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COMMENT

TEXAS RESPONDS TO THE USED OIL PROBLEM: THE USED OIL COLLECTION, MANAGEMENT, AND RECYCLING ACT

by Kyle Dudley Roberts

I. INTRODUCTION

In the summer of 1991 the Texas legislature gave a much needed boost to the Texas environment in the form of amendments to the Texas Health and Safety Code. The amendments codify the State's recycling policy, initiate a recycling awareness campaign, foster and promote governmental recycling, and establish a newsprint recycling program. In addition, the amendments create a depleted lead acid battery program, and a waste tire recycling program. The principal component of the amendments is the Used Oil Collection, Management, and Recycling Act (the Act). As noted below, the Act addresses a problem the United States Environmental Protection Agency (EPA) has avoided since 1984. Although far from perfect, the Act is a significant improvement in the state's approach to used oil disposal and recycling.

This comment surveys the amendments as they relate to used oil and the Used Oil Collection, Management, and Recycling Act. The first portion of

3. Id. (to be codified at TEX. HEALTH & SAFETY CODE ANN. § 361.424).
4. Id. (to be codified at TEX. HEALTH & SAFETY CODE ANN. §§ 361.425-426).
5. Id. (to be codified at TEX. HEALTH & SAFETY CODE ANN. § 361.430).
6. Id. (to be codified at TEX. HEALTH & SAFETY CODE ANN. § 361, subchapter O).
9. See infra notes 23-85 and accompanying text.
10. See infra notes 38-85 and accompanying text.
this Comment is a general overview of the problems associated with used oil. The second section reviews federal actions as they pertain to the identification of used oil as a hazardous substance. The final section discusses the key provisions of the Act. It is too early to predict how the courts will interpret the Act's language, and, as a consequence, the Act's ultimate impact on the Texas environment. Nevertheless, the Act and the other amendments reflect Texas' commitment to environmental protection and create an infrastructure to address the critical problem of improper used oil disposal.

II. THE USED OIL PROBLEM

The Act's passage is significant because it addresses and resolves, at the state level, a problem unresolved at the federal level for many years. The problem is used oil, particularly used oil generated by private citizens. Over 1.2 billion gallons of used oil are produced in the United States every year.11 Used oil is virtually ubiquitous because it is generated by so many sources. The sources of the used oil are varied and include automobiles, airplanes, boats, trucks, train engines, and various manufacturing processes. Research indicates that 493 million gallons of used oil escape proper management each year.12 The National Oil Recyclers Association and the EPA estimate that 241 million gallons of used oil are improperly dumped in the ground each year.13 As a comparison, that is twenty-four times the amount of oil spilled by the Exxon Valdez into Prince William Sound.14 Means of improper disposal include surreptitious dumping into or on the ground, in landfills, into sewers and drainage systems, and into other watercourses.15 Given the magnitude of these illegal discharges and the concomitant adverse impact on human health, one would expect timely and effective legislation at the federal and state level to deal with the problem. Regrettably, that expectation has been only partially fulfilled.

A. Federal Law and Used Oil

I. CERCLA and the Petroleum Exclusion

The Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA)16 is the foundation for governmental response authority, release notification, and liability with regard to the release of a "hazardous substance."17 CERCLA defines the term "hazardous sub-

13. Id.
14. Id.
15. See Used Oil Act, supra note 8 (to be codified at Tex. Health & Safety Code Ann. § 371.041(b)). One can reasonably interpret this section as arising from common methods people have used in the past to improperly dump their used oil.
stance” 18 to include approximately 715 toxic substances, listed under four other environmental statutes, including the Resource Conservation and Recovery Act (RCRA). 19 The definition of “hazardous substance” specifically excludes “petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance.” 20 This exclusion has been characterized as a tribute to the influence and lobbying efforts of the oil companies, 21 and, because CERCLA does not define “petroleum,” has given rise to disputes regarding the nature and scope of the exclusion. For purposes of this Comment, the question is whether used, or “waste” oil, falls within the CERCLA petroleum exclusion.

The EPA has attempted to provide some direction as to the scope of the CERCLA petroleum exclusion. 22 The definitive EPA interpretation of the term “petroleum” is contained in a 1987 memorandum from the EPA General Counsel to the Assistant Administrator for Solid Waste and Emergency Response. 23 The EPA General Counsel opined that the petroleum exclusion includes crude oil and crude oil fractions, and any hazardous substances that are “indigenous” in such petroleum substances. 24 In addition, “petroleum” includes “hazardous substances which are normally mixed with or added to crude oil or crude oil fractions during the refining process.” 25 In contrast, the petroleum exclusion does not include hazardous substances which are “added to” 26 or which increase in concentration “solely as a result of contamination of the petroleum during use.” 27 Based on this interpretation, the EPA concluded that it could respond to releases of the “added” hazardous substance, but not to the release of the oil itself. 28 The EPA also opined that “most used oil” would not be within the petroleum exclusion because the contaminants frequently found in used oil are listed as hazardous substances; as a consequence, the presence of these contaminants bring used oil within the reach of CERCLA. 29 Thus, a discharge of virgin petroleum is excluded from the operation of CERCLA, but a discharge of used automobile oil, to the extent such oil contains listed hazardous substances in excess of the level “normally” found in crude oil or crude oil fractions (which includes raw and

22. See, e.g., 51 Fed. Reg. 8206 (1986) (used oil which contains hazardous substances at levels in excess of those normally found in petroleum is subject to CERCLA); 50 Fed. Reg. 13,456, 13,460 (1985) (“waste oil” includes only unadulterated waste oil); 46 Fed. Reg. 22,144, 22,145 (1981) (petroleum wastes which are not specifically listed under RCRA are excluded from the definition of “hazardous waste” for notification purposes under section 103(c)).
23. See EPA General Counsel Memo, supra note 17, at 41:3321.
24. Id. at 41:3323.
25. Id.
26. Id.
27. Id.
28. EPA General Counsel Memo, supra note 17, at 41:3323.
29. Id. at 41:3322.
blended gasoline)\textsuperscript{30} does not fall within the exclusion.

2. RCRA, HSWA and the Bifurcated Treatment of Used Oil Under Federal Law

Congress passed the Used Oil Recycling Act of 1980 (UORA)\textsuperscript{31} to provide some means for recycling used oil. As part of this legislation, Congress placed the burden on the EPA\textsuperscript{32} to determine whether to apply the characteristics of hazardous wastes employed under RCRA\textsuperscript{33} to used oil, and to report its determination to Congress.\textsuperscript{34} This act also required the EPA to provide Congress with the supporting data on which it based its determination.\textsuperscript{35} The UORA did not require the EPA to list used oil as a hazardous waste, but merely required the EPA to determine whether used oil met the statutory and regulatory criteria normally applied to such substances.\textsuperscript{36} In response to the directive, the EPA determined that, due to the presence of toxic constituents, certain used oils should be listed as hazardous wastes.\textsuperscript{37} Despite this determination, the EPA failed to list used oil as a hazardous waste.\textsuperscript{38} As a consequence of this failure, Congress passed sections 241-42 of the Hazardous and Solid Waste Amendments of 1984 (HSWA)\textsuperscript{39} to "prod" the EPA to take action.\textsuperscript{40}

Title 42 of the United States Code, sections 6935(b) and (c), codifies the principal provisions of the HSWA. Section 6935(b) required the EPA to "propose whether to list or identify used automobile and truck crankcase oil as hazardous waste" under RCRA, on or before November 8, 1985.\textsuperscript{41} This section also required the EPA to make a final determination by November 8, 1986 whether to list used automobile and truck crankcase oil "and other used oil" as hazardous wastes under RCRA.\textsuperscript{42} In contrast, section 6935(c) pertains specifically to used oil which is recycled and exempts such oil from treatment under section 6935(b).\textsuperscript{43} Section 6935(c) thereby bifurcates the treatment provided to used oil on the basis of whether the oil is to be dis-

\textsuperscript{30} Id.
\textsuperscript{32} 94 Stat. at 2058 (uncodified).
\textsuperscript{34} 94 Stat. at 2058 (uncodified).
\textsuperscript{35} Id.
\textsuperscript{36} 42 U.S.C. §§ 6935(b) (1988).
\textsuperscript{38} See Hazardous Waste Treatment Council, 861 F.2d at 272.
\textsuperscript{41} 42 U.S.C. § 6935(b) (1988).
\textsuperscript{42} Id.
\textsuperscript{43} 42 U.S.C. § 6935(c).
posed of or recycled. An example of this separate treatment is the require-
ment under section 6935(c) that the EPA promulgate separate standards
relating solely to the generation and transportation of used oil meant for
recycling.

3. The EPA’s Schizophrenic Positions on Used Oil as Hazardous Waste

a. November 1985: Used Oil is a Hazardous Waste

On November 29, 1985, the EPA proposed to amend the regulations for
hazardous waste management under RCRA by listing used oil as a hazard-
ous waste. The EPA based the proposed rule on its determination that
used oil typically contains significant quantities of hazardous substances,
such as lead, other metals, chlorinated solvents, toluene, and naphtalene,
which pose a threat to human health and the environment if improperly
managed. This position was consistent with the EPA’s earlier determina-
tion in 1981, embodied in its report to Congress, that used oil was a haz-
ardous waste because of the presence of numerous toxicants such as benzene,
naphtalene, phenols, lead, chromium, and cadmium.

In proposing to list used oil as a hazardous waste, the EPA gave priority
to a perceived alteration in its mandate under the HSWA. The EPA inter-
preted the HSWA to place greater emphasis on protecting human health and
the environment than on encouraging the recovery and recycling of used
oil. With this in mind, the EPA applied the criteria for hazardous waste
and determined that “used oil contains highly toxic contaminants in signifi-
cant quantities, that these contaminants are mobile and persistent in the en-
vironment, and that used oil is generated in large quantities.” The EPA
concluded that, because of these qualities, used oil posed “a substantial pres-
ettention threat to human health or the environment,” and war-
ranted listing as a hazardous waste. The EPA also provided substantial
technical support for its conclusion that used oils contain toxic contaminants
in quantities that pose a threat to human health and the environment.

This supporting data emphasized the technical basis of the determination
and provided convincing evidence of the dangers inherent in used oil.

44. Id. § 6935(c)(1).
45. Id. § 6935(c)(2)(A).
47. Id.
50. Id. at 49,260.
51. Id. The EPA expressly acknowledged that it would continue to treat used oil in-
tended for disposal differently than used oil intended for recycling.
54. Id.
55. Id.
56. Id. The proposed rule identified a variety of toxic constituents that are contained in
used oil. These constituents included lead, trichloroethylene, tetrachloroethylene, 1,1,1-
trichloroethane, naphthalene and toluene in significant concentrations. Id. The EPA stated that
these substances have “carcinogenic, mutagenic, teratogenic, or other chronic or acutely toxic
b. November 1986: Used Oil is Not a Hazardous Waste

Less than one year after proposing to list all used oil as a hazardous waste, the EPA announced its decision not to adopt its own proposal.57 In a complete reversal of positions, the EPA determined that used oil being recycled should not be listed as a hazardous substance under RCRA.58 Furthermore, the EPA noted that it was conducting “certain studies” to determine whether used oil being disposed of should be listed as a hazardous waste under RCRA, or whether it should be regulated outside of RCRA under different statutes such as the Toxic Substances Control Act.59

In contrast to its earlier emphasis on the potential threat used oil posed to human health and the environment, the EPA based its 1986 decision on the conclusion that “listing recycled oil [as a hazardous waste] would discourage recycling of used oil.”60 The EPA did not claim a new interpretation of the HSWA as a basis for this change in position or reference a new alteration in its mandate. In fact, the EPA expressly stated that the provision on which it relied so heavily in its 1985 proposal had not been amended,61 and failed to explain its change in emphasis from the protection of human health to the encouragement of used oil recycling. Instead, the EPA ignored its earlier decision and based its decision not to adopt a hazardous waste listing on the tenuous and quantitatively unsupported conclusion that to do otherwise would discourage recycling.62

The EPA further claimed that although it had based its 1985 decision to list oil as a hazardous waste on a purely technical basis under 40 C.F.R. 261.11(a)(3),63 RCRA expressly authorized the EPA to consider nontechnical factors in its determination of whether to list a substance as a hazardous waste.64 This feeble and unpersuasive attempt to legitimize its action was
clearly a cave-in to "nontechnical" pressures.65

The EPA also supported its decision to bifurcate treatment of recycled oil and disposed oil on its tortured and newly adopted reading of the identical statute on which the EPA based its 1985 decision.66 In an alarming admission, the EPA stated that it found the claim that listing would discourage used oil recycling to be "inherently reasonable"67 and that it had not evaluated the effect of a hazardous waste listing on used oil recycling.68 This claim is distressing because, if true, the statement indicates that the EPA was woefully out of touch with the realities of the marketplace and had not performed the necessary research appropriate for such a significant and far-reaching determination. In addition to the foregoing, this claim is fundamentally inconsistent with the fact that in 1981 the EPA generated a report in response to UORA69 and that UORA mandated that the EPA consider the impact on reuse and recycling of a hazardous waste listing.70

c. EPA's Decision Not to List Used Oil For Recycling as a Hazardous Waste is Overturned in Court Challenge

The EPA's final determination not to list used oil as a hazardous waste was successfully challenged in Hazardous Waste Treatment Council v. EPA (HWTC I).71 The interpretation of 42 U.S.C. section 6935(b), and whether the section authorized the EPA to base its decision to list or not list a substance as hazardous on nontechnical factors was critical to the court's evaluation of the EPA's action.72 The court considered each of the EPA's arguments in support of its nontechnical approach,73 and rejected each as either implausible74 or unpersuasive.75 In sum, the court concluded that the EPA must base its decision on the technical considerations embodied in 42

65. Id. at 41,902 (the EPA stated that it had been "deluged" with hundreds of comments opposing the hazardous waste listing and that most of the comments stated that such a listing would disrupt established recycling networks. The EPA also stated that it was "impressed" by the "broad range of parties" who expressed concern over the listing).
66. Id.
67. Id. at 41,903.
68. Id. at 41,902.
69. See Report to Congress, supra note 37.
71. 861 F.2d 270 (D.C. Cir. 1988).
72. Id. at 275.
73. Id. at 275-76.
74. Id. at 275. The EPA claimed that because § 8 of the UORA directed it to "ensure that the recovery and reuse of used oil are not discouraged[,]" the agency could consider nontechnical factors in its determination of whether used oil is a hazardous waste. Id. The court pointed out that this language pertained only to the EPA's determination of whether the regulatory criteria applicable to hazardous wastes should be applied to used oil, not to the listing determination itself. The court also held that this language must be narrowly limited to this specific determination and to the report to Congress § 8 required. Id. In the court's view, once the EPA delivered its report to Congress, § 8 vanished and had no further application. Id.
75. Id. at 276. The court rejected other EPA claims founded on the interpretation that Congress intended to permit the EPA to determine hazardous waste listings based on whether the listing would promote the general aim of environmental protection. Id. at 275-76. The court evaluated the statute's historical development and concluded that Congress intended for the EPA to consider the UORA's general aim of environmental protection only when promulgating regulations pertaining to hazardous recycled oil. Given this view, the court determined
U.S.C. section 6921, and not on nontechnical considerations such as the "stigmatic effect" of a hazardous waste listing. As for the EPA's proposed separate treatment for recycled used oil and used oil meant for disposal, the court concluded that section 6935(b) required the EPA to provide a blanket determination for used oil in general, and that the statute did not indicate that Congress contemplated a distinction between these types of used oil based solely on their ultimate disposition. The impact of HWTC I is the invalidation of the EPA's final determination not to list used oil to be recycled as a hazardous waste, and the court's directive to the EPA to base its subsequent listing determination solely on the technical factors contained in the statute and the federal regulations. To date, the EPA has not complied with the court's directive.

d. The Listing Decision Remains Unresolved at the Federal Level

The debate over listing continues to rage, and proponents on both sides recently presented testimony on the issue to the House Energy and Commerce Committee's Subcommittee on Transportation and Hazardous Materials. The oil industry sought to prevent used oil from being classified as a hazardous waste. Proponents of nonlisting, including the Chair of the Subcommittee, reasoned that listing discourages used oil recycling. Proponents of listing disagree and claimed that California, which lists certain used oil as hazardous waste, recycled fifty percent more oil than in states that do not list used oil as hazardous. Moreover, those in favor of listing pointed out that, despite the listing, "the used oil industry in California is alive and well." The issue may be decided via legislation in the form of House Bill 1411, which, reportedly, would prohibit the EPA from listing used oil as a hazardous waste.

B. Treatment of Used Oil Under Texas Law: The Used Oil Collection, Management, and Recycling Act

On June 3, 1991, the Texas Legislature passed Senate Bill 1340, which
added chapter 371 to the Texas Health and Safety Code. This chapter is known as the Used Oil Collection, Management, and Recycling Act. The Act embodies the State's general policy for used oil and used oil recycling, stating that used oil is a valuable resource when properly managed. In addition, the Act establishes a framework with regard to public education, promotes the creation of oil collection facilities, sets forth registration requirements for transporters of used oil, and creates a program to provide grants to local governments as a means to encourage compliance with the Act's provisions. The following section focuses primarily on those provisions that set forth prohibited activities and offenses under the Act, establish liability for violations of the Act, and identify the applicable criminal and civil penalties imposed on violators.

1. The Need For a System to Deal with Privately Generated Used Oil

The Act is founded on the premise that used oil is a valuable energy resource and, when properly managed, contributes toward efficient energy use and resource conservation. In addition, the Act arose from the legislature's finding that private citizens dispose of "millions of gallons of used oil" improperly because they are not provided with adequate collection facilities. This lack of facilities induces private citizens to rid themselves of their used oil by other means, such as placing it "on land or in landfills, sewers, drainage systems, septic tanks, surface waters or groundwaters, watercourses, or marine waters." Improper disposal of used oil is not only a significant environmental problem, but also a waste of a valuable source of energy. Based upon this evaluation of the problem, the legislature found that "adequate public funds are required to provide for the proper collection, management, and recycling of used oil."

98. Id. (to be codified at Tex. Health & Safety Code Ann. § 371.002(1)).
99. Used Oil Act, supra note 8 (to be codified at Tex. Health & Safety Code Ann. § 371.002(3)).
100. Id.
101. Id. (to be codified at Tex. Health & Safety Code Ann. § 371.002(4)).
102. Id. (to be codified at Tex. Health & Safety Code Ann. § 371.002(5)).
103. Id. (to be codified at Tex. Health & Safety Code Ann. § 371.002(6)).
2. "Used Oil," "Recycling," and Other Key Statutory Definitions

As with other environmental statutes, the definitions of important terms in the Act establish the Act's scope and tone. The Act defines "used oil" as "any oil that has been refined from crude oil or a synthetic oil that, as a result of use, storage, or handling, has become unsuitable for its original purpose because of impurities or the loss of original properties but that may be suitable for further use and is recyclable."104 The Act defines "recycling" as "preparing used oil for reuse as a petroleum product by rerefining, reclaiming, or other means; or using used oil as a lubricant or petroleum product instead of using a petroleum product made from new oil."105 The Act defines other key terms such as a used oil "generator" and a "public used oil collection center." A used oil "generator" means "a person whose act or process produces used oil."106 A "public used oil collection center" includes "automotive service facilit[ies]," facilities that "store used oil in aboveground tanks" and accept "small quantities of used oil from private citizens," and "publicly sponsored collection facilit[ies]" that are designated and authorized by the Texas Department of Health to accept from private citizens "small quantities" of used oil for recycling.107 In an unfortunate omission, the Act does not define or otherwise give meaning to the term "small quantities" as it is used in conjunction with used oil in defining "public used oil collection center." This omission creates problems in interpreting the scope of these operations because there is no threshold to establish whether an operation is subject to the Act and its permitting provisions. Conversely, the use of the phrase "small quantities" implies that once an operation reaches a point where it receives "medium" or "large" quantities of oil from private citizens, the operation will no longer be subject to the Act.

3. The Components and Dynamics of the Used Oil Collection System Under the Act

The Act contemplates a program that educates the public and fosters the most efficient method to encourage used oil recycling by private citizens. To accomplish these objectives, the Act requires the Department of Health to create a program that informs the public of both the need for a used oil recycling program and the benefits of such a program.108 The program must create and publicize a used oil information center109 at which materials are available to explain the laws and rules pertinent to used oil recycling.110 The center must also provide the public with information regarding the location

104. Used Oil Act, supra note 8 (to be codified at TEX. HEALTH & SAFETY CODE ANN. § 371.003(10)).
105. Id. (to be codified at TEX. HEALTH & SAFETY CODE ANN. § 371.003(8)).
106. Id. (to be codified at TEX. HEALTH & SAFETY CODE ANN. § 371.003(5)).
107. Id. (to be codified at TEX. HEALTH & SAFETY CODE ANN. § 371.003(6)).
108. Id. (to be codified at TEX. HEALTH & SAFETY CODE ANN. § 371.021).
109. Used Oil Act, supra note 8 (to be codified at TEX. HEALTH & SAFETY CODE ANN. § 371.021(1)).
110. Id.
of collection centers and the proper methods for recycling oil. The Act does not mandate the establishment of collection facilities, but instead "encourages" private business and local governments to get involved. For businesses, this encouragement is in the form of limited liability to owners, operators, and lessors of properly registered public used oil collection centers. For local governments, the encouragement is in the form of state grants to those governments that create programs for the collection, reuse, and recycling of used oil generated by private citizens. To encourage such programs, the Act expressly promotes curbside pickup of used oil, publicly operated used oil collection centers, government-provided containers for used oil storage prior to pick up, and "any other activity the [D]epartment [of Health] determines will encourage the proper recycling of DIY used oil."

4. Violations Under the Act

The Act provides that "[a] person may not collect, transport, store, recycle, use, discharge, or dispose of used oil in any manner that endangers the public health or welfare or endangers or damages the environment." The mens rea requirements for an offense vary depending on the activity involved. Specifically, one commits an offense if that person "intentionally discharges used oil into a sewer, drainage system, septic tank, surface water or groundwater, watercourse, or marine water." In addition, a person commits an offense if that person "intentionally mixes or commingles used oil with hazardous waste or other hazardous substances or PCBs." Thus, one must intentionally discharge or mix used oil with other hazardous waste; an inadvertant discharge would not constitute an offense. The mens rea requirement is reduced to knowledge where the subject activity involves the

111. Id.
112. Id. (to be codified at TEX. HEALTH & SAFETY CODE ANN. § 371.021(2),(3)).
113. Id. (to be codified at TEX. HEALTH & SAFETY CODE ANN. § 371.025(a), (b), (c), (d), and (e)). In order to take advantage of this limited liability, the owners, operators and/or lessors must ensure that they do not (1) mix the collected oil with any hazardous waste or polychlorinated biphenyls (PCBs); (2) accept used oil they know to contain hazardous waste or PCBs; and (3) fail to comply with management standards adopted by the Department of Health.
114. Used Oil Act, supra note 8 (to be codified at TEX. HEALTH & SAFETY CODE ANN. § 371.023). The Act employs a specific definition for used automobile oil generated by private citizens. The term is "Do-it-yourself used oil," or "DIY" used oil, which it defines as "used oil that is generated by a person who changes the person's own automotive oil." Id. (to be codified at TEX. HEALTH & SAFETY CODE ANN. § 371.003(4)).
115. Id. (to be codified at TEX. HEALTH & SAFETY CODE ANN. § 371.023(b)(1)).
116. Id. (to be codified at TEX. HEALTH & SAFETY CODE ANN. § 371.023(b)(3)).
117. Id. (to be codified at TEX. HEALTH & SAFETY CODE ANN. § 371.023(b)(4)).
118. Id. (to be codified at TEX. HEALTH & SAFETY CODE ANN. § 371.023(b)(5)). See supra note 114 for the Act's definition of DIY used oil.
119. Used Oil Act, supra note 8 (to be codified at TEX. HEALTH & SAFETY CODE ANN. § 371.041(a)).
120. Id. (to be codified at TEX. HEALTH & SAFETY CODE ANN. § 371.041(b)(1)) (emphasis added).
121. Id. (to be codified at TEX. HEALTH & SAFETY CODE ANN. § 371.041(b)(3)) (emphasis added).
mixing or commingling of used oil with "solid waste" that will be disposed of in landfills, or where a person directly disposes of the used oil on land or in a landfill.

The Act identifies three other specific offenses, but does not identify the mental state required for the respective offense. The Act states that it is an offense to transport, market or recycle used oil without complying with the Act’s registration requirements; to "introduce used oil into the environment" by applying it to roads or land or any other manner; or to violate a cease and desist order issued by the Department of Health. Because the Act specified the mens rea requirements for certain offenses, a reasonable interpretation of the Act could require a lesser mens rea requirement, such as recklessness, negligence, or even strict liability, for these latter offenses.

The Act is consistent with RCRA and CERCLA, and with other environmentally oriented Texas statutes, in the sense that it provides for criminal liability. The Act is inconsistent with these other laws to the extent that the Act’s mens rea requirement of intent is more demanding than the knowledge requirement common to RCRA and CERCLA. RCRA imposes criminal penalties on any person who knowingly (1) "transports or causes to be transported any hazardous waste" in violation of the permitting requirements; (2) "treats, stores, or disposes of any hazardous waste" in violation of the act; (3) treats, stores, disposes, transports or otherwise handles any used oil in knowing violation of a permit; and (4) generates, treats, stores, exports, or disposes of hazardous waste and destroys, alters, conceals, or fails to file any record or other document required by the act. These are some of the primary violations under RCRA and yet it imposes the lesser mens rea of knowledge rather than one of willfulness or intent. CERCLA also imposes criminal penalties based on mens rea requirements below that of intent. For example, CERCLA requires notification to federal and state agencies when there has been a release of a reportable quantity of a hazardous substance. CERCLA imposes criminal penalties for failure to notify...
of such a release, but does not require knowledge for this element of the offense. In addition, CERCLA imposes a knowledge requirement for violations based on the failure to notify the EPA of the existence of facilities used for the treatment, storage or disposal of hazardous substances and the destruction, mutilation, erasure, disposal, concealment, or other falsification of records to be provided to the EPA. CERCLA is consistent with RCRA in the sense that each requires the lesser mens rea requirement of knowledge for violations of their respective primary provisions.

The Act is also inconsistent with the Texas Solid Waste Disposal Act (TSWDA) with regard to criminal penalties and the attendant mens rea requirement. The TSWDA imposes criminal penalties in response to significant violations on the basis of knowledge, not intent. Additional Texas statutes impose criminal penalties on violators based on lesser mens rea requirements. The Texas Water Commission (TWC) has authority under the Texas Water Code to protect the waters of the state. Under this authority the TWC may impose criminal penalties for unauthorized discharges of sewage, municipal waste, recreational waste, agricultural waste, or industrial waste into any water in the state. The TWC may also impose criminal penalties for any other acts that may cause pollution in state waters. The provisions authorizing these penalties do not require a willful act or even a knowing act for liability, although a conviction is only a misdemeanor and punishable by a $10,000 fine. The Texas Hazardous Substances Spill Prevention and Control Act (THSSPCA) sets forth regulations to govern spills or discharges of oil or hazardous substances into state waters and provides for criminal penalties. This act also requires persons responsible for any discharges or spills to remove or abate the discharges or spills. The THSSPCA requires knowledge before a criminal penalty can be im-

132. Id. § 9603(b). CERCLA does not require knowledge for the element associated with the failure to notify, but it does require that the person charged with the violation had knowledge of the release.
133. Id. § 9603(c).
134. Id. § 9603(d)(2).
136. TSWDA provides for several criminal penalties based on the knowledge requirement. These penalties may be imposed on a person who, among other things, knowingly (1) transports for storage, processing, or disposal any hazardous waste to any location that has not complied with the act's permitting requirements; (2) stores, processes, or disposes of any hazardous waste without a permit required by the act; (3) violates any material condition or requirement of a permit issued under the act; (4) omits, or causes to be omitted, material information or makes, or causes to be made, any false material statement or representation in any application, label, manifest, record, permit, or other document filed, maintained, or used to comply with any requirement of the act applicable to hazardous wastes; and (5) generates, transports, stores, processes, or disposes of, or otherwise handles hazardous wastes. TEX. HEALTH & SAFETY CODE ANN. § 361.221 (Vernon Supp. 1991).
138. Id. § 26.121(a)(1) (this section is effective until delegation of NPDES (National Pollutant Discharge Elimination System) permit authority).
139. Id. § 26.121(a)(3).
142. Id. § 26.266.
posed for the falsification of records or reports pertaining to the prevention or clean up of a discharge or a spill.\textsuperscript{143}

Given the preceding comparison between the Act and other environmental statutes, the Act's higher \textit{mens rea} requirements seem out of place. The Act's criminal penalties are not so disproportionate to those contained in comparable laws to warrant a higher \textit{mens rea} requirement. In fact, the Act's penalties, outlined below, seem miniscule when compared to those provided in RCRA and CERCLA. For example, violations of certain sections of RCRA subject the offender to fine of up to $250,000, imprisonment of up to 15 years, or both.\textsuperscript{144} Violations of other RCRA provisions are punishable by a fine of up to $50,000 per violation and imprisonment of up to two years for a first-time offender.\textsuperscript{145} If the offender is an organization, rather than a natural person, fines levied in connection with offenses may reach $1,000,000.\textsuperscript{146} CERCLA provides criminal penalties for violations of its reporting requirements that include imprisonment of up to three years, or five years for subsequent convictions.\textsuperscript{147} Violators of CERCLA may also receive fines under Title 18 of the United States Code, and these fines can reach $250,000 per individual and $500,000 per organization in the event of a felony conviction.\textsuperscript{148} Despite the Act's relatively mild criminal penalties, it remains possible that the Act may be enforced as successfully on the state level as other environmental statutes have been at the federal level.\textsuperscript{149}

5. \textit{Criminal and Civil Penalties and Other Relief Available Under the Act}

The Act provides that a first offense under the Act is a Class C misdemeanor.\textsuperscript{150} A Class C misdemeanor is punishable by a fine not to exceed $200.\textsuperscript{151} If a person is convicted of an offense under the Act and commits a subsequent offense, the second offense (and each successive offense) becomes a Class A misdemeanor.\textsuperscript{152} A Class A misdemeanor is punishable by "(1) a fine not to exceed $2,000; (2) confinement in jail for a term not to exceed one year; or (3) both a fine and imprisonment."\textsuperscript{153}

The Act also imposes civil penalties of between $100 and $500 per day for each violation of the Act.\textsuperscript{154} The Act does not provide for recovery of civil

\textsuperscript{143} Id. § 26.268(d).
\textsuperscript{145} Id. § 6928(d).
\textsuperscript{146} Id. § 6928(e).
\textsuperscript{147} 42 U.S.C. § 9603(b) (1991).
\textsuperscript{150} Used Oil Act, \textit{supra} note 8 (to be codified at \textsc{tex. health \\& safety code} § 371.042(a)).
\textsuperscript{151} \textsc{tex. penal code ann.} § 12.23 (Vernon 1974).
\textsuperscript{152} Used Oil Act, \textit{supra} note 8 (to be codified at \textsc{tex. health \\& safety code ann.} § 371.042(b)).
\textsuperscript{153} \textsc{tex. penal code ann.} § 12.21(1)-(3) (West 1974).
\textsuperscript{154} Used Oil Act, \textit{supra} note 8 (to be codified at \textsc{tex. health \\& safety code ann.} § 371.043(a)).
penalties by private citizens; instead, only the Texas Department of Health, the local government in whose jurisdiction the violation occurred, or the State of Texas may bring suit to recover.\footnote{155} In addition to the criminal and civil penalties noted above, the Act provides for injunctive relief.\footnote{156} Injunctive relief is available if a violation of the Act occurs or is threatened, if such a violation or threat of violation causes "or may cause immediate injury or constitutes a significant threat to the health, welfare, or personal property of a citizen, or a local government . . . ."\footnote{157} As with actions to recover civil penalties, only the Department of Health, the local government or the state may bring suit to enjoin the subject activity.\footnote{158}

6. The Used Oil Recycling Fund and the Automotive Oil Fee

The final major component of the Act is the creation of the used oil recycling fund (the Fund). The Fund is in the state treasury\footnote{159} and consists of the permit and registration fees authorized under the Act,\footnote{160} fines imposed and collected for violation of the Act, and applicable interest charges and penalties.\footnote{161} Other sources of funds include gifts, grants, donations and other financial assistance authorized under the Act.\footnote{162}

The principal means to generate revenue for the Fund is a fee on the sale of automotive oil. The Act imposes a fee of two cents per quart of oil or eight cents per gallon.\footnote{163} Although the Department of Health may adjust the fee to meet expenses for the recycling program,\footnote{164} the fee may not exceed five cents per quart or twenty cents per gallon.\footnote{165}

The primary purpose of the Fund is to meet the costs attendant to the recycling program the Act promotes. Specifically, the Fund is to be used for public education,\footnote{166} grants to local governments,\footnote{167} registration of used oil collection facilities, registration of used oil transporters, marketers, and re-

\footnote{155} Id. (to be codified at Tex. Health & Safety Code Ann. § 371.043(d)).
\footnote{156} Id. (to be codified at Tex. Health & Safety Code Ann. § 371.044).
\footnote{157} Id.
\footnote{158} Id.
\footnote{159} Used Oil Act, supra note 8 (to be codified at Tex. Health & Safety Code Ann. § 371.061(a)).
\footnote{160} Id. (to be codified at § 371.061(b)(1)). The Act allows the Department of Health to impose a registration fee on all public used oil collection facilities under section 371.024(e); the Act also provides for a registration fee to be imposed on all transporters of used oil under section 371.026(e), and for a fee on the sale of automotive oil under section 371.062(g). Id.
\footnote{161} Id. (to be codified at §§ 371.042 and 371.043). These sections provide for the imposition of criminal and civil penalties, respectively.
\footnote{162} Id. (to be codified at Tex. Health & Safety Code Ann. § 371.061(b)(3)). This section expressly allows the Department of Health to "apply for, request, solicit, contract for, receive, and accept gifts, grants, donations, and other assistance from any source to carry out its powers and duties under this chapter." Id. § 371.027.
\footnote{163} Id. (to be codified at Tex. Health & Safety Code Ann. § 371.062(g)).
\footnote{164} Used Oil Act, supra note 8 (to be codified at Tex. Health & Safety Code Ann. § 371.062(g)).
\footnote{165} Id.
\footnote{166} Id. (to be codified at Tex. Health & Safety Code Ann. § 371.061(c)(1)).
\footnote{167} Id. (to be codified at Tex. Health & Safety Code Ann. § 371.061(c)(2)).
cyclers, and for the administrative costs of implementing the Act. A portion of the Fund is earmarked to defray the cost of cleaning up sites contaminated by used oil. For that purpose, the Act requires the Department of Health to transfer twenty-five percent of the automobile oil fees collected to the Texas Water Commission. The TWC must use the transferred funds "for the sole purpose of restoring the environmental quality of those sites in the state that the commission has identified as having been contaminated through improper used oil management and for which other funds from a potentially responsible party or the federal government are not sufficient." Thus, the Fund has the dual purpose of meeting administrative and implementation costs, and defraying the state's cost of cleaning up sites contaminated with used oil.

III. CONCLUSION

The Used Oil Collection, Management, and Recycling Act is a major breakthrough with regard to used oil disposal and recycling. The Act promotes an ambitious public education program and encourages local governments, through the use of state grants, to create and utilize programs that assist the private citizen in properly disposing of used oil. Private citizens generate literally millions of gallons of used oil each year and the legislature

168. Id. (to be codified at Tex. Health & Safety Code Ann. § 371.061(c)(3)).
169. The fiscal note attached to the amendments contains projections of the revenue the Act will generate for the used oil recycling fund. Fiscal Note, Tex. S.B. 1340, 72d Leg., R.S. (1991) at 4. The Legislative Budget Board (the Board), which produced the fiscal note at the request of the chairman of the Committee on Environmental Affairs, estimated both the revenues and expenses associated with the Act for the period from 1992 to 1996. The Board predicted that in 1992 the Act would generate $2,222,000 in revenue and would cost the Department of Health of $2,601,925. The net result is a deficit of $379,925 for the year. Id. 1992 is the only year during which the fund would suffer a deficit, however, because the Board predicted a net surplus in the fund for the years 1993-96 of $2,392,578, $2,450,578, $2,559,578, and $2,682,578, respectively. Id.

In an unfortunate omission, the Board failed to provide the basis for its financial projections. This is unfortunate because the projected figures, standing alone, give rise to a variety of questions. For example, the Board projected that fund revenues will increase from $2,222,000 in 1992 to $4,928,000 in 1993, but does not specify the assumptions on which this projection is based. Id. The fiscal note provides no support for this two-fold increase in revenues between 1992 and 1993. Nor does the fiscal note provide support for the projected costs to the Department of Health or for the prediction that these costs will remain at the same level during the years 1993 through 1996.

The fiscal note leaves unanswered other questions regarding the Act's economic impact on the Fund and on local government. The Board could not estimate revenues stemming from the transporter fee because the Act does not specify the amount of the fee. Id. In addition, the Board could not anticipate the cost to units of local government, but it did not specify the precise reason for this inability; it stated simply "the fiscal implications to units of local government cannot be determined." Id.

Despite the absence of data to support or explain these projections, there is no reason at this point to conclude that the Board's forecast is inaccurate. The figures seem to contain certain inconsistencies, such as the doubling mentioned above, but the only accurate way to discern the impact of the Act is to collect the actual figures after the Act has been in effect for an appropriate period of time.

170. Used Oil Act, supra note 8 (to be codified at Tex. Health & Safety Code Ann. § 371.061(d)).
171. Id.
found evidence that much of this oil was disposed of improperly because the public does not have adequate disposal facilities. Hopefully, by providing incentives to local governments to create curbside pickup programs, or provide other convenient services, the state can address the problem of improper used oil disposal. In addition to these incentives to local governments, the Act provides limited liability to those business concerns that comply with the Act's registration requirements pertaining to the collection, transportation, and recycling of used oil. The limitation of liability for owners and operators of these enterprises should encourage private business to enter the marketplace and provide used oil collection services.

In contrast to the incentives described above, the Act also provides for the imposition of criminal and civil penalties against violators. Although the Act provides somewhat mild penalties in comparison to federal statutes, the combination of penalties should deter the improper discharge or other dumping of used oil to some degree. The extent to which the Act is able to do so will not be known until the state, local governments, and/or the Department of Health bring actions under the Act to impose such penalties. At this time the Act is simply too new to predict its success or failure.

One of the critical features of the Act, particularly in this era of huge budget deficits, is the provision for a self-generating fund, known as the used oil recycling fund, that is to be used to cover administrative and other costs of implementation. The principal revenue-raising component is the automobile oil fee, which will probably generate the bulk of the fund. Other sources of funds include the registration fees charged to used oil collection facilities owners and operators, and to used oil transporters, marketers, and recyclers, and the civil penalties and fines imposed on violators. These provisions ensure that the program will be viable and will not cause an undue drain on the state's resources. In addition, a portion of the fund will be applied to defray cleanup costs associated with sites contaminated by used oil. Given this combination of provisions, Texans can be hopeful that something is being done at the state level to address the problem of improper used oil disposal with funds generated by a means other than taxes to clean up the contaminated sites.