

ACCESS AGREEMENT

This Access Agreement, "Agreement", is made and entered into, by and between the CITY OF ODESSA, TEXAS, a home rule municipal corporation, "City", and Texas Natural Resource Conservation Commission, an agency of the State of Texas, "TNRCC";

WITNESSETH:

WHEREAS, TNRCC needs to place pipelines and wells on City property for the purpose of providing ground water remedial action for the Precision Machine and Supply, Inc. State Superfund Site; and

WHEREAS, the parties agree to the following provisions;

NOW, IN CONSIDERATION OF THE PREMISES AND MUTUAL COVENANTS CONTAINED HEREIN, CITY AND THE TNRCC AGREE AS FOLLOWS:

- Section 1. **Grant:** City hereby grants, subject to the terms and conditions contained herein, to TNRCC, the nonexclusive right, at TNRCC's risk and expense to lay, install, construct, maintain, replace, repair and operate certain pipelines, wells and associated equipment designated in the area, "Area", shown on the attached Exhibit "A" (incorporated herein by reference), with the right of ingress and egress. The purpose of this Agreement is to authorize the use of the described city property for the described remedial purposes, and no grant of a franchise or authority is given to TNRCC to use the pipelines and wells for other purposes unless specifically agreed to in writing by the City of Odessa. Such rights do not include any interest in the surface of the right-of-way or minerals.
- Section 2. **Term:** The term of this lease shall commence on its execution by both parties and continue until TNRCC ceases all remedial action in the Area for the Precision Machine and Supply, Inc. State Superfund Site.
- Section 3. **Additional Lines or Facilities:** In the event that additional lines, wells or associated equipment not depicted on the attached Exhibit "A" are placed in the Area by TNRCC, TNRCC shall provide notice to City of such proposed additional construction and obtain approval from City.

Section 4. No Obstruction of Public Property: TNRCC agrees to not unnecessarily obstruct or interfere with the public use of any of the streets, roads, highways, alleys, public ways, utilities or other real property owned or controlled by the City or other public utilities.

Section 5. Repair of Damages: TNRCC agrees to provide for the repair of any and all damages caused by TNRCC to any streets, utilities, roads, highways, alleys, public ways, or other real property owned or controlled by the City and shall restore, as nearly as practicable, such property to its condition immediately prior to the incident causing such damage. TNRCC shall commence such repairs immediately upon completion of the work or activity in which TNRCC was involved at the time the damage occurred and shall complete such repairs as promptly as possible and in a reasonable manner, in compliance with city ordinances and Public Works' standard specifications. TNRCC shall require its contractor to warrant the work for a period of one year.

Section 6. Expenses and Operations: TNRCC agrees that all expenses connected with the pipeline and wells including, without limitation, the construction, operation, maintenance and repair, shall be solely at TNRCC's expense. The pipelines, wells and associated equipment required to be constructed by TNRCC during the term of the Agreement shall be for the sole and exclusive use of TNRCC.

Section 7. Installation of Underground Pipeline: TNRCC agrees to install the pipelines underground at such depth and in such manner so as not to interfere with the existing improvements and below City water and wastewater lines. TNRCC agrees to install and maintain markers where the pipelines cross any City lines. All pipelines to be constructed underneath street crossings shall be installed as provided by existing City specifications. The backfill of all trenches shall be in accordance with existing standard City specifications. The pipeline shall be installed with 42" of cover and comply with City of Odessa standards and ordinances. Notwithstanding anything to the contrary contained herein, however, if at any particular point or points where the

pipeline is to be installed along, across and under the described City property, the City reasonably recommends in advance that a greater depth be required, TNRCC agrees to comply with such required depth as so recommended.

Section 8. Work Notice: Prior to performing any non-emergency work on City property or right-of-way, the contractor for TNRCC shall provide City with notice, comply with all City ordinances related to safety and fire protection, except for payment of fees, and assure compliance with City's existing related specifications prior to commencing the work. In regard to emergency work, such notice shall be provided as soon as practical.

Section 9. Legal Remedies: If TNRCC or City shall be in violation of the provisions provided for in this Agreement, such party shall be given thirty (30) days written notice of any such violation, and if such party shall fail to commence curing such violation within such time, and thereafter diligently pursue the curing of such violation as promptly as reasonably possible, both parties may pursue its legal and equitable remedies without further notice.

Section 10. Duties Upon Termination: Upon termination of the Agreement, TNRCC shall within six (6) months cause the pipelines and any temporary structures, such as barricades or fences, to be removed and TNRCC shall cause the described property to be restored, as nearly as practicable to the same condition, as same was at the time of the execution of the Agreement, normal wear and tear excepted. All work incident to the removal of the pipelines or restoration of the described property shall be done at the sole cost and expense of TNRCC. In addition, TNRCC shall plug and abandon, or remove if customary by TNRCC, all wells subject to this Agreement and pay for and satisfy State of Texas statutory and regulatory requirements regarding such abandoned or removed wells.

Section 11. Force Majeure: If TNRCC or City is rendered unable, wholly or in part, by force majeure to perform or comply with any obligation or condition of this Agreement, such obligation or condition shall be suspended during the continuance of the

inability so caused and such party shall be relieved of liability and shall suffer no prejudice for failure to perform the same during such period; provided the cause for suspension shall be remedied so far as possible with reasonable dispatch. When suffering any such force majeure, TNRCC or City shall give notice and reasonably full particulars to the other party as soon as reasonably possible upon the occurrence of such event. The term "force majeure" as used in this Agreement shall mean any cause not reasonably within the control of the party and which could not have been avoided with the exercise of reasonable care and diligence.

Section 12. Other Ordinances: The City, by this Agreement, may adopt other ordinances and does not surrender or to any extent, lose, waive, imperil, or lessen the lawful powers and rights now or hereinafter vested in the City under the constitution and statutes of the State of Texas and under the Charter of the City unless in conflict and superceded by federal law.

Section 13. Standard of Care for Work: All work shall be done in a safe and workmanlike manner.

Section 14. Warranties: City makes no warranties or representations regarding the condition of the property permitted for use by TNRCC.

Section 15. Relationship: The relationship between City and TNRCC is that of independent entities, and City and TNRCC by the execution of this Agreement do not change that independent status. No term or provision of this Agreement or act of the parties in the performance of this Agreement shall be construed as making one party the agent, servant, or employee of the other party or engaged in a joint enterprise.

Section 16. Reservation of Rights: Nothing in this Agreement affects TNRCC's statutory access rights or inhibits the exercise of those rights in accordance with statutory authority or is intended as a waiver by TNRCC of any immunity from suit to which it is entitled under State of Texas law. Should TNRCC elect to pursue any statutory rights of access, both the obligations of TNRCC and the City, pursuant to this

Agreement, shall be void except all rights, duties and obligations in Sections 5 and 6 that accrued prior to such termination shall survive such termination.

Section 17. Notice: Any notice herein required to be made to the TNRCC may be made to Subhash Pal, Superfund Clean Up Section, TNRCC, MC-143, P. O. Box 13087, Austin, Texas 78711, and any notice herein required to be made to the City may be made to the Director of Public Works of the City of Odessa at 411 West 8th Street, Odessa, Texas 79761.

Section 18. Miscellaneous: This Agreement (a) shall be binding upon each party and its respective legal representatives, successors, and assigns; (b) includes a right of access for TNRCC's contractors, subcontractors, agents, officers, designees, and employees; (c) may be modified or amended only by written instrument signed by each party hereto; (d) shall be governed by and construed in accordance with the laws of the State of Texas and of the United States of America and the rules and regulations of any agency having jurisdiction; (e) the obligations are performable in Ector County, Texas; (f) may be executed in several counterparts, and each counterpart, when so executed and delivered shall constitute an original Agreement, and all such separate counterparts shall constitute but one and the same Agreement; (g) embodies the entire Agreement and understanding between the parties with respect to the subject matter hereof and supersedes all prior agreements, consents and understandings relating to such matter whether written, verbal or otherwise; and (h) no transfer or assignment of this Agreement shall be made without the consent of the City which shall not be unreasonably delayed or withheld. The captions in this Agreement are for convenience only and shall be accorded no substantive meaning in the interpretation thereof.

EXECUTED in duplicate original copies this 16th day of January,
2000, by the duly authorized representatives of City and TNRCC.

"CITY"
CITY OF ODESSA

By: Jerry S. McGuire
Jerry S. McGuire, City Manager

"TNRCC"
TEXAS NATURAL RESOURCE
CONSERVATION COMMISSION

By: Subhash C. Pal

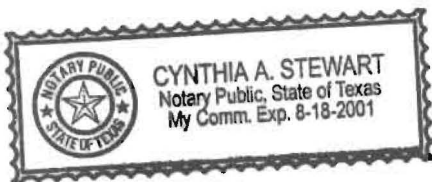
(CITY)

STATE OF TEXAS §

COUNTY OF ECTOR §

BEFORE ME, Cynthia A. Stewart on this day personally appeared Jerry S. McGuire, City Manager, known to me (or proved to me on the oath of) _____ or through _____ to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that he executed the same in the capacity stated, as the act of the municipal corporation, for the purposes and consideration therein expressed.

GIVEN UNDER MY HAND AND SEAL of office this 16 day of January, A.D., 2001.



Cynthia A. Stewart
Notary Public in and for the State of Texas

(TNRCC)

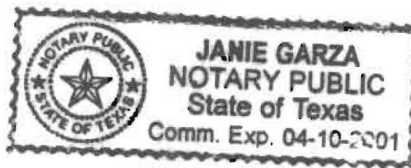
STATE OF TEXAS §

COUNTY OF ECTOR §

BEFORE ME, Janie Montemayor Garza this day personally appeared SUBHASH C. PAL known to me (or proved to me on the oath of) _____ or through _____ to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that he executed the same in the capacity stated, as the act of an agency of the State of Texas, for the purposes and consideration therein expressed.

GIVEN UNDER MY HAND AND SEAL of office this 23 day of January, A.D., 2001

Janie Garza
Notary Public in and for the State of Texas





Precision Machine & Supply Groundwater Remediation

STATE SUPERFUND SITE
TEXAS NATURAL RESOURCE CONSERVATION COMMISSION

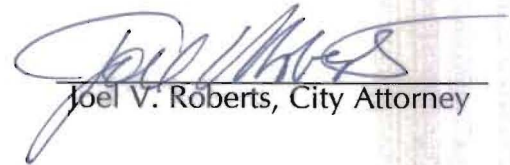
DRAWN BY: L.A.
DATE: Jan 4, 2001
SCALE: 1" = 200'

MEMORANDUM

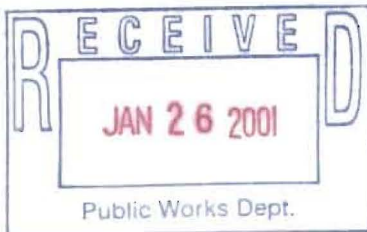
File
new steel lease
with other materials
CITY OF ODESSA
Legal Department

DATE: January 25, 2001
TO: Matt Squyres, Director of Public Works
FROM: Joel V. Roberts, City Attorney
RE: Access Agreement With TNRCC - Superfund Site

Enclosed please find a fully-executed copy of the aforementioned agreement. This copy is for your files.


Joel V. Roberts, City Attorney

JVR/bh
enclosure



COPY



CITY OF ODESSA

LEGAL DEPARTMENT

January 17, 2001

**Ms. Carolyn M. Sweeney
Environmental Law Division
Texas Natural Resource
Conservation Commission
P. O. Box 13087
Austin, Texas 78711-3087**

Re: Access Agreement

Dear Ms. Sweeney:

Enclosed are two copies of the Access Agreement which have been executed by the City Manager. I would appreciate your obtaining the signature of TNRCC and returning one fully-executed copy.

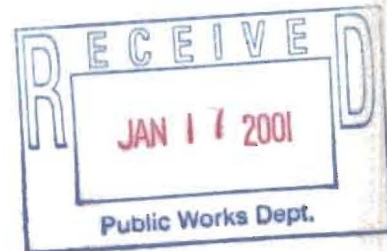
Thank you for your assistance.

Sincerely yours,

Joel V. Roberts
**Joel V. Roberts
City Attorney**

JVR/bh

enclosures



RESOLUTION NO. 2001R-01

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF ODESSA, TEXAS, APPROVING AN AGREEMENT WITH TEXAS NATURAL RESOURCE CONSERVATION COMMISSION (TNRCC) TO USE CITY RIGHT-OF-WAY FOR REMEDIAL ACTION FOR THE PRECISION MACHINE AND SUPPLY, INC. STATE SUPERFUND SITE; AND DECLARING AN EFFECTIVE DATE.

BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF ODESSA, TEXAS:

Section 1. That the City Manager is authorized to approve an agreement with TNRCC to use City right-of-way for remedial action for the Precision Machine Supply, Inc. State Superfund Site.

Section 2. That this resolution shall be effective at the time of its adoption.

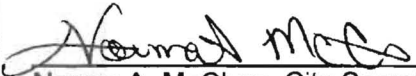
The foregoing resolution was read and adopted on the 9th day of January, A.D., 2001, by the following vote:

Bill Cleaver	AYE
Jim Morris	AYE
Larry Melton	AYE
Bob Slider	AYE
Berta Calzada	AYE

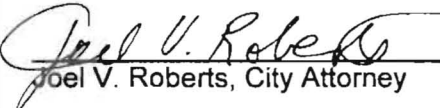
Approved the 9th day of January, A.D., 2001.

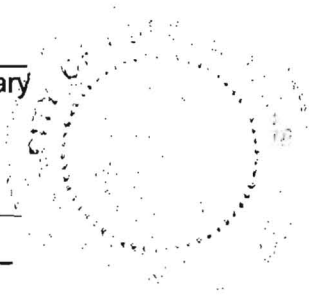

Bill Hext, Mayor

ATTEST:


Norma A. McClure, City Secretary

APPROVED AS TO FORM:



Joel V. Roberts, City Attorney





Memorandum

Public Works

To: Joel Roberts, City Attorney
From: Matthew S. Squyres, Director of Public Works 
Date: January 16, 2001
Subject: Access Agreement for TNRCC/Precision Machine Superfund Site

Attached you will find two duplicate original Access Agreements between the City of Odessa and Texas Natural Resource Conservation Commission (TNRCC) executed by the City Manager. Please transmit both originals for execution by TNRCC. When fully executed, please provide this office with a copy for our files.

Should you have any questions or need additional information please feel free to contact this office.

Attachments

MSS:nkb

CONTRACT EXECUTION FOR

Department: PUBLIC WORKS
Name of Other Party: Texas Natural Resource Conservation Commission
Purpose of Contract: Access Agreement for groundwater remedial action in right-of-way
Contract Manager: Matthew S. Squyres

ACTION

<u>Initial/Date</u>	
<u>MS</u> / <u>1/11</u>	Director - Attached are two copies of General Contracts executed by other party or at least three copies of Construction Contract.
<u>MS</u> / <u>1/11</u>	Director - City Council approval obtained on <u>January 9, 2001</u> , if City Council Approval is required. <u>Resolution # 2001R-01</u>
<u>MS</u> / <u>n/a</u>	Director of Finance - Funds are appropriated, and City Council approval is not required.
<u>MS</u> / <u>n/a</u>	Director - Attached is a copy of any insurance certificate required to be submitted at the time of execution, receipt for any required fees and other documentation required to show required compliance prior to City approval.
<u>MS</u> / <u>n/a</u>	Director - Attached is the Contract Action Form.
<u>MS</u> / <u>1/11</u>	Legal - Contract is in legal form and ready for execution by City Manager/ Department Director.

Procedure

- (1) Director determines need of the city, availability of funds, scheduling requirements, description of services, consideration and other terms and conditions.
- (2) Director submits information to City Attorney for preparation or review of contract.
- (3) Director obtains City Council approval, if required.
- (4) If City Council approval is not required, Director of Finance determines that funds have been appropriated.
- (5) Director provides required insurance certificate, if any, and a xerox copy of any required payment or other documentation to show required compliance.
- (6) Director submits required copies of two contracts (or at least three for Construction Contracts) executed by other party to City Attorney with Contract Execution Form, Contract Action Form and copy of any required insurance certificate and proof of payment. City Attorney will approve as to form and submit to City Manager/Department Director for execution by City.
- (7) City Manager will execute and return to City Attorney. City Attorney will obtain attestation from City Secretary and file one original with Contract Manager and the Contract Action Form and return all other documents to Director.
- (8) The Contract Managers will keep a tickler file to insure that all requirements of the Contract assigned to the Contract Managers are performed and that the Contract is renewed if necessary prior to termination.
- (9) This policy only applies to contracts as defined.



Matt Squyres

01/11/2001 08:06 AM


To: Nelda Bond/PW/odessa_notes@odessa_notes_dom
cc:
Subject: Re: Precision Machine TNRCC access agreement

fyi

----- Forwarded by Matt Squyres/PW/odessa_notes on 01/10/2001 08:11 PM -----

Van Hagan

01/10/2001 04:20 PM

To: Matt Squyres/PW/odessa_notes@odessa_notes_dom
cc:
Subject: Re: Precision Machine TNRCC access agreement 

Yes, I agree. We do have a job file (#010131-50) and could place a copy in our job file. But once the job file is archived it is not always easy, or timely, to get a hold of.

Matt Squyres



Matt Squyres

01/10/2001 03:52 PM

To: Van Hagan/EN/odessa_notes@odessa_notes_dom
cc: Nelda Bond/PW/odessa_notes@odessa_notes_dom
Subject: Precision Machine TNRCC access agreement

Do you concur that this should be filed with street use licenses like conduits, or does engineering have a file on this project?

**CITY COUNCIL AGENDA
CITY OF ODESSA**

Meeting Date:	January 9, 2001	Consent:	X	Regular:	
Contact:	Van Hagan <i>[Signature]</i>	Ordinance:		Resolution:	X
Department:	Public Works	Bid Award:		Hearing:	
Dept. Head Signature:	<i>Matthew S. Spuyell</i> CAPTION	Other:		Presentation:	

Consider access agreement for Texas Natural Resource Conservation Commission (TNRCC) to provide groundwater remedial action for the Precision Machine & Supply, Incorporated State Superfund Site.
-RESOLUTION-

SUMMARY OF ITEM

The attached resolution and Access Agreement would allow TNRCC to install certain pipelines, wells, and associated equipment in the neighborhood of the Precision Machine & Supply State Superfund site to provide groundwater remedial action. It is anticipated that these facilities will be installed under city streets and alleys, and it is estimated that they will be in place anywhere from five to eight years. In order to allow TNRCC to perform this work, it is recommended to approve the attached agreement.

FISCAL IMPACT:

Fiscal Yr.	2000-2001	Available Funds	Budget	Est./Actual Cost	Difference
Fund:		Total Project/Account			\$0
Cost:		Less Other Planned			\$0
Revenue:		This Agenda Item	\$0	\$0	\$0

Fiscal Note Attached				ACTION NEEDED TO AMEND THE BUDGET				
Yes	No	X	Appropriation Amt:		Transfer Amount			
			Appropriation By:	Reserves	Additional Revenues	Grant		

Comments:

There are no fees associated with this access agreement.

List of Supporting Documents:	Other Departments, Boards, Commissions or Agencies:		
Resolution Access Agreement	TNRCC		
Reviewed by:	Purchasing <i>N/A</i>	Finance <i>12-27-00</i> <i>[Signature]</i>	City Mgr.
Budget <i>12/27/00</i> <i>[Signature]</i>	Legal <i>12/27/00</i> <i>942</i>	ACM/DCM	

FAX TRANSMITTAL



TNRCC

Protecting Texas
by Reducing and
Preventing Pollution

DATE: December 29, 2000

NUMBER OF PAGES
(including cover sheet):

2

TO: Name Joel Roberts
 Organization City of Odessa
 Facsimile Number (915) 335-3257

FROM: **The Texas Natural Resource Conservation Commission**
 Name Caroline M. Sweeney
 Division Environmental Law Division
 Telephone Number (512) 239 - 0665
 Facsimile Number (512) 239 - 0606

NOTES:

RECEIVED
 DEC 29 2000
 CITY ATTORNEY

This facsimile message and accompanying documents contain information from the Texas Natural Resource Conservation Commission Environmental Law Division which may be **CONFIDENTIAL AND/OR PRIVILEGED**. The information is intended to be for the use of the individual or entity named on this transmittal sheet. If you are not the intended recipient, be aware that any disclosure, copying, distribution or use of the contents of this information is prohibited.

If you have received this facsimile in error, please notify us by telephone immediately and return the original message to us at Texas Natural Resource Conservation Commission, Environmental Law Division, P.O. Box 13087, Austin, Texas 78711-3087 by First Class Mail via the United States Postal Services. Thank you.

PLEASE CALL AS SOON AS POSSIBLE IF ALL PAGES ARE NOT RECEIVED OR IF THERE ARE ANY OTHER PROBLEMS WITH THE TRANSMITTAL OF THIS FAX.

Robert J. Huston, *Chairman*
R. B. "Ralph" Marquez, *Commissioner*
John M. Baker, *Commissioner*
Jeffrey A. Saitas, *Executive Director*



TEXAS NATURAL RESOURCE CONSERVATION COMMISSION

Protecting Texas by Reducing and Preventing Pollution

December 29, 2000

Via Facsimile: 915.335.3257

Mr. Joel V. Roberts
City Attorney
City of Odessa
P.O. Box 4398
Odessa, Texas 79760

**Re: Precision Machine State Superfund Site
Access**

Dear Mr. Roberts:

Thank you for your letter this morning. I'd like to respond to some of the issues the letter raised. Section 361.752(c) of the Health and Safety Code applies to reasonable access provisions between a third party (who is usually the person responsible for the contamination) and the landowner rather than the TNRCC (who is not responsible for the contamination) and the landowner. Section 361.752(d) makes it clear that the section does not limit TNRCC's statutory access authority. For these reasons, I do not think Section 361.752(c) is relevant to our negotiations.

As for Section 26.014 of the Water Code, it does allow TNRCC to "remediate a condition related to the quality of water in the state." The groundwater beneath the area that the TNRCC needs to access is contaminated. To remediate this condition, the TNRCC needs to run pipes through the ground in this area so that the contaminated water can be pulled from the ground and piped to the water treatment plant. The pipelines would not be permanent and would be removed when the remediation is complete. As the TNRCC's remedial actions are taken out of necessity, for health and safety reasons, and to abate a significant nuisance, they are not constitutional takings. Please find enclosed an article describing a case in which an appellate court denied that there was a constitutional taking in a similar situation. My understanding of the facts is that contaminated groundwater was thought to have migrated under the landowner's property from a neighboring Superfund site. EPA installed approximately 20 wells on the property to determine if the groundwater was contaminated and, if so, the nature and extent of the plume.

We would like to proceed on this issue in either one of two ways: 1) TNRCC's original access agreement with the City of Odessa's safety requirements incorporated into it; or 2) an oral agreement that TNRCC can move forward without opposition from the City of Odessa.

Thank you in advance for your time and consideration on this matter.

Sincerely,

A handwritten signature in cursive script, appearing to read "Caroline M. Sweeney".

Caroline M. Sweeney

Writer's Direct Line - (512) 239-0665 Facsimile - (512) 239-0606 Mail Code 173
P.O. Box 13087 • Austin, Texas 78711-3087 • 512/239-1000 • Internet address: www.tnrcc.state.tx.us

ology for the assessment and that ATSDR, at the Air Force's urging, asked for an external peer review. This external review is contrary to the normal ATSDR process, the groups say.

These three issues are just part of a broader pattern of discrimination, the groups say. The citizens ask the federal agencies to consider the three issues in light of six other examples of alleged discrimination. The other examples, according to the groups, include EPA and TNRCC's failure to list Kelly AFB on the Superfund National Priorities List, DOD and TNRCC's failure to release information to the public, DOD and regulators' decision to only clean up on-site soil and groundwater contamination and TNRCC's failure to use its enforcement authority.

Litigation

APPELLATE COURT DENIES CALIFORNIA SUPERFUND TAKINGS CLAIM

A federal appeals court earlier this month denied the request of a group of California land owners for compensation under the Constitution's takings clause, arguing that the remedy selected by EPA in fact improved the value of their property rather than detracting from it.

In *Henry Hendler, et al. v. U.S.*, the U.S. Court of Appeals for the Federal Circuit found that a lower court did not err in finding the property owners received a special benefit that offset the value of easements taken. The plaintiffs argued that by putting a series of monitoring wells on their property, EPA had detracted from their property's value, constituting an illegal taking.

But the court reasoned that the property owners gained a benefit from EPA's investigation since they would have had to conduct an investigation of contamination before they could commercially develop the land.

The three-judge panel stated in their May 11 opinion that "However harsh . . . the federal offset rule may seem, which allows the government to escape any payment for private property actually taken for public use, we accept it as the governing rule . . . if the rule is to be changed, and to make it more consistent with the rule followed in the states, it is for Congress to make that change."

The court also deferred to the trial court's finding that EPA's action did not adversely affect the ability of the property owners to redevelop the property. "While we might have reached contrary findings had we sat as the trier of fact," the court stated, "that does not entitle us to reverse the trial court's findings."

Finally, the court upheld the lower court's determination that EPA's regulatory action did not have a sufficient economic impact to constitute a regulatory taking, because the land owners failed to prove that their use was sufficiently interfered with.

The case dates back to 1989 when a group of property owners including Hendler filed a claim against EPA seeking compensation for the agency's actions beginning in 1983. The group argued that while they had done nothing to contribute to the contamination, they had suffered harm from EPA's actions which they say left their properties unmarketable and unsuitable for redevelopment.

While the appellate court in 1991 found that a physical taking had occurred, the lower court on remand awarded no compensation, reasoning that Hendler had received special benefits from EPA's actions. Hendler then filed the current appeal, challenging the finding of special benefits and the trial court's denial of Hendler's regulatory taking claim. The group was seeking \$3.3 million for the physical taking and \$17 to \$18 million for a regulatory taking (*Superfund Report*, Dec. 9, p18).

An attorney for the property owners, while unhappy with the decision, says that the court made the decision as narrow as possible. The source adds that there may be a possibility of petitioning the Supreme Court to hear the case.



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Precision Machine and Supply

EPA No: TXD008025058
Location: [\(Map\)](#) Odessa, Ector County
Category: Cleanup Underway
Type of Facility: Chrome Plating and Machine Shop
Proposed to Registry: October 16, 1987

Site Background:

The Precision Machine and Supply site is located at 500 West Olive Street in Odessa. This site was operated from 1952 until December 1980 as a machine and chrome-plating shop. The 0.75-acre site consists of a metal building, an alley, and a fenced yard. Operations at the site generated chromic acid rinsate, which was stored in a 1,500-gallon fiberglass underground tank, prior to disposal off site. Two concrete slabs, equipped with drains leading to the tank, were used as wash racks for rinsing chrome parts.

<i>Media Affected</i>	<i>Latitude/Longitude</i>	<i>Hazard Ranking Score</i>
Shallow groundwater, soil	31°50'29"N 102°21'48"W	23.73
<i>Contaminants</i>	<i>TNRCC Region</i>	<i>Legislative District</i>
Chromium, lead	7 - Odessa	Texas Senate - 28 Texas House - 81 U.S. Congress - 19

Project Contact: Subash C. Pal, P.E.,
512/239-4513

Community Relations Coordinator: Janie Montemayor, 512/239-3844

Funded by: Hazardous & Solid Waste Remediation Fee Account

Records Repository: *Ector County Library*
321 W. Fifth Street
Odessa TX 79761
915/332-0633
TNRCC Records Management Center
North entry Bldg D, Room 190
Austin TX 78753
512/239-2920

Handicapped parking is available on the east side of Bldg D near IH-35 and convenient to wheelchair access ramps that are between Bldg D and Bldg E.

Superfund Actions Taken to Date:

- October 16, 1987, a legal notice was published in the *Texas Register*, (12 TexReg 3858-3859) describing the site, proposing the site to the state Superfund registry, and announcing that a public meeting to receive citizen comments would be held at Odessa City Hall on October 29, 1987 in Odessa.
- January 22, 1988, the site was listed on the Superfund registry (13 TexReg 427-428).
- September 25, 1990, the Texas Water Commission published a legal notice in the *Texas Register*, (15 TexReg 5624-5625) soliciting services of a consultant to perform the remedial investigation/feasibility study (RI/FS) at the site.
- October 1991, TNRCC issued a work order to determine the nature and extent of contamination (remedial investigation/feasibility study).
- In October 1995, the TNRCC divided the site into two operable units, groundwater and soil, with separate remedies to be proposed for each unit.
- May 24, 1996, the final report was approved, marking completion of the remedial investigation/feasibility study phase.
- May 31, 1996, a legal notice was published in the *Texas Register*, (21 TexReg 4911)

announcing a public meeting would be held at Odessa City Council Chamber on July 16, 1996, to present to the community the best choice among cleanup remedies for the soil unit, and to receive citizen comments to be considered in the final recommended remedy.

- July 16, 1996, a public meeting was held at Odessa City Council Chambers to present to the community the proposed choice among cleanup remedies for the soil unit, which was excavation, off-site transport and disposal. Groundwater recovery and treatment was proposed for the groundwater unit.
- November 28, 1997, legal notices were published in the *Texas Register*, (22 TexReg 11850-11851) and the *Odessa American*, announcing a public meeting would be held at the Ector County Library on January 8, 1998, to present to the community the amendments to the recommended cleanup remedy.
- January 8, 1998, a public meeting was held at the Ector County Library to present to the community the amendments to the recommended cleanup remedies for the soil and groundwater units.
- May 20, 1998, an administrative order was issued for remediation of the soil and the groundwater units.
- January 6, 1998, TNRCC issued a work order for design of the selected remedy.
- May 13, 1998, remedial design for the groundwater unit was underway.
- August 31, 1998, a contract was awarded for the soil remedial action.
- February 1999, the contractor reported the soil unit remedial action was substantially complete.
- November 1, 1999, an amendment to the agreed administrative order for the remedial design of the groundwater was accepted.
- March 20, 2000, four additional monitoring wells were installed to better define the groundwater unit.
- June 16, 2000, TNRCC reviewed and approved the groundwater investigation and modeling report.

MORE ECTOR COUNTY SITES

[BACK to TOP](#)

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CITY OF ODESSA INTER-OFFICE MEMORANDUM

TO: Bill Hext _____ Jerry S. McGuire _____ Mary Kaye Moore _____ Richard Morton _____ Becki Murphy _____ Kirk McCarley _____ Norma McClure _____ Matt Squyres <u>X</u> _____ Van Hagan _____ Joe Tucker _____ Mark Simpson _____ James Zentner _____ Marwan Khoury _____ Mary Dominguez _____ Don Carlton _____ Dale Childers _____ Steve Pollock _____ Charlie Smith _____ Felicia Nzere _____	Jeanne Jasper _____ Matt Irvin _____ Debbie McReynolds _____ Ricky Subia _____ James Jenkins _____ John Blanco _____ Lou Orras _____ Christopher Pipes _____ Ralph McCain _____ Silvia Townsend _____ Jim O'Leary _____ Stacy Trotter _____ Sherman Smith _____ Steve Patton _____ Darrell Wells _____ Neil McDonald _____ Donna Carrasco _____ Tom Cronick _____ Betty Robinson _____	Don Clark _____ Jud Weatherly _____ Carolyn Fears _____ Barry Wooten _____ Doug Hildebrand _____ Larry Long _____ Lori Bevers _____ Warren Waterman _____ Les Moore _____ Bobbi Hagan _____ Naira Carrasco _____ Olivia Rivas _____ Gloria Gonzalez _____ Robbie Hicks _____ Records - PD _____ Neil McDonald _____ Wesley Burnett _____ Liz Aguirre _____ Sharon Wilson _____
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FROM: Joel V. Roberts, City Attorney

DATE: December 21, 2000

RE: Liability/Superfund Site

The following assistance is requested:

- () Please sign attached documents and return to Legal.
- () The attachments are for your information only.
- () The attachments are for your approval or comments and suggestions. Please advise.
- () Furnish information or documents: _____.
- () What is status on the following project: _____.
- () Please arrange for payment.
- (X) Attachments:
- (X) Other Comments:

These are some sections that we need to know about regarding liability and Superfund sites.



Title 5

(6) requiring a response action or other lawful means of addressing the release or threatened release of solid waste in connection with the solid waste facility before, during, or on the expiration of the term of the extension of credit;

(7) providing financial or other advice or counseling in an effort to mitigate, prevent, or cure default or diminution in the value of the solid waste facility;

(8) restructuring, renegotiating, or otherwise agreeing to alter the terms and conditions of the extension of credit or security interest, exercising forbearance;

(9) exercising other remedies that may be available under applicable law for the breach of a term or condition of the extension of credit or security agreement; or

(10) conducting a response action under the national contingency plan adopted under 42 U.S.C. Section 9605, under a commission-approved cleanup plan, or under the direction of an on-scene coordinator appointed under the national contingency plan or a commission-approved cleanup plan, if the actions do not rise to the level of participating in management within the meaning of Subsections (a) and (b).

Added by Acts 1997, 75th Leg., ch. 793, § 15, eff. Sept. 1, 1997.

[Sections 361.704 to 361.750 reserved for expansion]

SUBCHAPTER V. IMMUNITY FROM LIABILITY OF INNOCENT OWNER OR OPERATOR

§ 361.751. Definitions

In this subchapter:

(1) "Contaminant" has the meaning assigned by Section 361.601.

(2) "Innocent owner or operator" means a person that:

(A) is an owner or operator of property that has become contaminated as a result of a release or migration of contaminants from a source or sources not located on or at the property; and

(B) did not cause or contribute to the source or sources of the contamination referred to in Paragraph (A).

Added by Acts 1997, 75th Leg., ch. 793, § 15, eff. Sept. 1, 1997.

§ 361.752. Immunity From Liability; Access to Property

(a) An innocent owner or operator of property is not liable under this code or the Water Code for investigation, monitoring, remediation, or corrective or other response action regarding the conditions attributable to a release or migration of a contaminant or otherwise liable regarding those conditions.

(b) A person that acquires a portion of the tract on which the source of a release of contaminants is located from the person that caused the release is eligible for immunity under Subsection (a) only if, after appropriate inquiry consistent with good commercial or customary practice, the person did not know or have reason to know of the contamination at the time the person acquired the property.

(c) To be eligible for immunity under Subsection (a), an owner or operator must grant reasonable access to the property for purposes of investigation or remediation to a person designated by the executive director. An agreement for reasonable access may provide:

(1) that the designated person may not unreasonably interfere with the use of the property;

(2) for payment of reasonable compensation for access to the property; or

(3) that the owner or operator is indemnified from liability for an intentional or negligent act of the designated person arising from the person's access to and use of the property.

(d) This section does not limit any right of the commission under another provision of this code or the Water Code to obtain access to the property.

§ 361.753

SANITATION AND ENVIRONMENTAL QUALITY
Title 5

§ 361.753. Certification

(a) A person may apply to the commission for a certificate confirming that the person is an innocent owner or operator. The application must include a complete site investigation report that demonstrates that:

(1) the property has become contaminated as a result of a release or migration of contaminants from a source or sources not located on or at the property;

(2) the owner or operator has not caused or contributed to the source or sources of the contamination referred to in Subdivision (1); and

(3) the owner or operator is eligible for immunity under Section 361.752(b).

(b) The commission may charge an application fee in an amount not to exceed the cost of reviewing the application. The commission shall deposit a fee collected under this subsection to the credit of the hazardous and solid waste remediation fee fund.

(c) Not later than the 45th day after the date the commission receives the application, the commission shall notify the applicant whether the application is complete.

(d) Not later than the 90th day after the date the commission receives the application, the commission shall:

(1) issue or deny the certificate; or

(2) notify the applicant of any additional information needed to review the application.

(e) Not later than the 45th day after the date the commission receives the additional information requested under Subsection (d)(2), the commission shall issue or deny the certificate.

(f) The certificate evidences the immunity from liability of the applicant as provided by Section 361.752.

(g) The commission may condition the issuance of the certificate on the placement of restrictions on the use of the property that are reasonably necessary to protect the public health, including:

(1) institutional controls such as deed restrictions or municipal zoning restrictions; or

(2) at the owner's or operator's option, other control measures.

Added by Acts 1997, 75th Leg., ch. 793, § 15, eff. Sept. 1, 1997.

§ 361.754. Rights of Innocent Owner or Operator Regarding Contamination From Source Not Located on or at Property

This subchapter does not limit the right of an innocent owner or operator to pursue any remedy available at law or in equity for conditions attributable to the release or migration of contaminants from a source or sources that are not located on or at the property.

Added by Acts 1997, 75th Leg., ch. 793, § 15, eff. Sept. 1, 1997.

CHAPTER 362. SOLID WASTE RESOURCE RECOVERY FINANCING ACT

SUBCHAPTER B. OPERATION OF SYSTEM

Section

362.013. Contract Terms and Procedures.

Library References

County Solid Waste Control Act, see Brooks, 36
Texas Practice § 32.5.

SUBCHAPTER B. OPERATION OF SYSTEM

§ 362.013. Contract Terms and Procedures

SECTION 361.224

Notes of Decisions

1. Pleading

State v. Hart (App. 9 Dist. 1988) 753 S.W.2d 213,
[main volume] writ denied.

SUBCHAPTER H. ENFORCEMENT; ADMINISTRATIVE
PENALTIES [REPEALED]

§§ 361.251, 361.252. Repealed by Acts 1997, 75th Leg., ch. 1072, § 60(b)(2), eff.
Sept. 1, 1997

Historical and Statutory Notes

Prior to repeal, § 361.251 was amended by Acts 1993, 73rd Leg., ch. 551, § 2, Acts 1995, 74th Leg., ch. 76, §§ 5.95(49), (53), 11.66, and Acts 1995, 74th Leg., ch. 884, § 2.

Prior to repeal, § 361.252 was amended by Acts 1993, 73rd Leg., ch. 551, § 3, Acts 1995, 74th Leg.,

ch. 76, § 5.95(49), (53), and Acts 1995 74th Leg., ch. 884, § 2.

Section 2 of Acts 1997, 75th Leg., ch. 1072, which repealed the section, enacted V.T.C.A. Water Code, Chapter 7.

Annotations Under Repealed Sections

SECTION 361.252

Notes of Decisions

Validity 1

1. Validity

Statutes authorizing Air Control Board and Water Commission to assess fines prior to judicial review, and to require supersedeas bond in amount of fines assessed as prerequisite to judicial review, violated open courts guarantee of Texas Constitution; prepayment requirement was unreasonable financial barrier to access to court. Texas Ass'n of

Business v. Texas Air Control Bd. (Sup. 1993) 852 S.W.2d 440, rehearing overruled.

Statutes authorizing Air Control Board and Water Commission to assess fines prior to judicial review did not violate state constitutional right to jury trial; administrative proceedings to enforce state environmental laws were not analogous to any action tried to jury in 1876, when State Constitution was adopted. Texas Ass'n of Business v. Texas Air Control Bd. (Sup. 1993) 852 S.W.2d 440, rehearing overruled.

SUBCHAPTER I. ENFORCEMENT; ADMINISTRATIVE ORDERS CONCERNING
IMMINENT AND SUBSTANTIAL ENDANGERMENT

§ 361.271. Persons Responsible for Solid Waste

(a) Unless otherwise defined in applicable statutes and rules, a person is responsible for solid waste if the person:

(1) is any owner or operator of a solid waste facility;

(2) owned or operated a solid waste facility at the time of processing, storage, or disposal of any solid waste;

(3) by contract, agreement, or otherwise, arranged to process, store, or dispose of, or arranged with a transporter for transport to process, store, or dispose of, solid waste owned or possessed by the person, by any other person or entity at:

(A) the solid waste facility owned or operated by another person or entity that contains the solid waste; or

(B) the site to which the solid waste was transported that contains the solid waste; or

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(b) A political subdivision or an officer or employee of the political subdivision is not a person responsible for solid waste released or threatened to be released from a facility or at a site if:

(1) the political subdivision acquired ownership or control of the facility or site through bankruptcy, tax delinquency, abandonment, or other circumstances in which the subdivision involuntarily acquired title to the facility or site by virtue of the subdivision's function as sovereign; and

(2) the political subdivision, officer, or employee did not cause or contribute to the release or threatened release of solid waste at the facility or site.

(c) A political subdivision that is in a county with a population of 2.4 million or more or is in a county adjacent to a county with a population of 2.4 million or more and that builds or installs a drainage project on a site of a solid waste facility is not a person responsible for solid waste released or threatened to be released from the facility or at a site of the facility if:

(1) the political subdivision acquired ownership or control of the facility or site through bankruptcy, tax delinquency, abandonment, or other circumstances in which the subdivision involuntarily acquired title to the facility or site by virtue of the subdivision's function as sovereign; and

(2) the plans for the drainage project have been submitted to and reviewed by the commission.

(d) A political subdivision that builds or installs a drainage project under Subsection (c) is not subject to civil or criminal liability arising from the building or installation of the drainage project. This subsection does not apply to an injury or property damage claim that results from an act or omission of the political subdivision constituting gross negligence, recklessness, or intentional misconduct.

(e) A fiduciary's responsibility for solid waste is subject to Subchapter T.

(f) A lender's responsibility for solid waste is subject to Subchapter U.

Amended by Acts 1993, 73rd Leg., ch. 159, § 1, eff. May 16, 1993; Acts 1995, 74th Leg., ch. 76, § 11.67, eff. Sept. 1, 1995; Acts 1997, 75th Leg., ch. 793, § 11, eff. Sept. 1, 1997; Acts 1997, 75th Leg., ch. 1072, § 34, eff. Sept. 1, 1997.

§ 361.272. Administrative Orders Concerning Imminent and Substantial Endangerment

(a) The commission may issue an administrative order to a person responsible for solid waste if it appears that there is an actual or threatened release of solid waste that presents an imminent and substantial endangerment to the public health and safety or the environment:

(1) from a solid waste facility at which solid waste is stored, processed, or disposed of; or

(2) at any site at which one or more of those activities concerning solid waste have been conducted in the past, regardless of whether the activity was lawful at the time.

(b) An administrative order may be issued under this section to:

(1) restrain the person from allowing or continuing the release or threatened release; and

(2) require the person to take any action necessary to provide and implement a cost effective and environmentally sound remedial action plan designed to eliminate the release or threatened release.

(c) An administrative order issued under this section shall:

(1) be delivered to the persons identified by the order by certified mail, return receipt requested;

(2) be delivered by hand delivery to the person identified by the order; or

(3) on failure of delivery of the order by certified mail or hand delivery, be served on the persons by publication:

 A. in the Texas Register; and

SANITATION AND ENVIRONMENTAL QUALITY

Title 5

party's expenditures related to the cleanup at issue if the commission or the executive director approves the cleanup. If the expenditures were made before the property was proposed to be listed on the state registry and the commission or the executive director approves the cleanup, the court shall also reduce in an equitable and just manner the party's proportionate share of the costs.

(c) The apportionment of costs only adjusts the rights of parties identified by Section 361.271 and does not affect a person's liability to the state.

Amended by Acts 1997, 75th Leg., ch. 793, § 13, eff. Sept. 1, 1997.

§ 361.344. Cost Recovery by Liable Party or Third Party

(a) A person who conducts a removal or remedial action that is approved by the commission and is necessary to address a release or threatened release may bring suit in a district court to recover the reasonable and necessary costs of that action and other costs as the court, in its discretion, considers reasonable. This right is in addition to the right to file an action for contribution, indemnity, or both in an appeal proceeding or in an action brought by the attorney general.

(b) Venue for the suit is:

(1) in the county in which the release or threatened release is or was located; or

(2) in any other county in which venue is proper under Chapter 15, Civil Practice and Remedies Code.

(c) To recover costs under this section in a proceeding that is not an appeal proceeding or an action brought by the attorney general under this subchapter, the person seeking cost recovery must have made reasonable attempts to notify the person against whom cost recovery is sought:

(1) of the existence of the release or threatened release; and

(2) that the person seeking cost recovery intended to take steps to eliminate the release or threatened release.

(d) The court shall determine the amount of cost recovery according to the criteria prescribed by Section 361.343.

(e) A fact determination or ruling by a district court in an appeal of an administrative order under Section 361.322 is not res judicata or collateral estoppel as to an issue brought in a proceeding under this section concerning a party not joined in the appeal.

Amended by Acts 1997, 75th Leg., ch. 165, § 20.02, eff. Sept. 1, 1997; Acts 1997, 75th Leg., ch. 793, § 14, eff. Sept. 1, 1997.

Historical and Statutory Notes

1997 Legislation

Section 1.02(b) of Acts 1997, 75th Leg., ch. 165 provides:

"If any provision of this Act conflicts with a statute enacted by the 75th Legislature, Regular Session, 1997, the statute controls."

§ 361.345. Creation of Rights

Subchapter I¹ and Section 361.344 and the enforcement by the commission of that subchapter and section do not:

(1) create rights or causes of action on behalf of a person other than those expressly stated by this chapter; or


(2) change common law or a rule of decision except as limited by this chapter to actions by the commission to eliminate an actual release or threatened release of solid waste that is an imminent and substantial endangerment to the public health and safety or the environment.

Amended by Acts 1995, 74th Leg., ch. 76, § 11.73, eff. Sept. 1, 1995.



Memorandum

Public Works

To: Joel Roberts, City Attorney
From: Matthew S. Squyres, Director of Public Works 
Date: December 21, 2000
Subject: TNRCC Superfund Site Comments

I received your memo regarding TNRCC's interpretation of their rights. I would offer the following comments for your consideration.

1. Not only the law, but the agreement they submitted appears to address specific properties, possibly not public properties. This makes the Exhibit A, referred to in the first paragraph, extremely critical. This is more than a street address and in crossing of public right-of-ways that are traveled routinely by the public with reasonable expectations as to their condition, we may need more control than is outlined in the access agreement.
2. In addition to groundwater monitoring wells, their approval should include remediation wells, piping, and associated equipment. I know we talked about this, but they did not include it in their agreement.
3. Under "Safety", there needs to be more discussion of the maintenance of the lines and possibly the liability associated with breaks in the waterlines, or if the equipment becomes into poor condition. It is our understanding, these equipment and lines could remain in the right-of-way for several years. There is numerous talk about our properties, and although TNRCC did include a 42 inch depth and markers to be placed where the pipelines cross grantors' lines, markers also need to be placed at crossing of all right-of-ways, streets, alleys, and/or easements.
4. The agreement needs to provide for removal of these facilities, as well as assurance that they will not block the right-of-way, streets, and alleys in any way. There is discussion that the grantor will continue to enjoy the use of the surface, but by the very nature of installation of these lines and wells, we will be somewhat inhibited in the use of our right-of-ways. There could also be conflicts with franchise utilities working in the city, and of course, I am thinking of the additional facilities being installed by telecommunication companies, who will also want access to these same alleys and streets. Many of the alleys are already full of utility lines, so the location will be important.

Should you have any questions or need additional information, please feel free to contact me. Thank you for your assistance with these discussions with TNRCC on this project.

cc: Van Hagan, City Engineer

CITY OF ODESSA INTER-OFFICE MEMORANDUM

TO: Bill Hext _____ Jerry S. McGuire _____ Mary Kaye Moore _____ Richard Morton _____ Becki Murphy _____ Kirk McCarley _____ Norma McClure _____ Matt Squyres <u>X</u> Van Hagan <u>X</u> Joe Tucker <u>X</u> Mark Simpson _____ James Zentner _____ Marwan Khoury _____ Mary Dominguez _____ Don Carlton _____ Dale Childers _____ Steve Pollock _____ Charlie Smith _____ Felicia Nzere _____	Jeanne Jasper _____ Matt Irvin _____ Debbie McReynolds _____ Ricky Subia _____ James Jenkins _____ John Blanco _____ Lou Orras _____ Christopher Pipes _____ Ralph McCain _____ Silvia Townsend _____ Jim O'Leary _____ Stacy Trotter _____ Sherman Smith _____ Steve Patton _____ Darrell Wells _____ Neil McDonald _____ Donna Carrasco _____ Tom Cronick _____ Betty Robinson _____	Don Clark _____ Jud Weatherly _____ Carolyn Fears _____ Barry Wooten _____ Doug Hildebrand _____ Larry Long <u>X</u> Lori Bevers _____ Warren Waterman _____ Les Moore _____ Bobbi Hagan _____ Naira Carrasco _____ Olivia Rivas _____ Gloria Gonzalez _____ Robbie Hicks _____ Records - PD _____ Neil McDonald _____ Wesley Burnett _____ Liz Aguirre _____ Sharon Wilson _____
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FROM: Joel V. Roberts, City Attorney

DATE: December 20, 2000

RE: TNRCC/Superfund Site

The following assistance is requested:

- () Please sign attached documents and return to Legal.
- () The attachments are for your information only.
- () The attachments are for your approval or comments and suggestions. Please advise.
- () Furnish information or documents: _____
- () What is status on the following project: _____
- () Please arrange for payment.
- (X) Attachments:
- () Other Comments:

I do not agree with her interpretation of the law. Monte Acres, TML Attorney, also does not agree. I have contacted Jeff Moore at the Attorney General's Office who will get back in touch.

- JVR



FAX TRANSMITTAL

Protecting Texas
by Reducing and
Preventing Pollution

DATE: December 20, 2000

NUMBER OF PAGES
(including cover sheet):



TO: Name Mr. Joel V. Roberts
 Organization City of Odessa -- Legal Dept.
 Facsimile Number 915.335.3257

FROM: The Texas Natural Resource Conservation Commission
 Name Caroline M. Sweeney
 Division Environmental Law Division
 Telephone Number (512) 239 - 0665
 Facsimile Number (512) 239 - 0606

NOTES:

Dear Mr. Roberts,

Thank you for the draft document. Our concern is that it goes beyond what the TNRCC is statutorily required to do in such instances. I have enclosed the statutory authority for your reference. Please also find our standard access agreement that I have enclosed as an alternative document for your consideration. I have added in some of your language pertaining to safety issues. Please let me know your thoughts on it. Thank you -- Caroline Sweeney

This facsimile message and accompanying documents contain information from the Texas Natural Resource Conservation Commission Environmental Law Division which may be CONFIDENTIAL AND/OR PRIVILEGED. The information is intended to be for the use of the individual or entity named on this transmittal sheet. If you are not the intended recipient, be aware that any disclosure, copying, distribution or use of the contents of this information is prohibited.

If you have received this facsimile in error, please notify us by telephone immediately and return the original message to us at Texas Natural Resource Conservation Commission, Environmental Law Division, P.O. Box 13087, Austin, Texas 78711-3087 by First Class Mail via the United States Postal Services. Thank you.

PLEASE CALL AS SOON AS POSSIBLE IF ALL PAGES ARE NOT RECEIVED OR IF THERE ARE ANY OTHER PROBLEMS WITH THE TRANSMITTAL OF THIS FAX.

WATER CODE

§ 26.014

unless otherwise expressly provided, an appropriation to or from, as appropriate, the account or fund provided by this Act as the replacement fund for the sources of revenue formerly credited to the abolished or consolidated fund."

§ 26.0136. Water Quality Management

(a) The commission is the agency with primary responsibility for implementation of water quality management functions, including enforcement actions, within the state. Water quality management functions shall be oriented on a watershed basis in consideration of the priorities identified by river authorities and basin steering committees. The commission by rule shall coordinate the water quality responsibilities of river authorities within each watershed and shall, where appropriate, delegate water quality functions to local governments under Section 26.175 of this code. The State Soil and Water Conservation Board shall coordinate and administer all programs for abating agricultural or silvicultural nonpoint source pollution, as provided by Section 201.026, Agriculture Code.

(b) Nothing in this section is intended to enlarge, diminish, or supersede the water quality powers, including enforcement authority, authorized by law for river authorities, the State Soil and Water Conservation Board, and local governments. Nothing in this section is intended to enlarge, diminish, or supersede the responsibilities of the Texas Agricultural Extension Service and the Texas Agricultural Experiment Station to conduct educational programs and research regarding nonpoint source pollution and related water resource and water quality matters.

(c) The commission shall establish rules to make the optimum use of state and federal funding and grant programs related to water quality programs of the commission.

(d) In this section, "river authority" has the meaning assigned by Section 26.0135(i) of this code.

Added by Acts 1991, 72nd Leg., ch. 294, § 2, eff. June 7, 1991. Amended by Acts 1993, 73rd Leg., ch. 53, § 2, eff. Sept. 1, 1993; Acts 1997, 75th Leg., ch. 101, § 2, eff. Sept. 1, 1997.

§ 26.014. Power to Enter Property

Text of section effective until delegation of NPDES permit authority

The members of the commission and employees and agents of the commission are entitled to enter any public or private property at any reasonable time for the purpose of inspecting and investigating conditions relating to the quality of water in the state. Mem-

bers, employees, or agents of the commission and commission contractors are entitled to enter public or private property at any reasonable time to investigate or monitor or, if the responsible party is not responsive or there is an immediate danger to public health or the environment, to remove or remediate a condition related to the quality of water in the state. Members, employees, commission contractors, or agents acting under this authority who enter private property shall observe the establishment's rules and regulations concerning safety, internal security, and fire protection, and if the property has management in residence, shall notify management or the person then in charge of his presence and shall exhibit proper credentials. If any member, employee, commission contractor, or agent is refused the right to enter in or on public or private property under this authority, the executive director may invoke the remedies authorized in Section 26.123 of this code.

Amended by Acts 1977, 65th Leg., p. 2207, ch. 870, § 1, eff. Sept. 1, 1977; Acts 1985, 69th Leg., ch. 795, § 1.066, eff. Sept. 1, 1985; Acts 1995, 74th Leg., ch. 883, § 1, eff. Aug. 28, 1995.

For text of section effective upon delegation of NPDES permit authority, see § 26.014, post

§ 26.014. Power to Enter Property

Text of section effective upon delegation of NPDES permit authority

The members of the commission and employees and agents of the commission are entitled to enter any public or private property at any reasonable time for the purpose of inspecting and investigating conditions relating to the quality of water in the state or the compliance with any rule, regulation, permit or other order of the commission. Members, employees, or agents of the commission and commission contractors are entitled to enter public or private property at any reasonable time to investigate or monitor or, if the responsible party is not responsive or there is an immediate danger to public health or the environment, to remove or remediate a condition related to the quality of water in the state. Members, employees, commission contractors, or agents acting under this authority who enter private property shall observe the establishment's rules and regulations concerning safety, internal security, and fire protection, and if the property has management in residence, shall notify management or the person then in charge of his presence and shall exhibit proper credentials. If any

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§ 26.014

ENVIRONMENTAL LAWS

member, employee, commission contractor, or agent is refused the right to enter in or on public or private property under this authority, the executive director may invoke the remedies authorized in Section 26.123 of this code.

Amended by Acts 1977, 65th Leg., p. 1640, ch. 644, § 1. Renumbered from § 21.064 and amended by Acts 1977, 65th Leg., p. 2207, ch. 870, § 1, eff. Sept. 1, 1977. Amended by Acts 1985, 69th Leg., ch. 795, § 1.067, eff. Sept. 1, 1985; Acts 1995, 74th Leg., ch. 882, § 2, eff. Aug. 28, 1995.

For text of section effective until delegation of NPDES permit authority, see § 26.014, ante

For effective date of Acts 1977, 65th Leg., ch. 644, see note under § 26.001.

§ 26.015. Power to Examine Records

Text of section effective until delegation of NPDES permit authority

The members of the commission and employees and agents of the commission may examine during regular business hours any records or memoranda pertaining to the operation of any sewer system, disposal system, or treatment facility or pertaining to any discharge of waste.

Amended by Acts 1977, 65th Leg., p. 2207, ch. 870, § 1, eff. Sept. 1, 1977; Acts 1985, 69th Leg., ch. 795, § 1.068, eff. Sept. 1, 1985.

For text of section effective upon delegation of NPDES permit authority, see § 26.015, post

§ 26.015. Power to Examine Records

Text of section effective upon delegation of NPDES permit authority

The members of the commission and employees and agents of the commission may examine and copy during regular business hours any records or memoranda pertaining to the operation of any sewer system, disposal system, or treatment facility or pertaining to any discharge of waste or pollutants into any water in the state, or any other records required to be maintained.

Amended by Acts 1977, 65th Leg., p. 1640, ch. 644, § 1. Renumbered from § 21.065 and amended by Acts 1977, 65th Leg., p. 2207, ch. 870, § 1, eff. Sept. 1, 1977. Amended by Acts 1985, 69th Leg., ch. 795, § 1.069, eff. Sept. 1, 1985.

For text of section effective until delegation of NPDES permit authority, see § 26.015, ante

For effective date of Acts 1977, 65th Leg., ch. 644, see note under § 26.001.

§ 26.0151. Public Information

(a) The commission shall provide for publishing or otherwise releasing on a regular basis as public information:

- (1) the results of inspections and investigations conducted under Section 26.014 of this code; and
- (2) any other information routinely prepared by the commission relating to compliance with this chapter or with a rule or order adopted under this chapter.

(b) The commission shall establish a procedure by which, in response to a written request, a person or organization will be sent a copy of an inspection, investigation, or compliance report for a specified facility or system or for facilities or systems in a specified area or, on a regular basis, a copy of the information released under Subsection (a) of this section.

(c) The commission shall charge a reasonable fee for each copy sent under Subsection (b) of this section. The fee must be set at an amount that is estimated to recover the full cost of producing and copying and mailing a copy of the report and must be paid in cash or by cashier's check.

(d) A copy of a report shall be sent to the person or organization requesting it not later than the 30th day after the date on which the fee is paid or on which the report is made, whichever is later.

(e) This section does not apply to any information excepted under Subchapter C, Chapter 562, Government Code.¹

Added by Acts 1985, 69th Leg., ch. 749, § 1, eff. Sept. 1, 1985. Amended by Acts 1987, 70th Leg., ch. 977, § 21, eff. June 19, 1987; Acts 1995, 74th Leg., ch. 76, § 5.95(101), eff. Sept. 1, 1995.

¹V.T.C.A., Government Code §562.101 et seq.

§ 26.016. Repealed by Acts 1997, 75th Leg., ch. 1072, § 60(a)(2), eff. Sept. 1, 1997

§ 26.017. Cooperation

The commission shall:

- (1) encourage voluntary cooperation by the people, cities, industries, associations, agricultural interests, and representatives of other interests in preserving the greatest possible utility of water in the state;

§ 361.195

ENVIRONMENTAL LAWS

These payments include any costs of inspection or sampling and laboratory analysis of wastes, soils, air, surface water, and groundwater done on behalf of a state agency and the costs of investigations to identify and locate potentially responsible parties.

(b) The commission shall seek remediation of facilities by potentially responsible parties before expenditure of federal or state funds for the remediations.

Acts 1989, 71st Leg., ch. 678, § 1, eff. Sept. 1, 1989. Amended by Acts 1990, 71st Leg., 6th C.S., ch. 10, art. 2, § 29, eff. Sept. 6, 1990; Acts 1997, 75th Leg., ch. 333, § 44, eff. Sept. 1, 1997.

For application provision of Acts 1997, 75th Leg., ch. 333, see notes following V.T.C.A., Health and Safety Code § 341.034.

→ § 361.196. Remediation: Permits Not Required; Liability

(a) Potentially responsible parties shall coordinate with ongoing federal and state hazardous waste programs although a state or local permit may not be required for any removal or remedial action conducted on site.

(b) Subject to Section 361.193, the state may enforce any federal or state standard, requirement, criterion, or limitation to which the remedial action would otherwise be required to conform if a permit were required.

(c) An action taken by the person to contain or remove a release or threatened release in accordance with an approved remedial action plan may not be construed as an admission of liability for the release or threatened release.

(d) A person who renders assistance in containing or removing a release or threatened release in accordance with an approved remedial action plan is not liable for any additional remediation costs at the facility resulting solely from acts or omissions of the person in rendering the assistance in compliance with the approvals required by this section, unless the remediation costs were caused by the person's gross negligence or willful misconduct.

(e) Except as specifically provided by this section, these provisions do not expand or diminish the common law tort liability, if any, of private parties participating in a remediation action for civil damages to third parties.

Acts 1989, 71st Leg., ch. 678, § 1, eff. Sept. 1, 1989. Amended by Acts 1990, 71st Leg., 6th C.S., ch. 10, art. 2, § 29, eff. Sept. 6, 1990.

§ 361.197. Cost Recovery

(a) The commission shall file a cost recovery action against all responsible parties who have not complied with the terms of an administrative order issued under Section 361.188. The commission shall file the cost recovery action no later than one year after all remedial action has been completed.

(b) The state may seek a judgment against the noncompliant parties for the total amount of the cost of the remedial investigation and feasibility study, the remedial design, and the remedial action, including costs of any necessary studies and oversight costs, minus the amount agreed to be paid or expended by any other responsible parties under an order issued under Section 361.185 or 361.188.

(c) The action may also include a plea seeking civil penalties for noncompliance with the commission's administrative order and a claim for up to triple the state's costs if the responsible party's defenses are determined by the court to be unreasonable, frivolous, or without foundation.

(d) The commission shall file a cost recovery action against each responsible party for the total costs of an action taken under Section 361.133(c)(1), (2), (3), (5), or (6) or Section 361.133(g).

Acts 1989, 71st Leg., ch. 678, § 1, eff. Sept. 1, 1989. Amended by Acts 1990, 71st Leg., 6th C.S., ch. 10, art. 2, § 29, eff. Sept. 6, 1990; Acts 1993, 73rd Leg., ch. 552, § 1, eff. June 2, 1993; Acts 1995, 74th Leg., ch. 883, § 4, eff. Aug. 28, 1995; Acts 1997, 75th Leg., ch. 793, § 9, eff. Sept. 1, 1997.

§ 361.198. Repealed by Acts 1997, 75th Leg., ch. 1072, § 60(b)(1), eff. Sept. 1, 1997

§ 361.199. Mixed Funding Program

The commission by rule shall adopt a mixed funding program in which available money from potentially responsible parties is combined with state or federal funds to clean up a facility in a timely manner. Use of the state or federal funds in a mixed funding approach does not preclude the state or federal government from seeking recovery of its costs from nonparticipating potentially responsible parties.

Acts 1989, 71st Leg., ch. 678, § 1, eff. Sept. 1, 1989. Amended by Acts 1990, 71st Leg., 6th C.S., ch. 10, art. 2, § 29, eff. Sept. 6, 1990.

§ 361.200. Settlement. the Commission Shall Assess and by Rule May Develop and Implement a Settlement Program

Under the program, the commission shall consider the advantages of developing a final settlement with

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