Statutes
HSWA I

Texas Water Commission

INTEROFFICE MEMORANDUM

TO : Jim Haley, Director, Legal Division DATE: February 22, 1990

THRU :

FROM : Carlos Celestino, Staff Attorney, Legal Division

SUBJECT: HSWA Authorization Issue

Section 361.003(13) of the TEXAS HEALTH CODE ANNOTATED defines "hazardous waste" as any solid waste identified or listed as a hazardous waste by the Administrator of the United States Environmental Protection Agency (EPA) pursuant to the Federal Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act, 42 U.S.C. 6901 et. seq. as amended." In adopting the federal definition of "hazardous waste" the Texas legislature could have set out the definition at length. Ex Parte Burke, 190 Cal. 326, 216 p. 193, 193 (1923). Instead, rather than accumulate voluminous statutes and require the legislature to be in constant session to keep pace with federal definition amendments, the legislature opted to adopt the existing federal definition of "hazardous waste" and incorporate it and subsequent amendments thereto into the State definition by reference. Read, Is Referential Legislation Worthwhile, 25 Minn. L. Rev. 261, 268 (1941).

Under the Texas Constitution, the legislature is granted broad powers unless specifically restricted. The Texas Constitution states that "no law shall be revived or amended by reference to its title; but in such case the act revived, or the section or sections amended, shall be re-enacted and published at length." TEX. CONST. Art 3 §36 (Vernon Supp. 1990).

This constitutional provision specifically restricts the Texas Legislature from enacting "blind amendments". TEX. CONST. Art 3 §36 (Vernon Supp. 1990). However, nothing in this provision specifically prevents the Texas legislature from adopting the federal definition of "hazardous waste" and incorporating that definition into State law by reference. Thus, "where not restrained by some constitutional limitation there is nothing to prevent any legislature, federal or local, from adopting precepts from the laws of any associated legislature by reference." Read, Is Referential Legislation Worthwhile, 25 Minn. L. Rev. 261, 269 (1941). An early Texas case dealing with incorporation by reference held that "where one statute adopts the provisions of another [the courts will] look to the provisions of the other merely for the purpose of discovering the legislative intent; and no reason is seen why, in such a case, the will of the legislature should not be given effect. Quinlan v. Houston and Texas Central

Railway Company, 34 S.W. 738, 741 (Tex. 1896). Further, "if the statute referred to be an existing law, the legislative purpose is to apply its provisions to the subject matter of the new act." Quinlan v. Houston and Texas Central Railway Company, 34 S.W. 738, 741, 742 (Tex. 1896).

States with the same or similar constitutional restriction as Article 3 Section 36 of the Texas Constitution, have judicially upheld legislative adoption of a federal statute and the incorporation of that statute into State law by reference. Ex Parte Burke, 190 Cal. 326, 216 p. 193 (1923). This is particularly true where the national and state government have pursued a common policy. See, Comment, "Validity of State Recovery Acts Adopting Federal Codes", 1935 No. 4 Mich. L. Rev. 597, 601. In Commonwealth v. Alderman, 345 Pa. 270 (Pa. Sup. Ct 1923), defendant was appealing a conviction of "possessing and transporting liquors contrary to the Woner Act." The court was confronted with whether the Pennsylvania Constitution was violated by the Woner Act which was passed in response to the 18th Amendment's prohibition against liquor specifically, the federal Volstead Act. The Woner Act defined the following:

> "Vinous, spirituous, malt or brewed liquors", dealt with in the statute, shall mean all liquors "fit for beverage purposes, other than such as are, from time to time, determined and found to be intoxicating by act of Congress passed pursuant to, and in the phrase, "intoxicating liquors" shall mean "anything found and determined, from time to time, to be intoxicating by act of Congress passed pursuant to, and in the enforcement of, the constitution of the United States." Alderman at 486.

The defendant argued that the Woner Act by its statutory definitions "(1) attempts to delegate to Congress, law-making power vested solely in the Pennsylvania legislature" and (2) "endeavors to write into the Pennsylvania Code part of the federal statute, known as the Volstead Act," in violation of the Pennsylvania Constitution. Alderman at 486. The specific constitutional restriction brought into question by the defendant stated as follows: "No law shall be revived, amended, or the provisions thereof extended or conferred, by reference to its title only, but so much thereof as is revived, amended, extended, or conferred shall be re-enacted and published at length." Alderman at 486.

The Pennsylvania Supreme Court held that the statute did not delegate state legislative authority to Congress because the statutory definitions of "vinous, spirituous, malt or brewed liquors." and "intoxicating liquors" were to be "viewed as merely designating a definite source of information, or standard, for the ascertainment of a fact essential to the application of the law." Alderman at 487. These statutory definitions were viewed by the court as making no change in Pennsylvania law as it was before the

Volstead Act and could have in fact been omitted by the Pennsylvania legislature "without any effect whatever." Alderman at 487. "Since the statutory definitions might have been omitted without changing the law of Pennsylvania ... it cannot be accounted an unconstitutional delegation of legislative power, such as to annul that statute." Alderman at 489.

The court further held that the Pennsylvania statute did not violate the state constitution because the constitution was never intended to apply to a situation where the state and federal government would share concurrent power to legislate and enforce the provisions of prohibition pursuant to the 18th Amendment. Alderman at 488. Nor did the statutory definitions fall under the "evils" sought to be avoided by the Pennsylvania constitutional restriction. Alderman at 488. Lastly, the court also held "that a new act of assembly may refer to established law, as applicable, without full recital" especially given the "binding force of prior federal interpretation of the 18th Amendment." Alderman at 489.

Several parallels can be made from Alderman to wit: (1) There is no discernable difference between the Pennsylvania statutory definitions which are "from time to time to be determined by Congress" and the "as amended" language contained in the Texas definition of hazardous waste; (2) The Texas definition of "hazardous waste" merely provides a "source of information or standard" because by reference to the federal definition, one is able to determine the universe of identified or listed hazardous waste in Texas; (3) The Texas legislature created no new law with the enactment of the Texas definition of "hazardous waste" as the legislature merely adopted existing federal law and incorporated it into state law by reference; and (4) The concurrent powers shared between Texas and the EPA on human health and environment would render inapplicable the Texas constitutional restriction against incorporation by reference.

The Texas courts have not dealt with the constitutional effect of legislative adoption of federal law and the incorporation of that law into Texas law by reference. However, the courts have ruled on the construction to be given to a federal statute or another state statute when adopted in a Texas statute. State v. Klein, Cr. R. 31 224 S.W.2d 250, (TEX. CRIM. APP. 1949); Findley v. Calvert, 509 S.W.2d 393 (TEX. CIV. APP. 1974); In Re: Estates of Carrigan, 517 S.W.2d 817 (TEX. CIV. AP. 1974). "Where a federal statute is adopted in a statute of this State, the presumption follows that the legislature knew of and intended to adopt the construction placed upon the federal statute by the federal courts." State v. Klein, 154 Cr. R. 31, 224 S.W.2d 250, 253 (TEX. CIV. APP. 1949). As previously noted, the Texas legislature's adoption of a federal statute was effectuated through the incorporation of the federal definition of "hazardous waste" and amendments thereto into the state definition by reference. Therefore, the Texas adoption of the federal definition of

"hazardous waste" also presumes that the legislature intended that the construction of the federal definition as viewed by the federal courts would also be adopted.

Non HSWA II / HSWA I

C. Lynn 6H

CC: 6A
6D
6C
6OC

Statutes

TEXAS WATER COMMISSION

88 DEC 21 AM 8:03
HAZARDOUS WASTE MGMT DIV.

B. J. Wynne, III, Chairman
Paul Hopkins, Commissioner
John O. Houchins, Commissioner

Allen Beinke, Executive Director
Michael E. Field, General Counsel
Karen A. Phillips, Chief Clerk

RECEIVED
EPA REGION VI
1988 DEC 19 PM 4:02
OFFICE

December 15, 1988

The Honorable Ashley Smith
Texas House of Representatives
State Capitol Room 411-C
Austin, Texas 78711

Re: Proposed amendment to the Texas Department of Commerce Act.

Dear Representative Smith:

I am writing you today to follow up on our discussion last Thursday concerning a problem that has arisen as an unintended consequence of the provisions of the Texas Department of Commerce Act[1] relating to changes in agency rules.

Section 7.003 of the Act requires that conditions in permits issued by state agencies be based on requirements in effect ***at the time the permit application is filed***. The purpose of this requirement is a good one--to streamline the regulatory process by preventing state agencies and political subdivisions from changing applicable rules in the middle of the permitting process.

Some environmental regulatory programs are delegated to the state by the federal government with the beneficial result that business and industry operating in Texas is required in most instances to obtain only one permit at the state level rather than both a state and federal permit. The State hazardous waste regulatory program administered by the Texas Water Commission is such a program. Federal regulations require that to maintain state delegation of this program and the concomitant benefits of "one-stop" permitting in Texas, permits for hazardous waste management facilities issued by the state must include all state and federal regulatory requirements in effect ***at the time of***

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[1] Acts, 70th Leg., Reg. Sess., ch. 364; TEX CIV. STAT. ANN. art. 4413(301) §§7.001-7.003 (Vernon Supp. 1988) ("the Act").

permit issuance. This federal requirement is in direct conflict with §7.003 of the Act.

If the Act is not amended, state program authorization for hazardous waste regulation will certainly be withdrawn by the U.S. Environmental Protection Agency. Other programs will be similarly affected. This will have the immediate effect of requiring business and industry in Texas to undertake dual permitting at the state and federal levels for a wide variety of activities having environmental consequences. It may also disqualify Texas from receiving federal grant money in some instances.

The Texas Department of Commerce Act was intended to facilitate economic development in Texas by streamlining the regulatory process. Unfortunately, §7.003 will have the opposite effect as applied to federally-delegated environmental programs such as hazardous waste and water quality regulation. A corrective amendment next session of the Legislature to exempt federally delegated environmental programs from §7.003 of the Act could solve this problem. Such an amendment has been recommended by the State Auditor.[2]

Since we discussed this matter last week, I recieved the enclosed draft of a bill to amend the Act in a manner which will preserve the ability of the state to accept delegation of federal environmental programs. This draft was prepared by the Texas Legislative Council at the request of the Governor's office. Since you were the author of the Department of Commerce Act last session, I hope you will consider sponsoring this legislation when the Legislature convenes in January.

I will be pleased to discuss this matter with you or your staff at any time.

Respectfully yours,

Buck Wynne

B.J. Wynne, III, Chairman
Texas Water Commission

Enclosures

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[2] A copy of State Auditor Report No. 9-056, dated December 12, 1988, is enclosed for your reference. The pertinent recommendation is found at page 6.

cc: The Honorable Terral Smith, Chairman
Committee on Natural Resources
Texas House of Representatives

Robert E. Layton, Jr., Regional Administrator
Region VI, U.S. Environmental Protection Agency

Cliff Johnson, Legislative Director
Office of the Governor

BJW/881215A

TEXAS SOLID WASTE DISPOSAL ACT

(Annotated Revised Civil Statutes of the State of Texas, Health — Public Article 4477-7 — Solid Waste Disposal Act; Enacted by Acts of 1969, Chapter 405; Amended by Acts of 1971, Chs. 516, 863; Acts of 1973, Chs. 149, 385, 576; Acts of 1977, Chs. 251, 308, 870; Acts of 1979, Ch. 251; Acts of 1981, Ch. 831; Acts of 1983, Chs. 435, 503, 771; Acts of 1985, Chs. 125, 239, 457, 464, 566, 567, 795, 887, 921, 931; Laws of 1987, Chs. 139, 279, 299, 302, 305, 632, 638; 781)

Administering Agency: Texas Water Commission
P.O. Box 13087
Capitol Station
Austin, Texas 78711

Short title; policy

Sec. 1. This Act may be cited as the Solid Waste Disposal Act. It is the policy of the state and the purpose of this Act to safeguard the health, welfare, and physical property of the people through controlling the collection, handling, storage, and disposal of solid wastes, including the accounting for hazardous wastes generated.

Definitions

Sec. 2. As used in this Act, unless the context requires a different definition:

(1) "Administratively complete" means that a complete permit application form, as well a the report and fees required to be submitted with a permit application, have been submitted to the department or the commission and the permit application is ready for technical review in accordance with the rules of the department or commission.

(2) "Apparent recharge zone" means that recharge zone designated on maps prepared or compiled by, and located in the offices of, the commission.

(3) "Board of health" means the Texas Board of Health.

(4) "Class I industrial solid waste" means any industrial solid waste or mixture of industrial solid wastes which because of its concentration or physical or chemical characteristics is toxic, corrosive, flammable, a strong sensitizer or irritant, a generator of sudden pressure by decomposition, heat, or other means and may pose a substantial present or potential danger to human health or the environment when improperly processed, stored, transported, or otherwise managed, including hazardous industrial waste.

(5) "Commission" means the Texas Water Commission.

(6) "Commissioner" means the Commissioner of Health.

(7) "Composting" means the controlled biological decomposition of organic solid waste under aerobic conditions.

(8) "Department" means the Texas Department of Health.

(9) "Disposal" means the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste (whether containerized or uncontainerized) into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or to be emitted into the air or discharged into any waters, including groundwaters.

(10) "Environmental response law" means the federal Comprehensive Environmental Response, Compensation and Liability Act of 1980 (Pub. L. No. 96-510).

(11) "Executive director" means the Executive Director of the Texas Water Commission.

(12) "Garbage" means solid waste consisting of putrescible animal and vegetable materials resulting from the handling, preparation, cooking, and consumption of food, including waste materials from markets, storage facilities, handling, and sale of produce and other food products.

(13) "Hazardous waste" means any solid waste identified or listed as a hazardous waste by the administrator of the United States Environmental Protection Agency (EPA) pursuant to the federal Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act, 42 U.S.C. 6901 et seq., as amended.

(14) "Industrial solid waste" means sol-