

APPENDIX A

CERTIFICATION OF AUTHORITY



Kathleen White, *Chairman*
R. B. "Ralph" Marquez, *Commissioner*
Larry Soward, *Commissioner*
Glenn Shankle, *Executive Director*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

GENERAL COUNSEL'S CERTIFICATION

The State of Texas, through the Texas Commission on Environmental Quality (commission or TCEQ), is currently in the process of seeking full approval for its *Texas Nonpoint Source Pollution Assessment Report and Management Program* ("NPS Program"). The Environmental Protection Agency (EPA) has given full technical approval to the NPS program.

In accordance with Section 319(b)(2)(D) of the Clean Water Act, each management program proposed for implementation must include:

A certification of the attorney general of the State or States (or the chief attorney of any State water pollution control agency which has independent legal counsel) that the laws of the State or States, as the case may be, provide adequate authority to implement such management program or, if there is not such adequate authority, a list of such additional authorities as will be necessary to implement such management program .

Following a review of the referenced 2005 NPS Program, the General Counsel certifies, under Section 319(b)(2)(D) of the Clean Water Act, that the laws of the State of Texas provide adequate authority to implement the NPS Program, as more specifically described below.

Relevant Legal Authority

The TCEQ is the state agency given primary responsibility for implementing the constitution and laws of the state relating to the conservation of natural resources and protection of the environment.¹ Specifically, the commission has general jurisdiction over the state's water quality program, including:

- the issuance of permits;
- the enforcement of water quality rules, standards, orders and permits; and

¹ Texas Water Code (TWC) §5.012.

- water quality planning.²

The commission also has the power to perform any acts whether specifically authorized by the Texas Water Code (TWC) or other law or implied by the TWC, necessary and convenient to the exercise to the exercise of its jurisdiction and powers.³ The commission is also authorized to adopt rules necessary to carry out its duties and powers.⁴

Chapter 26 of the TWC provides that the commission shall establish the level of quality to be maintained in, and shall control the quality of, the water in the state.⁵ Waste discharges or impending waste discharges covered by the provisions of Chapter 26 are subject to reasonable rules or orders adopted or issued by the commission in the public interest. The commission has also been given the powers and duties specifically prescribed by Chapter 26 and all other powers necessary or convenient to carry out those statutory responsibilities.

Section 26.012 requires the executive director to prepare and develop a general, comprehensive plan for the control of water quality in the state, which shall be used as a flexible guide by the commission. Additionally, § 26.017 requires the commission to:

- encourage voluntary cooperation by the people, cities, industries, associations, agricultural interests, and representatives of other interests in preserving the greatest possible utility of water in the State;
- encourage the formation and organization of cooperative groups, associations, cities, industries, and other water users for the purpose of providing a medium to discuss and formulate plans for attainment of water quality control;
- establish policies and procedures for securing close cooperation among state agencies that have water quality control functions; and
- cooperate with the governments of the United States and other states and with official or unofficial agencies and organizations with respect to water quality control matters.

Section 26.023 of the TWC provides that the commission is the sole and exclusive authority for setting water quality standards, and must set water quality standards for the water in the state by rule, and may amend the standards from time to time. The standards must be based on all quality assured data obtained by the commission, including local watershed and river basin database. The commission may also issue permits and amendments to permits for the discharge of waste or pollutants into or adjacent to water in the state and may refuse to issue a permit when issuance would violate the provisions of any state or federal law or rule or

² TWC §5.013.

³ TWC §5.102.

⁴ TWC §5.103.

⁵ TWC §26.011.

regulations.⁶ The commission must also consider the compliance history of an applicant and its operator in considering issuance, amendment or renewal of a permit to discharge effluent.⁷

The commission may prescribe reasonable requirements for a person making discharges of any waste or of any pollutant to monitor and report on his activities concerning collection, treatment, and disposal of the waste or pollutant.⁸ The executive director has the responsibility for establishing a water quality sampling and monitoring program for the state. All other state agencies engaged in water quality or water pollution control activities are statutorily required to coordinate those activities with the commission.⁹ Additionally, the commission and employees or agents of the commission are authorized to enter any public or private property at any reasonable time for the purpose of inspecting and investigating conditions relating to the quality of water in the state.¹⁰

Local governments may also inspect the public water in its area and may execute cooperative agreements with the commission to provide for the performance of water quality management, inspection, and enforcement functions and for the transfer of money or property from any party to the agreement to another party for the purpose of water quality management, inspection, enforcement, technical aid and education, and the construction, ownership, purchase, maintenance, and operation of disposal systems.¹¹ Municipalities may also establish a water pollution control and abatement program for the city to include services and functions which, in the judgement of the city or as may be reasonably required by the commission, will provide effective water pollution control and abatement for the city.¹² Municipal water pollution control and abatement programs must be submitted to the commission for review and approval.¹³ Further, the commission shall hold annual hearings in counties that include particularly sensitive areas, such as the Edwards Aquifer, to receive evidence on actions the commission should take to protect the aquifer from pollution.¹⁴ To further this goal, the commission has adopted rules in 30 Texas Administrative Code (TAC) Chapter 213 which regulate development activities over the Edwards Aquifer.

⁶ TWC § 26.027.

⁷ TWC § 26.0281.

⁸ TWC § 26.042.

⁹ TWC §26.127.

¹⁰ TWC §26.014.

¹¹ TWC § 26.171 and § 26.175.

¹² TWC § 26.177.

¹³ *Id.*

¹⁴ TWC § 26.046.

The commission also has broad authority over the location, design, construction, installation, and proper functioning of on-site sewage disposal systems¹⁵ and has adopted corresponding rules in 30 TAC Chapter 285 to encourage the use of economically feasible alternative techniques and technologies.

Chapter 7 of the TWC establishes the enforcement authority of the commission. The commission may initiate an action to enforce provisions of the TWC, THSC within the jurisdiction of the commission and rules, orders, permits, or other decisions of the commission.¹⁶ The commission must report at least once a month at a meeting of the commission on enforcement actions taken by the commission or others and the resolution of those actions.¹⁷ The commission may assess an administrative penalty against a person for violations with a maximum amount of \$10,000 a day for each violation.¹⁸ Persons charged with a penalty have the option of paying it in full, paying the penalty, paying an installment, paying or not paying in full and filing a petition for judicial review.¹⁹ If a person fails to comply with that section, then the commission or executive director may refer the matter to the attorney general for enforcement.²⁰

Texas Department of Transportation

The Texas Department of Transportation (TxDOT) is the primary agency in the State responsible for highway, road, and bridge construction. As described in the 2005 NPS Program, TxDOT's approach in addressing nonpoint source pollution is to limit impacts to receiving waters through implementation of highway design specifications. TxDOT has been conferred broad authority by the legislature.²¹ TxDOT and TCEQ have entered into Memoranda of Understanding which has been adopted by reference in 30 TAC § 7.119 with regard to the assessment of water quality impacts resulting from certain transportation projects.

Texas Railroad Commission

The Texas Railroad Commission (TRRC) is solely responsible for the control and disposition of waste and the abatement and prevention of surface and subsurface water pollution resulting from activities associated with the exploration, development, and production of oil and gas or geothermal resources, including:

¹⁵ Texas Health and Safety Code (THSC) § 366.011.

¹⁶ TWC § 7.002.

¹⁷ TWC § 7.003.

¹⁸ TWC § 7.051 and § 7.052.

¹⁹ TWC § 7.061.

²⁰ TWC § 7.066.

²¹ Texas Transportation Code, Chapter 201.

- activities associated with the drilling of injection water source wells which penetrate the base of useable quality water;
- activities associated with the drilling of cathodic protection holes associated with the cathodic protection of wells and pipelines subject to the jurisdiction of the Railroad Commission of Texas;
- activities associated with gasoline plants, natural gas or natural gas liquids processing plants, pressure maintenance plants, or repressurizing plants;
- activities associated with any underground natural gas storage facility,
- activities associated with any underground hydrocarbon storage facility; and
- activities associated with the storage, handling, reclamation, gathering, transportation, or distribution of oil or gas before refining.²²

To prevent pollution of streams and public bodies of surface water of the State, the Railroad Commission is must adopt and enforce rules in accordance with Texas Natural Resource Code § 91.101 relating to the drilling of exploratory wells and oil and gas wells. Additionally, TCEQ and TRRC have entered a Memorandum of Understanding adopted by reference in 30 TAC § 7.117 concerning cooperation and the division of jurisdiction between the agencies regarding wastes that result from, or are related to, activities associated with the exploration, development, and production of oil, gas, or geothermal resources, and the refining of oil.

Texas Parks and Wildlife Department

The Texas Parks and Wildlife Department is authorized to regulate the use of department lands for oil, gas, and other mineral recovery and associated activities as the department considers reasonable and necessary to protect the surface estate. The Texas Parks and Wildlife is authorized by TWC § 26.129 to enforce the provisions of the Texas Water Code to the extent that any violation affects aquatic life and wildlife.

Wetlands

The United States Army Corps of Engineers (Corps) is the principle authority for all dredging operations affecting bays and estuaries of Texas. While EPA has designated the Corps as the implementing agency under Section 404 of the CWA, the TCEQ is responsible for completing Section 401 Water Quality Certifications. The commission has enacted regulations in 30 TAC Chapter 279 establishing procedures and criteria for applying for, processing, and reviewing state certifications under CWA, §401, for activities under the jurisdiction of the agency for the purpose maintaining the chemical, physical, and biological integrity of the state's waters consistent with the Texas Water Code and the federal CWA. It is the policy of the commission to achieve no overall net loss of the existing wetlands resource base with respect wetlands functions and values in the State of Texas.

²² TWC § 26.131.

Spill Response

The *Texas Oil and Hazardous Substances Spill Prevention and Control Act* provides that it is the policy of the State to prevent the spill or discharge of hazardous substances into waters in the State and to cause the removal of any such spills and discharges without undue delay.²³ In accordance with the Act, the commission is the lead agency in spill response matters and shall conduct spill response for the state, and shall otherwise administer the provisions of the Act. The commission has also been designated by the Governor as the state's lead agency for Superfund activities and as the state's representative to the federal Regional Response Team in accordance with the *Comprehensive Environmental Response, Compensation, and Liability Act*, 42U.S.C. §§ 9601- 9675; the *Water Pollution Prevention and Control Act*, 33 U.S.C. §§ 12511387; and the *National Oil and Hazardous Substances Pollution Contingency Plan*, 40 CFR Part 300. Under the authority of the *Solid Waste Disposal Act*, the commission has broad removal authorities with respect to the cleanup of a release or threatened release of hazardous substances at a facility on the State registry.²⁴

Funding Mechanisms

The executive director, with the approval of the commission, may execute agreements with the United States Environmental Protection Agency or any other federal agency that administers programs providing federal cooperation, assistance, grants, or loans for research, development, investigation, training, planning, studies, programming, and construction related to methods, procedures, and facilities for the collection, treatment, and disposal of waste and other water quality control activities. The commission is authorized to accept federal funds for these purposes and for other purposes consistent with the objectives of Chapter 26 of the TWC and may use the funds as prescribed by law or as provided by agreement.



Derek Seal
General Counsel
Texas Commission on Environmental Quality

²³TWC Chapter 26, Subchapter G.

²⁴THSC Chapter 361.



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 2, 2005

Mr. Rex Isom, Executive Director
Texas State Soil and Water Conservation Board
P.O. Box 658
Temple, Texas 76503

Re: Statewide Agriculture/Silvicultural Nonpoint Source Management Program

Dear Mr. Isom:

I have reviewed the above management program document provided to me by TSSWCB staff. I have also reviewed Chapters 201 and 203 of the Texas Agricultural Code ("Code").

As you know, TSSWCB's statutory authority is contained in Chapters 201 and 203 of the Code. Section 201.026 of the Code gives the Board specific authority to "plan, implement, and manage programs and practices for abating agricultural and silvicultural nonpoint source pollution." Texas law therefore provides adequate authority for TSSWCB to promulgate and implement the Statewide Agriculture/Silvicultural Nonpoint Source Management Program set forth in the draft document provided to me by TSSWCB staff.

Please let me know if I can assist you further.

Sincerely,

George Noelke
Assistant Attorney General
Administrative Law Division