

Issue 4: Selection of State Superfund Remedial Actions

A. Brief Description of Issue

TCEQ is required by statute to select state Superfund remedial actions that it determines to be the lowest cost alternative among the statutorily viable remedial alternatives. The requirement to select the lowest cost alternative does not allow TCEQ to account for site-specific factors that may affect the successful implementation of the remedy.

B. Discussion

When selecting a remedial action for a state Superfund site, Texas Health and Safety Code (THSC) Section 361.193 requires TCEQ to select the lowest cost alternative that is technologically feasible and reliable, effectively mitigates and minimizes damage to the environment, and provides adequate protection of public health and safety and the environment. If a remedial alternative is technically feasible and reliable, it must be selected if it represents the lowest cost, even though other alternatives may be considered *more* reliable or feasible and therefore preferred given site-specific circumstances. Requiring the agency to select the lowest cost alternative does not allow TCEQ to account for site-specific factors that may affect the successful implementation of the remedy.

An example of a site-specific factor is where a higher cost could facilitate redevelopment by requiring fewer restrictions on the use of the property. For instance, a remedy allowing waste to be left on-site under a protective cap could be used as a parking lot. However, this might result in a higher cost for engineering and construction requirements. Costs might include additional testing and potential reinforcement of the cap suitable for future vehicle parking. Redesigning the space for more functional purpose may attract buyers and allow the space to be more productive. This productive reuse would likely benefit local taxing entities such as cities or counties. Additionally, having a site owner or operator who would assume responsibility for future maintenance of the cap also could reduce long term maintenance costs that may otherwise be borne by the State.

C. Possible Solutions and Impact

TCEQ recommends THSC Section 361.193 be revised to provide that costs to conduct a remedial action be balanced with the other factors currently provided in statute. The change would allow the State Superfund Program to consider the evaluation of site-specific factors that may affect the successful implementation of remedial action and select a remedy that best fits site conditions. From a fiscal perspective, this change may result in increased costs for remedy implementation, but may be balanced with other factors such as making the affected property available for redevelopment or reducing long-term liability.

The recommended change may affect potentially responsible parties (PRPs) of state Superfund sites who are parties in cost recovery and/or contribution litigation. Generally, state Superfund law authorizes TCEQ to address sites posing an imminent and substantial endangerment in one of two ways. First, TCEQ may utilize administrative or civil tools to compel PRPs to address the relevant site. Notably, those PRPs who conduct a TCEQ-approved removal or remedial action that is necessary to address a release or threatened release may bring suit in a district court for contribution to recover reasonable costs against other PRPs. Second, TCEQ may conduct environmental response actions utilizing the Hazardous and Solid Waste fee account (State Superfund) and thereafter litigate to recover expended costs from PRPs. An often-disputed issue in state Superfund litigation is the commission's selection of the remedy because the expenses

associated with a particular remedy translate into costs for which a PRP may be pursued by either the state, other PRPs, or both.

Removing constraints to select the lowest cost remedial alternative and allowing TCEQ to balance all statutory factors will ensure the selected remedial action for any state Superfund site will achieve the most advantageous combination of cost, quality, and sustainability.