SMU | Dedman School of Law

SMU Law Review

Volume 55 | Issue 1 Article 12

January 2002

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TULK V. MOXHAY AND TEXAS ENVIRONMENTAL LAW: LAND USE RESTRICTIONS UNDER THE TEXAS RISK REDUCTION PROGRAM

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ADMIT it. You vaguely remember that *Tulk v. Moxhay* was mentioned in some first-year law school course.[1] Well, the course was Property, and *Tulk v. Moxhay* was the nineteenth century English case that established that certain covenants (promises relating to land use) would be enforceable in equity against successive owners even when the absence of "horizontal privity" prevented them from being enforced at law. (Remember horizontal privity? Remember the difference between law and equity? Remember first year Property?) Thus, the concept of the equitable servitude was born. In the United States today, the distinction between covenants and servitudes is largely gone, but the issue that underlies the dispute in *Tulk* still remains. When can current landowners place restrictions on the use of their property that will be binding on future owners of the property?

This issue is raised by the set of regulations known as the "Texas Risk Reduction Program" ("TRRP Rules") promulgated by the Texas Natural Resource Conservation Commission ("TNRCC"). The TRRP Rules establish a consistent set of requirements for the cleanup of contaminated property under different Texas laws.[2] These regulations impose a variety of requirements relating to the characterization of the contamination and the required level of cleanup.

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1. 2 Phillips 774, 41 Eng. Rep. 1143 (1848). This article was written, with great respect, in honor of Professor Joe M'Knight, a great scholar and a great colleague. One thing you can be sure of is that Joe knows *Tulk*. There is not much that Joe doesn't know—whether it is English law, English history, Spanish law, Spanish history, matrimonial property, family law, creditor's rights. . . . In fact, the only area I suspect that Joe has a weakness is in the field of environmental law. That's why I got into it; I don't have to compete.

2. *See infra* notes 22-43 and accompanying text for a discussion of the TRRP Rules.

Under the TRRP Rules, the required level of cleanup varies depending on the current land use of the property. Contamination on property used for commercial or industrial purposes need not be cleaned up to the same level as land used for residential purposes. To ensure, however, that land cleaned to commercial/industrial levels is not later converted to residential use, the TRRP Rules employ a number of different techniques to prevent the change to residential use without additional cleanup. One such technique is the requirement that certain landowners establish a "restrictive covenant" enforceable by the State that limits the land to commercial/industrial use. The regulations require that these restrictive covenants be enforceable against future purchasers – that they "run with the land." *Voila – Tulk.*

The purpose of this article is to describe some of the issues related to the use of restrictive covenants and other land use restrictions under the TRRP Rules. There are reasons to believe that the current techniques of land use control required by the TRRP Rules will not effectively accomplish the goal of placing restrictions, enforceable by the TNRCC, that are binding on subsequent owners of the property. This article suggests some simple (and some not so simple) changes that might make the restrictions more effective.

The article begins with a brief overview of liability for cleanup of contaminated property in Texas and the provisions of the TRRP Rules. It then discusses issues that arise under the land use techniques required by the regulations. It concludes with a "modest proposal" to integrate the land use control requirements of several programs to make the risk reduction program more effective.

I. STATUTORY LIABILITY FOR ENVIRONMENTAL CONTAMINATION IN TEXAS

A. CLEANUP AUTHORITY

In Texas, the TNRCC has broad authority to compel a wide-range of parties to cleanup contaminated property.[3] One provision of the Texas Health and Safety Code, closely modeled after the federal Comprehensive Environmental Response Compensation and Liability Act ("CERCLA" or "Superfund"),[4] gives the TNRCC the authority to issue a cleanup order to 1) the current owner/operator of contaminated property,[5] 2) the past owner/operator at the time of disposal, 3) persons who arranged for disposal on the property, or 4) in some cases persons who

3. The TNRCC has jurisdiction over most environmental issues involving industrial and commercial pollution. The Texas Railroad Commission has jurisdiction over most environmental problems associated with oil and gas extraction and production. The Texas Department of Health has some jurisdiction over municipal wastes.

4. 42 U.S.C. §§ 9601 *et seq.* (2001).

5. Actually, statutory liability applies to the owners and operators of a "solid waste facility." This is defined as land used for "processing, storing or disposing of solid waste." TEX. HEALTH & SAFETY CODE ANN. § 361.003(36) (Vernon 2001). It is safe to say that the TNRCC construes this broadly. The TNRCC also has broad authority to issue orders ad-

transported wastes to the property.[6] Additionally, provisions of the Texas Water Code give the TNRCC authority to address contamination in certain cases.[7] The owner or operator of a facility, for example, from which there is a "spill" to State waters, including groundwater, is potentially liable for remediation of the facility.[8]

Under these provisions, the current owner of contaminated property is potentially liable to the State for the cleanup of the property. Persons who buy contaminated property thus buy this liability. This obviously affects the marketability of property. In the mid-1990's, however, the Texas legislature adopted two programs, the "Innocent Owner/Operator Program" and the "Voluntary Cleanup Program," that limit the liabilities of landowners. These programs, collectively labeled by the TNRCC as "Brownfields Initiatives,"[9] have the effect of encouraging the cleanup and economic development of contaminated property.

B. THE INNOCENT OWNER/OPERATOR PROGRAM

In 1997, Texas adopted provisions, known as the Innocent Owner/Operator Program ("IOP"), that exempt persons from cleanup liability to the State if they can prove that contamination migrated onto their property from an off-site source.[10] Such "innocent parties" cannot be subject to cleanup orders from the State.[11] The IOP program also provides for the issuance of an Innocent Owner/Operator Certificate by the TNRCC that "evidences" the parties' innocent status. The IOP statute authorizes the TNRCC to require imposition of "institutional controls," such as deed restrictions, as a prerequisite to issuance of the certificate.[12] It is the existence of the IOP that has created the need to execute restrictive covenants under the TRRP Rules.[13] As discussed below, however, the IOP program may also contain a solution to the problem of institutional controls under the TRRP Rules.[14]

C. VOLUNTARY CLEANUP PROGRAM

In 1995, the Texas legislature enacted the Voluntary Cleanup Program

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dressing contamination at facilities containing "hazardous substances" that are listed in the State Registry. *See id.* § 361.181-.202.

6. *Id.* § 361.271-.272

7. TEX. WATER CODE ANN. § 26.019 (Vernon 2001) grants the TNRCC authority to issue orders "necessary to effecuate the purposes" of the Water Code.

8. *See id.* § 26.261-.267.

9. *See* 30 TEX. ADMIN. CODE § 333 (West 2001) (Brownfields Initiatives).

10. TEX. HEALTH & SAFETY CODE ANN. § 361.751-.754 (Vernon 2001). The TNRCC regulations governing the IOP are contained in 30 TEX. ADMIN. CODE § 333.31-.43 (West 2001).

11. TEX. HEALTH & SAFETY CODE ANN. § 361.752 (Vernon 2001) (innocent owner/operator is not liable "under this code or the Water Code for investigation, monitoring, remediation, or corrective action or other response action").

12. *See infra* notes 69-71 and accompanying text.

13. *See infra* notes 44-46 and accompanying text.

14. *See infra* notes 66-77 and accompanying text.

("VCP").[15] The VCP statute and its implementing regulations are relatively short and simple. Eligible persons can apply to cleanup contaminated property under the VCP, and, if they clean the property in a manner that satisfies the requirements of the TNRCC, a "Certificate of Completion" for the property will be issued by the TNRCC. At that point, future owners of the property will not, in most cases, be subject to liability to the State for further cleanup of the property.[16]

There are, however, a number of limitations on the scope of this protection. First, it does not exempt currently liable parties from future action by the State. The program is prospective only and is designed to ensure that future owners of the property (who might be liable to the State without the VCP protections) can buy the property without fear of this liability.[17] Second, the VCP protections only extend to liability to the State.[18] Future landowners may, for example, still have cleanup liability to the federal government under several federal environmental statutes, and they may be liable to private parties in tort. Third, the VCP is intended to promote voluntary cleanups, and property may not be eligible for the program if it is already the subject of a State cleanup order. Finally, the extent of the liability protection may be limited. The protection, for example, may extend only to the portion of the property that is entered into the VCP[19] or it may, as discussed below, be lost if the landowner changes the land use specified in the Certificate of Completion "if the new use may result in increased risk to human health or the environment."[20]

The actual cleanup requirements are not specified in the VCP statute or regulations. Rather, the VCP regulations require that cleanup be conducted in compliance with the TRRP Rules.[21]

II. THE TEXAS RISK REDUCTION PROGRAM

The TNRCC has established a consistent set of cleanup requirements, called the Texas Risk Reduction Program, that apply to several different Texas environmental programs.[22] The TRRP Rules have a number of

15. TEX. HEALTH & SAFETY CODE ANN. §§ 361.601-.613 (Vernon 2001). The TNRCC regulations implementing the VCP are contained in 30 TEX. ADMIN. CODE §§ 333.1-.10 (West 2002).

16. TEX. HEALTH & SAFETY CODE ANN. § 361.610 (Vernon 2001).

17. *Id.* § 361.610(b) (release from liability applies only to parties who were not "responsible parties" at the time of issuance of a certificate of completion).

18. *Id.* (person is released from all liability "to the state" for cleanup of areas of the site covered by the certificate).

19. *See* 30 TEX. ADMIN. CODE § 33.10(b) (West 2001) (consolidated permit processing) (certificate of compliance for "partial response actions" pertains only to partial response action area).

20. TEX. HEALTH & SAFETY CODE ANN. § 361.610(c)(3) (Vernon 2001).

21. TEX. ADMIN. CODE §§ 333.7(a); 333.8(a); 333.9 (West 2002). The TRRP rules also specify that they apply to cleanups under the VCP. *Id.* § 350.2(f).

22. *Id.* §§ 350.1-.135. The TRRP Rules apply, inter alia, to cleanup undertaken pursuant to State requirements for spill prevention and control, the cleanup of industrial solid waste and municipal hazardous waste, the Voluntary Cleanup Program, and the Under-

extremely complex provisions, but, in outline, they too are relatively simple. Parties undertaking a cleanup under the TRRP Rules must identify the pollutants contaminating the property and characterize the extent of the contamination. Parties must then undertake a cleanup that satisfies certain requirements.[23]

The TRRP Rules create two cleanup options, known as Remedy Standard A and Remedy Standard B.[24] Under Remedy Standard A, the property must actually be cleaned up (within a reasonable period of time) so that remaining concentrations of pollutants do not exceed levels established to protect human health and the environment.[25] Under Remedy Standard B, the property need not actually be cleaned up to these pollutant levels; rather, "physical controls" may be put in place to limit exposure to the pollutants.[26] Under Remedy Standard A, for example, a landowner might choose to dig up and properly dispose of contaminated soil; under Remedy Standard B, a landowner may choose to leave the contaminated soil in place but pave the area to prevent human contact with the soil.[27] Parties electing Remedy Standard B face more stringent requirements relating to supervision by the TNRCC and will have continuing financial and monitoring obligations.[28]

There are a number of issues that arise in implementing these requirements.

Property Subject to Cleanup Requirements. Under the TRRP Rules, the full extent of contamination must generally be identified.[29] This means that a landowner will be required to determine whether contamination has migrated onto neighboring property, and the extent of any such "off-site" contamination must be identified. If contamination has migrated off-site, VCP and TRRP Rules appear to require that all of the contaminated off-site areas be cleaned up.[30]

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ground and Aboveground Storage Tank programs. *Id.* § 350.2(b)-(m). The TRRP rules, amended in 1999, apply to all cleanups undertaken after May 1, 2000. *See id.* § 350.2(a).

23. *See id.* § 350.3 (TRRP process).

24. *Id.* § 350.31 (general requirements for remedy standards).

25. *Id.* § 350.32 (specific requirements for Remedy Standard A).

26. *Id.* § 350.33 (specific requirements for Remedy Standard B).

27. *See* 24 Tex. Reg. 7726, 7439 (Sept. 17, 1999) (describing Remedy Standard A response as possibly involving excavation of contaminated soils and Remedy Standard B as possibly involving "a cap such as a parking lot.").

28. *See, e.g.*, 30 TEX. ADMIN. CODE § 350.33(g)-(m) (West 2002).

29. Actually, the extent of contamination must be characterized only to the point that the concentrations of pollutants are lower than the most conservative, residential human-health level. *Id.* § 350.51(c)-(e). Under the VCP rules, persons may, however, cleanup all or a specified portion of their own property. *Id.* § 333.7(c)(2) (contamination outside the "partial response action area" is not required to be addressed under the VCP if it is on property owned or controlled by the VCP applicant).

30. *See id.* § 350.31 (cleanup under TRRP must address "affected property" which is defined at section 350.4(a)(1) to include both on-site and off-site areas that contain pollutants above the assessment level applicable to residential use); *id.* § 333.7(b) (VCP work plans and reports for partial response actions must satisfy TRRP rules where contamination has migrated onto property owned or controlled by others).

Establishing Pollutant Cleanup Levels. Under either Remedy Standard A or B, the target cleanup levels, known as "protective concentration levels" ("PCLs"), vary depending on whether the property is being used for residential or commercial/industrial purposes.[31] Required cleanup levels for residential property are lower, and therefore more protective, than cleanup levels for commercial/industrial property.[32]

Both residential and commercial/industrial cleanup levels can be set in one of three ways.[33] Tier 1 levels (both for residential and commercial/industrial use) have been published by the TNRCC and are relatively stringent. Tier 2 and Tier 3 levels can be established by the party undertaking the cleanup and are based on a calculation of protective levels using site-specific data.[34]

Institutional Controls. In certain cases, property cleaned under the TRRP Rules must be subjected to "institutional controls." These are defined to include a 1) deed notice, 2) "Certificate of Completion" issued under the VCP, or 3) restrictive covenant which indicates the "limitations on or conditions governing the use of the property."[35] The definition of "institutional controls" also includes "equivalent zoning or governmental ordinances."[36]

If on-site or off-site property is cleaned to residential cleanup levels under Remedy Standard A (Remedy Standard A – Residential), institutional controls are not generally required. In other words, if you cleanup your own and, if necessary, neighboring property to residential levels, you need not file any deed notice or covenant.[37]

Institutional controls are *always* required, however, if you cleanup to commercial/industrial levels. Whether the required institutional control

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31. *See, e.g., id.* § 350.32(a)(3); 350.33(a)(1).

32. This difference is justified based on assumptions that humans on commercial/industrial property will have less exposure to the contaminated environment and for a shorter period of time than persons on residential property.

33. *See id.* § 350.75 (tiered human health protective concentration level evaluation)

34. *Id.* § 350.71-.79. In the preamble to the TRRP Rules, the TNRCC states:

> The three-tiered process provided in the adopted rule aids the development of appropriate protective concentrations levels. The tiers represent increasing levels of evaluation where site-specific information is factored into the process. The first tier is based on conservative, generic models that do not account for site-specific factors. The agency will publish and regularly update tables specifying the Tier 1 protective concentration levels. Under Tier 2, persons may apply site-specific data and use agency-specified equations. Tier 3 allows for more detailed and complex evaluations, and user specified fate and transport models. In all cases, the ability to use more complex evaluations continues to ensure the protective concentration levels are appropriate for the site conditions.

35. *Id.* § 350.3(47).

36. *Id.*

37. *See id.* § 350.31(g) (describing institutional control requirements for Remedy Standard A – Commercial/Industrial and Remedy Standard B for Residential or Commercial/Industrial). In the preamble to the TRRP Rules, the TNRCC states that "Remedy Standard A - Residential, which does not require deed notice, VCP certificates of completion or restrictive covenants is always available as an option." 24 Tex. Reg. 7456, Subchapter F. Institutional Controls (Sept. 17, 1999).

involves filing notice (deed notice or VCP certificate) or an enforceable restrictive covenant depends on whether the property is owned or operated by an "innocent party" under the IOP. If owner/operator is not innocent (e.g., the contamination originated on the property being addressed under the TRRP Rules), you need only file a deed notice or VCP Certificate.[38] Thus, if you are remediating your own property to commercial/industrial levels and the contamination originated on your property, you need only file a notice in the deed records.[39] This notice must specify that "if any person desires to use the property for residential purposes, they must first notify the commission (TNRCC) at least 60 days in advance of such use and that additional response actions may be necessary."[40]

If, however, you cleanup property owned by an "innocent party" to other than Remedy Standard A - Residential, the owner of the property *must* file a restrictive covenant that limits the land to commercial/industrial use. The covenant must state that "if any person desires in the future to use the property for residential purposes, the agency [sic] must grant prior approval to such use."[41] Thus, if you cleanup off-site contamination to commercial/industrial levels on the property of an innocent party, then a restrictive covenant *must* be filed.

Under the TRRP, a deed notice, VCP certificate or restrictive covenant cannot, in most cases, be filed on property without the landowner's consent.[42] Therefore, off-site cleanups must achieve residential levels *unless*

38. Actually, it is not quite true to say that all cleanups that meet Remedy Standard A - Residential need no institutional controls. In some cases, if residential levels have been characterized using certain types of site-specific data, institutional controls may be necessary to prevent alteration of the conditions that formed the basis for the site-specific number. For example, the "affected property assessment" requires calculation of soil exposure based on an exposure area that does not typically exceed "1/8th of an acre or the size of the front or back yard." The TNRCC may, however, approve use of a larger area "based upon the activity patterns of residents at a specific affected property." If a larger area is approved, an institutional control, such as deed notice, may be required even if the cleanup otherwise meets Remedy Standard A – Residential requirements. *See* 30 TEX. ADMIN. CODE § 350.111(b)(8), (10) (West 2002).

Id. § 350.111(b)(2). If you are an "innocent owner or operator" (as defined in accordance with the IOP) you must file a restrictive covenant rather than a deed notice or VCP Certificate. *See* § 350.111(b)(5).

39. If you are cleaning up off-site property of a non-innocent party (i.e., the contamination originated, at least in part, from the off-site property), then the off-site owner need only file a deed notice or VCP certificate to satisfy the requirements for institutional control. *Id.* § 350.111(b)(2).

40. *Id.*

41. *Id.* § 350.111(5). "Agency" is defined as the Commission. *Id.* § 3.2(3).

42. *Id.* § 350.111(c) (except in certain cases, "the person shall obtain the written consent from the landowner for the filing of the deed notice or VCP certificate of completion prior to filing of a deed notice or VCP certificate of completion required to be filed under this chapter in real property records. Restrictive covenants shall be executed only by the landowner."). Under section 350.111(c), a deed notice or VCP Certificate of Completion can be filed *without* the landowner's consent in three circumstances. First, consent is not required for the filing of a "superceding notice" that removes requirements. *Id.* § 350.111(b)(4). Second, no consent is necessary if 1) it is "technically impractical" to meet a Remedy Standard A – Residential cleanup, 2) the non-innocent party refuses to grant consent, 3) a court has determined appropriate compensation, and 4) the person seeking to

the off-site owner agrees to file a deed notice (if non-innocent) or execute a restrictive covenant (if an innocent party). Under these rules, off-site owners are powerless to require cleanup of their property to better than residential levels, but they can block cleanup to less stringent commercial/industrial levels.[43]

Ka-ching. The sound you just heard was money changing hands as a person undertaking a cleanup pays the owner of the neighboring property to agree to file a deed notice or restrictive covenant so that the cleanup can be limited to less costly commercial/industrial levels.

III. THE ISSUE OF INSTITUTIONAL CONTROLS

A. THE NEED FOR INSTITUTIONAL CONTROLS

Some form of "institutional control" is required in all cases in which a cleanup meets other than Remedy Standard A – Residential.[44] The purpose of these institutional controls is to ensure that property cannot subsequently be used for residential purposes without further cleanup. Curiously, the more restrictive institutional control, the filing of a restrictive covenant, is required only of "innocent parties." Non-innocent parties, whether on-site or off-site, need only file non-binding deed notices.

This paradoxical result is created by the Texas Innocent Owner/Operator Program. Non-innocent parties are potentially subject to cleanup or-

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file the deed notice has paid that amount into a court registry. *Id.* § 350.111(d). Three, if "after extensive and diligent inquiry" by the person seeking to file the notice, the executive director of the TNRCC determines that the landowner cannot be found. *Id.* § 350.111(f). Under section 350.111(c), a restrictive covenant is not necessary (and a deed notice or VCP Certificate can be filed) if 1) the landowner is not an "innocent owner or operator" under the Texas IOP, 2) it is technically impractical to reach Remedy Standard A – Residential and compensation is determined by and paid to the court, or 3) the TNRCC determines that the person cannot be found.

43. As the TNRCC notes in the preamble to the TRRP Rules, "[t]he innocent landowner can refuse to consent to the placement of an institutional control which effectively forces a residential-based Remedy Standard A response action." 24 Tex. Reg. 7436 (Sept. 17, 1999). This is also presumably true for a "non-innocent" landowner who must consent to the filing of a deed notice.

44. One problem with the TNRCC regulations is confusion created by their use of the term "institutional control." Institutional controls, as defined by the TNRCC, are not necessarily "controls." The filing in the public records of a deed notice or a "certificate of completion" does not create any limitation on the use of property; it merely provides notice to the public and future owners. Only restrictive covenants (or equivalent zoning) actually control or limit the future use of property. The TNRCC, like the Red Queen in Alice in Wonderland, can define a term anyway it wants. It does, however, have to live with the confusing consequences. By defining non-controls, such as deed notice, as an institutional control they confuse the difference between Remedy Standard A and B. Remedy Standard A requires full cleanup without *physical controls*, but TNRCC itself has fallen into the trap of saying that Remedy Standard A requires cleanup without institutional controls. The preamble to the TRRP Rules states "To attain Remedy Standard A, the affected environmental media . . . shall be removed and/or decontaminated to protective concentrations such that physical controls (such as caps, slurry walls) *or* institutional controls (such as restrictive covenants or deed notices are not necessary. . . ." 24 Tex. Reg. 7439 (Sept. 17, 1999) (emphasis added). This is simply wrong. A Remedy Standard A cleanup to commercial/industrial levels *always* requires some form of "institutional control" as defined by the TRRP Rules.

ders by the TNRCC. Thus, if non-innocent parties change their land use from commercial/industrial to residential they will be subject to a cleanup order by the TNRCC. Deed notice in this case advises future owners of their potential liability if they change land use.

Innocent parties under the IOP are not, however, subject to any cleanup orders.[45] If innocent parties changed their land use from commercial/industrial to residential, the TNRCC would be powerless to compel them to undertake additional cleanup.[46] The TNRCC has apparently determined that a cleanup, even a voluntary cleanup, to commercial/industrial levels is only satisfactory if it has the authority to limit the future use of the property for residential purposes.

B. The Enforceability of Restrictive Covenants

The TRRP Rules provide limited guidance on the restrictive covenants that must be executed by "innocent parties." Such restrictive covenants are defined as:

> An instrument filed in the real property records of the county where the affected property is located which ensures that the restrictions will be legally enforceable by the executive director [of the TNRCC] when the person owning the property is an innocent landowner.[47]

Elsewhere, the TRRP Rules state that restrictive covenants must be "in favor of the TNRCC and the State of Texas" and "run with the land."[48] The restrictive covenants cannot be involuntarily imposed; they must be "executed by the landowner."[49] The covenant itself must "limit the property to commercial/industrial land use" and contain a statement "indicating that if any person desires in the future to use the property for residential purposes, then the agency must grant approval prior to such

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45. Notwithstanding this limited authority, the TRRP Rules in a somewhat misleading provision purport to establish a general regulatory prohibition on alteration of land use from commercial/industrial to residential. The regulations provide:

> No person shall suffer, cause, allow, or permit a threat to human health or the environment by changing a land use specified in an approved [TRRP cleanup plan] from commercial/industrial to residential or by removing, altering or failing to maintain a physical or institutional control that applies to an affected property that underwent an approved response action.

30 Tex. Admin. Code § 350.35(b) (West 2002). If such a prohibition, which purports to apply independently of any restrictive covenant, were effective, the whole rationale for restrictive covenants would be eliminated. Presumably, this provision applies only to persons who are not "innocent parties" under the IOP. It also establishes a regulatory requirement if the TNRCC were found to have authority over innocent parties.

46. As the TNRCC notes in the preamble to the TRRP Rules:

> [t]he commission is requiring restrictive covenants for innocent landowner situations to ensure that controls are maintained and remain effective because the commission otherwise may not have any corrective action authority over these landowners.

24 Tex. Reg. 7436 (Sept. 17, 1999).

47. 30 Tex. Admin. Code § 350.4(76) (West 2002).

48. *Id.* § 350.111(c).

49. *Id.*

use."[50]

The TRRP regulations seem to contemplate unilateral execution of a restrictive covenant by the innocent party. In other words, the regulations require that a landowner execute a document creating a restrictive covenant.[51] Nothing indicates that any other party needs to join in the execution of this restrictive covenant, and there is no mechanism requiring the State to formally endorse or accept any covenant.

There is, however, a fundamental flaw with this use of restrictive covenants.[52] Under traditional common law principles, a landowner cannot unilaterally establish an enforceable land use restriction that binds the landowner and successors. Both case law and commentary indicate that enforceable covenants can only be created through an otherwise valid contract or as part of a conveyance in an interest in land. The new Restatement (Third) of Property – Servitudes, for example, provides that an enforceable servitude can be created if the owner of the property to be burdened "enters into a contract or makes a conveyance intended to created a servitude."[53] Similarly, Texas case law also indicates that enforceable covenants are created only by a conveyance and possibly also contract.[54] In the absence of a contract or transfer of property interest, the restrictive covenants required by the TNRCC are likely unenforceable. Note that the issue of enforceability is likely to arise in an action to enforce the covenant against subsequent innocent owners. Although such successive owners will have taken with notice of the purported restriction, notice alone may not be sufficient to allow enforcement of an otherwise invalidly created servitude.

One not so simple response to this problem is to amend the Solid

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50. *Id.* § 350.111(b)(5). For Remedy Standard B cleanups, the restrictive covenant must also maintain any physical control. *Id.* § 350.111(b)(6).

51. *See id.* § 350.111(e).

52. Restrictive covenants or servitudes are simply obligations relating to land use. The RESTATEMENT (THIRD) OF PROP., SERVITUDES § 1.1 (1998) provides that a servitude is a "legal device that creates a right or an obligation that runs with land or an interest in land." The Restatement establishes "servitude" as the common term for easements, profits, real covenants and equitable servitudes. *Id.* § 1.4.

53. *Id.* § 2.1 (Creation of a Servitude).

The comment on this provision states:

> Recognition of the contractual nature of covenants has sometimes led modern commentators to assume that covenants can be created only as modern contracts, which normally require consideration. However, under ancient principles, covenants expressed in deeds are effective. With the modern recognition that running covenants are interests in land, it can now be said that covenants can be created by conveyance as well as by contract.

Id. § 2.1, cmt. a.

54. In *Wiley v. Schorr*, 594 S.W.2d 484, 487 (Tex. Civ. App.—San Antonio 1980, writ ref'd n.r.e.), for example, the court stated that: "It is well settled in this state that owners of property may by agreement, apart from a conveyance, create binding restrictions on the use of their property." *Cf.* Clear Lake Apartments Inc. v. Clear Lake Util. Co., 537 S.W.2d 48, 51 (Tex. App. App.—Houston [14th Dist.] 1976, writ granted), *aff'd as modified sub nom.* Clear Lake Water Auth. v. Clear Lake Util., 549 S.W.2d 385 (Tex. 1977) (covenant must be contained in grant of land or some property interest in land); Wayne Harwell Prop. v. Pan Am. Logistics Ctr., Inc., 945 S.W.2d 216 (Tex. Civ. App.—San Antonio 1977, writ denied).

Waste Disposal Act[55] expressly to provide that restrictive covenants, unilaterally created and filed by innocent parties are enforceable by the State and binding on successors.[56] In the absence of a statutory change, there are, however, steps that the TNRCC can take to increase the likelihood that such covenants will be effective.

1. *Creation of Restrictive Covenants through Contracts between Private Parties*

To ensure the creation of effective restrictive covenants, TNRCC must point to some contract or conveyance that contains the required covenants. The TNRCC can easily ensure this when one landowner is cleaning the property of an innocent neighbor. In these cases, TNRCC should, at a minimum, require that the off-site innocent owner establish the restrictive covenant as part of a contract with the neighboring landowner undertaking the cleanup. Such a document would need to satisfy the formalities, including signature, consideration and the statute of frauds, for creation of an enforceable contract, and notice of this restrictive covenant should be filed in the public records. This should ensure the enforceability of the restrictive covenant against successors. This solution is fully consistent with Texas statutes and the existing TRRP Rules. The TNRCC might be able to implement this requirement simply through guidance that clarifies the requirements for execution of an enforceable restrictive covenant.

This solution, however, fails to address two remaining problems. First, this solution is not workable when innocent parties are cleaning up their own land. The TRRP Rules require innocent parties to execute a "restrictive covenant" binding their own land, and, in such a case, there may not be a private party with whom they could execute an enforceable contract.

Second, a contract between two private parties may not ensure that the covenant is enforceable by the State. In such a case, the State is not in privity of contract for purposes of enforcement nor has the State succeeded to the interest of anyone who could have enforced the covenant. It is possible, however, that the existing TRRP Rules adequately deal with this problem. The TRRP Rules require that restrictive covenants expressly be made "in favor of the TNRCC and the State of Texas." The regulations contemplate that the TNRCC can enforce the restrictive covenant under a "third-party beneficiary" theory in which certain beneficiaries, who are not themselves parties to the contract, may enforce its provisions.[57] Texas courts have specifically held that third parties may enforce the benefit of a restrictive covenant if the third parties are clearly

55. 42 U.S.C. § 6901-6992k (1988).

56. Colorado recently adopted a statute that expressly addresses the issues of creation and enforcement of "environmental covenant." Colo. Rev. Stat. §§ 25-15-317 to 326. The National Conference of Commissioners on Uniform State Laws is also considering a uniform law that would address these issues. *See* 32 ENV'T REP. (BNA) 2299 (Nov. 30, 2001).

57. *See* MCI Telecomm. Corp. v. Tex. Util. Elec. Co., 995 S.W.2d 647 (Tex. 1999).

among the intended beneficiaries.[58] Stating that the covenant is "in favor" of the State should eliminate issues of intent to name the State as a "third-party beneficiary." It would not, however, eliminate the problem of whether the covenant itself was validly created.[59] Nonetheless, a third-party beneficiary theory may allow the State to enforce an *otherwise enforceable* restrictive covenant.[60]

2. *Creation of a Restrictive Covenant through Contract or Conveyance with the State*

To ensure that a restrictive covenant imposed by an innocent landowner is binding on successors and enforceable by the State, the TNRCC could require that such parties embody the covenants in an express contract or conveyance with the TNRCC. This contract or conveyance would be required to satisfy otherwise applicable requirements for the creation of a contract or conveyance (i.e., statute of frauds) and also government contracting and acquisition requirements. This should satisfy all common law requirements for the enforcement of the restrictive covenant by the government against the landowner and successors.[61]

This is the approach adopted by the federal government. In recognition of the problem of enforcement of restrictive covenants, EPA and the Department of Justice require that parties imposing land use restrictions as part of a cleanup under CERCLA grant the federal government a property interest such as an easement.[62] EPA notes that any transfer of a property interest as part of a CERCLA settlement must satisfy federal government property procurement regulations.[63]

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58. *See, e.g.*, Interstate Circuit, Inc. v. Pine Forest Country Club, 409 S.W.2d 922 (Tex. Civ. App.—Houston [1st Dist.] 1967, writ ref'd n.r.e.); Hooper v. Lottman, 171 S.W. 270 (Tex. Civ. App.—El Paso 1914, no writ).

59. RESTATEMENT (SECOND) OF CONTRACTS § 309(1) (1981) (A promise creates no duty to a beneficiary unless a contract is formed between the promisor and the promisee; and if the contract is voidable or unenforceable at the time of its formation the right of any beneficiary is subject to the infirmity). *See* Young Refining Corp. v. Pennzoil Co., 46 S.W.3d 380 (Tex. App.—Houston [1st Dist.] 2001, pet. denied) (stating that under Texas law a third-party beneficiary has standing to sue to enforce an enforceable contract but, citing to the Restatement, states that there must first be an enforceable contract).

60. Even this conclusion is suspect given the special legislative treatment given to the enforcement of restrictive covenants by the State. The Texas Property Code contains specific provisions authorizing the enforcement of restrictive covenants by government entities. These provisions authorize enforcement in only a limited class of cases. *See, e.g.*, TEX. PROP. CODE § 203.001-.005 (Vernon 2000) (county attorney can enforce restriction in subdivision located in county; applicable to counties with a population of more than 200,000). Whether private parties, simply by naming the State as a beneficiary, can make private contracts enforceable by the State is at least questionable.

61. The requirement to embody a restrictive covenant in a contract or conveyance with the State should not constitute a "taking" of private property. The decision of an "innocent party" to execute a restrictive covenant is purely voluntary under the TRRP Rules. *See* 24 Tex. Reg. 7436, 7490 (Sept. 17, 1999).

62. Superfund Program; Revisions to Model CERCLA RD/RA Consent Decree, 63 Fed. Reg. 9541 (Feb. 25, 1988).

63. *Id.*

C. The Effectiveness of "Equivalent" Zoning

Under the TRRP Rules, no notice or restrictive covenant is required in any situation in which the property is subject to "equivalent" zoning or governmental ordinance.[64] A Remedy Standard A – Commercial/Industrial cleanup, for example, would normally require an innocent party to execute a restrictive covenant limiting future property to commercial/industrial use. If, however, "equivalent" zoning were in place, no restrictive covenant, indeed no deed notice at all, would be required.

Although not limited to this situation, the alternative of zoning is clearly intended to deal with those situations where contamination affects many different properties. In such a case, separately obtaining approval for deed notice or a restrictive covenant from each property owner would be difficult (and certainly contentious). A government ordinance that affects all those properties may be a more efficient way of imposing land use restrictions that apply to large numbers of property. Of course, reliance on a compulsory government ordinance is inconsistent with the TNRCC's position that the filing of notices or covenants should be voluntary and cannot be imposed without the landowner's consent. It does, however, place the onus on the government entity to adopt the ordinance and thus relies on the political process and pressures to achieve fairness.

There are several things to note about the alternative of equivalent zoning. First, this provision does not mean what you may think it means. The fact that property is located in an area zoned for industrial use does not satisfy the regulatory requirements. Traditionally, zoning has employed the "Euclidean" model[65] in which zoning uses are cumulative. Under cumulative zoning, not only the specified zoning use, but also all "higher" uses, are authorized. For example, in a single family zone, only single-family use is authorized. In multi-family zones, multi-family and single family uses are authorized. In industrial zones, industrial use, multi-family use and single-family uses are all authorized. Thus, reliance on use designation in a jurisdiction employing cumulative zoning clearly does not satisfy the objectives of the TRRP Rules. Even in a jurisdiction, relying on "exclusive use" rather than "cumulative" zoning, other requirements of the TRRP Rules ensure that simple zoning ordinances will not be adequate. Traditional zoning, for example, will not normally provide notice of the existence, type and scope of contamination.

The preamble to the TRRP Rules recognizes the limited nature of "equivalent zoning." Although it leaves open the possibility of establishing "equivalency" through other means, the TNRCC identified four elements that might be necessary: 1) the zoning or ordinance is by its terms to be protective of human health and the environment, 2) the zoning or ordinance provides notices of the contaminants left in place and that the zoning or ordinance is necessary to prevent exposure, 3) the zoning or

64. 30 Tex. Admin. Code § 330.111(b) (West 2002).

65. This description comes from the case of *City of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), in which the U.S. Supreme Court upheld the constitutionality of zoning.

ordinance applies to both current and future uses of the land covered, and 4) the zoning or ordinance cannot be modified or rescinded without consent of the commission.[66]

Adoption of such tailored "brownfields" ordinances may well be achievable. Local jurisdictions may have substantial incentives to adopt such ordinances to facilitate the cleanup of contaminated areas. Since, however, the need for such an ordinance only arises if the area is going to be cleaned to less than residential levels, the political context of adoption becomes interesting. In what circumstances will a municipality be willing to impose zoning restrictions and less extensive cleanup of property of its citizens? I leave it to you to speculate on the political pressures created by the potentially competing issues of the desire for economic development, the power of local developers, and the landowners' goal of clean and unrestricted property.

In addition to political obstacles, there is a legal obstacle that may make the alternative of "equivalent" zoning unfeasible. The TNRCC has stated that in order to be equivalent, the zoning or ordinance cannot be modified or rescinded without the consent of the TNRCC.[67] Such a requirement is almost certainly unenforceable. A legislative body may not limit the authority of a future legislature in that way. As one Texas court stated, "a city may not by contract or otherwise barter or surrender its governmental or legislative functions or its police power."[68] Thus, equivalent zoning may not be an alternative to imposition of restrictive covenants.

IV. A MODEST PROPOSAL(S)

The problem of restrictive covenants arises as a result of the IOP program; perhaps the solution lies there as well. The IOP provisions form the basis for a consistent and effective mechanism for imposing enforceable restrictive covenants under the IOP and the TRRP Rules.

A. Access Agreements and Institutional Controls under the IOP

Under the IOP program, innocent parties who can establish that contamination has migrated onto their property have no liability to the State.[69] This protection is self-implementing without the requirement of prior approval by the State. In other words, an innocent party can presumably assert their innocent status in response to any attempt of the State to impose liability. Under the statute, however, a party must grant the State reasonable access to their property in order to be eligible for

66. 24 Tex. Reg. 7726, 7647 (Sept. 17, 1999).
67. *Id.*
68. City of Pharr v. Pena, 853 S.W.2d 56, 62 (Tex. App.—Corpus Christi 1993, writ denied). *See also* City of Farmers Branch v. Hawnco, Inc., 435 S.W.2d 288, 290 (Tex. Civ. App.—Dallas 1968, writ ref'd n.r.e.).
69. Tex. Health & Safety Code Ann. § 361.752(a) (Vernon 2000).

immunity.[70] The statute provides that this access may be included in an "agreement" with the State.[71]

The IOP program does, however, have a rather confusing mechanism for obtaining an "Innocent Owner/Operator Certificate" from the TNRCC.[72] The effect of obtaining such a Certificate is unclear, but presumably it has some evidentiary value.[73] Apparently it acts to shift the burden of proof to the State to establish that the holder of the certificate is not an "innocent party"; in the absence of such a certificate, landowners presumably have the burden of proof of establishing their innocence. Curiously, the IOP Certificate does not "run with the land," and subsequent owners of the land must separately apply for an IOP Certificate.[74]

The decision to obtain an IOP Certificate is voluntary, but, if a party elects to request an IOP Certificate, the statute does contain certain prerequisites. First, the party must submit information establishing that the contamination originated from an off-site source and that the party has not "caused or contributed" to the contamination.[75] Additionally, the statute provides that the TRNCC "may condition" the issuance of a certificate on the placement of restrictions on the use of the property that are reasonably necessary to protect the public health.[76] The statute provides that these may include "institutional controls" such as deed restrictions or municipal zoning restrictions.[77]

Although clearly contemplated by the statute, the current IOP rules neither require execution of an access agreement nor contain a mechanism for imposing enforceable restrictive covenants. Rather, the TNRCC regulations merely provide that it may revoke the IOP Certificate if the person does not allow reasonable access or maintain institutional controls.[78]

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70. *Id.* § 361.752(c).

71. *Id.*

72. *Id.* § 361.753.

73. *Id.* § 361.753(f) ("The certificate evidences the immunity from liability of the applicant as provided by Section 361.752").

74. 30 TEX. ADMIN. CODE § 333.38(b) (West 2002).

75. *See* TEX. HEALTH & SAFETY CODE ANN. § 361.751(2)(B) (Vernon 2001); 30 TEX. ADMIN. CODE § 333.34 (West 2002).

76. TEX. HEALTH & SAFETY CODE ANN. § 361.753(g) (Vernon 2002). The requirement that institutional controls be imposed as a condition of the issuance of an IOP Certificate means less than it may seem. The statute provides only that the issuance of the certificate may be so conditioned; it does not provide that *immunity* is conditioned on compliance with these restrictions. If the restrictions were themselves enforceable as valid restrictive covenants or even if they were violated, non-compliance would presumably result only in loss of the evidentiary advantage of the Certificate, not the loss of immunity. *See* 30 TEX. ADMIN. CODE § 333.40 (West 2002) (conditions for loss of Innocent Operator Certificate, not loss of immunity).

77. TEX. HEALTH & SAFETY CODE ANN. § 361.753(g)(1) (Vernon 2001). The statute also provides that these restrictions may include "at the owner's or operator's option, other control measures." *Id.* § 361.753(g)(2).

78. 30 TEX. ADMIN. CODE §333.40(b), (d) (West 2002).

B. INTEGRATING THE IOP AND TRRP RULES

The provisions of the IOP and TRRP programs provide the basis for a consistent and effective mechanism for imposing enforceable restrictive covenants under the IOP and the TRRP Rules: the IOP provides the mechanism (an access agreement) for establishing enforceable covenants and the TRRP provides the content of those covenants. The TNRCC could integrate these programs through the following steps.

First, the TNRCC should require that any person requesting an IOP Certificate execute an "access agreement" with the TNRCC. Such an access agreement, essentially an affirmative easement, would itself be a property interest sufficient to support a covenant.[79] As noted, the statute specifically contemplates the execution of such an agreement with the State.[80]

This access agreement would also contain any restrictive covenants required of the innocent landowner. In the context of a cleanup under the TRRP Rules, those covenants would be defined by TRRP requirements. Again, the statute specifically contemplates execution of institutional controls, including restrictive covenants, as a prerequisite to obtaining an IOP Certificate. Such covenants, executed as part of a properly filed access agreement, should be enforceable by the State and binding on successors. The obligation to impose these enforceable covenants through the access agreement would be the quid pro quo of obtaining the IOP Certificate. Thus, by requiring an access agreement containing restrictive covenants, the TNRCC would ensure the continued enforceability of land use controls on otherwise "innocent" parties who voluntarily seek an IOP Certificate. This arrangement is clearly consistent with the intent of the statute.

Second, the TRRP Rules could be altered to require that innocent parties obtain an IOP Certificate rather than executing a restrictive covenant. This would simultaneously include the obligation to establish enforceable restrictive covenants through cross-reference to the IOP program and create a mechanism for documenting the innocent status of the landowner. Equally important, this might ease some of the "negotiation" problems of obtaining a covenant from an innocent party. Rather than a regulatory requirement that innocent parties impose restrictive covenants on their own land, the requirement would be to obtain certification of their "innocent" status. Note that the "innocent" party's decision to seek an IOP Certificate would still be voluntary (or at least as voluntary as the decision to impose "restrictive covenants" under the current TRRP Rules). If the innocent party chose not to obtain an IOP Certificate, the

79. *See* Clear Lake Apartments, Inc. v. Clear Lake Util. Co., 537 S.W.2d 48, 51 (Tex. App.—Houston [14th Dist.] 1976, writ granted), *aff'd as modified sub nom.* Clear Lake Water Auth. v. Clear Lake Util., 549 S.W.2d 385 (Tex. 1977) (property interests, such as easements, support creation of covenant).

80. This would seem to be statutory authority to acquire such an interest. *See* TEX. GOV'T CODE ANN. § 2204.002 (Vernon 2001).

non-innocent party would be required to cleanup the property to meet Remedy Standard A - Residential requirements.

Voila again - *Tulk* and Texas are satisfied.

V. CONCLUSION

The creation of restrictive covenants, enforceable by the State, is a central element of the Texas Risk Reduction Program. The TRRP Rules announce the need for such covenants, but they may not employ a method that will achieve their objectives. As discussed above, common law rules regarding the creation of covenants and the limitations of the zoning alternative create a substantial problem for the risk reduction program. Solutions exist. These range from the simple—TNRCC guidance requiring that covenants be contained in a contract between neighbors, to the more difficult—a statutory change to the Solid Waste Disposal Act. Integration of the IOP and TRRP Rules may also be an alternative.

In the absence of some response, however, the Texas Risk Reduction Program may not be reducing risk as much as it purports.