defenses, but it leaves many questions unanswered.

As previously noted, the defenses under the Brownfields Act contain certain common elements—some of which are threshold criteria and others are criteria setting forth certain continuing obligations on the part of the landowner in an effort to maintain the defense.

A. Threshold Criteria

The two "threshold criteria" are (1) "all appropriate inquiry" and (2) a demonstration that the party is not "affiliated" with any other person that is potentially liable for response costs at the property.²²

1. "All Appropriate Inquiry"

(a). The Origin of the Phrase

The term "all appropriate inquiry" first came along when CERCLA was amended by SARA in 1986. SARA made several significant changes to CERCLA. Among other changes, SARA provided that a landowner could be held liable under CERCLA despite having no connection with the release of hazardous substances at a property. To address the self-imposed extension of potential landowner liability, SARA provided a defense, known as the "innocent landowner defense." This defense was subject to the property owner having had no reason to know the property was contaminated prior to the purchase after conducting "all appropriate inquiry" into the prior uses of the property.

SARA's innocent landowner defense stemmed from the following language: "the defendant must have undertaken at the time of acquisition an all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice in

an effort to minimize liability."²³ SARA further states that in construing the "all appropriate inquiry" provision, the courts will take the following into account:

- Any specialized knowledge or experience on the part of the defendant;
- The relationship of the purchase price to the value of a property if contaminated;
- Commonly know or reasonably ascertainable information about a property;
- The obviousness of the presence/likely presence of contamination at a property;
- The ability to detect such contamination by appropriate inspection²⁴

SARA made it clear that assessment of environmental conditions of property prior to purchase was an essential part of property transactions, because if it turned out that hazardous substances were present, the only defense was going to be that an "all appropriate inquiry" had not discovered the contamination.

As originally enacted, SARA did not require the EPA to specifically define "all appropriate inquiry" for the purpose of establishing the innocent owner defense. Without such a definition, there was considerable ambiguity as to how to satisfy the standard; and consequently, litigation ensued.²⁵ In the early 1990s, the American Society for Testing and Materials ("ASTM") organized a group representing industry, real estate interests, lenders and environmental groups and charged them with better defining "the good commercial or customary practice." The result of the effort was the *E 1527-93: Standard Practice for Environmental Site Assessments: Phase I*

²³ *Id.* at 9601(35)(B).

²⁴ *Id.*

²² The "no affiliation" element is required for bona fide prospective purchasers and contiguous property owners.

²⁵ A good example of the confusion surrounding the vagueness of 'all appropriate inquiry' can be found in *U.S. v. Serafini*, 706 F. Supp. 346 (1988).

Environmental Site Assessment Process, (hereinafter the “ASTM Phase I Standard”), originally published in 1993. The standards have been revised and amended twice, with the last major revision in 2000.

As the ASTM standards began to be widely used, still more litigation followed. The EPA had not officially endorsed the standards and courts split on the weight that should be given to the ASTM practice and how to decide if the standards had been properly followed. Some courts took the position that substantial compliance with the ASTM standards was sufficient to preserve the defense. Other courts argued that if in fact all appropriate inquiry had been conducted, the innocent owner defense would be superfluous.²⁶ This reasoning put developers and lenders in a difficult position and to some degree obviated the need for a standard practice. These courts essentially said that if you looked but did not find it, you did not look hard enough. This uncertainty, as to the degree of required due diligence inquiry, made it difficult, if not impossible, for risk adverse parties to participate in brownfields redevelopment.

(b) All Appropriate Inquiry Redefined

The Brownfields Act amended the “innocent landowner defense” under CERCLA. In addition to creating two new categories of liability protection for contiguous property owners and bona fide prospective purchasers, the law required EPA to develop regulations to establish standards and practices for conducting “all appropriate inquiry” (“AAI”) in order to secure CERCLA’s innocent owner protections.²⁷

²⁶ U.S. v. A & N Cleaners and Launderers, Inc., 854 F.Supp. 229 (S.D.N.Y.,1994); BCW Associates Ltd. v. Occidental Chemical Corp., 1988 Westlaw 102641 (E.D. Pa.).

²⁷ The Brownfields Act requires EPA to complete rulemaking by January 2004 to define the standard for AAI and sets out criteria that EPA must include in promulgating the rules. 42 U.S.C. 9601(35)(8)(ii), (iii). The proposed AAI rules were published in the

The EPA chose to develop the proposed regulation for AAI through the creation of a stakeholder/negotiated rulemaking committee in much the same way that the ASTM had developed the ASTM Phase I Standard. In December 2003, the committee reached consensus on a proposed rule.

The proposed rules were published in the Federal Register on August 24, 2004. The AAI definition/standards are designed to demonstrate that the purchaser actively investigated any potential or actual hazardous substance releases before purchasing the property. If no releases are discovered during the assessment, the purchaser is deemed an “innocent owner.” If a release or suspected release is discovered, the purchaser could still buy the property as a “bona fide purchaser” (as discussed above) and take the necessary steps toward cleanup required by state and federal laws and regulations. The law and proposed regulations have three distinct but connected purposes. In the case of contiguous property owners and innocent landowners, the AAI definition is designed to demonstrate that the owner has looked, but has not found contamination. In the case of prospective purchasers, AAI defines reasonable steps to address that contamination. The AAI practice will also guide site assessments funded by EPA grants under EPA brownfields redevelopment programs.

The Brownfields Act designated the ASTM Phase I Standard as the interim technical standard until a final rule is promulgated. The new proposed regulation provides an “all appropriate inquiry,” standard that stands to replace the ASTM Phase I standards.²⁸

Federal Register on August 26, 2004. 69 FR 59541 (August 26, 2004).

²⁸ An issue that remains to be seen is whether the AAI rule, when promulgated, will have an impact on due diligence requirements of certain defenses to Texas Superfund liability. For example, securing “innocent landowner” status requires the performance of an “appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort

(c) Impact of the New AAI Rule

As proposed, the AAI regulations will require borrowers and prospective purchasers, in many cases, to conduct a more involved assessment than is currently conducted under ASTM standards. While the ASTM Phase I assessment provided detailed guidelines for assessment, AAI is a much more performance-based standard that allows for more discretion on the part of the environmental professional so long as the detection of any existing and threatened releases of hazardous substances is still successfully achieved. That is, the Brownfields Act provided additional defenses against CERCLA liability but at the same time seems to have ratcheted up the level of due diligence inquiry required to secure the defenses.

The proposed regulation will likely have significant short-term impacts in the commercial real estate and brownfields redevelopment markets. As industry, lenders and environmental consultants learn to apply the new standards, the cost of environmental site assessment will almost certainly increase and, for complex brownfields transactions, it will likely increase substantially. The proposed regulation will also likely require compliance training and education of both lenders and borrowers. Also, a purchaser seeking a grant

to minimize liability." See TEX. HEALTH & SAFETY CODE §361.275(f). The current practice for conducting an "appropriate inquiry" is to perform an assessment under the ASTM standard; however, it is possible that this practice will change once the AAI rules have been promulgated. Similarly, under the Innocent Owner/Operator Program (TEX. HEALTH & SAFETY CODE Chapter 361, Subchapter V) immunity from liability is available to 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, only if he did not know or had reason to know of the contamination after an "appropriate inquiry." See TEX. HEALTH & SAFETY CODE §361.752(b). Again, under current practice the "appropriate inquiry" is performed under the ASTM standard; however, with the promulgation of the AAI standard, it is possible that current practice would change to conform to the new AAI standards.

from EPA to redevelop brownfields property will be required to satisfy the AAI standard in order to qualify for the grant.

In general, the proposed rule will require a broader scope of environmental inquiry than the ASTM Standard. More specifically, the following areas appear to be departures from the ASTM Standards.

- **Interviews:** while the ASTM Standards require interviews with current owners or operators, the proposed rules expand this inquiry, requiring the environmental professional to conduct interviews with a wider range of individuals with knowledge of the subject property, including past and present owners and operators of the subject property; employees of current and past occupants of the subject property; and current and past facility managers with relevant knowledge of the property. If the property is abandoned, owners and occupants of nearby properties will also have to be interviewed. Proposed Rule 40 CFR 312.23.
- **Visual Inspections:** while both standards require a visual inspection of the property, the proposed rules would require the environmental professional to conduct a more comprehensive visual inspection of adjoining properties. Proposed Rule 40 CFR 312.27(a)(2).
- **Review of Government Records:** the ASTM Standard provides a list of federal and state environmental databases that must be reviewed. The proposed rules go further than listing databases, and lists categories of federal and state records that must be reviewed during an environmental inquiry. Proposed Rule 40 CFR 312.26(b).
- **Data Gaps:** under the proposed rules, a final report will have to be prepared that acknowledge areas of uncertainty (data gaps) that may impact the conclusions reached by the environmental professional.

Proposed Rule 40 CFR 312.21(c) and 312.21(f).

- **Environmental Cleanup Liens:** under the proposed rule, a search for any environmental cleanup liens that are filed or recorded under federal, state, tribal or local laws must be conducted. Proposed Rule 312.25.
- **Timing of AAI:** The proposed rule requires that certain inquiries be conducted 6 months prior to the date of purchase of the property. These inquiries include: interviews with past and present owners, operators, and occupants; searches for recorded environmental cleanup liens; reviews of federal, tribal, state, and local government records, visual inspections, the declaration by the professional engineer. Proposed Rule 40 CFR 312.20(b)(3).
- **Environmental Professionals:** under the proposed rules, "environmental professionals" must conduct or oversee all appropriate inquiries. "Environmental professionals" under the proposed rules must meet certain educational requirements, in addition to training and experience requirements. This may, arguably, limit the number of consultants that may be authorized to perform ESAs. Proposed Rule 40 CFR 312.10(b).

Until such time that the AAI rule is finalized, however, the existing ASTM standard is the standard per the above-cited provision of the Brownfields Act.

B. CONTINUING OBLIGATIONS

Once threshold criteria have been satisfied, the party must comply with "continuing obligations" in an effort to maintain its liability immunity.

These continuing obligations include:

- Complying with information requests;

- Complying with land-use restrictions and institutional controls
- Providing all required notices;
- Cooperating and providing assistance or access to parties implementing remedies; and
- Exercising "appropriate care" with respect to hazardous substances affecting the property;

The first two obligations seem straightforward. According to the Common Elements Guidance, a land-use restriction may be considered relied on when the restriction is identified as a component of the remedy.²⁹ The Senate Committee Report notes that this criterion requires simply that the new owner refrain from "damaging a cap, removing signs or fences, or otherwise failing to maintain an institutional control, etc."³⁰

"Providing all required notices" and "cooperation, assistance and access" are not as straightforward. Notice requirements under various state and federal regulations are often less than clear, and subject to differing interpretations. For example, the issue of providing notice under the Texas Water Code for "historic contamination" has been a subject of debate for several years and it is still unclear whether notice for such contamination is required. Also, would an immaterial failure to comply with a notice requirement disqualify an owner from immunity?

The requirement of "cooperation, assistance and access" is similarly troublesome. Does a bona fide prospective purchaser or innocent landowner have to agree to the placement of monitoring wells on their property and provide long-term access to same? Is asking for compensation for such access allowed? Can an owner restrict access due to business operations?

²⁹ Common Elements Guidance at 6.

³⁰ S.Rep. No. 107-2, 107th Cong., 1st Sess. (March 12, 2001).

If so, how much restriction is allowed, and who decides?

Without a doubt, however, the most challenging post-acquisition criteria is the "appropriate care" standard. The first challenge is to decipher whether the standard is the same for all three defenses. Although grouped under one heading, the requirement is not the same for each. The bona fide prospective purchaser is required to exercise "appropriate care" which includes taking "reasonable steps"³¹ while the contiguous owner only is required to take "reasonable steps."³² An innocent landowner has to comply with the due care requirement of the third party defense³³ and must also take "reasonable steps" regarding pre-existing contamination.³⁴ Furthermore, the "reasonable steps" language for the innocent landowner is contained in the "reason to know" section of the statute—a placement that confuses the matter because it is unclear how the "reasonable steps" are part of the original due diligence exercise. The Common Elements Guidance ignores these issues and concentrates on the fact that under each defense "reasonable steps" must be undertaken to stop any continuing releases and to prevent any threatened future releases.

The "reasonable steps" requirement has prompted some to claim that this requirement may eventually impose the very same cleanup obligations on parties as those that are trying to be avoided by invoking the defense. This may be an overly broad reading of the defense.

In the Common Elements Guidance, EPA recognizes that Congress did not intend to create, as a general matter, the same types of response obligations that exist for a CERCLA liable party. Unfortunately, EPA does not answer the question of what reasonable steps are required to maintain the defense; instead, EPA takes the position that a reasonable steps

determination will be a "site-specific, fact-based inquiry" that will have to take into account the different elements of the landowner liability protection. The guidance does indicate, however, that because the bona fide prospective purchaser is buying with knowledge of contamination, his "reasonable steps" will be different than a contiguous property owner or innocent landowner. Presumably, the bona fide prospective purchasers "reasonable steps" are more onerous than those required for the other defenses.

Despite the EPA's claims that "reasonable steps" do not mean full-scale remediation, the uncertainties associated with the level of "reasonable steps" that are required to satisfy the defense, serves as an obstacle for the realization of the effectiveness of the defenses. The solution would be for the EPA to promulgate regulations or to issue a more comprehensive guidance document interpreting the reasonable steps standard in such a way that communicates what the standard may entail, rather than what it will not entail.

V. CONCLUSION

With the new AAI standard comes the promise of additional clarity for prospective purchasers regarding whether their due diligence inquiries will be adequate to secure key defenses to CERCLA liability. Unfortunately, this additional clarity on the AAI standard does little to address ambiguous language regarding continuing obligations that must be met to maintain the newly codified CERCLA defenses. This may ultimately leave landowners and prospective purchasers of contaminated properties wondering whether they are in a better position than they were before this latest round of CERCLA "reforms."

Of course, the CERCLA defenses that were discussed in this paper are just one component of the overall environmental risk management picture. They do not provide any protection from other federal statutory claims or state statutory or common law claims. From the perspective of the prospective purchaser, the focus should be the same as it was prior to the

³¹ 42 U.S.C. §9601(4)(D).

³² *Id.* at 9607(q)(A)(iii).

³³ *Id.* at §9607 (b)(3).

³⁴ *Id.* at §9601(35)(B)(i)(II).

Brownfields Act: (1) assess the environmental risk associated with a site and (2) take actions to minimize or shift that risk.

In the process of completing these two steps, several questions have to be addressed along the way, such as:

- What is the level of contamination?
- What is the likelihood of enforcement?
By whom?
- Are there contractual means of shifting environmental risks?
- Should environmental insurance be secured?
- Is there funding available for additional environmental assessment or cleanup?
- How should the transaction be structured to facilitate funding and preserve statutory defenses?

In the end, the ability to address these questions will ultimately determine the relative success of every brownfields redevelopment project.

Michael J. Nasi

Mike Nasi is a partner and a compliance counselor in the environmental practice areas of air quality, waste permitting, remediation, and surface mining. Mike Nasi also manages the firm's environmental enforcement defense practice. Mike has successfully defended clients faced with TCEQ enforcement in contested case hearings, negotiated significant penalty reductions in several cases brought by the TCEQ, and developed innovative Supplemental Environmental Projects (SEPs) in the context of many of those cases. Mike serves on several TCEQ Advisory/Guidance Committees representing the interests of the regulated community. Mike maintains chapters for the Environmental Law Handbook in West's Texas Practice Series on Environmental Enforcement, Oil & Hazardous Substance Spill Reporting & Response, and the new Chapter on Brownfields Redevelopment. He has authored numerous articles on environmental enforcement, air quality, waste permitting and remediation and other environmental law issues in numerous state publications, including the Texas Environmental Law Journal. Mike is a member of the State Bar of Texas and is the Chairman of the Education Committee for the State Bar of Texas Section on Environmental and Natural Resources Law. Mike received a B.A. from the University of Texas and a J.D. from the University of Houston.

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SEVENTEENTH ANNUAL TEXAS ENVIRONMENTAL SUPERCONFERENCE

All Appropriate Inquiry/Due Diligence

Consultant's Perspective

- Bob Chapin, *Weston Solutions, Inc.*



Batman, Robin is being threatened
by the Horrible Liability. You
must find out if the AAI holds the
answers that will set him free!





ASTM

I have what you
are looking for
Batman!



AAI

Eventually I won't use ASTM,
Joker! You're old news! New,
stronger standards called AAI
are taking over this town!

ASTM VS. AAI

Which CERCLA Defense(s)

- Innocent landowner defense

- Innocent landowner defense
- Bona fide prospective purchaser defense
- Contiguous property owner defense

To qualify for these three defenses, the landowner must conduct AAI in accordance with the upcoming federal rule. AAI must be conducted within one year of acquiring the property.

Applicable to what types of properties?

- Limited to commercial real estate, excluding those for residential use with no more than four units

- Commercial real estate
- Residential properties used for commercial purposes (any number of units)
- Residential properties under government ownership



ASTM VS. AAI



Objective of the assessment or inquiry?

- | | |
|---|---|
| <ul style="list-style-type: none">• Identify recognized environmental conditions (RECs) | <ul style="list-style-type: none">• Identify conditions indicative of releases or threatened releases |
|---|---|

Who is qualified to perform assessments /inquiries?

- | | |
|--|--|
| <ul style="list-style-type: none">• Broad definition | <ul style="list-style-type: none">• Specific requirements for education, experience, and license/certification, or working under direction of qualified person |
|--|--|

Responsibility for searching records of engineering and institutional controls

- | | |
|--|--|
| <ul style="list-style-type: none">• User | <ul style="list-style-type: none">• Environmental professional (if sources are "reasonably ascertainable") |
|--|--|
- 



ASTM

VS.

AAI



What sources of government records must be searched?

- Federal and State Records

- Federal, tribal, state and local government records

How extensive are historical research requirements?

- Prescriptive

- Left to discretion of environmental professional

REVIEWS OF HISTORICAL SOURCES OF INFORMATION

ASTM E 1527-00 Standard

Uses shall be identified back to “first developed use or back to 1940, whichever is earlier.”

Specifically identifies eight “standard historical sources” to be reviewed.

Aerial photographs

Fire insurance maps

Property tax files

Recorded land title records

USGS 7.5 minute topographic maps

Local street directories

Building department records

Zoning/Land use records

Review of standard historical sources at less than approx. five-year intervals is not required

EP to explain the reason for any gaps in the history of the property use.

How far back must research go?

Which historical sources must be used?

Does a research interval apply?

What if there are still data gaps?

Draft AAI Rule

Review must go back as far as “it can be shown that the property contained structures or from the time the property was first used for residential, agricultural, commercial, industrial, or government purposes.”

EP’s professional judgment determines which specific historical sources are reviewed.

N/A

EP must:
Identify data gaps;
Document all sources of information consulted to address such data gaps;
Comment upon the significance of such data gaps;

INTERVIEWS

ASTM E 1527-00 Standard

No specific requirements for abandoned properties.

No specific requirements to interview persons with knowledge about previous operations.

What if site is abandoned and no owner, operator or occupant is available?

Is it necessary to interview past owners, occupants and operators of the subject property?

Draft AAI Rule

Interview(s) with one or more owners/occupants of neighboring properties from which it appears possible to have observed such abandoned properties are mandatory.

Environmental professional should interview one or more of the following persons:

Current and past facility managers

Past owners, occupants, or operators of the subject property, or

Employees of current and past occupants of the subject property.



- AAI will effect all real estate transactions
- Timeliness in advance of purchase
- Until AAI is final, current ASTM standard is in use
- ASTM will be revised to reflect AAI and eliminate inconsistencies
- Costs may double until procedures become more standardized
- Premium will be on accuracy and efficiency





Undeveloped

Prove never used

–No Sanborn Maps

–No Aerial Coverage

Chain of Title

Interview With Current and
Past Owners

Interview With Neighbors

No Evidence of Dumping

No Visible Ecological Impacts





Abandoned

Chain of Title

Interview Neighbors

Identify Data Gaps

–No Past Operators

–No Past Employees

–No Previous Records





Vacant

State and City Records

Sanborn Maps

Aerial Coverage

Data Gaps May Be Similar to
Abandoned Properties

Contiguous Property Owners





Refinery

Spills/Leaks

Internal and External Reports

Repair Records

Multiple Ownership Changes

Incomplete Transfer of Records

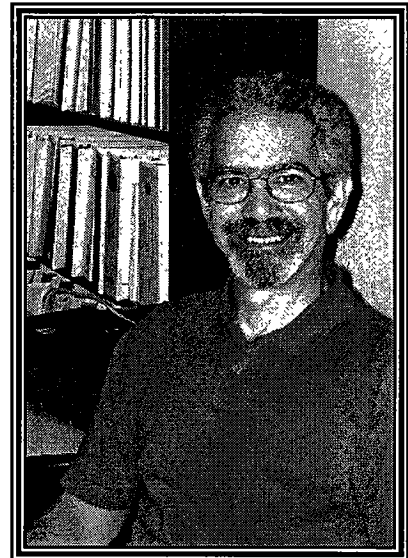


Robert I. Chapin, P.G.

Weston Solutions, Inc.

Robert I. Chapin, P.G.
Texas Licensed Professional Geologist

B.S. Geology, University of Oregon, 1975
M.A. Hydrogeology, University of Texas at Austin, 1981



Robert I. Chapin, P.G. is a Client Service Manager with over 26 years of experience performing and supervising environmental site assessments and hydrogeologic studies, with specific emphasis on risk-based remediation and closures of industrial and hazardous waste sites. In that role, he has functioned as a single point of contact for the clients, provided project oversight and remedial and regulatory strategy for the clients and the project managers, coordinated resources between offices, and maintained and nurtured client and project relationships. Mr. Chapin also has extensive experience with real estate transfer environmental assessments, Brownfield property development, and agency negotiations on behalf of Weston clients. He has participated as a member of several Work Groups formed by the TCEQ for the development of guidance documents for the implementation of the Texas Risk Reduction Rules (TRRP0. He has provided regulatory and technical strategies and training in RCRA issues. His clients have included chemical manufacturers, petroleum refiners, metal smelters, and aerospace manufacturers. He has participated in a variety of RCRA and CERCLA related projects, including development and implementation of RFI and RI work plans, Part B permit applications and amendments, development and implementation of groundwater quality assessment work plans, corrective measure and feasibility studies, closure plans, remedial action plans, and risk assessments related to closure. Additionally, he has managed and participated in numerous subsurface investigations under regulations governing solid waste and USTs.

Municipal Setting Designations

“The Ever Lovin’ Blue-Eyed Thing”

(A Municipality’s Perspective)

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City of Fort Worth, Texas**

**Presented to the
17th Annual Texas Environmental Superconference
State Bar of Texas
August 4, 2005**

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1. INTRODUCTION

“I’m the ever lovin’ blue-eyed Thing.”

**– Benjamin J. Grimm
a.k.a. The Thing**

In 2003 the Texas Legislature enacted House Bill 3152, establishing municipal setting designations (MSDs), codified as Texas Health and Safety Code §§361.801-361.808. The law is administered by the Texas Commission on Environmental Quality (TCEQ), and is to be used in conjunction with the Voluntary Cleanup Program and other remediation programs.

The law creates a means by which the scope of investigations and response actions addressing groundwater contamination may be limited, if the groundwater is prohibited for use as a potable water source by municipal ordinance or restrictive covenant. The most important thing to remember about an MSD is that it can only eliminate requirements to assess and remediate the groundwater consumption exposure pathway. Other exposure pathways, including inhalation, contact, and impact to ecological receptors, must still be addressed.

Of important note to municipalities is the legislative finding in THSC §361.8015(b):

The legislature finds that an action by a municipality to restrict access to or the use of groundwater in support of or to facilitate a municipal setting designation advances a substantial and legitimate state interest where the quality of the groundwater subject to the designation is an actual or potential threat to human health.

This clear expression of the legislature’s intent establishes that municipalities may exercise their police powers in approving municipal setting designations and enforcing restrictions on the use of groundwater therein. That legislative finding should appease most city attorneys concerned that creation of MSDs in their municipalities could constitute an uncompensated taking.

HB 3152 also amended various portions of the Texas Local Government Code, further setting forth this police power. In §211.003 (a), pertaining to zoning regulations, it is specified that a municipality may regulate "the pumping, extraction, and use of groundwater by persons...for the purpose of preventing the use or contact with groundwater that presents an actual or potential threat to human health." The concurrent amendment to §212.003(a) extended this power to a municipality's extra-territorial jurisdiction (ETJ). This power is further reiterated in §401.005, which specifies that, for the purpose of establishing and enforcing MSDs, a municipality within its boundaries or its ETJ "may regulate the pumping, extraction, or use of groundwater by persons...to prevent the use of or contact with groundwater that presents an actual or potential threat to human health."

2. WHERE DOES OUR DRINKING WATER COME FROM?

“I ain’t no pet rock.”

**– Benjamin J. Grimm
a.k.a. The Thing**

In Texas, the two main sources for all water uses are surface water (rivers, lakes and reservoirs) and groundwater (aquifers).

Surface water supply is most abundant in the eastern half of the state while in the western half of the state, groundwater is the major source.¹ “Historically, the state has depended on groundwater as the primary source, but drought and overuse of these supplies has caused a significant decline in aquifer levels throughout the state.”² In 1997, 39 percent of the water used in Texas came from surface water resources, and 61 percent came from ground water resources – this includes all usage, such as agricultural and industrial, not just domestic. Due to population growth, it is estimated that by the year 2050, 69 percent of the state’s water supply will be surface water and 31 percent groundwater.³

In the year 2000, Texans used approximately 10 million-acre feet⁴ of groundwater, with 6.5 million acre-feet of that usage coming from the Ogallala Aquifer.⁵ The Ogallala is the “major water-bearing unit in the High Plains of Texas.”⁶ In 2000, Willacy County in the Rio Grande Valley of South Texas had the lowest amount of reported groundwater usage (21 acre-feet) and Castro County in the

western panhandle had the highest (514,120 acre-feet).⁷

While over a million water wells have been drilled in Texas over the past 100 years, only about 130,000 of those have been inventoried and placed into the Texas Water Development Board groundwater database,⁸ and with only a variable level of accuracy.

In addition to the Ogallala, eight major aquifers have been identified in Texas: Carrizo-Wilcox, Cenozoic Pecos Alluvium, Edwards, Edwards-Trinity (Plateau), Gulf Coast, Hueco-Mesilla Bolson, Seymour and Trinity. The 20 minor aquifers that have been identified are: Blaine, Blossom, Bone Spring-Victorio Peak, Brazos River Alluvium, Capitan Reef Complex, Dockum, Edwards-Trinity (High Plains), Ellenburger-San Saba, Hickory, Igneous, Lipan, Marathon, Marble Falls, Nacatoch, Queen City, Rita Blanca, Rustler, Sparta, West Texas Bolsons and the Woodbine.⁹

Of the 31 largest municipalities in Texas – those with a population over 90,000 – only San Antonio relies on groundwater for 100% of its municipal water supply. Houston, El Paso, Lubbock, Amarillo, Brownsville, Pasadena, Grand Prairie, Beaumont, Midland, Odessa, and Tyler each rely on groundwater for various percentages of their municipal supply. For example, the City of Amarillo receives 45% of its source water

¹ Southern Regional Water Program, *Drinking Water & Human Health in Texas*, retrieved from the SRWQIS web site, June 21, 2005:

<http://srwqis.tamu.edu/states/texas/drinkingwater.aspx>

² Southern Regional Water Program, *Water Quantity and Policy in Texas*, retrieved from the SRWQIS web site, June 30, 2005:

<http://srwqis.tamu.edu/states/texas/waterquantity.aspx>

³ Ibid.

⁴ An acre-foot is the volume of water required to cover one acre of land (43,560 square feet) to a depth of one foot. This is equivalent to 325,851 gallons. Ten million acre-feet is roughly equivalent to 3.3 trillion gallons of water.

⁵ Texas Water Development Board, *Factoids*, retrieved from the TWDB web site, June 21, 2005:

<http://www.twdb.state.tx.us/gwrd/gcd/factoids.htm>

⁶ Texas Water Development Board, *Ogallala Aquifer*, retrieved from the TWDB web site, June 27, 2005:

<http://www.twdb.state.tx.us/publications/reports/GroundWaterReports/GWReports/R345%20Aquifers%20of%20Texas/Majors/ogallala.pdf>

⁷ Texas Water Development Board, *Factoids*, Ibid.

⁸ Texas Water Development Board, *Well Information/Groundwater Data*, retrieved from the TWDB web site June 29, 2005:

http://www.twdb.state.tx.us/gwrd/waterwell/well_info.asp

⁹ Ashworth, John B. and Hopkins, Janie, *Report 345: Major and Minor Aquifers of Texas*, November 1995, retrieved from the TWDB web site June 21, 2005:

<http://www.twdb.state.tx.us/publications/reports/GroundWaterReports/GWReports/Individual%20Report%20htm%20files/Report%20345.htm>

from the Ogallala Aquifer, while the City of Grand Prairie only supplements its water supply with groundwater from the Trinity Aquifer during peak usage.¹⁰ Fort Worth, Dallas, Austin, Arlington, Corpus Christi, Plano, Garland, Laredo, Irving, Mesquite, Carrollton, McAllen, Waco, Abilene, Wichita Falls, Richardson, Killeen, Denton and Lewisville rely solely on surface water resources.¹¹ This water usage is illustrated in the map in Figure 1.

Water is a precious commodity in Texas, and municipalities guard their drinking water sources. The City of Fort Worth Water Department, for example, monitors water quality in Lake Worth and participates with the Tarrant Regional Water District to ensure that other lakes providing the city source water are regularly tested. The city also actively promotes water conservation by its customers.¹² This activity is complemented by the Environmental Management Department's Water Quality Section, which is responsible for maintaining and monitoring water quality in urban lakes, rivers, neighborhood creeks, and storm drains. This is accomplished through a combination of wet-weather and dry-weather monitoring, inspecting and monitoring industrial facilities with high-risk runoff, inspecting construction sites for non-storm water discharges, and operating a regional household hazardous waste collection center.

Individual municipalities will react to the concept of MSDs differently, and the communities' sources for drinking water will be the chief factor in that reaction. If MSDs are a real or perceived threat to a

municipality's drinking water sources, the chance of generating support for MSDs in that city will be slim.

3. MSDs ARE A VALUABLE BROWNFIELDS REDEVELOPMENT TOOL

"This tough guy's got a soft spot for ya."

**– Benjamin J. Grimm
a.k.a. The Thing**

The groundwater contamination that is of concern in MSD situations is typically shallow, perched groundwater with a depth of less than 30 feet. It is separated from another underlying body of groundwater by a confining layer – often clay or rock – and doesn't threaten deeper aquifers. In Fort Worth, and in many other parts of the state, this shallow groundwater is generally of such low volume and poor quality, that it will never be used as a drinking water source. Frequently complicating this issue are areas of historical contamination from multiple sources such as filling stations, dry cleaners, plating facilities, and auto repair shops.

Due to the costs and time involved with reaching the maximum contaminant levels¹³ (MCLs), the requirement that this low quality/low volume groundwater be cleaned to drinking water standards was an impediment to brownfields redevelopment. Because no one was drinking, or was ever going to drink this water, the cleanup requirement made no sense from an environmental, human health, or economic standpoint. Developers walked away from projects when they realized that the costs

¹⁰ Refer to Tables 1-A and 1-B.

¹¹ Ibid.

¹² City of Fort Worth, *2004 Water Quality Report*, retrieved from the City of Fort Worth web site, June 24, 2005:
<http://www.fortworthgov.org/water/WaterQuality/2004CCR/2004ccr.pdf>

¹³ A maximum contaminant level is the highest level of a contaminant that is allowed in drinking water.

involved in remediating the groundwater to drinking water quality was beyond their means.

The economic impediment to redevelopment compounded the social and economic problems posed by abandoned or unused commercial and industrial properties sitting fallow in urban areas. It is undisputed that the negative social and economic impacts of these properties are real and insidious.

In his study examining crime in abandoned buildings in Austin, Texas, William Spelman, Associate Professor of Public Affairs at the University of Texas, concluded that 41 percent of abandoned buildings could be entered without use of force. Of these open buildings, 83 percent showed evidence of illegal use by prostitutes, drug dealers, property criminals, and others. Crime rates on blocks with open abandoned buildings were twice as high as rates on matched blocks without open buildings.¹⁴

A 2001 Temple University study of Philadelphia, Pennsylvania, found that houses within 150 feet of a vacant or abandoned property experienced a net loss of \$7,627 in value. Those within 150 to 300 feet depreciated by \$6,819 and those within 300 to 450 feet depreciated by \$3,542.¹⁵

In his study, "Abandoned Buildings: Models for Legislative & Enforcement Reform," Mark Setterfield, Associate Professor of Economics at Trinity College in Hartford, Connecticut, states:

It would take very little to convince a visitor to, much less a resident of, any of

America's cities that there exists an abandoned building problem. Even the most cursory glance at the central urban environs of cities such as Hartford and New Britain reveals a preponderance of burned out or boarded up buildings and vacant lots. Meanwhile, residents of neighborhoods blighted by abandoned buildings complain of a variety of economic and social problems connected with commercial and residential structures that have fallen into disuse and disrepair. As the examples of Hartford and New Britain attest, these problems are by no means confined to larger metropolitan centers; the phenomenon of the small city with "big city problems" is very much a part of the urban landscape of contemporary America.¹⁶

In addition to wasted resources, lost tax revenues and declining property values, Professor Setterfield cites the negative effects on the community as one of the chief concerns associated with abandoned buildings. He states:

Abandoned buildings can also have an insidious effect on the social fabric of a community, by encouraging 'social atomization' – a process which isolates the individual (or individual family) within a community, weakening ties to others and, hence, the sense of collectivity which is the hallmark of any thriving community....abandoned buildings may foster a sense of despondency and resignation that detracts from the vitality of a community....buildings which fall into

¹⁴ Spelman, William, "Abandoned Buildings: Magnets for Crime?" *Journal of Criminal Justice*, 1993.

¹⁵ Temple University, *Blight Free Philadelphia: A Public-Private Strategy to Create and Enhance Neighborhood Value* (2001)

¹⁶ Trinity College, *Abandoned Buildings: Models for Legislative & Enforcement Reform*, Mark Setterfield, Associate Professor of Economics. Retrieved June 10, 2004, from the Trinity College web site: www.trincoll.edu/depts/tcn/Research_Reports/resrch23.htm

disrepair and remain dilapidated are interpreted as a signal that no one cares.

Abandoned buildings pose a major fire hazard that endangers the lives of both citizens and firefighters. The United States Fire Administration reports that over 12,000 fires in vacant structures are reported each year in the United States, resulting in \$73 million in property damage annually. The administration also reports that more than 70% of fires in vacant or abandoned buildings are incendiary or suspicious.¹⁷

Following the 1999 death of six Worcester, Massachusetts, firefighters while fighting a fire at a structure that had been abandoned for a decade, the administration concluded that “abandoned buildings are a serious threat to firefighters and fire departments....”¹⁸ In 1987, a Detroit firefighter was killed when a fire in an abandoned warehouse flashed over. When the fire spread to other structures, two more firefighters died when a wall collapsed as they tried to limit the fire's growth. The fire department had previously been called to numerous small fires in the building, which had been started by vagrants for warmth.¹⁹ In 2003, a homeless man and two homeless women were smoking crack in an abandoned building in Yonkers, New York, and started a

fire for warmth. The fire spread through a dozen buildings, killing five members of the same family and leaving another 200 homeless.²⁰

In Fort Worth, firefighters battled four major fires of a suspicious/incendiary nature at an abandoned tannery between February 2002 and December 2003. The facility is located next to a residential neighborhood and had abandoned tanks and drums of tannery chemicals along with large amounts of other combustible materials at the site.²¹

While MSDs are not a cure-all for the ills of urban blight, they are an essential tool in a municipality's brownfields arsenal to make these abandoned sites more attractive to potential developers, and to getting these sites cleaned up, redeveloped, and back on the tax roles as productive elements of the community.

4. A MUNICIPALITY'S ROLE IN THE MSD PROCESS

“Back off, buttercup, you're breathin' on my baby blues!”

**– Benjamin J. Grimm
a.k.a. The Thing**

A property is eligible for an MSD if it is located within the corporate limits or

¹⁷ American Re, *New Tool Ready To Combat Arson; Vacant & Abandoned Buildings Targeted*. Retrieved March 22, 2004, from the AmRe web site: http://www.amre.com/content/press/pressmain.asp?release=04-16-02_abandonedbuildings

¹⁸ U.S. Fire Administration, *Technical Reports: FEMA Review Deadly 1999 Worcester, Mass., Provides Insight Into Lessons Learned*. Retrieved March 22, 2004, from the U.S.F.A. web site: www.usfa.fema.gov/fire-service/techreports/tr134.shtm

¹⁹ Insurance Committee for Arson Control, *Fires in Abandoned Buildings Continue to Plague Firefighters, Citizens*. Retrieved June 10, 2004, from the ICAC web site: www.arsoncontrol.org/default.asp?target=/2002/newsletter/0611f.htm

²⁰ 1010wins.com *Last Defendant Pleads Guilty in Yonkers Fire*, June 4, 2004. Retrieved June 10, 2004 from the 1010wins.com web site: 1010wins.com/topstories/winstopstories_story_156112909.html

²¹ In February 2005 the EPA completed an emergency response action at this site in partnership with the TCEQ and the City of Fort Worth. The city is currently working to find a developer to acquire, complete remediation, and redevelop the site.

extraterritorial jurisdiction of a municipality that has a population of at least 20,000.²² A public drinking water supply system must exist that meets state requirements and is capable of supplying drinking water to the property for which the MSD is sought and all property within a half mile.

The TCEQ will not certify an MSD unless the city council of the municipality in which the MSD is located adopts an ordinance prohibiting potable use of groundwater in the MSD. Alternatively, use of groundwater for potable purposes can be prohibited by deed restriction enforceable by the municipality. In that instance, the city council must adopt a resolution supporting the MSD designation.

Additionally, the MSD application must be supported by a resolution enacted by:

- the city council of each municipality with a boundary located within a half mile of the property;
- the city council of each municipality that owns or operates a groundwater supply within five miles of the property; and
- the governing body of each retail public utility that owns or operates a groundwater supply well within five miles of the property.

Municipalities are under no statutory obligation to support MSDs, nor to accept or process requests for support of MSDs from developers or property owners. For those municipalities that want to support MSDs located in their jurisdictions, state law provides no guidance on how to proceed, save the requirement that an ordinance or resolution be enacted. However, each municipality that wants to support creation of MSDs in its jurisdiction should establish

procedures for handling requests, preferably by ordinance, so that applicants know what is required of them and so that the city treats applicants in a consistent manner.

5. GET BUY-IN FROM CITY STAFF AND CITY COUNCIL

“Hey, kiddo, I’m one of the good guys.”

**– Benjamin J. Grimm
a.k.a. The Thing**

The concept of the MSD will be foreign to most city council members and city staffers, and difficult to grasp initially. Educating these groups so that they understand the concept and its implications, and then getting their buy-in, is the first and most important step to take when developing MSD procedures.

The City of Fort Worth Environmental Management Department began the MSD development process by forming a multi-departmental group consisting of staff members from those city departments whose services might be impacted by MSDs. These were the city’s Water Department, Transportation and Public Works Department, Development Department, Community and Economic Development Department, Planning Department and City Attorney’s Office. A meeting was held to educate the staff members on MSDs, and to elicit any concerns they might have. The environmental issues were discussed, as were concerns for the health and safety of city employees and contractors working on utilities and streets. The benefit of MSDs as a brownfields redevelopment tool and its potential to enhance economic

²² Refer to Tables 2-A and 2-B.

redevelopment in the central city was emphasized.

Once staff support for MSDs was assured, several presentations to the council's Central City Revitalization and Economic Development Committee were scheduled. Again, the use of MSDs as a brownfields redevelopment tool was emphasized, and it was made clear that an MSD was designed to impact groundwater cleanup standards as they related to consumption of drinking water, but that other human health and environmental concerns would still have to be addressed. Additionally, the committee was assured that staff would develop a broad, but thorough, public participation process.

Once the committee was comfortable with its understanding of MSDs, and able to give conditional support, staff was instructed to prepare a procedural ordinance for accepting and processing MSD applications, and to bring the draft back to the committee for review. After the committee reviewed the draft ordinance, it was sent to the full city council, and was passed on January 11, 2005, becoming the first MSD procedural ordinance in Texas.

6. FORT WORTH'S PROCEDURAL ORDINANCE

"It's clobberin' time!"

**– Benjamin J. Grimm
a.k.a. The Thing**

In Fort Worth, persons wishing to get city council approval for an MSD, must first submit an application and go through a two-part public participation process.

Applications must be submitted to the city's Director of Environmental Management. Six originals of the application must be signed and certified by an authorized representative of the applicant and submitted to the director with an application fee of \$2,000. This application fee offsets the city's administrative costs associated with application review and issuing notice. The content required in the application is similar to the TCEQ's requirements.

Environmental Management reviews the application for completeness, and routes copies to the Water, Engineering, Development, and Transportation and Public Works departments for their review. These departments will look at the application in context of city property interests and service issues, to determine whether these could be impacted by the MSD. The departments have ten days to return written comments to Environmental Management, noting discrepancies in the application and advising of any city interests that might be impacted.

If the application is complete, Environmental Management will schedule both a public meeting and public hearing. If the application is incomplete, the application will be returned to the applicant, with the deficiencies noted in writing. The applicant will have 30 days to correct and resubmit the application.

The city must provide three forms of notice of the meeting and hearing: written notice mailed to specified persons, a sign posted on the property of the proposed MSD, and a notice in the official newspaper of the city. During the public participation process, Environmental Management must ensure that a copy of the application is displayed at the public library facility closest to site of the proposed MSD.

The written notice required by Fort Worth's ordinance is more inclusive than the statutory requirements. Under the ordinance, notice will be sent to owners of real property lying within one-half mile of the boundary of the proposed MSD, in addition to persons who own private registered water wells within five miles of the boundary of the proposed MSD, each retail public utility that owns or operates a groundwater supply well within five miles of the proposed MSD, and each municipality with a boundary located not more than one-half mile of the proposed MSD or that owns or operates a groundwater supply well located within five miles.

The public meeting must be held no later than 45 days from the date Environmental Management received the application. It must be held in the evening at a location convenient to the affected community. Although the city is responsible for the conduct of the meeting, the applicant or a representative must appear in order to provide information to the community, answer questions, and receive input from those in attendance.

The public hearing before the city council must be held no later than 60 days from the date Environmental Management receives the application. Again, the applicant or a representative must appear. If they fail to appear, the application is deemed to be withdrawn. Persons may speak in favor of or against the application, following established city council rules for all public hearings.

After the hearing, city council will vote to approve or disapprove the application. If council votes to approve, it must:

- adopt a resolution supporting the applicant's application to the TCEQ for an MSD; and

- enact an ordinance prohibiting use of designated groundwater for potable purposes from beneath the site (council may also place other reasonable restrictions on use of the groundwater at the site, such as prohibiting the use of the groundwater for landscape irrigation).

If the city council disapproves an application, or if the applicant withdraws its application after notice has been given, no new application for an MSD on the site may be filed for a period of 12 months.

Finally, a person who has received approval of an MSD from the city must, upon issuance from the TCEQ, provide the city with a copy of the certificate of completion or other documentation issued for the site, showing that response actions have been completed.

Fort Worth received its first MSD application in February, and it was approved by the city council on April 12. The application was for the Montgomery Plaza redevelopment at 2600 W. 7th Street, just west of downtown. The 46-acre site housed a former Montgomery Ward catalog store and distribution warehouse which sustained damage in the March 28, 2000, tornado. The affected groundwater is shallow, perched groundwater at an average depth of 14 feet below ground surface, underlain by a confining limestone formation. Uses at the site that contributed to groundwater contamination included an auto service center, a products service building (with paint booths, degreaser stations, and solvent dip tanks), and petroleum storage tanks. The chemicals of concern identified in the groundwater consist of petroleum hydrocarbons, metals, volatile organic compounds and semi-volatile organic compounds in concentrations exceeding

residential assessment levels for potable water use.

During the application process, the city kept the MSD program at the TCEQ apprised of progress. This ongoing communication with the TCEQ is vital to ensuring a smooth process. The public meeting was held in the evening at the meeting room of a local cafeteria, creating a relaxed atmosphere for the community. The public hearing was uneventful, the community voiced no objections to the application, and the city council unanimously passed the resolution and ordinance creating CFW-MSD-0001.

7. CONCLUSION

“I’m just The Thing.”

**– Benjamin J. Grimm
a.k.a. The Thing**

MSDs are a valuable tool for brownfields redevelopment in urban areas. An MSD certification for a site will free up funds that would otherwise have been used for cleaning shallow and unusable groundwater to

drinking water standards. These funds will now be available to address the site’s redevelopment needs. That should give municipalities a blanket of comfort for brownfields redevelopment projects they are undertaking on their own or in partnership with private interests, because their own financial risks for that project will be significantly reduced.

Municipalities wishing to pursue use of the MSD tool must first assure that city staffs and city councils understand the concept and are willing to support it. Procedures for accepting applications for approvals of MSDs should be created, and should provide for a broad public participation process so that the affected community is fully advised of the application and has the opportunity to ask questions and to comment. When used to their full advantage, MSDs may be just “The Thing” to further brownfields redevelopment in many Texas municipalities.

Online Resources

Municipal Setting Designation Program, TCEQ:
<http://www.tnrcc.state.tx.us/permitting/msd.html>

Municipal Setting Designations, A Guide for Cities, TCEQ, March 2005:
http://www.tceq.state.tx.us/comm_exec/forms_pubs/pubs/gi/gi-326_497993.pdf

City of Fort Worth MSD procedural ordinance, application form, and resolutions and ordinances establishing individual MSDs in the city:
http://www.fortworthgov.org/dem/brownfields_ms_d_ordinance.htm

Table 1-A

Drinking Water Sources for Texas Municipalities Population Over 90,000 – Sorted by Population			
	Pop.	Drinking Water Source	
		Groundwater	Surface Water
Houston ¹	2,033,400	35% - 202 very deep wells in Evangeline and Chicot aquifers	T65% - Lake Conroe, Lake Houston & Lake Livingston
San Antonio ²	1,228,512	100% - Edwards Aquifer	0%
Dallas ³	1,211,437	0%	100% - Lake Ray Hubbard, Lake Lewisville, Lake Grapevine, Lake Ray Roberts & Lake Tawakoni
Austin ⁴	681,437	0% - none directly, but the Edwards Aquifer feeds into the Colorado River	100% - Colorado River as it flows into Lake Austin and Town Lake
Fort Worth ⁵	592,836	0%	100% - Lake Worth, Lake Benbrook, Eagle Mountain Lake, Lake Bridgeport, Cedar Creek Reservoir and Richland Chambers Reservoir
El Paso ⁶	588,452	Hueco-Mesilla Bolson Aquifers	Rio Grande River
Arlington ⁷	361,717	0%	100% - Cedar Creek, Richland Chambers, Lake Benbrook, and Lake Arlington
Corpus Christi ⁸	278,708	0%	100% - Lake Corpus Christi, Choke Canyon Reservoir System & Lake Texana
Plano ⁹	252,368	0%	100% - Lake Lavon (primary) and Lake Texoma & Lake Cooper (supplemental)
Garland ¹⁰	219,070	0%	100% - Lake Lavon, Lake Chapman, Lake Texoma
Lubbock ¹¹	205,905	Ogallala Aquifer	Lake Meredith
Laredo ¹²	201,139	0%	100% - Rio Grande River
Irving ¹³	194,372	0%	100% - purchased from City of Dallas
Amarillo ¹⁴	180,380	45% - Ogallala Aquifer	55% - Lake Meredith
Brownsville ¹⁵	161,048	Desalinized water from Rio Grande Alluvium purchased from Southmost Regional Water Authority	Rio Grande River
Pasadena ¹⁶	147,236	yes	yes
Grand Prairie ¹⁷	141,692	11 wells in Trinity Aquifer, average depth of 2,000 feet (supplemental)	Purchased from cities of Dallas (primary) and Fort Worth
Mesquite ¹⁸	128,653	0%	100% - Lake Lavon
Carrollton ¹⁹	118,745	0%	100% - purchased from City of Dallas
McAllen ²⁰	117,650	0%	100% - Rio Grande River and Lake Falcon & Lake Amistad
Waco ²¹	117,464	0%	100% - Lake Waco
Abilene ²²	114,454	0%	100% - Fort Phantom Hill Lake, Hubbard Creek Reservoir & Lake O.H. Ivie
Beaumont ²³	113,473	3 wells in Chicot Aquifer	Neches River
Wichita Falls ²⁴	103,262	0%	100% - Lake Kickapoo & Lake Arrowhead
Richardson ²⁵	100,803	0%	100% - Lake Lavon (primary) and Lake Chapman & Lake Texoma (supplemental)
Midland ²⁶	97,048	Ogallala and Edwards-Trinity Plateau aquifers	Lake J.B. Thomas, Lake O.H. Ivie, Moss Creek Lake & Lake E.V. Spence
Killeen ²⁷	96,858	0%	100% Lake Belton
Denton ²⁸	93,700	0%	100% - Lake Lewisville & Lake Ray Roberts
Odessa ²⁹	93,170	Cenozoic Pecos Alluvium aquifer (supplemental)	Lake Ivie (primary)
Lewisville ³⁰	90,774	0%	100% - Lake Lewisville (primary) and purchased water from City of Dallas (supplemental)
Tyler ³¹	90,079	12 wells in Carrizo Wilcox sand group at 600-1,100 feet	Lake Tyler & Lake Tyler East (primary) and Lake Palestine (supplemental)

2003 Population Estimates - Texas State Data Center: txsdc.utsa.edu/tpepp/txpopest.php

¹ City of Houston, *Water Conservation Statistics and TIPS*, retrieved from the City of Houston web site, June 23, 2005: <http://www.publicworks.cityofhouston.gov/utilities/conservation/conservationtips.htm>

² Greater Edwards Aquifer Alliance, *Our Drinking Water*, retrieved from the GEAA web site, June 23, 2005: http://www.aquiferalliance.org/p_Our_Drinking_Water.cfm

³ City of Dallas, *Dallas Water Supply*, retrieved from the City of Dallas web site, June 23, 2005: http://www.dallascityhall.com/dallas/eng/html/water_quality_information.html

⁴ City of Austin, *City of Austin Water Sources*, retrieved from the City of Austin web site, June 24, 2005: <http://www.ci.austin.tx.us/water/watersource.htm>

⁵ City of Fort Worth, *2004 Water Quality Report*, retrieved from the City of Fort Worth web site, June 24, 2005: <http://www.fortworthgov.org/water/WaterQuality/2004CCR/2004ccr.pdf>

⁶ El Paso Water Utilities, *Water Resources*, retrieved from the El Paso Water Utilities web site, June 23, 2005: http://www.epwu.org/water/water_resources.html

⁷ City of Arlington, *2004 Drinking Water Quality Report*, retrieved from the City of Arlington web site, June 23, 2005: http://www.ci.arlington.tx.us/water/pdf/2004_Drinking_Water_Quality_Report_revised.pdf

⁸ City of Corpus Christi, *Water History*, retrieved from the City of Corpus Christi web site, June 23, 2005: <http://www.cctexas.com/?fuseaction=main.view&page=1005>

⁹ City of Plano, *Plano's Water Source*, retrieved from the City of Plano web site, June 24, 2005: <http://www.planotx.org/water/source.html>

¹⁰ City of Garland, *2004 Water Quality Report*, retrieved from the City of Garland web site, June 23, 2005: <http://www.ci.garland.tx.us/NR/rdonlyres/83957FC8-35C8-4B2A-B77B-DA251ECC0D4A/0/WaterQuality.pdf>

¹¹ City of Lubbock, *2003 Water Quality Report*, retrieved from the City of Lubbock web site, June 23, 2005: http://publicworks.ci.lubbock.tx.us/water/documents/2003_ccr.pdf

¹² City of Laredo, *Laredo News and Calendar*, retrieved from the City of Laredo web site, June 24, 2005: http://www.laredocalendar.com/article_detail.cfm?id=130

¹³ City of Irving, *2004 Water Quality Report*, retrieved from the City of Irving web site, June 23, 2005: <http://ci.irving.tx.us/water/pdf/WQR05.pdf>

¹⁴ City of Amarillo, *2004 Water Quality Report*, retrieved from the City of Amarillo web site, June 23, 2005: <http://www.ci.amarillo.tx.us/departments/dirutils/2004WaterQualityReport.pdf>

¹⁵ City of Brownsville, *2004 Water Quality Report*, retrieved from the City of Brownsville web site, June 24, 2005: http://www.brownsville-pub.com/water/eng_ccr_2004.pdf

¹⁶ City of Pasadena, *2004 Drinking Water Quality Report*, retrieved from the City of Pasadena web site, June 24, 2005: <http://www.ci.pasadena.tx.us/waterquality2004.pdf>

¹⁷ City of Grand Prairie, *2004 Water Quality Report*, retrieved from the City of Grand Prairie web site, June 23, 2005: http://www.gptx.org/EnvironmentalServices/WaterQuality/documents/2004CCR_webversion.pdf

¹⁸ City of Mesquite, *Frequently Asked Questions*, retrieved from the City of Mesquite web site, June 23, 2005: <http://www.cityofmesquite.com/utilities/faq.php>

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- ¹⁹ City of Carrollton, *2004 Water Quality Report*, retrieved from the City of Carrollton web site, June 23, 2005: <http://www.cityofcarrollton.com/development/publicworks/pdf/Water%20Quality%20Report.pdf>
- ²⁰ McAllen Economic Development Corporation, *State rates McAllen drinking water TOPs in Texas*, retrieved from the MEDC web site, June 24, 2005: <http://www.medc.org/newsletter/internal.aspx?sid=0&ArticleID=1094&iid=147>
- ²¹ City of Waco, *North Bosque River Watershed*, retrieved from the City of Waco web site, June 23, 2005: http://www.waco-texas.com/city_depts/waterutilities/rivershed.htm
- ²² City of Abilene, *Mayor Loosens Water Restrictions* – May 25, 2005, retrieved from the City of Abilene web site, June 24, 2005: <http://www.abilenetx.com/press/may.htm>
- ²³ City of Beaumont, *2004 Drinking Water Consumer Confidence Report*, retrieved from the City of Beaumont web site, June 24, 2005: <http://www.cityofbeaumont.com/CCR04.pdf>
- ²⁴ City of Wichita Falls, *2004 Water Quality Report*, retrieved from the City of Wichita Falls web site, June 23, 2005: <http://www.ci.wichita-falls.tx.us/pubworks/ccr%202004%20also.pdf>
- ²⁵ City of Richardson, *2003 Consumer Confidence Report*, retrieved from the City of Richardson web site, June 24, 2005: <http://www.cor.net/Utilities/News.html>
- ²⁶ City of Midland, *2004 Water Quality Report*, retrieved from the City of Midland web site, June 24, 2005: <http://www.ci.midland.tx.us/Utilities/WaterRpt2004.pdf>
- ²⁷ City of Killeen, *2003 Drinking Water Quality Report*, retrieved from the City of Killeen web site, June 24, 2005: <http://www.ci.killeen.tx.us/publicworks/utilityservices/CCR%202003%20Final.pdf>
- ²⁸ City of Denton, *2003 Water Quality Report*, retrieved from the City of Denton web site, June 24, 2005: <http://cityofdenton.com/pages/utlswaterqualityrep.cfm?2004%5Fwqr%>
- ²⁹ City of Odessa, *2003 Water Quality Report*, retrieved from the City of Odessa web site, June 24, 2005: <http://www.odessa-tx.gov/internet/WebSubsectionDept.asp?key=2322>
- ³⁰ City of Lewisville, *2004 Water Quality Report*, retrieved from the City of Lewisville web site, June 24, 2005: <http://www.cityoflewisville.com/main/NewsReleases/WaterQuality04.pdf>
- ³¹ City of Tyler, *Tyler Water Utilities – History*, retrieved from the City of Tyler web site, June 24, 2005: <http://www.cityoftyler.org/1244502742C482D58D7BB4A0E3BBA859/default.html>

Table 1-B

Drinking Water Sources for Texas Municipalities Population Over 90,000 – Sorted Alphabetically			
		Drinking Water Source	
		Groundwater	Surface Water
Abilene	114,454	0%	100% - Fort Phantom Hill Lake, Hubbard Creek Reservoir & Lake O.H. Ivie
Amarillo	180,380	45% - Ogallala Aquifer	55% - Lake Meredith
Arlington	361,717	0%	100% - Cedar Creek, Richland Chambers, Lake Benbrook, and Lake Arlington
Austin	681,437	0% - none directly, but the Edwards Aquifer feeds into the Colorado River	100% - Colorado River as it flows into Lake Austin and Town Lake
Beaumont	113,473	3 wells in Chicot Aquifer	Neches River
Brownsville	161,048	Desalinized water from Rio Grande Alluvium purchased from Southmost Regional Water Authority	Rio Grande River
Carrollton	118,745	0%	100% - purchased from City of Dallas
Corpus Christi	278,708	0%	100% - Lake Corpus Christi, Choke Canyon Reservoir System & Lake Texana
Dallas	1,211,437	0%	100% - Lake Ray Hubbard, Lake Lewisville, Lake Grapevine, Lake Ray Roberts & Lake Tawakoni
Denton	93,700	0%	100% - Lake Lewisville & Lake Ray Roberts
El Paso	588,452	Hueco-Mesilla Bolson Aquifers	Rio Grande River
Fort Worth	592,836	0%	100% - Lake Worth, Lake Benbrook, Eagle Mountain Lake, Lake Bridgeport, Cedar Creek Reservoir and Richland Chambers Reservoir
Garland	219,070	0%	100% - Lake Lavon, Lake Chapman, Lake Texoma
Grand Prairie	141,692	11 wells in Trinity Aquifer, average depth of 2,000 feet (supplemental)	Purchased from cities of Dallas (primary) and Fort Worth
Houston	2,033,400	35% - 202 very deep wells in Evangeline and Chicot aquifers	65% - Lake Conroe, Lake Houston & Lake Livingston
Irving	194,372	0%	100% - purchased from City of Dallas
Killeen	96,858	0%	100% Lake Belton
Laredo	201,139	0%	100% - Rio Grande River
Lewisville	90,774	0%	100% - Lake Lewisville (primary) and purchased water from City of Dallas (supplemental)
Lubbock	205,905	Ogallala Aquifer	Lake Meredith
McAllen	117,650	0%	100% - Rio Grande River and Lake Falcon & Lake Amistad
Mesquite	128,653	0%	100% - Lake Lavon
Midland	97,048	Ogallala and Edwards-Trinity Plateau aquifers	Lake J.B. Thomas, Lake O.H. Ivie, Moss Creek Lake & Lake E.V. Spence
Odessa	93,170	Cenozoic Pecos Alluvium aquifer (supplemental)	Lake Ivie (primary)
Pasadena	147,236	yes	yes
Plano	252,368	0%	100% - Lake Lavon (primary) and Lake Texoma & Lake Cooper (supplemental)
Richardson	100,803	0%	100% - Lake Lavon (primary) and Lake Chapman & Lake Texoma (supplemental)
San Antonio	1,228,512	100% - Edwards Aquifer	0%
Tyler	90,079	12 wells in Carrizo Wilcox sand group at 600-1,100 feet	Lake Tyler & Lake Tyler East (primary) and Lake Palestine (supplemental)
Waco	117,464	0%	100% - Lake Waco
Wichita Falls	103,262	0%	100% - Lake Kickapoo & Lake Arrowhead

Figure 1

Drinking Water Sources for Largest Cities in Texas

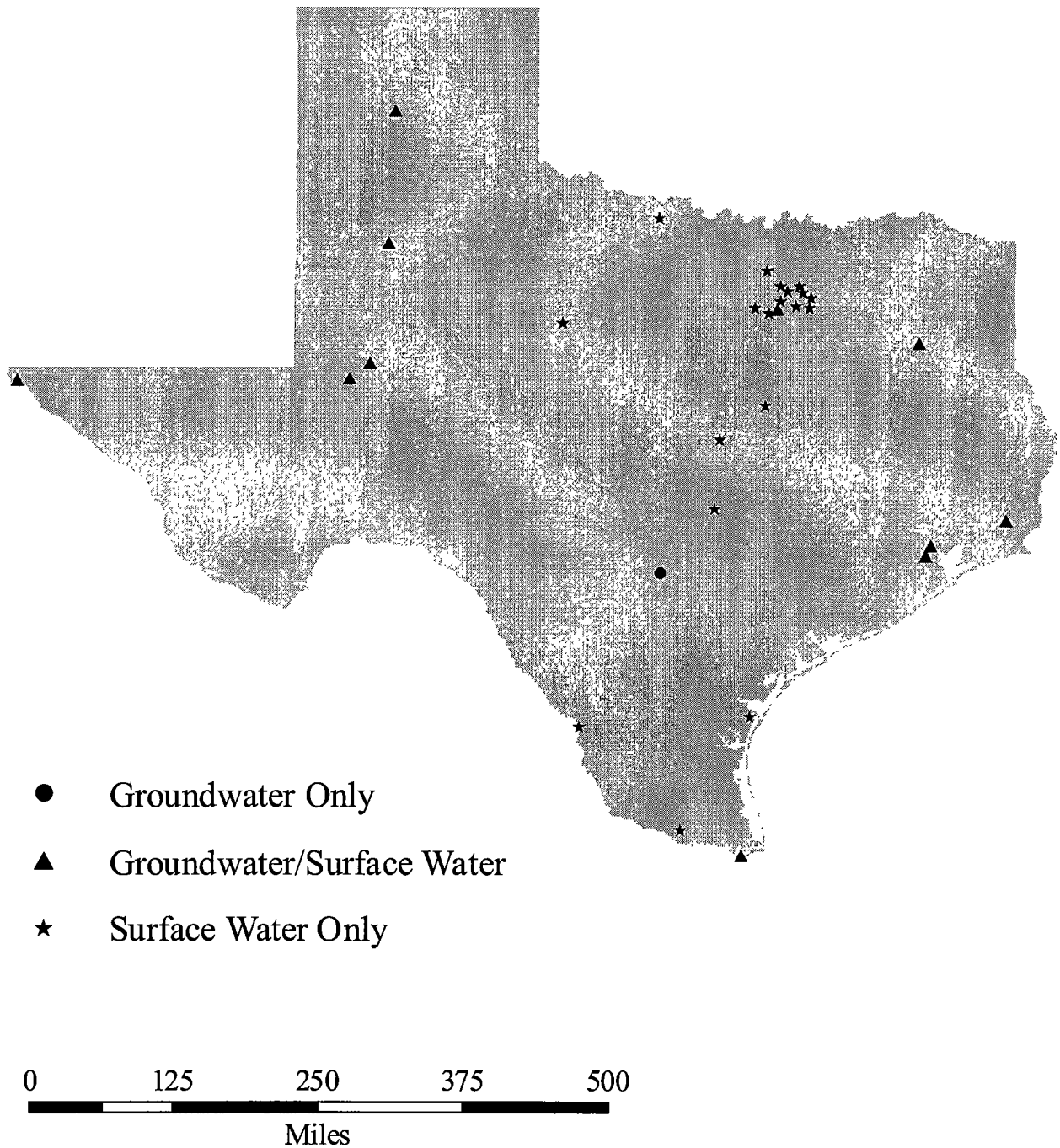


Table 2 - A

Texas State Data Center Population Estimates - January 1, 2004 Texas Municipalities With Population 20,000 or Greater (Sorted by Population)					
Municipality	Pop.	Municipality	Pop.	Municipality	Pop.
Houston	2,033,400	Harlingen	63,404	La Porte	33,035
San Antonio	1,228,512	Missouri City	63,115	Friendswood	32,006
Dallas	1,211,437	Allen	61,256	Nacogdoches	30,468
Austin	681,437	Victoria	61,055	San Juan	29,998
Fort Worth	592,836	Flower Mound	60,908	Copperas Cove	29,976
El Paso	588,452	North Richland Hills	60,455	Weslaco	29,797
Arlington	361,717	Frisco	58,927	Socorro	28,857
Corpus Christi	278,708	Galveston	57,539	Deer Park	28,675
Plano	252,368	Port Arthur	57,341	Rosenberg	28,190
Garland	219,070	Mission	56,934	Cleburne	28,179
Lubbock	205,905	Edinburg	56,845	Lake Jackson	27,305
Laredo	201,139	Temple	55,784	Lancaster	27,241
Irving	194,372	Pharr	55,678	Farmers Branch	27,176
Amarillo	180,380	League City	53,621	Paris	26,256
Brownsville	161,048	Rowlett	52,060	Corsicana	26,014
Pasadena	147,236	Pearland	50,504	Kingsville	25,836
Grand Prairie	141,692	Euless	49,848	Big Spring	25,458
Mesquite	128,653	Bedford	48,582	Burleson	25,248
Carrollton	118,745	Grapevine	46,245	Greenville	25,202
McAllen	117,650	New Braunfels	43,680	San Benito	24,897
Waco	117,464	DeSoto	42,792	Rockwall	24,867
Abilene	114,454	Texas City	42,441	Eagle Pass	24,667
Beaumont	113,473	Conroe	42,113	Pflugerville	24,662
Wichita Falls	103,262	San Marcos	42,102	Seguin	24,532
Richardson	100,803	Haltom City	40,698	Marshall	24,430
Midland	97,048	Cedar Hill	39,095	Schertz	24,336
Killeen	96,858	Coppell	38,909	Waxahachie	24,205
Denton	93,700	Cedar Park	37,614	Southlake	24,160
Odessa	93,170	Hurst	37,471	Denison	23,300
Lewisville	90,774	Sherman	36,512	Watauga	23,087
Tyler	90,079	The Colony	36,038	Wylie	23,029
San Angelo	88,170	Texarkana	36,020	University Park	22,529
McKinney	81,462	Huntsville	35,975	Alvin	22,404
Round Rock	81,265	Del Rio	35,400	Plainview	22,133
Longview	74,904	Duncanville	35,362	Weatherford	21,515
Sugar Land	74,079	Georgetown	34,994	Benbrook	21,496
College Station	73,691	Keller	34,467	Colleyville	21,370
Bryan	69,146	Mansfield	33,707	Kerrville	21,254
Baytown	67,659	Lufkin	33,235		

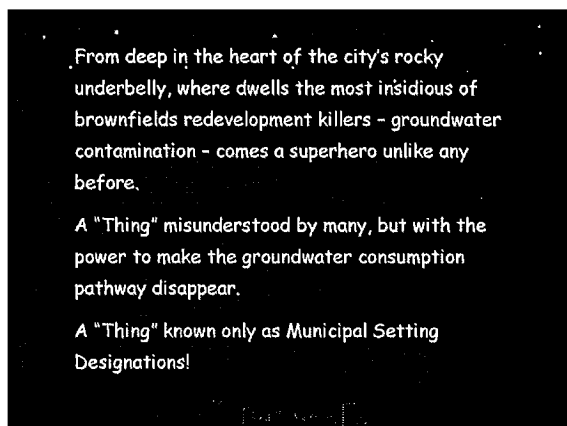
SOURCE: Texas State Data Center: txsdc.utsa.edu/tpepp/txpopest.php

Table 2 - B

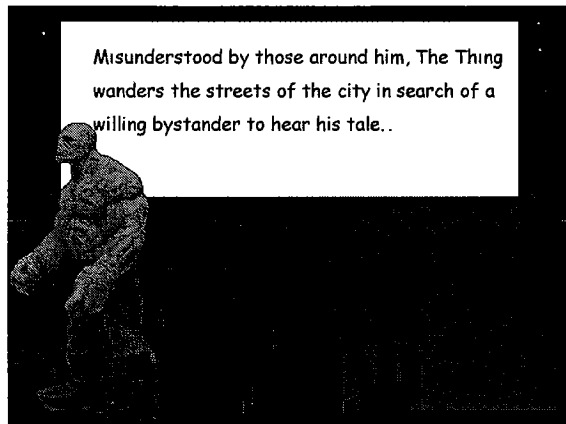
Texas State Data Center Population Estimates - January 1, 2004 Texas Municipalities With Population 20,000 or Greater (Sorted Alphabetically)					
Municipality	Pop.	Municipality	Pop.	Municipality	Pop.
Abilene	114,454	Fort Worth	592,836	Odessa	93,170
Allen	61,256	Friendswood	32,006	Paris	26,256
Alvin	22,404	Frisco	58,927	Pasadena	147,236
Amarillo	180,380	Galveston	57,539	Pearland	50,504
Arlington	361,717	Garland	219,070	Pflugerville	24,662
Austin	681,437	Georgetown	34,994	Pharr	55,678
Baytown	67,659	Grand Prairie	141,692	Plainview	22,133
Beaumont	113,473	Grapevine	46,245	Plano	252,368
Bedford	48,582	Greenville	25,202	Port Arthur	57,341
Benbrook	21,496	Haltom City	40,698	Richardson	100,803
Big Spring	25,458	Harlingen	63,404	Rockwall	24,867
Brownsville	161,048	Houston	2,033,400	Rosenberg	28,190
Bryan	69,146	Huntsville	35,975	Round Rock	81,265
Burleson	25,248	Hurst	37,471	Rowlett	52,060
Carrollton	118,745	Irving	194,372	San Angelo	88,170
Cedar Hill	39,095	Keller	34,467	San Antonio	1,228,512
Cedar Park	37,614	Kerrville	21,254	San Benito	24,897
Cleburne	28,179	Killeen	96,858	San Juan	29,998
College Station	73,691	Kingsville	25,836	San Marcos	42,102
Colleyville	21,370	Lake Jackson	27,305	Schertz	24,336
The Colony	36,038	Lancaster	27,241	Seguin	24,532
Conroe	42,113	La Porte	33,035	Sherman	36,512
Coppell	38,909	Laredo	201,139	Socorro	28,857
Copperas Cove	29,976	League City	53,621	Southlake	24,160
Corpus Christi	278,708	Lewisville	90,774	Sugar Land	74,079
Corsicana	26,014	Longview	74,904	Temple	55,784
Dallas	1,211,437	Lubbock	205,905	Texarkana	36,020
Deer Park	28,675	Lufkin	33,235	Texas City	42,441
Del Rio	35,400	Mansfield	33,707	Tyler	90,079
Denison	23,300	Marshall	24,430	University Park	22,529
Denton	93,700	McAllen	117,650	Victoria	61,055
DeSoto	42,792	McKinney	81,462	Waco	117,464
Duncanville	35,362	Mesquite	128,653	Watauga	23,087
Eagle Pass	24,667	Midland	97,048	Waxahachie	24,205
Edinburg	56,845	Mission	56,934	Weatherford	21,515
El Paso	588,452	Missouri City	63,115	Weslaco	29,797
Eules	49,848	Nacogdoches	30,468	Wichita Falls	103,262
Farmers Branch	27,176	New Braunfels	43,680	Wylie	23,029
Flower Mound	60,908	North Richland Hills	60,455		

SOURCE: Texas State Data Center: txsdc.utsa.edu/tpepp/txpopest.php

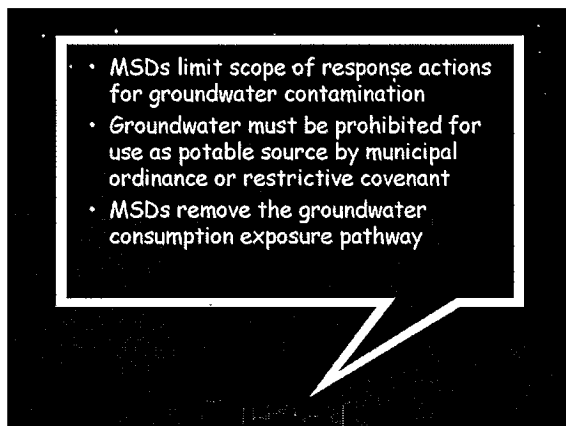












• Clear legislative intent that municipalities may exercise police power in:


- Approval of MSDs &
- Enforcement of groundwater restrictions

Uh huh...

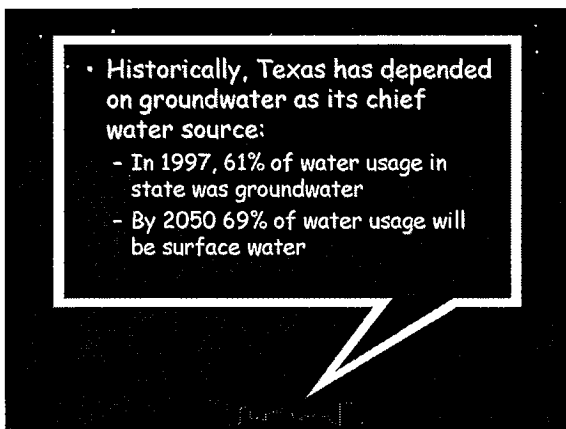
Hmmm...

I still think he's funny lookin'.

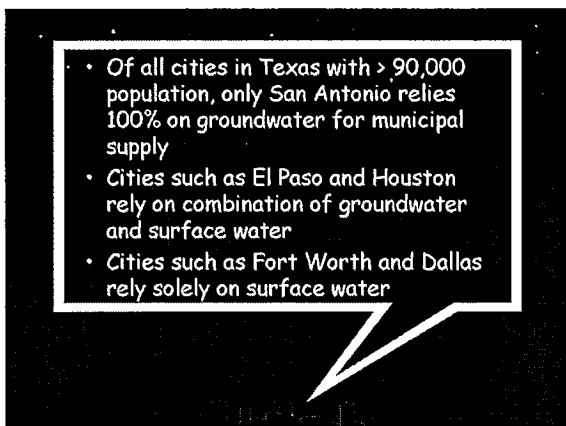
Undaunted by the blank stares, our hero presses on...







- Historically, Texas has depended on groundwater as its chief water source:
 - In 1997, 61% of water usage in state was groundwater
 - By 2050 69% of water usage will be surface water



- Of all cities in Texas with > 90,000 population, only San Antonio relies 100% on groundwater for municipal supply
- Cities such as El Paso and Houston rely on combination of groundwater and surface water
- Cities such as Fort Worth and Dallas rely solely on surface water

- Municipalities will react differently to concept of MSDs
- Communities' sources for drinking water will be chief factor in that reaction
- If MSD perceived as threat to drinking water resources, chance of support will be slim

This tough guy's gotta soft spot for yal

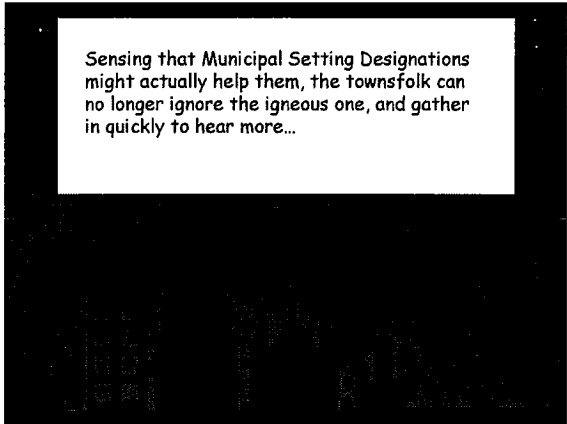
I hope it ain't quicksand!

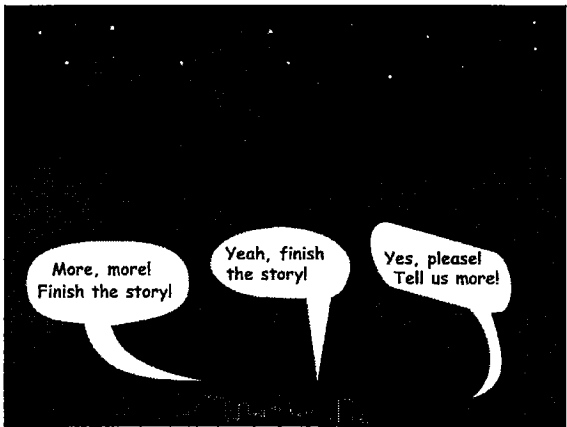
- Typical groundwater in MSD situations:
 - Shallow, perched (< 30-foot depth)
 - Separated from underlying groundwater by confining layer (clay or rock)
 - Doesn't threaten aquifers
 - Low volume & poor quality
 - Historical contamination from multiple sources

- Cost of cleaning low quality groundwater to drinking water standards impediment to brownfields redevelopment
- Developers walk away from projects
- Municipalities reluctant to invest
- Brownfields remain fallow

- Negative social & economic impacts of brownfields are real and insidious:
 - Haven for crime
 - Surrounding properties decreased in value
 - Interpreted by community as "no one cares"
 - Abandoned buildings major fire hazard

- MSDs are not cure-all for ills of urban blight, but they are an essential tool in a municipality's brownfields redevelopment arsenal



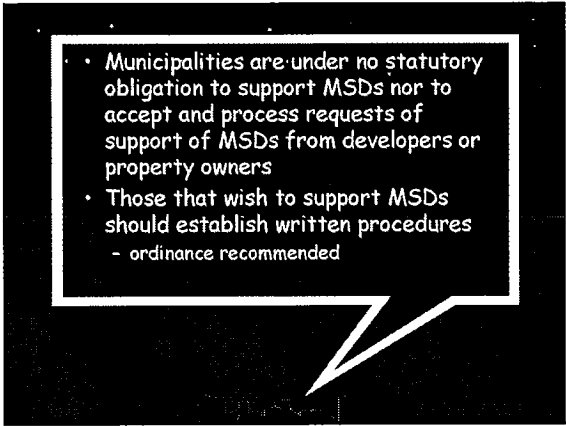


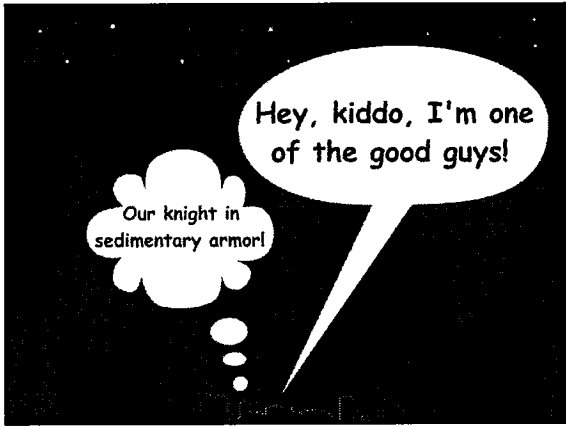


- Property eligible for MSD if:
 - It is located in city with population $\geq 20,000$ or that city's ETJ
 - An approved public drinking water supply system exists that supplies or can supply water to site and properties within a half mile

- TCEQ will not certify unless city council of municipality adopts ordinance prohibiting potable use of groundwater in MSD OR there is deed restriction enforceable by municipality and city council adopts supporting resolution

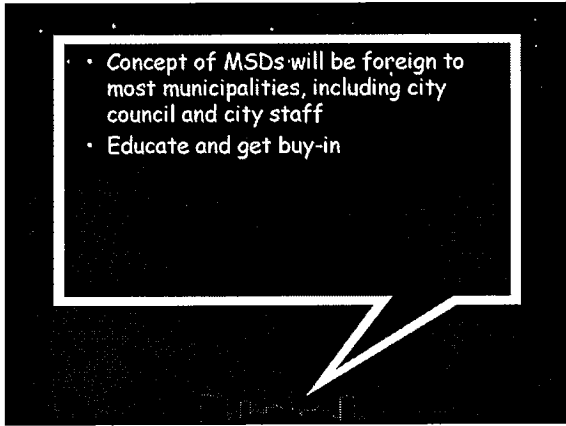
- Additionally, MSD must be supported by resolution passed by:
 - City council of each municipality within half mile of site
 - City council of each municipality with GW supply well within five miles of site
 - Governing body of each retail public utility with GW supply well within five miles of site

- 
- Municipalities are under no statutory obligation to support MSDs nor to accept and process requests of support of MSDs from developers or property owners
- Those that wish to support MSDs should establish written procedures
- ordinance recommended



Our knight in sedimentary armor!

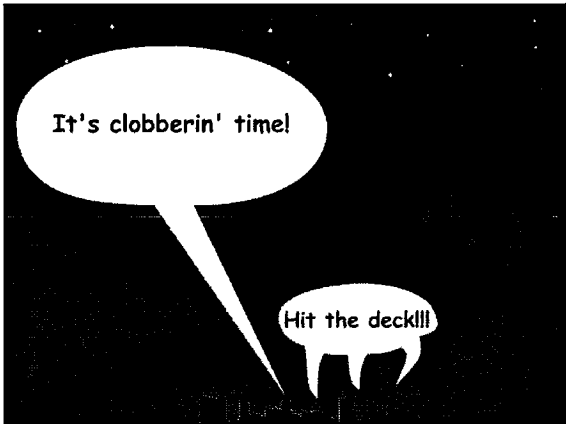
Hey, kiddo, I'm one of the good guys!

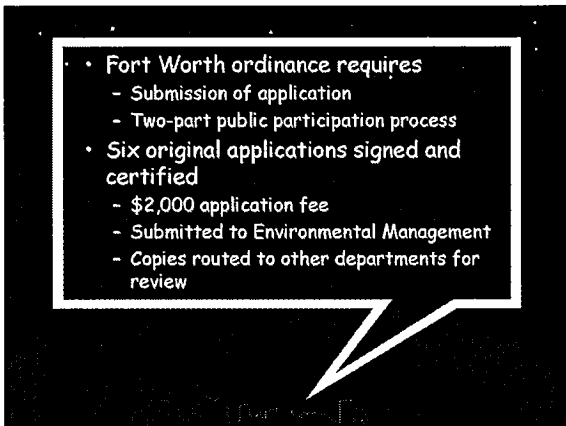
- 
- Concept of MSDs will be foreign to most municipalities, including city council and city staff
- Educate and get buy-in

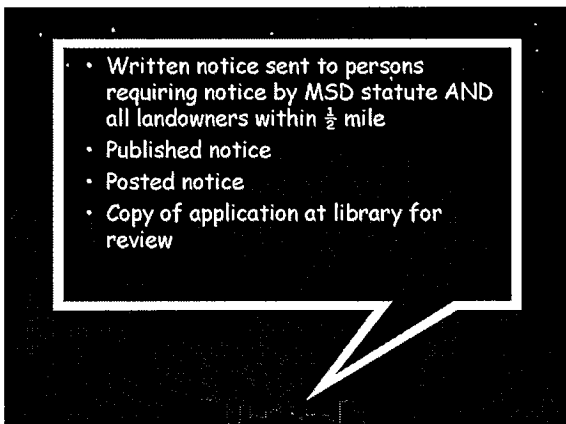
- Fort Worth process started with formation of multi-departmental group
- Staffers were educated on concept of MSD and concerns were elicited
- Benefit of MSD as tool for central city revitalization emphasized

- Once staff support assured, education of city council committee was next
 - Multiple meetings on MSD concept and content of procedural ordinance
 - Broad and thorough public participation process urged

- Fort Worth City Council enacted state's first MSD procedural ordinance on January 11, 2005



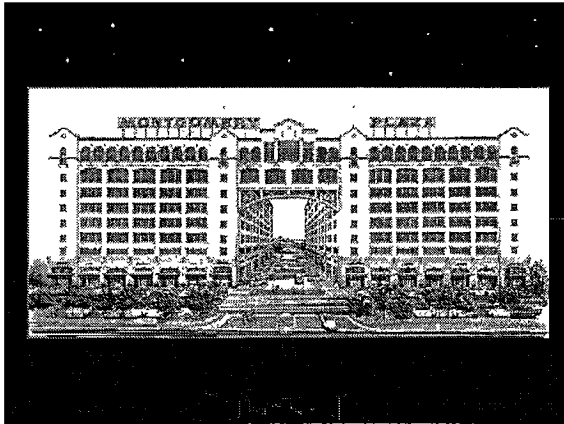


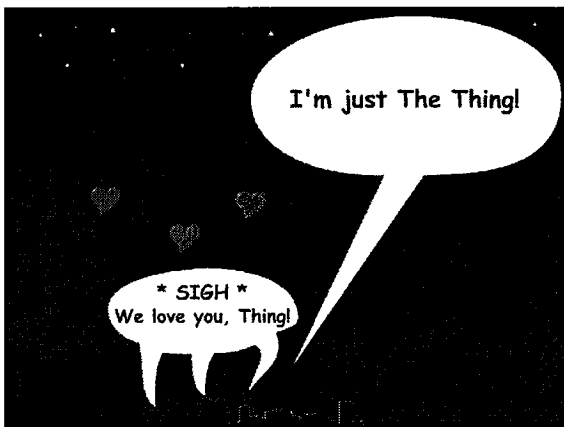


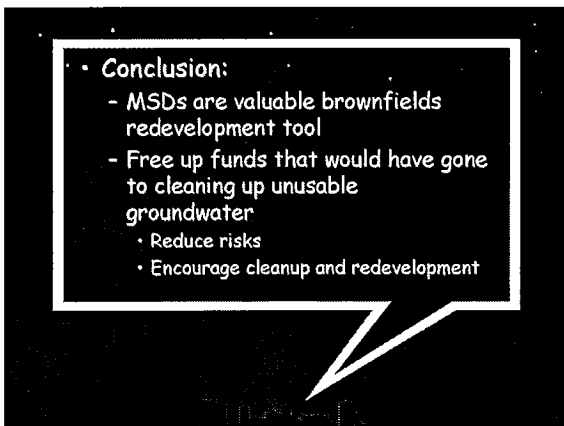
- Public meeting (community)
 - No later than 45 days from date of application
 - Applicant must appear to provide information, answer questions, etc.
- Public hearing (city council)
 - No later than 60 days from date of application
 - Applicant must appear

- After hearing, city council votes to approve or disapprove application
- If approve:
 - Must adopt resolution supporting MSD application to TCEQ; and
 - Must enact ordinance prohibiting use of designated groundwater for potable purposes (and any other reasonable restrictions)

- Fort Worth approved its first MSD in April
 - 46-acre Montgomery Plaza redevelopment
 - Former catalog store & distribution warehouse
 - Shallow, perched groundwater with contaminants > drinking water standards
- Smooth public participation process
- Unanimous city council approval





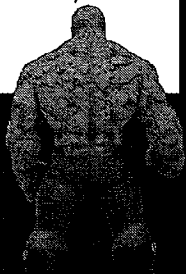


- Conclusion:
 - MSDs are valuable brownfields redevelopment tool
 - Free up funds that would have gone to cleaning up unusable groundwater
 - Reduce risks
 - Encourage cleanup and redevelopment

• **Conclusion:**

- Municipalities that wish to pursue use of MSDs must assure that staff and council on board
- Written procedures must be established
- Fort Worth ordinance available at www.fortworthgov.org/dem

Mission accomplished, our hero wanders off into the night in search of another city with redevelopment hogtied by groundwater contamination.



There goes a good man...errr...thing.

Yep, he's a real rock.



Kathryn A. Hansen

Kathryn Hansen is the regulatory and environmental coordinator for the City of Fort Worth Environmental Management Department. She has been responsible for managing the city's brownfields economic redevelopment program since its inception in 1999, and recently authored the city's municipal setting designations procedural ordinance. She serves as lead on the city's Project XL project with EPA, which seeks an alternative method for managing asbestos in the demolition of substandard nuisance buildings by local governments. Her duties also include providing the department's other disciplines with regulatory and legislative analysis. She has been a licensed attorney in the state of Texas for 22 years, including a combined total of 11 years as an assistant city attorney for the cities of Fort Worth and Arlington. As a Fort Worth assistant city attorney she was legal counsel for the Public Health Department and Environmental Management Department, and authored the city's Environment Code. She began her legal career as a staff attorney for the Dallas Legal Aid Society. Ms. Hansen holds a bachelor of arts degree in journalism with a minor in anthropology from the University of North Texas and a doctor of jurisprudence degree from the University of Houston.

Municipal Setting Designations
"The Real Estate Community Perspective"

Presented to the
17th Annual Texas Environmental Superconference
State Bar of Texas
August 4-5, 2005

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Municipal Setting Designations: The Real Estate Community Perspective¹

Municipal Setting Designations (MSDs) offer the real estate community a valuable new tool to address the acquisition, sale, financing, and redevelopment of urban properties with actual or perceived environmental issues (brownfields). This paper describes the primary issues of interest to the real estate community regarding brownfields and how MSDs can make the acquisition, sale, financing, and redevelopment of such properties both technically and financially manageable.

Background

Many Texas cities and towns have shallow groundwater affected with low levels of contaminants from historical operations of dry cleaners, gas stations, auto repair locations, and other common urban sources. These environmental impacts are usually compared to drinking water standards to determine if corrective action is necessary even though the affected groundwater is not used for potable purposes, if it is used at all. Cleanups governed by drinking water standards are notoriously expensive and time-consuming.

Recognizing that most cities rely on surface water or very deep groundwater for drinking water, Subchapter W of Chapter 361 of the Texas Health & Safety Code now allows municipalities to approve, and the TCEQ to certify, areas called "municipal setting designations." An area is eligible for certification as an MSD if it is within the corporate limits or extraterritorial jurisdiction of a municipality with a population of at least 20,000 and an existing public drinking water system supplies drinking water to the area and surrounding properties within ½ mile of the proposed MSD.

If those eligibility criteria are met, an applicant can seek certification of an MSD by:

- (1) Fulfilling TCEQ and municipal notice and application requirements;
- (2) Restricting the use of affected groundwater within the proposed MSD by ordinance or restrictive covenant;
- (3) Obtaining a resolution in support of the ordinance or restrictive covenant from the local municipality, other municipalities within ½-mile of the proposed MSD, and the governing authority for any retail public utility with a groundwater supply well located within five miles of the proposed MSD; and

¹ See Whitten, *Municipal Setting Designations in Texas*, (portions of this article reprinted with permission of The Brownfield News, June 2005)

- (4) If necessary, demonstrating to TCEQ that certification of an MSD would not negatively affect the current and future regional water resource needs or obligations of a municipality, retail public utility, or private well owner.

Upon certification of an MSD, contaminant impacts are subject to less rigorous investigation and cleanup requirements. In essence, investigation and cleanup requirements are governed only by the risk of actual human exposure to affected groundwater (such as through contact during construction or inhalation of contaminants from the groundwater to the surface) and as necessary to protect ecological resources. By eliminating investigation and cleanup standards based on human ingestion risk factors, environmental impacts at MSD properties can be resolved more quickly and less expensively. With faster and less expensive cleanups, contaminated sites more easily attract new capital investment that in turn promotes redevelopment, the creation of more jobs, higher taxable values, and stronger urban cores.

To date, several Texas cities, including Dallas and Fort Worth, have taken steps to support the certification of MSDs. In 2004, Dallas approved the State's first two MSD applications on a pilot project basis. These MSD applications ultimately resulted in TCEQ's certification of MSD Nos. 001 (See Attachment "A") and 002. In January 2005, the City of Fort Worth adopted the State's first procedural ordinance governing the approval and enforcement of MSDs.² The City of Dallas adopted the State's second MSD procedural ordinance in May 2005.³

As the Dallas and Fort Worth MSD programs mature and more Texas cities implement their own MSD programs, MSDs will become an increasingly popular mechanism for facilitating the timely and cost-effective investigation and cleanup of contaminated urban properties. MSDs will succeed because they solve otherwise intractable problems faced by the real estate community.

Real Estate Community Issues

In evaluating the value of MSDs, it is important to consider what the real estate community cares about in evaluating brownfield acquisition and redevelopment opportunities. The primary considerations are:

- (1) Liability Exposure. Real estate owners, lessees, developers, and lenders care about avoiding legal liability for cleanup costs, bodily injury, and property damages related to known and unknown pre-existing pollution conditions, especially when they neither caused nor contributed to such conditions (See Attachment "B").

² www.gsfp.com/areasofspecialfocus/MSD.asp

³ www.gsfp.com/areasofspecialfocus/MSD.asp

- (2) Transaction and Operating Costs. Real estate buyers and developers care about minimizing the added legal, technical, and insurance costs associated with buying, remediating, redeveloping, and operating a brownfield site. In any real estate transaction, it is mandatory that the economics of the deal make sense. The added costs of working with contaminated properties renders many such sites unmarketable.
- (3) Timing. Real estate owners, lessees, developers, and lenders care about how long it takes to resolve the environmental conditions affecting a property. Time is money. Delays that impede planned construction or business activities can result in financial disaster. Uncertainty about timing therefore represents financial risk. Remediation of groundwater contamination is a notoriously lengthy process that involves significant uncertainty as to whether cleanup objectives will ever be met.
- (4) Financing. Real estate owners and developers care about their ability to obtain financing (or re-financing) on reasonable terms and in a reasonable time period. Lenders are often hesitant to finance brownfield sites until the pollution conditions are resolved to the satisfaction of federal and state regulators. Nearly all real estate transactions are leveraged. The inability to obtain financing at acceptable rates can be a non-starter for a prospective real estate transaction involving a contaminated property.
- (5) Future Marketability. Real estate buyers and developers care about their prospects for selling the property at a profit in the future. Every buyer of real estate is a potential future seller of real estate. Brownfield sites can be significantly less marketable than unimpaired properties. Prospective buyers therefore need reasonable assurance that they will be able to cost-effectively remove any impairment to marketability before they are ready to sell the property.
- (6) Uncertainty. Real estate buyers, developers, and lenders care about managing uncertainty. Uncertainty affects all of the above-referenced items and affects the viability of any real estate transaction. The uncertainties associated with contaminated properties often simply exceed the ability of real estate buyers, developers, and lenders to manage the associated risks.

How MSDs Address Real Estate Community Issues

The following outline describes how municipal setting designations address the issues of the real estate community set forth above.

1. *Liability Exposure.*

MSDs reduce legal liability exposure relating to pollution conditions at brownfield sites to an acceptable level in several ways:

- Prospective purchasers and lenders can use MSDs in conjunction with the Voluntary Cleanup Program to obtain a statutory release from liability for cleanup costs under the Texas Solid Waste Disposal Act.

- MSDs reduce potential tort liability for bodily injury by notifying at-risk individuals of contaminated groundwater and/or removing potential human exposure pathways by providing alternative sources of potable water.
- MSDs reduce potential tort liability for property damage to surrounding properties by increasing the levels of contamination deemed by the State of Texas to be protective of human health and the environment.⁴
- MSDs reduce the risk of law suits among neighboring property owners by providing a cost-effective alternative to litigation.
- For the reasons set forth above, environmental insurance is available at a reasonable cost for prospective MSD sites.

2. *Transaction and Operating Costs.*

MSDs reduce costs associated with site investigation and cleanup. In appropriate situations, MSDs can:

- Eliminate the need to fully delineate the groundwater plume.
- Eliminate the need to negotiate off-site access rights for environmental testing.
- Reduce the amount of soil investigation.
- Reduce or eliminate the need for soil remediation.
- Reduce or eliminate need for groundwater remediation.
- Eliminate ongoing periodic groundwater monitoring.

MSDs can also eliminate the need for permanent physical controls (e.g., caps, slurry walls, sheet piling, hydraulic containment wells and interceptor trenches) that might otherwise lead to ongoing, post-closure costs at brownfield sites.

3. *Timing.*

MSDs can accelerate the regulatory closure process with the TCEQ and reduce business and construction delays:

- MSDs can be used to self-implement a Remedy A Standard under the Texas Risk Reduction Program (TRRP). Self-implementation, for example, can eliminate the need to obtain advance TCEQ concurrence for soil response actions that must be performed prior to commencement of site grading and construction. Self-

⁴ See Susan Rainey, Municipal Setting Designations and Tort Liability: Adjacent Property Owners at Risk, 35 St. B. Tex. ENVTL. L.J. 41 (2004).

implementation enables owners and developers to avoid business interruptions and construction delays. Without an MSD, many brownfield sites cannot cost-effectively achieve Remedy Standard A and therefore cannot qualify for self-implementation.

- MSDs can eliminate the need for long-term soil and groundwater treatment and monitoring.

4. *Financing.*

MSDs can significantly enhance the ability to obtain financing for brownfield properties. Experience has shown that commercial lenders are willing to lend on MSD properties prior to regulatory closure, and even prior to certification of the MSD, ***IF THEY ARE COMFORTABLE WITH THE LEGAL-CONSULTING TEAM.***

5. *Marketability.*

MSDs can significantly enhance the ability to market a property for sale or lease in the following ways:

- As noted previously, MSDs enable real estate owners and developers to achieve Remedy Standard A under TRRP (i.e., a closure with no temporary or permanent institutional or physical controls). The finality of a Remedy Standard A closure (especially when joined with a VCP Final Certificate of Completion) reduces uncertainty for prospective buyers and lenders and thereby increases marketability.
- By enabling a Remedy Standard A closure and by involving the city government and local community in the regulatory process, MSDs reduce the unwarranted post-closure stigma sometimes associated with brownfield sites. As a result, MSDs are now being used for single and multi-family residential developments in addition to commercial/industrial sites.
- A VCP certificate of completion obtained using an MSD is far superior to a certificate under the Innocent Owner/Operator Program because a VCP certificate of completion ***RUNS WITH THE LAND*** and is far less susceptible to being reopened by the State in the event of the future discovery of new information (e.g., when a future prospective purchaser identifies a previously unknown onsite source during pre-acquisition due diligence).

6. *Uncertainty.*

MSDs reduce the degree of uncertainty associated with many aspects of brownfield cleanup and redevelopment. For example:

- The technical feasibility of MSD certification and its impact on applicable investigation and cleanup standards can be determined early in the process (e.g., during the pre-acquisition timeframe) at relatively low cost.

- Once the MSD is certified, regulatory closure can be achieved with a much higher degree of certainty as to both timing and cost.
- The availability of affordable environmental insurance on prospective MSDs sites reduces uncertainty regarding potential liability exposures.

The assessment of the political feasibility of an MSD will continue to present varying degrees of uncertainty depending upon a variety of factors, in particular, the location of a property being considered for an MSD. For example, properties in cities which have already adopted procedural ordinances, such as Dallas and Fort Worth, present a high level of certainty that an MSD will be certified. An even greater level of certainty exists for projects in the City of Beaumont. Beaumont has banned potable use of groundwater beneath the entire city and has designated the City of Beaumont as a Municipal Setting Designation (See Attachment "C").

Other Notes

1. MSDs are not just for the private sector.

MSDs are tools not just for the private sector but for municipalities themselves. Several municipalities either in the process or considering seeking MSDs on city-owned properties and areas targeted for large-scale redevelopment.

2. *Consultant Alert!*

As the real estate community becomes aware of the potential advantages of MSDs, it will be incumbent upon the environmental consulting community to inform their clients of the existence and potential benefits of MSDs. Property owners who learn from other sources about the potential of MSDs to accelerate closure of sites undergoing long-term cleanup can be expected to take to task their consultants who are continuing with business as usual (i.e., monitored natural attenuation, pump-and-treat, or bioremediation). Consultants who do not evaluate the advantages of an MSD and advise their clients accordingly risk losing their clients' confidence. Furthermore, for sites that are permanently "stuck" in the VCP, IOP, or corrective action because of groundwater issues, it is incumbent upon consultants to evaluate whether an MSD might facilitate closure.

3. *Get the right team.*

Finally, it is critical that the legal and environmental consulting community understands that a successful MSD project requires a sophisticated team with the appropriate technical, legal, and political expertise. MSD projects must "begin with the end in mind" through an early analysis of the particular situation to determine if an MSD is technically and politically

feasible and, if obtained, whether the MSD would be effective in achieving the desired objectives.

The team must be comprised of environmental consultants fully conversant in how the MSD changes the standards under TRRP and able to discuss technical issues with non-technical people (e.g., at public meetings and city council briefings). The team's lawyers must also be fully conversant with the administrative and political process to obtain an MSD and the legal effects attendant to certification of an MSD. At present, due to the young age of the MSD program, there are very few consulting/legal teams in the State with the experience needed to execute the MSD process from beginning to end.⁵

⁵ The author wishes to thank his colleagues, Greg Rogers and John Slavich, for their input on this article.

ATTACHMENT "A"

Texas Commission on Environmental Quality



Municipal Setting Designation Certificate 001

As provided for in §361.807, Subchapter W, Texas Health and Safety Code (Solid Waste Disposal Act):

I, Glenn Shankle, Executive Director of the Texas Commission on Environmental Quality certify the Municipal Setting Designation for the Goodwill Industries of Dallas, Inc. Property, 2800 North Hampton Road, Dallas, the tract of land described in Exhibit "A". The eligibility requirements of Texas Health and Safety Code §361.803 are satisfied as attested to by the affidavit in Exhibit "B" provided pursuant to Texas Health and Safety Code §361.804(b)(2)(D). This certificate shall continue in effect so long as the institutional control required by Texas Health and Safety Code §361.8065 is maintained in effect.

Any person addressing environmental impacts for a property located in the certified municipal setting designation shall complete any necessary investigation and response action requirements in accordance with Texas Health and Safety Code §361.808, in conjunction with the applicable Texas Commission on Environmental Quality environmental remediation regulation, as modified by Texas Health and Safety Code §361.808.

EXECUTED this 11th day of October, 2004.

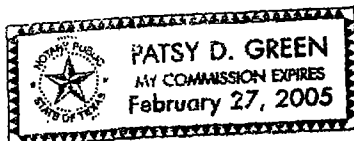
A handwritten signature of Glenn Shankle in black ink.

Glenn Shankle
Executive Director
Texas Commission on Environmental Quality

STATE OF TEXAS
TRAVIS COUNTY

BEFORE ME, on this the 11th day of October, 2004, personally appeared Glenn Shankle, Executive Director of the Texas Commission on Environmental Quality, known to me to be the person whose name is subscribed to the foregoing instrument, and they acknowledged to me that they executed the same for the purposes and in the capacity therein expressed.

GIVEN UNDER MY HAND AND SEAL OF OFFICE, this the 11th day of October, 2004.

A handwritten signature of Patsy D. Green in black ink.
Notary Public in and for the State of Texas

ATTACHMENT "B"

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



**VOLUNTARY CLEANUP PROGRAM
FINAL CERTIFICATE OF COMPLETION**

As provided for in §361.609, Subchapter S, Solid Waste Disposal Act (SWDA), Texas Health and Safety Code.

I, JACK W. CARSTEN, JR., P.G., MANAGER OF THE VOLUNTARY CLEANUP SECTION, TEXAS COMMISSION ON ENVIRONMENTAL QUALITY (TCEQ), CERTIFY UNDER §361.609, SWDA, TEXAS HEALTH AND SAFETY CODE, THAT NECESSARY RESPONSE ACTIONS HAVE BEEN COMPLETED FOR VCP NO. 1669 AS OF MAY 2, 2005 FOR THE TRACT(S) OF LAND DESCRIBED IN EXHIBIT "A". CERTIFICATION IS BASED ON THE AFFIDAVIT OF COMPLETION OF RESPONSE ACTION, EXHIBIT "B", DEED NOTICE, EXHIBIT "C" AND ON ADDITIONAL SITE INFORMATION MAINTAINED IN TCEQ FILES. THE CERTIFICATE IS ISSUED IN RELIANCE ON A MUNICIPAL SETTING DESIGNATION THAT HAS BEEN CERTIFIED BY THE TCEQ UNDER §361.807 OF THE HEALTH AND SAFETY CODE FOR THIS TRACT OF LAND TO PROHIBIT USE OF GROUNDWATER AND THE MUNICIPAL SETTING DESIGNATION CERTIFICATE IS INCLUDED AS EXHIBIT "D". AN APPLICANT WHO ON THE DATE OF APPLICATION SUBMITTAL WAS NOT A RESPONSIBLE PARTY UNDER §361.271 OR §361.275(g) SWDA, AND ALL PERSONS (e.g., FUTURE OWNERS, FUTURE LESSEES, FUTURE OPERATORS AND LENDERS) WHO ON THE DATE OF ISSUANCE OF THIS CERTIFICATE WERE NOT RESPONSIBLE PARTIES UNDER §361.271 OR §361.275(g), SWDA ARE QUALIFIED TO OBTAIN THE PROTECTION FROM LIABILITY PROVIDED BY §361.610, SUBCHAPTER S, SWDA.

EXECUTED this 23 day of May, 2005

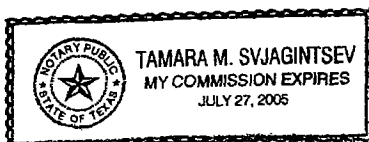
Jack W. Carsten, Jr., P.G., Manager
Voluntary Cleanup Section

STATE OF TEXAS
TRAVIS COUNTY

BEFORE ME, on this the 23rd day of May, personally appeared Jack W. Carsten, Jr., P.G., Manager, Voluntary Cleanup Section of the Texas Commission on Environmental Quality, known to me to be the person and agent of said commission whose name is subscribed to the foregoing instrument, and he acknowledged to me that he executed the same for the purposes and in the capacity therein expressed.

GIVEN UNDER MY HAND AND SEAL OF OFFICE, this the 23rd day of May, 2005

Notary Public in and for the State of Texas



ATTACHMENT "C"

ORDINANCE NO. 05-031

**ENTITLED AN ORDINANCE ESTABLISHING ALL PROPERTIES
WITHIN THE CORPORATE CITY LIMITS OF THE CITY OF
BEAUMONT AS A MUNICIPAL SETTLING DESIGNATION AND
PROHIBITING THE USE OF DESIGNATED GROUNDWATER
FROM BENEATH THIS PROPERTY AS POTABLE WATER.**

**WHEREAS, the City of Beaumont is a municipal corporation of the State of Texas,
with a population of at least 20,000; and**

**WHEREAS, the public drinking water supply system that exists within the corporate
limits of the City of Beaumont, satisfies the requirements of Chapter 341 of the Texas
Health and Safety Code and supplies or is capable of supplying safe and sanitary drinking
water to property within the city limits of the City of Beaumont and to property within one-
half (½) mile of the property within the city limits of the City of Beaumont; and,**

**WHEREAS, the City of Beaumont requires all property owners owning property
within the city which is within 300 feet of a city sanitary sewer or water line to be connected
to the city sanitary sewer or water line; and,**

**WHEREAS, the City desires to establish within its corporate limits a municipal
settling designation for all property located within the city limits and prohibit the use of
designated groundwater from beneath all property within the City of Beaumont as potable
water.**

NOW, THEREFORE, BE IT RESOLVED BY THE

CITY COUNCIL OF THE CITY OF BEAUMONT:

**THAT all property located within the corporate city limits of the City of Beaumont be
established as a municipal settling designation; and,**

BE IT FURTHER ORDAINED that the use of designated ground water from beneath all property within the corporate limits of the City of Beaumont as potable water is hereby prohibited.

PASSED BY THE CITY COUNCIL of the City of Beaumont this the 22nd day of March, 2005.




- Mayor Evelyn M. Lord -

David E. Whitten

Mr. Whitten is a shareholder in the firm of Guida, Slavich & Flores, P.C. His practice focuses in the areas of environmental law, environmental litigation, environmental aspects of real estate transactions, and federal, state and local governmental affairs. He served as a lobbyist before the United States Congress, and previously served as counsel to the Chairman of the Water Resources Subcommittee of the U.S. House of Representatives.

Mr. Whitten received his undergraduate degree (with honors) in 1976 from the University of Texas, and his law degree from the University of Texas in 1979, where he served on the Texas Law Review. He is a member of the American Bar Association, the State Bar of Texas and the Dallas Bar Association.

In October, 2004, Mr. Whitten successfully obtained the first Municipal Setting Designation certified by the State of Texas (MSD Certificate 001), and in May 2005, the first Final Certificate of Completion issued by the State pursuant to an MSD.

BIOGRAPHY NOT SUBMITTED

Historic Contamination: Reporting and Beyond

Keith Hopson, Brown McCarroll, L.L.P.

I. Introduction

This paper briefly discusses the history and current status of historic contamination reporting and analyzes the consequences associated with the discovery and remediation of historic contamination. As most environmental practitioners are aware, there is no statute or regulation clearly addressing the discovery and reporting of historic contamination in Texas. As a result, the environmental practitioner is often left to sort through guidance and precedent that may be neither relevant nor clear to try to answer the numerous questions associated with the common occurrence of discovering historic contamination. This absence of clear statutory and regulatory guidance oftentimes makes it difficult for environmental professionals to properly advise their clients when confronted with the discovery of historic contamination.

II. “Spills” v. “Historic Contamination”

Initially it is important to make the distinction between “spills” and “historic contamination” as the terms are used and/or defined in the law. A “spill” is defined in Texas Water Code § 26.039 as “an act or omission through which waste or other substances are deposited where, unless controlled or removed, they will drain, seep, run, or otherwise enter water in the state.”¹ In other words, a spill is a deposit that occurred in the immediate past, typically with knowledge of the identity and amount of the substance or substances involved. There is clear regulatory guidance on how to treat a spill once it has occurred.² Once a spill has happened, the responsible person³ has a duty to report the spill to the TCEQ regional office for the region in which the spill occurred within 24-hours of the occurrence.⁴ Furthermore, the responsible person is required to immediately abate and contain the spill and also begin reasonable response actions to manage the discharge.⁵ Appropriate response actions at any time following the discharge or spill include use of the Texas Risk Reduction Program (TRRP) rules.⁶

Historic contamination, on the other hand, is not as clearly defined or regulated. While the term “historic contamination” is not statutorily or regulatorily defined, it is generally thought to mean groundwater or soil contamination, the source and genesis of which is typically unknown. Historic contamination is not governed by 30 T.A.C. Chapter 327; in fact, there are no administrative rules in Texas that specifically and directly address the reporting or management of historic contamination. This has led to some confusion as to what historic contamination is and when or if TCEQ should be notified once it is discovered. While there is a general understanding that Texas Water Code § 26.039 mandates that contamination that threatens the waters of the state must be reported, there remains ongoing debate as to whether the Texas Water Code provisions that address discharges and spills also govern historic

¹ The regulatory definition is located at 30 T.A.C. § 327.2(3).

² See 30 T.A.C. Chapter 327.

³ Defined in 30 T.A.C. § 327.2(15).

⁴ 30 T.A.C § 327.3.

⁵ 30 T.A.C. § 327.5.

⁶ See 30 T.A.C. Chapter 350.

contamination.⁷ TCEQ staff tends to take the position that Texas Water Code § 7.155, which describes the offense of a discharge or spill, in addition to Texas Water Code § 26.039, which defines the terms “accidental discharge” and “spill,” are broad enough to govern historic contamination. However, attorneys in private practice sometimes take the position that because the statutes do not clearly define and address historic contamination, they do not apply. This debate has lead to lingering disagreement among environmental practitioners in Texas and the agency staff as to the duty to report historic contamination once it is discovered. However, many attorneys in private practice (this one included) typically take the conservative approach and advise their clients to report such contamination to the agency when it is found (or confirmed to be found) and if the client can be deemed a responsible person for the contamination.

A primary uncertainty relative to historic contamination, as outlined in the *Asarco* and *Fina* cases that are discussed below, focuses on the ramifications subsequent to reporting such a discovery. Remediation of a contaminated site (be it historic contamination or not) can be very costly. Besides incurring the actual cost of cleaning up the site, there remains a concern that the entity reporting the contamination may also be subject to administrative penalties above and beyond the cost of remediation. An analysis of the two Commission decisions in the *Asarco* and *Fina* cases reinforces the need for greater clarity in this area.

III. History of Historic Contamination Policies in Texas

Attempts to define historic contamination in Texas have been going on since at least 1994. However, the TCEQ and its predecessor agencies over the years do not have a very enviable track record when it comes to attempts to clarify this important issue. The following outlines the history of agency attempts to address historic contamination:

- The first regulations addressing historic contamination were proposed on August 9, 1994. Pursuant to the direction of the 72nd Texas Legislature (S.B. 1099), the agency proposed rules to document the location and nature of contamination discovered during routine site assessments and any other investigation that documented contamination on land or in groundwater. In addition, the regulations attempted to define the term “historical contamination”⁸ and allowed 10 days to report the discovery.
- Over a year later, those rules had still not been adopted, and revised “Spill Rules” were proposed on November 17, 1995 (20 Tex. Reg. 9537). The revised Spill Rules eliminated the Aug. 9, 1994 references to historic contamination. While the agency claimed the removal of any reference to historic contamination was because they were duplicative, there is a widely held belief that the attempt to define historic

⁷ These provisions are Texas Water Code §§ 7.155 and 26.039.

⁸ “Historical contamination” was defined as “The presence on land, or in the groundwater, of contamination in the form of oil, hazardous substances, or other substances resulting from discharges or spills the time or origin of which is not known. Historical contamination shall not include any discharge or spill: (A) authorized by a permit issued pursuant to federal law or any other law of the State of Texas; (B) any discharge or spill to which Texas Natural Resource Code, Chapter 40, Subchapter C, D, E, F, or G, applies; (C) any discharge or spill that is regulated solely by the Railroad Commission of Texas; or (D) residual contamination from a discharge or spill that was previously reported to the TNRCC or a predecessor agency.

contamination was pulled down due to the agency's inability to develop a workable definition/regulatory scheme.

- On May 14, 1996 (21 Tex. Reg. 4228), the Chapter 327 Spill Rules were published in the Texas Register.
- November 12, 2000 TCEQ memo, "Coordination of Remediation Activities Related to Emergency Response," was issued as a guidance document for the management of historic releases.
- August 27, 2002 TCEQ memo, "Remediation Division Report Requirements for a Release Investigation," was issued as a guidance document for the management of historic releases.
- May 27, 2003 TCEQ memo, "Coordination of Remediation Activities Related to Emergency Response and Historical Releases," was issued and superceded the November 12, 2000 memo as the authority on historic releases. This guidance became effective June 6, 2003.
- September 10, 2003 TCEQ guidance, "Determining Which Releases are Subject to TRRP," was issued.
- October 21, 2003 TCEQ revised guidance, "Determining Which Releases are Subject to TRRP," was issued and replaced the August 27, 2002 memo and the September 10, 2003 guidance relative to historic contamination. This is the guidance the agency utilizes today.⁹
- November 2003, the TCEQ pulled down the May 27, 2003 memo.

IV. Current Status of Reporting Historic Contamination

As noted above, TCEQ takes the position that historic contamination is currently subject to Texas Water Code §§ 7.155 and 26.039 and to the TCEQ guidance, dated October 21, 2003 titled, "Determining Which Releases are Subject to TRRP." Under this guidance, the discovery of a release or historic contamination is to be reported within 24-hours to the TCEQ's Remediation Division, Corrective Action Section, in Austin by the individual operating, in charge of, or responsible for the activity or facility.

This document has been revised from the September 10, 2003, version to reflect a time period of 60 days (instead of 30 days) from the date of release reporting to complete excavation of affected soil. The report transmitting the excavation results (determination process results) must be submitted to the TCEQ within that expanded 60-day window. At 60 days, the person must either elect to use TRRP without using the screening process, document that the release has passed the screen and therefore is not subject to TRRP, or indicate that the screen failed and the release is subject to TRRP.

⁹ This document can be found at <http://www.tnrcc.state.tx.us/permitting/remed/techsupp/releasesTRRPprev.pdf>.

V. The Consequences of Discovering Historical Contamination

Since 1998, the TCEQ Commissioners have issued two interim orders – in the *Asarco* and *Fina* cases – that address the consequences of reporting and remediating historic contamination in Texas. Unfortunately, because there are numerous distinguishing facts between the two cases and because the agency has yet to hold a work session or propose regulations on this topic, many of the issues surrounding the ramifications of discovering and reporting historic contamination remain unclear. An analysis of the two decisions follows:

A. Petition of the Executive Director v. Asarco Inc.¹⁰

Asarco owned a zinc smelting facility in Corpus Christi that operated from 1942 to 1985.¹¹ Encycle/Texas, Inc. (Encycle), a subsidiary of Asarco, began recycling operations at the site in 1989. In 1994, agency representatives discovered elevated lead levels on vacant lots near the facility site during a widespread sampling effort near several refineries in the Corpus Christi area. The Executive Director never identified Asarco's Corpus Christi facility as the sole source of the contamination (likely based on the location of the contaminated property in a highly industrialized area with older housing with leaded paint). Asarco immediately implemented a blood lead testing program in the neighborhood (no health issues were identified), worked with the agency on an expanded sampling program and the development of appropriate cleanup levels and after agency approval conducted a soil removal program. Asarco also negotiated an Agreed Administrative Order with the agency to address remediation of the contamination. In addition to Asarco bearing the costs of remediating the property, however, agency staff proposed a significant administrative penalty over and above the costs for investigation and remediation. The imposition of the additional administrative penalties lead to the *Asarco* parties' submission of the following certified questions to the Commission:

1. In determining whether administrative penalties (over and above investigation and remediation costs) can or should be assessed, should the TNRCC differentiate between those sites where contamination was deposited by spills, releases, discharges or emissions in violation of then-existing statutory or regulatory requirements and other sites involving historic contamination (i.e., contamination that was not deposited by spills, releases, discharges, or emissions that were in violation of then-existing statutory or regulatory requirements)?
2. If the answer to Question No. 1 is yes, how should the staff treat pending enforcement matters involving historic contamination?

On March 4, 1998, the Commission considered the questions after hearing oral arguments and considering amicus briefs. Its responses to the questions are as follows:

¹⁰ SOAH Docket No. 582-97-1891; TNRCC Docket No. 97-0719-IHW-E.

¹¹ During the portions of the facility's operational life for which permits were required, Asarco had the necessary air and water permits and authorizations issued by state and federal agencies. However, given the dates of the operation of the facility, for the majority of the operational life of the plant (twenty plus years or more), no specific air or water permits or authorizations were required at all.

“1. The Commission has the legal authority to impose administrative penalties against Asarco Incorporated for violations of Texas Water Code Section 26.121 and Commission rule 335.4 based on the Executive Director’s allegations contained in the Executive Director’s Preliminary Report for the period February 1994 to May 1995. This assumes the Executive Director meets its burden of proof at the hearing.

2. The Commission distinguishes between sites where there is contamination and sites where there is historic contamination, and as a matter of policy imposes administrative penalties against a person responsible for a site with historic contamination only when there are extenuating circumstances. ‘Extenuating circumstances’ are, for example, and not limited to, when a person is responsible for contamination and the person does not respond to known contamination at their site or the environs in a reasonably timely fashion given the threat posed to human health and safety.”¹²

This decision is notable because it 1) verifies the Commission’s position that it has the statutory authority to assess an administrative penalty for historic contamination, 2) cites Texas Water Code § 26.121¹³ as the authority for this position, even though the statute doesn’t specifically mention historic contamination, and 3) suggests that the agency (as a matter of policy) will not impose administrative penalties in matters of historic contamination except in “extenuating circumstances.” While the Commission’s order sheds no light on how it reached its conclusions, the following analysis by an agency staff member provides her rationale for the decision:

“The premise of the Executive Director’s argument in *Asarco* is that the presence of contamination constitutes a continuing violation of a prohibition against discharging. The decision in *Asarco* revolved around the idea that, if the contamination is in place when a law prohibiting contamination is enacted, then the continued existence of the contamination is a violation. Thus,

¹² Interim Order of the Texas Natural Resource Conservation Commission, “Concerning the Petition of the Executive Director against Asarco Incorporated, and responding to the Administrative Law Judge’s submission of two certified questions; SOAH Docket No. 582-97-1891; TNRCC Docket No. 97-0791-IHW-E,” (April 3, 1998).

¹³ The relevant portion of that statute is as follows: “(a) Except as authorized by a rule, permit, or order issued by the commission, no person may: (1) discharge sewage, municipal waste, recreational waste, agricultural waste, or industrial waste into or adjacent to any water in the state; (2) discharge other waste into or adjacent to any water in the state which in itself or in conjunction with any other discharge or activity causes, continues to cause, or will cause pollution of any of the water in the state, unless the discharge complies with the person’s: (A) certified water quality management plan approved by the State Soil and Water Conservation Board as provided by Section 201.026, Agriculture Code; or (B) water pollution and abatement plan approved by the commission; or (3) commit any other act or engage in any other activity which in itself or in conjunction with any other discharge or activity causes, continues to cause, or will cause pollution of any of the water in the state, unless the activity is under the jurisdiction of the Parks and Wildlife Department, the General Land Office, the Department of Agriculture, or the Railroad Commission of Texas, in which case this subdivision does not apply. ... (c) No person may cause, suffer, allow, or permit the discharge of any waste or the performance of any activity in violation of this chapter or of any rule, permit, or order of the commission.”

where contamination is deposited in the environment before the existence of prohibitory regulations, but remains unaddressed or unremediated, after the promulgation of state laws prohibiting unauthorized spills, that contamination constitutes a violation of state laws. Thus, even if the contamination is historic in the sense that it was initially deposited into the environment years before the adoption of state regulations, if it is not cleaned up until after the promulgation of statutory prohibitions then it will be subject to the assessment of administrative penalties by the Commission.”¹⁴

This interpretation does not exactly square with the actual language in the interim order in the *Asarco* matter. It may also raise constitutional issues. Perhaps a better summary would be that once historic contamination is discovered, the Commission has legal authority to impose administrative penalties from the time of discovery, but the Commission will not, as a matter of policy, seek administrative penalties over and above the cost of remediation where the responsible party promptly and properly addresses that contamination.

The *Asarco* decision verified that the Commission, based on Texas Water Code § 26.121 and 30 T.A.C. § 335.4, has the authority to impose an administrative penalty on an entity or individual deemed a responsible person for historic contamination from the date the contamination was discovered until the date the site was cleaned up. However, the *Asarco* decision made clear that as a matter of policy, the TCEQ may only impose such penalties for historic contamination when there are “extenuating circumstances” (i.e., where the responsible party fails to timely and properly remediate the contamination). However, the decision from the *Fina* case, discussed below, seems to carry additional implications.

B. Executive Director of the TNRCC v. Fina Oil & Chemical Co. and Fina Pipe Line Co.¹⁵

The subject of the *Fina* proceeding was a four-inch pipeline that was (for most of its life) a gathering line, bringing crude oil from the field to Fina’s Big Spring Refinery from 1938 to 1992. The portion of the pipeline most relevant to the proceeding was west of Coahoma and generally ran north of and parallel to two sets of railroad tracks. At issue in the case was groundwater contamination under two subdivisions that the Executive Director traced to leakage that allegedly occurred at a joint in the pipeline. In the area where the contamination was discovered, the pipeline ran a few inches below the ground. There was an area of staining that an expert at the agency believed was soil stained by leakage at the pipeline joint. This conclusion was disputed by Fina,¹⁶ who in turn argued that operations on the nearby railroad tracks could have contributed to the staining. The investigations by the agency eventually lead to the Executive Director issuing an order in 1998 requesting corrective action of the site be undertaken

¹⁴ Marianne Baker & Steve Morton, “Historic Contamination: The Situation Here is Not What it Seems!,” p. 20-21 (August 1999).

¹⁵ SOAH Docket No. 582-95-1044; TCEQ Docket No. 95-1004-ISW-E.

¹⁶ Fina ultimately prevailed on the issue when the ALJ decided the agency could not meet the burden of proof to connect the alleged pipeline leak with the groundwater contamination. It was subsequently settled for a nominal amount.

by Fina, and assessing an administrative penalty in the amount of \$750,000. The dispute lead to the filing of the following six certified questions:

1. As defined in Section 26.001 of the Texas Water Code and as applied to create liabilities for “discharges” under Section 26.121 of the TWC, does “discharge” include the passive migration of underground contaminants, which can occur after an initial release of waste into the environment?
2. As defined in 30 T.A.C. § 335.1 and as applied to create liability for “disposal,” which causes a “discharge” under 30 T.A.C. § 335.4, does “disposal” include the passive migration of underground contaminants, which can occur after the initial release of waste into the environment?
3. If, in response to Questions Nos. 1 and 2, the Commission determines that “discharge” in Section 26.001 of the TWC and “disposal” in 30 T.A.C. § 335.1 can include the passive migration of underground contaminants, does the Commission then intend that these definitions of “discharge” and “disposal” be applied in such a way as to make it a violation of Section 26.121 of the TWC and 30 T.A.C. § 335.4 to “fail to remediate” without regard to the legality of the initial release or must it be shown that the initial release was a wrongful release under then applicable law(s) to qualify as a “continuing” violation under these provisions?
4. Is a “failure to remediate” more appropriately a matter to be prosecuted as a failure to obey a remediation order of the Commission for which a respondent may be penalized if his failure to obey that order is shown to have been without good cause?
5. If the Commission determines that failing to remediate constitutes a wrongful discharge or disposal in violation of Section 26.121 of the TWC and/or 30 T.A.C. § 335.4, when does the Commission intend that penalties begin to accrue for this failure to remediate violation (1) if no corrective action order has been issued or (2) if only the Executive Director’s Preliminary Report and Petition has been issued, the respondent has requested a hearing, and no final order has yet been issued following the conclusion of the contested hearing?
6. In the absence of allegations being raised under any other legal theory of liability, can the owner of an otherwise useful product, be held strictly liable for remedial work and punitive penalties for violating Section 26.121 of the TWC and 30 T.A.C. § 335.4 if its product leaks from the carrier’s pipeline that is transporting the product? If so, please clarify what applicable provisions of Texas law create such liability based solely on the ownership of material that was a useful product, until it was leaked from the pipeline.

The Commission considered the questions on October 27, 1999 and issued the following responses:

“1) ‘Discharge,’ as defined in Section 26.001 of the Water Code, and as applied to create liabilities under Section 26.121 of the Water Code, is not limited to the initial release of waste, but includes the subsequent movement of underground contaminants.

2) ‘Disposal,’ as defined by Commission Rule 335.1, and as applied to create liabilities under Commission Rule 335.4, is not limited to the initial release of waste, but includes the subsequent movement of underground contaminants.

3) The Commission has the legal authority to impose administrative penalties against Fina Oil and Fina Pipe for violations of Water Code Section 26.121 and Commission Rule 335.4, regardless of the time the contamination was originally released into the environment. The terms “discharge” and “disposal” include the passive migration and seepage of contamination through the soil and groundwater. The initial release is not the only act that constitutes a violation of the statute and the rule.

4) The Commission has the legal authority to hold Fina Oil and Fina Pipe liable under the Water Code Section 26.121 and Commission Rule 335.4 for discharges and disposals of waste without authorization from the Commission. Discharges and disposals of waste are not matters that can only be prosecuted as a failure to obey a remediation order of the Commission. A party remains liable, and may be penalized, from at least the time it was given notice of the contamination until the time that the continued seepage or migration of the waste is abated.

5) The Commission has the legal authority to assess penalties for violations of the Water Code and the rules of the Commission. Penalties may be assessed from at least the time the responsible party was given notice of the violation.

6) The Commission has the legal authority to hold Fina Oil, the owner of refined substance transported in a pipeline, liable for remedial work and administrative penalties, if its product leaked from the carrier’s pipeline, and subsequently seeped through the soil and into groundwater, in violation of Section 26.121 of the Water Code and Commission Rule 335.4.”¹⁷

¹⁷ Interim Order of the Texas Natural Resource Conservation Commission, “Concerning the Petition of the Executive Director against Fina Oil and Chemical Company and Fina Pipe Line Company, and responding to the Administrative Law Judge’s submission of six certified questions; SOAH Docket No. 582-95-1044; TNRCC Docket No. 95-1004-IHW-E,” (Nov. 22, 1999).

In the analysis of the certified questions in the *Fina* case, the ALJ evaluated and attempted to distinguish the facts of the *Asarco* case from those at hand. The ALJ noted that in its interim order in *Asarco*, the Commission distinguished between “contamination” (i.e., contamination from discharges that were violations of then-existing statutory or regulatory provisions) and “historic contamination” (i.e., contamination resulting from discharges which did not violate then-existing laws at the time they occurred) and determined that “as a matter of policy” administrative penalties would be imposed for historic contamination only when there were “extenuating circumstances,” such as when the person responsible for the contamination fails to remediate known contamination within a “reasonably timely fashion given the threat posted to human health and safety.”¹⁸ Perhaps part of the difficulty centered on the fact that *Fina*, unlike *Asarco*, disputed its liability for the contamination at issue. Accordingly, it was left with the Hobson’s choice of remediating the contamination in order to avoid falling on the “extenuating circumstances” side of the line the Commissioners drew in the *Asarco* interim order to avoid administrative penalties or contesting its liability (which it ultimately did successfully). This situation certainly highlights a significant problem with the Commission’s guidance in *Asarco* in any instance where there is a dispute over the underlying responsibility for the contamination at issue.

Notably, in comparing the *Asarco* and *Fina* cases, the ALJ also determined in the following excerpt that the Commission’s intentions in *Asarco* were not entirely clear:

“It is unclear whether the Commission considered penalties for failing to remediate ‘historic’ contamination to result from having ignored an order to remediate, or, if not, what other legal authority created this obligation to remediate past legal releases. Otherwise, one might interpret the *Asarco* interim order as authorizing, albeit only under ‘extenuating circumstances,’ penalties for past legal action because such action is now illegal. However, it remains unclear that in issuing the *Asarco* interim order, the Commission deliberately intended to establish a policy that, upon application, is at odds with the Respondent’s reasonable and legally-sound arguments concerning the generally prospective application of new laws or regulations. Hopefully, answers to the certified questions will clarify the Commission’s intention and policy on this point.”¹⁹

Perhaps the ALJ in the *Fina* matter would not have been as perplexed regarding the implications of the *Asarco* interim order had the Commissioners followed up on their commitment to schedule a work session to consider historic contamination or had they followed up on counsel for Respondent’s suggestion that the whole issue of historic contamination was more appropriately addressed in a rulemaking than in the course of an enforcement action.

An analysis of the *Fina* interim order verifies that in its answers to the certified questions, the Commission intended to extend its authority to impose administrative penalties to include

¹⁸ *Executive Director of the TNRCC v. Fina Oil & Chemical Co. and Fina Pipe Line Co.*, Order No. 20, “Rulings on Motions for Summary Disposition,” SOAH Docket No. 582-95-1044; TCEQ Docket No. 95-1004-ISW-E (Aug. 3, 1999).

¹⁹ *Id.*, at 18.

any violation of Texas Water Code. By interpreting the definitions of “discharge” and “disposal” to include passive migration and seepage, the Commission made clear its determination that such actions constituted continuing violations. It is possible to reconcile *Asarco* and *Fina* given enough details about the specific facts and with the knowledge that Asarco immediately proceeded with remediation and Fina did not.

Analysis of the Commission’s interim order in the *Fina* matter certainly suggest that the Commission has gone on record indicating it has even more broad authority to issue administrative penalties than those it claimed in the *Asarco* matter. There are also numerous key distinctions between the two matters. In *Asarco*, the respondent, although not the only party responsible for the contamination in issue, never claimed it was not a contributor to the contamination in question. That was certainly not the case in *Fina*, where Fina ultimately prevailed on the issue of whether (even if the pipeline leaked) it was responsible for the contamination of concern to the agency. It is likewise difficult to compare the situation where Asarco, by virtue of conceding that it was at least a contributor to the contamination, promptly addressed the situation and Fina, where it contested its liability and accordingly did not promptly proceed with the necessary steps for remediation. Obviously, it is possible to read the actions in *Fina* as being consistent with the *Asarco* order in that one could equate Fina’s actions as falling under the definition of “extenuating circumstances.” Such a reading could, however, fly in the face of certain constitutional rights if one were forced to remediate contamination in order to avoid administrative penalties prior to being able to contest its liability for that contamination.

Knowing the specific facts of the two cases makes them distinguishable and may permit reading the two interim orders issued by the Commission as not being contradictory. The sad, and ultimately more important fact is that if someone wanted to understand the obligations associated with historic contamination, a member of the regulated community would be relegated to locating interim orders and ascertaining the factual differences between these two cases in order to have even a partial understanding of the agency’s position regarding historic contamination.

Interestingly, were one to search the agency website for “historic contamination,” they would only find the entry below:

(Certified Question)

Item 17. SOAH Docket No. 582-97-1891; TNRCC Docket No. 97-0791-IHW-E. Petition of the Executive Director against Asarco, Inc. assessing administrative penalties and requiring certain actions for industrial waste violations pursuant to the Texas Solid Waste Disposal Act, Chapter 361 of the Texas Health and Safety code. The petition also alleges violations pursuant to Chapter 26 of the Texas Water Code and the rules of the Commission. The Commission will consider two questions certified by the Administrative Law Judge pursuant to 30 TAC Section 80.131 that relate to the imposition of administrative

penalties for historic contamination. (Nueces County) (Ray Winter)

That the Commission does have legal authority, but will only oppose [sic] administrative penalties when there are extenuating circumstances in these kind of situations, RM/JB. McBee voted No.

Not only is this terribly incomplete, because the website entry contains a typo, one would even be misled as to the agency's position.²⁰

VI. Conclusion

The landscape of the law with regard to historic contamination is certainly unsettled. The discovery and reporting of historic contamination occurs on a regular basis. Yet, in order to have even a partial picture of the obligations associated with historic contamination one would have to review existing agency guidance and locate (and try to understand) two interim orders issued by the Commission. Attempting to search the TCEQ's website for the phrase "historic contamination" turns up an incorrect summary of the Commissioners' Interim Order in the *Asarco* case and searching for the term "historical contamination" turns up nothing of relevance. In this day, in this State, that seems unacceptable. The regulated community, and the agency staff, deserve to have clear, unambiguous directions from the agency in their dealing with the historic contamination they may encounter in the normal course of their business.

At a minimum, perhaps it's time to consider holding the work session that was discussed seven years ago or establishing a representative work group to address this important issue. Perhaps the best solution of all would be for the agency staff to formally propose regulations and permit interested parties to review and comment on such a proposal. Such an undertaking may not be easy, but that does not detract from the need for such action.

²⁰ Search of the agency's website for "historical contamination" turns up only seven entries of little to no relevance to this issue.

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Electronic Discovery: Legal Issues and Practical Challenges

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Introduction.

The electronic revolution has changed the way business is done. In the past, hard copies of paper documents occupied large physical spaces and represented a significant part of the discovery process. Today, in contrast, almost all business communication is conducted electronically from word processing programs to internal and external e-mail accounts. Researchers at the University of California at Berkeley announced that 93% of all information created during 1999 was generated in digital form, on computers of some sort.¹ That means that only 7% was generated using other media, like paper, phonograph records, clay tablets or smoke signals.²

This generation of communication has created new efficiency and effectiveness of business management in many respects. The increased presence of technology in the workplace, however, has also required significant changes in the way litigation, and specifically discovery, is handled. Adapting to these changes, litigants face an ever-changing arena referred to as electronic discovery, which can be a veritable treasure trove or minefield depending on the level of preparation taken by the client and the client's counsel prior to the arrival of any legal dispute.

The limited number of overarching rules to govern electronic discovery frequently leads to unique burdens for parties seeking to comply with a request for electronic data. Electronic discovery can be expensive, difficult, time-consuming, and sometimes fatal to the underlying case — typically not results that satisfy clients.

Given these issues, should *you* be concerned about electronic evidence? Consider this: one in 20 companies have battled a workplace lawsuit triggered by email, and 14 percent of companies have been ordered by a court or regulatory body to produce employee email.³ Even if you have not been asked to produce electronic documents to date, learning about electronic discovery now can be very beneficial when you do receive your first request for electronic data, and it can lessen your risk of sanctions due to a lack of understanding with regards to the preservation of electronic evidence. This paper outlines some of the major issues and considerations for lawyers involved in the electronic discovery process.

Electronic Documents and Good Old Fashioned Discovery

Both the Texas and Federal Rules of Civil Procedure, as well as case law interpreting the rules, already recognize an obligation to produce electronic data responsive to requests for production (even prior to the recent proposed amendments to the Federal Rules).⁴ Texas Rule of Civil Procedure 196.4 specifically addresses the duties of the requesting and responding parties regarding the production of electronic or magnetic data. Under that rule, the requesting party “must specifically request production of electronic or magnetic data and specify the form in which the requesting party wants it produced.”⁵ If the responding party cannot produce the

¹ Kenneth J. Withers, Federal Judicial Center, *Electronic Discovery* (presentation at National Workshop for U.S. Magistrate Judges, June 12, 2002).

² *Id.*

³ American Management Association, 2003.

⁴ Many of these issues are discussed well in Tammy Wavle Shea, *Discovery of Electronic Information*, 40 HOUS. LAW. 29, 30 (Jan/Feb. 2003).

⁵ TEX. R. CIV. P. 196.4.

material in the form requested after expending reasonable efforts, the party must state an objection in compliance with the terms of the rules.⁶ If the court orders the responding party to comply with the request, the court must also order that the requesting party pay the reasonable expenses of any extraordinary steps required to retrieve and produce the information.

In federal court, Federal Rule of Civil Procedure 34 requires production of electronic data in “reasonably usable form.” This rule allows a request for production of “other data compilations from which information can be obtained, translated, if necessary, by the respondent through detective devices into reasonably usable form . . . [.]”⁷

Both Texas and federal courts mandate parties produce data in electronic form, even after the information has already been produced in “paper” form.⁸ For example, in *City of Dallas v. Ormsby*, the Amarillo Court of Appeals upheld a trial court’s sanctions for failure to produce data contained in computer records.⁹ The plaintiff requested documents concerning a roadway where a fatal accident had occurred, but the city argued it did not withhold documents because it supplied the information as a memorandum rather than a computer printout.¹⁰ The court disagreed, and compelled the production of the electronic version of the information.¹¹

The Amarillo court first recognized that documents to be produced as they are kept in the usual course of business.¹² The court then held that the rules of civil procedure made clear that the term “documents” includes data compilations from which information can be obtained and translated.¹³ Therefore, the court found a duty to produce such electronic data in electronic form and held the failure to do so was sanctionable.¹⁴ More recently, the fight over form of production is focused on cost issues. Interestingly, several companies now find it easier to produce electronic data electronically.

Electronic Discovery Process

In August 2004, the Federal Rules of Civil Procedure Advisory Committee proposed significant changes to the Federal Rules with regards to discovery of electronically stored information.¹⁵ These proposals include amendments to Rules 16, 26, 33, 34, 37, and 45, along with a related amendment of Form 35. The Standing Committee on the Federal Rules approved these amendments in June 2006, and they are slated to take effect by December 2006.

⁶ *Id.*

⁷ FED. R. CIV. P. 34.

⁸ This will be particularly true after the new Federal Rules take effect.

⁹ *City of Dallas v. Ormsby*, 904 S.W.2d 707, 712 (Tex. App.—Amarillo 1995, writ denied).

¹⁰ *Id.* at 710-11.

¹¹ *Id.* at 710-11.

¹² *Id.* at 710.

¹³ *Id.* at 711.

¹⁴ *Id.*

¹⁵ Eight jurisdictions have adopted rules to govern electronic discovery: Mississippi Court Order 13 (May 29, 2003) amending Mississippi Rule of Civil Procedure 26, Texas (TEX.R.CIV.P. 193.3(d) and Rule 196.4), District of Arkansas, Eastern and Western, Local Rule 26.1 , District of Delaware, Default Standards for Discovery of Electronic Documents , District of Kansas, Electronic Discovery Guidelines, District of New Jersey, Local Rule 26.1 , and District of Wyoming, Local Rule 26.1. Some of these rules will survive the adoption of the new overarching rules, so they are worth a review if counsel has a case pending in one of those jurisdiction.

The new provisions include:

- **Early Discussion of E-Discovery Issues: Rule 16(b), Rule 26(f), & Form 35.** The proposed rules amend Rules 26(f) and 16(b) as well as Form 35 to prompt counsel to discuss early on how to handle e-discovery issues. This will necessitate additional or more extensive interaction with opposing counsel at an earlier point in the case. The question is whether – even before the scheduling conference – are these concerns being raised too late?
- **Definition of Electronically Stored Information. Rule 34(a).** Revised Rule 34 indicates that electronically stored information is subject to production and discovery. This is not a significant change.
- **Form of Production: Rule 34(b).** The revised Rules allow requesting parties to specify production format, but the rules do not direct counsel to pick one production format over another. The key point here is to determine the form of production early.
- **Option to Produce Electronically Stored Information in Response to Interrogatories: Rule 33(d).** Under the new Rule 33, the responding party is allowed to produce electronic data when responding to interrogatories as long as the requesting party is able to locate and identify the information as easily as the responding party. Again, this is not a significant change.
- **Reasonably Accessible Information: Rule 26(b)(2)(C).** This change requires the requesting party to obtain a court order compelling the responding party to produce the information that is not “reasonably accessible.” This has the potential to be a key battleground issue in the future.
- **Belated Assertion of Privilege: Rule 26(b)(5)(B).** A party who unintentionally disclosed privileged information may get it back from the receiving party unless the receiving party can prove it is entitled to the information. This issue is one of the key battlegrounds in this area.
- **Safe Harbor on Sanctions: Rule 37(f).** The safe harbor provision prevents judicial sanctions for failing to hand over electronically-stored information if the information was destroyed during the “good faith” routine use of a computer system.

The Safe Harbor rule merits further discussion. An earlier version of this rule contained language protecting parties if the party took reasonable steps to preserve the information. This language was deleted in favor of the “good faith” language that is now present in the rule. In either formulation, there is an attempt to prevent litigation from being used to paralyze a company’s operations. However, a likely response will be motions seeking preservation orders, thereby eliminating the protections of these provisions. Therefore, attorneys representing corporate interests should exercise extreme caution with regard to these orders as the choice of words can easily create six or seven figure obligations.

Another issue with these new rules is the challenge of defining “reasonable” preservation steps. It is common knowledge that data is regularly destroyed through automatic processes, and merely opening a document or booting a computer can alter files and metadata. As such, corporations and law firms should be concerned that they cannot act quickly enough to preserve data and avoid allegations of spoliation.¹⁶ Essentially, the failure to understand this can be extremely costly.

The proposed change known as the “two-tier” approach is also important. This revision states that a party need not provide discovery of electronically stored information that the party identifies as not “reasonably accessible.” Unfortunately, “reasonable accessibility” is not defined, nor should it be because its meaning will change over time. The danger is that parties may try to describe data as inaccessible when it is merely inconvenient to produce. Worse, some parties may intentionally make information less accessible, or, at a minimum, they will be accused of that. Further, some data that is considered accessible could cost more to produce than inaccessible data, depending on the type of data, software used, or method of storage. Several of these points were raised in Dallas, so the rules may change, but, at this point, it is not clear.

Reacting Electronically.

So what do you do if you receive a request to produce electronic data? How do you protect yourself, or your client in the case of outside counsel, from committing spoliation by unintentionally erasing electronic evidence relevant to the case? Below is a step-by-step guide to help you navigate the challenges of electronic discovery and provide tips to make the process more manageable.

Familiarity breeds consent.

A good first step takes place before anything actually even begins. By understanding the structure of the client’s organization, attorneys can take the first step toward identifying relevant electronic data and the sources. This means meeting with the client’s IT staff and its personnel so that, when the need arises, the client can immediately begin to preserve data. At a minimum, this meeting should cover: the computer systems in use, the document retention program in place, relevant legacy problems, the nature of any encrypted data, and the physical location of any potentially discoverable data.¹⁷ One of the bigger challenges may be “buy in” from the corporate management, but given the increased technological sophistication of the workplace, this task should be easier today than in the past.

Understanding Your Data

Unfortunately, most times, the attorneys are not called in until litigation has already started. At that point, the client’s in-house attorneys, other outside counsel, IT staff, and key employees, are all critical in locating relevant electronic data. That said, relying solely on the IT staff may be a

¹⁶ Spoliation is discussed further below.

¹⁷ The real first step is even understanding the vocabulary of electronic discovery. For example, “legacy data” is data which is read by systems no longer in use by the client in question, such as WordStar or Lotus 1-2-3. This data might be relevant, but hard to access.

mistake. The basic function of the IT department is to make sure that nothing is lost. It is not to make sure that only necessary things are kept – which is the goal of a document retention program. As part of an attorney’s role in this process, the attorney should be asking:

- How to implement strategic e-discovery plans, including identifying, locating, retrieving, preserving and authenticating electronic evidence;
- What is the most cost-effective means for responding to discovery requests, with requests with minimum disruption; and
- What are the special considerations for the responses and objections to interrogatories and requests for production.

Given these challenges, it is often advisable to hire an expert on these types of issues at a very early stage.

Ignoring systems that are antiquated, damaged or burdensome to be searched for responsive documents and email may also put you in hot water with the courts.¹⁸ There are a number of experts that are well-equipped and professionally trained to work with these types of systems so don’t assume that you can use the seemingly inaccessible nature of the data as a defense. The important thing to do is get involved with experts early to determine what can and can not be done with your data and systems.

The amount of data that is potentially relevant is often underestimated at the start of discovery projects, especially by those who have little or no prior experience with electronic evidence. Employees create more electronic information than you think. Keep in mind, if the Court issues an order directing retrieval, or worse yet, the opposing party happens to have email from that individual and those records were not produced, it could give the appearance of impropriety and may lead to sanctions. **It is critical that practitioners understand these nuances before agreeing to any protective orders or production schedules. The cost ramifications can be significant.**

It is critical to understand where relevant data is stored and how much data is at issue. Even before a lawsuit involving electronic data is commenced, in-house and outside counsel should understand how their company’s information systems are set up, and what procedures are in place to store – and destroy – electronic data.

¹⁸ One particular type of media that warrants additional discussion is backup tapes, which were designed for recovering information in the event of a disaster, not for litigation purposes. As a result, data is not organized in a document production-friendly manner. In fact, email, accounting, word processing documents, and databases information are often commingled on the same tapes making it more difficult to locate the key documents you are looking for. Another aspect of backup tapes that makes them a significant challenge with regards to litigation is that these tapes are generally rotated every 30, 60, or 90 days. Failure to halt these policies immediately on anticipation of litigation will result in lost data and subject the company to potential spoliation sanctions. See *E*Trade Sec. LLC v. Deutsche Bank AG*, 2005 U.S. District LEXIS 3021 (D. Minn. Feb. 17, 2005) (noting that the failure to preserve DVDs containing voicemail and backup tapes warranted sanctions).

It is important to emphasize the difference between electronic data and paper documents.¹⁹ Unlike shredding or burning a paper document, using the “delete” key does not necessarily discard an electronic document. The electronic document is likely to reside in various locations. Additionally, embedded information called metadata is contained in electronic documents. The metadata does not appear on paper documents or on the computer screen. It allows an expert to determine what edits were made to the documents, how many versions are in existence, and the date and time of creation.²⁰

Also, a significant difference between discovery of paper documents and discovery of electronic documents is the organization of each. The process by which team members organize paper documents differs from the organization process involving electronic documents. Since electronic documents can be searched by name, key phrase, or date, one has the ability to organize the document review chronologically, by sender, or by conversation topic. The headache of sorting through documents as they appear in a pile is somewhat eliminated.

That said, electronic documents are not always easier to sort than paper. A common dilemma one may encounter is legacy data. Legacy data cannot be read by the software used to review the documents. This problem occurs because of the IT staff’s tendency to often upgrade or replace software. The software that can read the older documents may not be available immediately.

In sum, gone are the days when paper documents were found only in someone’s office or briefcase. Today it is not uncommon for individuals to secretly carry around slim thumb or lipstick drives – which, despite their small sizes, can hold hundreds of thousands of pages of data. In the much publicized Kobe Bryant case, District Judge Terry Ruckriegle ordered AT&T to turn over text messages that were sent from the cell phone of the woman who accused Bryant of rape and that might be “highly relevant” in determining whether Bryant is guilty. As these situations demonstrate, data can be found in many different places today and on an increasing number of devices. The most common locations are desktop and laptop computers, network hard drives, removable media (floppy disks, tapes, CD-ROMs, thumb or lipstick drives), back-up tapes, personal digital assistants and cell phones. Third parties, such as Internet service providers, may also be in possession of data.

Types and Amount of Data

Determining what type(s) of data you will be producing – and how you will produce them – is imperative. Are you only producing emails, word processing documents, spreadsheets, database information, or a combination of these types of data? Once you know this, you will need to determine what packages and versions of software were used in creating this data. For example, is the email Microsoft Outlook, Lotus Notes, Groupwise, etc. The type of data can have bearing

¹⁹ See Robert A. Creamer, *Ethics and Lawyer Liability Issues in Electronic Discovery* (May 13, 2005) at 1-2.(on file with author).

²⁰ In March 2005, the New York Times reported that the BTK was caught, in part, because of metadata on a disk he had delivered to a local television station. The police used the disk to track BTK to a local church, and to Dennis Rader, president of the church council, who had recently used the computer. Monica Davey, *Computer Disk Led To Arrest In Killings, Pastor Says*, NEW YORK TIMES, March 2, 2005, at A 12.

on exactly what can be done with the data in the filtering and processing stages, and not all e-discovery vendors have the capabilities to work with all software packages and versions.

The amount of data that is potentially relevant is often underestimated at the outset of electronic discovery projects, especially by those who have little or no prior experience with electronic evidence. There are a few reasons for this. First, employees create more electronic information than you think. And second, because people assume that “e-phobic” individuals are not using their computers when in fact their assistants are retrieving and responding to email on their behalf. Keep in mind, if the Court issues an order directing retrieval, or worse yet, the opposing party happens to have email from that individual and those records were not produced, it could give the appearance of impropriety and may lead to sanctions. If you do not have an understanding of how much data you are working with e-discovery experts can help you estimate page counts based on their experiences if certain information such as the number of custodians (the persons, places or things from which the data was derived) and the type of media is known.

If you choose to work with an outside e-discovery expert, it is extremely helpful to provide them with certain information during early discussions:

- On what media will the data be provided (*i.e.*, PSTs on CDs, word processing documents on a hard drive, etc.)?
- How many pieces of media is the data contained on?
- Do you know how much data (often measured in gigabytes) is on each piece of media?
- Which email package(s) and what version(s) were used?
- What is the make and model of the drives used to create the backup tapes?
- What is the type and version of the backup software?
- When will the data be available for your expert to begin?
- What are your deadlines for review and production?

Providing this type of information as early in the process as possible will allow you and your expert time to determine if there will be any problems with regards to issues such as restoring the back up tapes, working with certain email packages or other applications, or processing and turning around your data in a timeframe that meets your deadlines.

Data Collection

Not many years ago, the destruction of documents meant simply throwing them in the trash or running them through a shredder. Today, the question of whether a document was destroyed or tampered with demands more consideration. Computer users destroy and alter electronic data every day, and often without knowledge. Simply turning on a computer can overwrite documents such as those in “slack” and “temporary” files. And just clicking on a file can change the documents metadata (data about the data) such as the “last-accessed” date.

So how can you avoid spoliation issues when data may be relevant to a lawsuit? Best practices dictate that you immediately make a copy of relevant data using mirror-imaging technology and halt electronic document-destruction processes such as the recycling of backup tapes. Mirror imaging creates a copy of every sector in the computers hard drive. This is very different from

simply copying every file, which may result in alterations such as those listed above. While many internal IT departments are familiar with mirror imaging technology, e-discovery experts can also assist you in securing this data and explaining what actions could potentially cause spoliation. An added benefit of working with an outside expert to perform mirror imaging services is that you have independence in the process, lessening the chance of any questions of impropriety.

Those of us who breathe this stuff every day know that mistakes made at the start can be very difficult (**read: expensive**) to fix later. The following pointers are adapted from an article in Kroll OnTrack's monthly newsletter.²¹ Each project (and its incumbent challenges) will differ, but this list is a solid beginning as to the concerns practitioners might face and pitfalls they should avoid:

1. **Failing to Have a Data Collection Plan.** Having an initial data collection "plan of attack" is vital in every electronic discovery situation.
2. **Failing to Prioritize the Data.** Clearly defining the collection scope and priority of key players will avoid creating unnecessary delays and increased costs down the road.
3. **Neglecting to Conduct Thorough Interviews.** Counsel must make it a priority to thoroughly interview the IT team regarding the client's IT systems.
4. **Ignoring Key Data Locations & Important File Types.** Often, it can be difficult to ascertain where electronic evidence is held.
5. **Conducting Do-It-Yourself Data Collection.** Many software products allow a client to collect data themselves. This is unfortunately the fastest way to create significant problems for the client several months later, when the problems can no longer be fixed.
6. **Performing Dangerous Desk-side Collection.** See comments with 5 above. In the sanctions cases discussed in the Shook, Hardy E-Discovery Newsletter attached to this paper, this is a common theme.
7. **Failing to Mirror Image v. Imaging Excessively.** Remember that this area of the law is new and, to some extent, untested. Unfortunately, the person grading performance does so two years after the acts were completed, but with proper documentation, clients can achieve good results.²²
8. **Limiting Names.** When collecting data, consider alternative names, including maiden anames, initials, nicknames, email addresses, and everything else. I have learned this the hard way.

²¹ Kroll OnTrack, *Practice Points: Top 10 Data Collection Pitfalls*, CASELAW UPDATE AND E-DISCOVERY NEWS, April 2005 (found at <http://www.krollontrack.com/newsletters/clu/apr05.pdf>).

²² See *Galvin v. Gillette Co.*, 2005 WL 1476895 (Mass. Super. May 19, 2005) (Court holds that emails need not be produced where Gillette demonstrated that compliance would be "daunting" and nearly impossible).

9. **Assuming IT Can Shoulder the Burden Alone.** Kroll notes that IT does not always understand how to best handle data subject to legal discovery. I could not agree more.
10. **Filing to Maintain Proper Chain of Custody.** Proper documentation includes indicating where the media has been, whose possession it has been in, and the reason for that possession. If you do this wrong, you might not be able to fix it.

When hiring an outside expert to perform your data collection, you will need to provide them with information about what they should expect onsite:

- Where, and in how many locations, is the data stored?
- When will the collection take place?
- What types of hardware, operating systems and software are involved?
- How many drives are going to be imaged?

Filtering

Not every electronic document found on a custodian's computer or on backup tapes is responsive or relevant to a discovery request. Therefore, data filtering is a must. In fact, there is a cost to handling too many documents. Most e-vendors will charge by the document or page (although they vary on when in the process the cost is assessed). Also, the more documents you do not eliminate through some other measure, the more time your people will spend reviewing documents. This cost is not one to be underestimated.

If the amount of data collected in the steps above brings up questions like, how are we going to review and produce all of this data by our discovery deadline, don't panic. One of the characteristics of electronic data that can make your life easier is the ability to filter your documents. Filtering techniques extract documents based on specific dates, custodians, keyword searches, and file types, and also offer de-duplication options so that you do not have to review the same document twice. Effective filtering parameters can reduce your data by an average of 75 percent, which often results in significant cost savings through lower processing costs and more efficient document review.

When you get to the filtering stage, you will need to make several decisions:

- What dates are relevant to your lawsuit?
- How many custodians' data do you need to review? This will have a significant impact on the amount of data you will be reviewing. Do you have a priority for which custodians' data you want to review first? Where there is a long list of custodians you may want to prioritize, review documents from a subset of custodians first, and then determine whether you will still need to process and review the data from the additional custodians.
- As discussed above, what file types do you want processed? Are there any you would like excluded, such as graphic or database files?
- Will you be searching for keywords? If so, you will need to create your list of keywords before the filtering stage begins. A list of keywords that is between 30 and 50 terms is

recommended to find potentially relevant information while not being over inclusive of irrelevant data. Some other suggestions when creating key words are to use “whole words” instead of the first few letters of a word which will likely take hits on irrelevant words. Avoid noise words (such as “the,” “it,” “a,” “an”), initials and acronyms if possible. Use Boolean searches, such as “and,” “or,” “not,” to help broaden or narrow your search.

- Do you want your electronic discovery expert to tag unusually large files so that you can review them in their original native format before processing them for review?
- Do you want to de-duplicate your documents? At the custodian or universe level? During the de-duplication process every file is analyzed at the bit level to determine exact duplicates.

The answers to these questions are not self explanatory. This is more than picking a list of interesting people. It is developing an overlay of which custodians need which set of keywords and at what time. The important piece is that this work needs to be done early in the case, before any of the documents is reviewed.

This paradox is at the core of electronic discovery. In many cases, litigants will know all of the keywords and the relevant time frames. The problem is cases often take unexpected turns. Some are explicit through amended pleadings, some are less direct. When this happens in paper-intensive cases, the solution is to return to the company’s files. In cases which have electronic documents, there is spoliation and increased costs.

Just eliminating documents during the filtering stage can result in an average of 20 to 50 percent reduction of data. If you choose to use your electronic discovery vendor’s online review tool to review your documents you will only need to review one instance of a duplicated document, and may have the choice to repopulate your duplicates for production, depending on the technology capabilities of the expert. Adequate handling of electronic duplications can decrease the costs associated with discovery and can provide insight into issues such as privilege, prior negotiations, and other background information.²³

Bringing in additional troops: the outside e-vendor

Given these challenges, it is often advisable to hire an expert on these types of issues at a very early stage. If you choose to work with an outside e-discovery expert, it is extremely helpful to provide them with certain information during early discussions:

- On what media will the data be provided (*i.e.*, PSTs on CDs, word processing documents on a hard drive, etc.)?
- How many pieces of media is the data contained on?
- Do you know how much data (often measured in gigabytes) is on each piece of media?
- Which email package(s) and what version(s) were used?
- What is the make and model of the drives used to create the backup tapes?
- What is the type and version of the backup software?

²³ Stephanie Sabatini, *The Dilemma of Duplicates* (January 15, 2004), available at <http://www.law.com>.

- When will the data be available for your expert to begin?
- What are your deadlines for review and production?

Learning this type of information as early in the process as possible will allow you (and your expert) time to determine if there will be any problems with regards to issues such as restoring the back up tapes, working with certain email packages or other applications, or processing and turning around your data in a timeframe that meets your deadlines.

Processing

A common debate with regards to the electronic discovery process is whether documents should be kept in their native file format, which is the format in which the documents were created, such as MS Word, MS Excel, etc., or whether they should be converted to a uniform format, such as .tiff or .pdf. This decision should be made at the outset of the electronic discovery process as it impacts almost all of the other steps. There are advantages and disadvantages to both native review and converted file review, which will not be discussed, here, but it is important to evaluate these factors before deciding how you would like to review your data.

If you choose to convert your documents they will be converted to .tiff or .pdf, and at that point you will have the choice to review your documents from a CD or DVD, in a litigation support database, such as Summation or Concordance, or via an online review tool, which is a Web-based tool in which your electronic discovery provider loads your documents so that you can view your documents online and perform review functions such as categorizing, redacting, and searching.

Presently, the online document repository has become much more common as a way to review large numbers of documents. There are several reasons for this:

- It is easy to share documents between lawyers and law offices.
- It is easier for lawyers to work on the same set of documents and make notes for the other lawyers to find.
- It allows lawyers to access documents from any location.
- Documents are less likely to be overlooked.
- It is easier to track the team's progress, if you choose the right e-vendor. This is also true for categorizing the documents.

Furthermore, an electronic document repository can be used as the manner of production. In other words, once the review of documents is complete, the attorneys can merely transfer the production set to a database established especially for opposing counsel. There should be a discussion as to who should pay for this database.

While there is a lot to consider when evaluating and producing electronic data, understanding the process upfront can result in significant savings in terms of cost and time. It may also obviate the possibility of sanctions due to the inadvertent destruction of data.

Finding the right online repository

When selecting an online repository, there are several questions that you should ask. There are several levels of e-discovery providers, and each of their systems have slightly different capabilities. These questions will help with the differentiation.²⁴

1. **Speed** – These days, almost every provider takes advantage of high speed connections. If you do not have one, you need to discuss this explicitly with the vendor in question – or you will spend a lot of time waiting in the future. That said, some providers download the documents directly to your PC; and some of those download one page at a time. On the other hand, some have you log into a secure server that they control. You need to ask, and see a demonstration. No system is perfect, but you need to understand what you are getting.
2. **Security** – This series of questions encompasses several issues. The reviews should be able to categorize, but not change documents. This is true regardless of how the documents are being maintained (tiff, PDF, or native format). The system must also be secure from outside attack. The level of protection needed will vary from case to case. In some cases, the attorneys will want to discuss this more fully with the vendor.
3. **Ease of Use and Functionality** – The only way to evaluate this is the test drive. Be sure to include actual review in the testing group. Many of the e-vendors systems look a lot like Outlook, so the basic use should not be a challenge. The second order functions worth asking about are how easy is it to transfer a collection of documents, can reviewers communicate about documents easily within the system, how easy is it to print, how can notes be taken about specific documents, how do reviewers create privilege logs, how documents are tracked.
4. **Avoiding Multiple User Abuse** – A review of electronic documents will probably involve a large number of reviewers. The handling of multiple reviewers must be seamless. It may be preferable to have the system lock out reviewers once one is reviewing a document. The logging system discussed below is an important part of this too.
5. **Self Administration** – Here the bottom line is you will want to be in control. Waiting for an admin at the e-vendor to make any change for you is just not efficient. Keep in mind that not everyone is working in your time zone. There are degrees of this, but you will want some autonomy. Among the key functionality you may want to control are adding new reviewers, modifying reviewer profiles, and assigning data sets.

²⁴ This list is based on the factors contained in Lange, Michele C.S. “E is for Evidence: Using an Online Repository to Review and Produce Electronic Data,” originally published in Journal of Internet Law June 2003 and available at <http://www.krollontrack.com/>.

6. **No special software** – You will probably want to have a system that you can use from anywhere or any computer. Today's firms are not always receptive to having individuals install software on PCs, so the need for additional installs should be avoided. This is not to say that security is not a concern, but focusing on this will hopefully lead to great flexibility and efficiency.
7. **Organizational Parameters** – With any large document review, the attorneys will need to capture the information gleaned from the review. Critical to this is the way in which the repository is organized and can be managed. At a minimum, there should be an extensive foldering function and the ability to tag and make comments on individual documents. It is also helpful if at least some reviewers can mass-categorize.
8. **Searching Functions and Logging Changes to the Classifications** – This is another aspect that you can only understand with a proper test drive. You will need to review to understand how the review is progressing, to prepare for depositions and other discovery. You will also need to be able to determine who has modified documents and sometimes when.
9. **Output** – This is important from a timing point of view. You will be making arrangements with opposing counsel as to when documents will be produced, but before that you will need to fully understand how long it takes, what formats are possible, and how the e-vendor will capture the exact set of documents to be produced. These are not small issues. You should also ensure that some subset of the review database can be moved into a production database if needed.
10. **Privilege Searching and Log Creation** – Any collection of documents will have privileged documents among them. Most e-vendors have a method for identifying those documents and isolating them from the other documents (which will be produced). Given the inevitable problem of inadvertent disclosure, the attorneys need to reach a high comfort level on this issue.
11. **Coordination with Paper Documents.** Depending on the review, you have also have a significant number of paper documents as well. Some online repositories allow for the upload of these types of documents. Others do not. If you do upload them, these documents will not have metadata, unless you put it there. This is an additional expense to be considered.

Dealing with a Production Team.

Regardless of size, an electronic discovery production team needs to be coordinated. There is substantial non-substantive training that will often be required and for a complicated case, refresher courses are probably a good idea as well. The key is to keep the communication lines open. This can be done through several mechanisms, including regular calls or meetings with:

1. **The review team.** These meetings would initially start on substance – making sure that the documents being reviewed by different people get marked the same

way. As time goes on, these meetings would become the best way for the team leaders to assess how the review is going and the best use of resources. At some point, the need for these meetings might decrease.

2. **The e-vendor.** These meetings would initially involve getting all the information to the e-vendor. Then, the topic would become getting all of the information properly loaded, and finally, the topic would migrate to technical issues related to the review and the production. These meetings are essential to the proper scheduling of production and meeting deadlines, particularly if the review involves several different firms.
3. **The client.** Shocking. These meetings would initially involve collection issues, but because the costs can be so prohibitive, these meetings would provide a vehicle to keep the client onboard with the process. Additionally, if the review needs to expand, this allows the outside lawyer to warn the client as early as possible.

While it is possible to combine these meetings, it is not always the most efficient use of time.

Privilege. Privilege. Privilege.

Maintaining privilege must be at the core of the entire production process. As one might expect, there are nuances with privilege and electronic data. For example, a court recently ruled that an employee's use of the employer's e-mail system for privileged communication with his personal attorney does not necessarily constitute waiver in a bankruptcy adversarial proceeding.²⁵ Courts have recognized that emails are often internally forwarded and this does not result in waiver of the privilege.²⁶ In *Premiere Digital Access*, an email from in-house counsel had been forwarded to other employees and produced from those employee's in-boxes. This was not discovered for a year.²⁷ The Court held that this production was inadvertent and did not waive the privilege.²⁸

Given the volume of production, there must a protocol from the outset to minimize the number of privileged documents that are inadvertently produced. Disclosure could result in waiver of privilege for that document or worse still, a waiver of privilege for that document and other documents on the same subject. The easiest way to handle this is come to an agreement as to inadvertently produced documents from early in the litigation.

The methodology used to identify (and screen) those potentially privileged documents should be another subject of extensive discussion with your e-vendor.

And then there is the privilege log. Privilege logs in the e-discovery universe can be very large – several thousand entries is not unusual. As such, it is often difficult to produce privilege logs. In

²⁵ *In re Asia Global Crossing Ltd*, 322 B.R. 247 (S.D.N.Y Mar. 25, 2005).

²⁶ *Premiere Digital Access, Inc. v. Central Telephone Co., d/b/a Sprint of Nevada*, 360 F.Supp.2d 1168 (D. Nev. Feb. 22, 2005).

²⁷ *Id.*

²⁸ *Id.*

jurisdictions where privilege logs must be produced simultaneously with the unprivileged documents, attorneys would be well advised to negotiate a several week delay (if not several months) before any privilege log is due.

Also, in terms of process, you will want to identify potentially privileged documents automatically and then have a second “high powered” team make these difficult calls. This will hopefully minimize the chance of mistakes. It may also help to have a “clawback” team in place to monitor productions to confirm that no privileged documents have been produced and, if any have, that you demand their return immediately.

Translating the Bytes.

Once the effort of learning the landscape of electronic discovery has yielded a smoother and more efficient discovery process, a lawyer must use the fruits of discovery in an effective manner. Making effective use of electronic data is primarily important in two phases of litigation: first, in the initial stage of discovery when large amounts of data are received and efficient filtering is necessary, and second, in using the electronic data effectively at trial.

Reviewing Discovery Results for Useful Information.

Even after analyzing interrogatory responses and deposing the proper corporate representatives to narrow the scope of discovery, lawyers will still likely face a considerable amount of electronic data from which to assemble a case. Many times, the volume of data cannot be predicted in advance because information about how it is processed is only revealed after processing has begun. A cursory examination and selection of information can hide significant facts that once seemed like a negligible amount of data but, after review and restoration, expands significantly beyond original expectations. In order to take advantage of the resource that electronic data can represent, however, it is important to know how to review the data quickly and accurately. As discussed above, there are several possibilities. Recently, a federal judge in New York held that the party responding to a discovery request met its obligation by producing responsive electronic information in a text-searchable format.²⁹ The court in that case relied in part on the Sedona Conference Working Group paper on electronic discovery.³⁰

Metadata, mentioned above, can be valuable background information embedded within the electronic version of a document but not necessarily apparent from a hard copy. For example, categories of metadata embedded in a Microsoft Word document include:

- *Track Changes*. Shows changes that have been made to a document, including text that has been deleted.
- *Last 10 Authors*. Provides names of the last 10 people to have worked on a document.
- *Comments*. Allows people viewing a document to make comments that do not become part of the text.

²⁹ *Zakre v. Norddeutsche Landesbank Girozentrale*, 2004 WL 764895 (S.D.N.Y., April 9, 2004).

³⁰ *Id.* (citing The Sedona Conference: Best Practices, Recommendations & Principles for Addressing Document Discovery (2004)).

- *Document Statistics*. Lists people who worked on a document, how long they worked on it and how many revisions they made.
- *Versions*. Displays different versions of the same document.
- *Routing Slip*. Reveals the names of people who have received copies of the document.
- *Template*. Reveals information about the origins of a document.³¹

This metadata can be particularly important where issues regarding revisions to documents are at issue or where establishing that a specific individual had knowledge of such a document or item of information is crucial.³²

Getting It Admitted.

In order to make effective use of electronic evidence, the information must be admissible under the applicable rules of evidence governing the proceeding. As with most evidentiary issues, a threshold question involves the reliability of the electronic evidence.³³ Texas Rule of Evidence 801 defines hearsay as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Electronic information, like other written documents, may be hearsay and cannot be admitted into evidence without applying a recognized exception to the hearsay rule.

This type of information does, however, raise unique issues concerning accuracy and authenticity.³⁴ Accuracy may be impaired by incomplete data entry, mistakes in output instructions, programming errors, damage and contamination of storage media, power outages, and equipment malfunctions. The integrity may also be compromised in the course of discovery by improper search and retrieval techniques, data conversion, or mishandling. Similarly, authentication of electronic documents may also present a challenge to the unprepared practitioner. In addition to knowledge of the relevant case law, preparation before trial for seeking admission of the evidence or objecting to the admission of some information can minimize obstacles to admissibility.

General Standards.

In *Burleson v. State*, a former employee convicted of deleting certain payroll data from his computer terminal after his termination argued that the trial court erred by admitting electronic documents printed from the computer into evidence.³⁵ On appeal, the defendant argued that the trial court erred by admitting electronic documents printed from the computer into evidence.³⁶ The Fort Worth Court of Appeals rejected the claim and held that computer generated documents are discoverable and admissible as tangible evidence.³⁷ The court explained that electronic

³¹ Payne Consulting Group, *Hidden Bounty*, ABA Journal, July 2004 at 27.

³² See Grace V. Bacon, *The Fundamentals of Electronic Discovery*, 47 B. BAR J. 18, 19-20 (2003).

³³ See Manual of Complex Litigation, Federal Judicial Center 2004, at §11.446. See also Gregory P. Joseph, *A Simplified Approach to Computer-Generated Evidence and Animations*, 43 N.Y.L. Sch. L. Rev. 875 (1999–2000).

³⁴ Manual of Complex Litigation, Federal Judicial Center 2004, at §11.446.

³⁵ *Burleson v. State*, 802 S.W.2d 429, 433-35 (Tex. App.—Fort Worth 1991, writ ref’d).

³⁶ *Id.* at 435.

³⁷ *Id.* at 436.

evidence is admissible if the court, based on the preponderance of the evidence presented, determines that the technology behind the evidence is trustworthy.³⁸

Similarly, in *United States v. Sanders*, a defendant appealed his Medicaid fraud conviction claiming the trial court erred in admitting computer printouts of medical claims paid by the Texas Department of Human Resources.³⁹ The Fifth Circuit held that the elements for admissibility of computer records are that the data was prepared pursuant to routine procedures and the procedures were designed to assure accuracy of the records.⁴⁰ Because the elements were satisfied, the court affirmed the trial court's decision in admitting the evidence.⁴¹

Most often, parties employ the business records exception as a means to introduce electronic evidence during trial. Nearly all jurisdictions recognize this exception to the traditional hearsay rule for records maintained and relied upon in the regular course of business, on the belief that it would not be practical to require every employee of a business to testify in order to establish the matters through personal and direct testimony.⁴²

Finally, a valuable resource for introducing large amounts of electronically generated information is the business record affidavit rule contained in Texas Rule of Evidence 902(10). This rule is effective in facilitating the production of accounting and other detailed records that should not require actual witnesses to prove them up at trial. The rule requires the filing of an affidavit at least fourteen days before trial stating the information necessary to establish the documents as business records under Rule of evidence 803(6) or (7). This procedure has been utilized notwithstanding objections the affidavits contain hearsay.⁴³ Complying with this procedure allows a witness testifying at trial to provide a summary of the data contained within the larger volume of information.

Authentication.

Authentication of electronic records involves demonstrating the accuracy of the process or system responsible for generating or maintaining the information. The Fifth Circuit, in *Capital Marine Supply, Inc. v. M/V Roland Thomas II*, considered a contention that the trial court erred in allowing the balance due on a loan to be proven through computer records.⁴⁴ In affirming the trial court's decision to allow the evidence, the court of appeals stated that proper authentication required sufficient proof presented at trial to show the accuracy of the records based on routine procedure.⁴⁵ Also, litigants can satisfy the authenticity requirement by demonstrating that an

³⁸ *Id.* at 441.

³⁹ *United States v. Sanders*, 749 F.2d 195, 196 (5th Cir. 1984).

⁴⁰ *Id.* at 198-99.

⁴¹ *Id.*

⁴² *See, e.g., United States v. DeGeorgia*, 420 F.2d 889, 893 (9th Cir. 1969) (holding that regularly-maintained records upon which a company relies in conducting business assures accuracy not likely to be enhanced by introducing into evidence the original documents upon which the records are based).

⁴³ *See Fullick v. Baytown*, 820 S.W.2d 943 (Tex. App.—Houston [1st Dist.] 1991, no writ).

⁴⁴ *Capital Marine Supply, Inc. v. M/V Roland Thomas II*, 719 F.2d 104, 105 (5th Cir. 1983).

⁴⁵ *Id.* at 106.

individual with knowledge of the events recorded maintained a computer record in the ordinary course of business.⁴⁶

In state court, Texas Rule of Civil Procedure 193.7 establishes a presumption of authenticity for documents produced in the course of discovery under certain circumstances. The Rule provides:

A party's production of a document in response to written discovery authenticates the document for use against that party in any pretrial proceeding or at trial unless — within **ten days or a longer or shorter time ordered by the court**, after the producing party has actual notice that the documents will be used — the party objects to the authenticity of the document, or any part of it, stating the specific basis for the objection.⁴⁷

While this presumption simplifies the process for the party seeking to admit evidence, the Rule can be a huge burden for opposing parties. Specifically, the quantity of electronic evidence that may be produced, the ability to modify the evidence, and the ability to create falsified evidence all require the opposing party to diligently search the results of electronic discovery to determine whether any objections should be made within the ten day window. A practical approach to this dilemma might be to enter into an agreement with opposing counsel regarding how to identify the documents he or she intends to use with sufficient time for the non-producing party to review, object, and obtain a ruling from the court, before the evidence is presented.

Educating Clients.

If nothing else, the material above should indicate that electronic discovery can be a useful tool against unwary opponents in the litigation process. In order to maximize client security and achieve the most consistent results as lawyers, however, steps must be taken even before any impending litigation arises. For example, an effective document preservation program will decrease client exposure to broad and potentially damaging electronic discovery requests. Furthermore, the advice of experts can be invaluable in this stage, as well as absolutely necessary at times once litigation begins. Finally, underlying all of these considerations is the reality that the costs of electronic discovery can be substantial.

Document Preservation Programs.

As suggested above, the existence of an effective and reasonable document preservation program serves as an active and early step in preparing for and responding to broad electronic discovery demands. The guidelines of a program should include consideration of the business, regulatory, and tax needs of the organization, including the need to maximize electronic storage space on the entity's server. Thus, a company could establish a document retention policy with guidelines retaining only e-mails with business record significance to avoid the dangers of disclosing sometimes damaging information that might be contained in personal communications. Of course, any system should include provisions for "litigation holds" to prevent destruction of

⁴⁶ *Longoria v. Greyhound Lines, Inc.*, 699 S.W.2d 298, 301 (Tex. App.—San Antonio 1985, no writ).

⁴⁷ TEX. R. CIV. P. 193.7 (emphasis added).

documents related to ongoing or anticipated litigation. The presence and routine compliance with such a system, however, should be a considerable factor in any spoliation analysis.

In September 2004, the Sedona Conference released for public comment its “Best Practice Guidelines & Commentary for Managing Information & Records in the Electronic Age.” The Guidelines suggest basic principles, commentary and illustrations to assist organizations in implementing sound and justifiable protocols for managing electronic data. The Guidelines’ comment period closed on March 1, 2005, and a final edition is expected in Spring 2005.⁴⁸

The importance of routine compliance with any document preservation program cannot be overstated. Failure to effectively implement and monitor document retention programs can result in severe consequences even in the absence of intentional wrongdoing. For example, in *In re Prudential Sales Practices Litigation*, the court imposed a one million dollar sanction on Prudential after finding management had implemented a “haphazard and uncoordinated” policy of notifying employees about their responsibilities of preserving electronic documents.⁴⁹

More recently, one court ordered defendants to pay costs relating to the spoliation as well as \$2.75 million in monetary sanctions for destroying relevant emails.⁵⁰ The government had filed a motion for evidentiary and monetary sanctions against the defendants for spoliation of evidence. Although the court had ordered preservation of all potentially relevant documents, the defendants continued to delete email when it became 60 days old, on a monthly system-wide basis for a period of two years after the court order. Even after learning about their inadequate document retention policy, the defendants continued to destroy documents for several months, including relevant emails from at least 11 company supervisors and officers. In addition, the defendants failed to notify the court about the situation until four months after they found out about it. Finding that a significant number of emails had been permanently destroyed, the court declared that “it is astounding that employees at the highest corporate level in Philip Morris, with significant responsibilities pertaining to issues in this lawsuit, failed to follow [the] Order ... which, if followed, would have ensured the preservation of those emails which have been irretrievably lost.”⁵¹ Granting the government’s motion for sanctions, the court stated that it will preclude the defendants from calling a key employee, who failed to follow the retention policy, as a fact or expert witness at trial.⁵²

In addition to sanctions, noncompliance could result in discovery of information that falls outside the parameters of the document preservation system. Although document preservation programs should serve to protect an entity and narrow the scope of discovery requests, a skillful adversary will likely request copies of the opponent’s policy in order to seek information regarding the level of internal compliance. If policies have not been disseminated throughout the organization or if a client has been lax in enforcing the policies, potentially harmful information may unexpectedly be within the scope of discovery. However, the best program cannot help the

⁴⁸ A copy of the Guidelines is available at the Sedona Web site: http://www.thesedonaconference.org/publications_.html.

⁴⁹ *In re Prudential Sales Practices Litigation*, 169 F.R.D. 598, 615 (D.N.J. 1997).

⁵⁰ *United States v. Phillip Morris USA Inc. f/k/a Philip Morris Inc.*, 2004 WL 1627252 (D.D.C. July 21, 2004).

⁵¹ *Id.*

⁵² *Id.*

situation unless it is fully implemented and there is “buy in” at all levels of the company. Otherwise, the program will hurt more than it will help.

Handling Electronic Data Responsibly.

Once a lawsuit is filed, attorneys should instantly direct the client to suspend those document retention policies to prevent discarding relevant data. Then, attorneys should instruct the client to notify its employees to refrain from deleting e-mails or other computer documents. Further, the client should request the IT staff to remove backup tapes from rotation and suspend automatic purges of servers, especially e-mail servers. When the client worries about data on particular computers or servers, attorneys should instruct the client to remove the hardware from operation. Programs containing discoverable electronic data should not be executed. Specifically, programs affecting the operating system should not be used.

One significant pitfall is allowing employees to continue to use the original hard drive, server, or backup tapes. To avoid tarnishing the original, a mirror image of these materials should always be created for use and the original kept in an evidence safe. Thus, using mirror images instead of originals, can decrease the risk of tainting the evidence.

As discussed above, do not assume that only utilizing the client’s IT staff to collect data is enough. Although the IT staff is probably knowledgeable about the computer equipment, networks, and firewalls, an outside expert can assist with issues where IT staff is inhibited. The client’s IT staff already have full-time jobs and may not have time to collect electronic data. Conflicts of interest and independence issues abound. Also, IT staff generally do not have experience with forensics software, of which, hundreds exist for different purposes, uses, and effectiveness. Perhaps most critical, the IT staff will not have deposition or court experience to defend their work, as experts routinely do.

Beware of Spoliation.

Several issues arise when considering the duty to preserve evidence. This is of critical importance in today’s litigation environment.⁵³ Generally, no duty arises before the litigation is filed, threatened, or reasonably foreseeable unless that duty is voluntarily assumed or it is imposed through other means. The duty to preserve documents or tangible evidence in a given instance can arise from the existence of pending, threatened, or reasonably foreseeable litigation. This duty also can arise from a number of other sources, including a contract, a voluntarily assumed duty, a statute or regulation, or an ethical code.⁵⁴ Texas courts may punish the spoliators of evidence with any of the sanctions available under Texas Rule of Civil Procedure 215, including the exclusion of the evidence, the striking of pleadings, and the payment of fees and costs associated with remedying the conduct.

⁵³ Judge Scheindlin has written a comprehensive article on sanctions in e-discovery cases. Shira A. Scheindlin and Kanchana Wangkeo, *Electronic Discovery Sanctions in the Twenty-First Century*, 11 MICH. TELECOMM. TECH. L. REV. 71 (2004).

⁵⁴ *Trevino v. Ortega*, 969 S.W.2d 950, 955 (Tex. 1998) (Baker, J., concurring).

One of the most important aspects of the *Ortega* decision is Justice Baker's concurrence addressing the existing remedies for spoliation.⁵⁵ Justice Baker examined the duty to preserve evidence, breach of that duty and prejudice to the spoliation victim's ability to present a case. First, Justice Baker noted that parties may have a statutory, regulatory or ethical duty to preserve evidence.⁵⁶ Justice Baker opined that a duty to preserve arises before litigation begins, when a party is "on notice" of litigation.⁵⁷ Justice Baker noted that under *National Tank Co. v. Brotherton*, a party is on notice of potential litigation when, after viewing the totality of circumstances, the party either actually anticipated litigation, or a reasonable person in the party's position would have anticipated litigation.⁵⁸

With respect to the scope of the duty to preserve evidence once the duty arises, Justice Baker concluded the only evidence a party must preserve is that which is relevant to the litigation.⁵⁹ Justice Baker also maintained that parties should be responsible for both negligent and intentional spoliation.

Establish a Protocol Early.

Although electronic data discovery may not sound difficult, the burden on attorneys and their clients may be tremendous depending on the size and the scope of the data. For example, terabytes of data can extend over thousands of miles, and still only include computers and servers currently used. Company organizational charts are effective means for assembling the various sources of electronic data.⁶⁰ A chart diagramming each section of the company from the most senior employees to the more junior level employees assists attorneys in tracking which employees housed what data.

By documenting the client's collection efforts, attorneys can ensure that adequate information is collected to shore up the chain of evidence and custody, and, hopefully, avoid problems. Such documentation may include detailing the following information: the origin of the computer evidence, what computer the data is from, what hard drive, the location of the computer, who the computer belonged to, who was authorized to use the computer, and how the drive was imaged. Continuously documenting the electronic data collection efforts helps assist in collecting less non-relevant data and ensures that data, which should be collected, is not overlooked.

Negotiate Issues Production with Opposing Counsel Early.

Agreements with opposing counsel are necessary so that opposing counsel cannot exploit the discovery process. Before production begins, both sides should agree on production protocol and the anticipated time table. As part of this, an agreement should be executed implementing a method to search the data using certain key words, including a list of actual search terms. Key

⁵⁵ *Id.* at 954.

⁵⁶ *Id.* at 955.

⁵⁷ *Id.* at 955-56.

⁵⁸ *Id.* at 956 (citing *National Tank Co. v. Brotherton*, 851 S.W.2d 193, 204-07 (Tex. 1993)).

⁵⁹ *Ortega*, 969 S.W.2d at 957.

⁶⁰ The American Bar Association Section of Antitrust Law and Center for Continuing Legal Education, *Following the E-Paper Trial: Electronic Document Production Issues in the Digital Age*, (March 12, 2004).

word searching, such as OCR searches, is a reasonable approach when dealing with enormous amounts of electronic data. By implementing a sampling technique, attorneys can prove to the opposing side the accuracy of key word searches. Be sure to be generous with your timetables; there will always be issues.

Second, attorneys should negotiate the terms and anticipated schedule for a rolling production. A rolling production affords the requesting party the benefit of receiving documents sooner than it would otherwise. In turn, a rolling production allows the responding party extra time to review the voluminous information, before it must produce it. Further, attorneys should negotiate the format of the electronic data to be produced.

Similarly, attorneys should discuss the protocol for inadvertent disclosure of privileged electronic documents. Attorneys should agree to procedures that become effective when a privilege document is inadvertently produced to prevent the need to repeatedly write letters to opposing counsel. If an ISP is hosting the documents for the lawsuit, then have a designated employee of the ISP remove the document from the produced folders and place it in a designated folder. The ISP can notify the opposing side of the removed document. If the opposing side has advance notice of these procedures, then attorneys can possibly prevent the accidental viewing of the privileged document.

Costs and Sanctions.

Electronic discovery can result in substantial costs to the parties involved in complex cases. These costs can increase significantly considering that special equipment or experts may be required to translate data from outdated formats and equipment into usable form. The breadth of discoverable information and the ability to efficiently review huge numbers of electronic documents has increasingly shifted the costs of discovery to the responsive parties because it is the responding party that must generally provide the data through an electronic medium. Although some courts continue to take the traditional approach that companies using electronic documentation assume the risk of the discovery costs, some courts have moved away from this notion because of the prevalence of electronic business applications in recent years.

The leading cases on the cost issue are the *Zubulake* decisions, which provide a framework for dealing with electronic discovery. In *Zubulake I*, the court warned that the prevailing cost-shifting analysis from *Rowe* might favor large corporations when engaged in litigation with private parties, a result which could “undermine the ‘strong public policy favor[ing] resolving disputes on their merits,’ and may ultimately deter the filing of potentially meritorious claims.”⁶¹ *Zubulake I* delineated a set of factors to determine whether costs should be shifted. Those factors included:

- The extent to which the request is specifically tailored to discover relevant information;
- The availability of such information from other sources;
- The total cost of production, compared to the amount in controversy;
- The total cost of production, compared to the resources available to each party;

⁶¹ *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 321 (S.D.N.Y. 2003) (“*Zubulake I*”).

- The relative ability of each party to control costs and its incentive to do so;
- The importance of the issues at stake in the litigation; and
- The relative benefits to the parties of obtaining the information.⁶²

The *Zubulake III* court examined these factors and ordered the responding party to endure seventy-five percent and the requesting party twenty-five percent of the total estimated cost for restoring and searching the defendant's e-mail backup tapes throughout discovery.⁶³

In *Zubulake I*, the court opined that the first two factors, known collectively as the marginal utility test, are the most significant.⁶⁴ The marginal utility test, initially announced in *McPeck v. Ashcroft*,⁶⁵ embodies the theory that the more likely it is the source of data contains information relevant to a claim or a defense, then the fairer it is for the responding party to search at its own expense.⁶⁶ The court should then consider factors three, four, and five to determine the relative ability of each party to bear the burden of the expenses.⁶⁷ The court held that factor six could be evaluated independent of the other factors if it is relevant to the facts of the particular case.⁶⁸ Finally, factor seven weighs the least in the court's cost-shifting analysis because discovery responses commonly benefit the requesting party.⁶⁹ Nevertheless, when the production also affords a substantial or strategic benefit to the responding party, the seventh factor becomes pertinent. After weighing all factors, the *Zubulake I* court permitted cost-shifting because of the possibility of more significant information. Given the speculative nature of the additional discovery, Judge Scheindlin opined that the plaintiff should pay some part of the cost.⁷⁰ This case highlights the need for litigations to seriously consider the steps to take when faced with electronic discovery.

Most recently, the *Zubulake* court has sanctioned the defendants for destruction of email evidence.⁷¹ In this latest motion, the employee contended that the employer, who recovered some of the deleted relevant emails, prejudiced her case by producing recovered emails long after the initial document requests. Furthermore, some of the emails were never produced, including an email that pertained to a relevant conversation about the employee. As such, the employee requested sanctions in the form of an adverse inference jury instruction. Determining that the employer had willfully deleted relevant emails despite contrary court orders, the court granted the motion for sanctions and also ordered the employer to pay costs. The Court further noted the defense counsel was partly to blame for the document destruction because it had failed in its duty to locate, preserve and timely produce the relevant information. In addressing the role of counsel in litigation generally, the court stated that "[c]ounsel must take affirmative steps to monitor compliance so that all sources of discoverable information are identified and

⁶² *Id.*
⁶³ *Zubulake v. UBS Warburg L.L.C.*, 216 F.R.D. 280 (S.D.N.Y. July 24, 2003) ("Zubulake III").
⁶⁴ *Id.* at 323.
⁶⁵ *McPeck v. Ashcroft*, 202 F.R.D. 31 (D.D.C. 2001).
⁶⁶ *Id.*.
⁶⁷ *Zubulake I*, 217 F.R.D. at 323.
⁶⁸ *Id.*
⁶⁹ *Id.*
⁷⁰ *Id.*
⁷¹ *Zubulake v. UBS Warburg*, 2004 WL 1620866 (S.D.N.Y. July 20, 2004) ("Zubulake V").

searched.”⁷² The Court concluded that attorneys are obligated to ensure all relevant documents are discovered, retained, and produced. Additionally, the Court declared that litigators **must** guarantee that identified relevant documents are preserved by placing a “litigation hold” on the documents, communicating the need to preserve them, and arranging for safeguarding of relevant archival media.⁷³

In Texas, Rule of Civil Procedure 196.4 addresses cost-shifting. A responding party is required to produce information “reasonably available . . . in its ordinary course of business” and may object to unreasonable discovery requests outside of this scope.⁷⁴ If after the objection, a court orders further production from the party, the reasonable costs shift to the requesting party for “extraordinary steps” necessary to retrieve and produce information.⁷⁵ Although there is little or no case law in from Texas courts on what constitutes extraordinary steps, this represents an area of law likely to develop significantly in the future. *See In re Lowe’s Companies, Inc.*, 134 S.W.3d 876, 880 (Tex. App. – Houston [14th Dist.] 2004, orig. proceeding).

Conclusion.

Although e-mail and electronic documents may not constitute a part of all litigation matters today, the ever-increasing use of technology in the workplace signals electronic discovery is facet of litigation that is here to stay. With changes in technology and the lack of understanding how the technology works, pitfalls (and opportunities) abound for the litigator. Understanding these issues can lead to a better result for clients and – equally important – compliance with appropriate professional obligations. The information contained in this paper represents only the beginning of the process of learning about electronic discovery; but with this information, any lawyer can establish a firm foundation in order to build a more complete understanding of the topic. Such an understanding will assist not only your clients but an entire law firm as well.

⁷²

Id.

⁷³

Id.

⁷⁴

TEX. R. CIV. P. 196.4.

⁷⁵

Id.

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E-Discovery

LITIGATION UPDATE

Legislation & Court Rules

[1] Proposed E-Discovery Amendments to the Federal Rules to be Submitted to the Standing Committee on Rules

The Advisory Committee on Civil Rules approved proposed amendments to the Civil Rules dealing with the discovery of electronically stored information at its April 14-15, 2005 meeting. The approved amendments will be submitted to the judiciary's Standing Committee on Rules for consideration at its meeting June 15-16 in Boston. The proposed amendments to Civil Rules 16, 26, 33, 34, 37, and 45 deal with the discovery of electronically stored information. The Advisory Committee will transmit the proposed new amendments with a recommendation that they be approved and transmitted to the Judicial Conference for consideration.

The Advisory Committee made some modifications to the proposed Rules following the comment period. For example, the proposed change to Rule 26(b)(2) has been amended to clarify that a party need not provide discovery of electronically stored information from sources that are not reasonably accessible because of undue burden or cost. The Advisory committee voted to retain, for redrafting, the proposed changes to Rule 37. The changes to Rule 37 would provide litigants a "safe harbor," in certain circumstances, for electronic data inadvertently lost through the routine operation of the computer system. The chair of the Advisory Committee, District Court Judge Lee Rosenthal

(S.D. Texas), indicated that the committee still intends to submit the "safe harbor" proposed changes to Rule 37 for the Standing Committee's consideration in June.

Litigation

Verdicts of Note

[2] Failure to Preserve and Produce E-mails Pave the Way for a \$1.45 Billion Verdict

Coleman (Parent) Holding, Inc. v. Morgan Stanley & Co., Inc. Case no. 502003CA00504XXOCAI (Fla. Cir. Ct.).

On March 1, 2005, Judge Elizabeth T. Maass of the Fifteenth Circuit Court for the County of Palm Beach, Florida, granted a motion for an adverse inference instruction due to Morgan Stanley's destruction of e-mails and noncompliance with a court order compelling e-mail discovery. *Coleman (Parent) Holdings v. Morgan Stanley & Co., Inc.* 2005 WL 679071 (Fla. Cir. Ct. Mar. 1, 2005). On March 23, 2005, the court issued a partial default judgment against Morgan Stanley, finding that the company had "deliberately and contumaciously violated numerous discovery orders.... [I]t chose to hide information about its violations and coach witnesses to avoid any mention of additional, undisclosed problems with its compliance with the Agreed Order." *Coleman (Parent) Holdings v. Morgan Stanley & Co., Inc.* 2005 WL 674885 (Fla.



Cir. Ct. Mar. 23, 2005). At trial, the judge instructed the jury it could assume the firm had helped defraud plaintiff and that a statement from the court about the discovery misconduct could be considered by the jury in determining the propriety and amount of punitive damages. The jury, on May 16, 2005, awarded plaintiff \$604.3 million in actual damages. On May 18, 2005, the jury awarded \$850 million in punitive damages.

Ronald Perelman, chairman of Revlon, Inc., agreed in 1998 to sell an 82% stake in Coleman, Inc., owned by his holding company. The buyer, Sunbeam Corporation, paid part of the sale price with \$680 million of Sunbeam stock. Subsequently Sunbeam went into bankruptcy proceedings amid accounting fraud allegations. Morgan Stanley was Sunbeam's investment banker and advised it during the Coleman purchase. Perelman's holding company brought suit alleging Morgan Stanley knew about the accounting fraud and its silence about the fraud misled the holding company and Perelman.

The court found that Morgan Stanley continued its practice of overwriting its e-mails after 12 months, despite an SEC regulation requiring all e-mails be retained in readily accessible form for two years. Because the e-mail had been overwritten, the court had previously entered an agreed order requiring Morgan Stanley to search backup tapes and to review and produce all responsive and non-privileged e-mails. Morgan Stanley was to certify compliance. The certification of complete production was provided a month after the certification deadline and was issued despite the fact that Morgan Stanley had discovered more than 1,000 additional backup tapes that had not been processed or reviewed. Morgan Stanley did not then alert the court or plaintiff of the additional tapes. More than six months after certifying full compliance, Morgan Stanley informed plaintiff that it had

located additional e-mail backup tapes and would produce more responsive e-mails. The court also found that various explanations for the delays were not factually correct. During the early months of 2005, Morgan Stanley informed counsel for plaintiff it had located additional boxes of backup tapes. In early 2005, Morgan Stanley revealed that its earlier searches had failed to produce all of the responsive e-mail attachments.

The court sanctioned Morgan Stanley for the destruction of e-mail and for failing to comply with the court order compelling e-mail discovery. The judge ordered that the jury would be instructed that certain facts in the complaint shall be "deemed established for all purposes." In the order, the judge also indicated that instructions to the jury would contain a statement describing the discovery misconduct by the defendant company and the jury would be told that it may consider this in evaluating whether the defendant "sought to conceal its offensive conduct" in determining whether punitive damages should be assessed.

The instructions to the jury included the following: "Morgan Stanley participated in a scheme to mislead [Coleman] and others and cover up the massive fraud at Sunbeam until Morgan Stanley and Sunbeam could close the purchase of Coleman." After the jury awarded \$604.3 million in actual damages and an additional \$850 million in punitive damages, Morgan Stanley issued a statement promising to appeal. In part, the statement read:

"This damages award is legally deficient and a by-product of the unprecedented and highly prejudicial rulings imposed by the judge throughout the trial. Morgan Stanley was not permitted to defend itself on the merits in either the compensatory damages or the punitive damages phases of the trial and, consequently, was denied a fair hearing."



“Morgan Stanley requested a full and fair hearing in the punitive phase so the jury, for the first time, could hear all the facts, but the trial judge denied that request. As a result, the jury never heard the actual facts. Far from being part of the Sunbeam fraud, Morgan Stanley was a victim of that fraud, losing \$300 million when Sunbeam collapsed, one of the many facts that the jury was not allowed to hear.”

[3] **The *Zubulake* Verdict—\$29.2 Million**

On April 6, 2005, a jury awarded \$29.2 million in *Zubulake v. UBS Warburg*, the case that has raised e-discovery awareness. *Zubulake* was an employment gender discrimination and retaliation case involving a highly-paid Wall Street equities salesperson. In her last year at UBS she earned \$650,000 total compensation. The verdict included approximately \$2.2 million in back pay, \$6.8 million in front pay and \$20.2 in punitive damages. Defendant’s failure to preserve and timely produce e-mail resulted in an adverse inference instruction. During the punitive damages phase, plaintiff’s counsel argued that defendant’s acts of concealing and destroying evidence demonstrated the intent, deliberateness, and knowledge of the violation.

On March 16, 2005, Judge Scheindlin ruled on the parties’ motions in limine. *Zubulake v. UBS Warburg*, 2005 WL 627638 (S.D.N.Y. Mar. 16, 2005). In relevant part, the defendants sought to preclude the plaintiff from placing the prior decisions in the case before the jury, to preclude introduction of correspondence between counsel on discovery matters, to preclude any evidence concerning defendants’ failure to preserve several backup tapes and to exclude any evidence about its lack of compliance with SEC rules on e-mail retention. The court concluded that the jury would hear other evidence and receive an adverse inference

instruction about the spoliation of e-mail and discovery failures. Therefore, the plaintiff was precluded from referencing the earlier decisions and, unless the defendants opened the door, was precluded from introducing the discovery correspondence or the failure to preserve the backup tapes. The SEC retention violations were excluded as being unduly prejudicial.

Privilege and Waiver

[4] **Mere Use of Corporate E-Mail System for Privileged Communication Does Not Waive Privilege**

In re Asia Global Crossing Ltd., 322 B.R. 247 (S.D.N.Y. Mar. 25, 2005)

An employee’s use of the employer’s e-mail system for privileged communication with his personal attorney does not necessarily constitute waiver in a bankruptcy adversarial proceeding. The trustee sought production of these privileged materials of former employees, contending that the use of the corporate e-mail system waived any privilege. The trustee alleged that corporate policy warned users that any e-mail would be company property, that the email system was not secure and that third parties had access to the e-mail system. There was contrary evidence about what the company policy actually entailed or how it had been communicated.

Both attorney-client and work product privileges were asserted for the e-mails. The court noted that the prevailing view is that lawyers and clients may communicate confidential information through unencrypted email with a reasonable expectation of confidentiality and privacy.

Certain of the e-mails in question had been forwarded to third parties and copied to in-house counsel. The court concluded that any privilege



pertaining to these e-mails had been waived. By sending e-mails to the in-house attorney, the e-mails were deemed to have been voluntarily disclosed to the adversarial party because the eventual trustee acts for the debtor company.

With the exception of those e-mails that had been forwarded to third parties and copied to corporate in-house counsel, the court concluded that it could **not** determine that waiver had occurred and it declined to order production of the remaining e-mails.

[5] Inadvertent Production of Privileged E-Mail Forwarded to Other Employees Did Not Result in Waiver.

Premiere Digital Access, Inc. v. Central Telephone Co., d/b/a Sprint of Nevada, 360 F.Supp.2d 1168 (D. Nev. Feb. 22, 2005).

E-mail communication from defendant's in-house counsel was privileged legal advice and its inadvertent Rule 26 disclosure did not result in a waiver of the privilege. The e-mail had been forwarded to other Sprint employees and produced with their e-mail messages during the Rule 26 disclosures. Defendant did not become aware of its disclosure for almost a year.

Plaintiff is a local internet service provider ("ISP") that contracted with Sprint of Nevada to provide internet access for its 800 customers. Sprint included in the contract its Acceptable Use Policy that prohibited plaintiff or its customers from engaging in a list of unacceptable uses. Sprint received numerous complaints about three of plaintiff's customers, all transmitters of bulk junk e-mail. After warning plaintiff, the activities did not abate. Sprint then terminated access to the three customers. However, their activities continued using spamming and spoofing designed to hide the source of the email. Then Sprint terminated all of plaintiff's

internet access. Plaintiff brought suit against Sprint for breach of contract, violation of the covenant of good faith and fair dealing, trade restraint, and unconscionable contract.

The district court set aside the magistrate judge's determination that privilege had been waived. The court determined that the e-mail in question had been drafted by in-house counsel for the primary purpose of advising other corporate representatives of the legal ramifications of a potential course of action. The court held that under both Nevada and federal law the communication was privileged. The court found that the disclosure was the inadvertent mistake of an inexperienced paralegal and the mistaken oversight of her supervising attorneys.

Sanctions

[6] \$2.2 Million Default Judgment as Sanctions for Discovery Misconduct

Whiteball Specialties, Inc. v. Delaportas, 2005 WL 568041 (W.D.Wis. Mar. 10, 2005)

The court entered default judgment in the amount of \$2,200,000 as a sanction for defendants' ongoing discovery misconduct. The default judgment was entered against all defendants jointly and severally.

Plaintiff sought sanctions following two court orders "critical" of defendants' discovery conduct. The defendants did not produce the requested discovery. The court found their excuses "unbelievable" and said their conduct displayed "willfulness, bad faith and fault."

The court found that defendants were unable or unwilling to produce critical invoices, tax, and financial information and other materials either electronically or in hard copy.



[7] Default Judgment Recommended Due to Spoliation of Evidence on Defendant's Hard Drive

Communications Center, Inc. v. Hewitt, No. CIV S-03-1968 WBS KJM (E.D. Cal. Apr. 5, 2005)

The magistrate judge recommended default judgment be entered against defendants, on all but two counts, due to defendant's use of the Evidence Eliminator software and reformatting one hard drive after the court ordered production of mirror images of the hard drives.

Despite the court order to produce mirror images of defendant's hard drives defendant produced CDs that were not mirror images on two occasions and then produced mirror images. After producing the CDs and before producing the mirror images, defendant ran Evidence Eliminator several times and reformatted one drive. The magistrate judge rejected defendant's claim that he only used the software to remove evidence of an on-line affair he had with a person other than his wife and to prevent disclosure of embarrassing web sites he had visited. The forensic examination of the log created demonstrated that more than internet histories were destroyed.

[8] Defendant Fails to Establish Alleged Spoliated Documents Ever Existed

Gilbane Building Co. v. Downers Grove Community High School District no. 99, No. 02 C 2260 (N.D.Ill. May 3, 2005)

Defendant and the third party defendant sought sanctions against plaintiff for alleged spoliation of evidence. The magistrate judge recommended a sanction of \$5,000 and an award of \$5,000 in attorney fees and costs and recommended the district court deny all other requested sanctions.

The motion for sanctions sought dismissal of plaintiff's claims, default judgment on the counterclaim and attorneys' fees and costs. In the alternative, the motion sought an adverse inference instruction.

The magistrate judge found that the defendant failed to establish that certain documents had been created and therefore would not have been deleted. With respect to other documents that hadn't been preserved, the magistrate concluded plaintiff was negligent but found that prejudice had not been established. The magistrate did find that plaintiff failed to conduct an adequate search for electronic evidence. This failure to adequately search was the basis for the recommendation of a \$5,000 monetary sanction and \$5,000 in attorneys' fees and costs.

[9] Court Denies Costs for Destruction of Documents and Orders Navy to Reproduce Results of Specific Database Queries

Jinks-Umstead v. England, 2005 WL 775780 (D.D.C. Apr. 7, 2005)

A former contracting officer alleged discriminatory and retaliatory violations of Title VII by the Navy. During the first trial on the claims, the defendant produced about 1,400 pages of Work in Place ("WIP") reports that had not been previously produced. The judge then ordered a new trial to permit the plaintiff to present her case "with the benefit of evidence she was entitled to receive before her first trial." Additional discovery was also permitted.

During the subsequent discovery, plaintiff learned that Holleran, the Navy supervisor who made staffing recommendations, did so based on ad hoc reports from the database and notes on "stickies" from conversations. When her need for them was completed, she discarded the documents, reports, and "stickies." The data in the ad hoc database



reports was the same data that appeared on WIP reports. She likewise discarded her WIP reports. All the underlying data remained in the database, however, and could be recreated to replicate what Holleran had reviewed.

The court ordered the Navy's database expert, Carney, to formulate queries and recover information from the database to "re-create" the information that had been provided to Holleran whose notes had not been retained. "It is the court's intention that Carney do now whatever she did when Holleran asked her for the information that both she and Holleran described in their depositions."

The court denied the plaintiff's motion for attorney's fees and costs due to the alleged destruction of documents since the underlying data remained in the database.

[10] Broad Preservation Order Entered Despite Existing Orders in Similar Cases

Weiller v. New York Life Ins. Co., 6 Misc.3d 1038(A); 2004 WL 3245345 (N.Y. Sup. Ct. Mar. 16, 2005)

An insurer was ordered to preserve documents and data, including e-mail, e-mail back-up tapes, computer hard drives, and disks containing communications related to various broad categories. The motion for entry of the order was filed after defendant refused to stipulate to a preservation order claiming that they were already under preservation orders in similar litigation so that a formal order in this matter was unnecessary.

The district court characterized the application for a preservation order as, in substance, a motion for a preliminary injunction. The proposed preservation order was nearly a "word-for-word" duplicate of preservation orders already in existence in similar federal cases involving the same defendants.

In granting the motion, the district court acknowledged defendants' claim that preservation of computer hard drives under a similar preservation order cost defendants more than one million dollars. The court indicated that, while at some point it would entertain an application to shift or share costs, it would "not constrain the production of possibly relevant evidence on account of the later need to allocate the cost."

[11] Sanctions Recommended Include Adverse Inference Instruction and Monetary Damages

E*Trade Sec. LLC., v. Deutsche Bank AG, 2005 U.S. Dist. Lexis 3021 (D.Minn. Feb. 17, 2005)

Plaintiff filed complaint against defendants alleging they engaged in a fraudulent securities lending scheme that resulted in the collapse of at least one broker/lender and the loss of millions of dollars by other entities. Plaintiff moved for spoliation sanctions against the "Nomura defendants" alleging that, after Nomura Canada was on notice of potential litigation, Nomura Defendants erased computer hard drives and failed to suspend its DVD-based phone message recording system to prevent the rewriting of recorded phone messages. Defendant NSI also failed to place a litigation hold on its e-mail to prevent its automatic deletion.

The magistrate judge recommended that sanctions be imposed, including an adverse inference instruction and monetary sanctions. The defendants were also required to produce certain documents and records.

The court stressed that the duty to preserve is triggered when defendants knew or should have known the evidence was relevant to future or current litigation. The court noted that if litigation has not yet commenced, there must be a finding of bad faith to support a sanctions request but that bad



faith can be implied by the party's behavior. If "the destruction of evidence occurs after litigation is imminent or has begun," then "no bad faith need be shown" before imposition of a sanction.

Nomura Canada permanently erased all the company's hard drives in mid-2002, a few months before the complaint was filed but several months after the magistrate judge determined that it should have been on notice of potential for litigation. Nomura contended that the hard drives were erased because the company was shutting down and it was giving the computers to its employees. However, the magistrate judge concluded that because a trustee in a bankruptcy case had already sent a notice to Nomura Canada that the bankruptcy court was investigating what appeared to be a "complex and far-reaching fraudulent scheme." Nomura was aware of the potential for litigation and should have instituted a preservation hold. Because of this awareness, the court indicated no showing of bad faith or willful intent was needed. Apparently, the magistrate judge's earlier statement that bad faith was required to be shown if destruction occurred before litigation began was not meant to cover the situation where a defendant was on notice of the potential for litigation. In any event, the magistrate judge added that Nomura Canada's conduct also was in bad faith because it selectively retained documents from the hard drives. Hence, the act of erasing the hard drives was sanctionable.

Nomura recorded and preserved its traders' calls on recordable DVDs. The system involved two rewritable DVDs. When one was full the system would record to the other and when the second was filled the system would switch back to the previous DVD and record over it. Nomura did not make any changes to this system after it was aware of likely

litigation. The magistrate concluded there was a high likelihood that telephone calls relevant to this matter were lost. The magistrate concluded this also was sanctionable spoliation.

Another defendant, NSI, failed to place a litigation hold on the auto-deletion of e-mail. NSI stated that any deleted e-mail would be retained on back-up tapes. However, the backup tapes were only retained for three years. Although NSI contended that it placed a litigation hold on the e-mail accounts of certain key employees, it stated that in 2004 it identified other employees whose e-mail needed to be searched but, the magistrate judge noted, the back up tapes containing these employees would have been overwritten since backup tapes were only retained for three years. That meant that relevant e-mail messages from 2001 and earlier were "irretrievably destroyed." The magistrate concluded that NSI committed spoliation by not placing an adequate litigation hold on e-mail boxes and making no changes in its backup tape three-year retention policy.

The magistrate recommended that an adverse inference instruction be given as a result of the spoliation.

Separately, the magistrate judge found a violation of Rule 26(g)(2)'s certification obligations and ordered each defendant produce additional documents and to pay \$5,000 for costs incurred.

Finally, Nomura Canada was ordered to produce certain recordings which they claimed were inaudible, and to pay \$5,000, also because of a Rule 26(g)(2) violation.



[12] Plaintiff's Failure to Produce Website Pages Results in Dismissal and Monetary Sanctions

Beck v. Atlantic Coast PLC., 868 A.2d 840 (Del.Ch. Feb. 11, 2005)

A plaintiff saw a class action dismissed and his counsel was hit with sanctions by an upset trial court who began his opinion by writing, "I regret having to write this opinion." Discovery abuses were at the root of the court's anger.

The case involved a product called "Windows Power Tools" which plaintiff claimed did not work. Plaintiff originally sought to certify a class action against companies that sold the product but eventually the case involved one defendant, Atlantic Coast, which conducted online sales for software publishers.

Plaintiff claimed he had purchased the product, but, it later was disclosed that the plaintiff had never purchased or used the product. Plaintiff also kept a web page on which he bragged about his e-mail communications with the software developer, which communications contained numerous misrepresentations. The contents of the web page were not produced in discovery by plaintiff's counsel.

Atlantic Coast's counsel discovered the web page and eventually determined that plaintiff, the putative class representative, had never used the product. It filed a sanctions motion seeking dismissal and fees.

The trial court held that the information not produced was plainly material and intentionally concealed. Due to this discovery failure and other egregious behavior and incorrect assertions by the plaintiff and his attorneys, the court dismissed the case with prejudice, assessed sanctions against plaintiff and the plaintiff's lawyers, jointly and severally, of \$2,500 payable to the court and

\$25,000 payable to the defendant and issued an injunction against plaintiff's attorneys preventing them from bringing any suit against the defendants on behalf of any party and requiring them to include a copy of the order in any future *pro hac vice* filings.

[13] Untimely E-mail Production Results in Cost-shifting and a Recommendation of Partial Evidence Preclusion

Lava Trading, Inc. v. Hartford Fire Ins. Co., 2005 WL 459267 (S.D.N.Y. Feb. 24, 2005)

The magistrate judge recommended that plaintiff's improper discovery conduct result in partial evidence preclusion at trial and ordered cost-shifting and further depositions. The magistrate noted that plaintiff withheld a large quantity of relevant and damaging e-mails until the end of fact discovery and past the conclusion of expert discovery. Defendant moved for dismissal or, in the alternative, for evidence preclusion, costs for an additional deposition, and permission to place in evidence the quantity of e-mail produced in an untimely fashion by plaintiff.

In this lawsuit, plaintiff claimed breach of contract of insurance policies that covered its premises at the World Trade Center at the time of the September 11, 2001 attacks. The magistrate noted that many of the 11,000 to 12,000 e-mails belatedly produced were e-mails that would clearly aid defendant.

The magistrate noted that plaintiff had "engaged in an excruciatingly slow and disjointed disclosure of documents... under the guise of a 'rolling' production...." Despite finding improper discovery conduct, the magistrate judge recommended that the matter not be dismissed but ordered that certain of plaintiff's witness would be subject to further deposition, that plaintiff reimburse defendant for any expenses, including attorney's fees, incurred in



preparing and conducting the additional fact and expert depositions and for preparing the motion. Plaintiff was ordered to supply an affidavit by a Lava official detailing the scope of the document searches undertaken in response to the Rule 34 notices and the completeness of the production of responsive documents. The magistrate also recommended that the district judge preclude plaintiff from introducing any of the newly produced documents at trial.

**[14] Fabrication of Electronic Documents
Warrants Dismissal with Prejudice**

REP MCR Realty, LLC. v. Lynch, 2005 WL 670642 (N.D. Ill. Mar. 21, 2005)

The court found that Defendant and Third-party plaintiff fraudulently created or modified certain key documents and then produced them in discovery. The defendant signed a personal guaranty on a business loan. The business subsequently defaulted and went into bankruptcy proceedings. Plaintiff brought suit on the personal guaranty. The defendant brought a third-party action against the attorneys representing his business in the transaction. Defendant electronically created documents purporting to show that the lender did not require a personal guaranty and that the business partners would be signing only in their corporate capacity. The three documents at issue included two letters and a signed "draft" of the guaranty.

Proof of the forgery was shown by, among other evidence, an improper footer attached to the bottom of the "draft" guaranty which did not match the format of the electronic document management system employed by the law firm that prepared the other documents. The court held that forging key documents required the sanction of dismissal with prejudice of the third party claims. The court granted plaintiff summary judgment on the merits and did not consider whether judgment would be

granted against the defendant on the basis of the generation of fraudulent evidence.

Criminal

**[15] The Supreme Court Reverses Arthur
Andersen's Conviction**

Arthur Andersen LLP v. United States,
544 US ____ (May 31, 2005)

The US Supreme Court unanimously reversed Arthur Andersen's criminal conviction for instructing its employees to destroy documents pursuant to its document retention policy. The statute at issue, 18 U.S.C. § 1512, has since been amended by Congress.

The Court held that the jury instructions failed to properly convey the elements of a "corrupt persuasion." As given, the instructions failed to convey the requisite consciousness of wrongdoing. The Court noted how little culpability the instructions required. The jury was told that even if the petitioner honestly and sincerely believed its conduct was lawful, the jury could convict. The Court noted that, under the instructions, the jury could find guilt simply by finding the actions had impeded the government's fact-finding ability.

The Court noted that document retention policies are created in part to keep certain information from getting into the hands of others, including the government. The Court explained that it is not wrongful, under ordinary circumstances, to instruct employees to comply with a valid document retention policy. The Court also noted that a knowingly corrupt persuader "cannot be someone who persuades others to shred documents under a document retention policy when he does not have in contemplation any particular official proceeding in which those documents might be material."



Recent and Upcoming Shook, Hardy & Bacon E-Discovery Publications and Presentations		
Date	Event	Location
February 11	Civil Rules Advisory Committee Testimony	Washington, D.C.
April 7-8	E-Discovery West Conf. (Marcus Evans)	San Francisco
April 21-23	Sedona Mid-Year Conference	Cambridge, MD
April 27	Pike & Fischer Audio Conference on The Sedona Guidelines for Managing Information & Records in the Electronic Age	Kansas City
April 29-30	KCMBA Bench Bar – E-Discovery Conf.	Osage Beach, MO
May 19-20	DRI E-Discovery Seminar	Washington, D.C.
May 23-25	Managing Electronic Records Conference	Chicago
June 1	FIOS E-Discovery WebCast	Kansas City
June 2-4	Alabama Defense Lawyers Association	Destin, FL
July 14-17	Sedona International E-Discovery Conf.	Cambridge, UK
September 14-17	Sedona Annual E-Discovery Conference	Vancouver, BC
September 28-30	E-Discovery East Conference	New York, NY
November 17-18	Georgetown E-Discovery Institute	Washington, DC
December 15	ISBA E-Commerce Seminar	Des Moines
Articles		Publication
“No File Left Behind: Practical Tips on Corporate Electronic Records Management.”		M&A Newsletter; Marcus Evans Seminars
“Know When to Hold ‘Em: Records Retention by Third-Party Contractors.”		DRI Publications
“Defending the Faith in Corporate Records Compliance”		Inside Litigation Magazine
“E-Discovery and Information Systems: What You Do Not Know May Hurt In A Big Way”		IADC Newsletter
“Weapons of Mass Discovery”		DRI Newsletter
Sedona Guidelines for Managing Information and Records in the Electronic Age, Co-Editor		The Sedona Conference and Pike & Fischer



E-Discovery

LITIGATION UPDATE

The E-Discovery Litigation Update is prepared by the Technology Law & E-Discovery Group at Shook, Hardy & Bacon. This Group assists corporate clients and their counsel in meeting the increasingly complex demands of electronic evidence discovery, including national coordination of outside counsel firms on technology law issues. The Group also partners with clients to develop, implement and manage proactive and cost-effective solutions for electronic document retention, collection, production, and work product collaboration among corporate and outside counsel. If you would like more information about Shook, Hardy & Bacon's Technology Law & E-Discovery Group, contact **James Daley** of our Kansas City office at 816-474-6550 (e-mail: mjdaley@shb.com) or **John Barkett** of our Miami office at 304-358-5171 (e-mail: jbarkett@shb.com).

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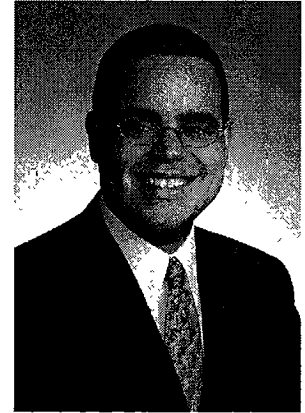
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Concentration:
Business Litigation

Professional Profile

David has successfully tried cases to a jury verdict and has prosecuted appeals before appellate courts in Texas. Those trials have involved oil and gas matters, securities fraud, lender liability and real estate disputes. More specifically, David's representations have included:

- * representation of a publicly-held company (specifically, extensive work related to electronic discovery) against securities fraud claims of over five billion dollars,
- * representation of a publicly-held company and one of its officers against claims of commodities fraud,
- * litigation on behalf of a software company against its former consultants on intellectual property issues,
- * litigation between the owners of a series of multinational partnerships involving the disposition of the partnerships' assets,
- * management of national defense efforts for a window manufacturer against product liability claims in fifteen states, and
- * defense of clients against claims of housing discrimination.

In addition to this wide range of business disputes, David has focused on working with companies to manage their electronic information, particularly in the context of large litigation matters.

David is Chair of Leadership Houston, which will celebrate its 25th anniversary in 2006. He is also on the Board of the Houston Bar Association, and active on the Boards of a number of other organizations, including the Holocaust Museum Houston, Neighborhood Centers, Inc., Young Audiences of Houston, and the Downtown Club of Houston. David is a Past President of the Houston Young Lawyers Association.

In 2004, David was selected as one of the Five Outstanding Young Houstonians by the Houston Junior Chamber of Commerce and one of the Five Outstanding Young Texans by the Texas Junior Chamber of Commerce. That year, he was also selected





David A. Chaumette, cont.

as a Volunteer of the Year by both the Girl Scouts of San Jacinto Council and Aspiring Youth of Houston.

He is also a member of the National Bar Association, the Houston Lawyer Association, and the College of the State Bar of Texas. He is also a Fellow of the Texas Bar Foundation, the Houston Bar Foundation and The Houston Young Lawyers Foundation.

David has presented papers before numerous organizations on topics, including electronic discovery, employment disputes, spoliation, and ethics issues. He is also the author of many articles on these topics and additional topics related to environmental law.

Licenses

David is admitted to practice before the United States Supreme Court, the state courts of Texas, the Fifth Circuit, and the United States District Courts for the Northern, Southern, Western and Eastern Districts of Texas, and the District of Colorado.

Current and Previous Positions

2002 to Date Shook, Hardy & Bacon L.L.P.
1998 to 2002 Porter & Hedges, L.L.P.
1994 to 1998 Mayor, Day, Caldwell & Keeton, L.L.P.
1993 to 1994 Judicial Law Clerk for The Honorable Lynn N. Hughes (United States District Court for the Southern District of Texas)

Education

1993 J.D., University of Chicago Law School
1990 M.S., Stanford University (Aeronautics/Astronautics)
1989 B.S.E., *cum laude*, Princeton University

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San Francisco
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Washington, D.C.

Business Practice Tips for Success in Litigation Support Consulting **by Dr. Thomas M. Dydek, Ph.D., D.A.B.T., P.E.**

Introduction

I am a self-employed consulting toxicologist and environmental engineer. I have been in business for myself for the past 10 years. My main area of work is determining the potential adverse human health effects which can occur because of over-exposure to chemicals or microbial agents, either in the workplace, in the community, or in indoor environments. About half of my work is in the litigation support area and the remainder is mostly concerned with health effects evaluations for regulatory agency programs.

The biggest surprise for me when I went into business for myself was how much time I would have to spend doing administrative work. As a consultant, you will be doing a lot more than just technical work on projects. Some of these tasks are things you may take for granted if you are working for someone else.

I have put together the following suggestions for accomplishing the administrative aspects of a consulting practice. Some of these ideas were passed along to me by other consultants when I entered the field and others I had to learn on my own. I hope that this information is useful to you.

Services Agreement and Fees

It is essential to have a retention agreement or Professional Services Agreement (PSA) and get it in place for every case on which you work. Sometimes the law firm will have a set format that they want to use. In my experience, I have been the one to produce the agreement and get it signed. I have provided a copy of the PSA I use as a "go-by" for you (see Attachment A). It is rare to run into serious disputes with clients in a consulting practice, but if there are problems and you don't have a contract, it will be very difficult if not impossible for you to recover losses or to defend yourself if it comes to that. It just makes good business sense to have a retention agreement in place and to have it in place before you begin any work on the project.

Another big issue is how much to charge for your services. This will depend on your field of expertise and your qualifications and level of experience. An expert with a bachelor's degree and several years of experience cannot in general command as great a billing rate as someone with more degrees and more experience. Some experts feel that they can price themselves out of jobs by having a rate that's too high. On the other hand, if your rate is too low, clients may think you're not that great of an expert. I have heard about experts who raised their rates in an effort to decrease their workloads, but actually more people were interested in hiring them at the higher rates.

As an example, I have a PhD and I am Board Certified in Toxicology. I am also a Licensed Professional Engineer. I have had more than 30 years continuous experience in the environmental field. In my litigation support projects, I figure that as long as I'm charging about

the same per hour as a Senior Partner in the law firm (which would be my equivalent in the legal world), that billing rate should be acceptable to my attorney clients. I seldom get the impression from clients that I'm overpriced. Also, there are some professional organizations that do salary surveys that you can get to assist you in your decision. You also need to decide if you will charge the same for litigation support services or non-legal work. I think it's easier to charge the same, that's what I have always done. Doing things that way also avoids questions from opposing lawyers on cross-examination.

Many experts charge extra for giving testimony versus just "regular" work on a litigation support project. I have used a 50% surcharge on my work in this area, but it has caused some friction at times. Some lawyers don't think that there should be an extra charge for testimony. On the other hand, it is a more stressful situation for the expert and the work does need to be done according to their schedule, not yours. The actual testimony time in a case usually is very small, anyway (usually less than 5% of the total hours). To avoid hassles and additional questions about your fees from opposing attorneys, you might want to just charge the same for everything. This can be a negotiable item, but whatever is agreed to should be spelled out as part of the Professional Services Agreement (see page 3 of Attachment A for the Fee Schedule I now use).

Other possible bones of contention are charges for travel time and for out-of-pocket expenses. Some clients balk at paying for travel time, or at least want some sort of discount. They may not think it is fair for them to pay for time when the expert is just sitting around traveling. If it's air travel, though, I am usually working on the case by reading documents and otherwise studying the project anyway, so I feel justified in charging for travel time in that instance. In any case, the time spent traveling is time that you could be working on other projects, so in that sense, it is logical to charge for travel time. I have had some occasions in which I only charged one-half the normal rate for travel time, but those instances are rare.

My understanding of the "industry standard" for out-of-pocket expenses (travel, lodging, publications purchased for a particular job, etc.) is to add a mark-up. I have always used 15%, which is a common mark-up percentage. Some clients have balked at this as well, though, and if this is a real sticking point for them I have agreed to charge out of pocket expenses at cost. In one case involving an insurance company client, I was not hired specifically because they didn't want to pay the mark-up. Again, the out-of-pocket expenses are not usually a big portion of the total charges, so it is not a big deal. If the clients don't want to have a mark-up, go ahead and let them have their way. It's not worth the bad feelings to hassle over something like this.

Charges for making copies, sending FAXes, postage, and so forth can be seen by clients as "nickleing and dimeing" them. In the past I charged 17 cents per page for copies and \$1.50 per page for FAXes, but I have had the feeling that some clients don't like it. You don't want to miss out on future work from a client because they didn't like how much you charged for making copies or sending FAXes. Once again, these expenses are almost never a significant fraction of the total cost of your services. You will have to decide how much to charge for these items, if you want to charge for them at all.

Retainers

It is very important to work on a retainer basis with lawyers, especially solo practitioners or lawyers in small firms. Also, in my experience, I have had better results in collecting from defense firms than from Plaintiff's attorneys. At first, I did not require defense attorneys to furnish a retainer, but now I get retainers for all my litigation support work. I have been tailoring the amount of initial retainer to the scope of work or in some cases to what I think they can "afford" for a particular project. Lately, I've been thinking of going with a set minimum retainer (maybe \$2,000) to simplify matters. If they can't afford to advance you \$2,000, you probably don't want them for a client. Don't start any work without the retainer, even if they say they are putting the check in the mail that day. Sometimes they don't.

When you have exhausted the retainer amount (or preferably before you get to that point) you should let your client know as soon as possible that an additional retainer will be required. When you are in the middle of a case that is going to trial soon, however, this might be difficult. Things can move very quickly in legal cases and the expert needs to be proactive in getting additional retainers in a timely fashion. It is easy to do more work than the original retainer can cover, but if you do this you could be putting yourself in financial jeopardy.

I once did an indoor air quality project for a company that leases out buildings, remodels those buildings into office space and then sub-leases the office out to other companies. I requested and received an initial retainer for my services and then deviated from the advice I just gave and did some work above and beyond the original scope of work and retainer amount. I billed the client and received prompt payment for those extra services, so I felt comfortable in continuing in that manner. What I didn't know was that one of this company's main tenants in Houston was Enron. When that bubble burst, my client's company was in deep financial trouble. Because of that, they started delaying the payment of my invoices while still requesting more work. I didn't know of their money problems, so I kept working on the project until they owed me about \$16,000. That was almost six years ago now and I have had to go to court to try and recover what is owed to me. It has been a tremendous drain of time and energy to have to pursue getting paid on this and this matter still has not been resolved. The moral of the story is no matter how well a client has been paying, there is no guarantee that they will keep on paying. You should always get paid up front for your consulting services if at all possible.

It is often difficult to know when a client might become a problem. One way is to check out the lawyer the same way they are checking you out. Find out how large a firm he or she is in, how long they have been in practice, and if they are Board Certified in their practice areas. The Martindale Hubble directory of attorneys also contains a rating system that is useful in determining your potential client's level of experience and expertise (see their Web Site at <http://lawyers.martindale.com>). Keep track of how prompt your clients are with retainers or payments or if they start asking you to do more work without bringing their accounts up to date. If it is taking longer and longer to get paid, this should be a red flag for you. If you do start to get suspicious, remember that you have the information the client wants. Don't send them that report or do that deposition until you have been paid for past charges and for the work to be done now.

Advertising and Marketing Your Services

Most people say that the best ways to build a consulting practice are by word of mouth and from return business. These may be the best ways, but they can be very slow. Unless you are independently wealthy or just don't care about growing your business quickly, you will need to take an active role in getting new business and not just wait passively for new projects to come in your door. This is where advertising and marketing come in. While the discussion below pertains mostly to acquiring new clients, don't forget about the people you have worked for in the past. They say the easiest client to get is the one you already have. Keep up your contacts with people you have worked for before every six months or so to remind them that you are available to assist them in any new cases for which they might need support in your areas of expertise.

Some consultants are wary of advertising their services. They may fear that opposing attorneys may try to impeach them as an expert by portraying them as a "hired gun", someone who will say anything for a price. They may try to get the judge or jury to believe that you are paid to give the "correct" opinion or that your opinion is for sale to the highest bidder (or the famous "how much have you been paid to give your testimony today" question). All that is required to defuse this is to answer calmly and truthfully that you are being paid for your time, not for your testimony, and that your mission is to give your opinion based on the facts of the case. Of course, some advertising (including statements made on your Web Site) can be objectionable or leave the door open for attack. Be thoughtful and discrete in your advertising presence. Remember that most attorneys are also out there advertising their services in one way or another.

One of the best ways for an expert to get their names in front of prospective legal clients is to get listed in various expert witness directories. One of the most effective regional marketing tools I've found is the annual "Southwestern Directory of Expert Witnesses & Consultants". Many lawyers in Texas use this publication to find experts. The same type of directory is published for other areas of the country (Southeastern Directory, Midwestern Directory, and so forth). To find out about how to get listed there, you can search for "American Lawyer Media" on the Internet. You might also consider the National Directory of Expert Witnesses. Their phone number is 800-735-6660. It's only about \$250 per year for a single listing in that directory, well worth it if it only brings in one job every couple of years. As well as having a print version of their directories, these organizations are now also expanding into an Internet presence that is more and more useful to experts as attorneys become more familiar with Web searches and other information.

There are now many Internet-based expert witness listing services. For a usually nominal amount (\$300-\$500 per year) you can get your information included on their Web Sites. There are some entities who are charging over \$1,000 per year for basically the same service, so I have steered clear of these. Many law firms are now using these expert lists to find experts for their cases. Some lawyers are just using "Google" searches for experts so it would also be wise to have your own Web Site. I have found that this is a very valuable source of new clients, not just locally, but throughout the country. One downside of having a Web presence is that lawyers wanting to hire someone will not be the only individuals privy to your information. Anyone with

an Internet connection can now access your information and may give you a call. I get several inquiries a month from individuals who just want some free advice. I usually try to help these people the best I can, but some will try to take advantage of your time.

Another source of referrals is organizations that exist to provide expert finder services for attorneys. There is usually no charge to experts to take advantage of these services. The way that these groups make their money is to tack on an extra charge per hour. Some do a 40% markup on your fees, though, so they can price themselves (and you) out of some projects. I have used an organization called TASA (Technical Advisory Service for Attorneys) for five or six years now. I generally get at least one call per month from them about an attorney looking for an expert, but in those three or four years, I have only had a actual new job come through two or three times. The advantage of using a service like this is that they do all the marketing work and the billing a collecting and it doesn't cost the expert anything. The downside is that it just doesn't bring in that much work. TASA's number is 800-523-2319. The people there are very pleasant. Another similar organization is called the Technical Network Consulting Service. I have not used their services, but I may sign up with them soon.

Another marketing tool to use is for you to present technical papers at local, regional or national conferences or to give talks at meetings of local chapters of professional organizations (Air and Waste Management Association, American Industrial Hygiene Association, and others). Writing journal articles or book chapters is another way to establish yourself as a qualified expert in your field. Basically, you just need to get your name and face "out there" so that people know you exist and that you are available to assist them if they need your help. Some experts have agreements with local newspapers or TV and radio stations as someone to get a quote from when a story concerning your area of expertise comes along. I haven't done much along those lines, but it does work for some experts. I have done some pro bono consulting work for television shows such as "CSI Las Vegas" and the Discovery Channel's "Dr. Know". While this work is usually not a paid engagement, the exposure generally catches a prospective client's eye. I have had attorneys notice that I am a consultant for these shows on my resume and commented on it. Anything that accomplishes that goal is a worthy bit of marketing.

Finally, I should emphasize the importance of finding out which of the above marketing and/or advertising services is really working for you. It is easy to spend too much money on listings that are not producing any projects you wouldn't have had otherwise. Keep track of where people find you. The easiest way to do this is to just ask prospective clients when they first contact you. Most are willing to let you know where they found your name. As I mentioned above, the Southwestern Directory has worked well for me, but others such as the Claims Adjusters Reference Manual (insurance company listings) have not. If I don't get much in the way of referrals from a particular source within a year or so, I don't sign up with them again.

Professional Insurance

There is some controversy about whether consultants need to carry professional liability (errors and omissions) insurance. I do not carry it, but many consultants do. The "service" I and many other consultants provide is usually only our opinion, and therefore is not really subject to liability. Another down side of having insurance I've heard is that if you do have such liability insurance, it actually makes it more likely that you could be sued because of the "deeper pockets" issue. You would probably be covered financially in such a situation, but you would still have to go through the hassle of a lawsuit. Most of us have enough to do already and don't need the extra work of dealing with being sued. The situation is different for consultants who do actual fieldwork or are involved in remediation efforts for example. When the consultant is actually moving dirt or touching a client's property, carrying liability insurance makes sense.

Another negative aspect of this type of insurance is that it can be quite expensive: \$6,000 to \$10,000 per year. More recently, rates have come down. Some professional organizations offer errors and omissions insurance for around \$1,000 per year, which isn't bad. You might contact the relevant professional group for your area of expertise (such as the State Professional Engineering Board) and get their recommendations. If you notice in my Services Agreement, I also have a liability limitation clause. This is in an effort to reduce any financial risks since I don't carry the insurance. Lawsuits against consultants are rare, but may be on the rise.

Miscellaneous Suggestions

If you are in solo practice or if you only have a very small staff, it makes sense to use a home office. Office space can be expensive and office rent comes right off your bottom line every month. If you have very slow times (and almost all consultants do) you could be evicted which would be very disruptive to your business and harmful to your professional reputation. You have to pay your home mortgage or house rent anyway. You might as well have only one of those payments to make each month. There are also tax advantages to having a home office. Portions of many home expenses such as utilities and repairs can be taken as business expense deductions on your income tax. The other main advantage of a home office is that you don't have to commute to get to work. In Austin as well as in most cities commuting is becoming more and more of a time-consuming challenge. Some people spend two to three hours per day just in transit from home to office. These are hours you can save by having a home office. The stress of dealing with traffic is something most people can live without.

If you're planning to work out of your home (which I do), get a separate phone and FAX lines. If you do that, it is easy to keep telephone business expenses separate from personal ones. If you don't have one already, get a high-speed Internet connection, it really helps. Use professional looking letterhead, business cards, and other company materials. You might also send out an announcement that you are entering the consulting business to everyone you can think of who may be a prospective client. Send out announcements of other events such as attaining Board Certification, getting a professional license, or getting new office space. You should take advantage of any opportunity to get your name in front of a prospective client in a professional manner.

I also recommend getting your own domain name for your Web Site (mine is "www.tox-expert.com"). Internet providers can change ownership or go out of business. If you are using one of their domain names, every time they make a change, your Web Site and E-mail addresses will change. This will probably result in you having to get new letterhead, new business cards, and advise all of your clients and prospective clients of the change. Speaking from experience gained the hard way, this is a big hassle!

In a similar vein, use a business mailing address that will not change for the foreseeable future. In the past, I used a Mail Store to handle business mail which worked fine until one day they informed me they were closing, again necessitating new letterhead, business cards, and other company materials. Because I work out of my residence, I now use my home address, but a post office box at the U.S. Post Office might sound more professional. It's a little impersonal, though, and you do need a physical address to receive overnight service transmittals such as Federal Express packages.

I use an Internet provider to support my Web Page and to provide technical assistance should I need it. Unless you're a real "Web Head" it's a good idea to have some technical support in this area. There are methods by which your page can contain certain terms such as your area of expertise, "expert witness", and so forth so that your page will show up when people search using those terms. The Internet provider should be able to do this for you.

Most law firms use either WordPerfect or MicroSoft Word as word processing programs. If you not already familiar with both it would help to be. The more recent versions of these two types of word processing software can convert from one to another, so it is important to get the most recent versions so that you can send compatible documents back and forth with your clients.

These are all things I learned from others or by trial and error. I hope I have saved you some time and trouble by providing this information to you. Go out and have a great time consulting!

ATTACHMENT A
SAMPLE PROFESSIONAL SERVICES AGREEMENT

**DYDEK TOXICOLOGY CONSULTING
PROFESSIONAL SERVICES AGREEMENT**

MADE AND ENTERED INTO by and between _____,
(hereinafter referred to as "Client") and **Dr. Thomas Dydek, Ph.D., D.A.B.T., P.E.** (hereinafter referred to as "Dr. Dydek").

WHEREAS, the Client desires to engage Dr. Dydek as a consultant; and

WHEREAS, Dr. Dydek desires to render certain services and has the experience and staff to perform those services;

NOW, THEREFORE, in consideration of the mutual covenants and agreements hereinafter contained, the parties hereto agree as follows:

Section 1. Services. The Client hereby agrees to engage Dr. Dydek and Dr. Dydek hereby agrees to perform certain services for the Client as mutually agreed upon.

Section 2. Standard of Care and Warranty. Dr. Dydek agrees that his Services will be performed with that level of care and skill ordinarily exercised by members of the profession currently practicing under similar conditions and circumstances. No other warranty, expressed or implied, is made. Dr. Dydek will not be responsible for the interpretation or use by others of data he has developed.

Section 3. Reports. If requested by the Client, Dr. Dydek will provide written reports. In preparing these reports, Dr. Dydek may review and interpret information provided by the Client or by third parties. Dr. Dydek will not independently verify the accuracy or completeness of such information (unless requested by the Client) and will not be responsible for any errors or omissions contained in such information.

Section 4. Compensation. For Dr. Dydek's performance and completion of all services, Client shall compensate Dr. Dydek at the hourly rates and charges as set forth in Attachment A: Standard Rate Fee schedule, which is hereby incorporated into this Agreement.

Section 5. Indemnification. Client shall defend, indemnify, and hold Dr. Dydek and his employees, servants, consultants, agents, successors, and assigns harmless from and against any claim asserted by any person or entity (other than an officer, director, employee, or subcontractor of Dr. Dydek) arising out of (i) Client's acts, errors, and omissions, (ii) Client's negligence or (iii) Client's breach of any obligation or responsibility imposed on him by the provisions of this Agreement, except in the case of errors, omissions, or negligence in the work performed by Dr. Dydek.

Likewise, Dr. Dydek shall defend, indemnify, and hold Client and their employees, servants, consultants, agents, successors, and assigns harmless from and against any claim asserted by any person or entity (other than an officer, director, employee, or subcontractor of Client) arising out of (i) Dr. Dydek's acts, errors, and omissions, (ii) Dr. Dydek's negligence or (iii) Dr. Dydek's breach of any obligation or responsibility imposed on him by the provisions of this Agreement, except in the case of errors, omissions, or negligence in the work performed by Client.

Section 6. Liability Limitation. Dr. Dydek's liability to the Client for any loss or damage, including, but not limited to, special and consequential damages, arising out of or in connection with this Agreement from any cause, including Dr. Dydek's professional negligence, errors, or omissions shall not exceed the compensation received by Dr. Dydek hereunder, and Client hereby releases Dr. Dydek from any liability above such amount.

Section 7. Disputes. Any disputes relating to the performance of the Services covered by this Agreement will be submitted to Alternative Dispute Resolution in Travis County, Texas before and as a condition precedent to other remedies provided by law. If a dispute at law arises related to the Services under the Agreement and that dispute requires litigation and legal or other costs are incurred, the prevailing party shall be entitled to recover all reasonable costs incurred in the defense of the claim, including staff time, court costs, attorney and expert witness fees, and other claim-related expenses. The venue for any such legal actions shall be Travis County, Texas.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed by themselves or by their duly authorized representatives as of the ____ day of _____, 200__.

CLIENT NAME AND ADDRESS

**Dydek Toxicology Consulting
6013 Cervinus Run
Austin, Texas 78735**

By: _____

By: _____

Title: _____

Title: _____

Printed Name: _____

Printed Name: _____

ATTACHMENT A

DYDEK TOXICOLOGY CONSULTING STANDARD FEE SCHEDULE

The following gives the standard hourly labor rates, charges for reimbursable expenses, surcharge rate for expert testimony, and terms of payment.

Labor Rates	Senior Toxicologist	\$250.00/hour
	Senior Engineer	\$150.00/hour
	Clerk	\$30.00/hour

These rates shall apply to all time spent working on the project except for testimony time. Charges for expert witness testimony time are given below. Travel time shall be billed at the above rates on a "door-to-door" basis.

Reimbursable Expenses	Car/Truck Mileage	\$ 0.40/mile
	Photocopies	\$ 0.17/page
	Sending Telecopies (FAX transmissions)	\$1.50/page
	Other Out-of-Pocket Expenses (Travel, Telephone, Lodging, Meals, etc.)	Charged at Cost

Expert Testimony	A labor rate surcharge of 50% shall be added for expert testimony given at depositions, hearings, or at trial. A minimum of four hours expert testimony time will be billed for each day that a staff member is testifying. Time spent in preparation for trials, hearings, and depositions will be billed at the above base labor rates.
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Terms	An initial retainer will be determined based on the envisioned scope of work at the outset of the case. Work will not proceed until the retainer has been received. Additional retainers, if needed, will be determined by agreement between Client and Dr. Dydek and will be furnished by Client before subsequent work is undertaken by Dr. Dydek.
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Biographical Information
Dr. Thomas M. Dydek, Ph.D., D.A.B.T, P.E.

Phone: (512) 280-5477
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E-mail: dydek@tox-expert.com
Web Site: www.tox-expert.com

Dr. Dydek is the President and founder of Dydek Toxicology Consulting, a toxicology and engineering services consulting firm in Austin, Texas. He has a Bachelor's degree in Mechanical Engineering and a Master's degree in Environmental Engineering from Rice University in Houston, Texas. He has a Ph.D. in Environmental Science from the University of North Carolina School of Public Health, and has done a post-doctorate fellowship in toxicology in the College of Pharmacy at the University of Texas at Austin.

Dr. Dydek is a Diplomate of the American Board of Toxicology and is a Licensed Professional Engineer. He is an active member of the Society of Toxicology, the Society for Risk Analysis, the American Conference of Governmental Industrial Hygienists, the Air and Waste Management Association, and other professional organizations. He has attended many technical workshops, seminars, and conferences and given presentations at many of these events.

Dr. Dydek has more than 30 years continuous experience in the environmental field. He has worked for the various Federal and State of Texas environmental regulatory agencies. He has also taught at the University level and has been in the consulting business for the past ten and one-half years. His area of expertise as a toxicologist is the evaluation of human health and welfare effects of environmental pollutants.

Dr. Dydek currently works mainly on projects related to human health risk assessment for air quality permits, hazardous waste site remediations, and as an expert witness in toxic tort cases and in other legal matters. He has evaluated exposures to solvents, pesticides, heavy metals, petroleum products and various other chemicals in occupational settings, in the community, and in indoor environments. He also evaluates exposures to biological agents such as molds and bacteria.

A Registered Professional Engineer as an Expert Witness

Dan Mueller, P.E.

With sufficient qualifications and experience, a registered professional engineer may be the right person to serve as an expert in litigation related work. Although many professions operate under established code of ethics and have established licensing procedures, this paper explores the role of a professional engineer providing expert witness services within the framework of the profession's code of ethics, the rules and set forth in the Texas Engineering Practice Act (licensing authority in the State of Texas), and qualification and role the expert witness is expected to meet and provide in his or her role in litigation procedures.

Professional Engineer Code of Ethics

For the purpose of framing this discussion, the *Code of Ethics for Engineers* as presented by the National Society of Professional Engineers is used for discussion. In the Preamble of the discussion of Code of Ethics, it is stated: "Accordingly, the services provided by engineers require honesty, impartiality, fairness, and equity, and must be dedicated to the protection of the public health, safety, and welfare. Engineers must perform under a standard of professional behavior that requires adherence to the highest principles of ethical conduct."

The fundamental canons are stated as follows:

Engineers, in the fulfillment of their professional duties, shall:

- 1. Hold paramount the safety, health, and welfare of the public.*
- 2. Perform services only in the areas of their competence.*
- 3. Issue public statements only in an objective and truthful manner.*
- 4. Act for each employer or client as faithful agents or trustees.*
- 5. Avoid deceptive acts.*
- 6. Conduct themselves honorably, responsibly, ethically, and lawfully so as to enhance the honor, reputation, and usefulness of the profession.*

Further analysis of specific code of ethic language that may factor in the engineer's services as an expert witness, interesting topics for discussion are presented.

Under the section Rules of Practice, the following is stated:

- 1. Engineers shall be objective and truthful in professional reports, statements, or testimony. They shall include all relevant and pertinent information in such reports, statements, or testimony, which should bear the date indicating when it was current.*
- 2. Engineers may express publicly technical opinions that are founded upon knowledge of the facts and competence in the subject matter.*

3. *Engineers shall issue no statements, criticisms, or arguments on technical matters that are inspired or paid for by interested parties, unless they have prefaced their comments by explicitly identifying the interested parties on whose behalf they are speaking, and by revealing the existence of any interest the engineers may have in the matters.*

Further stated within the section Professional Obligations:

1. *Engineers shall acknowledge their errors and shall not distort or alter the facts.*
2. *Engineers shall advise their clients or employees when they believe a project will not be successful.*
3. *Engineers shall avoid the use of statements containing a material misrepresentation of fact or omitting a material fact.*

The Texas Engineering Practice Act

The Texas Engineering Practice Act defines the practice of engineering as: “the performance of or offer to perform any public or private services or creative work, the adequate performance of which requires engineering education, training, and experience in applying special knowledge or judgment of the mathematical, physical, or engineering sciences to that services or creative work.”

Related to providing expert witness services, the Texas Engineering Practice Act specifically states that the act does not “prohibit or otherwise restrict a person from giving testimony or preparing an exhibit or document for the sole purpose of being placed in evidence before an administrative or judicial tribunal, subject to the Board’s disciplinary powers under Subchapter J regarding negligence, incompetency, or misconduct in the practice of engineering.”

It is clear from this statement that being registered as a professional engineer in Texas is not a requirement for providing expert witness services; however, the services provided must lie within the qualification of the non-engineer.

The Qualification as an Expert Witness

In determining if a person is qualified to serve as an expert in a particular case, the name/term Daubert is often referred. This name/term references a United States Supreme Court case in which it was held that the trial court judge in essence acts as a “gate keeper” who must rule as to whether or not to allow particular scientific testimony from experts.

There are two main criteria in performing their gate keeping function. These are:

- Is the testimony based on scientific knowledge; and
- Is whether the testimony is relevant to the facts of the case.
-

Further factors to be considered in ruling on the admissibility of expert witness testimony include:

- whether the testimony can be and has been tested,
- whether the testimony is based on peer-reviewed publications,
- the known or potential rate of error of the methods relied upon by the expert, and
- the general acceptance within the relevant scientific community of the methodology used by the expert.

Daubert related parameters for the qualification of an expert witness are consistent with both the professional engineers code of ethics or with the duties of an engineer as defined by the Texas Engineering Practice Act. In fact an engineer that discharges his/her duties as an expert within appropriate professional guidelines should not be concerned with a Daubert related challenge. A professional engineer should not present him or herself as an expert without proper qualifications and any opinion rendered should be based on sound engineering judgment. This infers that the basis is peer reviewed, the premise can and has been tested, and it is accepted within the relevant scientific community.

It is fair to say that if a professional engineer is disqualified as an expert witness as a result of a Daubert challenge, then the paramount question should be under what circumstances was the engineer originally retained? Were the qualifications and experience accurately presented and were the opinions developed utilizing applicable facts and in a straightforward manner. I would ascertain that if any of these items do not meet the Daubert test then they also do not meet the standards of the engineering profession as articulated by accepted code of ethics as well as licensing requirements.

The Role of a Professional Engineer as an Expert Witness

So what is the role of a professional engineer as an expert witness? First let's explore what is expected of an expert witness. An expert is retained to offer an explanation in laymen terms of technical or scientific issues relating to litigation or regulatory permitting/enforcement issues. This may entail expert testimony or it may just involve providing advice on the technical issues

We are all too aware of the misconception that experts are retained to supply a foregone conclusion. But nothing can be further from the truth nor do more to harm the credibility of the expert. The attorney's role is to be an advocate for their client. As part of that advocacy position, there may be inferences to what the technical or scientific arguments that would best support that advocacy position. However, it is the expert that must provide the opinion that is sound and defensible. The attributes of a good expert is the assurance that the client will be provided with an honest evaluation of the facts based on the expert's knowledge and experience – both the good and the bad.

If an expert develops an opinion based on the facts and sound science, then why would experts hired by opposing parties have differing opinions? The answer may at first seem that one of the hired experts is doing just what was previously stated not to be an expert's role – retained to supply a foregone conclusion. In actuality the reason for differing expert

opinions is that engineering is a science and within that realm, there rarely are black and white issues. Even the most basic engineering evaluation is based on a series of assumptions and those assumptions may be based on a number of underlying factors. Therefore an engineering expert ends up evaluating the various underlying technical parameters that provide the basis for predicting the circumstances that produced the situation the litigation activities are attempting to address. Under these circumstances, two engineering experts may have significantly varied opinions even though both are well developed and supported. The critical element is that all facts and sound engineering judgment are used by both parties.

Here is an example. A significant rainfall event resulted in flooding in a newly developed residential neighborhood. At the time the flooding occurred a major renovation of a nearby highway was occurring as well as initial work on an adjacent neighborhood. So why did the flooding occur? A number of possible contributing factors are:

- faulty design of storm drainage systems in the new newly development neighborhood;
- altered storm water flow from current construction (both the highway and adjacent property);
- improper maintenance of existing storm drainage facilities down gradient of the area that flooded causing storm water to backup and ultimately flood the subject property; or
- a storm event so extreme that it exceeded reasonable design parameters of any storm water control facility.

In actuality, there are only a few facts that cannot be disputed. They are:

- rainfall rates and intensities vary widely and reconstructing how much rain fell, where it fell, and for what exact duration cannot be determined without some degree of uncertainty; and
- the exact cause and effect of the flood event will not be determined without a degree of uncertainty but most likely was a result of a combination of the factors previously discussed.

Therefore, experts hired will end up debating the uncertainties of the various factors that contributed to the flooding. The experts will be using the same facts, but may develop widely varying opinions. In developing these varying opinions, each expert will have performed their work within the proper ethical and licensing framework but the results may be widely divergent.

Summary

- The professional engineer's role as an expert is to develop and present a sound opinion based on all the available facts. Even if the opinion is contrary to what the attorney was expecting, the expert's real value to the client is to provide the unbiased opinion allowing the attorney to then develop the strategy to deal with this information.

- If the professional engineer performs the duties of an expert within the bounds and framework of the code of ethics and licensing requirements, then legal challenges to the expert's opinion (such as a Daubert challenge) will not be a concern.
- The fact that two professional experts can have widely differing opinions does not indicate that one of the experts is acting outside the bounds and framework of the code of ethics and licensing requirements. The fact that determining the technical basis for a situation will have wide and varied underlining causes and evaluating theses causes open the door to widely varied final opinions.

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2. The Texas Engineering Practice Act (Chapter 1001, Texas Occupations Code). Revised: May 21, 2004.

Dan Mueller, P.E.

Mr. Mueller is a registered professional engineer with over 25 years of experience in numerous areas of environmental engineering including water resources, industrial waste treatment and disposal, soil and groundwater contaminant investigations, and hazardous waste management. He has provided expert witness services involving not only case development and testimony but also coordination of expert witness teams representing various disciplines.

Mr. Mueller holds a B.S. in Biology, B.S. in Civil Engineering, and M.S. in Civil Engineering. He is the founding partner in The Mueller Consulting Group - a firm that provides specialized technical and litigation support and regulatory compliance and policy assessment. He can be reached at 972-342-2321 or DMueller@MuellerLLC.com.

BIOGRAPHY NOT SUBMITTED

**CURRENT ISSUES IN EXPERT TESTIMONY
IN ENVIRONMENTAL CASES**

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ANDREWS
ATTORNEYS **KURTH** LLP

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RULES

TEX. R. CIV. P. 192.3(e)(6)	4
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BOOKS

Michol O'Connor, O'Connor's Texas Rules * Civil Procedure (Michol O'Connor and Byron P. Davis, eds., 2005)	4
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PUBLICATIONS

Steven D. Easton and Franklin P. Romines, “ <i>Dealing with Draft Dodgers: Automatic Production of Drafts of Expert Witness Reports</i> ,” 22 Rev.Litig. 355 (2003)	4
Garth T. Yearick, “ <i>Lawyers Address Destruction of Testifying Expert’s Draft Reports</i> ,” <i>Litigation News</i> (ABA Litigation Section) Jan. 2003	3
Richard J. Oparil, “ <i>Discoverability of Work Product and Privileged Documents In The Hands of A Testifying Expert</i> ,” Committee on Pretrial Practice and Discovery Newsletter, American Bar Association, Section Litigation, Vol. 12, No. 2, 2004	4

I. INTRODUCTION

This paper provides an overview of current issues involved in expert testimony in environmental cases. As might be expected, many of the issues addressed are not peculiar to environmental matters but, when possible, the author has attempted to highlight the particular applicability of the issues to environmental litigation in particular.

II. DAUBERT ISSUES

The U.S. Supreme Court's ruling on admissibility of expert testimony in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), continues to be addressed by federal Circuit Courts of Appeals. Recent cases and the circuits that have discussed the application of *Daubert* include *United States v. Diaz*, 300 F.3d 66 (1st Cir. 2002); *Willis v. Amerada Hess Corp.*, 379 F.3d 32 (2nd Cir. 2004); *Calhoun v. Yamaha Motor Corp.*, 350 F.3d 316 (3rd Cir. 2003); *Marsh v. W.R. Grace & Co.*, 80 Fed.Appx. 883 (4th Cir. 2003); *United States v. Hicks*, 389 F.3d 514 (5th Cir. 2004); *Nelson v. Tennessee Gas Pipeline Co.*, 243 F.3d 244 (6th Cir. 2001); *Ammons v. Aramark Uniform Servs.*, 368 F.3d 809 (7th Cir. 2004); *Hartley v. Dillard's, Inc.*, 310 F.3d 1054 (8th Cir. 2002); *United States v. Finley*, 301 F.3d 1000 (9th Cir. 2002); *Clausen v. M/B New Carissa*, 339 F.3d 1049 (9th Cir. 2003); *Truck Insurance Exchange v. MagneTek, Inc.*, 360 F.3d 1206 (10th Cir. 2004); *United States v. Frazier*, 387 F.3d 1244 (11th Cir. 2004); *Meister v. Medical Engineering Corp.*, 267 F.3d 1123 (D.C. Cir. 2001).

III. RECENT CASE DEVELOPMENTS

In addition to *Daubert* issues, the courts in environmental litigation have recently addressed a variety of expert issues. Recent case law involving experts in environmental matters are discussed below.

Pinal Creek Group v. Newmont Mining Corp., 352 F.Supp.2d 1037 (D.C.Az., 2005). In this CERCLA contribution action, plaintiff sought to introduce expert testimony of several legal experts regarding corporate issues relevant to an operator liability claim. The court struck most of the expert testimony as inadmissible legal opinion, although it did allow testimony regarding interlocking directors and officers to the extent that the testimony showed that the relationship issue diverged from corporate norms. In addition to the legal experts, the court did allow two non-legal experts. A mining engineer expert was allowed to testify about involvement of a corporate defendant's agent in pollution-causing activities at the site. In addition, a consulting historian of technology was allowed to testify about involvement of the company's activities in developing the mining site.

BFI Waste Systems of North America v. DeKalb County Georgia, 303 F.Supp.2d 1335 (N.D.Ga. 2004). In this dispute over a landfill permit, the court struck portions of BFI's expert, who sought to provide opinions about the actions of the county commissioners and the application of county ordinances to the BFI permit application.

Ellis v Gallatin Steel Company, 390 F.3d 461 (6th Cir. 2004). In this case, the Court of Appeals upheld the district court's decision to admit expert testimony on the issue of damages. Here, the court held that the district court did not commit error in failing to mention the *Daubert*

factors. In this instance the assessment of the local real estate market did not require peer review or existence of scholarly writing and therefore the testimony was allowed.

Cooper v. Travelers Indemnity Co., 113 Fed.Appx. 198 (9th Cir. 2004). The Ninth Circuit upheld a trial court's exclusion of expert testimony on lost profits due to contaminated well water. The trial court excluded expert testimony on lost profits because the economics expert only considered client data on reaching his conclusions, whereas in *voir dire* he testified it was his normal practice to verify client-provided data. Because the expert had deviated from his normal practice, the district court excluded it and this decision was upheld on appeal.

Burleson v. Texas Dept. of Criminal Justice, 393 F.3d 577 (5th Cir. 2004). The Fifth Circuit upheld exclusion of plaintiff's causation experts on *Daubert* grounds, while allowing the testimony of defendants' causation experts to stand, in granting summary judgment for defendants. Because of this, the court concluded that there was competent summary judgment evidence for alternative causation and no material fact issues regarding defendants' causation claim.

McClain v. Metabolife Int'l, Inc., 401 F.3d 1233 (11th Cir. 2005). The Court of Appeals overturned the district court's admission of plaintiff's toxicological expert on *Daubert* grounds, holding that his causation analysis failed to satisfy the *Daubert* factors for admissibility. Therefore, the Court of Appeals reversed and remanded.

Pugh v. Conn's Appliances, Inc., 2004 WL526742 (Tex.App.—Beaumont March 8, 2004) (not designated for publication). The Court of Appeals upheld the trial court's admission of defendant's expert's testimony over objection by plaintiff that defendant has failed to properly supplement the report. In part, the court said that plaintiff's late production of evidence which defendant's expert used for basis of opinion constituted good cause for allowing the expert to testify.

Borg-Warner Corp. v. Flores, 153 S.W.3d 209 (Tex. App.—Corpus Christi 2004). The Court of Appeals upheld the trial court's admission of expert testimony on mixed questions of law and fact, including opinions on manufacturing, design and marketing defects of defendant's products, including inadequacy of any warnings.

Formosa Plastics Corp., USA v. Kajima Int'l, Inc., 2004 WL2534207 (Tex.App.—Corpus Christi, Nov. 10, 2004) (not designated for publication). The Court of Appeals overruled a trial court's decision not to disqualify a testifying expert on a claim that he had switched sides. The Court of Appeals found that the trial court abused its discretion in refusing to disqualify experts that had previously been consulted by Formosa and which were subsequently retained by Kajima. It therefore ordered a new trial in which none of the controverted experts were allowed to testify.

Greenberg Traurig of New York, P.C. v. Moody, 161 S.W.3d 56 (Tex. App.—Houston [14th Dist.] 2004). The Court of Appeals held that the trial court committed reversible error in allowing expert testimony on pure questions of law. Plaintiff had offered expert testimony on legal issues from a former law professor and a former justice of the Texas Supreme Court. These experts were the only experts for plaintiffs and comprised more than half of the entire case. The

court held that because their testimony was based on pure questions of law, based on incorrect statements of law, and contained opinions no relevant to the case, it was error for the trial court to allow this testimony.

General Motors Corp. v. Iracheta, 161 S.W.3d 462 (Tex. 2005). In this negligence action, the Supreme Court held that plaintiff's expert testimony was unreliable, applying Texas' counterpart to the *Daubert* case. As a result of striking this expert testimony because there was no evidence supporting plaintiff's defect theory, the court reversed and rendered judgment that plaintiff take nothing.

McLaughlin, Inc. v. North Star Drilling Technologies, 138 S.W.3d 24 (Tex.App.—San Antonio, 2004). The court upheld expert testimony that was based upon education and experience over an objection to his qualifications. The Court of Appeals held that the trial court had not abused its discretion in determining that the expert's qualifications were sufficient to allow him to testify.

Volkswagen of America, Inc. v. Ramirez, 159 S.W.3d 897 (Tex. 2004). The Supreme Court reversed the trial court and the Court of Appeals, finding that plaintiff's experts were not reliable. Once the expert testimony had been stricken, there was no basis for an award against defendants and the court reversed and rendered. The court found that the expert's testimony ultimately rested on the credibility of the expert, since there were no other factors to evaluate his expert opinion. Because this is insufficient grounds for expert testimony, the expert should not have been allowed to testify.

Cano v. Evers Minerals Corp., 362 F.Supp.2d 814 (W.D.Tex. 2005). This was a toxic tort case in federal court, involving allegations that plaintiff's cancer was caused by radiation from a mine's production of natural uranium ore. Applying Texas law, the district court held that plaintiff had not provided reliable causation expert testimony. The court engages in an extensive analysis of causation issues in toxic tort litigation, ultimately finding that plaintiff's experts do not meet the standard for admissibility, and thereby rendered summary judgment in favor of defendant.

IV. OTHER EMERGING ISSUES IN THE USE OF EXPERTS

A. Discoverability of Drafts of Expert Reports

A recent issue of *The Litigation News* contains a discussion of discoverability of drafts of expert reports and potential sanctions if lawyers advise experts to destroy drafts of expert reports. Garth T. Yearick, "Lawyers Address Destruction of Testifying Expert's Draft Reports," *Litigation News* (ABA Litigation Section) Jan. 2003. The discussions focus on the case, *W.R. Grace Co.-Conn. v. Zotos Int'l, Inc.*, No. 98-CV-838S(F), 2000 U.S.Dist. LEXIS 18096 (W.D.N.Y., Nov. 2, 2000), in which the district court held that there was a duty to preserve and maintain experts' draft reports for possible disclosure to the plaintiff. In this case the court went so far as to order the defendant to reconstruct the draft reports from the expert's computer and ordered the defendant to pay the plaintiff's expenses incurred in bringing the motion before the court. The court did not order sanctions for counsel's instructions to its expert to destroy the drafts, but held that under advisement. A bright rule requiring production of drafts of expert

reports was advocated in the article. Steven D. Easton and Franklin P. Romines, “*Dealing with Draft Dodgers: Automatic Production of Drafts of Expert Witness Reports*,” 22 Rev.Litig. 355 (2003). There, the authors discuss case law concerning production of drafts of expert reports and advocate that such production should be automatic and that sanctions should apply for failure to provide such reports or for counseling experts to destroy such drafts.

O’Connor’s Texas Rules of Civil Trials 2005 asserts that, under the discovery rules applicable in Texas, particularly TRCP 192.3(e)(6) and 194.2(f)(4)(A), almost everything a retained expert reviewed or produced as part of participation in the case is discoverable, including drafts of reports prepared by the expert and the expert’s file. Although the authors of *O’Connors* did not cite any Texas cases for this proposition, the provisions of the rule cited to are certainly broad enough to support such a contention. This development is significant because it seems contrary to the practice of many experts in litigation. As noted in the *Litigation News* article, one practitioner noted that most experienced testifying experts do not retain drafts, and indeed that seems to be the common practice that experts in litigation have learned to adopt as a standard policy. This practice fails to address the problem of an increasing requirement that such drafts must be kept and failure to do so could result in potential sanctions. If production of drafts is the standard, it may not be sufficient for an expert to testify that it is their policy not to keep drafts to avoid sanctions.

Given the potential consequences and what appears to be an emerging gap between typical practice and what courts are willing to allow, several avenues may be pursued. The most clear-cut, and one that avoids the possibility of unpleasant surprise, is for the parties to enter into a stipulation at the outset regarding the discoverability of drafts of expert reports. It would seem in most cases, given the typical practice, that parties would be willing to enter into such a stipulation. Moreover, if a party is unwilling to enter into such a stipulation, this provides an early notice to opposing counsel that they may need to be careful in their practice of working with drafts of their experts, since an opponent who is unwilling to enter into such a stipulation is more likely to request production of such drafts and also to seek sanctions if such drafts have been destroyed. In those circumstances, the attorney needs to work carefully with their experts to assure that if a court does order production of draft expert reports, such reports can be made available, unless counsel is confident that by failing to keep such drafts it will not be subject to sanctions. Given the potential downside of having sanctions imposed, which may include striking the expert’s testimony, such a decision should be made very carefully.

V. DISCOVERY OF WORK PRODUCT AND PRIVILEGED DOCUMENTS PROVIDED TO TESTIFYING EXPERTS

The issue regarding discoverability of draft expert reports is part of a larger issue regarding whether or not work product and privileged documents that are provided to a testifying expert are discoverable. The emerging case law is turning much more toward a complete disclosure of everything that is provided to an expert, and the Texas rules regarding expert discovery are consistent with such a view. In light of this development, most commentators have stated that the only way to ensure that materials are protected is to not provide this material to the expert witness. See, e.g., Committee on Pretrial Practice and Discovery Newsletter, American Bar Association, Section Litigation, Vol. 12, No. 2, 2004: “*Discoverability of Work Product and Privileged Documents In The Hands of A Testifying Expert*,” author: Richard J. Oparil.

This trend in expert discovery, coupled with the potential discoverability of draft expert reports, encourages the increased use of non-testifying experts to help in case evaluation. Both federal and state rules are similar in allowing parties to consult with a non-testifying expert as long as that non-testifying expert's work is not used by a testifying expert. However, care must be taken when using a consulting non-testifying expert to ensure that such an expert does not, through his or her own efforts, gather facts which render that expert discoverable. An expert with firsthand knowledge of the facts becomes, in essence, a discoverable fact witness and therefore is not subject to protection as a consulting expert.

Another issue which is not clearly addressed is to what extent use of a consulting expert's work product by the attorney in helping to prepare a testifying expert can be deemed to be reliance by the testifying expert on the work of the consulting expert. Although this seems contrary to the policy encouraging the use of non-testifying experts for case evaluation, it is possible to imagine a scenario where the testifying expert's opinions may have been influenced by comments from counsel and that are predicated on a non-testifying expert's work to such an extent that a court may, in some circumstances, order discovery of the non-testifying expert. As in all these cases, it seems the most prudent policy is to carefully control what documents are provided to a testifying expert and to limit production of documents that contain attorney work product or privileged material to testifying experts since that material in itself is discoverable and could lead to discovery of a non-testifying expert.

While use of non-testifying expert consultants may be prudent to help evaluate a case, it does increase the costs of litigation if parties are forced to retain dual sets of experts in order to be able to obtain adequate expert evaluation of cases without risking possible disclosure of work product client confidences and privileged material. Again, as with the discovery of draft expert reports, another possible solution is a pre-trial stipulation or Rule 11 agreement that may allow some materials to be shared with an expert without triggering the possibility of disclosure. This would be a harder stipulation to implement than a rule against provision of draft reports since defining the universe of materials that can be provided to an expert without triggering discovery obligations could be problematic in most cases.

VI. USE OF INSIDE EXPERTS

One possible source of expert witness testimony in any environmental case are in-house experts working for the clients. Such experts have certain advantages and disadvantages. The client may be more inclined to go with in-house experts, especially if cost of outside experts is a major factor. In light of the above discussion of concerns of the discoverability of materials provided to an in-house, it may be harder to control the information that an in-house expert is determined to have reviewed since they may have acquired materials outside of the litigation process that could be considered as the basis for their opinion. This could potentially open up discovery into areas that might otherwise be subject to attorney-client privilege or work product and, therefore, use of in-house experts should be evaluated to determine if this creates such an issue.

VII. CONCLUSION

Expert witnesses are undergoing continued scrutiny by the courts. The importance of experts in environmental cases is undisputed, but practitioners are well advised to understand that the trend is for increased discovery of experts to ascertain how their opinions have been developed, what role counsel has played in shaping their opinions, and the materials reviewed in developing the expert testimony. This trend, coupled with the on-going development of the Daubert inquiry, means that environmental attorneys need to be extremely careful in selecting and working with experts in environmental litigation.

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Carrick focuses his practice on environmental litigation and counseling. His experience includes representation in federal and state court and before regulatory agencies on property contamination cases, cost-recovery matters, and enforcement actions. His current representation includes defense of government enforcement actions for ground water and surface water contamination. Before entering private practice, Carrick served for 12 years in the Environmental Enforcement Section of the US Department of Justice, as a trial attorney and a supervising attorney, litigating civil enforcement matters under all the major environmental statutes. He has practiced in state court in Texas and in federal district courts in Texas, Louisiana, Oklahoma, Arkansas, Connecticut, Rhode Island, and New Jersey. Carrick's experience includes matters involving petrochemical plants, refineries, swine facilities, poultry processing plants, creosoting plants, pipelines, lead smelters, cement kilns, manufactured wood product plants, and aluminum plants. His environmental career includes experience as an environmental consultant, specializing in air quality issues.

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J.D., 1985
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Massachusetts Institute of Technology
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Massachusetts Institute of Technology
B.S., Aeronautics and Astronautics, 1978

Professional Licenses and Associations:

State Bar of Texas 1985
US District Court for the Western District of Texas 1998
US District Court for the Northern District of Texas 2002

US District Court for the Southern District of Texas 2002
US District Court for the Eastern District of Texas 2002
US Court of Appeals for the Fifth Circuit 1998
US Court of Appeals for the Seventh Circuit 2001
US Court of Appeals for the Tenth Circuit 2001
US Patent and Trademark Office 2001
American Bar Association
Federal Bar Association
Environmental Law Institute
Air and Waste Management Association
Travis County Bar Association
Houston Bar Association

Presentations:

“Environmental Case Law Update,” Dallas Bar Association
Environmental Law Section (February 27, 2003)

“Environmental Case Law Update,” Houston Bar Association
Environmental Section (December 11, 2002)

“Environmental Case Law Update,” Fourteenth Annual Texas
Environmental Superconference (August 2002)

“Current Issues in EPA Regulation of CAFOs,” Dallas Bar
Association Environmental Law Section (May 23, 2002)

“The Care and Feeding of Attorneys: An Environmental
Engineer’s Guide to Working with Lawyers,” Steve Morton and
Carrick Brooke-Davidson, Environmental Engineer (October
2001)

“Indoor Air Quality in Texas: The Legal Framework,” Carrick
Brooke-Davidson, Texas Association of Environmental
Professionals/Air and Waste Management Association Joint
Meeting (December 12, 2000)

Mold and Indoor Air Quality: A Conference on Health,
Technical and Legal Issues, Legal Aspects of Indoor Air and
Insurance Issue (also responsible for organizing conference)
(October 10, 2000)

Twelfth Annual Texas Environmental Superconference, Indoor
Air Quality: Texas Legal Framework (August 3, 2000)

“Expert Witness Examination,” Ninth Annual Texas
Environmental Superconference (July 31, 1997)

“Environmental Compliance Disputes: Alternatives to
Litigation,” International Petroleum Environmental Conference
(September 1996)

“Status and Feedback on the Auditing Privilege,” ABA Natural
Resources Section, Key Environmental Issues in USEPA Region
6 (May 1996)

“Litigating a CERCLA Case with Federal PRPs,” ABA Natural

Resources Section, Multi-Site Brown Bag Program (December 1995)

“Litigating a Civil Environmental Enforcement Case – Motions, Liability, Experts, and Trials,” United States Department of Justice, Office of Legal Education Civil Environmental Enforcement Seminar (September 1994)

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Arnoldo Medina is an attorney with Shell Oil Company (“Shell”), Legal Services US, in the Regulatory and Compliance Group, Environmental Section. Mr. Medina advises refinery, chemical, distribution and retail clients throughout the U.S. on environmental law and regulatory compliance, permitting, remediation and enforcement for air, water, and waste matters. Previously, Mr. Medina was a senior associate with Campbell, George, & Strong, LLP in Houston, Texas, where he represented corporate clients in environmental permitting, compliance and enforcement matters before the U.S. Environmental Protection Agency and the Texas Commission on Environmental Quality (“TCEQ”).

Mr. Medina began his career with the Texas Natural Resource Conservation Commission, predecessor to the TCEQ, as a staff attorney from 1997 to 2002. His practice areas included air quality, industrial and hazardous waste, and radioactive material regulation, permitting, and rulemaking. Mr. Medina represented the Executive Director in complex legal matters before the Commission and in hearings before the State Office of Administrative Hearings.

Mr. Medina earned his B.B.A. from Texas A&M University–Corpus Christi in 1992 and his J.D. from the University of Colorado School of Law in Boulder, Colorado in 1996. Mr. Medina graduated as the Colorado Hispanic Bar Association Outstanding Hispanic Law Graduate, the recipient of the Colorado Journal of International Environmental Law & Policy (“CJIELP”) James Corbridge Leadership Award, and the CJIELP Research and Writing Award for his article on NAFTA and environmental considerations of petroleum development in the Gulf of Mexico.



NAPL – A Primer

... or

What Lurks in the Deep



Presentation to
17th Annual Texas Environmental Superconference
August 5, 2005

Brad L. Snow, P.E., P.G.
RMT, Inc. – Austin, Texas

Presentation Objectives

- Very big topic – just touch on a few high points
- Define NAPL
- Describe previous understanding of NAPL occurrence
- Describe current technical state-of-the-art
- Summarize TCEQ's direction in regulating NAPL cleanup

Credits

- Some figures and charts are from presentations by Adamski and Charbeneau at TCEQ NAPL Seminar in Austin, May 2005.
- Sub-Mariner, Atlantis, Atlantic Ocean
- www.chivian.com for Sub-Mariner images

What is NAPL?

- Non-Aqueous Phase Liquids
 - Non-aqueous means separate phase liquid
 - Immiscible= oil and water don't mix
- Lighter-than-water = LNAPL (S.G. <1)
- Denser-than-water = DNAPL (S.G. >1)



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Examples of DNAPL

- Denser-than-water = DNAPL
- Creosote and pentachlorophenol
- Chlorinated solvents:
 - tetrachloroethylene (PCE)
 - trichloroethylene (TCE)
 - carbon tetrachloride
- Salt water (brine) and glycols are not DNAPL – they easily dissolve in water, are miscible



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Examples of LNAPL



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Oil that is, black gold, Texas tea

Examples of LNAPL

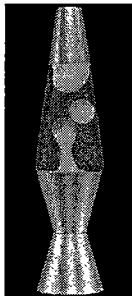
- Lighter-than-water = LNAPL
- Crude oil and natural gas condensate
- Liquid fuels: gasoline, diesel, kerosene, jet fuel
- Vegetable oil
- Also known as:
 - Phase-separated hydrocarbons (PSH)
 - Free product
 - Floating product layer



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Not Quite LNAPL or DNAPL!

- White Blob: mineral oil, paraffin, carbon tetrachloride and paraffin wax
- The Blue Liquid: water, dye and maybe glycols
- Blob and Blue Liquid densities very similar
- Heat of lamp changes density of blob more than blue liquid



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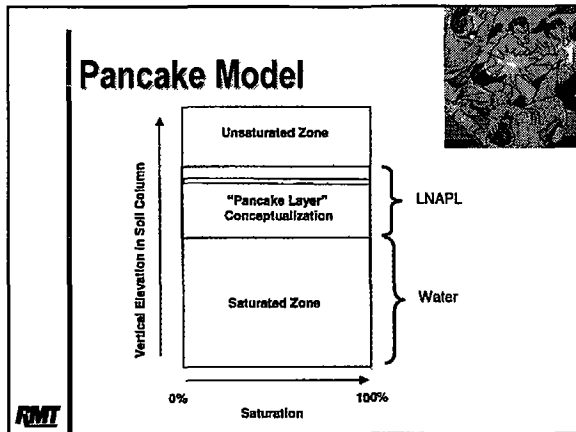
Old (Mis)understanding of LNAPL

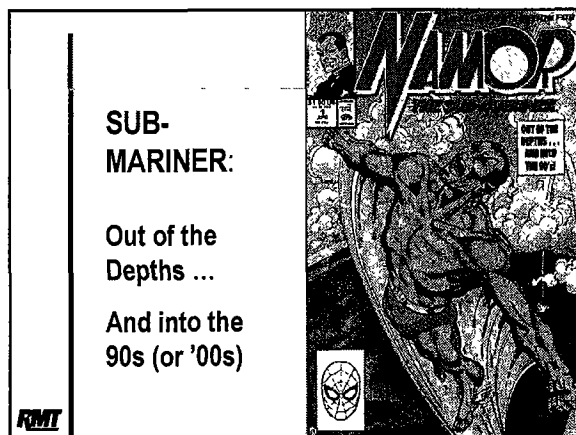
“Pancake” Model

- Mostly continuous layer of LNAPL floats on the water table and/or capillary fringe
- Fully saturated with LNAPL (or close to it)
- LNAPL enters monitor well, displacing water until its buoyancy is balanced
- Exaggerated NAPL thickness in well varies based on soil texture (more exaggerated in fine-grained soil due to a thicker capillary fringe height)



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Updated Understanding of LNAPL 1

- LNAPL is mixed with air and groundwater - % varies with soil type
 - Not like Pancake model with full oil saturation
- To enter the soil, the LNAPL has to displace the groundwater
 - overcome the interfacial surface tension between the oil and water
 - Surface tension is what allows water to bead up on a waxed car

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Updated Understanding of LNAPL 2

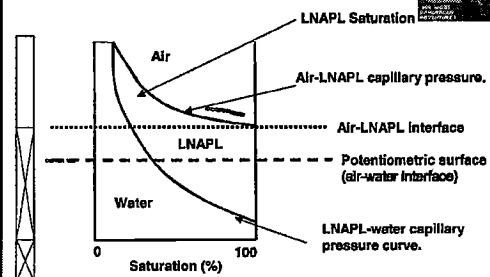


The groundwater was there first and the oil has to move it out of the way

- So, the LNAPL must squeeze in where it can – usually just the largest pores
 - LNAPL pressure higher than water capillary pressure
- For most soil, there isn't much LNAPL saturation in the soil (usually <20% of total void space)

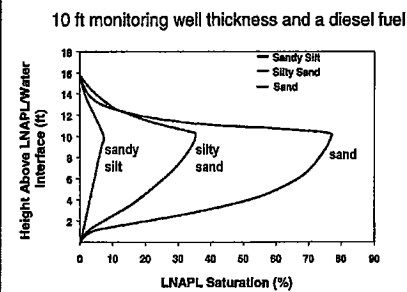
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LNAPL Saturation

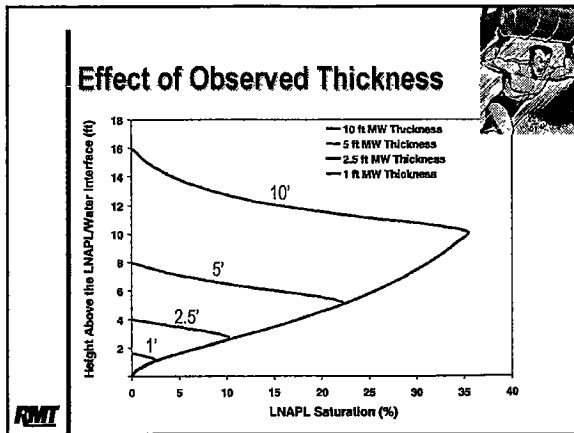


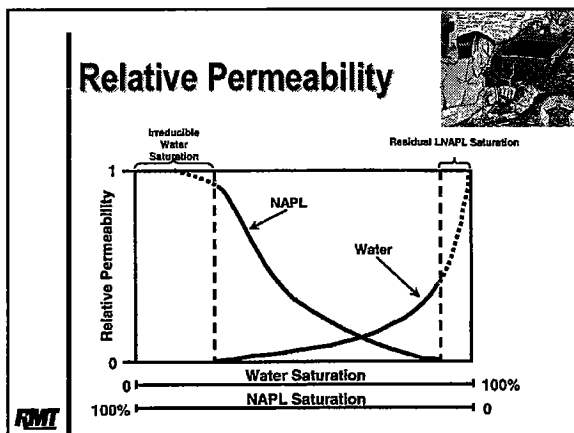
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Effect of Soil Type



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Predictive Models – LNAPL Saturation Distribution

- Van Genuchten and Brooks and Corey models
- Based on soil properties and observed LNAPL thickness in wells
- Soil properties inferred from water-air capillary pressure testing
- Key parameters: pore size distribution (largest pores carry disproportionate influence)

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Predictive Models – LNAPL Migration

- To spread laterally, LNAPL must displace the groundwater by overcoming water capillary pressure
- API (Charbeneau) model for predictions



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Real World Complicating Factors 1



- Soil properties oftentimes are not uniform
- Example situation:
 - Layer of clay over sand containing LNAPL
 - During high water levels, oil is trapped under the clay
 - Can create greatly exaggerated thickness
 - Even minor changes in soil properties (more fines) can trap oil below the water table

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Real World Complicating Factors 2



- Water table fluctuations
 - Mobile LNAPL moves up and down with water level
 - Combines with residual LNAPL (immobile, trapped oil) above or below water table
 - Because the residual saturation is usually greater below the water table, lower water levels can result in increased thickness in wells
 - Conversely, rising water levels can reduce apparent thickness (but not always! – see previous)

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Real World Complicating Factors 3



- **Fine grained soil**
 - Macropores (cracks, root holes, worm holes, etc.) hold LNAPL
 - Most small pores hold water very tightly – won't allow LNAPL to enter
 - Usually very low % LNAPL saturation – most pores do not contain LNAPL
 - Macropores can allow LNAPL to migrate well below water table and to show greatly exaggerated thickness in wells

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Real World Complicating Factors 4



- **Residual Saturation**
 - Even if all mobile LNAPL is removed, residual saturation remains trapped in the soil pores
 - Expect much of the total LNAPL saturation to persist (maybe 20-50% of total)
- **LNAPL Weathering**
 - LNAPL dissolves in place and can biodegrade (natural attenuation)
 - What remains becomes more viscous (and less mobile)
 - Becomes lower in soluble fractions (and less usually toxic)

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When Can I Stop LNAPL Recovery? 1



- Remove enough to:
- **Stop LNAPL migration**
 - **Control dissolved phase migration**
 - **Reduce residual saturation so that natural attenuation or other methods can be effective**

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When Can I Stop LNAPL Recovery? 2



- Difficult to predict with models
 - Real world complications are daunting
 - Still, useful to provide an estimate of recovery volumes
- Use performance-based criteria
 - Decline in recovery rate
 - % LNAPL of total fluids recovered

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Agency Trends



- Things are looking up
- TCEQ is a leader in realistic approach to remediation end points
- Moving away from “to extent practicable”
- Moving toward performance-based site-specific approaches
 - More expensive site assessment
 - Reduced remediation cost
- TRRP-32 guidance will be here soon

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BIOGRAPHICAL SKETCH FOR BRAD SNOW

Brad L. Snow, P.E., P.G. is a Senior Consultant with RMT, Inc. in Austin, Texas. He has 23 years of environmental experience, specializing in investigation and risk-based corrective action of contaminated soil and groundwater and in strategic due diligence. He As a hydrogeologist, Brad has practical experience in hands-on remediation of affected groundwater, including recovery of non-aqueous phase liquids (NAPL). In addition, he is a key member of RMT's Positive ClosureSM practice for delivering cost, schedule and regulatory certainty on site remediation projects. Brad received B.S. and M.S. degrees in Geological Engineering from the University of Missouri-Rolla. He is a licensed Professional Engineer and Professional Geologist in Texas and other states.

Use of Interactive 3D and 4D Environmental Data Graphics

Gavin Hudgeons, President, e60 Vision, LLC

Friday, August 5, 11:00-11:20

Environmental attorneys continually face the monumental challenge of communicating difficult environmental data sets and the problems and issues they represent to both professionals and laypersons alike.

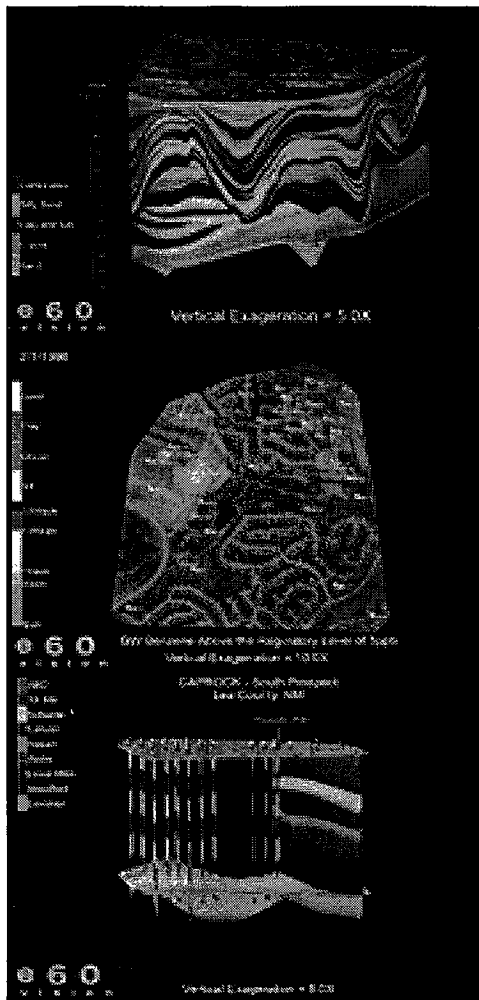
Data collected during site assessments and monitoring events are mostly visualized as 2D contour maps, graphs, and charts within bulky paper documents. By today's standard, it is often difficult within a reasonable time frame for someone to become knowledgeable enough on the geological, chemical and distributive complexities of each site to be an active participant in technical decision making processes associated with contentious sites. Furthermore, a survey of 33 environmental consulting firms nationwide found that 21% of Phase I reports were significantly insufficient to communicate a realistic understanding of environmental conditions (Dunn, 1997). Finally, one of the two most frequently cited causes of failure in environmental cases is lack of effective technical communication (Moorhouse and Millet, 1994).

These are some of the significant issues being addressed with implementation by legal firms of powerful 3 and 4D interactive technology, animations, and organizational graphical interfaces for environmental case litigation.

Innovative development of visualization technology now permits fully interactive 3 and 4D site histories to be created that depict the distribution and sample location of every regulated constituent and biodegradation indicator ever collected at the site in an extremely time efficient and cost-effective manner.

The visualizations are organized via graphical interfaces for ease of use, portability and distribution. Virtually all of the data for a site is placed at the fingertips of the user, and permit the user to take an active role in technical site discussions, even if she/he was recently introduced to the site and does not have a technical background. The advantages of applying these technologies as part of a firm's broad strategy of environmental management include: faster and more informed remediation and assessment decisions; a dramatic reduction of the time required to educate laypersons and experts on difficult technical concepts; concise and effective communication between consultants, attorneys, juries, judges, land owners, public interest groups, city planners, and regulators; and time and resource savings by minimizing unnecessary meetings, travel, assessments and sampling. The ultimate result of these efforts is improved ability to communicate technical concepts, easier analysis of environmental issues, and effective management of sites and site data which results in lower costs and a stronger case.

This presentation will include interactive visualizations from four environmental sites: a contaminated petroleum tank farm; a large state Superfund Site; a large petrochemical refinery; and a municipal landfill. Rather than address discrete and/or specific needs, it will present technology that facilitates implementation of interactive 3 and 4D visualizations of geospatial data as part of a broad strategy for effective environmental case development and litigation support.



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Biographical Sketch
Gavin Hudgeons, President, e60 Vision, LLC
Friday, August 5, 11:00-11:20

Gavin Hudgeons is founder and president of e60 Vision, a technology based environmental firm specializing in 3 and 4D visualizations of environmental sites. Prior to founding e60 Vision in 2003, he served as a senior consultant for TetraTech, as a hydrogeologist for Environmental Resources Management (ERM), Inc., and as a summer petroleum geologist for ExxonMobil Oil Corporation. Gavin has been involved in the implementation and management of environmental assessments, sampling, and monitoring events at industrial and commercial facilities of some of the world's largest petrochemical corporations. He has designed, implemented and managed solutions to contaminant recovery systems and has improved recovery at petroleum refinery/terminal facilities. Gavin has authored and updated multiple environmental regulatory reports and managed a range of environmental remediation sites. He was also a member of the Hart Senate Building anthrax response team where he performed biological sampling in response to the 2001 anthrax terror incidents.

Gavin founded e60 Vision in 2003 knowing that there was a better way to communicate and manage large amounts of environmental data than was being done. He has been the technical lead on combining multiple visualization technologies into e60 Vision's final deliverable, as well as on 3D visualization and data management projects including Superfund Sites, landfills, and petroleum prospects. His training includes advanced training in Mining and Environmental Visualization Systems. He holds a Master of Science in Geological Sciences from the University of Texas at Austin, and a Bachelor of Arts in Environmental Geology with from the University of Montana in Missoula.

John Blevins, Director
Compliance Assurance and Enforcement Division
U.S. EPA, Region 6

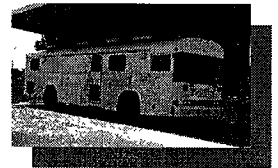
“New Technology for Enforcement”

Finding and measuring sources of air pollution are essential in correcting and maintaining a clean and healthy environment. Our country has many communities that are located in or near non-attainment areas for the National Ambient Air Quality Standards. This has created a need for more comprehensive monitoring tools. These tools identify and help in the effort to reduce emissions that lead to the formation of ozone, regional haze and, in general, polluted air.

Many times the sources of emissions are difficult to identify through traditional monitoring and regulatory methods. With the new innovative technologies, we have found components that were not previously considered as causes of emissions. We are also developing new ways of measuring traditional emissions.

My presentation focuses on new and developing technologies available that enhance the detection and characterization of air emissions.

1. Trace Atmospheric Gas Analyzer (TAGA) unit - a self-contained mobile laboratory capable of real-time sampling and analysis in the low parts per billion level of outdoor air or emissions from various environmental sources and concerns. In addition, the TAGA has specialized sampling equipment for measuring indoor air and at remote locations. The unit provides real-time analysis of instantaneous air samples. It is similar to a snapshot of air quality at that moment.
2. Remote sensing camera - Smart LDAR (leak detection and repair) – technology that can quickly and economically identify significant “leakers.” It has the sensing ability to find leaking chemicals from targets large or small. Monitoring time could be reduced from 3-4 months to 2-3 weeks and “leakers” can be caught before emissions accumulate.
3. Digital Opacity Camera System (DOCS) – This technology uses a digital camera and software to record and measure the opacity of plumes from stationary sources. This is an Air Force research project in which EPA is a partner. The ultimate goal of this project is to develop a test method that will be an alternative to the traditional means of measuring opacity by the human eye (known as Method 9). The main advantage of this new test method is that an actual picture of the plume being measured will be recorded and saved.



Region VI Participates in Development of New Test Method

Have you ever see a nasty thick black cloud of pollution billowing from a smokestack? Of course you have. But, unless you're familiar with the air enforcement program, you may not know that there is a way to determine how opaque that plume is. Well, there is a test method that EPA developed many years ago to measure opacity. Known as Method 9, and found in Appendix A of 40 CFR Part 60, it is used to measure how much opacity is associated with a plume of smoke.

What Is Opacity?

Opacity is a measurement of the amount of light that is blocked by a medium, such as smoke or a tinted window. Opacity is usually stated as a percentage. An opacity of 0% means that all light passes through, and an opacity of 100% means that no light passes through. Opacity is important because it gives an indication of the concentration of pollutants leaving a smokestack. The more particles that are emitted from a stack, the more light will be blocked, resulting in a higher opacity percentage.

How Is Opacity Measured?

At present, there are several ways to measure opacity. The simplest method is visual observation. Anyone can be trained and certified to become a Visible Emission Observer. Federal, state, and local inspectors, as well as government and industry staff, have been trained to conduct opacity readings to determine if a source is meeting its federal and/or state opacity requirements. These people have been trained to estimate the percentage of opacity for black and white smoke coming from smokestacks.

EPA adopted standardized training and certification procedures in Method 9. "Smoke School" involves a one-day lecture on the principles and history of opacity and certification using these procedures. For certification, black and white smoke is generated at different opacities for a total of 50 separate visible emission readings. Opacities must be within a certain percentage of accuracy, for both types of smoke, for certification to be obtained. Certification expires after six months.

Is There an Easier Way?

The Environmental Security Technology Certification Program (ESTCP) is a Department of Defense (DoD) program that promotes innovative, cost-effective environmental technologies through demonstration and validation at DoD sites. The ESTCP has approved and begun work on a project to test a digital recording and analysis method for opacity determination. This digital opacity method would be used as an alternate method to Method 9.

EPA's Emissions Measurement Center requested the formation of a scientific advisory group to review and provide comments during the development and testing of this new method. The members are from EPA, the Air Force, and outside contractors and are considered to be experts in either digital imaging and/or Method 9. This group will review test plans to ensure that key variables are covered in the field work, define project success, and agree what conditions must be met to achieve it by the end of the project.

The kickoff meeting for this group was held on Monday, April 2, 2001, at Hill AFB, Utah. The meeting included an overall project briefing, a review of the advisory group members and purposes, and a detailed briefing and demonstration of the proposed new technology. Representatives from RTP, NEIC, and Region VI attended and participated in this meeting. Upcoming meetings will cover the software used by the digital camera as well as the development and implementation of field tests of the camera. Field tests are currently scheduled for Salt Lake City, Utah, in early October 2001, and Augusta, Georgia, in late October 2001.

For more information, contact Raymond Magyar, senior air enforcement officer in EPA Region VI and a member of the science advisory group for this project, at 214-665-7288.

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Office of Enforcement and Compliance Assurance
US Environmental Protection Agency

John Blevins, Director

Compliance Assurance and Enforcement Division
U.S. EPA, Region 6

In January 2005, John Blevins joined EPA, Region 6, as Director of the Compliance Assurance and Enforcement Division. Previously employed by two EPA regional offices and two State environmental agencies, he brings with him a wealth of environmental knowledge and experience. As director, he is responsible for regulatory enforcement and compliance monitoring of the environmental statutes regulating air, water, toxic substances and land.



Mr. Blevins joined Region 6 after serving as director of the Air and Waste Management Division at Delaware's Department of Natural Resources and Environmental Control. While in Delaware, John managed numerous programs, including enforcement, emergency response, underground and aboveground storage tanks, brownfields, air programs, the accidental release program, and surveillance and monitoring. His work in state agencies gave him a unique perspective of compliance issues. He appreciates the importance of working closely with our state partners to preserve our environment and protect public health. He is also committed to fair and consistent enforcement in the belief that creating a level playing field strengthens our economy.

He has a bachelor's degree in environmental studies from Warren Wilson College in Swannanoa, North Carolina, and a master's degree in environmental engineering from the University of North Carolina, in Charlotte. John is married and the father of triplets.

BIOGRAPHY NOT SUBMITTED

Bio for Commissioner Larry R. Soward

Larry R. Soward of Austin was appointed by Gov. Rick Perry on October 17, 2003, to the Texas Commission on Environmental Quality. The Texas Senate confirmed his appointment on May 11, 2004.

Soward most recently served as executive assistant to the Texas lieutenant governor during the 78th Legislative Session and during two special legislative sessions held during 2003.

He has more than 26 years of experience leading state agencies, and served as the deputy land commissioner of the Texas General Land Office and Veterans' Land Board, the deputy commissioner of the Texas Department of Agriculture, and the deputy executive director of the Texas Public Utility Commission. In addition, Soward has been executive director of the Texas Water Commission, the culmination of a 12-year tenure at that agency. During his time at the Water Commission, he was also its general counsel and chief hearings examiner.

He graduated from the University of Texas (UT) with a law degree in 1974 and has practiced environmental law and water law as a solo practitioner and as partner of a small law firm. Soward also holds a bachelor's degree in mathematics from UT.

Soward's term will expire Aug. 31, 2009.

Lawrence E. Starfield
Deputy Regional Administrator

Larry Starfield is the Deputy Regional Administrator for the U.S. Environmental Protection Agency, Region 6, in Dallas, Texas. In this position, he is responsible for the efficient management of the 900-person regional office, and for the effective implementation of EPA programs in the South-Central United States.

Mr. Starfield served as the Regional Counsel for Region 6 where he managed an office of 60 lawyers that provided legal advice to the Regional Administrator and Region 6 program offices regarding the interpretation and implementation of federal environmental laws.

Before joining Region 6 in 1997, Mr. Starfield spent ten years with EPA's Office of General Counsel in Washington, D.C., where he served as an attorney-advisor, Assistant General Counsel for RCRA, and Acting Associate General Counsel for Solid Waste and Emergency Response.

Before coming to EPA, he worked in Paris, France, from 1985 to 1987 as the correspondent for the Bureau of National Affairs on French environmental law. From 1981 through 1985, he was an Associate with the law firm of Skadden Arps Slate Meagher & Flom, in Washington, D.C. He is a graduate of Wesleyan University and Yale Law School.

Current as of September 2004

For more information, please
contact the EPA Region 6
Office of External Affairs at
214 665-2200

Corporate Financial Reporting on Environmental Liabilities:
An Accounting & Auditing Perspective Regarding Sarbanes-Oxley and the EHS Professional
Note: The views expressed in this presentation are those of the authors

Kathryn Pavlovsky and Joe Solly
August 5, 2005

The enclosed serves to provide a high level accounting and auditing perspective with respect to the authoritative guidance provided and the EHS professional's responsibilities in the context of the Sarbanes Oxley world.

I. Background

Recent trends, including increased public demand for disclosure from investors and regulators, corresponding legislative and regulatory requirements, and increasing NGO and shareholder action, are significantly affecting the roles and responsibilities of the Environmental, Health & Safety ("EHS") professional. Specifically, the Sarbanes-Oxley Act in the USA and Bill 198 CEO / CFO Certification in Canada require increased assurance on internal controls by enforcing personal accountability for the accuracy of financial reporting; including material environmental matters. Additionally, scandals in the business environment continue to shake investors' confidence in corporate financial reporting and the underlying accounting and auditing practices; and have highlighted the importance of disclosing key information to potential investors.

Environmental liabilities can accumulate to the \$10 - \$100 million dollar range, jeopardizing the financial stability of the company. Undisclosed environmental risks and liabilities could impair the public's ability to make sound investment decisions. For example, discovery of hazardous waste in soil or groundwater that results in material fines, penalties, and remedial action. Another example is the changing of regulations requiring capital investments in technology that could result in the shutting-down of certain facilities.

In today's market, management of environmental liabilities can create competitive advantages, as successful companies are recognized as good corporate citizens. This is the driver for the growing practice of "socially responsible investing". Consumers' broader interests indicate it is no longer the amount of revenues, but how they are incurred and managed. Environmental performance is often a reflection of a company's public image and a first "contact" to consumers.

In July, 2004, The Government Accountability Office (GAO), issued a report entitled "Environmental Disclosure: SEC Should Explore Ways to Improve Tracking and Transparency of Information." The U.S. Government Accountability Office ("GAO") was asked by the U.S. Congress to evaluate:

- key stakeholders' view on how well the SEC has defined the requirements for environmental disclosure
- the extent to which companies are disclosing environmental information in their SEC filings

- the adequacy of SEC’s efforts to monitor and enforce compliance with the disclosure requirements
- suggestions for increasing and improving environmental disclosure¹

The GAO findings from researchers were (1) key stakeholders disagree about how well SEC has defined the disclosure requirements for environmental information, (2) requirements allow too much flexibility (3) requirements are too narrow in scope to capture important environmental information.

Findings also revealed (1) the extent to which companies are disclosing environmental information in their filings with SEC varies, (2) defining what should be disclosed can be challenging (3) inconsistent reporting among companies around what is reported and where and how it is communicated in their report (e.g. MD&A, AIF, Accrued Liabilities, etc.) and (4) difficulty in concluding when information is present or lacking. Specifically, does a low level of disclosure mean the company has no existing or potential environmental liabilities; has determined that such liabilities are not material; or is not adequately complying with disclosure requirements?

Non-entity stakeholders communicated that SEC guidance is not specific enough in certain areas such as:

- Disclosing liabilities when their occurrence or amount is uncertain
- Assessing the materiality of liabilities and potential risks
- Disclosing potentially significant environmental problems or regulatory initiatives that could pose future financial risks
- SEC oversight is inadequate

Entity stakeholders communicated that SEC guidance is sufficiently well defined such and that flexibility in the requirements is necessary to accommodate the variability in companies’ circumstances and that developing more specific guidance would not be feasible.

Research around what specific companies are doing is limited because it is difficult to determine what environmental information is potentially subject to disclosure and whether the information should be considered material.

GAO Independent Study’s Impact

The GAO recommended that the SEC take steps to improve the tracking and transparency of information related to its review of companies’ filings by:

- Modifying the disclosure requirements and improving guidance for reporting entities (e.g. what and when to report & specific cost estimation methods)

¹ Reference for this section: Environmental Disclosure-SEC Should Explore Ways to Improve Tracking and Transparency of Information. GAO July 2004.

- Stepping up SEC’s monitoring and enforcement of existing requirements (e.g. track reporting compliance more closely and SEC and EPA work closer together, set some legal precedents)
- Adopting non-regulatory approaches to improving disclosure (e.g. shareholder petitions and voluntary environmental reporting initiatives)

The GAO also recommended for the SEC to work more closely with the U.S. Environmental Protection Agency (“EPA”) to take better advantage of EPA data relevant to environmental disclosures (e.g. RCRA corrective action mandates for contaminated sites).

Early SEC efforts to close the Gap in GAAP include (1) publishing SAB 92 encouraging companies to not report “0” as the minimum of the range, (2) issuing SOP 96-1 providing guidance for reporting environmental liabilities. However, 92 was not required and SOP 96-1 only requires reporting available information and does not require reporting the total cost of the clean up until the Remedial Investigation and Feasibility Study is complete. So, in the meanwhile, companies only report the investigative costs and full disclosure is delayed for a number of years. Additionally, SOP 96-1 does not provide guidance for non RCRA and Superfund sites and does not provide guidance on site closure costs, compliance, legal fees and damages of ecology, property, business interruption and tort claims.

Sarbanes Oxley Act was enacted in 2002 to ensure compliance with corporate financial reporting mandates and provide mechanisms to ensure transparency and accuracy with such reporting mandates and requires CEO / CFO certification of internal controls and increases the personal liability. Continuing gaps are that Sarbanes does not address under-reporting or lack of aggregate reporting. Additionally, accurate reporting of material environmental liabilities was already required by SEC before Sarbanes became enacted.

The impact of all drivers is that the EHS professional will be encouraged to be more aligned with the internal audit function and that processes and procedures should be established, implemented and documented with respect to handling environmental liabilities.

Deloitte Survey – Supports Trend that EHS is Incorporated into Corporate Governance

Deloitte recently conducted a survey on the partnership between Internal Audit and EHS. The purpose of the survey was to explore the expanding advisory and risk management role of the Internal Audit function. In this context EHS, risk is increasingly recognized as being linked to more traditional business risks such as failure to operate, innovate, poor reputation and resultantly is being integrated into corporate governance requirements and guidelines (e.g. Director liability). Accordingly, in the face of such changes, Internal audit is faced with, and must respond to, management initiatives and Board responsibilities. The objective was therefore to assess the extent to which Internal Audit is choosing to respond and the best practices and challenges in doing so.

The Survey included organizations in the following sectors:

- Energy (7)
- Communications (3)

- Manufacturing (2)
- Transportation (1)

Key findings varied by company and sector and included the below:

- Responses indicated that 77% of Internal Audit functions are involved in EHS audits, typically independently of EHS.
- In 23% of the cases Internal Audit outsourced either audit planning or execution related to EHS.
- Other departments are often also involved in EHS audit and review, including Corporate Governance / Compliance groups.
- Typically Internal Audit's involvement is motivated by the need to manage reputation risk and to provide assurance to the Board on EHS risk management.
- Audit planning uses a formal risk-based approach in 60% of cases and relies on the results of audits performed by EHS in only 33% of cases, in keeping with the emphasis on assurance / independence.
- The results of Internal Audits are reported primarily to the Audit Committee (90%), as well as to other committees such as the Social Responsibility or EHS Committee, all independent of management. The results include recommendations for improvement in keeping with the advisory role of IA.

The focus of EHS audits performed by Internal Audit is as follows:

- Management EHS Planning: Emphasis is placed on verifying whether management has regulatory tracking systems and whether it has a formalized procedure to update environmental aspects of the organization.
- EHS Procedures & Documentation: The majority of emphasis is placed on verifying training of personnel and the existence of documented procedures. Version control and availability of documentation are emphasized to a lesser extent, including the efficiency and effectiveness of technology platforms to perform the documentation and training roles.
- EHS Communication: Internal Audit focuses primarily on verifying information provided to regulators, while information to the Board is verified in 70% of cases and that provided to the public in 30% of cases.

Responses to open ended questions regarding challenges and best practices emphasized the following:

- The Internal Audit groups surveyed considered their greatest challenges to be: identifying and prioritizing risks, getting management buy-in to risk assessment, losing the "police" role, maintaining competent staff, and achieving consistent quality in a cost-effective manner.

- Internal Audit stated that their most challenging EHS issues include employee stress and well-being, site contamination and climate change, obtaining senior management commitment to these, integration of these items into overall management of operations, change management and knowledge management.
- Survey respondents consider having clear delineations of responsibilities, maintaining audit independence, having risk-based rotational audit plans, and formal follow-up procedures as best practices.

Conclusions drawn from the survey are that the Internal Audit function is (1) choosing to be involved in EHS matters, (2) an invaluable, independent opinion regarding the performance of the organization in this area and (3) encountering the same challenges it encounters in its other activities, namely the prioritization of risks and losing the “police” role; and, more specifically to EHS, challenges in obtaining appropriate expertise and focusing its audits in areas where management recognizes opportunities for improvement.

Additional Challenges

As discussed above, environmental liabilities bring many financial and related risks including, but not limited to clean up costs, tort liability, damage to natural resources and biodiversity, bad credit, drop in share price, civil penalties and settlements, facility disruption or shut down, and reputation impacts. The management and handling of these liabilities is under increased scrutiny and considerations for such are addressed below.

Disclosure Decisions

The current environment consists of increasing pressure from media, politicians, regulators, and investors to fully disclose environmental liabilities. What to disclose therefore becomes a challenge. Specifically, environmental liabilities can be difficult to predict and if over-estimated an organization can tie up capital-in-reserves, increase borrowing money and the cost of credit, concerning investors. Likewise, if under-estimated, a crisis could present itself where funds are not available for the required remedial actions. Finally, in the absence of adequate disclosure, the risk to investors is that material environmental liabilities are communicated after financial results have been posted and investment decisions have been made.

Materiality Debates

Materiality is generally defined as costs exceeding 10% of assets. However, environmental liabilities at costs of less than 10% of assets could have a material impact on the company. Additionally, information can be material according to Canadian and U.S. law if reasonable investors would find it relevant to their investment decisions.

Therefore, companies are encouraged to expand their definition of materiality for environmental liabilities to gain shareholder and investor confidence through transparency.

Common weaknesses in Managing Environmental Liabilities

In our experience, common weaknesses in managing environmental liabilities in the context of Sarbanes include:

- Lack of documentation (e.g. internal or external scopes of work, or proposals, or cost schedules).
- Little justification to an established range of remedial costs and not using probability to select the final estimate
- Leaving sites idle
- Lack of using environmental specialists to distance the risk (e.g. undertake their own remedial activities with no report in the end).
- Uncertainty in who owns the risk (e.g. old properties with vague transfer agreements)
- Identifying contamination in soil or groundwater at values in excess of the MOE guidelines and not taking any action, and against recommendations from consultants. No plan to address the future of migration potential, etc
- Known environmental costs never translated properly into accounting language

II. Recommendations for responding to Sarbanes-Oxley and Financial Reporting Requirements

A. Process Mapping

These weaknesses may be mitigated by mapping processes for handling environmental liabilities and documenting a procedure for liability management that incorporates the accounting guidance to support the liability management program and financial reporting objectives.

B. Teaming with Internal and External Audit

The EHS professional should team with Internal Audit to conduct environmental reviews which serve to:

1. Assess the organization's environmental impacts and closure or retirement activities including associated financial implications, and how they are recorded in the financial statements; and
2. Determine the extent and degree that environmentally related risks are managed

The environmental reviews should be conducted by a liability management team aligned with the Environmental Management System and any ISO certifications roles and responsibilities. The team should also include:

- External Audit Team
- External Auditing Firm's specialist, or outside experts assisting the auditors

- Professionals who are familiar with environmental liability compliance and technical issues
- Environmental Engineers
- Environmental Attorneys

Companies should respond appropriately to environmental matters by providing those involved with valuing and reporting environmental liabilities a consistent methodology and assistance while also:

- Teaming with organizational engineering, financial, legal and other personnel to help determine whether asset retirement obligations and other environmental issues exist
- Providing a methodology that is logical, sound, consistent across the company and with industry practice
- Assisting client staff to implement the ARO standard, both from the scientific and accounting perspectives
- Communicating with audit staff to ensure the response meets the needs and expectations of the audit
- Evaluating the methodology to ensure it is logical, sound, consistent across the company and with industry practice
- Evaluating planned retirement activities to ensure they are reasonable and appropriate
- Ensuring that the company is using qualified resources

C. Establishing and Implementing Common Procedures for Valuing and Reporting

Common procedures for reporting and verifying the value of environmental liabilities should include but are not limited to the following:

1. Obtain calculation of reserves for environmental liabilities which contains a listing of all impaired sites
2. Categorize sites based on whether the client is sole generator or is a potentially responsible party (PRP) in a multiple generator site.
3. In a multiple generator situation, make further distinction between those sites where the client has or does not have control of decision making process
4. Test the completeness of each liability inventories using public databases
5. Review and calendar prior years listing with updates
6. Review legal confirmations, correspondence with regulatory agencies and other documents (e.g. Board Minutes) which may indicate impaired sites
7. Sample the expenditures account to see if additional sites exist Sample the non-environmental expenditures to see whether additional sites exist
8. Select liabilities for routine review
9. For newly added liabilities, evaluate estimates for accuracy and reasonableness using engineering reports, contractor estimates, etc.

C. Incorporate Accounting Guidance into Methodologies, Processes and Procedures

Liability management should include ensuring the below accounting guidance is incorporated in the processes, procedures and reporting. The impact of each and its impact to environmental reporting considerations requiring consistency is described in short detail below:

- FASB Statement No. 5, Accounting for Contingencies
- FIN 14, Reasonable Estimation of the Amount of a Loss – an interpretation of FASB Statement No. 5
- SOP 96-1, Environmental Remediation Liabilities
- SAB 92, Accounting and Disclosures Related to Loss Contingencies
- FAS 143, Accounting for Asset Retirement Obligations
- FIN 47, Accounting for Conditional Asset Retirement Obligations
- EITF Issue 90-8, Capitalization of Costs to Treat Environmental Contamination

FAS 5 Application

FAS 5 - Provides guidance on the accounting for contingencies and defines the likelihood of a loss contingency as follows:

Probable	The future event or events are likely to occur
Reasonably Possible	The chance of the future event or events occurring is more than remote but less than likely
Remote	The chance of the future event or events occurring is slight

FAS 5 requires an estimated loss from a loss contingency to be accrued if both:

1. Information available prior to issuance of the financial statements indicates that it is probable that an asset had been impaired or a liability had been incurred at the date of the financial statements. It is implicit in this condition that it must be probable that one or more future events will occur confirming the fact of the loss.
2. The amount of loss can be reasonably estimated.

Impacts

If a loss contingency is not accrued because one or both of the conditions are not met, or if an exposure to loss exists in excess of the amount accrued, disclosure of the contingency shall be made when there is at least a reasonable possibility that a loss or an additional loss may have been incurred. The disclosure shall indicate the nature of the contingency and shall give an estimate of the possible loss or range of loss or state that such an estimate cannot be made.

Note, after the date of an enterprise's financial statements but before those financial statements are issued, information may become available indicating that an asset was impaired or a liability was incurred after the date of the financial statements or that there is at least a reasonable possibility that an asset was impaired or a liability was incurred after that date. Disclosure may be necessary to keep the financial statements from being misleading.

Disclosure, if made, should indicate the nature of the item and give an estimate of the amount or range of loss or possible loss, or state that such an estimate cannot be made.

FIN 14, Reasonable Estimation of the Amount of a Loss – an interpretation of FASB Statement No. 5

Provides guidance on the application of FAS 5 to environmental remediation liabilities.

Impact

Specifically, when no amount within the range is a better estimate than any other amount, the minimum amount in the range should be accrued. Disclosure of the nature of the contingency, the amount accrued, and any additional exposure to loss may also be necessary.

SOP 96-1 Environmental Remediation Liabilities

Provides guidance for applying the probability criterion and estimating amounts to be accrued and disclosures.

FAS 5's probability criterion is met if both of the following elements are met on or before the date the financial statements are issued:

- Litigation has commenced or a claim or an assessment has been asserted, or, based on available information, commencement of litigation or assertion of a claim or an assessment is probable. In other words, it has been asserted (or it is probable that it will be asserted) that the entity is responsible for participating in a remediation process because of a past event.
- Based on available information, it is probable that the outcome of such litigation, claim, or assessment will be unfavorable. In other words, an entity will be held responsible for participating in a remediation process because of the past event.

Note, what constitutes commencement or probable commencement of litigation or assertion or probable assertion of a claim or an assessment in relation to particular environmental laws and regulations may require legal determination.

Given the legal framework within which most environmental remediation liabilities arise, AcSEC concluded that there is a presumption that the outcome will be unfavorable if:

- litigation has commenced or a claim or an assessment has been asserted or if commencement of litigation or assertion of a claim or assessment is probable
- the reporting entity is associated with the site (ie., the company arranged for the disposal of hazardous substances found at a site or transported hazardous substances to the site or is the current or previous owner or operator of the site)

Cost Considerations

Estimating environmental remediation liabilities involves an array of issues at any point in time. In the early stages of the process, cost estimates can be difficult to derive because of uncertainties about a variety of factors. For this reason, estimates developed in the early stages of remediation can vary significantly. In many cases, early estimates later require significant revision. The following are some of the factors that are integral to developing cost estimates:

- The extent and types of hazardous substances at a site
- The range of technologies that can be used for remediation
- Evolving standards of what constitutes acceptable remediation
- The number and financial condition of other potentially responsible parties (PRPs) and the extent of their responsibility for the remediation (that is, the extent and types of hazardous substances they contributed to the site)

An estimate of the range of an environmental remediation liability typically is derived by combining estimates of various components of the liability (such as the costs of performing particular tasks, or amounts allocable to other PRPs but that will not be paid by those other PRPs), which are themselves likely to be ranges. For some of those component ranges, there may be amounts that appear to be better estimates than any other amount within the range; for other component ranges, there may be no such best estimates. Accordingly, the overall liability that is recorded may be based on amounts representing the lower end of a range of costs for some components of the liability and best estimates within ranges of costs of other components of the liability. At the early stages of the remediation process, particular components of the overall liability may not be reasonably estimable. This fact should not preclude the recognition of a liability. Rather, the components of the liability that can be reasonably estimated should be viewed as a surrogate for the minimum in the range of the overall liability.

For example, a sole PRP that has confirmed that it sent waste to a Superfund site and agrees to perform a remedial investigation and feasibility study (RI/FS) may know that it will incur costs related to the RI/FS. The PRP, although aware that the total costs associated with the site will be greater than the cost of the RI/FS, may be unable to reasonably estimate the overall liability because of existing uncertainties, for example, regarding the kinds and quantities of hazardous substances present at the site and the technologies available to remediate the site. This lack of ability to quantify the total costs of the remediation effort, however, should not preclude recognition of the estimated cost of the RI/FS. In this circumstance, a liability for the best estimate (or, if no best estimate is available, the minimum amount in the range) of the cost of the RI/FS and for any other component remediation costs that can be reasonably estimated, should be recognized in the entity's financial statements.

Additional complexities arise if other PRPs are involved in an identified site. The costs associated with remediation of a site ultimately will be assigned and allocated among the various PRPs. The final allocation of costs may not be known, however, until the remediation effort is substantially complete, and it may or may not be based on an entity's relative direct responsibility at a site. An entity's final obligation depends, among other things, on the willingness of the entity and other PRPs to negotiate a cost allocation, the results of the entity's negotiation efforts, and the ability of other PRPs associated with the particular site to fund the remediation effort.

Uncertainties relating to the entity's share of an environmental remediation liability should not preclude the entity from recognizing its best estimate of its share of the liability or, if no best estimate can be made, the minimum estimate of its share of the liability, if the liability is probable and the total remediation liability associated with the site is reasonably estimable within a range.

The costs to be included in the measurement of the environmental remediation liability include the following:

- Incremental direct costs of the remediation effort Costs of compensation and benefits for those employees who are expected to devote a significant amount of time directly to the remediation effort, to the extent of the time expected to be spent directly on the remediation effort
- Precleanup activities, such as the performance of a remedial investigation, risk assessment, or feasibility study and the preparation of a remedial action plan and remedial designs for a Superfund site, or the performance of a Resource Conservation and Recovery Act of 1976 (RCRA) facility assessment, RCRA facility investigation, or RCRA corrective measures studies
- Performance of remedial actions under Superfund, corrective actions under RCRA, and analogous actions under state and non-United States laws
- Government oversight and enforcement-related activities
- Operation and maintenance of the remedy, including required postremediation monitoring

Examples of incremental direct costs of the remediation effort include the following:

- Fees to outside law firms for work related to determining the extent of remedial actions that are required, the type of remedial actions to be used, or the allocation of costs among PRPs
- Costs related to completing the remedial investigation/feasibility study (RI/FS)
- Fees to outside engineering and consulting firms for site investigations and the development of remedial action plans and remedial designs
- Costs of contractors performing remedial actions
- Government oversight costs and past costs; usually this is based on the cost incurred by the United States Environmental Protection Agency (EPA) or other governmental authority dealing with the site

- The cost of machinery and equipment that is dedicated to the remedial actions and that does not have an alternative use
- Assessments by a PRP group covering costs incurred by the group in dealing with a site
- Costs of operation and maintenance of the remedial action, including the costs of post remediation monitoring required by the remedial action plan

Determining (a) the extent of remedial actions that are required, (b) the type of remedial actions to be used, and (c) the allocation of costs among PRPs is part of the remediation effort, and the costs of making such determinations, including legal costs, are to be included in the measurement of the remediation liability.

Note, the costs of services related to routine environmental compliance matters and litigation costs involved with potential recoveries are not part of the remediation effort. Additionally, litigation costs involved with potential recoveries should be charged to expense as incurred until realization of the claim for recovery is considered probable and an asset relating to the recovery is recognized, at which time any remaining such legal costs should be considered in the measurement of the recovery. The determination of what legal costs are for potential recoveries rather than for determining the allocation of costs among PRPs will depend on the specific facts and circumstances of each situation.

Examples of employees who may devote a significant amount of time directly to the remediation effort include the following:

- The internal legal staff that is involved with the determination of the extent of remedial actions that are required, the type of remedial action to be used, and the allocation of costs among PRPs
- Technical employees who are involved with the remediation effort

With respect to recorded accruals for environmental remediation loss contingencies and assets for third-party recoveries related to environmental remediation obligations, financial statements should disclose the following:

- The nature of the accruals, if such disclosure is necessary for the financial statements not to be misleading, and, in situations where disclosure of the nature of the accruals is necessary, the total amount accrued for the remediation obligation, if such disclosure is also necessary for the financial statements not to be misleading
- If any portion of the accrued obligation is discounted, the undiscounted amount of the obligation and the discount rate is used in the present-value determinations

With respect to reasonably possible loss contingencies, including reasonably possible loss exposures in excess of the amount accrued, financial statements should disclose the following:

- The nature of the reasonably possible loss contingency, that is, a description of the reasonably possible remediation obligation, and an estimate of the possible loss exposure or the fact that such an estimate cannot be made

- If the criteria of SOP 94-6 are met with respect to estimated loss (or gain) contingencies, an indication that it is at least reasonably possible that a change in the estimate will occur in the near term

Entities also are encouraged, but not required, to disclose the following:

- The estimated time frame of disbursements
- Reasons why an estimate of the probable or reasonably possible loss or range of loss cannot be made
- For individual sites that are relevant for an understanding of the financial position, cash flows, or results of operations of the entity
- The amount accrued
- The nature of any reasonably possible loss contingency or additional loss, and an estimate of the possible loss or the fact that an estimate cannot be made and the reasons why it cannot be made
- Whether other PRPs are involved and their share of the obligation
- Status of regulatory proceedings time frame for resolution
- The estimated time frame for realization of recognized probable recoveries
- If the criteria of SOP 94-6 are met with respect to the accrued obligation, to any recognized asset for third-party recoveries, or to reasonably possible loss exposures or disclosed gain contingencies, the factors that cause the estimate to be sensitive to change

SAB 92

Provides additional guidance related to contingent liabilities from the SEC Staff. The Staff gives its guidance related to several questions including:

- Does the staff believe that it is appropriate to offset in the balance sheet a claim for recovery that is probable of realization against a probable contingent liability, that is, report the two as a single net amount on the face of the balance sheet?
- If a registrant is jointly and severally liable with respect to a contaminated site but there is a reasonable basis for apportionment of costs among responsible parties, must the registrant recognize a liability with respect to costs apportioned to other responsible parties?
- Estimates and assumptions regarding the extent of environmental or product liability, methods of remedy, and amounts of related costs frequently prove to be different from the ultimate outcome. How do these uncertainties affect the recognition and measurement of the liability?
- Assuming that the registrant's estimate of an environmental or product liability meets the conditions set forth in the consensus on EITF Issue 93-5 for recognition on a discounted basis, what discount rate should be applied?
- What financial statement disclosures should be furnished with respect to recorded and unrecorded product or environmental liabilities?
- What disclosures regarding loss contingencies may be necessary outside the financial statements?

- What disclosures should be furnished with respect to site restoration costs or other environmental exit costs?
- A registrant expects to incur site restoration costs, post-closure and monitoring costs, or other environmental exit costs at the end of the useful life of the asset. Would the staff object to the registrant's proposal to accrue the exit costs over the useful life of the asset?
- May a rate-regulated enterprise present on its balance sheet the amount of its estimated liability for environmental costs net of probable future revenue resulting from the inclusion of such costs in allowable costs for rate-making purposes?
- May a rate-regulated enterprise delay recognition of a probable and estimable liability for environmental costs which it has incurred at the date of the latest balance sheet until the regulator's deliberations have proceeded to a point enabling management to determine whether this cost is likely to be included in allowable costs for ratemaking purposes?
- How should the acquiring company account for and disclose contingent liabilities that have been assumed in a business combination?

FAS 143

FAS 143 requires an entity to recognize the fair value of a liability for an asset retirement obligation in the period in which it is incurred if a reasonable estimate of fair value can be made.

If a reasonable estimate of fair value cannot be made in the period the asset retirement obligation is incurred, the liability shall be recognized when a reasonable estimate of fair value can be made.

Provides an entity shall disclose the following information about its asset retirement obligations:

- A. A general description of the asset retirement obligations and the associated long-lived assets
- B. The fair value of assets that are legally restricted for purposes of settling asset retirement obligations
- C. A reconciliation of the beginning and ending aggregate carrying amount of asset retirement obligations showing separately the changes attributable to (1) liabilities incurred in the current period, (2) liabilities settled in the current period, (3) accretion expense, and (4) revisions in estimated cash flows, whenever there is a significant change in one or more of those four components during the reporting period.
- D. If the fair value of an asset retirement obligation cannot be reasonably estimated, that fact and the reasons therefore shall be disclosed.

Impact

Companies must recognize a liability for the fair value of an ARO that is conditional on a future event, if the liability's fair value can be estimated reasonably.

FIN 47

Provides guidance if there is not sufficient information to reasonably estimate the ARO when it is incurred, then it is recognized when the ARO can be reasonably estimated.

Impact

If the ARO liability cannot be reasonably estimated, that fact and the reasons must be disclosed.

EITF Issue 90-8

Provides guidance with respect to capitalization.

Impact

In general, environmental contamination treatment costs should be charged to expense, however, those costs may be capitalized if recoverable but only if one of the following criteria is met:

1. The costs extend the life, increase the capacity, or improve the safety or efficiency of property owned by the company. For purposes of this criterion, the condition of that property after the costs are incurred must be improved as compared with the condition of that property when originally constructed or acquired, if later.
2. The costs mitigate or prevent environmental contamination that has yet to occur and that otherwise may result from future operations or activities. In addition, the costs improve the property compared with its condition when constructed or acquired, if later.
3. The costs are incurred in preparing for sale that property currently held for sale.

Additional Considerations

SEC STAFF VIEWS

Excerpt from Deputy Chief Accountant of the SEC's Remarks before the 2004 AICPA National Conference on Current SEC and PCAOB Developments

“... Given these requirements, the recording of a material accrual for a contingent liability related to an event that occurred several years before should not be the first disclosure regarding that contingency. Rather, disclosures regarding the nature of the contingency and the amounts at stake should, in most cases, have already been provided. Disclosures should discuss the nature of the contingency and the possible range of losses for any item where the maximum reasonably possible loss is material. Vague or overly broad disclosures that speak merely to litigation, tax, or

other risks in general, without providing any information about the specific kinds of loss contingencies being evaluated are not sufficient.

Furthermore, I should point out that Statement S and Interpretation 14 require accrual for probable losses of the most likely amount of the loss. While the low end of a range of possible losses is the right number if no amount within the range is more likely than any other, I find it somewhat surprising how often "zero" is the recorded loss right up until a large settlement is announced...."

Other Potential Disclosure Matters

EITF 03-8: Accounting for Claims-Made Insurance and Retroactive Insurance Contracts by the Insured Entity

This discusses the July 1987, Report of the Task Force on Disclosure of Insurance, Disclosure Concerning Insurance Coverage issued by the AICPA which encouraged publicly held entities and entities with public accountability, such as governments, to disclose circumstances in which they are exposed to certain uninsured risks of future material loss.

The report indicates that each reporting entity should decide the matters to be disclosed, depending on its circumstances. The report does not recommend any specific disclosures that would be appropriate when an entity changes from occurrence-based insurance to claims-made insurance or elects to reduce significantly or eliminate its insurance coverage.

However, the report did note that although the FASB did not discourage disclosure of uninsured risks in appropriate circumstances, AcSEC believes that such disclosures should be encouraged rather than simply not discouraged.

III. Conclusion

The role of the EHS professional is being transformed with the enactment of Sarbanes-Oxley and shareholder activity. The EHS professional is now required to understand the accounting language and how it relates to environmental performance. This role will continue to evolve as new accounting standards coming into force across Europe in 2005 require auditors to ensure that current commitments to shareholders are included as constructive obligations on the balance sheets. The EHS professional will be required to monitor the environment with respect to pending regulation and requirements that could carry significant implications. Issues that stakeholders will continue to pursue are accountability, responsibility, disclosure and transparency, legal, financial and sustainability and consistent methodologies for handling will enable for stronger controls and responses to environmental drivers.

Kathryn Pavlovsky

Ms. Pavlovsky is a Manager in Deloitte's Houston office and has over ten years of experience in the areas of Environmental insurance and risk management where she conducts exposure assessments, maximum probable loss studies, costs and damages modeling, and cost-benefit analyses. Recently, she has been heavily involved in assessing environmental controls in conjunction with Sarbanes-Oxley readiness requirements, valuing contingent environmental liabilities, and assessing EHS/sustainability frameworks for the purpose of identifying performance and efficiency improvement opportunities. Prior to joining Deloitte, Ms. Pavlovsky was previously employed by Travelers Property Casualty and also Continental Airlines. Ms. Pavlovsky has an undergraduate degree from the University of Texas at Austin where she concentrated in Environmental Economics and a Master of Business Administration from the Jesse H. Jones Graduate School of Management.

THE IMPACT OF THE SARBANES-OXLEY ACT ON THE DISCLOSURE OF ENVIRONMENTAL LIABILITIES

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With the passage of the Sarbanes-Oxley Act, chief executive officers (“CEOs”) and chief financial officers (“CFOs”) have become personally responsible for the disclosure of the financial impacts of toxic tort litigation, environmental compliance, and loss contingencies associated with litigation and environmental matters to the company’s shareholders. The new obligations are causing CEOs and CFOs to take greater notice of such issues, which typically had been delegated to those with environmental responsibilities. While the Securities and Exchange Commission (the “Commission”) has imposed disclosure requirements specifically for environmental matters for at least twenty years, new rules promulgated by the Commission and new interpretations issued by the Financial Accounting Standards Board in the past year have expanded the items that must be reported and accelerated the speed with which disclosures must be made. This paper will focus on the impact that the Sarbanes-Oxley Act has had on corporate disclosure obligations and the new rules that corporations must follow in evaluating and quantifying litigation risks and environmental loss contingencies.

I. THE SARBANES-OXLEY ACT OF 2002

The Sarbanes-Oxley Act of 2002 was enacted on July 30, 2002.¹ The stated purpose of the Act was to “protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws, and for other purposes.”² Although the Sarbanes-Oxley Act does not contain provisions that specifically address environmental disclosure, some provisions could lead to increased reporting of environmental liabilities.

A. The Act

Section 302 of the Sarbanes-Oxley Act and rules promulgated thereunder, which are found in Exchange Act Rules 13a-14 and 13a-15 and in Forms 10-K and 10-Q and the Regulation S-K Item 601 rules for exhibits to such forms, now specifically require that the principal executive officer and the principal financial officer certify with respect to each Annual 10-K report and each Quarterly 10-Q report, subject to effective date and transition rules, that:

- The signing officer has reviewed the report;³
- Based on the officer’s knowledge, the report is not misleading (*i.e.*, there are no untrue statements of material fact or omissions of material facts);⁴
- Based on the officer’s knowledge, the financial statements and other financial information in the report *fairly present* in all material respects the financial condition and results of operations of the issuer;⁵
- The signing officer is responsible for establishing and maintaining the company’s disclosure controls and procedures;⁶

- Such officer has designed the company's internal controls over financial reporting, or caused such internal control over financial reporting to be designed under such officer's supervision, to ensure that material information relating to the company and its consolidated subsidiaries is made known to the officer by other others within those entities;⁷
- Such officer has evaluated the effectiveness of such disclosure controls and procedures and presented in the periodic report such officer's conclusions about the effectiveness of the disclosure controls and procedures;⁸
- They have made disclosures to the issuer's auditors and audit committee regarding all significant deficiencies and material weaknesses in the company's internal control over financial reporting and instances of fraud by those involved with internal control over financial reporting;⁹ and
- The signing officer has indicated in the report any change in the company's internal control over financial reporting that occurred during the registrant's most recent fiscal quarter that has materially affected, or is reasonably likely to materially affect, the registrant's internal control over financial reporting, including corrective actions with regard to significant deficiencies and material weaknesses.¹⁰

The "fairly presents" standard in the certification is broader than the historic formulation of "fairly presents in accordance with generally accepted accounting principles." This certification is not limited to a representation that the financial statements and other financial information have been presented in accordance with generally accepted accounting principles ("GAAP"), and is not otherwise limited by reference to GAAP. The certifying officers are, therefore, individually accountable for determining whether disclosure beyond GAAP is necessary or prudent. The emphasis is on transparency of an issuer's financial condition, results of operations and cash flows. With regard to environmental liabilities, the key issues are what to disclose, how to disclose it, when to disclose it, and who wants to know.

The certification requirement applies not only to the financial statements in the 10-K and 10-Q reports but also to selected financial data, footnotes to financial statements, Management's Discussion and Analysis of Financial Condition and Results of Operations ("MD&A") and other financial information in these reports. What is required is an overall assessment of accuracy and completeness, including whether accounting principles used are appropriate for the company's circumstances, whether the disclosure is informative and reasonably reflects underlying transactions, events and circumstances and whether more needs to be disclosed to present a complete financial picture of the company.

Under a federal criminal code amendment contained in Section 906 of the Sarbanes-Oxley Act, the CEO and CFO must, in effect, certify (in a document "accompanying" each report) that each Annual 10-K report and each Quarterly 10-Q report (*i.e.*, each periodic report containing financial statements, also including Form 11-K's as to plans) fully complies with the requirements of section 13(a) or 15(d) of the Securities Exchange Act of 1934 and that the financial statements therein *fairly present*, in all material respects, the financial condition and

results of operations of the company without any qualification or reference as to GAAP.¹¹ Severe criminal penalties attach for false certifications.¹²

Section 3 of the Sarbanes-Oxley Act directs the Commission to promulgate such rules and regulations as may be necessary or appropriate in the public interest or for the protection of investors and in furtherance of the Act.¹³ Section 404 of the Act requires the Commission to prescribe rules requiring each Annual 10-K report to contain an internal control report that: (1) states the responsibility of management for establishing and maintaining an adequate internal control structure and procedures for financial reporting; and (2) contains an assessment, as of the end of the most recent fiscal year of the company, of the effectiveness of the internal control structure and the company's procedures for financial reporting.¹⁴

Section 408 of the Sarbanes-Oxley Act requires the Commission to review a company's financial disclosures at least once every three years for the protection of investors.¹⁵ In addition, companies will be required to disclose "on a rapid and current basis" such additional information in plain English concerning material changes in their financial condition or operations, including trend and qualitative information and graphic presentations, as the Commission determines is necessary or useful for the protection of investors and in the public interest.¹⁶

B. The Rules

In accordance with Section 404 of the Sarbanes-Oxley Act, the Commission has promulgated rules as to further obligations with respect to certifications, disclosures and attestations as to "internal control over financial reporting."¹⁷ Under the Commission rules, companies must be able to point to an established protocol for identifying, tracking, estimating, and judging the materiality of environmental matters.

These new rules, which are found in amendments to the Exchange Act Rules 13a-14 and 13a-15, Regulation S-X Rules 1-02 and 2-02, Regulation S-K Items 307 and 308 and Forms 10-K and 10-Q, impose further disclosure obligations as to "internal control over financial reporting" and require companies to include in their annual reports a report of management on the company's internal control over financial reporting.¹⁸ The annual Form 10-K report, under the rules adopted under Section 404, will be required to include an internal control report of management that includes:

1. A statement of management's responsibilities for establishing and maintaining adequate internal control over financial reporting for the company;¹⁹
2. A statement identifying the framework used by management to evaluate the effectiveness of the registrant's internal control over financial reporting as required by 17 C.F.R. § 240.13a-15(b) or 240.15d-15;²⁰
3. Management's assessment of the effectiveness of the company's internal control over financial reporting as of the end of the most recent fiscal year, including a statement as to whether or not internal control over financial reporting is effective;²¹ and

4. A statement that the company's outside auditors have attested to, and reported on to the audit committee and board, management's evaluation of the company's internal control over financial reporting contained in the Annual 10-K report.²²

The new rules also require that the management of a company evaluate, with the participation of the company's CEO and CFO, any change in the company's internal control over financial reporting that occurred during each of the company's fiscal quarters that has materially affected, or is reasonably likely to materially affect, the issuer's internal control over financial reporting.²³

In addition, companies are required to file the certifications mandated by Sections 302 and 906 of the Sarbanes-Oxley Act as exhibits to their annual, semi-annual and quarterly reports.²⁴ The stated purpose of the new certification requirements is "to enhance the ability of investors, the Commission staff, the Department of Justice and other interested parties to easily and efficiently access the certifications through [its] Electronic Data Gathering, Analysis and Retrieval ("EDGAR") system and facilitate better monitoring of a company's compliance with the certification requirements."²⁵

Failure to comply with these rules can result in not only significant fines and penalties being assessed against the company, but also personal liability for CEOs and CFOs, including substantial monetary fines and jail time.²⁶

II. DISCLOSURE REQUIRED BY THE COMMISSION

The United States Congress has granted the Commission the authority to promulgate regulations and issue guidance on what information public companies must disclose in their public filings. The Commission has imposed disclosure requirements specifically for environmental matters for more than twenty years. Since the passage of the Sarbanes-Oxley Act, new rules promulgated by the Commission have expanded the items that must be reported and accelerated the speed with which disclosures must be made.

A. Regulation S-K

Regulation S-K, promulgated by the Commission in 1982, sets forth the requirements applicable to the content of the non-financial statement portions of filings required under the Securities Act of 1933 and the Securities Exchange Act of 1934.²⁷ There are three items in Regulation S-K that address disclosure of environmental costs and liabilities.

1. Item 101 of Regulation S-K – Description of Business

Item 101 of Regulation S-K requires disclosure of the material effects, if any, that compliance with federal, state and local environmental regulations may have upon the capital expenditures, earnings and competitive position of the registrant and its subsidiaries.²⁸ Disclosure of material estimated future capital expenditures for environmental control facilities is also required.²⁹ The focus of Item 101 is on the impact of existing regulations on a company's operations.

In determining whether an environmental matter is “material,” and thus should be disclosed, “the registrant should take into account both quantitative and qualitative factors such as the significance of the matter to the registrant (e.g., whether a matter with a relatively minor impact on the registrant's business is represented by management to be important to its future profitability), the pervasiveness of the matter (e.g., whether it affects or may affect numerous items in the segment information), and the impact of the matter (e.g., whether it distorts the trends reflected in the segment information).”³⁰ Generally, an item is material if there is a substantial likelihood its disclosure would be viewed by a reasonable investor as having significantly altered the “total mix” of information made available.³¹ The Commission has cautioned companies against making materiality determinations based solely on quantitative “rules of thumb,” such as 5% or 10% of total assets.³²

Registrants take different approaches with regard to the environmental disclosure requirement. Some include a detailed description of environmental liabilities in Item 1 of the Form 10-K. Others address the bulk of environmental disclosure in other portions of the Form 10-K, for example in Item 3, the Management's Discussion and Analysis of Financial Condition and Results of Operations (MD&A) and the notes to the financial statements.

2. Item 103 of Regulation S-K - Legal Proceedings

Item 103 of Regulation S-K requires a brief description of material pending legal proceedings, other than “ordinary routine litigation incidental to the business,” to which the registrant or any of its subsidiaries is a party or of which any of their property is the subject.³³ The name of the court or agency in which the proceeding is pending, the date instituted, the principal parties, the relief sought, and a description of the factual basis alleged to underlie the proceeding must be included.³⁴ Similar information is also required as to proceedings known to be contemplated by governmental agencies.³⁵

a. “Materiality”

Under Item 103, a proceeding is material if the amount claimed (exclusive of interest and court costs) exceeds 10% of the current assets of the registrant and its subsidiaries determined on a consolidated basis.³⁶ If, however, a proceeding presents in large measure the same legal and factual issues as other proceedings pending or known to be contemplated, the amount involved in those other proceedings must be included in computing the amount involved.³⁷

In determining materiality, any claim of indemnification, contribution or insurance coverage should be set off to reduce the amount claimed against the registrant only if there are unlikely to be timing differences or questions regarding the ability to recover on the indemnification, contribution, or insurance coverage.

b. “Other than ordinary routine litigation incidental to the business”

Registrants are not required to disclose ordinary routine litigation that is usual for their business.³⁸ For example, if a registrant's business ordinarily results in actions for negligence or other claims, such actions or claims need not be disclosed.³⁹

Specific types of proceedings which have been determined by the Commission not to be ordinary, routine litigation incidental to the registrant's business are described in Instructions 3, 4, and 5 to Item 103.⁴⁰ Included in these specific types of proceedings are administrative or judicial proceedings "arising under any federal, state or local provisions that have been enacted to regulate the discharge of materials into the environment or primarily for the purpose of protecting the environment."⁴¹

c. *Environmental matters*

Instruction 5 provides that an administrative or judicial proceeding arising under any federal, state, or local provisions regulating the discharge of materials into the environment or primarily for the purpose of protecting the environment shall not be deemed "ordinary routine litigation incidental to the business" and shall be described if:

- Such proceeding is material to the business or financial condition of the registrant;
- Such proceeding involves primarily a claim for damages, or involves potential monetary sanctions, capital expenditures, deferred charges or charges to income and the amount involved, exclusive of interest and costs, exceeds 10% of the current assets of the registrant and its subsidiaries on a consolidated basis; or
- A governmental authority is a party to such proceeding and such proceeding involves potential monetary sanctions, unless the registrant reasonably believes that such proceeding will result in no monetary sanctions, or in monetary sanctions (exclusive of interest and costs) of less than \$100,000; however, proceedings which are similar in nature may be grouped and described generically.⁴²

The Commission has not defined or described the point at which administrative activities may qualify as "proceedings."

The process leading to the issuance of an administrative clean-up order ordinarily will not involve a formal or informal hearing but instead will involve more summary processes and administrative orders. For example, the United States Environmental Protection Agency ("EPA") possesses broad powers of inspection, as well as the power to issue administrative orders to compel compliance with hazardous waste management requirements, monitoring and testing of sites and corrective action to remedy a hazardous waste release.

The Commission has expressed the view that the term "proceedings" should not be narrowly construed and has stated that all administrative orders relating to environmental matters, whether or not those orders follow a formal proceeding, may be reportable.⁴³

In its 1989 Interpretive Release on MD&A,⁴⁴ the Commission stated that the designation of a registrant as a potentially responsible party ("PRP") by the EPA under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") does not "in and of itself trigger disclosure," because that status alone does not necessarily provide knowledge that a governmental agency is contemplating a proceeding within the meaning of Item 103.⁴⁵

However, “a registrant's particular circumstances, when coupled with PRP status, may provide that knowledge.”⁴⁶

MD&A Interpretive Release No. 33-6835 further suggested that the concept of a “known uncertainty” should be applied in determining whether environmental liabilities are material and must, therefore, be disclosed.⁴⁷ If an uncertainty is known, then management must assess it as follows:

- First, is the uncertainty likely to occur or come to fruition? If not, no disclosure is required.
- If management cannot determine this question, it must objectively evaluate the consequences of the uncertainty on the assumption that it will occur or come to fruition. Disclosure is required unless management can determine that a material effect on the registrant’s financial condition or results of operations is not reasonably likely to occur as a result.⁴⁸

The Commission in Release No. 33-6835 applied these principles to a hypothetical situation, in the context of MD&A disclosure, where the registrant was correctly designated as a PRP by the EPA and had no available statutory defenses. The registrant, under these facts, was in the process of preliminary investigations of hazardous waste sites to determine the nature of its potential liability and the cost of clean up operations; other PRPs had been designated, but the registrant’s ability to obtain contribution or insurance coverage was unclear, and management was unable to determine that a material effect on future financial condition or results of operations was not reasonably likely to occur. On these hypothetical facts, the Commission stated that disclosure in the MD&A of the effects of the registrant's PRP status, quantified to the extent reasonably practical, would be necessary.⁴⁹

In Staff Accounting Bulletin No. 92, “Accounting and Disclosures Relating to Loss Contingencies” (“SAB 92”),⁵⁰ the Commission published certain staff positions regarding accounting and disclosures relating to loss contingencies, particularly as a result of environmental or product liability.⁵¹ Although SAB 92 relates primarily to the presentation of loss contingencies in financial statements, it notes the disclosure requirements of Items 101, 103, and 303 (MD&A) of Regulation S-K, and cites the guidance with respect to potential environmental liability contained in Release No. 33-6835.⁵² The staff stated in SAB 92 that disclosures made pursuant to such guidance should be sufficiently specific to enable a reader to understand the scope of the contingencies affecting the registrant.⁵³ For example, the staff stated that a registrant’s discussion of historical and anticipated environmental expenditures should, to the extent material, describe separately: (i) recurring costs associated with managing hazardous substances and pollution in on-going operations; (ii) capital expenditures to limit or monitor hazardous substances or pollutants; (iii) mandated expenditures to remediate previously contaminated sites; and (iv) other infrequent or non-recurring clean-up expenditures that can be anticipated which are not required in the present circumstances.⁵⁴

The staff also stated that “disaggregated” disclosure describing accrued and reasonably likely losses with respect to particular environmental sites or claims may be necessary for a full understanding of these contingencies if they are individually material.⁵⁵ As for financial

statement disclosure, the staff stated that presentation of liabilities net of claims for recovery is generally not appropriate, noting that separate presentation of the gross liability and the related claim for recovery in the registrant's balance sheet most fairly present the potential consequences of the contingent claim.⁵⁶ In considering whether a loss contingency such as a potential environmental liability is material, consideration must be given not only to the availability of insurance, indemnification or contribution but also to whether there would be timing differences on the recovery or issues as to the likelihood of recovery on the insurance, indemnification or contribution claim.⁵⁷

In MD&A Interpretive Release No. 33-6835, at footnote 30, the Commission stated that the costs anticipated to be incurred by a registrant under CERCLA pursuant to a remedial agreement entered into in the normal course of negotiations with the EPA are not generally considered to be "sanctions" within the meaning of Instruction 5 to Item 103. Instead, such remedial costs normally would constitute charges to income or capital expenditures.

3. Item 303 of Regulation S-K - Management's Discussion and Analysis of Financial Condition and Results of Operations

Item 303 of Regulation S-K contains a general requirement to disclose "any known trends or uncertainties that have had or that the registrant reasonably expects will have a material favorable or unfavorable impact on net sales or revenues or income from continuing operations."⁵⁸ The purpose of the MD&A is to provide relevant information to investors and other users for assessing the financial condition and results of operations of the registrant as determined by evaluating the amounts and certainty of cash flows from operations and from outside sources.⁵⁹ Item 303 looks beyond the specific effects of existing regulatory requirements to events and uncertainties that are known to management and are expected to be material but may not yet be reflected in current financial statements.

The Commission has developed a two-part test to assist companies in determining whether disclosure is required in the MD&A.⁶⁰ Management must first determine whether the trend or event is not reasonably likely to occur, in which case no disclosure is required.⁶¹ If management cannot make that determination, then disclosure is required unless management can determine that, assuming it occurs, such trend or event is not reasonably likely to be material.⁶² Under the "reasonably likely" standard, doubts about the likelihood that an event or uncertainty will occur, or will be material, should be resolved in favor of disclosure.⁶³

To monitor compliance with the disclosure requirements, the Commission's Division of Corporation Finance periodically reviews registrants' filings and issues comment letters, if necessary, to request additional information, amendments of prior filings, or specific disclosures in future filings. The Commission has warned that if a material change in financial condition or results of operation occurs and was not discussed in prior MD&A disclosures, the Commission staff will inquire into the circumstances of the prior MD&A filings to determine whether the registrant failed to meet the requirements of Item 303.⁶⁴ Since 2002, comments from the Commission requesting more particularized disclosures in the MD&A discussion regarding environmental costs and loss contingencies have become increasingly common.

B. Amended Form 8-K

Pursuant to Section 409 of the Sarbanes-Oxley Act, “[e]ach issuer . . . shall disclose to the public on a rapid and current basis such additional information concerning material changes in the financial condition or operations of the issuer . . . as the Commission determines, by rule, is necessary or useful for the protection of investors and in the public interest.”⁶⁵ The Commission published its rule implementing this provision on March 25, 2004, and the new rule became effective on August 23, 2004.⁶⁶ The rule expands the disclosures required under Form 8-K, the form used to disclose important corporate events on a current basis. Under the new rule, an issuer must file a Form 8-K within four business days of a triggering event.⁶⁷ The triggering events that have the greatest potential to arise in the environmental context are:

- **Item 1.01—Entry Into a Material Definitive Agreement.** Item 1.01 requires the disclosure of material definitive agreements entered into by a company that are not made in the ordinary course of business.⁶⁸ The Commission defines a “material definitive agreement” as “an agreement that provides for obligations that are material to and enforceable against the registrant, or rights that are material to the registrant and enforceable by the registrant against one or more other parties to the agreement, in each case whether or not subject to conditions.”⁶⁹ Item 1.01 parallels Item 601(b)(10) of Regulation S-K⁷⁰ under which a type of contract that ordinarily accompanies the kind of business conducted by the registrant and its subsidiaries will be deemed to have been made in the ordinary course of business.⁷¹ Accordingly, under Item 1.01, a material definitive agreement, such as a settlement of an environmental claim, does not trigger Form 8-K filing obligations if it is entered into in a company’s ordinary course of business.
- **Item 2.03—Creation of a Direct Financial Obligation or an Obligation Under an Off-Balance Sheet Arrangement of Registrant.** Item 2.03 requires disclosure in Form 8-K if the registrant becomes obligated on a direct financial obligation that is material to the registrant.⁷² The term “direct financial obligation” is defined to include: (a) a short-term debt obligation⁷³ that arises other than in the ordinary course of business; and (b) a long-term debt obligation, as defined in Item 303(a)(5)(ii)(a) of Regulation S-K.⁷⁴
- **Item 2.05—Costs Associated with Exit or Disposal Activities.** Item 2.05 requires disclosure when the board of directors, a committee of the board of directors, or an authorized officer or officers if board action is not required, commits the company to an exit or disposal plan or otherwise disposes of a long-lived asset, under which material charges will be incurred under GAAP.⁷⁵ If, for example, a company is disposing of idle property that requires remediation, and the cost of the cleanup would be material, the company would have to issue an 8-K.
- **Item 2.06—Material Impairments.** Item 2.06 requires disclosure when a company’s board of directors, a committee of the board of directors, or an authorized officer or officers of the company, if board action is not required, concludes that a material charge for impairment to one or more of its assets, including without limitation, an impairment of securities or goodwill, is required by GAAP.⁷⁶ No disclosure is

required if the company's conclusion regarding the impairment is made in connection with the preparation, review, or audit of financial statements at the end of a fiscal quarter or year and the conclusion is disclosed in the company's Exchange Act report for that period.⁷⁷ For example, if a company determines that one of its assets is contaminated to the point that its value is materially affected, the company would have to issue an 8-K.

III. DISCLOSURE REQUIRED BY GAAP

In addition to the Commission's reporting requirements, GAAP also requires disclosure of environmental costs and loss contingencies in financial statements in certain circumstances.

A. FASB Statement No. 5

The primary accounting standard applicable to environmental disclosure in financial statements is Federal Accounting Standards Board ("FASB") Statement No. 5.⁷⁸ FASB Statement No. 5 provides that loss contingencies⁷⁹ must be disclosed if: (1) available information indicates that it is probable that "an asset has been impaired or a liability has been incurred at the date of the financial statements"; and (2) the amount of the loss can be reasonably estimated.⁸⁰ If both of these conditions are met, FASB Statement No. 5 requires that the loss be disclosed as a charge to income.⁸¹

Paragraph 10 of FASB Statement No. 5 provides that even when both of these conditions for accrual are not met, disclosure of the loss contingency shall nonetheless be required where there is "at least a reasonable possibility" that the loss has been incurred.⁸² This is true even if "information may not indicate that it is *probable* that an asset had been impaired or a liability had been incurred at the date of the financial statements."⁸³ The disclosure must indicate the nature of the contingency and give an estimate of the possible loss or range of loss, or state that an estimate cannot be made.⁸⁴ The registrant is further required to record the most likely amount within the range if one can be determined.⁸⁵ However, if no amount within the range is a better estimate than any other amount, the minimum amount in the range should be accrued.⁸⁶

B. Staff Accounting Bulletin No. 92

In 1993, the Commission published SAB 92 to promote the timely recognition of contingent losses and to address the diversity in practice with respect to the accounting for and disclosure of contingent liabilities.⁸⁷ According to the Commission,

environmental liabilities typically are of such significance that detailed disclosures regarding the judgments and assumptions underlying the recognition and measurement of the liabilities are necessary to prevent the financial statements from being misleading and to inform readers fully regarding the range of reasonably possible outcomes that could have a material effect on the registrant's financial condition, results of operations, or liquidity.⁸⁸

Under SAB 92, contingent environmental losses must be accrued by a charge to income if it is probable that a liability has been incurred and if the amount of the liability can be estimated.⁸⁹ Offsetting losses and recoveries should be represented on the balance sheet

separately rather than netted because this “most fairly presents the potential consequences of the contingent claim on the company’s resources and is the preferable method of display.”⁹⁰

With respect to joint and several liabilities for a contaminated site, if there is a reasonable method of apportioning the costs, and it is probable that the other PRPs will contribute, then the registrant need only recognize the estimate of its portion of the liability.⁹¹ However, a note on the uncertainties relating to contributions by other PRPs may be necessary.⁹²

Liabilities should be estimated based on currently available facts, existing technology, and presently enacted laws and regulations, while also considering all other available information, including future circumstances such as the effect of inflation.⁹³ If management is able to determine that the amount of a liability is likely to fall within a range, and no amount within that range can be determined to be the better estimate, the registrant should recognize the minimum amount of the range.⁹⁴ Nonetheless, even though the range of costs may be broad, the minimum cost is unlikely to be zero.⁹⁵

If registrants discount estimates of liabilities, the rate used to discount the expected payments should be the rate that will produce an amount at which the environmental liability could be settled in an arm’s length transaction.⁹⁶ If the rate cannot be determined, a rate no greater than the risk-free rate should be used.⁹⁷

SAB 92 requires that certain information be furnished in the notes to financial statements to prevent those financial statements from being misleading.⁹⁸ For example, detailed disclosures regarding material environmental loss contingencies, including site restoration costs and other environmental exit costs, must be disclosed in the notes to financial statements.⁹⁹

C. AICPA Statement of Position 96-1

The American Institute of Certified Public Accountants published Statement of Position 96-1 titled “Environmental Remediation Liabilities” (“SOP 96-1”) in October 1996.¹⁰⁰ SOP 96-1 provides accounting guidance on the recognition, measurement, and disclosure of environmental remediation liabilities.¹⁰¹ Expanding the scope of FASB Statement No. 5, which requires reporting in a company’s financial statements when it is probable that a liability has been incurred and the amount of the liability can be reasonably estimated, SOP 96-1 provides that the probability criterion is met if litigation has commenced or a claim or assessment has been asserted, or litigation or assertion of the claim or assessment is likely, and it is probable that the outcome of such litigation, claim or assessment will be unfavorable.¹⁰² SOP 96-1 creates a presumption that such an outcome will be unfavorable if it is not disputed that the company is associated with the site (e.g., if the company arranged for disposal of wastes found at a Superfund site).¹⁰³

SOP 96-1, in an effort to provide concrete guidance for estimating Superfund liabilities, posts six benchmarks for undertaking the evaluation and—once it has been determined that an environmental remediation liability probably has occurred—provides specific guidance as to how to estimate that liability based on available information.¹⁰⁴ These include identification and verification of an entity as a PRP, receipt of a unilateral administrative order, participation as a PRP in the remedial investigation/feasibility study, completion of a feasibility study, issuance of

a Record of Decision, and remedial design implementation.¹⁰⁵ SOP 96-1 also requires environmental liabilities to be evaluated separately from the consideration of any expected insurance recoveries, claims for indemnification, or claims for contribution.¹⁰⁶

D. FASB Statement No. 143 and FASB Interpretation No. 47

FASB Statement No. 143 requires accrual of enforceable retirement obligations, including obligations for environmental cleanup costs, without regard to the probability of future legal action.¹⁰⁷ The obligation to perform the asset retirement activity is unconditional, even though uncertainty may exist about the timing and/or method of settlement.¹⁰⁸ Therefore, an entity is required to recognize a liability for the fair value of a conditional asset retirement obligation if the fair value of the liability can be reasonably estimated.¹⁰⁹

Over the years, diverse accounting practices have developed with respect to the timing of liability recognition for legal obligations associated with the retirement of a tangible long-lived asset when the timing and/or method of settlement of the obligation are conditional on a future event.¹¹⁰ In an effort to clarify when an entity would have sufficient information to reasonably estimate the fair value of an asset retirement obligation, the FASB recently issued an interpretation of FASB Statement No. 143 regarding environmental liabilities.¹¹¹ The interpretation is effective no later than the end of fiscal years ending after December 15, 2005 (December 31, 2005 for calendar-year enterprises).¹¹² However, the provisions of the Interpretation need not be applied to immaterial items.¹¹³

FASB Interpretation No. 47 clarifies that an entity is required to recognize a liability for the fair value of a conditional asset retirement obligation when incurred if the liability's fair value can be reasonably estimated.¹¹⁴ The interpretation also provides guidance on when an entity would have sufficient information to reasonably estimate the fair value of an asset retirement obligation.¹¹⁵ To the extent that sufficient information is not available at the time the liability is incurred, the interpretation clarifies that FASB Statement No. 143 requires a liability to be recognized initially in the period in which sufficient information becomes available to estimate its fair value.¹¹⁶ If the liability's fair value cannot be reasonably estimated, that fact and the reasons must be disclosed.¹¹⁷ In layman's terms, FASB Interpretation No. 47 requires environmental liabilities to be valued and reported more quickly than in the past.¹¹⁸

IV. EXTERNAL PRESSURE FOR GREATER TRANSPARENCY

A. ASTM Standards

In 2001, the American Society of Testing and Materials ("ASTM") adopted two new voluntary standards for estimating and disclosing environmental liabilities: the Standard Guide for Disclosure of Environmental Liabilities (E 2173-01)¹¹⁹ and the Standard Guide for Estimating Monetary Costs and Liability for Environmental Matters (E 2137-01).¹²⁰

ASTM's stated purpose in promulgating Standard E 2173 was to supplement GAAP.¹²¹ Standard E 2173 identifies the conditions that warrant disclosure and the content of appropriate disclosures.¹²² Standard E 2173 states that "[d]isclosure should be made when an entity believes its environmental liability for an individual circumstance or its environmental liability in the aggregate is material. These amounts include, but are not limited to, damages attributed to the

entity's products or processes, cleanup of hazardous waste or substances, reclamation costs, fines, and litigation costs.”¹²³

The ASTM's aggregation of environmental liabilities differs from the Commission's rules pertaining to the disclosure of lawsuits (S-K Item 103), which requires that only suits with “the same legal and factual issues” be aggregated for determining whether they are material and must therefore be disclosed under Item 103.¹²⁴ The ASTM's aggregation of environmental liabilities also differs from how most companies have interpreted S-K Item 303, which requires disclosure of “any known trends or uncertainties that have had or that the registrant reasonably expects will have a material favorable impact on net sales or revenues or income from continuing operations.”¹²⁵

Standard E 2173 provides that an entity seeking to comply with the standard should: (1) provide a statement regarding “the judgment or assumptions used by the reporting entity regarding the likelihood of liability from any or all individual sites, actions, suits, cases, claims, requests for payment, notices or demands, and the potential materiality of that liability”;¹²⁶ (2) provide a statement regarding the number of sites for which the reporting entity has been named as a PRP and the number of claims, suits, actions, demands, requests for payment, notices, or cases that have been presented to the reporting entity for environmental liabilities;¹²⁷ and (3) provide an estimate of its environmental liabilities, a description of the approach used to prepare the estimate, and the amounts accrued by the reporting entity for environmental liabilities.¹²⁸

Environmental liabilities should be stated on a gross basis, without netting out the effect of any potential offsetting recoveries, such as insurance.¹²⁹ The reporting entity should also discuss the “key external and internal environmental factors regarding the timing or amount of the liabilities, or recoveries.”¹³⁰ Finally, if the reporting entity cannot quantify all or part of a material environmental liability, it should say so and include a statement that “describes the conditions or problems associated with estimating the liability.”¹³¹

Standard E 2137 identifies and provides detailed descriptions of four estimation techniques: (1) expected value; (2) most likely value; (3) range of values; and (4) known minimum value.¹³² The standard does not require the use of any one of these techniques in all circumstances.¹³³ In general, the Standard suggests that in the unusual situation in which a reporting entity has specific information about the probability of various future uncertainties, and the cost implications of each uncertainty, then the reporting entity should use the expected value approach, because, in such situations, it is superior to the other estimation methods.¹³⁴

Although compliance with these standards is voluntary, various environmental organizations and institutional investors have petitioned the Commission to adopt and enforce the ASTM standards as regulations. The Commission has declined to do so. Nonetheless, the ASTM standards serve as guidance for the types of environmental liabilities that should be disclosed in public filings.

B. Government Accountability Office Report

In July 2004, the United States Government Accountability Office (“GAO”) issued a report encouraging the Commission to improve the means by which it tracks environmental disclosures in corporate filings.¹³⁵ The GAO had been asked by the United States Congress to evaluate: (1) key stakeholders’ views on how well the Commission has defined the requirements for environmental disclosure; (2) the extent to which companies are disclosing environmental information in their Commission filings; (3) the adequacy of the Commission’s efforts to monitor and enforce compliance with disclosure requirements; and (4) experts’ suggestions for increasing and improving environmental disclosure.¹³⁶

In the report, the GAO acknowledges that little is known about the extent to which companies are disclosing environmental information in their Commission filings, because it is difficult to determine without direct access to company records what environmental information is potentially subject to disclosure and whether that information should be considered material given the companies’ particular circumstances.¹³⁷ To better track corporate disclosures, the report recommends that the Commission and the EPA work together to increase opportunities for the Commission to access EPA enforcement data that may be relevant to environmental disclosures.¹³⁸

In response to the GAO report, the Commission is creating a searchable electronic database that will facilitate analysis across multiple filings.¹³⁹ The Commission will also make its comment letters and company responses thereto available to the public and accessible through the Commission’s website.¹⁴⁰ As a result, companies can expect increased scrutiny of their disclosures of environmental matters, not only from within the Commission, but also from environmental groups and institutional investors that track environmental issues.

C. Pressure from Investors and the Public At Large

Distrust of large multinational corporations existed before the Enron scandal. To many, what happened with Enron simply validated their belief that corporations were intentionally deceiving investors about the financial risks associated with their operations.

Historically, many corporations have focused on the minimum requirements that must be met in order to comply with the law. Over time, this focus has evolved beyond mere compliance with laws to a goal of exceeding regulatory requirements. Corporations now operate globally and understand that their operations have an impact on the world as a whole. More companies are asking not just “Is it the legal thing to do?” but rather “Is this the right thing to do?” For these companies, the focus now is on developing reputational capital.

Corporations are learning that public perceptions of the company have a direct effect on a government’s willingness to provide tax breaks, grant necessary permits, or allocate the resources needed (such as water) for the company’s operations. Corporations are also learning that investor perceptions of the company as an industry leader on environmental issues leads to greater trust and willingness to invest in the corporation. Publicly-traded companies are finding that a corporation’s reputation with regard to environmental matters has a direct correlation to shareholder value.

Investors feel that they have a right to information on how companies are dealing with environmental risks, such as the financial risks of climate change. Due to the nature of certain industries, such as the oil and gas industry, investors expect companies to have environmental issues. Minimal disclosure of environmental liabilities and loss contingencies likely will be viewed by investors as hiding information, even if such limited disclosure complies with the letter of the law. Many investors view the failure to adequately identify, evaluate, and disclose environmental liabilities as an indication of mismanagement within the corporation. Conversely, a robust disclosure policy related to environmental liabilities is viewed as a proxy for good management.

Now more than ever, large institutional investors are demanding more transparency in the reporting of environmental costs and loss contingencies. For example, in February 2004, the California State Treasurer launched the “Green Wave” initiative, which called on the state’s two largest public pension funds to use their financial clout in the marketplace to demand environmental accountability and broader disclosure of environmental liabilities from public companies in which they invest.¹⁴¹ Concerns of institutional investors are being fueled by environmental groups, such as the Rose Foundation for Communities and the Environment, that have established a foothold with investors to promote their pro-environment agenda.¹⁴² Even industry trade associations, such as the American Petroleum Institute, are encouraging their members to improve the quality and consistency of voluntary reporting on environmental, health and safety, and social and economic performance matters.¹⁴³

V. CONCLUSION

The Sarbanes-Oxley Act, while not including any specific provisions on environmental disclosure, has had a direct impact on the quality of the disclosures of environmental costs and loss contingencies by public companies and the speed at which such disclosures are made. In addition, by requiring CEOs and CFOs to certify the contents of companies’ reports and the adequacy of the internal systems that produced those reports (*i.e.*, to become personally responsible for the disclosure of the financial impacts of environmental compliance and loss contingencies to the company’s shareholders), the Sarbanes-Oxley Act has caused companies to take a harder look at their environmental disclosures.

While the Commission has not yet amended the disclosure rules to require broader disclosure of environmental liabilities, given the pressure being exerted by institutional investors and environmental groups, it is probable that such amendments will come. In the interim, companies should consider voluntarily providing greater transparency with regard to environmental matters in order to build trust with investors and the public at large, which will result in greater financial gains for the company over the long term.

¹ Pub. L. 107-204, 116 Stat. 746 (2002).

² *Id.*

³ 15 U.S.C.A. § 7271(a)(1) (West Supp. 2005).

⁴ *Id.* § 7271(a)(2).

⁵ *Id.* § 7271(a)(3).

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- 6 *Id.* § 7271(a)(4)(A).
- 7 *Id.* § 7271(a)(4)(B).
- 8 *Id.* § 7271(a)(4)(C)-(D).
- 9 *Id.* § 7271(a)(5)(A)-(B).
- 10 *Id.* § 7271(a)(6).
- 11 18 U.S.C.A. § 1350(a)-(b).
- 12 *Id.* § 1350(c).
- 13 15 U.S.C.A. § 7202(a).
- 14 *Id.* § 7262(a).
- 15 *Id.* § 7266.
- 16 *Id.* § 78m(l).
- 17 68 Fed. Reg. 36,636 (June 18, 2003).
- 18 *Id.* at 36,636.
- 19 17 C.F.R. § 229.308(a)(1) (2004).
- 20 *Id.* § 229.308(a)(2).
- 21 *Id.* § 229.308(a)(3). This discussion must include disclosure of any material weakness in the company's internal control over financial reporting identified by management and management is not permitted to conclude that the company's internal control over financial reporting is effective if there are one or more material weaknesses in the company's internal control over financial reporting. *Id.*
- 22 *Id.* § 229.308(a)(4). The auditor's attestation is an annual obligation for a separate report delivered in connection with its annual audit report and new procedures for such attestation engagements have been established by the Public Company Accounting Oversight Board in conjunction with input from the accounting profession and others. *See* 68 Fed. Reg. 23,335 (Apr. 25, 2003).
- 23 17 C.F.R. § 240.13a-15(b). The Commission defines "internal control over financial reporting" as:
- a process designed by, or under the supervision of, the issuer's principal executive and principal financial officers, or persons performing similar functions, and effected by the issuer's board of directors, management and other personnel, to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles and includes those policies and procedures that:
 - (1) Pertain to the maintenance of records that in reasonable detail accurately and fairly reflect the transactions and dispositions of the assets of the issuer;
 - (2) Provide reasonable assurance that transactions are recorded as necessary to permit preparation of financial statements in accordance with general accepted accounting principles, and that receipts and expenditures of the issuer are being made only in accordance with authorizations of management and directors of the registrant; and
 - (3) Provide reasonable assurance regarding prevention or timely detection of unauthorized acquisition, use or disposition of the issuer's assets that could have a material effect on the financial statements.

Id. § 240.13a-15(f).

24 *Id.* § 240.15d-14.
25 68 Fed. Reg. at 36,654.
26 18 U.S.C.A. § 1350(a)-(b).
27 17 C.F.R. § 229.10.
28 *Id.* § 229.101(c)(1)(xii).
29 *Id.*
30 *Id.* § 229.101, instruction 1.
31 TSC Industries v. Northway, Inc., 426 U.S. 438, 449 (1976); *see also* Federal Accounting Standards Board Statement of Financial Accounting Concepts No. 2 (“The omission or misstatement of an item in a financial report is material if, in the light of surrounding circumstances, the magnitude of the item is such that it is probable that the judgment of a reasonable person relying upon the report would have been changed or influenced by the inclusion or correction of the item.”).
32 SEC Staff Accounting Bulletin No. 99, 64 Fed. Reg. 45,150 (Aug. 19, 1999) (“SAB 99”). SAB 99 addresses the issue of materiality in the context of the preparation of financial statements and performance of audits of those financial statements. SAB 99 requires both quantitative and qualitative analysis in order to determine what should be deemed material.
33 17 C.F.R. § 229.103.
34 *Id.*
35 *Id.*
36 *Id.*, Instruction 2.
37 *Id.*
38 *Id.* § 229.103.
39 *Id.*, Instruction 1.
40 *Id.*, Instructions 3, 4, & 5.
41 *Id.*, Instruction 5.
42 *Id.*
43 *See* SEC Release No. 33-6130 (September 27, 1979).
44 SEC Release No. 33-6835 (May 18, 1989).
45 *Id.*
46 *Id.*
47 *Id.*
48 *Id.*
49 *Id.*
50 SEC Staff Accounting Bulletin No. 92, *Accounting and Disclosures Relating to Loss Contingencies*, 58 Fed. Reg. 32,843 (June 14, 1993).
51 *Id.*
52 *Id.*
53 *Id.*
54 *Id.*

55 *Id.*
56 *Id.*
57 *Id.*
58 17 C.F.R. § 229.303(a)(3)(ii).
59 *Id.*, Instruction 2.
60 Securities Act Release No. 6835, 54 Fed. Reg. 22,428, 22,430 (1989).
61 *Id.*
62 *Id.*
63 *Id.*
64 *Id.* at 22,430 n.28.
65 15 U.S.C. § 78m(l).
66 Additional Form 8-K Disclosure Requirements and Acceleration of Filing Date, 69 Fed. Reg. 15,594
(Mar. 25, 2004).
67 Form 8-K at General Instruction B.1.
68 *Id.* at Section 1, Item 1.01(a).
69 *Id.* at Section 1, Item 1.01(b).
70 69 Fed. Reg. at 15,596.
71 17 C.F.R. § 229.601(b)(1).
72 Form 8-K at Section 2, Item 2.03(a).
73 The Commission defines a “short-term debt obligation” as “a payment obligation under a borrowing
arrangement that is scheduled to mature within one year, or for those registrants that use the operating cycle concept
of working capital, within a registrant’s operating cycle that is longer than one year, as discussed in Accounting
Research Bulletin No. 43, Chapter 3A, *Working Capital*.” *Id.* at Section 2, Item 2.03(e).
74 *Id.* at Section 2, Item 2.03(c).
75 *Id.* at Section 2, Item 2.05.
76 *Id.* at Section 2, Item 2.06.
77 *Id.* at Section 2, Item 2.06, Instruction.
78 Federal Accounting Standards Board, Statement of Financial Accounting Standards No. 5, *Accounting for*
Contingencies (March 1975) (“FASB Statement No. 5”).
79 FASB Statement No. 5 defines a “loss contingency” as an existing condition, situation or set of
circumstances involving uncertainty as to a possible loss that will ultimately be resolved when one or more future
events occur or fail to occur. Resolution of the uncertainty may confirm the loss or impairment of an asset or the
incurrence of a liability. *Id.* at para. 1. Examples of loss contingencies include pending or threatened litigation and
actual or possible claims and assessments. *Id.* at para. 4.
80 *Id.* at para. 8 & 9.
81 *Id.* at para. 8.
82 *Id.* at para. 10.
83 *Id.* at para. 10, n. 6.
84 *Id.* at para. 10.

85 Federal Accounting Standards Board, Interpretation No. 14, *Reasonable Estimation of the Amount of a Loss*
(Sept. 1976), at para. 3.

86 *Id.*

87 SAB 92 at 32,843.

88 *Id.* at 32,845.

89 *Id.* at 32,843.

90 *Id.* at 32,844.

91 *Id.*

92 *Id.*

93 *Id.*

94 *Id.*

95 *Id.*

96 *Id.* at 32,844-45.

97 *Id.* at 32,845.

98 *Id.*

99 *Id.* at 32846.

100 American Institute of Certified Public Accountants, Statement of Position 96-1, *Environmental
Remediation Liabilities* (October 10, 1996).

101 *Id.*

102 *Id.*

103 *Id.*

104 *Id.*

105 *Id.*

106 “The staff believes that separate presentation of the gross liability and related claim for recovery in the
balance sheet most fairly presents the potential consequences of the contingent claim on the company’s resources
and is the preferable method of display.” *Id.* at 56.

107 Financial Accounting Standards Board, Statement of Financial Accounting Standards No. 143, *Accounting
for Asset Retirement Obligations* (June 2001).

108 *Id.*

109 *Id.*

110 Financial Accounting Standards Board, Interpretation No. 47, *Accounting for Conditional Asset Retirement
Obligations* (March 2005) (“FASB Interpretation No. 47”), at para. 1. For example, some entities recognize the fair
value of the obligation prior to the retirement of the asset with the uncertainty about the timing and/or method of
settlement incorporated into the liability’s fair value. *Id.* Other entities recognize the fair value of the obligation
only when it is probable the asset will be retired as of a specified date using a specified method or when the asset is
actually retired. *Id.*

111 FASB Interpretation No. 47.

112 *Id.* at para. 8.

113 *Id.* at para. 11.

114 *Id.* at para. 3.

¹¹⁵ *Id.* at para. 4-5.

¹¹⁶ *Id.* at para. 6.

¹¹⁷ *Id.*

¹¹⁸ Appendix A to FASB Interpretation No. 47 provides four examples that illustrate the application of the Interpretation. These examples are instructive on when an entity would be required to recognize the fair value of an asset retirement obligation in accordance with FASB Statement No. 143.

¹¹⁹ American Society of Testing and Materials, *Standard Guide for Disclosure of Environmental Liabilities* (Dec. 10, 2001) (“Standard E 2173”).

¹²⁰ American Society of Testing and Materials, *Standard Guide for Estimating Monetary Costs and Liabilities for Environmental Matters* (Mar. 10, 2001) (“Standard E 2137”).

¹²¹ Standard E 2173 at para. 1.1.

¹²² *Id.* at para. 1.2.

¹²³ *Id.* at para. 6.2.1.

¹²⁴ *See* 17 C.F.R. § 229.103.

¹²⁵ *Id.* § 229.303.

¹²⁶ Standard E 2173 at para. 6.2.2.1.

¹²⁷ *Id.* at para. 6.2.2.2.

¹²⁸ *Id.* at para. 6.2.2.3.

¹²⁹ *Id.* at para. 6.2.2.3(1).

¹³⁰ *Id.* at para. 6.2.2.5.

¹³¹ *Id.* at para. 6.2.2.3(3).

¹³² Standard E 2137 at para. 5.4.

¹³³ *Id.* at para. 5.2.1.

¹³⁴ *Id.* at para. 5.2.1-5.2.2.

¹³⁵ United States Government Accountability Office, Report to Congressional Requesters, *Environmental Disclosure: SEC Should Explore Ways to Improve Tracking and Transparency of Information* (GAO-04-808, July 2004).

¹³⁶ *Id.* at 2.

¹³⁷ *Id.* at 4.

¹³⁸ *Id.* at 4-5.

¹³⁹ *Id.* at 37.

¹⁴⁰ *Id.*

¹⁴¹ State Treasurer Phil Angelides Launches ‘Green Wave’ Environmental Investment Initiative to Bolster Financial Returns, Create Jobs and Clean Up the Environment, California Office of the State Treasurer, News Release (Feb. 3, 2004).

¹⁴² *See, e.g.,* The Rose Foundation for Communities and the Environment, *The Gap in GAAP: An Examination of Environmental Accounting Loopholes* (Dec. 2003); The Rose Foundation for Communities and the Environment, *Fooling Investors & Fooling Themselves: How Aggressive Corporate Accounting & Asset Management Tactics Can Lead to Environmental Accounting Fraud* (July 2004).

¹⁴³ See International Petroleum Industry Environmental Conservation Association and the American Petroleum Institute, *Oil and Gas Industry Guidance on Voluntary Sustainability Reporting* (Apr. 2005).



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Houston

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Experience

- *Over ten years of experience*
- *State and federal Superfund matters*
- *Counseling on regulatory requirements*
- *Evaluation and negotiation of corporate and real estate transactions*
- *Environmental audits*
- *Environmental litigation and criminal defense matters*
- *Disclosure of environmental liabilities in public filings*

Industries

- *Banking and Financial Services*
- *Chemicals*
- *Manufacturing*
- *Natural Resources*
- *Petroleum Refining*
- *Real Estate*
- *Energy and Utilities*

BIOGRAPHY: Heather M. Corken

Heather M. Corken
Sr. Associate

AREAS OF CONCENTRATION

- Environmental Law
- Litigation
- Transactions
- Mergers and Acquisitions
- Toxic Tort, Mass Tort and Environmental Litigation
- Energy

EXPERIENCE

For more than ten years, Heather Corken has practiced all aspects of environmental law advising clients on regulatory requirements, assisting them in the evaluation and negotiation of corporate and real estate transactions, and representing them in environmental litigation and criminal defense matters. A major focus of her practice is representing clients in state and federal Superfund matters.

Heather advises clients on a range of environmental issues impacting the oil and gas, petrochemical and pipeline industries. In addition, she counsels corporations on compliance with the Sarbanes-Oxley Act and disclosure of environmental matters in public filings.

Heather's recent significant projects include:

- Providing counsel to clients named as potentially responsible parties at state and federal Superfund sites in Alabama, California, Georgia, Oklahoma, Tennessee and Texas.
 - She has negotiated with the United States Environmental Protection Agency, the United States Department of Justice, and other federal and state regulatory agencies to reduce settlement amounts on behalf of clients.
- Assisting a large energy company in performing environmental audits of all its facilities in New Mexico, Oklahoma, and Texas and obtaining protection under the Audit Privilege Act of each respective state.
- Providing counsel to a large foreign corporation on the allocation of potential environmental liabilities associated with the acquisition of more than 300 gasoline service stations in the United States.
- Assisting several large foreign corporations in assessing potential environmental liabilities under state and federal law arising out of the transportation of crude oil and other petroleum products in waters of the United States.

BIOGRAPHY: Heather M. Corken

- Providing counsel to several large energy companies and a number of large manufacturing companies on the disclosure of the financial impacts of environmental compliance and loss contingencies in their annual reports, 10-Ks, 10-Qs and other public filings.

PROFESSIONAL ACTIVITIES AND MEMBERSHIPS

- Houston Bar Association
 - Environmental Law Section
 - Litigation Section
- State Bar of Texas
 - Environmental and Natural Resources Law Section
 - Litigation Section
- American Bar Association
 - Section of Environment, Energy, and Resources
 - Special Committee on Environmental Disclosure
 - Superfund and Natural Resource Damages Litigation Committee
 - Waste Management Committee

PUBLICATIONS

Heather is a contributing author and editor of the *Texas Environmental Law Handbook*, which is published by Government Institutes.

SPEECHES

Recognized as being very adept in environmental law matters, Heather's speaking engagements include:

- "How Transparency Leads to Trust: Promoting Investor Confidence through Broader Disclosure of Environmental Liabilities," Sustainability/Climate Change/Sarbanes-Oxley Program, URS Corporation, May 2005
- "Hot Topics in Texas Environmental Law," Environmental Law Update Seminar, Fulbright & Jaworski L.L.P., October 2004
- "Surviving Superfund: Surrender or Fight to the End?," Environmental Law Update Seminar, Fulbright & Jaworski L.L.P. and Roy F. Weston, Inc., October 2003
- Allocating Environmental Liabilities in Real Estate Transactions," Brownfields Redevelopment Conference, Houston Mayor Lee P. Brown, June 2002

EDUCATIONAL BACKGROUND

1994 - J.D., Vanderbilt University

BIOGRAPHY: Heather M. Corken

1991 - B.A., *cum laude*, History and International Studies, Rhodes College

Heather was admitted to practice law in Texas in 1994.

INTERESTS

Heather is an avid sports fan with a passion for Houston Astros baseball and SEC football. She enjoys running and recently completed a 1/2 Marathon.

LANGUAGE CAPABILITIES

- French - Limited Fluency

Houston
New York
Washington, D.C.
Austin
Dallas
Los Angeles
Minneapolis
San Antonio
Hong Kong
London
Munich

Mark R. Vickery, P.G.
Deputy Executive Director
Texas Commission on Environmental Quality

Mark Vickery serves as the Deputy Executive Director of the Commission. The deputy executive director serves as the chief operating officer to assist the executive director in the administration of the agency.

Mark Vickery previously served as Deputy Director for the Office of Permitting, Remediation and Registration (OPRR) of the Texas Commission on Environmental Quality. The Office comprised six divisions including Air Permits, Remediation, Registration, Review and Reporting, Waste Permits, Water Quality, and Water Supply. The Office also housed the Toxicology and Risk Assessment program of the agency.

Prior to Deputy Director for OPRR, Mark Vickery served as Deputy Director for the Office of Compliance and Enforcement of the Texas Commission on Environmental Quality. The Office of Compliance and Enforcement was responsible for four divisions, including Field Operations, which included sixteen regional offices across the state.

Before assuming his duties as Deputy Director, Mr. Vickery served as Director of the Field Operations Division for two years. Other positions held by Mr. Vickery include Manager of the Waste Tire Recycling Program and management positions in the agency's regulatory enforcement programs. He has been with the TCEQ for sixteen years.

Mr. Vickery is a native Texan and attended Texas Tech University in Lubbock, Texas where he received a Bachelor of Science Degree in Geology. Prior to joining the TCEQ, Mr. Vickery worked as an exploration geologist in Midland, Texas.



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BIOGRAPHY: Tom “Smitty” Smith, Director of Public Citizen’s Texas office

Smitty has served as state director of Public Citizen since 1985 and serves on the boards of Clean Water Action, Texas Wind Coalition, Texans for Public Justice, Campaigns for People, Texas Renewable Energy Industries Association, the Clean Energy Project of CEERT, Westcave Preserve, and a solar energy company. He has recently received the Thomas Paine award from Campaigns for People, 2001 *Austin Chronicles*’ critics’ choice award for “Best People’s Lobbyist” as well as a U.S. EPA’s “Environmental Excellence Award.”

Public Citizen is a consumer and environmental group active in issues concerning energy, environment, ethics and campaign finance reforms, trade agreements with Mexico and other countries, and urban sprawl. During his tenure at Public Citizen, Smitty has served on four commissions that looked at the future of the utility industry in Texas and has testified on more than 100 occasions on environmental and energy policy. His proudest accomplishments are: helping to pass laws requiring Texas to develop 2,000 MW of renewable energy; and creating the Texas Emissions Reductions Plan, which reduces emissions from Texas’ dirtiest diesels, gives incentives for purchasing the cleanest new cars and trucks, requires political subdivisions to reduce their energy use by 25% over the next 5 years and requires all new homes or commercial buildings to meet new tough energy use standards.

Smitty hails from Illinois. He graduated from Valparaiso University in northern Indiana and became a Texan by choice in 1974. Before joining Public Citizen, he worked as a legal aid, as a legislative aide, directed the Houston Food bank and ran an anti-hunger advocacy program.



Scott A. Sherman
Associate General Counsel
U.S. Environmental Protection Agency

Scott Sherman is the EPA Associate General Counsel for Solid Waste and Emergency Response. In this capacity, he serves as the senior EPA counselor for the nation's hazardous and solid waste programs and cleanup initiatives, including Superfund, RCRA, Brownfields, Federal Facilities, USTs, Emergency Management, and Land Revitalization. As Associate General Counsel, Scott also manages the Solid Waste and Emergency Response division of the EPA Office of General Counsel.

Scott previously served as a Special Assistant Attorney General for the State of Texas and as a senior legal and policy advisor to Texas state energy and environmental commissioners.

Scott received his B.A. with Highest Honors from the University of Texas and his J.D. *cum laude* from Harvard Law School. He also holds an M.S. in Real Estate from Johns Hopkins University, where his research focused on the cleanup and redevelopment of brownfield properties.

Doug Deason - Biography
Environmental Advisor
ExxonMobil Refining & Supply

Personal

<u>Wife</u>	Married Joy McCarver in May 1981.
<u>Children</u>	Drew- (20)[UT-Austin sophomore], Rachel - (18) [UT-Austin freshman]
<u>Home</u>	Houston, Texas (Clear Lake near Johnson Space Center)
<u>Church:</u>	University Baptist Church
<u>Education:</u>	B.S. Chemical Engineering, Mississippi State University - 1980
<u>Employment</u>	ExxonMobil Refining & Supply in Baytown Texas. Started with Exxon Chemical in Baton Rouge in June, 1980 .
<u>Spare time</u>	Sports, church & education support, family activities

WHAT DO I DO?

2005 - Environmental Advisor for ExxonMobil U.S. State Issues Team . Responsibilities are to coordinate air quality compliance efforts in Texas and continue to work on long term air quality advocacy.

Houston Ozone SIP activities [2000-2005]

- Focused on developing plans for ExxonMobil's Refining / Chemical Houston area's 5 manufacturing sites to comply with the HGA Ozone SIP rules. [2000]
- Represent ExxonMobil Corporation's business interests [Refining , Chemical's , Upstream(Oil & Gas Production) , Pipeline, & Marketing] in developing improvements to the Houston Ozone SIP .[2000-2004]
- Co-chaired the Business Coalition for Clean Air Technical workgroup (2000) , a project of the Greater Houston Partnership .
- Developed with EHCMA colleagues EHCMA Voluntary Episodic Release Reduction Initiative Framework [2001] , beginning enhanced focus on Episodic Release reduction.
- Presented Expert Witness Testimony in the BCCA AG appeal of the TCEQ 12/2000 SIP Adoption . [2Q2001]
- Identifying HGA SIP improvements with BCCA AG members & beginning implementation within ExxonMobil & with EHCMA / other industrial companies. [2001 - 2002]
- Continuing HGA SIP improvements with Mid Course Coalition member companies. [2003-2004]
- 2003-2005 - Chair , Greater Houston Partnership Clean Air Committee
- 2003-2005 - TCEQ Science Steering Committee , Executive Committee Member , Co-Chair of Emission Inventory Committee and Flare Efficiency Workgroups
- 2003-2005 - TERC Board Advisory Member
- 2003-2005 - Texas Air Research Consortium (TARC) Board Member

Public speaking to industry groups , conferences , television stations & newspapers.

Previous Clean Air Act Issues Experience (1994-2000)

Working with Exxon Chemical and Refining sites in the U.S. since 1994 developing plans for complying with the 1990 amendments to the Clean Air Act.

1. Understand company operations and environmental & health issues.
2. Understand requirements of laws and regulations and how we decide to legislate and regulate.

Doug Deason - Biography
Environmental Advisor
ExxonMobil Refining & Supply

3. Understand issues; recommend improvements to laws and regulations.
4. Develop and implement compliance systems including changes to how we operate (facilities), how we measure and record data (computer systems), and how we work (policies and management practices).

PREVIOUS WORK EXPERIENCES

- 1980-1986 - Baton Rouge - Technology support for Exxon's Petrochemicals & Refining Fuels facilities. Developed and improved Olefins / Aromatic's Technology with an emphasis on Olefin Plant furnaces, planned and implemented Technology & Business improvements in our plants and with customers. I was located in Baton Rouge, & had the experience of many short work and travel assignments within the U.S., Canada, Mexico, and Scotland.
- 1986-'91 - Baton Rouge - Supervised plant manufacturing improvement teams, Plant Technology support groups , & provided business improvement leadership. Added travel and work assignments in Japan & Holland to the list of travel locations.
- 1991-'94 - Houston. I was assigned to identify needs & guide how to improve Technology efforts to reduce emissions and wastes. Work and travel assignments included the U.S., Canada, Scotland, England, France, Holland, and Belgium.