

Texas Commission on Environmental Quality

INTEROFFICE MEMORANDUM

To: Commissioners **Date:** March 19, 2004

Thru: LaDonna Castañuela
Chief Clerk

From: Randolph Wood, Deputy Director
Office of Environmental Policy, Analysis, and Assessment

Subject: Consideration of a Petition for Proposed Rulemaking

Docket No.: 2004-0200-RUL

Rule Project No.: 2004-044-PET-NR

Who Submitted the Petitions:

The petition was filed on February 10, 2004 by Universal Engineering Sciences, Inc., Harrison & Cooper, Inc., and B&A Laboratories, Inc.

What the Petitioners Request:

The petitioners seek to add a section to Chapter 334, Subchapter H, which would allow the agency to directly reimburse subcontractors for work that they have performed for prime corrective action specialists at leaking petroleum storage tank sites. The petitioners suggest the following provisions: 1) the work must be eligible for reimbursement; 2) the work must have been performed for a prime corrective action specialist retained by the eligible owner or operator; 3) a Fund Payment Report containing the unpaid charges must have been issued by the agency; 4) the failure to pay, on the part of the prime corrective action specialist, is due to bankruptcy or insolvency; 5) a subcontractor who seeks direct reimbursement must meet specified filing and notice requirements; and 6) the provisions of the proposed new section are retroactive.

The petitioners indicate that they have acted as subcontractors to various prime corrective action specialists and each face substantial losses because several of the prime corrective action specialists for whom they have performed environmental services have failed to pay them due to bankruptcy or insolvency. They further indicate that without the proposed amendment there is no mechanism for the agency to pay the petitioners and other subcontractors for services they provided.

Recommended Action and Justification:

Staff recommends that the petition be denied.

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Reason(s) for recommendation: A rulemaking package containing proposed changes to 30 TAC, Subchapter H is currently in process, with proposal scheduled for the April 7, 2004 commission agenda. In that rulemaking package staff is recommending a change to 30 TAC Subchapter H so that a subcontractor may submit to the agency evidence that they have performed pre-approved work and have not been fully paid for the work. The agency may then file an interpleader with a court of competent jurisdiction and deposit funds associated with the claim into the registry of the court, so that the court may determine the appropriate distribution of the funds. The rulemaking package, though, will not allow for direct payment from the state to subcontractors, and will not allow for payment to subcontractors where a prime contractor has already been paid for the subcontractor's claimed work and there has not been a successful recovery of costs by the agency. The changes requested to Subchapter H language by the petitioners can be presented to the commission by the petitioners at that agenda and addressed by the agency during the official comment period following publication of the current proposed rule package in the *Texas Register*. The process suggested in the petition may result in the agency paying twice for the same work, once to prime contractors and then again to subcontractors. In addition bankruptcy law will govern the ability of the agency to pay subcontractors for work done as part of a claim by a contractor who has filed for bankruptcy.

Applicable Law:

Texas Government Code, §2001.021, which establishes the procedures by which an interested person may petition a state agency for the adoption of a rule and 30 Texas Administrative Code, §20.15, which provides such procedures specific to the commission.

Affected Public:

Affected persons will include owners and operators of leaking petroleum storage tank (LPST) sites (which also includes state, federal, and local government entities) with ongoing LPST site cleanups, which were reported on or before December 22, 1998, and their consultants, contractors, and subcontractors. In addition, affected persons/entities may include members of the general public that are impacted by soil or groundwater contamination. This will include businesses, schools, or residences that lie over contaminated soils or could be impacted by contaminated groundwater.

Affected Agency Programs:

Office of Permitting, Remediation, and Registration (OPRR), Registration, Review, and Reporting Division, Registration and Reporting Section and Petroleum Storage Tank Reimbursement Section; OPRR, Remediation Division, PST Responsible Party Remediation Section; Office of Administrative Services, Compliance, Evaluation and Audit Section; and Office of Legal Services will be affected.

Agency Contacts:

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David Green, Staff Attorney, 239-5917
Lola Brown, Texas Register Coordinator, 239-0348

Attachment: Petition

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cc: 5 copies to the Chief Clerk for distribution

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