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ENVIRONMENTAL LAW

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THIS Article reviews judicial and legislative developments in Texas environmental law between October 1, 1990 and October 1, 1991. Section one discusses several judicial decisions of significant interest to the environmental practitioner. Section two examines recent important legislative amendments to the Texas Water Code,[1] the Texas Health and Safety Code,[2] the Texas Natural Resources Code,[3] and the creation of the Texas Natural Resource Conservation Commission to replace the Texas Water Commission in 1993.[4] Part two also examines two new legislative acts, the Waste Reduction Policy Act of 1991[5] and the Oil Spill Prevention and Response Act of 1991.[6]

I. JUDICIAL DEVELOPMENTS

A. Permittee Required to Provide Assurance of Structural Integrity of Hazardous Waste Injection Well

In *United Resource Recovery, Inc. v. Texas Water Commission*[7] an Austin appeals court ruled that the Texas Water Commission (TWC) may require assurances from a hazardous waste disposal facility concerning the structural integrity of an injection well into which waste is proposed to be injected.[8] In 1983, United Resource Recovery (URR) filed six applications for permits to operate a hazardous waste facility: one permit for the facility, four injection well permits, and one water quality discharge permit.[9] In

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1. TEX. WATER CODE ANN. §§ 1.001-66.404 (Vernon 1990).

2. TEX. HEALTH & SAFETY CODE ANN. §§ 1.001-826.055 (Vernon Supp. 1991).

3. TEX. NAT. RES. CODE ANN. §§ 1.001-201.042 (Vernon 1978 and Supp. 1988).

4. Act of August 12, 1991, 72nd Leg., 1st C.S., Ch. 3, 1991 Tex. Sess. Law Serv. 4 (Vernon).

5. Waste Reduction Policy Act of 1991, 72nd Leg., R.S., ch. 296, 1991 Tex. Sess. Law Serv. 1235 (Vernon) (to be codified as an amendment to TEX. HEALTH & SAFETY CODE ANN. §§ 361.003-.440 (effective June 7, 1991)).

6. Oil Spill Prevention and Response Act of 1991, 72nd Leg., R.S., ch. 10, 1991 Tex. Sess. Law Serv. 13 (Vernon) (to be codified at TEX. NAT. RES. CODE ANN. Ch. 40).

7. United Resource Recovery, Inc. v. Texas Water Comm'n, 815 S.W.2d 797 (Tex. App.—Austin 1991, writ denied) (writ was denied on January 8, 1992).

8. *Id.* at 803-5.

9. *Id.* at 799. The proposed waste facility was to have two components: "(1) a surface facility where liquid hazardous wastes would be blended with fly ash and a secret catalyst

1986, after consolidating the six permit hearings and holding a hearing, the TWC approved URR's six applications. On review of the 1986 order, the district court held that URR had "failed to demonstrate the financial assurance required to secure its obligation to plug the wells and properly close the surface facility."[10] Because of this, the district court dismissed the TWC's order for want of jurisdiction as a non-final order. In 1988, URR submitted further financial assurance. At that time, the TWC approved the permit applications a second time and a suit was brought to protest the TWC's second approval of the applications. The district court reversed the TWC's order because TWC failed to hold an evidentiary hearing to consider URR's financial assurance.[11]

In 1989, the TWC again considered the applications and it assessed the merits of the proposed waste facility along with the adequacy of URR's financial assurance. The TWC asked a public interest advocate to report on the viability and benefits of the facility. After holding an evidentiary hearing in which the public interest advocate argued that URR had failed to demonstrate that it could adequately protect fresh ground water from pollution, the TWC issued an order denying all six permit applications. URR sued the TWC in the district court for judicial review of the order and the district court affirmed. URR appealed the decision to the Austin court of appeals. On appeal, URR argued that the TWC's findings were arbitrary and capricious, not supported by substantial evidence and that the TWC measured the six applications by a new standard for which URR had no notice.[12]

The Austin court noted at the outset that before the TWC may issue an injection well permit, it must find that "proper safeguards to adequately protect fresh ground and surface water from pollution" will be used by the applicant.[13] The appellate court found that the TWC's finding that URR failed to show it could adequately protect fresh surface and ground water was supported by substantial evidence and was not arbitrary and capricious.[14] Specifically, URR was not able to show that its secret mixing compound, F2S, would solidify the hazardous waste such that the waste would not become available to the surrounding environment. Located above the proposed injection site was a fresh water aquifer which would be at risk for pollution if waste escaped during injection. URR could not guarantee that the injected waste would not escape or would remain solidified. The court also stressed that URR's experts who testified regarding solidification had a financial interest in the operation's success and this connection necessarily affected their credibility as expert witnesses.[15] For all of these reasons, the court concluded, the TWC's finding that URR failed to adequately show

(F2S) to create a slurry; and (2) leached-out caverns in the [salt dome] into which the hazardous waste slurry would be injected for storage." *Id.*

10. *Id.*
11. *Id.*
12. *Id.* at 799-800.
13. *Id.* at 800 (citing TEX. WATER CODE ANN. § 21.051(a)(3) (1988)).
14. *URR*, 815 S.W.2d at 800-3.
15. *Id.* at 801.

solidification of the waste sufficient to protect fresh ground water was supported by substantial evidence.[16]

URR also argued on appeal that the TWC substituted a new standard in Texas for the solidification of hazardous waste to replace the existing federally-mandated paint-filter test.[17] With respect to this argument, the court held that the TWC, in addition to the federally-mandated paint-filter test,[18] "could require additional assurances of the structural integrity of the waste after injection and its long-term stability in [a salt] dome to meet the state mandate for protecting fresh groundwater."[19] The court held that the Texas Water Code provides that the TWC could require URR to prove that "the solidified material would stay solid in the [salt] cavern and not become available to the environment."[20]

The court's decision rested in part on studies considered by the TWC that examined the use of Texas salt domes as potential sites for permanent storage. Authored by the Bureau of Economic Geology (the Bureau), these studies recommended that "waste material stored in a salt cavern . . . be solidified and . . . maintain a strength and density equivalent to or greater than salt to enhance the stability of the salt dome."[21] The court concluded that because the Texas Water Code already required adequate assurance against threats to ground water from a proposed waste facility, URR had sufficient notice of what it was required to prove before the TWC.[22]

B. Prior Settlement Allows Waste Company To Operate Its Truck Tank Cleaning Company Without a Clean Air Act Permit

In *Harris County v. AllWaste Tank Cleaning, Inc.*[23] a Houston appeals court held that a waste cleaning company could continue to operate its business without a Clean Air Act permit on the basis of a 1987 agreed order of the Texas Air Control Board (TACB).[24] In March 1990, Harris County sued AllWaste Tank Cleaning Company (AllWaste) alleging AllWaste was a polluter in violation of the Texas Clean Air Act[25] and the Texas Solid Waste Disposal Act[26] because it was operating its business without a Clean Air Act permit. The State of Texas, the TWC, and the TACB were named as

16. *Id.* at 801-02.
17. *Id.* at 803-05.
18. During the pendency of URR's permit applications before the TWC, Congress passed a statute banning the disposal of liquid hazardous wastes in land fills or salt caverns. *See* 42 U.S.C. § 6924(b) and (c) (1988). In accordance with the Congressional ban, the Environmental Protection Agency promulgated a rule called the paint-filter test requiring owners and operators to show the absence of free liquids in a waste stream in land treatment and disposal facilities. *URR*, 815 S.W.2d at 803-5. *See* 40 C.F.R. § 264.314 (1990); 50 Fed. Reg. 18,370 (1985).
19. *URR*, 815 S.W.2d at 804.
20. *Id.*
21. *Id.*
22. *Id.* at 804-5.
23. 808 S.W.2d 149 (Tex. App.—Houston [1st Dist.] 1991, writ dism'd w.o.j.).
24. *Id.* at 152.
25. TEX. HEALTH & SAFETY CODE ANN. §§ 382.001-.115 (Vernon Pamph. 1991).
26. TEX. HEALTH & SAFETY CODE ANN. §§ 361.001-.405 (Vernon Pamph. 1991).

indispensable parties. In addition to statutory civil penalties, Harris County sought temporary and permanent injunctive relief against AllWaste.[27] In response, AllWaste affirmatively plead compromise and settlement as a result of the 1987 agreed order of the TACB. The trial court denied the temporary injunctive relief and Harris County appealed.[28]

Harris County argued on appeal that the trial court abused its discretion by not enjoining AllWaste's operation of its cleaning facility which had not first obtained a permit from the TACB. The court noted initially that an order denying a temporary injunction is reviewed for abuse of discretion.[29] It also stressed that it was not disputed that AllWaste did not have a permit, that a permit application was pending, and that an agreed order had previously been entered between AllWaste and the TACB. The court set forth the provisions of the 1987 order in full.[30]

The court held that because AllWaste was acting pursuant to the 1987 settlement, it could continue to legally operate its business without a Clean Air Act permit.[31] Therefore, AllWaste was not required to seek a formal permit from the TACB. Significant to the court's holding was that Harris County did not allege and could not point to violations by AllWaste of the settlement agreement. The court also found that sections of the settlement agreement supported AllWaste's position that the parties contemplated continued operations of its plant.[32] Specifically, these provisions stated that AllWaste would agree that if it operated its facility prior to final agency action, it would comply with the nuisance requirements of the TACB and all air pollution abatement equipment would "be maintained in good working order and operated properly during normal operations."[33] For these reasons, the court could not conclude that the trial court abused its discretion by failing to issue a temporary injunction against AllWaste.[34]

C. Railroad Commission May Order An Oil Company To Clean Up Oil Sludge On Its Property

In a recent case, an Austin appeals court upheld a Texas Railroad Commission (TRC) order which stated that only one oil company was required to clean up oil sludge it had poured into pits on its property, despite the fact that other companies disposed of sludge on the same property prior to that

27. *Allwaste*, 808 S.W.2d at 149. Under TEX. HEALTH & SAFETY CODE ANN. § 382.114(a) (Vernon 1991), if a corporation "is violating or threatening to violate . . . an Air Control Board rule, variance, or order, the local government may bring suit for injunctive relief or penalties." *Id.* at 150. Section 382.114(b) provides that the court shall grant any prohibitory or mandatory injunctions the facts may warrant. *Id.*

28. *Allwaste*, 808 S.W.2d at 149.

29. *Id.* at 150.

30. *Id.* at 150-151.

31. *Id.* at 152.

32. *Id.*

33. *Id.* at 151.

34. *Id.* at 152.

company's commencement of operations.[35] In *Lone Star Salt Water Disposal Co. v. Railroad Commission of Texas*[36] several oil companies, most recently Lone Star, had been pouring oil waste sludge into a pit on the same property. Since the 1920s, Lone Star, Texas Gulf, and Amoco had the exclusive right to control and operate disposal pits with Lone Star being the last company to do so. In 1978, the TRC notified Lone Star, Texas Gulf, and Amoco of a hearing to consider responsibility for the proper disposal of the sludge in the pits. After the hearing, the TRC ordered only Lone Star to clean the three pits by backfilling, compacting, and disposing of all the oil or byproducts present.[37] The district court affirmed the order of the TRC and Lone Star appealed.[38]

On appeal, Lone Star argued that the district court erred in affirming the TRC's order because the order was not supported by substantial evidence. Specifically, Lone Star argued that "the selection of only one party who partially contributed to an indivisible condition is inherently arbitrary."[39] Lone Star argued that because Texaco and Amoco also contributed to the harm and because it was not possible to distinguish the quantum of harm that each contributed, all parties should have been found jointly and severally liable.[40]

In affirming the TRC's order, the Austin court held that the order was supported by substantial evidence because Lone Star had pumped sludge into the pits and operated the pits for 23 years.[41] Therefore, the court concluded, Lone Star was responsible for cleaning the pits, even though another oil company had previously deposited sludge.[42] The court added that it was not inherently arbitrary for the TRC to choose one tortfeasor among multiple tortfeasors who contribute to an indivisible harm because under general tort principles, a party may chose "to proceed against only one potentially liable party" although others exist.[43]

The court recognized that the TRC has broad powers including the power to adopt orders to prevent pollution from the escape or release of oil.[44] The court also noted that the decision of the TRC is to be given deference on appeal and is presumed to be valid.[45] The TRC statewide rules provide that no person shall store crude oil or its byproducts in open pits or earthen storage.[46] The court reasoned that the rule does not require the TRC to order cleanup of the pits by every person who has ever stored sludge in the

35. Lone Star Salt Water Disposal Co. v. Railroad Comm'n of Texas, 800 S.W.2d 924, 926 (Tex. App.—Austin 1990, n.w.h.).
36. *Id.*
37. *Id.* at 926-7. The order was entered pursuant to Texas Railroad Commission Statewide Rule 8(c)(4) (since revised at Tex. R.R. Comm'n, 16 TEX. ADMIN. CODE § 3.8 (West Sept. 1, 1988)).
38. *Lone Star*, 800 S.W.2d at 926-27.
39. *Id.* at 930.
40. *Id.*
41. *Id.*
42. *Id.*
43. *Lone Star*, 800 S.W.2d at 930.
44. *Id.*
45. *Id.* at 928.
46. *Id. See* 16 Tex. R.R. Comm'n, TEX. ADMIN. CODE § 3.21(c) (West Sept. 1, 1988).

pits.[47] Because the record contains substantial evidence that Lone Star pumped a mixture of salt water and sludge into the pits over a 23 year period, it could require only Lone Star to clean the pits.[48]

D. Ex Parte Communication Between A Party To A Waste Incinerator Permit Hearing And Employees Of The Texas Air Control Board Is Prohibited

In *Coalition Advocating a Safe Environment v. Texas Water Commission*[49] an Austin appeals court held that an ex parte communication between a party to a waste permit hearing and an employee of the TACB is prohibited "when TACB's proposed findings and conclusions may bind the [TWC] to make a particular decision."[50] Chemical Waste Management Company (Chemical) applied with the TWC to construct and operate a hazardous waste incinerator as required by the Solid Waste Disposal Act.[51] Chemical, the TACB and the Coalition Advocating a Safe Environment (Coalition) participated in the TWC hearing at which Coalition opposed the permit. After the hearing, the TWC authorized construction of the incinerator under Chemical's compliance plan which it had previously submitted.[52]

Coalition appealed the TWC order and argued that during the hearing a staff engineer at the TACB participated in ex parte communications with a representative of Chemical in violation of the Administrative Procedure and Texas Register Act (APTRA).[53] Accordingly, the issue on appeal was whether the TACB was a decision-making or fact-finding agency such that ex parte communications between one of its engineers and another party to the proceeding were prohibited.[54] Coalition specifically alleged that Chemical had delivered to a TACB staff permit engineer, outside the hearing process, a several hundred page volume entitled "Supplemental Air Quality Information."[55] The staff engineer relied on the information contained in the volume in his testimony during the hearing; the volume, however, was

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47. *Lone Star*, 800 S.W.2d at 930.

48. *Id.* at 931.

49. 798 S.W.2d 639 (Tex. App.—Austin 1990), *vacated as moot*, 35 Tex. Sup. Ct. J. 160 (Nov. 20, 1991). The Texas supreme court dismissed the cause and vacated the lower court judgment and opinion upon a joint motion after the parties had settled. *Id.*

50. *Id.* at 643.

51. TEX. HEALTH & SAFETY CODE ANN. §§ 361.001-.405 (Vernon Pamph. 1991).

52. *Coalition*, 798 S.W.2d at 640.

53. TEX. REV. CIV. STAT. ANN. Art. 6252-13a, § 17 (Vernon Supp. 1992). Section 17 of APTRA provides:

> [u]nless required for the disposition of ex parte matters authorized by law, members or employees of an agency assigned to render a decision or to make findings of fact and conclusions of law in a contested case may not communicate, directly or indirectly, in connection with any issue of fact or law with any agency, person, party or their representatives, except on notice and opportunity for all parties to participate.

Id.

54. *Coalition*, 798 S.W.2d at 641.

55. *Id.* at 640.

never entered into the record.[56]

In analyzing the issue, the court stated that the TACB was not an ordinary party to the proceeding because the TACB's proposed findings and conclusions may bind the TWC to a particular decision.[57] Therefore, any communication between a party and a TACB employee is prohibited if the TWC will subsequently be required to follow the TACB's finding.[58] The court reversed the judgment of the district court and remanded the case.[59]

Although the TWC has exclusive authority to grant a hazardous waste facility permit, the court noted the TWC will give great weight to the recommendations of the TACB because Texas law provides that a lead agency should give deference to the interpretations of the TACB on air quality impact issues involving hazardous waste.[60] Because Texas law requires the TACB to submit to the TWC proposed findings of fact and conclusions of law regarding the air quality aspects of an application, the TWC "*must* adopt the TACB's findings, conclusions, and proposed permit language unless the [TWC] determines that [these recommendations] are unsupported by a preponderance of the evidence."[61] Because the proposed findings by the TACB may bind the TWC, any ex parte communication between a party to the hearing and a TACB employee is prohibited.[62]

In dissent, Chief Justice Shannon concluded that as between the TACB and the TWC, the Solid Waste Disposal Act "recognizes that the [TWC] is the exclusive authority to grant hazardous waste facility permits."[63] Although the act gives the TACB input into a waste permit proceeding as a party, "it does not purport to elevate the Board to the position of decision maker"[64] because the TACB's proposed findings are not binding on the TWC.[65] Rather, the TACB has only been given an advisory role by the legislature due to the technical nature of the air quality issues.[66] The Solid Waste Disposal Act makes clear that the TACB's proposed findings and

56. *Id.* The engineer also testified at the hearing that after the hearing process was commenced he had received numerous other materials from Chemical including memoranda. *Id.*

57. *Id.* at 641-43.

58. *Id.* at 643.

59. *Id.*

60. *Coalition*, 798 S.W.2d at 641 (citing Act of June 2, 1969, 61st Leg., R.S., ch. 405, 1969 TEX. GEN. LAWS 1320, *amended by* Act of June 11, 1987, 70th Leg., R.S., ch. 279, § 4, 1987 TEX. GEN. LAWS 1632 (since repealed) (current version at TEX. HEALTH & SAFETY CODE ANN. § 361.072(d) (Vernon Pamph. 1991)) which provided that "to the extent possible . . . the lead agency shall defer to the policies, rules and interpretations of the Texas Air Control Board on the air quality impact of the proposed hazardous waste or solid waste management activities, and that the Texas Air Control Board remain the principal authority of the state in matters of air pollution control." Section 4 also provides that "[i]f no contested case hearing on the permit application is held by the lead agency, the recommendations or the proposed permit provisions submitted by the Texas Air Control Board shall be incorporated into any permit issued by the lead agency").

61. *Coalition*, 798 S.W.2d at 642.

62. *Id.* at 643.

63. *Id.* at 644 (Shannon, C.J., dissenting).

64. *Id.* at 645.

65. *Coalition*, 798 S.W.2d at 645.

66. *Id.*

conclusions are merely recommendations.[67] Therefore, the dissent continues, the TACB is not a decision maker to the permit proceedings; the court should not prohibit the conversations between Chemical's representative and the TACB engineer.[68]

E. Evidence To Support Discriminatory Enforcement Defense Must Be Heard During The Trial Of An Environmental Enforcement Action

In *Malone Service Co. v. State*[69] a Houston appeals court held that a trial court must admit complete evidence in support of a discriminatory enforcement defense during an environmental enforcement action against a company allegedly dumping unauthorized hazardous waste into an earthen pit.[70] In August 1977, the Texas Water Quality Control Board issued an order with respect to a well injection permit held by Malone Service Company (MSC). The order directed MSC to close and discontinue use of an earthen pit. Thereafter, an environmental enforcement action against MSC was brought by the attorney general's office at the request of the TWC alleging the unauthorized dumping of hazardous waste into the earthen pit. A jury verdict was entered against MSC and damages were assessed against MSC and its president personally for causing ground water contamination through waste leakage at the pit.[71] MSC appealed alleging that the district court committed error when it refused to admit complete evidence offered by MSC regarding its discriminatory enforcement defense.[72]

MSC sought to introduce the state's enforcement log to support its equal protection defense that the state was discriminatory in enforcing its waste dumping laws to benefit Gulf Coast Waste Disposal Authority (Gulf Coast), a quasi-governmental agency and MSC's direct competitor.[73] The state's enforcement log showed that: "(1) six of Gulf Coast's customers and investors were 'large' polluters, (2) the State took enforcement action against only four of them, and (3) no penalties were assessed against those four."[74] The trial court admitted the enforcement log only after it excised the information on the log showing that no penalties were assessed against Gulf Coast customers and investors. The trial court found that the probative value of this evidence was outweighed by its prejudicial effect.[75]

The appellate court held that it was reversible error to exclude the evidence that no penalties were assessed in the state's enforcement action

67. *Id.* at 646.
68. *Id.*
69. 804 S.W.2d 174 (Tex. App.—Houston [14th Dist.] 1991, writ granted). The Texas supreme court granted a writ of error on April 17, 1991 (No. A14-A9-01132-CV); however, no proceedings in the Texas supreme court have been entered as of the present date.
70. *Id.* at 176-77.
71. *Id.* at 175-76.
72. *Id.* at 175.
73. *Id.*
74. *Malone*, 804 S.W.2d at 176.
75. *Id.*

against MSC's competitor Gulf Coast.[76] In analyzing the issue, the court emphasized that under equal protection analysis, the burden is on the defendant to prove discriminatory enforcement by showing that he has been singled out for prosecution over others similarly situated and that such action is selective and invidious.[77] By not admitting the full evidence regarding the penalties assessed against its competitor, the court reasoned, the jury was misled.[78] As admitted in excised form, the enforcement log most likely influenced the jurors to assess penalties which were far out of line with other companies similarly situated. The evidence on penalties contained in the enforcement logs should have been admitted so that the jury could assess MSC's discriminatory enforcement argument completely. Accordingly, the judgment of the district court was reversed and the case was remanded.[79]

II. LEGISLATIVE DEVELOPMENTS

The Seventy-Second Texas Legislature enacted substantial environmental legislation during its regular, first and second called sessions. During the regular session, the legislature passed the Waste Reduction Policy Act of 1991[80] and the Oil Spill Prevention and Response Act of 1991.[81] During the first called session, the legislature passed legislation creating the Texas Natural Resource Conservation Commission to replace the Texas Water Commission and substantially amended the Texas Water Code.[82] In addition, the Seventy-Second Legislature enacted legislation to provide for a comprehensive coastal management plan for the protection of state-owned coastal wetlands and to provide for beach access, dune preservation and the remediation of coastal erosion.[83] Lastly, legislation was enacted to provide initiatives to encourage state and local recycling programs.[84]

A. Creation of the Texas Natural Resource Conservation Commission

The Seventy-Second Legislature amended the Texas Water Code to replace the TWC with the Texas Natural Resource Conservation Commission

76. *Id.*

77. *Malone*, 804 S.W.2d at 176 (citing U.S. v. Rice, 659 F.2d 524, 526 (5th Cir. 1981) and U.S. v. Kahl, 583 F.2d 1351, 1353 (5th Cir. 1978)).

78. *Id.*

79. *Id.* at 177.

80. 72nd Leg., R.S., ch. 296, 1991 Tex. Sess. Law Serv. 1235 (Vernon) (to be codified as an amendment to TEX. HEALTH & SAFETY CODE ANN. §§ 361.003-.440 (effective June 7, 1991)).

81. 72nd Leg., R.S., ch. 10, 1991 Tex. Sess. Law Serv. 13 (Vernon) (to be codified at TEX. NAT. RES. CODE ANN. ch. 40).

82. Act of August 12, 1991, 72nd Leg., 1st C.S., ch. 3, 1991 Tex. Sess. Law Serv. 4 (Vernon); TEX. WATER CODE ANN. §§ 1.001-52.001 (Vernon 1991).

83. The Coastal Management Plan for Beach Access, Preservation and Enhancement, Dune Protection, and Coastal Erosion, 72d Leg., R.S., ch.295, §§ 1-44, 1991 Tex. Sess Law Serv. 1220 (Vernon).

84. Act of May 26, 1991, 72d Leg., R.S., ch. 303 §§ 1-25. 1991 Tex. Sess. Law Serv. 1267 (Vernon).

(NRCC),[85] effective September 1, 1993.[86] The creation of the NRCC is the result of a major reorganization of the state's environmental regulatory scheme.[87] The legislation provides for increased civil and criminal penalties for violations of Texas environmental laws. Enforcement by the agency is expected to rise.

As part of the reorganization in Senate Bill 2, effective September 1, 1993, the TACB will be abolished and the NRCC will assume all of its functions and responsibilities.[88] In addition, effective August 31, 1993, the NRCC will assume all the powers and duties of the Texas Department of Health (TDH) relating to the handling and disposing of solid waste.[89] The NRCC will also assume the permit functions with respect to the disposal of solid and radioactive waste formerly handled by the Texas Department of Health.[90] Lastly, on September 1, 1992, the TWC and thereafter the NRCC will assume all the duties and functions of the Texas Water Well Drillers Board and the Texas Board of Irrigators.[91]

Another goal of the recent legislation sessions was the adoption of legislation that will allow Texas to begin to implement the federal Clean Air Act Amendments of 1990.[92] Senate Bill 2 attempts to make the necessary changes to Texas' Clean Air Act. The TACB, which will become the NRCC after the agency consolidation, is specifically authorized to control air contaminants as is necessary to protect against acid rain, ozone depletion and global warming.[93] The Texas Clean Air Act's section on criminal penalties has also been significantly expanded.[94]

Because of the immense scope of the changes effected by Senate Bill 2, this Article only examines the more significant enactments and amendments.[95]

1. The Purpose Of The Natural Resource Conservation Commission

The stated purpose of the NRCC is to provide a "more efficient and effective administration of the conservation of natural resources and the protection of the environment in this state and to define the duties, responsibilities, authority, and functions of the commission and the executive director."[96]

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85. Act of August 12, 1991, 72nd Leg., 1st C.S., ch. 3 § 1.085, 1991 Tex. Sess. Law Serv. 4, 42 (Vernon).

86. *Id.*

87. The changes were the result of Senate Bill 2. *Id.*, 1991 Tex. Sess. Law Serv. 4 (an act "relating to the oversight and regulation of the state's environmental resources, natural resources, and energy resources; providing for the issuance of bonds by mitigation project participants; creating offenses and providing civil and criminal penalties.").

88. *Id.* § 1.086, 1991 Tex. Sess. Law. Serv. at 42.

89. *Id.* § 1.088, 1991 Tex. Sess. Law. Serv. at 43.

90. *Id.*

91. *Id.* § 1.089, 1991 Tex. Sess. Law. Serv. at 43.

92. *See Id.* §§ 2.02-2.391, 1991 Tex. Sess. Law Serv. at 46-71.

93. *Id.* § 2-3. 1991 Tex. Sess. Law Serv. at 47.

94. *Id.* §§ 2.21-2.22, 1991 Tex. Sess. Law Serv. at 61-62.

95. For a more comprehensive overview of the newly enacted environmental legislation and amendments, *see* B.J. Wynne and Gregory M. Ellis, *Survey of Environmental Law Enacted by the Seventy-Second Texas Legislature*, 45 S.W.L.J. 1221 (1991).

96. Act of August 12, 1991, *supra* note 82, § 1.003, 1991 Tex. Sess. Law Serv. at 5 (to be codified at TEXAS WATER CODE ANN. § 5.011).

This expands the duties of its predecessor, the TWC, from just the administration of matters concerning water in the state.[97] The NRCC was created as a transitional organization and will be composed of four deputy directors and an executive director.[98] One deputy director for air quality will be responsible for the management and supervision of the NRCC under the Texas[99] and Federal Clean Air Acts.[100] One deputy director for water will be responsible for the management and supervision of all water programs.[101] One deputy director for waste management will be responsible for all regulatory duties with respect to hazardous waste.[102] Lastly, one deputy director will be responsible for the management and supervision of the accounting and budgeting processing systems.[103]

2. *License Authority of the Natural Resource Conservation Commission*

A new subchapter, subchapter K, was added to the Health and Safety Code regarding the licensing authority of the NRCC with respect to radioactive waste materials.[104] The NRCC will be the sole authority, effective March 1, 1992, to directly regulate and issue licenses for the disposal of radioactive substances instead of the Railroad Commission.[105] Similarly, the legislature amended subchapter F of the Health and Safety Code to require that a license be obtained from the NRCC instead of the TDH to operate a disposal site.[106] In accordance with these two new subchapters, the TDH and the NRCC are required to adopt a "memorandum of understanding" outlining their respective duties.[107]

B. Texas Hazardous Waste Reduction Policy Act Of 1991

During the regular Session, the Texas legislature passed the Hazardous Waste Reduction Policy Act of 1991 (the Hazardous Waste Act).[108] The Hazardous Waste Act amends the Texas Health and Safety Code to include sections regarding the regulation of "commercial hazardous waste management facilit[ies]."[109] A commercial hazardous waste management facility (waste facility) is defined as "any hazardous waste management facility that

97. *Id.*
98. *Id.* § 1.0171, 1991 Tex. Sess. Law Serv. at 7 (to be codified at TEX. WATER CODE ANN. § 5.222).
99. TEX. HEALTH & SAFETY CODE ANN. §§ 382.001-.115 (Vernon Pamph. 1991).
100. 42 U.S.C. §§ 7401-7642 (1988).
101. Act of August 12, 1991, *supra* note 82, § 1.0171, 1991 Tex. Sess. Law Serv. at 7.
102. *Id.*
103. *Id.*
104. *Id.* § 1.050, 1991 Tex. Sess. Law Serv. at 18 (to be codified as an amendment to TEX. HEALTH & SAFETY CODE ch. 401).
105. *Id.* (to be codified at TEX. HEALTH & SAFETY CODE ANN. § 401.412).
106. *Id.* § 1.051, 1991 Tex. Sess. Law Serv. at 19 (to be codified at TEX. HEALTH & SAFETY CODE ANN. § 402.1511).
107. *Id.* § 1.051, 1991 Tex. Sess. Law Serv. at 19 (to be codified at TEX. HEALTH & SAFETY CODE ANN. § 402.1512).
108. 72d Leg., R.S., ch. 296, 1991 Tex. Sess. Law Serv. 1235 (Vernon) (to be codified as an amendment to TEX. HEALTH & SAFETY CODE ANN. §§ 361.003-.440 (effective June 7, 1991)).
109. *Id.* § 1.01, 1991 Tex. Sess. Law Serv at 1236 (to be codified at TEX. HEALTH & SAFETY CODE ANN. § 361.003(5)).

accepts hazardous waste or PCBs for a charge."[110] A hazardous waste management facility includes land used for "processing, storing, or disposing of hazardous waste."[111] The term includes publicly or privately owned waste facilities.[112]

In addition, Senate Bill 1099, which was enacted in June of 1991, contains a "moratorium" on hazardous waste facilities permitting.[113] Although state legislators rejected Governor Richards' call for a two year ban on the permitting of hazardous waste facilities, they enacted a four month ban on permitting new facilities and granting amendments, renewals, and other changes to existing permits. The Hazardous Waste Act requires more stringent rules for permitting various hazardous waste management facilities and increased the role of public input into the permitting process.[114]

1. Commercial Hazardous Waste Disposal Capacity Assessment

Not later than January 1, 1992, the TWC must calculate the need for commercial hazardous waste management capacity in Texas.[115] In making the assessment, the TWC must consider the need for various technologies for commercial waste disposal and evaluate the disposal capacity on a technology-by-technology basis.[116] The TWC must also assess metals and organic recovery, incineration of solid and liquid waste and the dumping and depositing of wastes in salt mines.[117] In addition, the TWC, no later than March 1, 1996, in consultation with the TDH, is required to evaluate the state's capacity for commercial non-hazardous solid waste disposal.[118]

In making either assessment, hazardous or non-hazardous, the TWC and the TDH must consider the demand for different technologies for the disposal of commercial waste on a technology-by-technology basis.[119] In order to encourage applicants for permits for waste facilities to include recycling and recovery components, the TWC and the TDH are required to provide a permit process that recognizes the development of new and innovative disposal technologies emphasizing waste reduction efforts.[120] In connection with a permit application, the TWC must hold a public meeting in the county in

110. *Id.*

111. *Id.* § 1.01, 1991 Tex. Sess. Law Serv. at 1237 (to be codified at TEX. HEALTH & SAFETY CODE ANN. § 361.003(16)).

112. *Id.*

113. Act of May 27, 1991, 72nd Leg., R.S., ch. 296, 1991 Tex. Sess. Law Serv. 1235 (Vernon).

114. *Id.*

115. *Id.* § 1.02, 1991 Tex. Sess. Law Serv. at 1240 (to be codified at TEX. HEALTH & SAFETY CODE ANN. § 361.0232).

116. *Id.* § 1.02, 1991 Tex. Sess. Law Serv. at 1240 (to be codified at TEX. HEALTH & SAFETY CODE ANN. § 361.0232(a)).

117. *Id.*

118. *Id.* § 1.02, 1991 Tex. Sess. Law Serv. at 1241 (to be codified at TEX. HEALTH & SAFETY CODE ANN. § 361.0233(a)).

119. *Id.*

120. *Id.* § 1.02, 1991 Tex. Sess. Law Serv. at 1241 (to be codified at TEX. HEALTH & SAFETY CODE ANN. § 361.0234(a)).

which the proposed waste facility is to be located.[121] Before a permit may be issued for a new waste facility or amended to provide for capacity expansion, the act requires an applicant to identify the extent to which any new or potential sources of waste will be stored or disposed of by the facility.[122]

The TWC is also required to evaluate the impact of the proposed facility on local land use.[123] In determining whether a new waste facility is compatible with local land use, the act requires the TWC to consider, at a minimum, "the location of industrial and other waste-generating facilities in the area, the amounts of hazardous waste generated by those facilities, and the risks associated with the transportation of hazardous waste to the facility."[124] A permit may not be issued for a new commercial hazardous waste facility if it is located "within one-half of a mile (2640 feet) of an established residence, church, school, day care center, surface water body used for a public drinking water supply, or a dedicated public park."[125] A permit application for a waste facility will not be issued unless the applicant can demonstrate the existence of emergency response capabilities at the proposed site adequate to handle a worst-case emergency.[126] The TWC must establish requirements for commercial hazardous waste management facilities that will enable periodic monitoring in order to assure compliance by the facilities with the terms of their respective permits.[127]

2. *Hazardous Waste Injection Wells*

The Texas Health & Safety Code is amended to provide that before a permit for a hazardous waste injection well in a solution-mined salt dome cavern is issued, the TWC must find an urgent public necessity for the injection well.[128] The Water Code also is amended by adding subsection G to provide that the TWC must find an urgent public necessity to permit hazardous waste injection into a well in a solution-mined salt dome cavern.[129]

3. *Pollution Prevention*

The Health and Safety Code is amended by adding subchapter N entitled

121. *Id.* § 1.04, 1991 Tex. Sess. Law Serv. at 1242 (to be codified at TEX. HEALTH & SAFETY CODE ANN. § 361.0791(a)).
122. *Id.* § 1.13, 1991 Tex. Sess. Law Serv. at 1248 (to be codified at TEX. HEALTH & SAFETY CODE ANN. § 361.0871(a)).
123. *Id.* § 1.13, 1991 Tex. Sess. Law Serv. at 1248 (to be codified at TEX. HEALTH & SAFETY CODE ANN. § 361.0871(b)).
124. *Id.*
125. *Id.* § 1.17, 1991 Tex. Sess. Law Serv. at 1249 (to be codified at TEX. HEALTH & SAFETY CODE ANN. § 361.102(b)).
126. *Id.* § 1.18, 1991 Tex. Sess. Law Serv. at 1250 (to be codified at TEX. HEALTH & SAFETY CODE ANN. § 361.109(c)).
127. *Id.* § 1.19, 1991 Tex. Sess. Law Serv. at 1251 (to be codified at TEX. HEALTH & SAFETY CODE ANN. § 361.113(a)).
128. *Id.* § 1.20, 1991 Tex. Sess. Law Serv. at 1251-52 (to be codified at TEX. HEALTH & SAFETY CODE ANN. § 361.114(b)).
129. *Id.* § 1.23, 1991 Tex. Sess. Law Serv. at 1252 (to be codified at TEX. WATER CODE ANN. § 27.051).

"Pollution Prevention."[130] The new policy and goals of this subchapter focus on source reduction and waste minimization.[131] "Source reduction" has the meaning assigned by the Federal Pollution Prevention Act of 1990.[132] "Waste Minimization" refers to the reduction of the environmental or health risks associated with hazardous waste and includes the "reuse, recycling, neutralization, and detoxification" of waste.[133]

The new subchapter's policies and goals are to "reduce pollution at its source and to minimize the impact of pollution in order to reduce risk to public health and the environment and continue to enhance the quality of air, land, and waters of the state where feasible."[134] Reduction of hazardous waste at its source is the primary goal of the new policy because no risk is posed to the public health if no waste is generated.[135] The secondary goal is to minimize waste once generated at the source wherever possible.[136] In accordance with these policies, source reduction and waste minimization plans are to be proposed.[137] These plans must include an outline and a prioritized list of economically and technologically feasible source reduction and waste minimization projects.[138] In conjunction with the plan, an annual report must be submitted outlining a summary of the plan.[139]

C. *The Oil Spill Prevention And Response Act Of 1991*[140]

The Seventy-Second Legislature amended the Natural Resources Code by adding chapter 40, the Oil Spill Prevention and Response Act of 1991 (the Oil Spill Act).[141]

1. *Policy*

The Oil Spill Act was passed to recognize the urgent need to protect the coastal environment in Texas.[142] In doing so, the Oil Spill Act recognizes the hazards posed by the transportation of oil and petroleum products in the

130. *Id.* § 2.01, 1991 Tex. Sess. Law Serv. at 1254 (to be codified as an amendment to TEX. HEALTH & SAFETY CODE ANN. ch. 361).

131. *Id.* § 2.01, 1991 Tex. Sess. Law Serv. at 1255-56 (to be codified at TEX. HEALTH & SAFETY CODE ANN. § 361.432).

132. Pub. L. No. 101-508, § 6603(5), 104 Stat. 1388 (to be codified at 42 U.S.C. § 13.102) (defining "source reduction" as any practice which "(i) reduces the amount of any hazardous substance, pollutant, or contaminant entering any waste stream or otherwise released into the environment . . . prior to recycling, treatment, or disposal; and (ii) reduces the hazards to public health and the environment.").

133. Waste Reduction Act, *supra* note 103, § 2.01, 1991 Tex. Sess. Law Serv. at 1255 (to be codified at TEX. HEALTH & SAFETY CODE ANN. § 361.431(11)(12)).

134. *Id.* (to be codified at TEX. HEALTH & SAFETY CODE ANN. § 361.432(a)).

135. *Id.* (to be codified at TEX. HEALTH & SAFETY CODE ANN. § 361.432(b)).

136. *Id.* (to be codified at TEX. HEALTH & SAFETY CODE ANN. § 361.432(c)).

137. 1991 Tex. Sess. Law Serv. at 1256-57 (to be codified at TEX. HEALTH & SAFETY CODE ANN. § 361.435.

138. *Id.*

139. *Id.* 1991 Tex. Sess. Law Serv. at 1257 (to be codified at TEX. HEALTH & SAFETY CODE ANN. § 361.436).

140. 72d Leg., R.S., ch. 10, 1991 Tex. Sess. Law Serv. 13 (Vernon)(to be codified at TEX. NAT. RES. CODE ANN. Ch. 40).

141. *Id.*

142. *Id.* § 40.002(a), 1991 Tex. Sess. Law Serv. at 13.

coastal waters of Texas.[143] The state interests in preventing the hazards associated with the transport of oil outweigh the economic burdens imposed under the Oil Spill Act.[144] In accordance with this policy, the legislative police power to protect coastal waters and shorelines is conferred upon the Commissioner of the General Land Office (the Commissioner), who will have the power to prevent spills, to provide for prompt response to abate and contain spills, to insure the removal and clean-up of pollution from such spills, to provide for the development of a discharge contingency plan, and to administer a fund for these activities.[145] Under the Commissioner's discretion, the General Land Office will be the state's lead agency for responding to actual or threatened unauthorized discharges of oil and for cleaning up the resulting pollution.[146] The Oil Spill Act provides continued authority for the Texas Railroad Commission to conduct permitting and enforcement proceedings to prevent pollution of surface and subsurface waters resulting from the "exploration, development, or production of oil, gas, or geothermal resources, including the transportation of oil or gas by pipeline."[147]

2. *Administration of Oil Spill Response and Cleanup*

The person responsible for the unauthorized discharge of oil or the person who has knowledge of the discharge must immediately notify the Commissioner and "undertake all reasonable actions to abate, contain, and remove pollution from the discharge."[148] Once notified of an actual or threatened unauthorized discharge of oil, the Commissioner must evaluate the discharge to prevent, abate or contain any pollution.[149] If a hazardous substance is involved in the discharge, the Texas Water Commission has the responsibility to abate, contain, remove, and clean up the hazardous substance.[150] In any case, the Commissioner must promulgate a discharge contingency plan to respond to an actual or threatened discharge and any resulting cleanup.[151]

Qualified immunity is conferred on a person or cleanup organization for actions taken to eliminate, contain or remove pollution from an unauthorized discharge.[152] Finally, a coastal protection fund is established in the Texas state treasury to be used by the Commissioner for carrying out the

143. *Id.*

144. *Id.*

145. *Id.* § 40.002(b), 1991 Tex. Sess. Law Serv. at 13. For any hearings required by the act, the Commissioner may establish procedures under the Administrative Procedure and Texas Register Act. *Id.* § 40.007(b), 1991 Tex. Sess. Law Serv. at 16.

146. *Id.* § 40.004(a), 1991. Tex. Sess. Law Serv. at 16.

147. *Id.* § 40.008, 1991 Tex. Sess. Law Serv. at 16.

148. *Id.* § 40.101(a), 1991 Tex. Sess. Law Serv. at 18.

149. *Id.* § 40.051, 1991 Tex. Sess. Law Serv. at 17.

150. *Id.* § 40.052, 1991 Tex. Sess. Law Serv. at 17.

151. *Id.* § 40.053(a), 1991 Tex. Sess. Law Serv. at 17. The Texas Water Commission, the Parks and Wildlife Department, and the Railroad Commission of Texas shall cooperate with the Commissioner of the Land Office in promulgating the provisions of the plan. *Id.*

152. *Id.* § 40.104(a), 1991 Tex. Sess. Law Serv. at 19.

purposes of the Act.[153] The fund can not exceed $50 million.[154]

D. *The Coastal Management Plan for Beach Access, Preservation and Enhancement, Dune Protection, and Coastal Erosion*

The Coastal Management Plan for Beach Access, Preservation and Enhancement, Dune Protection, and Coastal Erosion[155] establishes a comprehensive coastal management program as a first step towards development of a Texas state coastal zone management program under the federal Coastal Zone Management Act.

1. *Coastal Area Initiatives*

Coastal area initiatives added by this act include provisions addressing coastal erosion,[156] beach access,[157] dune protection,[158] the development of a coastal management plan,[159] and coastal flooding.[160] The General Land Office (GLO) is authorized to promulgate rules to avoid and remediate erosion, identify and prioritize critical coastal erosion areas, and promulgate rules on beach access issues, including protection of the public beach access easement from erosion and construction on land adjacent to public beaches.[161]

2. *Coastal Coordination Council*

In addition, the Coastal Coordination Council is created to establish the goals of the coastal management plan and to review federal, state and local activities for consistency with the plan.[162] The council consists of the Commissioner of the GLO, the Texas attorney general, the chairpersons of the Parks and Wildlife Commission and Texas Water Commission, a member of the Railroad Commission, one city or county elected official and one resident from the coastal area appointed by the governor.[163]

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153. *Id.* § 40.151(b), 1991 Tex. Sess. Law Serv. at 23.

154. *Id.*

155. Act effective June 7, 1991, S.B. 1053, 72nd Legis, R.S., ch. 2005, 1991 Tex. Sess. Law Serv. 1220 (Vernon).

156. *Id.* § 3, 1991 Tex. Sess. Law. Serv. at 1221 (to be codified as an amendment to TEX. NAT. RES. CODE ANN. §§ 33.601-33.604).

157. *Id.* §§ 5-17, 1991 Tex. Sess. Law Serv. at 1222-27 (to be codified as an amendment to TEX. NAT. RES. CODE ANN §§ 61.011-61.129).

158. *Id.* §§ 18-30, 1991 Tex. Sess. Law Serv. at 1227-29 (to be codified as an amendment to TEX. NAT. RES. CODE ANN. §§ 63.001-63.122).

159. *Id.* §§ 34-36, 1991 Tex. Sess. Law Serv. at 1230-31 (to be codified as an amendent to TEX. NAT. RES. CODE ANN. §§ 33.-52-33.055).

160. *Id.* §§ 39-44, 1991 Tex. Sess. Law Serv. at 1234-35 (to be codified as an amendment to TEX. WATER CODE ANN. §§ 15.002, 16.320-16.321, 17.001).

161. *Id.* §§ 3,4,30,38,39.

162. *Id.* § 37, 1991 Tex. Sess. Law Serv. at 12331 (to be codified as an amendment to TEX. NAT. RES. CODE ANN. §§ 33.201-33.208).

163. *Id.*

E. The Coastal Management Plan for State Owned Coastal Wetlands

The Coastal Management Plan for State-Owned Coastal Wetlands[164] is designated to recognize the value of state-owned coastal wetlands and provide for the creation of a State Wetlands Conservation Plan by the Texas Parks and Wildlife Department and GLO.[165] The plan creates a framework for attaining the goal of no overall net loss of state-owned coastal wetlands.[166]

The State Wetlands Conservation Plan addresses numerous issues: the inventory of state-owned wetlands and potential sites for compensatory mitigation; the enhancement, restoration and acquisition of wetlands; a clarification of wetlands mitigation policy among various state agencies; the development of guidelines and regulations for mitigation banking; the preparation of a long-range navigational dredging and disposal plan; and provisions to encourage the reduction of nonpoint source pollution of coastal wetlands, bays, and estuaries.[167]

F. Mandatory Recycling Programs

The Texas Legislature demonstrated its dedication to addressing environmental issues by enacting legislation in the spring of 1991 containing initiatives to encourage state and local recycling and the use of recycled products.[168] Under this act, Texas state agencies, state courts or judicial agencies, university systems or institutions of higher education, counties, municipalities, school districts, and special districts must establish programs for the separation and collection of all recyclable materials generated by the entity's operation.[169] At a minimum, this provision requires the collection of materials including aluminum, high-grade office paper, and corrugated cardborad.[170] The goal of this legislation is to achieve recycling of at least forty percent of the state's municipal solid waste stream by January 1, 1994.[171]

164. The Coastal Management Plan for State-Owned Coastal Wetlands, S.B. 1054, 72nd Leg., R.S., ch. 265, 1991 Tex. Sess. Law Serv. 1173 (Vernon) (act effective June 5, 1991).

165. *Id.* § 4, 1991 Tex. Sess. Law Serv. at 1172 (to be codified at TEX. PARKS & WILD CODE ANN. §§ 14.001-14.003).

166. *Id.* § 2, 1991 Tex. Sess. Law Serv. at 1173.

167. *Id.* § 4.

168. Act of May 26, 1991, S.B. 1340, 72nd Legis., R.S., ch. 303, 1991 Tex. Sess. Law Serv. 1267 (Vernon).

169. *Id.* § 1, 1991 Tex. Sess. Law Serv. at 1269 (to be codified at TEX. HEALTH & SAFETY CODE ANN. § 361.425).

170. *Id.*

171. *Id.* § 1, 1991 Tex. Sess. Law Serv. at 1268 (to be codified at TEX. HEALTH & SAFETY CODE ANN. § 361.433).