Reporting Historic Contamination: E.T., Phone It Home?

by Steve Morton[1]

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I. Introduction

Historic contamination is not a defined term in Texas environmental statutes or regulations. It is generally understood to be soil or groundwater contamination that is found in-situ through environmental media sampling; the origin and timing of the original release is unknown. The Texas Commission on Environmental Quality ("TCEQ") has taken the position that the spill reporting requirements found in the Texas Water Code apply to require reporting when historical contamination is discovered. However, as discussed in this paper, a plain reading of the relevant statutes suggest that they do not apply to historic contamination, only to active spills. These statutes include triggers such as reporting within "24 hours after occurrence" and reporting spills "exceeding a reportable quantity in a 24-hour period"—neither of which can be applied to historic contamination. Further, there does not appear to be any judicial determination clearly supporting the Agency's position. As a result, the legal obligation to report historic contamination is unclear at best.

There is no doubt it is important to address historical soil and groundwater contamination once discovered to prevent harm to human health and the environment. A clearly applicable reporting requirement for discovered historic contamination would be one way to ensure that the state is aware of the circumstances and can require remediation by the responsible party. We should be mindful however that many, if not most, instances of discovered historic contamination are already reported voluntarily to the TCEQ as part of the remediation process under the TCEQ's Voluntary Cleanup Program or the Corrective Action Program. These programs long ago adopted risk-based remediation goals and provided other incentives that encourage private parties to report historic contamination and undertake remediation as part of redevelopment of properties.

Given that the current statutory law is ambiguous at best for requiring reporting of historic contamination, any attempt to define a clear reporting requirement for historic contamination should be through legislative action and should take the unique nature of historic contamination and remediation into account.

This paper presents two points of view on whether groundwater and soil contamination, the source and extent of which is unknown, must be reported to the TCEQ under any of its general spill reporting statutes or regulations. The paper is organized by first

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refreshing the reader about the applicable portions of statutory and regulatory provisions. Next, the essential arguments for and against the reporting of historic contamination are presented. Within each discussion, support for the view that historic contamination does *not* need to be reported is presented first, followed by support for the opposite view.

In the absence of clear case law precedent (no reported Texas cases could be found addressing this issue) or clear statutory and regulatory guidance, the author's purpose is simply to assist the environmental practitioner faced with these questions, by assembling the various arguments, pro and con, on the issue of reporting duties. In each case, the individual practitioner and client must make their own decision based on their facts and their review of the law. As a final note, views or opinions expressed in this paper are not necessarily the views of, and are not to be attributed to, any client, whether private or public.

II. The Scenario

Elliot, an environmental lawyer (and a famous former child actor from the '80's), represents E.T. Investments, the current owner of a commercial warehouse property that is for sale. He is reviewing environmental due diligence that has been conducted at the property by the prospective buyer. The prospective buyer's lawyer, Gertie (who happens to be Elliot's sister), has just called stating that soil and groundwater samples taken from the property contain 100 parts per billion (ppb) 1,1,1 TCA in the groundwater and 1500 ppb 1,1,1 TCA in the soils. The Phase I on the property reveals prior use as a machine shop, although for the last ten years the property has been used for storage of Reese's Pieces with no manufacturing activities. The property is not subject to any specific permitting programs, such as RCRA or TPDES. Elliot has been asked by E.T. Investments whether they need to phone home the discovery of soil and groundwater contamination to the Texas Commission on Environmental Quality (TCEQ).

III. The Relevant Portions of Statutes, Regulations and Guidance

A. Statutes

Texas Water Code § 26.039
Accidental Discharges and Spills

(a) As used in this section:

(1) "Accidental discharge" means an act or omission through which waste or other substances are inadvertently discharged into water in the state.

(2) "Spill" means an act or omission through which waste or other substances are deposited where, unless controlled or removed, they will drain, seep, run, or otherwise enter water in the state.

(3) "Other substances" means substances which may be useful or valuable and therefore are not ordinarily considered to be waste, but which will cause pollution if discharged into water in the state.

(b) Whenever an accidental discharge or spill occurs at or from any activity or facility which causes or may cause pollution, the individual operating, in charge of, or responsible for the activity or facility shall notify the commission as soon as possible and not later than 24 hours after the occurrence. The individual's notice to the

commission must include the location, volume, and content of the discharge or spill.

(c) Activities which are inherently or potentially capable of causing or resulting in the spillage or accidental discharge of waste or other substances and which pose serious or significant threats of pollution are subject to reasonable rules establishing safety and preventive measures which the commission may adopt or issue. The safety and preventive measures which may be required shall be commensurate with the potential harm which could result from the escape of the waste or other substances.

(d) The provisions of this section are cumulative of the other provisions in this chapter relating to waste discharges, and nothing in this section exempts any person from complying with or being subject to any other provision of this chapter…. [remainder deals with releases from wastewater treatment and collection facilities].

Texas Water Code § 7.155
Violation Relating to Discharge or Spill

(a) A person commits an offense if the person:

(1) operates, is in charge of, or is responsible for a facility or vessel that causes a discharge or spill as defined by Section 26.263 and does not report the spill or discharge on discovery; or

(1) knowingly falsifies a record or report concerning the prevention or cleanup of a discharge or spill.

(b) An offense under Subsection (a)(1) is a Class A misdemeanor.

(c) An offense under Subsection (a)(2) is a felony of the third degree.

Texas Water Code § 26.263, Definitions

As used in this subchapter:

(1) "Discharge or spill" means an act or omission by which hazardous substances in harmful quantities are spilled, leaked, pumped, poured, emitted, entered, or dumped onto or into waters in this state or by which those substances are deposited where, unless controlled or removed, they may drain, seep, run, or otherwise enter water in this state. The term "discharge" or "spill" under this subchapter shall not include any discharge to which Subchapter C, D, E, F, or G, Chapter 40, Natural Resources Code, [footnote omitted] applies or any discharge which is authorized by a permit issued pursuant to federal law or any other law of this state or, with the exception of spills in coastal waters, regulated by the Railroad Commission of Texas.

(2) "Account" means the Texas spill response account.

(3) "Harmful quantity" means that quantity of hazardous substance the discharge or spill of which is determined to be harmful to the environment or public health or welfare or may reasonably be anticipated to present an imminent and substantial danger to the public health or welfare by the administrator of the Environmental Protection Agency pursuant to federal law and by the executive director.

(4) "Hazardous substance" means any substance designated as such by the administrator of the Environmental Protection Agency pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. Sec. 9601 et seq.), regulated pursuant to Section 311 of the federal Clean Water Act (33 U.S.C. Sec. 1321 et seq.), or designated by the commission.

(5) “Person” includes an individual, firm, corporation, association, and partnership.

(6) “Person responsible” or “responsible person” means:

(A) the owner, operator, or demise charterer of a vessel from which a spill emanates;

(B) the owner or operator of a facility from which a spill emanates;

(C) any other person who causes, suffers, allows, or permits a spill or discharge.

Tex. Water Code Sec. 26.121. Unauthorized Discharges Prohibited.

(a) Except as authorized 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 a 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, or the Railroad Commission of Texas, in which case this subdivision does not apply.

(b) In the enforcement of Subdivisions (2) and (3) of Subsection (a) of this section, consideration shall be given to the state of existing technology, economic feasibility, and the water quality needs of the water that might be affected. This subdivision does not apply to any NPDES activity.

(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 permit or order of the commission.

(d) Except as authorized by the commission, no person may discharge any pollutant, sewage, municipal waste, recreational waste, agricultural waste, or industrial waste from any point source into any water in the state.

(e) No person may cause, suffer, allow, or permit the discharge from a point source of any waste or of any pollutant, or the performance or failure of any activity other than a discharge, in violation of this chapter or of any rule, regulation, permit, or other order of the commission.

B. Regulations

TCEQ Spill Reporting Regulations
30 Texas Administrative Code Chapter 327

§ 327.3. Notification Requirements.

(a) Reportable discharge or spill. A reportable discharge or spill is a discharge or spill of oil, petroleum product, used oil, hazardous substances, industrial solid waste, or other substances into the environment in a quantity equal to or greater than the reportable quantity listed in §327.4 of this

title (relating to Reportable Quantities) in any 24-hour period.

(b) Initial notification. Upon the determination that a reportable discharge or spill has occurred, the responsible person shall notify the agency as soon as possible but not later than 24 hours after the discovery of the spill or discharge.

§ 327.4. Reportable Quantities.

(a) Hazardous substances. The reportable quantities for hazardous substances shall be:

(1) for spills or discharges onto land - the quantity designated as the Final Reportable Quantity (RQ) in Table 302.4 in 40 CFR §302.4; or

(2) for spills or discharges into waters in the state - the quantity designated as the Final RQ in Table 302.4 in 40 CFR §302.4, except where the Final RQ is greater than 100 pounds in which case the RQ shall be 100 pounds.

(b) Oil, petroleum product, and used oil.

(1) The RQ for crude oil and oil other than that defined as petroleum product or used oil shall be:

(A) for spills or discharges onto land ¬210 gallons (five barrels); or

(B) for spills or discharges directly into water in the state - quantity sufficient to create a sheen.

(2) The RQ for petroleum product and used oil shall be:

(A) except as noted in subparagraph (B) of this paragraph, for spills or discharges onto land - 25 gallons;

(B) for spills or discharges to land from PST exempted facilities - 210 gallons (five barrels); or

(C) for spills or discharges directly into water in the state - quantity sufficient to create a sheen.

(c) Industrial solid waste or other substances. The RQ for spills or discharges into water in the state shall be 100 pounds.

§ 327.2. Definitions

Discharge or spill - An act or omission by which oil, hazardous substances, waste, or other substances are spilled, leaked, pumped, poured, emitted, entered, or dumped onto or into waters in the State of Texas or by which those substances are deposited where, unless controlled or removed, they may drain, seep, run, or otherwise enter water in the State of Texas.

Responsible person - A person who is:

(A) the owner, operator, or demise charterer of a vessel from which a discharge or spill emanates; or

(B) the owner or operator of a facility from which a discharge or spill emanates; or

(C) any other person who causes, suffers, allows, or permits a discharge or spill.

IV. Discussion

A. The Spill Rules: 30 TEX. ADMIN. CODE Chapter 327 ("Spill Rules")

1. Point: Historic Contamination is Not Required to be Reported: The Spill Rules should be viewed as defining the universe of spills currently required to be reported to TCEQ pursuant to relevant

statutes, and the Spill Rules do not require reporting of historic contamination.

a. The Spill Rules are the TCEQ's statement of general applicability as to what needs to be reported under the relevant spill reporting statutes.

The Spill Rules were adopted by the TCEQ in May of 1996, with the stated purpose to "effectuate its powers, responsibilities and authorities regarding discharges or spills under the Texas Water Code, Chapter 26, and the Texas Health and Safety Code, Solid Waste Disposal Act, Chapter 361."[2] These rules were adopted in response to numerous requests of the TCEQ and its predecessor agencies by the regulated community to clarify vague spill reporting statutory language and provide consistency. Repeatedly throughout the preamble to the final adoption of the rules the Commission emphasized that one of the most important purposes of the Spill Rules was to provide clarity, consistency and clear reporting standards. For example, in responding to a request by a commenter to delete a definition from the rules, the Commission responded: "Removing [the definition] from the rule would require [responsible parties] to determine reportable spills under the general guidance of the Texas Water Code Section 26.039. This contradicts the purpose for implementing the spill rules, which is to provide clarity and consistency."[3] Similarly, in responding to a commenter seeking an exception to reporting, the Commission responded that "such exceptions add uncertainty to the goal of clear reporting standards."[4] As a result, it appears clear that the intent of the agency in adopting these rules was to provide the regulated community with consistent, clear directions for determining when spills needed to be reported under the rather broad, confusing language of the Texas Water Code. More specifically, the Commission intended responsible parties ("RPs") to not have to interpret for themselves the requirements of these statutes.

b. Neither the Spill Rules, nor other TCEQ reporting regulations, require the reporting of "historic contamination."

The preamble to the final adoption of the Spill Rules makes it clear that the TCEQ does not require the reporting of historic contamination pursuant to either the Spill Rules *or any other regulations:* "The Commission affirms that these rules do not apply to historical contamination... [c]urrently there are no other commission rules addressing reporting of historical contamination."[5]

Even without that statement, the face of the Spill Rules, which require reporting only if an RQ is exceeded in a 24 hour period[6], would not require the reporting of newly discovered soil or groundwater contamination, if for no other reason than it would be impossible to determine upon discovery whether the RQ had been exceeded.[7] The Commission appears to agree. In response to a commenter's question

[2] 21 Tex Reg. 4228,4229 (May 14, 1996). Current § 7.155 of the Texas Water Code was § 26.268(c) at the time of adoption of these rules.

[3] 21 Tex. Reg. 4228,4232

[4] *Id.*

[5] 21 Tex. Reg. 4228,4229

[6] 30 TEX. ADMIN. CODE §§ 327.3 and 327.4

[7] See discussion, infra, Section III.B.1.b., p. 15, regarding federal EPA Appeals Board Rulings on level of certainty and knowledge required for calculation of RQs.

about how and when RPs will report spills or discharges of unknown quantities, the Commission states: "the determination is left to the RP."[8]

c. The TCEQ cannot enforce a historic contamination reporting requirement without further rulemaking.

In its preamble to the final adoption of the Spill Rules, after stating that the Spill Rules do not require the reporting of historic contamination, the TCEQ offers only meager guidance (contradicting its earlier stated intent to avoid referring RPs to 26.039) to clarify its position on whether any *statutes* require such reporting: "persons who discover historical contamination are guided by the Texas Water Code Section 26.039, as they were before this rulemaking."[9] In responding to three commenters who took the position that excluding historic contamination from the Spill Rules should not "affect a responsible party's obligations to report newly discovered groundwater contamination under Texas Water Code § 26.039, the Commission simply responded: "The Commission agrees."[10] These three words do not provide the type of guidance and notice of a Commission requirement that should be used as the basis for any attempt to enforce against the failure to report historic contamination.

Generally, administrative agencies are bound by the terms of legislative rules in their adjudication of cases.[11]The Austin Court of Appeals has stated:

> Implicit in the listing of legal errors contained in [the APA], any of which requires reversal of an agency's final order if a party's substantial rights have been prejudiced, is a legislative mandate that administrative adjudications be conducted with procedural regularity independent of result. This regularity is frustrated, if not denied, if administrators are free to alter the prescribed bases for their decision making, or to supply in lieu of these prescribed bases those of their own *ad hoc* formulation, or to supplement these prescribed bases on an *ad hoc* basis. The ill consequences of this kind of undisciplined and arbitrary prerogative are obvious; hence, administrators are bound by their own legislative rules.[12]

Legislative rules are those rules promulgated by an agency that "implement" or "prescribe" law or policy pursuant to a lawful delegation of rule-making power.[13] They go beyond mere interpretation of legislative intent because they set forth new substantive provisions, i.e., they create new legal rights and duties.[14] Generally, legislative rules refer to any agency rule made in exercise of delegated legislative authority and intended to have the force and effect of law.[15] An

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[8] 21 Tex Reg. 4228,4234.

[9] 21 Tex. Reg. 4228,4229

[10] 21 Tex. Reg. 4228,4229

[11] *See First Fed. Say. & Loan Ass'n v. Vandygriff*; 639 S.W.2d 492, 499 (Tex. App.—Austin 1982, writ dism'd w.o.j.).

[12] *Id*. at 500.

[13] *See* APA, TEX. GOV'T CODE § 2001.003(6)(A)(i) (Vernon Pamphlet 1999); *Bullock v. Hewlett-Packard Co.*, 628 S.W.2d 754, 756 (Tex. 1982); *First Fed. Sav. & Loan Ass'n v. Vandygriff*, 639 S.W.2d 492, 498 (Tex. App.—Austin 1982, writ dism'd w.o.j.).

[14] *See Bullock* at 756-57; RONALD L. BEAL, TEXAS ADMINISTRATIVE PRACTICE AND PROCEDURE § 2.3.2 (1997).

[15] Other agency laws, which may or may not have the force and effect of law, include procedural rules, policies, and statements, including interpretative rules, policy statements, and internal housekeeping practices. Interpretative rules are those statements of

agency law may be characterized as legislative either expressly or implicitly by the agency invoking its delegated rule-making power.[16]

Texas agencies are not vested with the primary right and discretion to choose between ad hoc and legislative rulemaking.[17] The Austin Court of Appeals in *Madden v. Texas Board of Chiropractic Examiners*[18] stated that ad hoc rulemaking is a limited tool only to be used in lieu of legislative rulemaking if it is required to fulfill the legislative intent.[19] Generally, when agency policies may have an impact on important public and private interests, they should be promulgated as legislative rules of the agency following the procedures established in the APA. In fact, it may become apparent in a particular case that fairness requires a formulation and implementation of the policy through formal rule-making procedures, and the agency will be found to have abused its discretion if it chooses to implement agency policy on an ad hoc basis.[20]

Importantly, the Texas Legislature has mandated that the TCEQ promulgate rules when "adopting, repealing, or amending any agency statement of general applicability that interprets or prescribes law or policy or describes the procedure or practice requirements of an agency."[21] The TCEQ has met this statutory mandate by promulgating its spill rules. Because the TCEQ has elected to formulate policy by legislative rulemaking instead of on a case-by-case basis, that election is binding and controls "the law" applicable to the contested cases before it.[22] In order to impose a policy of statewide applicability requiring historic contamination reporting, particularly when the underlying statutes do not clearly require it, the TCEQ must follow these rules as adopted until the agency changes them in accordance with the APA.

As a result, the current spill rules apply to enforcement cases concerning the reporting of historical contamination. These rules clearly do not require the reporting of historical contamination. The agency is not free to require such reporting until current agency "law" is changed in accordance with the APA. And, as discussed below, good arguments exist that the Texas Water Code would not support such a requirement.

2. Counterpoint: Spill Rules are not the Exclusive Requirements for Reporting Historic Contamination. Texas Water Code §§ 26.039 and 7.155 contain independent obligations to report historic contamination and the Spill Rules do not

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an agency that "interpret" law or policy as set forth by the legislature. An interpretative rule does not have the force and effect of a statute and is merely one factor for a court of law to consider in determining the legislative intent. *See* APA, TEX. GOV'T CODE ANN. § 2001.003(6)(A)(i) (Vernon Pamphlet 1999); *Howell v. Mauzy*, 899 S.W.2d 690, 705 (Tex. App.--Austin 1994, writ denied); *Vandygriff* at 498.

[16] *See* Peter Raven-Hansen, *Regulatory Estoppel: When Agencies Break Their Own "Laws,"* 41 TEX. L. REV. 1, 15 (1985).

[17] *See id*. at 107, n. 27.

[18] 663 S.W.2d 622 (Tex. App.--Austin 1983, writ ref'd n.r.e.).

[19] *See* Ronald L. Beal, *Ad Hoc Rulemaking: Texas Style*, 41 BAYLOR L. REV. 101, 111, n. 64 (1989).

[20] *See generally* JOHN E. POWERS, AGENCY ADJUDICATIONS 29-31 (1990); *see, e.g., Madden v. Texas Bd of Chiropractic Exm 'rs*, 663 S.W.2d 622 (Tex. App.--Austin 1983, writ ref d n.r.e.).

[21] TEX. WATER CODE ANN. §5.103(c) (Vernon Supp. 1999).

[22] *See Vandygriff* at 500.

create an exemption from those requirements.

a. Sections 26.039 and 7.155, in and of themselves, require responsible persons to report historic contamination. As explained in more detail in Section III.B.2. of this paper, both sections contain broad language that requires reporting of almost any possible situation that might cause pollution. The use of active and passive terms in the definitions of spill (act or omission) and responsible person (causes, suffers or allows), along with the list of a variety of methods through which contamination might reach water, reflect an intent to thoroughly protect water in the state.

Additionally, the legislature knows how to be clear when they do not want to cover certain discharges in a statute. For example, in § 26.263, which contains the definition of discharge or spill used for the enforcement provisions in § 7.155, lists those discharges that are not considered discharges or spill for purposes of that section.[23] Significantly, those discharges that are excepted from § 7.155 are those that are either permitted or are required to be reported under other statutes. Further, historic contamination is not listed as one of the types of discharges excluded from reporting requirements. In contrast, there are no exceptions at all in § 26.039. If the legislature intended to exclude historic contamination from either § 26.039 or § 7.155, it could easily have done so. Rather, it left both statutes as broad as possible, to encompass current spills and historic contamination.[24]

b. The Spill Rules have limited applicability and do not define the entire universe of the spills or discharges that must be reported under the Texas Water Code and other statutes. Moreover, they do not exempt historic contamination from reporting requirements under §§ 26.039 or 7.155. Regarding the scope of the rules, the preamble to the Chapter 327 rules specifically states that the Spill Rules do not apply to historic contamination.

"The commission affirms that these rules do not apply to historical contamination. . .. [Several commenters] did note that the commission could clarify that these rules do not affect a party's obligations to report newly discovered groundwater contamination under the Texas Water Code, § 26.039. The commission agrees."

". . . As noted in the previous paragraph, persons who discover contamination during the course of site investigations are guided by the Texas Water Code, § 26.039, as they were before this rulemaking."[25]

The language in this preamble demonstrates that the commission recognizes an existing obligation to report historic contamination under § 26.039. Indeed, even the commenters recognized an obligation under § 26.039 to report historic contamination. If the commission had not believed there was an existing obligation to report historic contamination, they would have used different words in the preamble. They could have said they declined to create an obligation to report historic contamination.

[23] § 26.263(1) ". . . The term "discharge" or "spill" under this subchapter shall not include any discharge to which Subchapter C, D, E, F, or G, Chapter 40, Natural Resources Code, applies or any discharge which is authorized by a permit issued pursuant to federal law or any other law of this state or, with the exception of spills in coastal waters, regulated by the Railroad Commission of Texas."

[24] For a discussion of the definition of "historic contamination," see Section III.B.(2)(c) this paper.

[25] 21 Tex. Reg. 4228, 4229 (May 14, 1996) (prop. preamble to be amended to 30 TEX. ADMIN. CODE §§ 327.1 - 327.5, Spill Prevention and Control).

They did not. Rather, they explained that the rules do not affect the existing obligation to report under § 26.039.

Not only do the Spill Rules avoid creating requirements for historic contamination, they likewise do not attempt to exempt historic contamination from regulation under § 26.039 or § 7.155. Nothing in the rule language of Chapter 327 specifically refers to historic contamination at all. Thus, the rules do not affirmatively exempt historic contamination from reporting requirements. While the commission declined to put this exclusion in the rule, the preamble language is not ambiguous in stating that the rules do not apply to historic contamination.

c. Rulemaking is not necessary to require historic contamination to be reported. Statutes are effective in and of themselves, and do not necessarily require rules to effect their purposes. In certain cases, the legislature specifically directs an agency to adopt rules to carry out a statute.[26] But this is not true in every case and is not necessary in every case. Many statutes have long been carried out without specific rules repeating the statutory requirements. Section 26.039 existed, was followed, and was enforced for decades before the current Spill Rules were adopted. While the rules have proved helpful to responsible persons and to the agency in ensuring that spill reports are communicated appropriately, they were not necessary to make the statute effective.

d. The obligation to report historic contamination has long been recognized. In addition to the statutory language, by examining the history of the Spill Rules, one can find evidence that the commission, and the regulated community, recognize an obligation to report historic contamination. The rules were originally approved for drafting on October 31, 1989. Subsequent legislation[27] slowed the rulemaking process, and a proposal was not issued until August 9, 1994.[28] The proposed rule defined historic contamination and required *anyone* who discovered it to report the contaminants. Due to that requirement, as well as others, the rule drew over 600 pages of comments and was ultimately withdrawn. It is important to recognize that the question tackled during the rulemaking process was not whether historic contamination had to be reported, but when, and more importantly, who had the obligation to report. The main concern relating to historic contamination was whether consultants who discovered contamination during the course of a site investigation would be required to report their discovery, even over the objections of their client. The rule proposal required reporting in these circumstances.

After the original proposal was withdrawn, a group was assembled to take another shot at drafting spill rules. Because of the desire to actually get a rule adopted, it was decided that this most controversial of issues--whether consultants should be made to report when they discover historic contamination--would be left for possible future rulemaking.

Two points can be derived from this history. First, that the commission fully intended to adopt Spill Rules that addressed only a part of the universe covered by § 26.039. They made the choice to leave historic contamination out of the Spill Rules, not

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[26] Act of May 31, 1999, H.B. 801, § 2, 76th Leg., R.S., (to be added to TEX. WATER CODE § 26).

[27] Tex. Nat. Res. Code Ann. § 40.001 (Vernon Supp. 1991) (Texas Oil Spill Prevention and Response Act of 1991); and Act of June 7, 1991, S.B. 1099, §§ 1.01 - 3.01, 72nd Leg., R.S. (amending TEC HEALTH & SAFETY CODE § 361).

[28] 19 Tex. Reg. 6204 (1994) (prop. to be codified at 30 TEX. ADMIN. CODE §§ 327.1 - 327.9) (Tex. Natural Resource Conservation Comm'n.).

because the statute did not cover it, but because there was too much controversy over who should be required to report. Second, the fact that the commission, working with a Task Force 21 group, prepared the 1994 proposal that included special requirements for reporting historic contamination, demonstrates that there was little doubt that § 26.039 encompassed historic contamination. Thus, both the history of the rulemaking and the preamble to the adopted rules make it clear that the Spill Rules do not govern historic contamination; rather, guidance is found in the Water Code

e. Moreover, courts have long deferred to agency interpretation of statutes. "In construing a statute the courts should give great weight to an interpretation placed thereon and consistently followed for a long period of time by administrative officers in applying and administering it."[29] This is especially true where "the Legislature has never, by amendment, or otherwise, disturbed such interpretation, or expressed its disapproval thereof; which course on the part of the Legislature is equivalent to an adoption by it of such interpretation."[30] The legislature had ample notice, through the Spill Rule proposal in 1994, that the commission saw § 26.039 as covering historic contamination. Since then, three legislative sessions have passed (1995, 1997, 1999), three opportunities for the legislature to speak if they did not want § 26.039 to encompass historic contamination. Yet, the legislature did not do so. Thus, we can infer that the legislature supports the commissions reading of the statute, that historic contamination must be reported under § 26.039.

Sections 26.039 and 7.155 were effective to require reporting of historic contamination long before the Spill Rules were adopted. The history of the Spill Rules, as well as the adoption preamble, support this reading of the statutes. Further, nothing in the Spill Rules exempts responsible persons from the requirement to report historic contamination. Finally, if the legislature were not in favor of this reading, they had ample opportunity to correct the statute. Therefore, a responsible person who discovers historic contamination is required by §§ 26.039 and 7.155 to report that discovery to the TCEQ.

B. The Statutes

1. Point: Statutes Do Not Require Reporting of Historic Contamination: Even if the Spill Rules do not define the universe of spills requiring reporting to TCEQ, Texas Water Code §§ 26.039 and 7.155 do not require reporting of historic contamination.

a. Texas Water Code § 26.039 applies only to active releases, not the so-called "passive migration" that constitutes "historic contamination."

Although no reported cases interpreting the provisions of § 26.039 as to historical contamination could be located, one can look to several sources for guidance on the coverage of this provision. First, the plain language of the statute, which requires reporting within 24 hours after "occurrence," not after *discovery* of the occurrence of a discharge or spill, makes compliance impossible if the "occurrence" was historical. Statutes will not be construed to require impossible acts.[31] The primary duty of a court

[29] *Slocomb v. Cameron Indep. School Dist.*, 116 Tex. 288; 288 S.W.1064 (1926).

[30] *Id.*

[31] *See Barshop v. Medina County Underground Water Conservation Dist*., 925 S.W.2d 618, 629 (Tex. 1996)(holding that, when possible, a court will

in construing a statute is to effectuate the intent of the Legislature. The intent should be determined by examining the language used in the statute. A statute should be read as if every word, phrase, and expression were deliberately chosen for a purpose. Moreover, every word excluded from a statute must be presumed to have been excluded for a purpose.[32] A court interpreting the statute generally should not insert additional words or requirements into a statutory provision.[33]

In addition, the federal CERCLA cases and their decisions on "passive" migration provide helpful guidance. Under CERCLA, past owners and operators of facilities from which releases have occurred are theoretically strictly liable for contamination that was "disposed" during their period of ownership or operation. EPA and others have frequently taken the position that "passive migration" of contaminants on property was sufficient to constitute "disposal." Disposal is defined with language like the elements of § 26.039 "the *discharge, deposit*, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including groundwaters."[34]

Since 1992 many federal courts have addressed the issue of whether the definition of "disposal" includes "passive" migration. One of these cases, *Joslyn Mfg. Co. v. T.L. James & Co., Inc.*,[35] was affirmed by the Fifth Circuit. The court rejects, as overbroad, the passive disposal theory that liability should apply to all prior owners after initial disposal. The case involved the migration of creosote and other wood preservative chemicals for which Joslyn was responsible.[36] Joslyn claimed that Koppers, by owning the property after the contamination had occurred, was liable "on the basis that rainfall obviously causes hazardous materials to leach through the soil."[37] The district court's holding was affirmed on appeal, but, in affirming, the Fifth Circuit concluded only that there was no disposal, without discussing the passive migration theory.[38] The court also rejected Joslyn's argument that liability should attach to a passive owner, regardless of disposal.[39]

A comprehensive discussion of the "passive migration" disposal question appeared in the Third Circuit's *United States v. CDMG Realty Co.*[40] opinion, which involved a claim for liability against a prior owner based on passive migration. The defendant, Dowell Associates, owned land that contained a large, leaking landfill, but it never engaged in any active disposal, other than the performance of soil sampling. Dowell

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interpret a statute in a manner to avoid constitutional infirmities, such as requiring an impossible act).

[32] *See City of Austin v. Quick*, 930 S.W.2d 678, 687 (Tex. App.--Austin 1996, m writ); *Seay v. Hall*, 677 S.W.2d 19, 25 (Tex. 1984);

[33] *Cameron v. Terrell & Garrett, Inc*., 618 S.W.2d 535, 540 (Tex. 1981).

[34] 42 U.S.C. § 9601 (29) (incorporating by reference 42 U.S.C. § 6903 (3) emphasis added) (compare TEX. WATER CODE ANN. § 26.039: 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").

[35] 836 F. Supp. 1264 (W.D. La. 1993), *aff'd, Joslyn Mfg. Co. v. Koppers Co.*, 40 F.3d 750 (5th Cir. 1994).

[36] *See* 836 F. Supp. at 1267.

[37] *Id*. at 1270.

[38] *See Joslyn*, 40 F.3d at 761-62.

[39] *See id.* at 762

[40] 96 F. 3d 706 (3d Cir. 1996)

Associates sold the land to HMAT Associates in 1987.'[41] The United States sued HMAT for the costs of cleanup, and HMAT sought contribution from Dowell on the theory that the migration of the contamination during Dowell's ownership constituted disposal.[42]

In rejecting the theory that a person may be liable for passive disposal, the court in *CDMG Realty* concluded, among other things, that (1) the language of disposal suggests an active interpretation, (2) there is a difference between release and disposal, and (3) an active definition will not create a disincentive to voluntary cleanup.[43]

First, the court pointed out that disposal is defined as "the *discharge, deposit,* injection, dumping, spilling, leaking, or placing" of hazardous chemicals so that they may enter the environment. According to the court, none of these terms is commonly used to refer to the gradual spreading of hazardous chemicals already in the ground.

Second, current owners are liable if there has been a "release" of hazardous substances. The court pointed out that the definition of release explicitly contains the word "leach," while the definition of disposal does not.[44] Since leaching in this context generally refers to the spreading of waste caused by percolation of water through soil, the court concluded:

"Congress' [] use of the term "leaching" in the definition of "release" demonstrates that it was aware of the concept of passive migration in landfills and that it knew how to explicitly refer to that concept. Yet Congress made prior owners liable only if they owned land at the time of "disposal," not at the time of 'release'."[45]

Texas Water Code § 26.039 does not contain the word "leaching." Instead, it requires, in the first instance, an act or omission whereby substances are "deposited" or "discharged," the very same "active" terms held by this court to not include passive migration.

Another appellate-level case addressing the passive migration issue is *ABB Industrial Systems v. Prime Tech*.[46] In this case, the Second Circuit concluded that prior owners are not liable under CERCLA for passive migration, even though hazardous chemicals may have gradually spread underground while the defendant controlled the property. The court stated: "We are persuaded by the Third Circuit's reasoning [in CDMG], and rather than reinventing the wheel, we simply summarize . . . what we believe to be the Third Circuit's most persuasive arguments."[47]

One reported case in Texas concerning liability for on-going groundwater contamination, *State v. Malone*,[48] is not a case about historical contamination. Rather, the defendants in *Malone* were operators of a hazardous-waste disposal plant who were held liable for groundwater contamination and unauthorized hazardous-waste dumping.[49] The Texas Water Quality Board had issued an order amending Malone's deep well injection permit such that Malone was

[41] *See id.* at 711-12

[42] *See id*. at 710.

[43] *See id.* at 717-18

[44] *Id*. at 715.

[45] *See id*. at 715.

[46] 120 F.3d 351 (2d Cir. 1997).

[47] *Id*. at 358.

[48] 853 S.W.2d 82 (Tex. App.--Houston [14th Dist.] 1993, writ denied).

[49] *See id*. at 83.

required to discontinue the use of an earthen pit within a specified time period.[50] Malone continued to use the pit to receive and store hazardous wastes for nearly ten years after it was ordered to stop using the pit and close it according to an order issued by the Texas Department of Water Resources.

Malone was assessed penalties pursuant to § 27.101 of the Texas Water Code. Subsection (a) of this section, at the time the agency brought the civil action, provided as follows:

(a) A person who violates any provision of this chapter [entitled "Injection Wells"], any rule of the commission or the railroad commission made under this chapter, or any term, condition, or provision of a permit issued under this chapter shall be subject to a civil penalty in any sum not exceeding $5,000 for each day of noncompliance and for each act of noncompliance.[51]

In addition to determining the number of "acts" of noncompliance Malone engaged in, the jury was also asked to determine "on how many occasions . . . did Malone Service Company continue to discharge or cause seepage into [not *through*] the groundwater?" Based on the evidence, the jury found that Malone discharged or caused seepage into the groundwater daily for a total of 3,495 days.[52]

The facts of *Malone* (e.g., groundwater contamination from a discrete, known unit) and the holding by the Houston Court of Appeals in that case do not support the conclusion that a person must report to the TCEQ historical contamination discovered on his property.

Finally, given that the TCEQ has adopted rules pursuant to Tex. Water Code § 26.039 providing those active releases involving less than a Reportable Quantity in any 24-hour period do not need to be reported, it would be unreasonable to interpret the same statute as requiring any amount of historical contamination to be reportable. At the very least, such a strained interpretation of the statute would require rulemaking to provide adequate notice and an opportunity for comment.

a. Texas Water Code § 7.155 requires a specific determination that "harmful quantities" have been discharged or spilled and because this cannot be determined for historical contamination, this statute does not require such reporting.

The term "harmful quantity" is defined as levels set by the federal EPA and requires TCEQ Executive Director concurrence. Although not clearly stated, the definition of "harmful quantity" is presumably intended to be consistent with the "reportable quantities" under § 311 of the FWPCA.[53] This interpretation is consistent with both the legislative history of former Subchapter G of the Texas Water Code (now § 7.155) [which originally was based, to a large degree, on § 311 (for example, the term "harmful quantity" was originally used in § 311 of the FWPCA)] and the TCEQ's recent spill guidance document.

The State of Texas Oil and Hazardous Substances Pollution Contingency Plan ("Contingency Plan" or "Plan") is a document that[54] by its own terms, does not have the force of law, this Plan provides

[50] *See id*. at 84.

[51] Emphasis added.

[52] *Malone* at 85.

[53] *See* Table 117.3, 40 CFR § 117.3.

[54] State of Texas Oil and Hazardous Substances Spill Contingency Plan ("Plan"), November 1997 (RG-290).

guidance as to when to report a spill or release of oil or a hazardous substance or waste into waters of the State and to whom the report should be made.

In the chapter of the Plan entitled "Notification Requirements", the Plan states that a reportable spill or discharge is a "discharge or spill of oil, hazardous substances, industrial solid waste, or other substances into the environment in a quantity equal to or greater than the reportable quantity in any 24-hour period."[55] The Plan then adopts the reportable quantities designated by the TCEQ's Spill Rules.[56]

As a result, TCEQ appears to be interpreting Texas Water Code § 7.155 to utilize the RQs adopted by the Spill Rules. The 24-hour time frame for calculation makes it difficult, if not impossible, to determine whether newly discovered historical contamination exceeds a reportable quantity.

Under EPA Environmental Appeals Board cases interpreting RQs under CERCLA, it is clear that there is no presumption that a release must be reported in the absence of reasonable ability to calculate the quantity released. These decisions have uniformly held that knowledge that there has been a release of an RQ is a prerequisite to CERCLA/EPCRA release reporting.[57] These decisions have elaborated on this requirement, holding that constructive knowledge can trigger reporting requirements, as can knowledge sufficient to indicate with some degree of certainty that an RQ has been exceeded. Further, these decisions have held that there is a duty to diligently determine if there has been a release sufficient to trigger CERCLA/EPCRA release reporting requirements. As a result, these EAB decisions are inconsistent with the existence of a presumption that an RQ has been released in the absence of definitive information on the quantity of material released. Rather, these decisions stand for the proposition that there must be knowledge, with some degree of certainty, that there has been a release of a hazardous substance in excess of an applicable RQ for there to be a reporting obligation and that diligence must be exercised in obtaining the requisite knowledge.

2. Counterpoint: Sections 26.039 and 7.155 are broadly written and require reporting of historic contamination.

a. Sections 26.039 and 7.155 are broadly written to require reporting of any incident that might cause pollution of waters in the state. There is no limitation in either statute that limits reporting only to spills that happened on a given day. Moreover, the stated policy of the State of Texas supports requiring all spills to be reported. TEX. WATER CODE, § 26.262 declares:

"It is the policy of this state to prevent the spill or discharge of hazardous substances into the waters in the state and to cause the removal of such spills and discharges without undue delay."

Similarly, TEX. WATER CODE § 26.003 also affirms that:

"It is the policy of this state and the purpose of this subchapter to *maintain the quality of water in the state* consistent with the public health and enjoyment, the propagation and protection of terrestrial and aquatic life, the operation if existing industries, and the

[55] Plan page 4-2.

[56] *Id.*

[57] *See In re Genicom Corp*, EPCRA Appeal No. 92-2 (EAB, December 15,1992; *In re Mobil Corp*, EPCRA Appeal No. 94-2 (EAB, September 29, 1994).

economic development of the state . . . and to require the use of all reasonable methods to implement this policy." [emphasis added]

It is consistent with these policies to require reporting of historic contamination, which may contribute to water pollution and may threaten human health and the environment.

(1) The definitions of "discharge or spill,"[58] "accidental discharge"[59] and "spill"[60] are sufficiently broad to be fairly interpreted to include historic contamination. First, the definitions of "accidental discharge" and "spill" include an "omission" and not just an affirmative act that may cause a discharge. By including "omission, instead of just "act," the legislature indicated an intent to include the entire potential universe of spills. It includes not just conscious, or intentional discharges, but also those that occurred through no intent or fault of the responsible person. The purpose of §§ 26.039 and 7.155 is to allow agency oversight to ensure that all spills are remediated, so that the impact to human health and the environment is limited. It is therefore logical that the reporting requirement should cover the entire universe of spills.

(2) Second, by including the phrase "drain, seep, run, or otherwise enter" in the definition of "spill" and "spilled, leaked, pumped, poured, emitted, entered, or dumped" in the definition of "discharge or spill," the statutes recognize that contamination might occur long after the substances are initially deposited or that a discharge or spill may be a continuing event. Depending upon the circumstances, the initial deposit of a contaminant may be either a "spill" or an "accidental discharge" under § 26.039(a). Once the contaminant has been deposited, if it then migrates toward water without a barrier to prevent possible contamination of the water, then that incremental movement of waste or other substances also constitutes an inadvertent discharge--which must be reported. Similarly, defining a "responsible person" as someone who "causes, suffers, or allows"[61] a discharge, is yet another way in which the legislature signaled its intent to recognize the continuing violation of leaving historic contamination in place without reporting or remediating it.

(3) The definition of "pollution" in § 26.001(13) of Texas Water Code is also extremely broad. Section 26.039(b) requires reporting whenever an accidental discharge or spill may cause pollution. "'Pollution' means the alteration of the physical, thermal, chemical, or biological quality of, or the contamination of, any water in the state that renders the water harmful, detrimental, or injurious to humans, animal life, vegetation, or property or to public health, safety, or welfare, or impairs the usefulness or the public enjoyment of the water for any lawful or reasonable purpose."[62] This exceptionally broad definition again reflects the legislature's determination to protect Texas waters. Thus, because historic contamination may continue to cause pollution long after it is initially deposited it must be reported under § 26.039.

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[58] TEX. WATER CODE ANN. § 26.263(1) (Vernon Supp. 1999)

[59] TEX. WATER CODE ANN. § 26.039(a)(1) (Vernon 1998)

[60] TEX. WATER CODE ANN. § 26.039(a)(2) (Vernon 1998)

[61] TEX. WATER CODE ANN. § 26.263(6)(C) (Vernon 1998)

[62] TEX. WATER CODE ANN. § 26.001(13) (Vernon Supp. 1999)

b. *Malone v. State*. In one of the few reported Texas cases regarding illegal discharges, the court recognized that contamination that remains in the ground may constitute a continuing violation.[63] In that case, a jury found that a waste pit continually seeped contamination into the groundwater.[64] On appeal, the court disagreed with Malone's contention that the existence of contamination does not support a finding of continued activity: "we believe the jury could reasonably infer continual seepage in lieu of credible evidence of a force or event that would have stopped the seepage."[65] While the statute at issue in that case was TEX. WATER CODE § 26.121, the court's recognition that seepage may constitute a separate violation supports the interpretation that historic contamination must be reported because any incident of migration is a separate trigger. Given that, in most cases, there is no easy way to determine whether migration has occurred within the time allowed for reporting (as soon as possible and no later than 24 hours), the easy and obvious conclusion is that all contamination must be reported.

c. Section 7.155 provides for a penalty for failure to report a spill upon discovery. In addition to the broad language in the definition of spill and discharge, this section specifically recognizes that the responsible person may not know about a spill at precisely the time it occurs. Not knowing about the occurrence of a spill when it happens does not absolve the responsible person from the reporting requirement when they do discover the spill. While this is implicit in § 26.039, it is explicit in § 7.155.

d. The difficulty in distinguishing between current spills and historic contamination weighs in favor of requiring all spills to be reported. Regardless of how historic contamination is defined, there will always be difficulty in determining whether a particular area of contamination is the result of historic or non-historic contamination. If there were a regulatory distinction between historic and non-historic contamination, then in each case it might be necessary to determine precisely who deposited the contaminants, and when they were deposited. This adds an unnecessary element of uncertainty to the regulatory process, and introduces new issues on which to litigate. Additionally, allowing a distinction between two types of spills creates an unnecessary loophole that could result in reduced environmental protection. If contamination is not reported, then there is no way the agency can ensure that it is cleaned up.

e. Contrary to the assertion in Section III.B.1.b. of this paper, rulemaking to define "harmful quantity" is not required before historic contamination must be reported.[66] The Executive Director may define harmful quantity, under § 26.263, on a case by-case basis for historic contamination. Section 7.155 requires reporting of discharges as defined under § 26.263. Section 26.263(1) defines "discharge or spill" as "an act or omission by which hazardous substances in harmful quantities are spilled . . . ." Then, "harmful quantity" is defined to mean a quantity that is determined to be harmful by the EPA administrator and the Executive Director.

Rulemaking is not required because there is no express requirement in § 26.263 that rules

[63] *State v. Malone Service Co.*, 853 S.W.2d at 82 (Tex. App.--Houston [14th Dist], 1993).

[64] 853 S.W.2d at 85.

[65] *Id.*

[66] *Also, see* the discussion regarding rulemaking in Section III.A.2. of this paper.

be adopted. There is no specific requirement in § 26.263 for the agency to adopt rules. If the legislature wanted the agency to adopt rules to specifically define "harmful quantity," the legislature could have included that requirement. The definitions of "discharge or spill" and of "harmful quantity" in § 26.263 have been on the books for a long time. If the legislature believed that the agency should have defined "harmful quantity" by rule, it could have done so.

Rulemaking is not required, because the Executive Director is not authorized to enact rules. The statute specifically says, "as defined by the executive director." Section 26.263 does not say commission, as do many other sections (for example, the definition of "hazardous substances" in § 26.263(4)). Since, under the Administrative Procedures Act, only the commission is authorized to adopt rules, and since the statute refers to the executive director, it is reasonable to infer that the legislature did not intend to require rulemaking. Therefore, rulemaking is not required before reporting is required under §§ 26.039 and 7.155

f. Petition of the Executive Director against Asarco. The Commission's decision in the *Asarco, Inc*. enforcement case shows that the Commission will interpret § 26.039 and § 7.155 to apply to historic contamination. On March 4, 1998, the Commission considered two certified questions in an enforcement case against ASARCO, Inc. *Petition of the Executive Director against Asarco, Inc.,* SOAH Docket No. 582-97-1891; TCEQ Docket No. 97-0791-IHW-E. In their order, the Commission recognized the concept of historic contamination, and determined that the Commission has the legal authority to impose administrative penalties for violations of TEX. WATER CODE § 26.121. This decision represents a much more significant step than does merely requiring reporting of historic contamination. If the Commission is willing, under certain limited circumstances, to impose a penalty for the presence of contamination that was not illegal when it was deposited, then surely they will be willing to impose a penalty for failure to report the discovery of such contamination.

(1) Background of the case.

ASARCO, Inc., a zinc smelter in Corpus Christi, was located north of two residential neighborhoods. During inspections in 1994,

TCEQ inspectors documented that lead, cadmium and zinc, originating from the ASARCO site has migrated off-site and polluted the adjacent Dona Park and Manchester Place neighborhoods. Based on these facts, ASARCO has violated the TEX. WATER CODE § 26.121(a)(1), and 30 TEX. ADMIN. CODE § 335.4, by allowing the discharge of industrial waste into or adjacent to water in the state.[67]

(2) The Certified Questions

The parties in *Asarco* jointly submitted two certified questions to the commission at the beginning of the enforcement hearing:[68]

1. In determining whether administrative penalties (over and above investigation and

[67] *Executive Director's Preliminary Report and Petition, Asarco, Incorporated*, at 2, (SWR NO. 30003, Enforcement ID No. 1017, Docket No. 97-0719-IHW-E).

[68] *Tex. Nat. Res. Con. Comm'n, Interim Order concerning the Petition of the Executive Director against Asarco, Inc., 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.

remediation costs) can or should be assessed, should the TCEQ 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?

(3) Answers to the Certified Questions

After receiving briefs, from the parties and amicus curiae, and hearing oral argument, the Commission issued an Interim Order answering the certified questions:[69]

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 the contamination and the person does not respond to known contamination at their site or the environs in a reasonably time fashion given the threat posed to human health and safety.

In answering these questions, the Commission affirmed that it has authority to assess penalties for historic contamination for each day since the original release. If § 26.121 gives the agency authority to assess penalties for historic contamination, it is a much smaller thing to conclude that § 26.039 requires historic contamination to be reported. It is obvious that the discovery rule would apply no one can be expected to report the existence of an unknown. Worse, if the discovery rule were not implied, then one could be enforced against for not reporting contamination of which one was unaware. This would not be an equitable result, and further goes to show that the discovery rule must usually apply.[70]

Section 26.121 prohibits the discharge of waste without a permit. It does not expressly mention historic contamination. Yet, in *Asarco*, the Commission determined that § 26.121 does apply to historic contamination and authorizes daily penalties (e.g., for the period from February 1994 to May 1995). Like § 26.121, § 26.039 does not mention historic contamination. The logic that determines that historic contamination is covered under § 26.121 also applies to § 26.039. While the Commission, in its order, does not explain how it reached the conclusion that § 26.121 covers historic

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[69] *Id.*

[70] It is possible that in some circumstances a court might apply a "knew or should have known standard," possibly in a case where the responsible person had direct control over and was required to monitor the facility from which the discharge was emanating.

contamination, the Executive Director's brief provides a clear rationale for that 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, where contamination is deposited in the environment before the existence of prohibitory regulations, but remains unaddressed or un-remediated, 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 be subject to the assessment of administrative penalties by the Commission. "In short, currently existing un-remediated contamination in Texas is a current and continuing violation, regardless of the date the contamination was first deposited into the environment."[71]

Case law supports this interpretation. In addition to the decision in *Malone*, discussed earlier, numerous other courts support this position. In a case interpreting the Resource Conservation and Recovery Act, the United States Supreme Court's ruling, as well as Justice Scalia's concurrence, in part support the premise that a polluter may be liable for an ongoing violation.[72] "When a company has violated an effluent standard or limitation, it remains, for purposes of § 505(a), 'in violation' of the standard or limitation so long as it has not put in place remedial measures that clearly eliminate the cause of the violation." Other courts have found that continuing violations may be addressed despite the fact that they may have originated in activities occurring before the effective date of the statute.[73] Similarly, even if a particular waste is not considered hazardous at the time it is stored, once it is listed as a hazardous waste, it must be stored according to hazardous waste regulations.[74]

The Executive Director, in the *Asarco* brief, goes on to explain that courts that "have addressed historic contamination have focused less on a retroactivity analysis and, instead, have repeatedly considered the presence of contamination as a violation when it remains un-remediated past the effective date of the statute.[75]

For example, in *Sasser v. Administrator, U.S. EPA*,[76] Dr. Sasser was determined to restore the dikes surrounding a long-abandoned 76-acre rice field, near his plantation in South Carolina, for duck hunting. These dikes had

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[71] *Executive Director's Brief on Certified Questions,* SOAR Docket No. 582-97-1891, TNRCC Docket No. 97-0791-IHW-E (February 18, 1998), at 15.

[72] *Gwaltney v. Chesapeake Bay Foundation*, 484 U.S. 49, 108 S. Ct. 376, 98 L.Ed.2d 306 (1987).

[73] *See, e.g., United States v. Conservation Chemical Co. of Illinois*, 733 F.Supp. 1215 (N.D. Ind. 1989); *United States v. Northeastern Pharmaceutical & Chemical Co. (NEPACCO)*, 810 F.2d 726 (8th Cir. 1986), *United States v. Price*, 523 F. Supp. 1055 (D.N.J. 1981).

[74] *United States v. (NEPACCO)*, 810 F.2d 726 (8th Cir. 1986), *United States v. Price*, 523 F. Supp. 1055, 1069-74 (D.N.J. 1981); *Chemical Waste Management, Inc. v. U.S. EPA*, 869 F.2d 1526, 1530-31.

[75] *Executive Director's Brief on Certified Questions*, SOAR Docket No. 582-97-1891, TNRCC Docket No. 97-0791-IHW-E (February 18, 1998), at 10.

[76] 990 F.2d 127 (4th Cir. 1993).

deteriorated and the rice field had eventually become a tidal influenced wetland. When Dr. Sasser initially sought his permit for the work, in 1981, various state and federal agencies objected and the Corps of Engineers denied his application. Several years later, Dr. Sasser, relying on a general "National Permit," built a new embankment, installed a water gate, and then discharged dredge and fill material into the wetlands.

When the Corps discovered Sasser's actions in 1987, he refused to restore the property and the Corps referred the case to the EPA. EPA filed an administrative complaint charging that he violated 33 U.S.C. § 1311, and an Administrative Law Judge assessed a $125,000 fine. Sasser eventually appealed to the 4th Circuit Court of Appeals.

Sasser complained that the EPA lacked subject matter jurisdiction to assess an administrative penalty because the law authorizing the EPA to assess administrative penalties did not become effective until 1987, after the time that Sasser had committed the act.

Reasoning that Sasser's retroactivity defense was misplaced, the Court focused instead on the fact that the violation, a "discharge," was still occurring.

If the only violation of the Act had occurred in December 1986, Dr. Sasser would have at least a colorable argument against retroaction, but it is an argument which we need not address. Dr. Sasser's violation of the Act is a continuing one. *Each day the pollutant remains in the wetlands without. a permit constitutes an additional day of violation* . . . Since Dr. Sasser's violations continued long after the enactment of the 1987 amendment, the Administrator acted within the jurisdiction that Congress conferred on him in 33 USC § 1319(g). [emphasis added][77]

As the Executive Director explained in his brief, under § 26.121, it is a violation if someone fails to address, contain, and remediate a source of contamination that, is not addressed, will seep or spread.[78] The legislature recognizes that the spread of contamination causes pollution, as much or more than the original discharge. Further, as one U.S. District court pointed out, "To hold that remedial environmental statutes could or should not apply to conduct engaged in antecedent to the enactment of such statutes, when the effects of such conduct create a present environmental threat, would constitute an irrational judicial foreclosure of legislative attempts to rectify pre-existing and currently existing environmental abuses."[79] There is no question that historic contamination may present a present environmental threat. Thus, the rationale for the requirement to report contamination is just as compelling for historic contamination as it is for current spills. Moreover, the requirement to report spills to the agency is premised on the importance of agency oversight to ensure that a site is remediated. That rationale holds true for historic contamination as well as for current spills.

The best interpretation of the law, the interpretation most consistent with the TCEQ's mission to protect human health and the environment, is that § 26.039 requires reporting for historic contamination, and §

[77] 990 F.2d at 129.

[78] *Executive Director's Brief on Certified Questions*, SOAR Docket No. 582-97-1891, TNRCC Docket No. 97-0791-IHW-E (February 18, 1998), at 13.

[79] *United States v. Diamond Shamrock Corporation,* No. C80-1857, 1981 U.S. Dist. LEXIS 18568, at 7 (N.D. Ohio May 29, 19810.

7.155 allows enforcement if a report is not made. First, the purpose of the reporting requirement - to ensure that substances that have the potential to pollute are cleaned up properly - applies to historic contamination as well as to current spills. Second, allowing enforcement for a failure to report provides an incentive to comply with the reporting requirement. This in turn will protect waters in the state by ensuring that contaminated sites are cleaned up.

It is important to note that the conduct complained of in *Asarco* was not the initial deposit of the contamination. Rather, the violation was the continued discharge of the contamination, a current violation. Historically, the agency has considered un-remediated contamination to be a continuing discharge into or adjacent to the environment, and therefore a violation of TEX. WATER CODE § 26.121. A situation where pollutants are actively or passively discharged, released, or emitted into the environment, whether the initial act was recent or long in the past, is a violation of the law now, and for as long as the condition is "suffered, allowed or permitted" to continue. The TCEQ and its predecessor agencies have long considered un-remediated contamination to be a continuing discharge, and thus, a continuing violation of § 26.121.[80]

If historic contamination constitutes a discharge under § 26.121, then it must be reported under § 26. 039.

C. Regulatory Guidance

Consultants and practitioners are often pointed to a memorandum prepared by the TCEQ under the Texas Risk Reduction Rules Program, 30 Texas Admin. Code Chapter 350 ("TRRP") for release reporting guidance. This memorandum, entitled "Determining Which Releases are Subject to TRRP" sets out a series of concentration-based triggers that can be used to determine whether discovered contamination needs to be remediated under TRRP. If concentrations are low enough, this memorandum states that the contamination is not subject to TRRP.

Many assume that if historic contamination concentrations are not excluded by the memorandum, then it must be reported to the TCEQ. However, a close reading of the TRRP rules and the memorandum shows that TRRP does not itself establish reporting requirements.

First, the applicability section of the TRRP Rules make it quite clear that TRRP itself does not establish reporting requirements: "This chapter does not establish requirements for reporting releases to program areas." 30 Texas Admin. Code 350.2(a). The rules go further and state that TRRP does not itself create any remediation obligations but instead establishes remediation goals once other rules require remediation "The rules in this chapter specify objectives for response actions for affected properties and further specify the mechanism to evaluate such response actions once an obligation is

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[80] *See, e.g., State v. Coastal Refining & Marketing, Inc.*, Cause No. 92-17287, 345th District Court, Travis County, Texas (proposed Agreed Final Judgment published in 23 Tex. Reg. 855, Jan. 30, 1998); *In the Matter of the City of San Antonio and Metropolitan Transit Authority*, TNRCC Docket No. 96-1973-MLM-E (Feb. 12, 1997); *In the Matter of Calabrian Chemicals Corp*., TNRCC Docket No. 95-1292-SWR-E (Aug. 26, 1996); *In the Matter of Exxon Co. USA*, SWR No. 30040, TNRCC, (March 17, 1995); *In the Matter of Gulf Reduction Corp*., TNRCC Docket No. 94-0142-SWR-E (May 2, 1994); *In the Matter of San Angelo Electric Service Co.*, TNRCC Docket No. 94-0139-SWR-E (April 12, 1994*); In the Matter of Glitsch, Inc., Tex. Water Comm'n* (May 11, 1993); *State v. Malone Service Co.*, 853 S.W.2d 82 (Tex. App.--Houston [14th Dist.] 1993, writ denied); *In the Matter of Elf Atochem, Tex. Water Comm'n,* SWR No. 31695 (Dec. 2, 1992).

established to take a response action via other applicable rules, orders, permits or statutes" 30 Texas Admin. Code 350.2 (a). If the TRRP Rules cannot provide reporting requirements, then guidance memos issued under TRRP also can not establish reporting requirements.

Further, the memo itself states that it is not applicable unless the release has already been reported to the TCEQ pursuant to some other program or rule "Use of this determination process assumes:

• The person has notified the agency of the release in accordance with the Texas Water Code and applicable program rules…."

As a result, this often referred to TRRP guidance is not helpful to determine if or when historic contamination must be reported to TCEQ.