

US EPA ARCHIVE DOCUMENT

PROGRAM DESCRIPTION

STATE OF TEXAS

TEXAS NATURAL RESOURCE CONSERVATION COMMISSION

RCRA PROGRAM REVISION

RCRA CLUSTERS VII-X

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I. INTRODUCTION

A. THE TEXAS NATURAL RESOURCE CONSERVATION COMMISSION

Under the Texas Solid Waste Disposal Act (codified in Chapter 361 of the Texas Health and Safety Code), the Texas Natural Resource Conservation Commission (the "Commission" or "TNRCC") has the primary responsibility for the administration of laws and regulations concerning hazardous waste. The commission has over 2,800 employees, sixteen regional field offices, and has regulatory oversight for protecting air, water, and land resources in Texas from pollution. Pursuant to section 91.602 of the Texas Natural Resources Code, the Railroad Commission of Texas has jurisdiction over oil and gas hazardous waste. The current Memorandum of Understanding (MOU) between TNRCC and Railroad Commission is attached.

B. RCRA AUTHORIZATION

Since the beginning of the federal hazardous waste management program, the State of Texas has continuously exercised its prerogative to participate in the Environmental Protection Agency's authorization program. Texas received authorization of its hazardous waste "base program" under the Resource Conservation and Recovery Act (RCRA) 42 U.S.C. §§6901 *et seq.* (1976) on December 26, 1984. Texas received authorization for revisions to its base program on February 17, 1987 (non-HSWA Clusters I & II). Texas submitted further revisions to its hazardous waste program and final authorization of those revisions became effective on March 15, 1990 (non-HSWA Cluster III and parts of non-HSWA Cluster IV); July 23, 1990 (HSWA Cluster I); October 21, 1991 (TCLP); December 4, 1992 (non-HSWA Cluster IV); June 27, 1994 (non-HSWA Clusters V and VI, HSWA Cluster II, and RCRA I); November 26, 1997 (RCRA Clusters II, III, and IV); and October 18, 1999 (RCRA Cluster V). Most recently, Texas received authorization for RCRA Cluster VI on September 11, 2000.

This Program Description has been prepared in accordance with the requirements of 40 CFR § 271.21, procedures for the revision of state programs.

II. PROGRAM REVISION SCOPE, STRUCTURE, AND COVERAGE

The TNRCC has rules in place necessary to implement EPA's revisions to the federal hazardous waste program made from July 1, 1996 to June 30, 2000. The revisions in Checklists 154, 156, 157, 163, 167, 169, 170, 172, 175, 177 -179, 182-185, and 187 comprise RCRA Clusters VII through X.

The RCRA Cluster VII includes the following regulations:

1. Consolidated Organic Air Emission Standards for Tanks, Surface Impoundments, and Containers
Checklist 154. HSWA Provision.
2. Military Munitions Rule
Checklist 156. Non-HSWA Provision.
3. Land Disposal Restrictions -- Phase IV
Exemptions From RCRA for Certain Processed Materials
Checklist 157. HSWA Provision.

The RCRA Cluster VIII includes the following regulations:

1. Organic Air Emission Standards for Tanks, Surface Impoundments, and Containers; Clarification and Technical Amendment
Checklist 163. HSWA Provision.
2. Mineral Processing Secondary Materials Exclusion; Bevill Exclusion Revisions and Clarification; Exclusion of Recycled Wood Preserving Wastewaters
Checklist 167 E and F. Non HSWA Provisions.
Land Disposal Restrictions Phase IV -- Treatment Standards for Metal Wastes and Mineral Processing Wastes; Treatment Standards for Hazardous Soils
Checklist 167 A, B and C. HSWA Provisions.

The RCRA Cluster IX includes the following regulations:

1. Petroleum Refining Process Wastes
Checklist 169. HSWA/Non-HSWA Provisions.
2. Land Disposal Restrictions Phase IV -- Zinc Micronutrient Fertilizers, Administrative Stay
Checklist 170. HSWA Provision.
3. Land Disposal Restrictions Phase IV-- Extension of Compliance Date for Characteristic Slags
Checklist 172. HSWA Provision.
4. Hazardous Remediation Waste Management Requirements (HWIR-Media)
Checklist 175. HSWA/Non-HSWA Provision.

5. Organic Air Emission Standards: Clarification and Technical Amendments
Checklist 177. HSWA Provision.
6. Petroleum Refining Process Wastes -- Leachate Exemption
Checklist 178. HSWA Provision.
7. Land Disposal Restrictions Phase IV -- Technical Corrections and Clarifications to Treatment Standards
Checklist 179. HSWA and non-HSWA Provisions.

The RCRA Cluster X includes the following regulations:

1. NESHAPS: Final Standards for Hazardous Air Pollutants for Hazardous Waste Combustors, Miscellaneous Units, and Secondary Lead Smelters; Clarification of BIF Requirements; Technical Correction to Fast-track Rule
Checklist 182. HSWA/Non-HSWA Provisions.
2. Land Disposal Restrictions Phase IV -- Technical Corrections
Checklist 183. HSWA/Non-HSWA Provisions.
3. Accumulation Time for Waste Water Treatment Sludges
Checklist 184. Non-HSWA Provision.
4. Vacatur of Organobromine Production Waste Listings
Checklist 185. HSWA Provision.
5. Petroleum Refining Process Wastes -- Clarification
Checklist 187. HSWA Provision.

Revision checklists 153, 155, 158, 159 - 161, 164, 166, 168, 171, 173, 176, 180, and 181 are considered minor or routine rules by the EPA and according to 40 CFR 270.21(h) do not require a program description or an attorney general's statement. These are provided under separate cover.

Checklist 162 is not included as it addresses an aspect of the land disposal restrictions regulations which is not delegable and therefore not adopted by TNRCC's rules. Checklist 174 is also not included, as it addresses an optional, less stringent regulatory approach not yet adopted by TNRCC's rules.

*Checklist 174 is included but also adopted
the more stringent provisions*

III. STATE AGENCY RESPONSIBILITIES

A. THE TNRCC & RRC AGENCIES

In 1980, RCRA was amended to exempt from Subtitle C regulation drilling fluids, produced waters, and other wastes associated with the exploration, development, or production of crude oil, natural gas, or geothermal energy. See 42 U.S.C. §6921(b)(2)(A)(1995). At the time of the amendments, and over the next several years, these “other wastes” which were exempted from RCRA Subtitle C included all oil and gas waste under the Railroad Commission (RRC) jurisdiction. See 45 Fed. Reg. 85016, 85020; Texas: Phase I Interim Authorization of State Hazardous Waste Management Program (EPA 1980). In this approval of the State’s program, EPA states that “the jurisdiction of the Texas Railroad Commission covers areas which are currently excluded from its [EPA’s] regulatory authority under 40 CFR Part 261.” In 1985, the State of Texas understood that EPA had yet to interpret the exemption for drilling fluids, produced waters, and other associated wastes. The state also understood that the exemption might be narrowed. Therefore, the State of Texas amended the definition of oil and gas waste to exclude hazardous wastes from activities associated with gasoline plants, natural gas or natural gas liquids processing plants, pressure maintenance plants, or repressurizing plants, in the belief that this class of wastes encompassed all the wastes that might be determined to be beyond the scope of RCRA. In its 1988 regulatory determination, Regulatory Determination for Oil and Gas Geothermal Exploration, Development and Production Wastes, 53 Fed. Reg. 25446 (EPA 1998), EPA interpreted the exemption to be narrower, in some respects, than the State of Texas had anticipated. EPA found that the exemption applied only to wastes intrinsically related to the exploration, development, and production of oil, gas, and geothermal resources. EPA determined that certain wastes previously believed to be covered by the exemption were, in fact, subject to hazardous waste regulation. EPA’s regulatory determination lists some of the oil and gas wastes that are subject to RCRA Subtitle C. In accordance with the law of the State of Texas, these are oil and gas wastes regulated by the RRC.

1. The Texas Natural Resource Conservation Commission

The TNRCC has jurisdiction over “solid waste;” therefore, TNRCC regulates garbage, rubbish, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility, and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, municipal, commercial, mining, and agricultural operations and from community and institutional activities. See Tex. Health & Safety Code Ann. §361.003(34) (Vernon 2001). TNRCC’s jurisdiction includes hazardous substances. Id. §361.003(34)(B).

However, solid waste under the jurisdiction of the TNRCC does not include: (i) solid or dissolved material in domestic sewage, or solid or dissolved material in irrigation return flows, or industrial discharges subject to regulation by permit issued under Chapter 26, Water Code; (ii) soil, dirt, rock, sand, and other natural or man-made inert solid materials used to fill land if the object of the fill is to make the land suitable for the construction of surface improvements; or (iii) waste materials that result from activities associated with the exploration, development, or production of oil or gas or geothermal resources and other substance or material regulated by the Railroad Commission of Texas under Section 91.101, Natural Resources Code, unless the waste, substance, or material results from activities associated with gasoline plants, natural gas or natural gas liquids processing plants, pressure maintenance plants, or repressurizing plants and is hazardous waste as defined by the administrator of the United States Environmental Protection Agency under the federal Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act, as amended (42 U.S.C. Section 6901 et seq.). Id. at §361.003(34)(A)(i-iii).

At the time the EPA delegates RCRA authorization to the RRC, jurisdiction over waste, substance, or

material that results from activities associated with gasoline plants, natural gas or natural gas liquids processing plants, pressure maintenance plants, or repressurizing plants and is hazardous waste as defined by the administrator of the United States Environmental Protection Agency (EPA) under the federal Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act, as amended (42 U.S.C. Section 6901 et seq.) will transfer from the TNRCC to the RRC.

The TNRCC has never requested, nor has it ever been granted, RCRA authorization for oil and gas hazardous waste. Because the Texas Legislature has assigned jurisdiction of oil and gas wastes to the Railroad Commission (RRC), the statutory authority for regulation of such waste lies with the RRC.

2. The Railroad Commission

Generally, the RRC has jurisdiction over the discharge, storage, handling, transportation, reclamation, or disposal of waste materials (both hazardous and non hazardous) that result from the activities associated with the exploration, development, or production of oil or gas or geothermal resources and other activities regulated by the RRC. See generally Tex. Nat. Res. Code Ann Title 3 (Vernon 2001); Texas Water Code Ann. § 26.131 and Ch. 27 (Vernon 2000). Activities associated with the exploration, development, or production of oil or gas or geothermal resources are:

- (a) the drilling of exploratory wells, oil wells, gas wells, or geothermal resource wells;
- (b) the production of oil or gas or geothermal resources, including:
 - (1) activities associated with the drilling of injection water source wells that penetrate the base of usable quality water;
 - (2) activities associated with the drilling of cathodic protection holes associated with the cathodic protection of wells and pipelines subject to the jurisdiction of RRC to regulate the production of oil or gas or geothermal resources;
 - (3) activities associated with gasoline plants, natural gas or natural gas liquids processing plants, pressure maintenance plants, or repressurizing plants;
 - (4) activities associated with any underground natural gas storage facility
 - (5) activities associated with any underground hydrocarbon storage facility;
 - (6) activities associated with the storage, handling, reclamation, gathering, transportation, or distribution of oil or gas prior to the refining of such oil or prior to the use of such gas in any manufacturing process or as a residential or industrial fuel;
- (c) the operation, abandonment, and proper plugging of wells subject to the jurisdiction of the RRC to regulate the exploration, development, and production of oil or gas or geothermal resources; and
- (d) the discharge, storage, handling, transportation, reclamation, or disposal of waste or any other substance or material associated with any activity listed in the foregoing paragraphs, except for waste generated in connection with processing plants, pressure maintenance plants, or repressurizing plants if the waste is defined as hazardous waste by EPA. See 16 TAC § 3.8(a)(30) and TNRCC definitions at 30 TAC 335.1. Hazardous wastes generated at natural gas, or natural gas liquids processing plants, or reservoir pressure maintenance or repressurizing plants are subject to the jurisdiction of the TNRCC until the RRC is authorized by EPA to administer RCRA. When the RRC is authorized, jurisdiction over such hazardous waste will transfer from the TNRCC to the RRC.

B. MOU BETWEEN RRC AND TNRCC

By statutory requirement, a Memorandum of Understanding (MOU) has been developed between the TNRCC and the RRC to effectively coordinate Texas' regulatory program over the jurisdiction of waste materials. See Texas Solid Waste Disposal Act, Texas Revised Civil Statutes, art. 4477-7; House Bill 1407, Section 10, 67th Texas Legislative Session (1981). The MOU has been adopted by rule which is an adoption by reference of the RRC's rule and describes the division of responsibilities, as well as the procedures for coordination, between the two agencies. See TNRCC's rule at 30 TAC §7.117 and RRC's rule at 16 TAC §3.30.

C. DIVISION OF RESPONSIBILITY BETWEEN TEXAS AND EPA

The TNRCC has never requested, nor has it ever been granted, RCRA authorization for oil and gas hazardous waste. Because the Texas Legislature has assigned jurisdiction of oil and gas wastes to the RRC, the statutory authority for regulation of such waste lies with the RRC. Until EPA delegates RCRA authority to the RRC, the EPA is responsible for the regulation of hazardous waste associated with the exploration, development, or production of crude oil, natural gas, or geothermal energy. As well, EPA is responsible for the regulation of hazardous waste for which the TNRCC has not been previously authorized.

IV. STRUCTURE & PROCESSES OF THE TNRCC

A. THE COMMISSION

Three full-time commissioners are appointed by the governor to establish overall agency direction and policy, and to make final determination on contested permitting and enforcement matters. As well, they perform the legislative and judicial functions of the TNRCC. The commissioners are appointed for staggered six-year terms by the governor with the advice and consent of the Texas Senate. A commissioner may not serve more than two six-year terms. The governor also appoints the chairman of the Commission.

The Commission meets as necessary to render decisions concerning matters within its jurisdiction, including permits and other authorizations. The Commission also establishes the general policies of the agency and adopts the rules necessary to carry out the statutory responsibilities of the Commission. The Commission employs an executive director and six deputy directors to administer agency programs. The Commission also appoints a general counsel, a chief clerk, and a public interest counsel.

B. OFFICES THAT REPORT TO THE COMMISSIONERS

In addition to the General Counsel, five offices report directly to the Commissioners: Alternative Dispute Resolution, Chief Clerk, Internal Audit, Office of Public Assistance, and the Public Interest Counsel. The General Counsel is the chief legal advisor to the three commissioners. The internal structure of the office includes the General Counsel, several assistant general counsels, and support staff.

1. General Counsel's Office

The General Counsel is the chief legal advisor and the chief ethics advisor for the agency. The Office of the General Counsel (OGC) provides legal assistance and advice to the Commissioners concerning their review of permits, registrations, and other authorizations, proposed enforcement actions, rule making actions, and other general matters that come before the commission for consideration. The OGC also oversees the scheduling and management of the Commissioners' meetings. In addition, the General Counsel manages the administrative affairs of the OGC, and the other offices in the commissioners' cluster.

2. Alternative Dispute Resolution

The Alternative Dispute Resolution (ADR) Office provides a framework for the use of mediation in order to resolve multiple-party disputes that arise primarily in Commission contested case hearings. The ADR office utilizes trained third-party neutrals, or mediators, who facilitate communications between participants and conduct mediation meetings. The goal of the ADR process is to resolve disputes without the necessity of a formal contested case hearing. To achieve this goal, the mediator first facilitates communication between potential and/or named parties to a dispute, and educates participants about their ADR options. If all participants agree to use mediation, the mediator then conducts one or more mediation meetings, and assists the participants in the drafting and filing of a settlement agreement, if one is reached. In addition, the ADR office ensures that all ADR procedures are carried out in a timely manner so as not to delay any public hearing.

3. Chief Clerk

The Chief Clerk is responsible for ensuring proper and timely issuance, publication, and posting of required notices of application, public hearings, and public meetings concerning matters that are being processed and/or heard by the Commission. The public notice and hearing processes of the Commission are discussed in greater detail in Section V of this program revision. After formal action by the Commission on permit applications and other matters, the Chief Clerk's Office transmits the final decision documents to applicants and other parties. In addition, the Chief Clerk is designated as custodian of records of Commission proceedings and is responsible for maintaining the official recordings of Commission meetings.

4. Internal Audit

The Internal Audit staff conducts financial and operational audits of agency operations. The Internal Audits Section improves efficiency of agency operations, assesses effectiveness of the agency's system of internal accounting and operating controls, ensures compliance with state and federal requirements, and safeguards agency assets.

5. Office of Public Assistance

The Office of Public Assistance (OPA) was created to provide citizens greater assistance and access to information related to permitting and the permitting process. The commissioners established the OPA as a one-stop central location where the general public can ask about agency permits and permitting processes, express their concerns, and obtain information on that subject. The OPA has established a toll-free number (1-800-687-4040) to provide individual members of the public with an easy-to-reach, centralized point of contact. Every public notice of a permit application contains a statement advising concerned citizens to call OPA with their questions and lists the toll-free telephone number. The OPA assists citizens in understanding the permit public participation processes that are available and the requirements for requesting a contested evidentiary hearing.

6. Office of Public Interest Counsel

The Office of Public Interest Counsel was created by the legislature to ensure that the public interest is represented in contested matters heard by the Commission. The office is headed by the Public Interest Counsel, who is appointed by the Commission, and who is assisted by several assistant public interest counsels. The office participates in hearings to develop the evidence presented on environmental and consumer protection issues. Although the counsel does not serve as an attorney for people who wish to participate in a hearing, the counsel may assist individuals by explaining hearing procedures or legal issues

that may arise, and by ensuring that individuals are able to participate meaningfully and that issues of concern to them are presented.

C. THE EXECUTIVE DIRECTOR'S OFFICE

The Executive Director manages the day-to-day administration of the agency. The Executive Director, aided by a Deputy Executive Director, oversees several deputy directors who are responsible for the administration of the agency's programs. In addition, several offices report directly to the Executive Director.

1. Small Business and Environmental Assistance

Small Business and Environmental Assistance is a resource to help Texas' small businesses industries and local governments achieve voluntary compliance with environmental regulations through a better understanding of pollution prevention, recycling, and the Commission's compliance and enforcement processes. For example, this office is charged with the development of workshops and written materials concerning the proper storage, transportation, and disposal of hazardous waste. Small Business and Environmental Assistance provides confidential environmental technical assistance without the threat of enforcement action. Staff provide pollution prevention and compliance assistance to the regulated community. Among the Divisional priorities are small business and local government assistance, on-site technical assistance, and environmental public awareness programs. Services include regulatory assistance seminars, technical workshops, trade fairs, waste collection events, toll free hotline assistance and recognition of environmental excellence.

2. Intergovernmental Relations

Intergovernmental Relations provides information to the legislature about TNRCC activities and to the TNRCC about legislative priorities and initiatives. The division also addresses constituent concerns for legislators, develops legislative proposals needed by the agency, ensures that new legislation is implemented by the agency, and provides a point of contact for legislators, lobbyists, and trade associations.

3. Agency Communications

Agency Communications coordinates development of the agency's response to media inquiries and other agency communications with parties outside the agency. The division also provides research, writing, and production oversight as needed for internal and external agency-level communications. Finally, the division coordinates efforts of the Commissioners and the executive staff to communicate information and build support for TNRCC programs, regulations, and initiatives.

D. OFFICES OF THE TNRCC

There are five offices under the Executive Director's administration including: the Office of Permitting, Remediation and Registration; Office of Compliance and Enforcement; Office of Legal Services; Office of Administrative Services; and the Office of Environmental Policy, Analysis and Assessment. Those offices with hazardous waste management functions are summarized below.

1. Office of Permitting, Remediation and Registration

The Office of Permitting, Remediation and Registration is responsible for implementing the federal and state laws and regulations governing all aspects of permitting for the air, water and waste programs; oversees the investigation and cleanup of hazardous pollutants released into the environment; registers and manages the reporting requirements for certain facilities; and implements the petroleum storage tank reimbursement program. Toxicology and Risk Assessment (TARA) staff provide support for a broad range of agency activities by evaluating environmental concentrations for the potential to cause adverse health effects in the general public. TARA evaluates monitoring data collected in various environmental media and coordinates all agency human health risk assessment activities.

The Office of Permitting, Remediation and Registration is comprised of several Divisions: Air Permits; Registration, Review and Reporting; Remediation; Waste Permits; Water Quality; and Water Supply.

a. Waste Permits Division

Both the industrial and municipal waste programs were created as a result of the passage of the Texas Solid Waste Disposal Act (currently Chapter 361 of the Texas Health and Safety Code) in 1969 to address the management of solid waste within the State of Texas. The programs were modified as a result of the passage of federal legislation and regulations addressing hazardous and municipal waste.

The Industrial and Hazardous Waste (IHW) Permits Section is responsible for managing and administering waste related programs and requirements for the permitting of hazardous waste treatment, storage, and disposal facilities, and off-site industrial nonhazardous waste storage and treatment facilities. The permitting requirements include design and operational requirements as well as closure and post-closure care, financial assurance, and groundwater monitoring. The section administers the permitting program for Class I wells which inject hazardous and nonhazardous waste; Class III wells which inject fluids for extraction of minerals (solution mining of uranium, sodium sulfate, and sulfur); and Class V wells. The IHW Permits Section is also responsible for industrial solid waste characterization and classification, industrial solid waste recycling notices, variances and exclusions from solid waste, and tracking of used oil.

The Municipal Solid Waste (MSW) Permits Section is responsible for managing and administering waste related programs and requirements for the permitting and registration of municipal solid waste facilities and activities for such facilities as landfills, liquid waste processing facilities, incinerators, transfer stations, material recovery facilities, medical waste treatment facilities, and composting facilities. The MSW Permits Section is also responsible for the permitting of commercial industrial nonhazardous waste landfills. The Surface Casing team determines at what depths usable quality water will be penetrated in oil, gas, cathodic protection, Class II disposal wells, and seismic shot holes. This team also advises the Railroad Commission on the use of protected waters for enhanced oil production by underground injection.

The Licensing Team is responsible for licensing of on-site buried radioactive waste sites, and licensing of commercial low-level radioactive waste disposal sites. The Radioactive Waste Disposal program was created on March 1, 1992 through legislation which transferred jurisdiction for disposal of radioactive substances to the Texas Water Commission and subsequently to the TNRCC upon its formation on September 1, 1993. Texas is under an agreement state status with the federal Nuclear Regulatory Commission (NRC) for its Radioactive Waste Disposal Program. Jurisdiction is divided between the TNRCC and the Texas Department of Health, specifically the Bureau of Radiation Control (BRC). The TNRCC has jurisdiction over disposal of radioactive waste; the Department of Health has jurisdiction over transportation, recycling, storage, and handling of radioactive waste. TNRCC has jurisdiction over the low-level radioactive waste sites with buried radioactive waste. These sites are licensed rather than permitted.

b. Remediation Division

The Remediation Division is responsible for the cleanup of releases of hazardous waste and pollutants so that threats to human health and the environment are controlled or eliminated. Division programs address leaking petroleum storage tanks, hazardous and nonhazardous industrial waste sites, state and federal Superfund sites, voluntary cleanups, innocent owner/operator certifications, and state Brownfields initiatives. The division oversees investigative and remedial activities conducted by agency contractors, responsible parties, owner and operators, and third parties.

The key functions of the Remediation Division are as follows:

The Corrective Action Program monitors the remediation of soil and groundwater contamination at industrial facilities. The program performs this function to assure that the public is not exposed to hazardous levels of chemicals by requiring removal or mitigation of the contamination to levels protective of human health and the environment.

The federal Superfund law provides broad authority to respond directly to releases by cleaning up abandoned or uncontrolled hazardous waste sites which may endanger public health or the environment. In 1985 the Texas legislature created the State Superfund Cleanup Program to address sites which did not qualify for the federal Superfund list. Regulations governing federal and state Superfund sites provide protection to the public by holding responsible parties liable for contamination and cleanup and providing for the use of public funds for cleanup when responsible parties are unwilling or unable to pay.

The Voluntary Cleanup Program provides incentives to participants for investigation, cleanup and redevelopment of properties with contamination. In return, future lenders and landowners, local governments, public and private lending institutions, developers and other stakeholders gain statutory protection that limits their liability to the state regarding past contamination at a site.

The Innocent Owner/Operator Program (IOP) provides an opportunity for applicants to be considered an innocent owner or operator if the property became contaminated as a result of a release from sources not located on the property. The agency issues a certification to the applicant which ensures protection from liability for further investigation, monitoring, or remediation of the site.

Brownfields are abandoned, idled, or under-used industrial and commercial facilities where expansion or redevelopment is complicated by environmental contamination. The goal of the Brownfields Program is to assist local governments and non-profit organizations with revitalization and re-utilization of contaminated property.

The Site Assessment and Management Section screens abandoned sites for placement on state and federal Superfund lists. The Section performs removals at Superfund sites where immediate action is necessary to protect human health and the environment, oversees state funded cleanups of leaking petroleum storage tank sites, and represents the TNRCC as one of three agencies designated by the Governor under the federal Superfund law as a state Natural Resource Trustee. The other two agencies that serve as trustees are the Texas Parks and Wildlife Department and the General Land Office. The Trustee program acts on behalf of the public to seek compensatory restoration for damages to natural resources from releases of oil and hazardous substances.

The PST Responsible Party Remediation Section directs responsible tank owners and operators with leaking

petroleum storage tanks to abate releases, perform site assessments, and remediate contaminated soil and groundwater. This Section also reviews and pre-approves plans for all phases of corrective action to control remediation costs and to ensure that owners and operators can be reimbursed without delay.

c. Registration, Review and Reporting Division

The Registration, Review and Reporting Division consists of the following sections: PST Reimbursement, Technical Services, and Registration; Permits Administrative Review; and Registration and Reporting.

The Petroleum Storage Tank (PST) Reimbursement Section reviews and processes eligible owner/operator applications for reimbursements for leaking petroleum storage tank corrective action expenses. The PST program was created in response to federal laws enacted in 1984 creating regulations governing underground tanks. Statutes and regulations governing this activity allow the agency to maintain and protect the quality of groundwater and surface water resources in the state from petroleum storage tank releases. The state created a fund to reimburse the cost of cleanup of sites where releases have occurred from PSTs resulting in impacts to soil and groundwater.

The PST Technical Services Section maintains registration and construction information for underground and aboveground petroleum storage tanks, provides technical assistance and outreach for tank owners and operators, and oversees Stage II vapor recovery activities in ozone nonattainment areas.

The Registration & Reporting Section is responsible for managing the regulatory activities associated with registrations and reporting, and for providing any technical assistance needed by facilities to comply with these requirements. The section registers generators and treatment, storage or disposal facilities (TSDF) of hazardous and industrial solid waste as well as used oil handlers, collection centers, used oil filter handlers. Registration and tracking of industrial and hazardous waste facilities is required by the Texas Solid Waste Disposal Act (currently Chapter 361 of the Texas Health and Safety Code) which was passed in 1969 to address the management of solid waste within the State of Texas.

The Permits Administrative Review Section is responsible for carrying out the administrative review of permits entering the agency, including air, water and waste permits.

d. Water Quality Division

The Water Quality Division consists of two Sections: Waste Water Permitting and Water Quality Assessments.

The Wastewater Permitting Section implements the Texas Pollutant Discharge Elimination System (TPDES) Program to issue and administer permits for industrial and domestic wastewater treatment; agriculture operations, including concentrated animal feeding operations (CAFOs); stormwater runoff; and other wastewater treatment facilities. The Section also processes state-only no-discharge wastewater permits. About 4000 permits exist and about 750-1000 applications for new permits, amendments, and renewals are processed each year. In addition, the Section regulates the use, transport, and disposal of sludge from water and wastewater treatment facilities through registration and permitting activities. The Section also issues authorizations for the reuse of reclaimed water from both municipal and industrial sources, administers the federal pretreatment program through the TPDES program, and reviews the plans and specifications for domestic wastewater treatment systems.

The Water Quality Assessment Section primarily reviews state and federal TPDES permits for regulatory

technical requirements. The Section also certifies U.S. Corps of Engineer 404 permits that authorize dredge and fill projects to ensure that such projects will protect the water quality of streams, rivers, lakes, and coastal water bodies.

e. Water Supply Division

The Water Supply Division consists of three Sections: Public Drinking Water, Utilities & Districts, and Water Rights Permitting & Availability.

The Public Drinking Water Section administers state statutory requirements, agency rules and standards, and the primacy requirements of the federal Safe Drinking Water Act to assure that the approximately 6700 public water systems in Texas provide safe water to their customers. The 6700 systems serve approximately 97% of the state population. This program is accomplished through the review and approval of plans and specifications for construction, continuous monitoring for compliance with drinking water standards, implementation of the Source Water Assessment and Protection Program, and technical support to public water systems.

The Utilities and Districts Section is responsible for the regulation of rates and services of approximately 750 investor owned utilities and has appellate rate review authority over approximately 1300 water districts, 850 water supply corporations and municipalities serving outside their corporate limits. In addition, the section has general oversight over the water districts and investor owned utilities. As part of this oversight, the section reviews the creation of new districts; regulates utility service areas; reviews engineering plans for public water systems; reviews bonds for water districts; assesses financial, managerial and technical capabilities of utilities and provides consumer assistance.

The TNRCC regulates the use of surface water, primarily through the issuance of and amendments to surface water right permits in the Water Rights Permitting & Availability Section. There are about 6500 water right permits in the State. About 400 applications, ownership changes, and contracts need to be processed annually. Of these, about 300 are water right applications. The Section conducts hydrologic and environmental analysis of water right applications and interstate deliveries of water (supporting the Interstate Compact Commissions) to quantify water available for water rights, instream uses, and bays and estuaries. The staff evaluates water conservation plans and drought contingency plans required by statute. In addition, the TNRCC issues permits and licenses for weather modification projects and administers a grant program to assist in funding rain enhancement programs.

f. Air Permits Division

The Technical Program Support Section provides the technical support necessary for issuance of air permits. One of the duties of this section is the development of rules and policy, including: permits by rule, standard permits, general operating permits, and changes in the permitting regulations necessary for implementation of new programs, such as grandfathered permitting or integration of NSR permitting with Operating Permit issuance. Another duty of the section is development and implementation of Emissions Banking and Trading programs, including: the new Mass Emissions Cap and Trade Program and allowance and credit trading for both mobile and stationary sources. The section also includes the Air Dispersion Modeling Team, which is responsible for conducting or reviewing modeling to predict the impact of air pollutants on off-property receptors. Finally, the section is responsible for development of the Title V and NSR Information

Management Systems, which are tools used for permit project tracking, permit issuance, and storage of permit data.

All Title IV and Title V Federal Operating permits are reviewed and issued within the Operating Permits Section. The Operating Permits Section fulfills the requirements of Title V of the Federal Clean Air Act (FCAA) and Title 40, Code of Federal Regulations Part 70 (40 CFR 70) which require states to establish a state Operating Permit Program. Chapter 382, Subchapter C of the Texas Health and Safety Code authorizes the TNRCC to develop rules to implement the operating permit program required by 40 CFR, Part 70. The U.S. Environmental Protection Agency (EPA) granted interim approval of the Texas Operating Permit Program effective July 25, 1996.

All industrial sites with air emissions classified as "major" and certain sites with air emissions classified as "non-major" are required to apply for an operating permit. This permit codifies all state and federal air emissions regulations applicable to the site. The Operating Permits Section also reviews permit applications for the Title IV Acid Rain Program, which is an applicable requirement under Title V of the FCAA.

There are two New Source Review Permits Sections whose function is to minimize air pollution from new or modified facilities and to ensure protection of public health through the permitting process.

The Mechanical /Combustion New Source Review Permits Section is responsible for reviewing and issuing all new source permits for facilities in the mechanical, metallurgical, agricultural and combustion industries while the Chemical/Coatings New Source Review Permits Section has the responsibility for reviewing and issuing all new source permits in the chemical, refining, oil & gas, and coatings technology industries. These two NSR Sections exist to satisfy Section 110 of the FCAA which requires each state to have, in its State Implementation Plan (SIP), regulations governing the modification and construction of any stationary source that affects attainment with national ambient air quality standards (NAAQS). The sections process preconstruction permit applications for new and modified air emissions sources including preconstruction reviews for "major" sources as required under Title I and Title III of the Federal Clean Air Act, and they also perform air emission reviews in support of solid and hazardous waste permitting including the Resource Conservation and Recovery Act (RCRA) Combustion Strategy.

The Permits by Rule (PBRs) / General Operating Permits (GOPs) Section reviews all PBR claims for compliance with Texas' rules at Chapter 30 TAC 106, issues Title V authorization to operate letters under the General Operating Permits program (see 30 TAC 122), and prepares processing aids for use in the preparation and review of Title V Site Operating Permits. The PBR function and occasionally the GOP system are appropriate to the RCRA permitting process.

The PBR program is allowed under a section in the Texas Clean Air Act which allows the Commission to exempt "insignificant" sources of air emissions from the full permitting procedures of 30 TAC 116. To carry out this section of the law, the Commission has created over 120 PBRs. Each PBR is available for claim. The facility to be authorized must meet all applicable conditions of the general rules at 30 TAC 106.4 and each applicable condition of the number PBR(s) claimed. If the claim is successful, the facility may be installed, constructed or operated without any further TCAA air permitting action. A separate Title V permit may also be required. The GOP program is similar. All potentially applicable rules and standards for a specific category of facilities (for instance, Oil and Gas Exploration and Production facilities) are grouped together in a GOP. The operator then claims the appropriate GOP for Title V authorization for a site.

2. Office of Compliance & Enforcement

The Office of Compliance & Enforcement (OCE) consists of the Field Operations, Enforcement, Compliance Support, and the Monitoring Operations Divisions. The OCE oversees agency compliance monitoring and enforcement activities and the operations of 16 regional offices, 2 special project offices, and 2 laboratories across the state. The responsibilities of the Field Operations and Enforcement Divisions are summarized below.

a. Field Operations Division

It is the primary function of the Field Operations Division (FOD) to protect the public health and the environment through enforcement of state and federal rules and regulations regarding emissions or discharges of potentially harmful contaminants to the air, water, or land. The FOD carries out its mission to protect public health and the environment primarily through the use of compliance investigations. As a planning tool for future investigations and as an indicator of the impacts of their compliance and enforcement efforts, FOD monitors air and surface water quality at strategic locations throughout the state.

The Field Operations Division consists of 16 regional offices, 2 special project offices, and 2 laboratories located throughout the state, and a central office located in Austin. Major regional office responsibilities include:

- Conducting investigations at facilities/operations across the state to determine compliance with applicable air, water, and waste rules and regulations.
- Investigating complaints at permitted and non-permitted facilities/operations based on citizen requests for assistance.
- Developing enforcement actions as appropriate for air, water, and waste violations identified during investigations.
- Ambient monitoring for local and statewide air quality, drinking water monitoring for the protection of the public water supplies in communities across the state, and surface water monitoring to ensure the continued quality of streams, lakes, rivers, and other water bodies located throughout the state.
- Overseeing and ensuring compliance with water rights and, when drought conditions exist, allocating the limited water resources in certain areas of the state.
- Approving pollution abatement plans to ensure protection of the underground water supplies (aquifers) in certain areas of the state.
- Responding to emergency spills statewide in a timely manner.
- Providing education and technical assistance to the community as needed.

To ensure compliance with rules and regulations that affect all media, air, water, and waste, FOD performs a wide variety of different types of investigations. The FOD regional investigators activities involve all types of regulated entities from the very small “mom and pop” businesses to the largest of the petroleum refineries. Through the many individual program areas within FOD, investigations are made of municipal waste water treatment facilities, solid waste landfills, public drinking water supplies, and permitted storm water facilities. Within the industrial entities, FOD investigates the generation, storage, processing, and disposal of industrial and hazardous waste. Within the non-industrial and service based entities, FOD investigates entities such as petroleum storage and dispensing facilities, septic tank installation and operation, medical waste storage and disposal, and individually owned and operated public water supplies.

Field Operations (FO) personnel provide 24-hour, 7 days a week response to spill events. Field investigators make an on-scene response as necessary to many chemical and waste spills, and at any major situation where potential exists for environmental harm. Field Operations personnel also provide assistance to the Department of Emergency Management (DEM) during natural disasters (floods, hurricanes), including on-scene response to spills and coordination of cleanup activities.

b. Enforcement Division

When necessary, enforcement actions may be initiated to bring about compliance. The Enforcement Division is responsible for development of the standard operating procedures and policies used by agency staff regarding the enforcement process. The development of these procedures and policies ensures that violations are consistently handled across the state. Any person violating the Texas Water Code, the Texas Health and Safety Code, any condition of a permit or other authorization, or any rule, regulation, or order of the Commission is subject to enforcement action. The responsibility for initiating and pursuing formal enforcement actions is coordinated between several areas of the agency.

TNRCC enforcement functions are conducted by the Enforcement Division, the regional offices, and the Litigation Division. Most violations discovered during inspections are quickly corrected in response to notices of violations (NOVs). However, if serious and/or continuing violations are identified during an inspection, the regional office will initiate enforcement action. Staff may develop an administrative enforcement case potentially resulting in an administrative order with penalties. Cases may be referred to the Office of the Attorney General for enforcement through the courts, including potential civil penalties. Enforcement may also be initiated after record reviews indicate serious and/or continuing violations. Where possible, the TNRCC encourages expeditious settlement of enforcement actions by extending a settlement offer. If settlement does not occur within a short time, the Litigation Division will start the process that can lead to an administrative hearing. The Commission has ultimate approval of all administrative enforcement orders.

The response used to correct permit and/or rule violations is based upon the degree of violation, the environmental and health hazard, and the steps being taken by the permittee to become compliant. In most cases, the Commission's regional staff (FO Division) will attempt to work with the facility to attain compliance either through informal action or through issuance of NOV letters. Listed below in progressive order from less to more serious violations are responses the divisions use to obtain compliance. This list is in no way meant to be inclusive or exclusive.

1. Correspondence -Formally notify the facility of its noncompliance and request implementation of a program for becoming compliant. Correspondence will frequently suffice to correct minor violations. Confirmation of correction is generally documented by performing a Record Review Inspection (NRR) which resolves the violation(s) based on correspondence received from the facility. A site visit could be performed during the NRR inspection process.
2. Conferences/Discussion -Held during inspections to discuss the reasons for noncompliance and to establish an acceptable compliance schedule for becoming compliant. When dealing with complex situations and/or more flagrant violations, staff conferences are frequently required to fully develop all aspects of the problem and to develop acceptable corrective programs. This can occur at the regional or central office level.
3. Enforcement Action - Action is in accordance with Enforcement and FO Divisions enforcement procedures. Usually, Regional personnel will work with the facility to attain compliance at the

regional level through either informal action or the issuance of "Notice of Violation" letters. Response by the facility which is sufficient to address the inspectors' concerns results in the violation(s) being "resolved out," usually by a record review inspection. If the facility is recalcitrant and an existing or potential serious environmental threat exists, enforcement action is initiated. Enforcement action may result in an administrative order, civil court order or criminal court order.

Formal enforcement proceedings, initiated by the program staff for major violations (or minor violations if violator response to earlier enforcement action is unsatisfactory) include the following options:

1. Issuance of a NOV letter detailing recommendations for corrective actions;
2. Issuance of a petition (usually leading to an Agreed Order) which specifies a corrective action schedule the violator must follow and may contain proposed administrative penalties;
3. Enforcement proceedings before the Commission which may result in amendment, revocation, or suspension of a permit or authorization by rule; and
4. Non-administrative legal actions (in courts at law) seeking injunctive relief, civil, or criminal penalties.

Under §7.052 of the Texas Water Code, the State may seek administrative penalties of up to \$10,000 a day for each violation. Under §7.102 of the Texas Water Code, the Attorney General may represent the State in civil judicial actions which may seek penalties from \$50 to \$25,000 for each day of each violation. State prosecutors may bring actions for criminal penalties under §7.162-7.163 of the Texas Water Code.

Monitoring of a compliance schedule is carried out from the central office and regional offices through correspondence and/or inspections. Compliance schedules are maintained on a computer and printouts are reviewed regularly to determine the operator's conformance to his schedule. The printout lists schedules and deadlines derived from Commission or court orders. Failure to meet a compliance schedule is considered a violation of the Texas Water Code, Texas Health & Safety Code and/or TNRCC rules, and is handled in a manner commensurate with the severity of the violation and/or criminal intent.

The Superfund Assessment Section identifies sites that may qualify as State Superfund sites, assesses and prioritizes eligible sites for continued evaluation, and identifies potentially responsible parties for eligible sites. Staff determines which of the eligible sites are causing irreversible or irreparable harm to the public and require an immediate removal action. The section seeks voluntary, immediate removal action when required, and site cleanup from the identified potentially responsible parties prior to the proposal of the site as a state Superfund site. Staff prepares Hazard Ranking Packages which determine the related need of cleanup at each site. This section also participates in the EPA Cooperative Agreement to administer and provide oversight of EPA/Site Screening Inspections.

3. Office of Legal Services

The mission of the **Office of Legal Services** is to provide legal counsel and support to the Executive Director, the agency's program areas, and to the commissioners. The Office of Legal Services ensures that commission decisions follow the law and that agency rules comply with statutory authority. There are three areas that comprise the Division: (1) General Law Division, (2) Environmental Law Division, and (3) the Litigation Division.

a. General Law Division

The functions of the General Law division include: personnel and employment law, ethics, and TNRCC operating policy matters, contracts, public information/open records, rules review, administrative records for appeals under the Administrative Procedures Act, record retention policies, information management issues for the Office of Legal Services, and administrative support to Office of Legal Services.

b. Environmental Law Division

The Environmental Law Division is divided into the following major areas: water quality, hazardous and industrial solid waste, municipal solid waste, water rights, water utilities, and air quality. The Environmental Law Division assists in the preparation of the agency's applications for delegation of the RCRA program and in drafting any necessary rule changes. The Environmental Law Division functions to provide support for rulemaking, legal issues of federal program delegation, support for litigation in state and federal courts, interpretation of environmental statutes and rules, as well as assistance in permitting and contested permit cases, and the overall regulation reform effort.

c. Litigation Division

The Litigation Division provides legal support to the enforcement program staff and directs a criminal enforcement unit. In particular, the division provides legal representation and counseling in policy matters, hazardous and industrial waste enforcement activities, and in multi-media enforcement activities. The functions of the division include enforcement actions coordinated with the Enforcement Division in the Office of Compliance and Enforcement, litigation liaison for enforcement actions litigated by the Office of the Attorney General, delinquent fee and penalty actions coordinated with the Financial Administration Division in the Office of Administrative Services, contested administrative enforcement actions, assistance in criminal enforcement matters, as well as supplemental environmental projects and environmental audits coordination. The division also provides legal assistance to the Texas Irrigators Advisory Council. The special investigation section focuses on coordinating with state and federal agencies to identify violations of criminal codes. Concurrent with special investigations, an increase in multi-media monitoring and enforcement provides a more complete determination of a facilities' compliance with all relevant environmental rules and regulations.

V. PUBLIC NOTICE, HEARING, AND APPEAL PROCESSES

State law provides authority to implement the following requirements, to:

- a. Notify the public, affected states, and appropriate governmental agencies of proposed actions concerning the issuance of permits;
- b. Transmit such documents and data to and from the U.S. EPA and to other appropriate governmental agencies as may be necessary;
- c. Provide an opportunity for public hearing, with adequate notice thereof, prior to ruling on applications for permits; and
- d. Provide an opportunity for judicial review in state court of the final approval or denial of permits.

See generally Tex. Gov't Code Ann. Chapters 551, 552 (Vernon 1994 and Supp. 2002), Chapter 2001 (Vernon 2000 & Supp. . 2002); Tex. Water Code Ann. §§5.103, 5.105, 5.112, 5.115, 5.175, 5.351, 26.011, 26.020, 26.021, 26.122, 27.017, 27.018 (Vernon 2000 & Supp. 2002); 30 TAC Chapters 10, 39, 50, 55, 80, 281; .

The RCRA program provides for public participation throughout the permitting process. Federal requirements regarding public notice of permit actions, public comments, requests for public hearings, requests for public meetings, and procedures related to receipt of, consideration of, and response to public comment are set forth in 40 C.F.R. §§124.10-124.12 and 124.17. The requirements of 40 C.F.R. §124.10 applicable to state programs are reflected in provisions including 30 TAC Chapters 39, 50, 55, 80, and 305.

Permit applications are made available to the public. Once a permit application is complete and the draft permit is prepared by the Executive Director, copies of the draft permit are also made available to the public. Commission records are open to the public for review subject to statutory privileges and claims of confidentiality. Tex. Gov't Code Ann. Chapter 552.

In an application that was declared administratively complete before September 1, 1999, any notice of the application that is required to be published must be published in the newspaper of largest general circulation that is published in the county in which the facility is located or proposed to be located. 30 TAC §39.5(g). If the application was declared administratively complete on or after September 1, 1999, the applicant need only publish notice in the newspaper of largest circulation in the county in which the facility is located or proposed to be located. 30 TAC §39.405(f)(1). When it is required to mail notices, the notices are mailed to individual persons, state and local governmental bodies, and anyone else who requests to be included on the mailing list. 30 TAC §39.13 (for permit application declared administratively complete before September 1, 1999) and 30 TAC §39.413 (for permit applications declared administratively complete on or after September 1, 1999). Notices include the information that is required by 40 C.F.R. §124.10(d). 30 TAC §39.11 (for permit application declared administratively complete before September 1, 1999) and 30 TAC §39.411 (for permit applications declared administratively complete on or after September 1, 1999). The applicant is responsible for public notice by newspaper and, for the Notice of Application and Preliminary Decision, by local radio broadcast. 30 TAC §39.503(d). For notice of permit applications, a public comment period of at least 45 days is provided for hazardous waste facilities. 30 TAC §39.103(d)(4) (for permit application declared administratively complete before September 1, 1999), §39.503(d)(3) (for permit applications declared administratively complete on or after September 1, 1999).

For permits that were declared administratively complete before September 1, 1999, the Commission's rules require that the Executive Director prepare a response to all significant public comment on the draft permit. 30 TAC §55.25(b)(1). If the permit was declared administratively complete on or after September 1, 1999, the Executive Director is required to prepare a response to all timely, relevant and material, or significant public comment. 30 TAC §55.156(b)(1). Before an application may be approved, the Executive Director will prepare a response to all significant public comments on the draft permit that are raised during the public comment period and make the responses available to the public. The response shall specify the provisions of the draft permit that have been changed in response to public comment and the reasons for the changes. If the application was declared administratively complete before September 1, 1999, and is acted on by the Commission under 30 TAC §50.13 or, for applications declared administratively complete on or after September 1, 1999, acted on under 30 TAC § 50.113(c), that is, without a trial-type contested case hearing, the Executive Director's response to public comment shall be made available to the public and filed with the chief clerk at least ten days before the Commission acts on the application. The Commission shall consider all public comment in making its decision and shall either adopt the executive director's response to public comment or prepare its own response.

Pursuant to 30 TAC §55.25(b)(2), for applications that were declared administratively complete before September 1, 1999, a public meeting will be held when there is a significant degree of public interest in a permit application or whenever required by law. The public comment period is automatically extended to the close of any public meeting. Notice of the public meeting shall be published in the manner required under 30 TAC Chapter 39. A tape recording or written transcript of the public meeting must be made

available to the public. 30 TAC §55.25(b)(2). For application declared administratively complete on or after September 1, 1999, a public meeting will be held if the executive director determines that there is a substantial or significant degree of public interest, or a member of the legislature who represents the area requests that a public meeting be held, or when required by law. 30 TAC §55.154. The public comment period is automatically extended to the close of any public meeting under 30 TAC §55.152(b), and public notice of the meeting shall be given as required by 30 TAC §39.411(d).

Texas law also provides for trial-type, contested case hearings on applications for RCRA permits in some circumstances. For applications that were declared administratively complete before September 1, 1999, if a contested case hearing is requested, the Commission will evaluate whether the request meets the substantive requirements for granting of the request. 30 TAC §55.27. If a contested case hearing is held, the public meeting referred to in the paragraph preceding this one shall be conducted as a part of the preliminary hearing under 30 TAC §80.105, unless the Executive Director specifies a different time and place for the public meeting. 30 TAC §55.25(b)(2). For applications that are declared administratively complete on or after September 1, 1999, requests for contested case hearings are examined under 30 TAC Chapter 55, Subchapter F. 30 TAC §55.201 provides the requirements for a request for a contested case hearing, and the Commission will evaluate the request for a contested case hearing based on the requirements found in 30 TAC §55.211. For both types of applications, all public comment on the application received during the comment period and copies of the Executive Director's responses shall be admitted into the evidentiary record of the contested case hearing, and the parties are allowed to respond to and present evidence on each issue raised in a comment or response. 30 TAC §80.127(f).

Recent revisions to Tex. Water Code Ann §5.228 during the 2001 Texas legislative session, more clearly define the executive director's role in contested case hearings for permitting matters and required the Commission to adopt rules specifying what factors the executive director must take into account when considering whether to be a party in a permit hearing. Effective November 15, 2001, the Commission adopted a new rule section outlining when the executive director will participate in permit hearings as a party.

The Commission's contested case hearings are presided over by an administrative law judge (ALJ) employed by the State Office of Administrative Hearings, a separate state agency. At the completion of a hearing, the ALJ presiding over the contested case hearing closes the record and is required to make findings of fact, conclusions of law, and any ultimate findings required by statute. The ALJ is also required to submit a proposal for decision (PFD) on the Commission and the parties. If the application is declared administratively complete before September 1, 1999, if the ALJ prepares a PFD which is adverse to any party, the ALJ must include a statement of the reasons for the proposal and proposed changes to the draft permit recommended by the ALJ in response to public comment. 30 TAC §80.251. For any application declared administratively complete on or after September 1, 1999, the ALJ must also include a statement of the reasons for the proposal, but does not have to include proposed changes to the draft permit in response to public comment. 30 TAC 80.252. The Commission may overturn any findings of fact or conclusions of law made by the ALJ in the PFD, but the Commission must follow certain statutory requirements when making changes. Tex. Water Code Ann. §361.0832.

Judicial review of RCRA permits is available, as follows. If a contested case hearing was held, a party is entitled to judicial review under the authority and procedures of the Texas Administrative Procedure Act (APA), Tex. Gov't Code Ann. §2001.001 *et seq.* (Vernon 2000 and Supp. 2002). If a contested case hearing is not held, a person affected by a final ruling, order, or decision of the Commission may file a petition for judicial review under Tex. Water Code Ann. §5.351 within 30 days after the effective date of the decision. A person seeking judicial review, whether under the APA or Tex. Water Code Ann. §5.351, must have exhausted available administrative remedies, including by complying with Commission rules regarding

motions for rehearing or reconsideration, *see, e.g.*, Texas Gov't Code Ann. §2001.145 (Vernon 2000), 30 TAC §§50.19, 50.39, 55.27(g), and 80.271 (for permits declared administratively complete before September 1, 1999) and 30 TAC §§50.119, 50.139, 55.211, and 80.272 (for applications declared administratively complete on or after September 1, 1999). Requesting or participating in a contested case hearing is not among the exhaustive requirements for judicial review of permit actions under Tex. Water Code Ann. §5.351.

For an application declared administratively complete before September 1, 1999, a person who failed to file timely public comment, file a timely hearing request, participate in a public meeting held under the rules, and participate in any contested case hearing held under 30 TAC Chapter 80 may file a motion for rehearing as provided for in 30 TAC §§50.19, 55.27(g), or 80.271, or a motion for reconsideration under 30 TAC §50.39, so long as the motion addresses only the changes from the draft permit to the final permit decision, and thus may exhaust administrative remedies for purposes of seeking judicial review regarding those changes. 30 TAC §55.25(b)(3). For applications that were declared administratively complete on or after September 1, 1999, a person who did not participate in the permit process as described above may file a motion for rehearing as provided for in 30 TAC §§ 50.119 and 80.272, or file a motion to overturn under 30 TAC §50.139 so long as the motion addresses only the changes from the draft permit to the final permit decision. 30 TAC §55.201(h).

A finding by an ALJ or the Commission concerning a person's status as an affected person would not bind a Texas district judge in considering that same person's standing to seek judicial review, under Tex. Water Code Ann. §5.351, of the Commission's action on a RCRA permit application. Although the Texas Supreme Court has not expressly adopted the federal standard for individual standing, numerous cases from lower courts of appeal indicate that the two standards are very similar. The "affected person" standard set out in Tex. Water Code Ann. §5.115(a) and 30 TAC §55.29, for an application declared administratively complete before September 1, 1999, and 30 TAC 55.203, for an application declared administratively complete on or after September 1, 1999, comes into play when a person has a justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application, whereas the availability of Tex. Water Code Ann. §5.351 in the RCRA permit context, as noted above, does not depend on a contested case hearing having been requested or on a person having participated in such a hearing. The Office of the Attorney General agrees that it will not rely on or refer to the conclusion of an ALJ or the Commission that a person is not an affected person as a basis to oppose participation by that person in subsequent judicial proceedings brought under Tex. Water Code Ann. §5.351. The Office of the Attorney General may, however, rely on the facts underlying the conclusion in opposing a person's standing in court. Also, when an ALJ or Commission conclusion about affected person status is challenged in the judicial proceeding, the Attorney General may defend that conclusion.

The opportunity for public participation also exists in the enforcement process. 40 C.F.R. 271.16(d), requires that the state provide for public participation in state enforcement proceedings by allowing for intervention as a right in certain civil and administrative actions, or by implementing the three procedures described in 271.16(d)(2). By virtue of Tex. Gov't Code Ann. Chapter 551 (Vernon 1994 and Supp. 2002); Tex. Water Code Ann. §§5.177, 7.075, 7.110 (Vernon 2000 and Supp. 2002); 30 TAC Chapter 10; and sections §§70.10, 80.109, 80.115, 80.254, 80.263, the Texas program meets these requirements, as discussed more fully below.

Permit Enforcement: Texas Water Code §5.177 provides for public participation in state enforcement proceedings, in conformance with 40 CFR § 271.16(d)(2)(i), as follows: If a written complaint is filed with the Commission relating to an entity regulated by the Commission, the Commission must notify the parties to the complaint at least quarterly of the status of the complaint until final disposition of the complaint has been reached. This statute assures that the public will be kept regularly apprized of enforcement case status and will have a meaningful opportunity to participate as enforcement cases progress.

Administrative Enforcement Actions: Texas complies with the policy objectives laid out in 40 C.F.R. 271.16(d)(2)(ii) in the administrative context. Under 30 TAC §80.109, parties in a contested case hearing include persons having a justiciable interest in the matter being considered and who appear at the preliminary hearing. The Executive Director has agreed in the Memorandum of Agreement between the Commission and the EPA that he or she will not oppose intervention by persons having a justiciable interest in circumstances that do not, in his or her opinion, present a risk of undue delay or prejudice to the original parties.

At least two other opportunities for public participation in enforcement actions are afforded at the administrative level. First, all public comments received during the public comment period and the executive director's responses will be admitted into the evidentiary record.. 30 TAC §80.127(f). Second, decisions on matters like the ones under discussion must be set on the Commissioners' agenda for a final decision in compliance with the Open Meetings Act, Tex. Gov't Code Ann. Chapter 551. Public notice must be given. The public, including non-parties, may provide written comment, and an opportunity also may be afforded to make oral comment at the agenda meeting. See generally, e.g., 30 TAC Chapter 10; and §80.263.

Judicial Enforcement: Texas allows for participation in the judicial enforcement context. Under Tex. Water Code Ann. §7.110(d), the Office of the Attorney General may not oppose intervention by a person who has standing to intervene as provided by Rule 60, Texas Rules of Civil Procedure.

Rule 60 and common law doctrines of associational and individual standing create meaningful opportunities for citizen participation in civil penalty enforcement actions in court. In the case of Guaranty Federal Savings Bank v. Horseshoe Operating, 793 S.W.2d 652, 657 (Tex. 1990), the Texas Supreme Court outlined the requirements and operation of Rule 60:

Rule 60 of the Texas Rules of Civil Procedure provides that "[a]ny party may intervene, subject to being stricken out by the court for sufficient cause on the motion of the opposite party" Tex. R. Civ. P. 60. An intervenor is not required to secure the court's permission to intervene; the party who opposes the intervention has the burden to challenge it by a motion to strike. See *In re Nation*, 694 S.W.2d 588 (Tex. App. — Texarkana 1985, no writ); *Jones v. Springs Ranch Co.*, 642 S.W.2d 551 (Tex. App. — Amarillo 1982, no writ).

Furthermore, under Rule 60, a person or entity has the right to intervene if the intervenor could have brought the same action, or any part thereof, in his own name, or, if the action had been brought against him, he would be able to defeat recovery, or some part thereof. *Inter-Continental Corp. v. Moody*, 411 S.W.2d 578, 589 (Tex. Civ. App. — Houston [1st Dist.] 1966, writ ref'd n.r.e.); *Texas Supply Center, Inc. v. Daon Corp.*, 641 S.W.2d 335, 337 (Tex. App. — Dallas 1982, writ ref'd n.r.e.). The interest asserted by the intervenor may be legal or equitable. *Moody*, 411 S.W.2d at 589. Although the trial court has broad discretion in determining whether an intervention should be stricken, it is an abuse of discretion to strike a plea in intervention if (1) the intervenor meets the above test, (2) the intervention will not complicate the case by an excessive multiplication of the issues, and (3) the intervention is almost essential to effectively protect the intervenor's interest. *Moody*, 411 S.W.2d at 589; *Daon Corp.*, 641 S.W.2d at 337.

Because an intervenor must have been able to have brought an action originally in order to withstand a motion to strike the plea in intervention, it is necessary to review the Texas law of standing for associations and individuals. It is also instructive to note the similarities between the standing doctrine as applied by federal courts under Article III of the United States Constitution and as applied by Texas state courts.

Texas employs the same standard for associational standing as used by the federal courts in construing

standing under Article III of the United States Constitution. *Texas Association of Business v. Texas Air Control Board*, 852 S.W.2d 440 (Tex. 1993).

Although the Texas Supreme Court has not expressly adopted the federal standard for individual standing, there are numerous cases from lower courts of appeal that indicate that the two standards are very similar. A person has standing to sue in Texas if:

he has sustained, or is immediately in danger of sustaining, some direct injury as a result of the wrongful act of which he complains; . . . he has a personal stake in the controversy; . . . the challenged action has caused the plaintiff some injury in fact, either economic, recreational, environmental or otherwise; . . . or he is an appropriate party to assert the public's interest in the matter, as well as his own.

Cedar Chest Funeral Home v. Lashley, 889 S.W.2d 325, 329 (Tex. App. — Dallas 1993, no writ). See also *Precision Sheet Metal Mfg. Co. v. Yates*, 794 S.W.2d 545, 551 (Tex. App. — Dallas 1990, writ denied); *Dresser Industries, Inc. v. Snell*, 847 S.W.2d 367, 376 (Tex. App. — El Paso 1993, no writ); *Billy B., Inc. v. Board of Trustees of the Galveston Wharves*, 717 S.W.2d 156, 158 (Tex. App. — Houston [1st Dist.] 1986, no writ). This standard closely follows the federal requirements for individual standing announced in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S.Ct. 2130 (1992) (to have standing a plaintiff must show an injury in fact, a causal connection between the injury and the action complained of, and that the injury will be addressed by a favorable decision).

It also has long been the law in Texas that “standing consists of some interest peculiar to the person individually and not as a member of the general public.” *Hunt v. Bass*, 664 S.W.2d 323 (Tex. 1984); *Mitchell v. Dixon*, 140 Tex. 520, 168 S.W.2d 654 (1943); *Yett v. Cook*, 115 Tex. 205, 281 S.W. 837 (1926); *City of San Antonio v. Stumberg*, 70 Tex. 366, 7 S.W. 754 (1888). This “special injury” rule is not unlike the limitation on standing employed in the *Defenders of Wildlife* case cited above that requires a concrete and particularized injury by the plaintiff asserting standing.

Notice and Comment On Proposed Settlements: In the administrative and judicial enforcement contexts, Texas complies with 40 C.F.R. 271.16(d)(2)(iii). That provision requires the state to “[p]ublish notice of and provide at least 30 days for public comment on any proposed settlement of a State enforcement action.”

Under 30 TAC §80.254, when the Executive Director and the respondent in an enforcement case that has gone to State Office of Administrative Hearings (SOAH) have reached an agreed settlement of an enforcement case, they shall submit the agreement to the ALJ in writing. The ALJ shall forward the proposed settlement to the Commission for consideration. If a party to the case dissents from the proposed settlement, the ALJ shall give such party a reasonable time to file comments, and shall forward all timely filed comments to the Commission. After any required public notice and opportunity for comment on proposed settlements (see the next paragraph) and consideration of the record, the Commission may either approve it or disapprove it and remand the case for hearing.

Under Tex. Water Code Ann. §7.075, before the Commission approves an administrative order or proposed agreement to settle an administrative enforcement action, the Commission shall allow the public to comment in writing on the proposed order or agreement. Notice of the opportunity to comment shall be published in the Texas Register not later than the 30th day before the date on which the public comment period closes. The Commission shall consider any written comments and may withdraw or withhold consent to the proposed order or agreement. Texas Water Code §7.075 applies to all settlements of administrative enforcement cases, regardless of whether they were referred to SOAH.

Under Tex. Water Code Ann. §7.110(a), before the Commission approved an agreed final judgment, order, or agreement, or before the court signs a judgment, the Office of the Attorney General shall permit the public to comment in writing on the proposed order, judgment, or other agreement. Notice of the comment opportunity will be published in the Texas Register not later than the 30th day before the date on which the public comment period closes. Tex. Water Code Ann. §7.110(b). The Office of the Attorney General shall promptly consider any written comment and may withdraw or withhold consent to the proposed order, judgment, or other agreement if the comments disclose facts or considerations that indicate that the consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the Commission's statutes, rules, or permits. Tex. Water Code Ann. §7.110(c).

VI. SUMMARY OF THE 77TH LEGISLATURE, 2001

The 77th Legislative Session strengthened programs to address air, water, and waste management issues during the 2001 biennial session in Austin. The Sunset Bill resulted from a comprehensive examination of the agency's functions and job performance. As a result, important changes will be made to ways the agency deals with the public and approaches some of its basic tasks.

New law makes compliance history an important component in permit and enforcement actions. For the first time, the TNRCC will be required to consistently review the environmental records of an individual or company. If the applicant has a pattern of repeatedly violating state or federal environmental laws, that fact alone may be the basis for denying or revoking a permit.

Other significant legislative directives include measures to continue the regional water planning process, strengthen the management of groundwater resources, extend the petroleum storage tank program, and create more stringent air regulations for older, "grandfathered" industrial plants.

The following hazardous waste-related bills were enacted by the 77th Texas Legislature:

House Bill 2912

House Bill 2912, the TNRCC "sunset" bill, amended several waste-related sections of the Texas Water Code and Texas Health and Safety Code.

Amended section 5.228 of the Texas Water Code more clearly defines the Executive Director's role in contested case hearings concerning permitting matters.

New section 361.088 of the Texas Health and Safety Code requires the TNRCC to review a solid waste permit every five years to assess the permit holder's compliance history.

New section 361.1125 of the Texas Health and Safety Code authorizes the TNRCC to use appropriated money to commence immediate remediation or removal of hazardous waste substances at scrap tire sites.

Amended section 361.114 of the Texas Health and Safety Code prohibits the storage, processing or disposal of hazardous wastes in a solution-mined salt dome cavern or a sulphur mine. This section also deletes all language pertaining to standards for the permitting of such activity.

New section 361.119 of the Texas Health and Safety Code requires the TNRCC to regulate a solid

waste processing facility as a solid waste facility. This section also requires the TNRCC to ensure that a solid waste processing facility is not allowed to operate as an unregulated recycling facility.

Provisions for notice of hearing and requirements for reopening of closed or inactive landfills are set forth in new section 361.120 of the Texas Health and Safety Code.

New section 361.121 of the Texas Health and Safety Code requires the owner of the land application unit or other responsible person to obtain a permit by September 1, 2003 for the land application of certain sludge. This section also requires the TNRCC to prescribe the conditions for such permit and to set requirements for the applicant.

The TNRCC has authority, consistent with federal law, to issue orders for remediation of hazardous waste from a solid waste management unit at a solid waste processing, storage, or disposal facility under new section 361.082(h) of the Texas Health and Safety Code and section 7.031(f) of the Texas Water Code.

New sections 361.431(a) and (b) of the Texas Health and Safety Code require a political subdivision or solid waste producer to give preference to contracting for the disposal of solid waste to entities who use processes and technologies that reduce the volume of sludge and hazardous waste being disposed. This section also provides that there is a preference for technology that reduces the volume of solid waste or destroys/renders solid waste inert.

New section 361.1875 of the Texas Health and Safety Code provides that the TNRCC may not name a person as a responsible party if after investigation the TNRCC finds that the contaminants originate from an off-site source, additional corrective action is not required and the TNRCC will not pursue formal enforcement.

House Bill 2997

House Bill 2997 amended several sections of the Texas Water Code and Texas Health and Safety Code by encouraging the use of environmental management systems (EMS's).

The Legislature amended Subchapter D, Chapter 5 of the Water Code by adding Section 5.127. In Section 5.127, the TNRCC is required to adopt a comprehensive program that provides regulatory incentives to encourage the use of EMS's by regulated entities, state agencies, local governments and other entities. An EMS is defined as "a documented management system to address applicable environmental regulatory requirements that includes organizational structure, planning activities, responsibilities, practices, procedures, processes, and resources for developing, implementing, achieving, reviewing, and maintaining an environmental policy directed toward continuous improvement."

Section 5.127 requires the TNRCC to provide incentives to encourage the use of EMS's and provides minimum standards for these systems. Section 5.127 also requires that the TNRCC integrate the use of EMS's, develop models for these systems, and establish indicators to measure the program's performance.

New sections 26.028(e) and 26.0281 of the Texas Water Code and amended section 361.084(a) of the Texas Health and Safety Code provide that the TNRCC, in considering an applicant's compliance summary shall consider as evidence of compliance, information regarding implementation of an EMS for which the permit application, modification, amendment, revision, reopening or renewal is sought. Similarly, amended sections 27.051(e) of the Texas Water Code and section 382.0518(c) of the Texas Health and Safety Code provide that the TNRCC, in considering an applicant's compliance summary must include as evidence of compliance, information regarding the implementation of an EMS at the facility seeking authorization.

Senate Bill 688

Senate Bill 688 amended section 5.557 of the Texas Water Code, resulting in changes to the requirements for public notice and hearing on certain permit applications.

Amended section 5.557 requires the TNRCC, upon request of an applicant or the executive director, to directly refer the application to a contested case hearing. The amended section is not subject to sections 5.554, 5.555, and 5.556 of the Texas Water Code (relating to certain procedures applicable to applications) and sections 2003.047(e) and (f) of the Texas Government Code (relating to issues lists). Section 5.557 requires the TNRCC to provide that the administrative record of decision on an application include public comment and the executive director's response to public comment.

VII. FUNDING AND RESOURCES

Funding and resources available to TNRCC for implementation of the RCRA program, including RCRA Clusters VII - X are summarized below:

A. STAFFING

Table 1 shows staffing within the TNRCC Strategies that include RCRA/HSWA activities and the percentage of effort devoted to the implementation of the industrial and hazardous waste management program.

Table 1

**State Agency Staff Carrying Out the
Program Fiscal 2002 (proposed)**

<u>Strategy</u>	<u>Number of Work years</u>
01-01-03 Waste Management & Permitting	97.74
01-01-07 Pollution Prevention & Recycling	0.96
02-01-01 Field Inspections & Compliance Response	55.00
02-01-02 Enforcement & Compliance Support	23.50
03-01-03 Hazardous Materials Cleanup	25.72
TOTAL	202.92

B. FUNDING

Budget requirements for the fiscal year are met through federal assistance funds authorized by Sec. 3011 of Subtitle C, Hazardous Waste Management of RCRA, and made available by a Federal Cooperative Agreement between EPA and the State of Texas. Seventy-five percent of the funding is provided by the EPA and the twenty-five percent state match is provided by funds assessed by the Commission through user fees and appropriated by the Texas Legislature.

Since the beginning of state fiscal year 1986, the funding support to state hazardous waste regulatory programs and remediation activities at abandoned waste disposal sites has been provided almost exclusively by fees assessed against industries involved in the production or management of hazardous wastes.

Table 2 shows the allocation of federal and non-federal resources dedicated to the implementation of the RCRA program as requested in the FY 2002 Performance Partnership Agreement (PPA).

Table 2

<u>Strategy</u>	<u>Federal</u>	<u>Non-Federal</u>
01-01-03 Waste Management & Permitting	\$2,923,912	\$974,637
01-01-07 Pollution Prevention & Recycling	63,750	21,250
02-01-01 Field Inspections & Compliance Response	2,924,601	974,867
02-01-02 Enforcement & Compliance Support	1,198,261	399,421
03-01-03 Hazardous Materials Cleanup	1,389,476	463,158
TOTAL	\$8,500,000	\$2,833,333

C. COSTS

Table 3 shows the distribution of federal and non-federal funds by object class category for proposed fiscal 2002.

Table 3

Costs by Object Class Categories

<u>Expense Item</u>	<u>FY 2002 Total Proposed Costs</u>
Work Years	202.92
Salary (including Release Time)	\$6,485,820
Fringe (.2075)	\$1,345,807
Indirect (.3420)	\$2,218,150
SUBTOTAL	\$10,049,777
Travel	\$315,992
Capital	\$ 4,000
Supplies	\$174,587
Contracts	\$171,366
Other	\$617,611
TOTAL	\$11,333,333

D. ACTIVITIES

Regulated activities related to waste generation and management are summarized in Table 4.

TABLE 4

**ESTIMATED STATE OF TEXAS ACTIVITIES SUBJECT TO PROGRAM
REVISION REQUIREMENTS FOR 1999**

Type of Activity	Number of Hazardous Waste Generators (Texas)	Waste Quantities Tons (Texas)
Hazardous Waste Generators	6,918 (2)	62,079,728 (1)
Tons of Hazardous Waste Transported Into Texas		223,588 (1)
Tons of Hazardous Waste Transported Out Of Texas		238,777 (1)

LEGEND

- (1) All volume data is based upon 1999 data.
- (2) Number of active generators within Texas with a hazardous stream on their Notice of Registration (NOR). It includes LQs and SQGs.

