

**CAN YOU DIG IT?:
ENVIRONMENTAL LAW FOR THE
CONSTRUCTION INDUSTRY**

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I. INTRODUCTION

One day at your construction project:

“Knock knock.”

“Who’s there?”

“The Texas Commission on Environmental Quality (or maybe the U.S. Environmental Protection Agency or the City). This is an inspection. Hand over your Storm Water Pollution Prevention Plan.”

Not a joke if you are the owner or operator of a construction project in Texas. All three of these governmental authorities – federal,

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state, and local – have regulatory authority over construction projects under environmental laws and regulations. In 2016 alone, the Texas Commission on Environmental Quality (“TCEQ”) brought enforcement actions, and collected penalties, against over 40 companies at construction projects in Texas.

Most of the major federal environmental laws are aimed at pollution prevention. The construction industry at work generally does not generate conspicuous pollution (think a belching smokestack or sludge oozing from a pipeline into a river) but federal, state, and local environmental laws are aimed, nevertheless, directly at the construction industry. Practically every significant construction project is, in effect, an environmental project that will require environmental permitting or other authorizations.

Even if your company is not the party responsible for obtaining environmental permits, your project may be delayed or quashed altogether by the owner/operator’s failure to obtain environmental permits at the appropriate time. A project that proceeds without authorization, or that does not comply with the terms and conditions of environmental authorizations, can result in environmental agency enforcement. This article will discuss the intertwining of several environmental law programs into the pre-construction and construction phases of a project, with heavy emphasis on the regulation of storm water discharges. A general understanding of some of the more common environmental law “impacts” to a construction project, and direct liabilities to governmental agencies, should assist in spotting issues that need pre-construction planning and appropriate risk allocation.

II. STORM WATER² DISCHARGES

The vast majority of enforcement activity against construction projects and the construction industry itself takes place under the umbrella of the federal Clean Water Act in storm water regulation.³ The primary pollutant of concern in construction storm water discharges is suspended solids from erosion of sediment. EPA has determined that as storm water flows over a construction site, it can pick up pollutants like sediment, debris, and chemicals and transport them to nearby storm sewer systems or directly into rivers, lakes, or coastal waters.⁴ Additionally, high suspended solids can affect the dissolved oxygen in water, reduce light penetration and the heavier solids will settle out and change the biological characteristics of a receiving water body.⁵

The Clean Water Act primarily is implemented through its permit program - the National Pollutant Discharge Elimination System program. Clean Water Act prohibits the “discharge” of any “pollutant” from a “point source” to “waters of the United States” unless that discharge is permitted in advance.⁶ This overarching

² Burning question: Is “storm water” one word or two? EPA often uses “stormwater,” but most environmental law practitioners write it as “storm water.”

³ Federal Water Pollution Control Act, 33 U.S.C. 1251, *et seq.*, commonly known as the Clean Water Act.

⁴ See EPA webpage *Stormwater Discharges from Construction Activity*, <https://www.epa.gov/npdes/stormwater-discharges-construction-activities#overview>.

⁵ See *e.g.* U.S. Environmental Protection Agency 1998 National Water Quality Inventory Report to Congress (Figures 4-4 and 6-12, pages 87 and 149 respectively).

⁶ 33 U.S.C. Section 1342(a).

prohibition and the defined terms of art therein are crucial in understanding why, and which, construction activities fall within the permit program.

A point source is “...any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.”⁷ Traditionally this applied to end-of-pipe discharges and did not cover storm water runoff. However, EPA has defined discharges of storm water “associated with industrial activity” to be point sources of pollution.⁸ EPA then identifies storm water discharges from two categories of construction activities as being “associated with industrial activity” and, thus, subject to permitting requirements. Those are:

- **Large Construction Activity:** Construction activity including clearing, grading and excavation, except operations that result in the disturbance of less than five acres of total land area. Construction activity also includes the disturbance of less than five acres of total land area that is a part of a larger common plan of development or sale if the larger common plan will ultimately disturb five acres or more;⁹ and
- **Small Construction Activity:** Construction activities including clearing, grading, and excavating that result in land

⁷ 40 C.F.R. § 122.2.

⁸ 40 C.F.R. § 122.26(a)(ii)

⁹ 40 CFR § 122.26(b)(14)(x).

disturbance of equal to or greater than one acre and less than five acres.¹⁰

One major point of confusion, and source of enforcement, is that a smaller project that is part of a “larger common plan of development” of 1 acre or more is subject to the permit requirements. The fact that individual builders can commence construction in a development at different times is irrelevant, and title to property at particular times does not determine permitting obligations.

EPA has made numerous efforts to clarify the “larger common plan of development” concept to a confused regulated industry. For example, one EPA guidance document offers the following clarification:

If your smaller project is part of a larger common plan of development or sale that collectively will disturb one or more acres (e.g., you are building on 6 half-acre residential lots in a 10-acre development or are putting in a fast food restaurant on a 3/4 acre pad that is part of a 20 acre retail center) you need permit coverage. The "common plan" in a common plan of development or sale is broadly defined as any announcement or piece of documentation (including a sign, public notice or hearing, sales pitch, advertisement, drawing, permit application, zoning request, computer design, etc.) or physical demarcation (including boundary signs, lot stakes, surveyor markings, etc.) indicating construction

activities may occur on a specific plot.¹¹

The case-by-case application of this concept means that there often is disagreement between the agency and the construction industry on whether the permit program applies.

A. Construction General Permit

The Clean Water Act permit program allows for three types of permits: individual, group, and general. General permits are an administrative device used by EPA (and, in Texas, by the TCEQ) to relieve the burden on the agency when permits are required for large numbers of similar discharges. A general permit, unlike an individual permit, is issued by notice and publication in the Federal Register (or delegated state register). Permit coverage is obtained by filing a Notice of Intent (“NOI”).¹² The NOI, as its name suggests, advises the regulator of a potential permittee’s intention to fully comply with the terms and conditions of the published General Permit. A general permit carries a 5-year term from the date of its publication, regardless of when a permittee files its NOI.

The State of Texas has been delegated the authority to operate the federal Clean Water Act permit program under the Texas Water Code.¹³ Texas, through the TCEQ, has

¹⁰ 40 CFR § 122.26(b)(15).

¹¹ U.S. Environmental Protection Agency website, *Stormwater Discharges from Construction Activities – Frequently Asked Questions*, <https://www.epa.gov/npdes/stormwater-discharges-construction-activities#faq>.

¹² TCEQ Form 20022 (rev. June 13, 2016).

¹³ Note that New Mexico is the only one of the five EPA Region 6 states that has not received delegation of the Clean Water Act permit program. As a result, construction projects in New Mexico remain directly

issued a general permit under which discharges of storm water associated with construction activity are authorized under Chapter 26 of the Texas Water Code. This permit is commonly referred to as the Construction General Permit.¹⁴ Storm water permitting at construction sites is largely managed through that permit.¹⁵ The stated goals of the construction storm water permit program are to: (i) prevent or minimize the impact of construction; (ii) minimize erosion during construction; and (iii) consider post-construction storm water management.¹⁶ The current permit - TXR 150000 - was issued on March 3, 2013 and will expire March 4, 2018.

B. What is Construction Activity?

TCEQ's Construction General Permit authorizes storm water discharges from construction activities such as clearing, grading, excavation, demolition, and activities that expose or disturb soil. The permit also authorizes discharges of storm water from "construction support activities" that specifically support the construction activity and involve earth disturbance or pollutant-generating activities such as

regulated by the EPA rather than the state environmental agency, the New Mexico Environment Department.

¹⁴ General Permit to Discharge Under the Texas Pollutant Discharge Elimination System, effective March 3, 2013, commonly referred to as the "Construction General Permit."

¹⁵ Note that any permit applicant may choose to permit individually, and TCEQ retains discretion to require individual permits where water quality concerns dictate.

¹⁶ Discharges to or through Municipal Separate Storm Sewer Systems (e.g. the curb drain systems in Dallas, Austin, Ft. Worth, San Antonio, Houston, and many other municipalities) are discharges to water in the state.

activities associated with concrete or asphalt batch plants, rock crushers, equipment staging yards, materials storage areas, excavated material disposal areas, borrow areas. Some non-storm water discharges also are authorized.

According to EPA guidance, "construction activity" does not refer to unrelated earth-disturbing activities such as interior remodeling, completion of interiors of structures, etc. "Construction activity" also does not include routine earth disturbing activities that are part of the normal day-to-day operation of a completed facility (e.g., daily cover for landfills, maintenance of gravel roads or parking areas, landscape maintenance, etc.).¹⁷

C. Who Is Responsible?

Parties meeting the definition of "operator" of a construction project must comply with the Construction General Permit. The Construction General Permit defines two types of operators: Primary and Secondary. Operators at small construction sites (1 to less than 5 acres) are those who meet the definition of a primary operator. However, at large construction sites (5 acres or more), the two distinct categories of operators apply.

1. Primary Operators

Primary operators are defined as the person or persons that meets either of the following two criteria:

¹⁷U.S. Environmental Protection Agency website, *Stormwater Discharges from Construction Activities – Frequently Asked Questions*, <https://www.epa.gov/npdes/stormwater-discharges-construction-activities#activities>.

- a. The person or persons that have on-site operational control over construction plans and specifications, including the ability to make modifications to those plans and specifications; or
- b. The person or persons that have day-to-day operational control of those activities at a construction site that are necessary to ensure compliance with a Storm Water Pollution Prevention Plan (“SWPPP” or sometimes “SWP3”), discussed more fully below, for the site or other permit conditions.¹⁸

Primary operators, as the name suggests, have primary responsibility for compliance with the Construction General Permit. TCEQ regulatory guidance advises that primary operators are parties who can modify the construction plans and specifications, or direct workers at the site in order to maintain compliance with the permit conditions.¹⁹ At large construction sites, primary operators are responsible for developing, implementing, and maintaining on site, the SWPPP; filing the NOI with TCEQ (including an application fee), sending a copy of the NOI to the Municipal Separate Storm Sewer Systems (“MS4”) authority prior to starting construction activity, posting the required Primary Operator Site Notice at the site entrance, complying with the final stabilization requirements, and filing the Notice of Termination²⁰ (“NOT”) with TCEQ (and a copy to the MS4) after final stabilization.

¹⁸ General Permit to Discharge Under the Texas Pollutant Discharge Elimination System, effective March 3, 2013, Section I.B.

¹⁹ *Primary and Secondary Operators Under the Construction General Permit for Stormwater Discharges*, RG-486 (Rev. Jan. 2014).

²⁰ TCEQ Form 20023 (Oct. 17, 2014).

At small construction sites, NOIs and NOTs are not required, but the operator remains responsible for preparation and implementation of the SWPPP, posting a Small Site Notice, and notifying the MS4.

There can be more than one party within the definition of a primary operator at a construction project. TCEQ does not construe the terms “on-site operational control” and “day-to-day control” to mean that the operator has to be present at the site every day. The agency has not established any minimum or maximum number of hours that create day-to-day operational control. The emphasis of the day-to-day portion of the definition is whether the operator has day-to-day control "to ensure compliance with" the storm water controls established in the SWPPP.

Developers and owners almost always are considered “operators.” This is the case even when there will be one or more general contractors actually carrying out the on-site compliance activities, such as inspections and maintenance of storm water controls. Generally, contractual shifting of responsibility between the various contractors does not affect the agency’s enforcement authority. General contractors are responsible for compliance with the permit terms and conditions even if the SWPPP was developed by someone else (such as the owner of the project).

2. Secondary Operators

Secondary operators are defined as the person or entity, often the property owner, whose operational control is limited to:

- a. The employment of other operators, such as a general contractor, to perform or supervise construction activities; or
- b. The ability to approve or disapprove changes to construction plans and specifications but who does not have day-to-day on-site operational control over construction.²¹

TCEQ regulatory guidance advises that secondary operators include parties who can approve or disapprove changes *initiated* by another permitted operator, including associated cost, and can hire or fire another operator. However, TCEQ notes that secondary operators, as distinguished from primary operators, are parties that cannot *initiate* changes to the construction plans and specs. One important caveat, if there is not a primary operator at the construction site, then the secondary operator is defined as the primary operator and must comply with the requirements for primary operators. Also note that a secondary operator is not prohibited from submitting an NOI as a primary operator, which allows the operator more flexibility to direct work at the site as the project progresses.

Secondary operators are responsible for participating in development of the SWPPP, signing a completed Secondary Operator Site Notice and posting it at the site entrance, and submitting a copy of that notice to the MS4.

D. The Storm Water Pollution Prevention Plan

²¹ General Permit to Discharge Under the Texas Pollutant Discharge Elimination System, effective March 3, 2013, Section I.B.

The SWPPP is the heart of compliance with the Construction General Permit. TXR150000 requires, as does its federal counterpart, the operator to develop and implement a SWPPP. In order to meet the terms and conditions of the Construction General Permit, an operator must perform a Texas two-step: (i) prepare *and implement* a SWPPP; and, only after implementation has taken place (ii) complete and submit the NOI signaling an intention to comply with the terms and conditions of the Construction General Permit.

The storm water controls required under TXR150000 are largely based on implementing best management practices (“BMPs”), and do not currently contain water-quality-based effluent limits, i.e. specific numerical criteria. The required contents of a SWPPP include, among other things, identifying and addressing all potential sources of pollution that may affect the quality of storm water discharges from the site. A SWPPP contains, at a minimum, a project description, a location map, a site map showing construction details, information on receiving waters, and a description of the BMPs used to minimize the potential for pollution in storm water discharges both during and after construction activities. Additionally, the SWPPP must confirm compliance with fairly rigid site inspection requirements. During the course of a construction project, the original plans may be changed often, and the SWPPP is required always to reflect the current conditions and controls employed at a site.

E. Commonly Observed Violations

Following is a list of non-compliances that experience has shown often appear in TCEQ

enforcement actions under the Construction General Permit:

1. Paperwork Issues

- Failure to file a NOI, and failure to post the appropriate information at the construction site.
- Failure to keep the SWPPP updated as the project progresses (e.g. showing a new construction entrance), and failure to have the updated copy at the construction site for inspection.
- Failure to file appropriate forms such as the Delegation of Authority letter to allow persons other than corporate officials to sign compliance documents like inspection forms.
- Failure to include the qualifications of the inspectors in the SWPPP.
- Failure to document any corrective action taken as a result of an inspection recommendation.
- Failure to have all of the appropriate parties sign on to the SWPPP.
- Failure to file the Notice of Termination at the appropriate time.

2. Non-paperwork Issues

- Off-site tracking of dirt by vehicles leaving the construction site.
- Actual non-storm water discharges into the storm water sewer system.
- Best Management Practices identified by the SWPPP are not implemented (e.g. silt fences or inlet protection is missing), or is deemed to be ineffective.

F. Enforcement

When enforcement does occur, the construction industry finds that it has several

masters. In Texas, TCEQ has primacy over implementation and enforcement of the federal storm water permitting program, but that does not mean that EPA is devoid of enforcement authority.²² The sheer number of construction projects, and their transient nature, poses a resources challenge to TCEQ. As a result, EPA Region 6 does appear from time to time, particularly in North Texas near its Dallas headquarters. Additionally, a lot of the real action occurs at the local level where municipalities have city code-based construction storm water programs that can almost entirely overlap the TCEQ program, but which are independently enforceable by the municipalities.

As an example, the City of Dallas Code of Ordinances has provisions governing storm water discharges from construction sites that essentially incorporate by reference the requirements of the TCEQ's Construction General Permit.²³ But, there are several additional zingers that directly and significantly impact construction projects. Here are three powerful Dallas add-ons to the program:

- The city may deny approval of any building permit, street or sidewalk cut permit, plumbing permit, service connection permit, grading permit,

²² In the early days of the storm water permit program, prior to TCEQ's assumption of the permitting authority, EPA aggressively pursued enforcement of construction-related storm water discharge violations. For example, in June 2001, a civil Complaint against Wal-Mart Stores, Inc. resulted in a settlement penalty amount of \$1,000,000 and a \$4.5 million effort to improve the retailer's compliance with storm water requirements at its construction sites nationwide.

²³ City of Dallas Code of Ordinances, Art. IX, §19-118(a).

subdivision plat, site development plan, or other city approval *necessary to commence or continue construction or development*, if the management practices described in the plans and specifications, or observed upon a site inspection by the city, are determined not to control and reduce, to the maximum extent practicable, the discharge of sediment, silt, earth, soil, and other materials associated with clearing, grading, demolishing, excavating, and other construction activities.²⁴

- Dallas makes an owner of a construction site jointly and severally responsible with the operator for compliance with the storm water requirements, *even if the owner is not an “operator” of the site.*²⁵
- Any contractor or subcontractor on a construction site, who is not an owner or operator of the site but *who is responsible under the construction contract or subcontract* for implementing a best management practices control measure, is jointly and severally responsible for any intentional, willful, or negligent failure to adequately implement that control measure if such failure causes or contributes to causing the city to violate a water quality standard, the city’s own discharge permit, or any other discharge permit issued by a state or federal regulatory authority for discharges from the storm water drainage system.²⁶

²⁴ *Id.* at § 19-118(f).

²⁵ *Id.* at § 19-118(g).

²⁶ *Id.* at § 19-118(h).

These types of provisions vastly change the way parties involved in a construction project may view risk, and craft risk allocation contractually. TCEQ, for example, will not pursue a project owner or a subcontractor whose authority at a project does not fall into one of the defined “operator” categories. TCEQ will simply bring enforcement against the operators and let those parties chase others who may have contractual responsibilities. A municipality with code provisions such as the above specifically can bring direct action against the owner of the construction site, as well as a subcontractor who is responsible for implementing a best management practice under the SWPPP.

Municipal authorities send quarterly lists of significant violators to EPA for federal enforcement. This list consists of alleged violators from whom a city does not receive the level of cooperation it seeks. Thus it is always conceivable that a municipal storm water inspection at a construction site will lead to a visit from EPA.

Finally, the federal Clean Water Act contains citizen suit provisions allowing citizens with standing to stand in the shoes of the government to enforce against violations. Citizens can seek civil penalties, injunctive relief, and attorney’s fees.²⁷

G. Three Storm Water Stories

1. The Feds

Facts: During construction of a large sports arena (during one of the wettest seasons on record), an EPA inspector arrives at the site once a week and snaps photos of things not

²⁷ 33 U.S.C. § 1365.

to his liking. For example, one week, a truck has backed over a silt fence and trash is observed on the ground. Inspector snaps photo. Another week, a materials storage area is not covered, and some dirt has been tracked into the street by trucks. Inspector snaps photo. In the end, the City sues the contractor and a number of other parties that are operators under the permit, alleging numerous separate violations of the Construction General Permit. Clearly, a large penalty is in the works.

Response: Is a photo of a silt fence that has been crushed or has fallen over really evidence of a storm water permit violation? How about observed tracking, or debris at the construction site? A look at the Construction General Permit reveals that an operator must implement BMPs such as silt fences to reduce pollutants leaving the construction site in storm water runoff. However, such BMPs are fighting with the power of Mother Nature, so the permit calls for regular inspections of the BMPs, and allows a reasonable time to repair or replace broken or ineffective BMPs. If a broken silt fence remained unrepaired from inspection to inspection, that would likely result in a finding of a violation. However, the operator in this case never allowed any BMP issue to lag. The required inspection records documented this fact. Similarly, the SWPPP detailed a daily close-of-business trash and debris pickup. A photo taken immediately prior to that time would appear to show potential violations that, in fact, were not violations. Tracking also is unavoidable during wet periods but the operator had implemented BMPs to minimize tracking, and had documented, periodic, street cleaning. EPA dismissed all claims against this operator, but pursued other operators at

the site whose records were not in order or did not document compliance.

Lessons Learned: Make sure to document all inspections and findings, and make sure to document timely responses to those findings, i.e. comply with the Construction General Permit. For example, documentation of an inspection finding that a silt fence is torn should be followed by documentation of replacement of the fencing. Be able to demonstrate that housekeeping is taking place regularly. Keep invoices showing street cleaning and other compliance activities.

2. Texas

Facts: A construction company develops and implements a SWPPP, submits a NOI, and constructs a large commercial building, including a retaining wall near a creek. The company completes the project and exits the site. A year later, the retaining wall spectacularly fails during torrential rains, discharging storm water and debris, and significantly damaging the creek and a downstream lake. The TCEQ files a \$748,000 administrative complaint against the company based on its records showing that no Notice of Termination had been filed on the project. Consequently, TCEQ understood that the construction project was still active, the construction company was still the “primary operator” of the project, and that deficient BMPs caused an illicit discharge of pollutants to a water of the state.

Response: The operator was able to show TCEQ that the project, in fact, had been completed long before the time of the retaining wall failure. Maintenance of the retaining wall was not a responsibility of the

contractor, and the contractor did not have legal access to the property at the time of the failure. TCEQ countered that, in the absence of the Notice of Termination, TCEQ was justified in claiming the contractor was an “operator.” We countered with a TCEQ guidance document that took the position that while failure to file a Notice of Termination was, itself, a violation, it did not mean that the former “operator” still had “operator” status under the law. TCEQ immediately reduced the penalty by \$700,000, leaving the remaining \$48,000 relating to the failure to file the Notice of Termination for negotiation.

Lesson Learned: A short form submission can be the difference between no enforcement action at all, and a potentially large penalty. Every filing should be calendared, and confirmation of submission must be maintained. Side note, much filing with TCEQ is done electronically and many agency enforcement actions from errors in making electronic submissions. Always obtain confirmation of TCEQ’s receipt.

3. Municipal

Facts: A construction company that builds high-end homes constructs several homes in one phase of a development project. The City has issued 9 building permits for construction of 9 separately platted homes. A municipal storm water inspector determines that each less than 1-acre lot is part of a “larger common plan of development” that exceeds 5 acres. No NOI to comply with the Texas Construction General Permit had been filed, although storm water controls are in place at the project. The City filed 27 separate Class C misdemeanor actions against the contractor,

alleging violations of the Construction General Permit.

Lessons Learned: The various departments of a municipality may have no interaction with one another. The issuance of building permits cannot be deemed to imply any acquiescence by the City that the project complies with the storm water program. If the municipality has its own ordinance requiring compliance with the State Construction General Permit, the municipality can bring direct enforcement. (End note, all 27 actions were dismissed based on facial deficiencies in the City’s claims.)

III. OTHER PERMIT PROGRAMS AND POTENTIAL SOURCES OF LIABILITY

A. Air Permitting

Air permitting requirements can be triggered by new facility construction as well as expansion projects. Section 382.0518(a) of the Texas Clean Air Act states: “Before work is begun on the construction of a new facility or a modification of an existing facility that may emit air contaminants, the person planning the construction or modification must obtain a permit from the commission.”²⁸ TCEQ’s implementing air permitting regulations state that **before** any actual construction work begins on a new facility that will emit (or to modify an existing facility that does emit) air contaminants, an air permit must be obtained.²⁹

Identifying what constitutes the “start of construction” is crucial to a construction

²⁸ Tex. Health & Safety Code Chap. 382

²⁹ 30 Tex. Admin. Code § 116.110.

project. TCEQ guidelines clarify that “construction” will be interpreted very broadly to include practically anything other than site clearance or site preparation. TCEQ web site advises that:

- Equipment may be received at a plant site and stored provided no attempt is made to assemble the equipment or to connect the equipment into any electrical, plumbing, or other utility system;
- Portable equipment such as hot mix asphalt plants and rock crushers may be placed on the property provided no work is done to assemble or erect the equipment;
- All work such as excavation, form erection, or steel laying pertaining to foundations upon which permit units will rest shall be considered construction;
- For permit units not requiring a concrete foundation, the erection or construction of associated items like earthen dams, placement of piling, soil stabilization, storage tank fills, or retaining structures shall be considered construction, and are not allowed without prior receipt of the construction permit;
- Land clearing, soil load bearing tests, leveling of the area, sewer and utility lines, road building, power line installation, fencing, construction shack building, etc., are considered "site clearance/preparation." However, once the soil and site are ready for foundations, the first excavation into the readied soil is "start of construction."³⁰

³⁰ TCEQ webpage, *Air Permits to Construct: Before You Build*,

B. Texas Water Rights

The construction industry also can be affected by a bizarre position of the State of Texas concerning water rights. Under the authority of Section 11.081 of the Texas Water Code,³¹ the TCEQ’s water rights regulations state: that “no person may divert, store, impound, take or use water or begin construction of any work designed for the storage, taking, or diversion of water without first obtaining a water right.”³² Water rights are serious business in Texas. (As we all know, whiskey is for drinking; water is for fighting.) TCEQ has frequently taken the position that the little blue lines appearing on USGS maps (some as old as 1963) are evidence of the presence of jurisdictional “state waters.” Particularly during times of drought or low rainfall, the TCEQ vigorously seeks out water rights violations with the “blue line” offense. The allegation leaves a respondent in the position of proving the negative – that no state water is present where the blue lines appear – which becomes almost impossible if site conditions already have been changed by construction activities.

C. Waste Regulation

Parties that generate solid or hazardous wastes in connection with industrial activities are responsible for managing those wastes, including storage, transportation, and disposal, in accordance with TCEQ’s regulatory program under the Texas Solid Waste Disposal Act. TCEQ defines “solid waste” broadly to include any discarded material, whether solid, liquid, semisolid, or

<https://www.tceq.texas.gov/permitting/air/newsources/view/before.html>.

³¹ Tex. Water Code § 11.081.

³² 30 Tex. Admin. Code § 297.11.

gas, from industrial and commercial activities.³³ Unlike many states, Texas actively regulates non-hazardous industrial wastes based on a waste classification system identifying those wastes as Class 1, Class 2, or Class 3 (inert, insoluble materials such as rock, brick, glass, and dirt).³⁴ Generators of solid or hazardous waste are subject to a registration system and, depending upon quantity and classification of wastes, have various regulatory obligations. A “generator” is:

Any person, by site, who produces municipal hazardous waste or industrial solid waste; any person who possesses municipal hazardous waste or industrial solid waste to be shipped to any other person; or any person whose act first causes the solid waste to become subject to regulation under this chapter. For the purposes of this regulation, a person who generates or possesses Class 3 wastes only shall not be considered a generator.³⁵

If a general contractor generates anything other than Class 3 wastes, such as significant quantities of waste paints or solvents, it may be subject to the solid and hazardous waste management program barring a regulatory exemption.

In particular, when conducting construction at a brownfield property (such as a former industrial facility or a landfill), the likelihood of waste generation can increase.

³³ 30 Tex. Admin. Code § 335.1(140).

³⁴ 30 Tex. Admin. Code § 335.1(26); *See also Guidelines for the Classification and Coding of Industrial and Hazardous Wastes*, RG-022 (Rev. Nov. 2014).

³⁵ 30 Tex. Admin. Code § 335.1(67).

There may be historical conditions on the property that were not revealed during pre-construction environmental assessments, such as former dry cleaners and former gas stations with buried chemical-containing pits and tanks.

Even properties that were former agricultural operations, such as cattle ranching or cotton farming, can have hidden environmental issues that may be encountered during excavation. For example, many cattle operations filled earthen pits with toxaphene for de-ticking, and arsenic was the desiccant of choice for King Cotton. Soil contaminated with toxaphene or arsenic may be unexpectedly excavated by a contractor. Once removed from the ground, that material qualifies as a waste in Texas, possibly even a hazardous waste, that must be stored, transported, and disposed of pursuant to TCEQ’s regulatory program. The party that qualifies as the “generator” will be responsible for complying with that program.

TCEQ’s ultimate enforcement tool is a regulatory provision commonly called “the General Prohibition.” That regulation states:

[N]o person may cause, suffer, allow, or permit the collection, handling, storage, processing, or disposal of industrial solid waste or municipal hazardous waste in such a manner so as to cause:

(1) the discharge or imminent threat of discharge of industrial solid waste or municipal hazardous waste into or adjacent to the waters in the state without obtaining specific authorization for such a discharge

from the Texas Commission on Environmental Quality;

(2) the creation and maintenance of a nuisance; or

(3) the endangerment of the public health and welfare.³⁶

In the absence of, or in addition to, some other clear regulatory violation, TCEQ will often allege a violation of the General Prohibition because of the practically unlimited application to any person, and the broad array of activities that could be deemed “causing,” “suffering,” or “allowing.” Even loose causation may be enough to support this type of claim.

The chances of an enforcement action under the General Prohibition go way up when a spill or discharge occurs. TCEQ regulations require reporting of certain spills or discharges under Chapter 327 by the “responsible person.”³⁷ The responsible person is the owner or operator of the site, or “any other person who causes, suffers, allows, or permits, a discharge or spill.”³⁸ The General Prohibition does not specifically depend upon a reportable release. However, in the event of a reportable release, it is entirely possible that TCEQ would look to a general contractor that is in control of a construction site where a reported discharge of waste has occurred (particularly if construction activities caused the release) as a responsible person who has spill response obligations, as well as a person who has violated the General Prohibition. This is an area where contractual risk allocation will be important, although it will not impact direct liability to the TCEQ.

³⁶ 30 Tex. Admin. Code § 335.4.

³⁷ 30 Tex. Admin. Code Chap. 327.

³⁸ 30 Tex. Admin. Code § 327.2(15).

D. CERCLA/Texas Solid Waste Disposal Act

The federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (“CERCLA”) imposes strict liability upon four categories of potentially responsible parties (“PRPs”) for any release or threatened release of a hazardous substance into the environment: (i) the current owner and operator of the hazardous waste facility; (ii) the past owner or operator of the hazardous waste facility at the time of the release; (iii) the person who “arranged for” disposal or treatment of a hazardous substance; and (iv) the transporter of hazardous substances. Texas has a similar state analogue under the Texas Solid Waste Disposal Act with similarly described “persons responsible for solid waste.”³⁹

Despite some alarming case law in the 1990s,⁴⁰ a CERCLA liability analysis from the courts would generally be expected to examine the facts highlighting how much control and authority a contractor had over a site. In particular, courts will look to the level of authority and control the contractor had over decisions concerning hazardous substance management, such as disposal decisions. CERCLA liability risk is reduced when a contractor has no authority to exercise control over a hazardous substance and is merely implementing the site owner’s directions. CERCLA liability risk is

³⁹ Texas Solid Waste Disposal Act, Tex. Health & Safety Code, Chap. 361, subchap. I.

⁴⁰ See e.g. *Kaiser Aluminum & Chemical Corp. v. Catellus Development Corp.*, 976 F.2d 1338 (9th Cir. 1992) (Finding that an excavation contractor “transported” a hazardous substance by moving contaminated soil onto an uncontaminated area of the property.); see also *North Miami v. Berger*, 828 F.Supp. 401 (E.D. VA 1993).

increased when a contractor exercises authority/control over management, removal, or disposal of hazardous substances.

E. Texas Water Code Section 7.351

Section 7.351 of the Texas Water Code grants enforcement authority to local governments to bring lawsuits for civil penalties against those who violate Texas environmental laws, essentially to stand in the shoes of the TCEQ.⁴¹ The penalties sought by local governments often are an order of magnitude higher than the penalties that would have been sought by the TCEQ. The maximum penalty that may be sought in a Section 7.351 case is \$25,000 per violation per day the violation exists. Texas Register public notices for case resolutions reveal healthy use of Section 7.351 by counties and municipalities in the last several years, in large part because local governments can hire outside counsel on a contingency fee basis to pursue the claims.

To date, the big kahuna of settlements occurred in a case brought by Harris County against McGinnes Industrial and others seeking penalties for discharge of paper mill waste into the San Jacinto River. At trial, two defendants settled for approximately \$29 million. Of that amount, the State and Harris County equally split \$20 million, and the private law firm attorneys received \$9 million. Effective September 1, 2015, changes to the Texas Water Code in the 84th Texas Legislature placed some limitations on recovery. The first \$4.3 million of the amount recovered is divided equally between the State and the local government. Any amount recovered in excess of \$4.3

million is awarded to the State. A local government's recovery of civil penalties in a Section 7.351 case is now capped at \$2.15 million. Nevertheless, counties and municipalities continue to use the Section 7.351 authority to fill their coffers with very little litigation risk.

Practically any violation of state environmental laws can serve as the basis for a Section 7.351 lawsuit, including all of the programs mentioned in the preceding discussion. Construction project operators can be, and have been, subject to these actions.

F. Hybrid Waste/Water Issue

What about the operator of a construction project who has obtained permit coverage under the Texas Clean Water Act for its discharges of storm water? Is that party also required to comply with all of the solid waste generator requirements solely because storm water discharges will contain sediment or other pollutants? This is tricky. As noted above, a construction site operator could be engaged in waste generation and management activities that might be regulated under the solid and hazardous waste program. However, when looking solely at the contents of storm water permitted under the Texas Water Code, the answer should be "no."

The definition of solid waste specifically excludes industrial wastewater discharges that are point source discharges subject to the federal Clean Water Act permit program.⁴² The author raises this issue as a caution because at least one Texas Water

⁴¹ Tex. Water Code § 7.351.

⁴² 30 Tex. Admin. Code § 335.1(140)(A)(iv), referencing 40 C.F.R. § 261.4(a)(2).

Code 7.351 lawsuit by a municipality, with TCEQ as an indispensable party, has alleged Solid Waste Disposal Act waste violations based entirely on the potential contents of permitted storm water discharges from a large construction site. This could signal a troubling new enforcement theory that would force every construction site operator in the state to register as a waste generator.⁴³

G. Miscellaneous Environmental Issues

Other questions to ask in the pre-construction phase of a project that may identify intersections between the project and environmental laws are:

- Will the project impact jurisdictional wetlands?
- Will dredge and fill or other activities require U.S. Corps of Engineers authorization?
- Will any demolition or renovation activities disturb asbestos-containing materials, triggering contractor licensing and regulatory requirements?
- Could the project impact any endangered species under the Endangered Species Act?
- Could this project required an Environmental Assessment under the National Environmental Policy Act?

⁴³ This author strongly believes that any such effort would be completely inconsistent with existing divisions of authority in the federal and state environmental laws.

- Are environmental justice concerns likely to arise due to the location of the project in a low income or minority neighborhood?

Finally, anyone involved in the construction industry should watch carefully for changes to the permit requirements affecting the industry, and should be prepared to submit public comments on those changes. For example, the Construction General Permit once contained numeric pollutant limitations that, for the time being, have been removed. This permit is reissued every 5 years and is subject to administrative public notice and comment.

IV. CONCLUSION

The construction industry is regulated by a wide array of environmental laws and regulations. A working knowledge of the potential environmental law snares that can slow down or stop a project, or result in liability for the project owners and operators, is necessary in light of this net of regulation. Asking the right questions during the pre-construction phase of any project can help ensure preparedness for the day when the TCEQ, the City, or even the EPA, come knocking at the door.

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