



Addressing Contaminated Industrial Property: Remediation, not Litigation

A policy white paper
with recommendations for improvement

Texas Conservative Coalition Research Institute

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Introduction

Since at least the late Eighties, the Texas Legislature and the Texas Commission on Environmental Quality (TCEQ) have encouraged the cleanup of contaminated properties in a myriad of ways. For example, the Petroleum Storage Tank Responsible Party Lead Program,¹ the Voluntary Cleanup Program,² the Innocent Owner Program,³ and the Dry Cleaner Remediation Program,⁴ to name a few, are legislative initiatives designed to promote the remediation of property that has been impacted by industrial and other commercial activities over the course of time. Often these historically contaminated sites occur because, in the past, on-site disposal was authorized or was accepted practice at the time the site was impacted. In many instances, the legislative and regulatory initiatives seek to relieve the concerns of potential new owners/developers contemplating owning or utilizing the impacted property by way of cleaning up sites through these programs. It is unquestionable that these programs have led to the restoration of commercially valuable property and promoted economic development in the State.⁵ Furthermore, encouraging private parties to purchase and voluntarily remediate contaminated property has relieved the State of Texas and its taxpayers from bearing the significant costs of remediation for these often abandoned tracts.

¹ The program's mission is to supervise the cleanup of spills from regulated storage tanks by recording and evaluating all reported incidents of releases of petroleum and other hazardous substances from underground and above-ground storage tanks. Source: Texas Commission on Environmental Quality, online at http://www.tceq.texas.gov/remediation/pst_rp/mission.html (last checked March 13, 2013). The program is funded by the petroleum storage tank reimbursement (“PSTR”) fund, the revenue for which is largely derived from charges, fees and penalties under the program itself. Administrative Code Chapter 334.

² “The Texas [Voluntary Cleanup Program] provides administrative, technical, and legal incentives to encourage the cleanup of contaminated sites in Texas.” A person electing to participate pays all costs of TCEQ oversight of the voluntary cleanup. Source: Texas Commission on Environmental Quality, online at <http://www.tceq.state.tx.us/remediation/vcp/vcp.html> (last checked March 13, 2013).

³ The Innocent Owner Program “provides a certificate to an innocent owner or operator if their property is contaminated as a result of a release or migration of contaminants from a source or sources not located on the property, and they did not cause or contribute to the source or sources of contamination.” Source: Texas Commission on Environmental Quality, online at <http://www.tceq.texas.gov/remediation/iop/iop.html> (last checked March 13, 2013).

⁴ The Dry Cleaner Remediation Program “establishes a prioritization list of dry cleaner sites and administers the Dry Cleaning Facility Release Fund to assist with remediation of contamination caused by dry cleaning solvents. Source: Texas Commission on Environmental Quality, online at http://www.tceq.texas.gov/remediation/dry_cleaners/index.html (last checked March 13, 2013). The program is largely funded by charges, fees and penalties under the program itself. Health and Safety Code Section 374.101(b).

⁵ For example, “Crestview Station was a 71 acre property in central Austin that functioned as a chemical research facility from 1949 until 2005... [following TCEQ cleanup activities, t]he site has been redeveloped as a mixed-use property, with both single family homes and apartment, ball fields, and 150,000 square feet of office and retail space.” Source: Texas Commission on Environmental Quality, online at <http://www.tceq.texas.gov/remediation/bsa/SuccessStories.html> (last checked March 13, 2013).

For its part, the TCEQ and its predecessor agencies have competently administered remediation programs such as those mentioned above, and conscientiously exercised appropriate discretion in their enforcement programs to avoid sending mixed messages to the regulated community. In short, whether due to some legislative incentive program or not, the TCEQ has generally not sought a penalty from owners of contaminated property if the owner was addressing the environmental issues. The basic reason is that the TCEQ reserves its penalty actions to punish non-compliance and recalcitrant owners. Thus, contamination that occurs as a result of legal, authorized disposal or other activity has been seen as appropriate for remediation but not penalty, unless the owner of the property is not willing to engage in remediation. While the TCEQ is not reluctant to exercise its enforcement authority when appropriate, in historical contamination cases, it recognizes the value of allowing these entities to clean up these sites without the additional financial burden of a penalty, which can take funds away from the cleanup efforts.

Thus, the State has acknowledged that assessing penalties against innocent landowners, subsequent purchasers, or successors in interest would deter persons from taking on contaminated properties and remediating them. While entities have shown a willingness to take on the cost of remediation of contaminated property, there is very little likelihood that anyone would take on such a property if they were subject to per diem penalties. As mentioned above, the State has also recognized that penalty dollars that are paid to the State are better spent on addressing the contamination. This is particularly true in cases where prior legal disposal activities left chemicals behind and only over the course of time has contamination occurred or been identified. In sum, these “historical contamination” cases have not resulted in penalty actions brought by the State when actions have been or are being taken to remediate the site.

I. The Growing Problem

In the last year and a half or so, the Harris County Attorney’s office has engaged in a pattern of litigation that has the potential to undermine the Texas Legislature’s and TCEQ’s contaminated property remediation programs and policies, as well as to impact economic development. Through overreaching local environmental enforcement lawsuits, Harris County is threatening the State’s property cleanup policies, and sending a signal to parties interested in developing contaminated property to avoid assuming responsibility given the threat of penalty-only suits.⁶ At least three lawsuits, notably being prosecuted by private contingency-fee lawyers on behalf of Harris County, seeking per-day penalties over decades of time threaten the sound environmental policies and associated economic development programs briefly discussed above.

⁶ As a study by the Connecticut General Assembly noted, “[t]he fear of being sued discourages businesses from cleaning up and redeveloping brownfields, a fear that arises even when a business acquires a property that was polluted by a prior owner and remediated according to government standards. Regardless of how rigorously it investigates and remediates the property, a business risks missing a hazardous substance or inadvertently spreading it while trying to remove it.” Source: Connecticut General Assembly Office of Legislative Research, 2010-2012 Business and Growth Initiatives Report, August 23, 2012. Online at <http://www.cga.ct.gov/2012/rpt/2012-R-0276.htm> (last checked March 13, 2013).

II. The Contingency-fee Penalty Only Cases

Harris County has an active environmental program that is often engaged in enforcement actions brought in State District Court.⁷ About a year and a half ago, Harris County began hiring private lawyers on a contingency-fee basis, and it has essentially left the prosecution of at least three similar cases to these lawyers. The similarities in the cases are several but, most notably, in each case the county is seeking hundreds of millions of dollars from the defendants and, if successful, the private lawyers would stand to substantially benefit. Generally, the private lawyers stand to gain 25% or more of the dollars recovered: tens, if not hundreds, of millions of dollars. The cases are:

(1) The drycleaner case – this case was brought against several property owners, namely, PMSV River Oaks, LP, SF Properties, LLC, Redonda Properties, Inc., Seven BC Company, S.K. and Brothers, Inc., and the Trustees of various Trusts, for contamination in the shallow groundwater underlying some property in the River Oaks section of Houston. The suit seeks millions of dollars in penalties for historic contamination associated with dry cleaning operations that had been in the area for many years. Interestingly, this same contamination is being addressed through the legislatively-created Drycleaner Program, which is intended to address historical contamination associated with dry cleaning operations through state funding.

(2) The underground fuel storage tank case – AT&T has underground fuel storage tanks associated with servicing fleet vehicles and with cellular phone towers that serve to fuel generators in the event of a power outage. Over time, fuel has either leaked or spilled at some of these sites and required remediation. The sites that are targeted in this case have all been addressed through the State’s leaking underground storage tank program without penalties being assessed. The case seeks hundreds of millions of dollars from AT&T.

(3) The Superfund case - over a certain discrete period in 1965-66, Champion Paper contracted with McGinnes Industrial Maintenance Corporation (MIMC) for the disposal of paper mill waste. The disposal site was reviewed and permitted by Harris County as an ideal spot for disposal. Unknown to the companies at the time of disposal, the waste contained dioxin and other contaminants and, eventually, through a number of external happenings, including subsidence, dredging, sand

⁷ For example, National Public Radio has reported that Terry O’Rourke, First Assistant Harris County Attorney, believes that his office is enforcing pollution laws because the state of Texas isn’t. He has been quoted as saying: “[s]adly, the history of the State of Texas in protecting people, especially people here on the Gulf Coast from environmental contamination, is pitiful... The people in Austin are compliance agencies and they look at the polluters as their clients or their customers... It is so offensive to us whose job is protecting people.” Source: Dave Fehling, NPR, November 8, 2011. Online at <http://stateimpact.npr.org/texas/2011/11/08/harris-county-attorneys-office-on-tceq-offensive-sue-polluters/> (last checked March 13, 2013).

production, and others, the San Jacinto River inundated the impoundments. Meanwhile, through corporate acquisitions, Champion Paper became International Paper, and Waste Management acquired MIMC in a larger transaction. On April 2, 2010, the U.S. EPA issued a memorandum for a Time Critical Removal Action (TCRA) to stabilize the waste impoundments and to prevent direct human and organism contact with the waste materials until the site can be remedied. Presently, a Remedial Investigation/Feasibility Study (RI/FS) is being carried out to address the site. This Harris County case seeks almost two billion dollars in penalties.

Harris County's contingency fee lawyers seek only penalty dollars and are not seeking to remediate the sites that are the subject of the actions. In fact, each of these sites has been or is being remediated through a discrete environmental program.

III. The State's Role

Under the Texas Water Code, the State is made a "necessary and indispensable" party (Water Code § 7.353) to local government environmental enforcement actions, such as those described above. However, the State's role in prosecuting cases such as these is unclear in present law. For example, the applicable statutes empower local governments to bring these actions "in the same manner" as the TCEQ but do not specify whether the local authorities must follow the TCEQ's policies. Thus, even though the Harris County Attorney's office and their contingency-fee lawyers have been told directly that the State disapproves of these lawsuits (for some of the reasons explained above), the cases continue. Further, the State's statutory role as a "necessary and indispensable party" to these cases can be misinterpreted as the State condoning the prosecution of the lawsuits when, in fact, the State has no clear role in the cases other than to receive half of the penalty collected.

Furthermore, the state's remediation programs (including those described above) have proven successful at cleaning-up contaminated sites, which is the most important factor in determining an appropriate approach to this issue. For instance, the TCEQ notes that through May 2012, the Voluntary Cleanup Program:

...has accepted 2,323 applications representing dry cleaners, manufacturing facilities, shopping centers, warehouses, auto-related businesses and other commercial and industrial enterprises. Of these sites, 1,570 have been issued final certificates of completion and 167 have received conditional certificates of completion.⁸

Similarly, with regard to the Petroleum Storage Tank Responsible Party Lead Program, TCEQ reports that:

⁸ Texas Commission on Environmental Quality, Voluntary Cleanup Program information; available online at: <http://www.tceq.state.tx.us/remediation/vcp/vcp.html>

As of January 31, 2013, the TCEQ has been notified of 26,549 leaking petroleum storage tanks. Of this total, 9,877 were confirmed to have affected groundwater. Since the initiation of the program, 24,849 LPST cases have been closed.⁹

Given the success of these types of programs, and the deleterious impact on remediation of lawsuits such as those being pursued in Harris County, it is incumbent upon the Legislature to ensure that the state's remediation programs are not undermined by punitive litigation at the local level.

IV. Legislative Solutions

Two bills, H.B. 3117 and H.B. 3119 filed by Representative Cindy Burkett, would address the concerns raised above without affecting a local government's enforcement authority, so long as it is applied with proper consideration for the incentive programs and policies of the State, and not exercised through contingency fee arrangements.

H.B. 3119 addresses the dubious practice of employing private lawyers on a contingency basis by simply prohibiting such arrangements. Of course, a local government may still bring such actions using government lawyers or private lawyers on some other fee arrangement (hourly, for instance); so, the local government's ability to choose counsel is unaffected. However, with the present statutory *per diem* penalty range of \$50 to \$25,000 associated with most environmental regulations, a contingency fee arrangement could unjustly enrich a private lawyer whose incentive is to maximize the award, not to remediate the property or environmental impacts.

Similarly, H.B. 3117 would not degrade a local government's present authority to bring actions for enforcement of environmental laws and to penalize violations. However, consistent with the present statutory grant of authority, the bill would clarify that the State, through its Attorney General, has clear authority to resolve any such lawsuits consistent with the overarching policies and objectives of the State. In short, the State's authority, which has been delegated to local governments, would be paramount as a check on the local government's enforcement of the State's laws. H.B. 3117 would ensure that in cases where the State is and has always been a "necessary and indispensable" party, the interests of the State would not be subordinate to the interests of private attorneys retained on a contingency fee basis.

Conclusion

Through the TCEQ, the Legislature has made sensible and appropriate provision for the cleanup and remediation of sites that have been contaminated by various types of industrial activity. The state's approach has hinged on working with property owners and businesses to clean up affected sites, in recognition that punitive fees or fines levied against these actors actually diminishes their ability to make the necessary investments in remediation.

⁹ Texas Commission on Environmental Quality, PST Responsible Party Lead Program information; available online at: http://www.tceq.texas.gov/remediation/pst_rp/mission.html

In order for these remediation programs to remain successful, it is critical that they are not undermined at the local level by lawsuits that primarily seek financial recompense from property owners and businesses. H.B. 3117 and H.B. 3119 would address these issues by reaffirming the state's proper role and ending the practice of local governments employing private lawyers on a contingency basis for such proceedings.