

Cause No. D-1-GN-10-000774

ARK-LA-TEX WASTE OIL CO., INC.	§	IN THE DISTRICT COURT OF
Plaintiff,	§	
	§	
v.	§	
	§	
TEXAS COMMISSION ON	§	
ENVIRONMENTAL QUALITY, AND	§	TRAVIS COUNTY, TEXAS
ITS COMMISSIONERS, BRYAN	§	
SHAW, BUDDY GARCIA, and	§	
CARLOS RUBENSTEIN,	§	
Defendants.	§	419th JUDICIAL DISTRICT

PLAINTIFF’S FIRST AMENDED ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, Plaintiff, Ark-La-Tex Waste Oil Co., Inc. (“Ark-La-Tex” or “Plaintiff”), complaining of Defendants, the Texas Commission on Environmental Quality (“TCEQ” or “Commission”), Bryan Shaw, Buddy Garcia and Carlos Rubenstein, and by this First Amended Petition seeks declaratory judgments regarding, and a *de novo* review of, the TCEQ’s issuance of a unilateral Administrative Order seeking payment from the Plaintiff of an unspecified sum of money to be determined in the future for certain costs related to investigations undertaken at a state superfund site and directing the Plaintiff to begin a remedial action, without an opportunity for an adjudicative hearing. As grounds for review, Plaintiff would show as follows:

I. PARTIES

1. Plaintiff, Ark-La-Tex Waste Oil Co., Inc., is duly organized in the State of Louisiana and addressed at 3801 McCoy Drive, Bossier City, LA 71111. Plaintiff is named as a Responsible Party (“RP”) in the TCEQ Administrative Order that is the subject of this lawsuit.

2. Defendant TCEQ is an administrative agency of the State of Texas. Service of process may be accomplished by personal delivery of citation to the Executive Director of the TCEQ, Mr. Mark Vickery, P.G., located at 12100 Park 35 Circle, Building F, Austin, Travis County, Texas 78753.

3. Defendant Bryan Shaw is a Commissioner and the Chairman of the TCEQ and is sued in his official capacity. Chairman Shaw may be served by delivering the same to the TCEQ's General Counsel, Les Trobman at P.O. Box 13087, MC-101, Austin, Texas 78711-3087.

4. Defendant Buddy Garcia is a Commissioner of the TCEQ and is sued in his official capacity. Commissioner Garcia may be served by delivering the same to the TCEQ's General Counsel, Les Trobman at P.O. Box 13087, MC-101, Austin, Texas 78711-3087.

5. Defendant Carlos Rubenstein is a Commissioner of the TCEQ and is sued in his official capacity. Commissioner Rubenstein may be served by delivering the same to the TCEQ's General Counsel, Les Trobman at P.O. Box 13087, MC-101, Austin, Texas 78711-3087.

II. DISCOVERY CONTROL PLAN

6. Plaintiffs seek to conduct discovery under a Level 3 Discovery Control Plan.

III. JURISDICTION AND VENUE

7. This is a direct appeal of a unilateral Administrative Order issued by the TCEQ on February 12, 2010 ("Order" or "Administrative Order"). A copy of the Order is attached hereto as **Exhibit A**.

8. This action is brought pursuant to §§ 361.188(b), 361.321, and 361.322 of the TEXAS HEALTH AND SAFETY CODE and § 37.001, et. seq. of the TEXAS CIVIL PRACTICE AND REMEDIES CODE, the Texas Uniform Declaratory Judgments Act ("UDJA"). TEXAS HEALTH AND SAFETY CODE § 361.321 allows a person affected by a ruling, order, decision or other act of the TCEQ to appeal said ruling, order, decision, or other act by filing a petition in the Travis County District

Court. Plaintiff (along with other persons) is named by the TCEQ in the Order as a party responsible for reimbursing the TCEQ's expenses related to certain investigations into potential environmental contamination at a state superfund site, as well as ordered to undertake remedial action, and as such, it is clearly affected by the Order. TEXAS HEALTH AND SAFETY CODE § 361.322 allows any person subject to an administrative order issued pursuant to TEXAS HEALTH & SAFETY CODE § 361.272 to appeal said order in district court. Because the Order at issue was issued pursuant to §§ 361.271 and 361.272, and the Plaintiff is a person subject to the Order, § 361.188(b) makes the Order subject to appeal under §§ 361.321 and 361.322. Finally, the Texas UDJA, TEXAS CIVIL PRACTICE AND REMEDIES CODE § 37.004, allows this district court to declare that the Order is invalid, or is an *ultra vires* action by the TCEQ.

9. This action is timely filed under the provisions of TEXAS HEALTH & SAFETY CODE §§ 361.321 and 361.322. Section 361.321 provides that an appeal must be brought not later than the 30th day after the ruling, order, decision, or other act of the governmental entity (here, the TCEQ) whose action is appealed. The TCEQ issued the unilateral order effective as of February 12, 2010, but served the Order on Plaintiff subsequent to that date. Accordingly, this petition, which is filed within 30 days of that date, is timely. Section 361.322 provides that an appeal brought pursuant to that section must be filed before the 46th day after the date of receipt, hand delivery, or publication service of the order that is being appealed. Accordingly, this petition, which is filed within 46 days of the date of publication and receipt, is timely.

10. Venue is proper in Travis County District Court pursuant to TEXAS HEALTH & SAFETY CODE § 361.321(a). As stated above, Section 361.321 allows a person affected by a ruling, order, decision or other act of the TCEQ to appeal said ruling, order, decision, or other act by filing a petition in Travis County District Court. Plaintiff is a "person affected" by the Order and "person subject to" the Order because it is named as a "responsible party" who has been ordered to conduct remedial

activities and reimburse the TCEQ's Hazardous and Solid Waste Remediation Fee Account for costs allegedly incurred by the TCEQ.

IV. FACTUAL BACKGROUND

11. The tract of land designated by the TCEQ as the "Voda Petroleum State Superfund Site" (the "Site") is comprised of approximately 6.12 acres located in Gregg County, Texas. According to TCEQ¹ records, the Site was historically used as a waste oil recycling facility from approximately 1981 to 1991, when all operations ceased and the Site was essentially abandoned by the owners and operators.

12. In 1995, the TCEQ conducted an investigation of the Site to determine if the historic operations had resulted in environmental contaminants entering the groundwater and/or soils at the Site. Part of this investigation included a Hazard Ranking System ("HRS") evaluation of the Site. The HRS is a scoring system used to evaluate potential, relative risk(s) to public health and the environment from releases or threatened releases of hazardous substances. The HRS score assigned to a site as the result of the evaluation is the primary factor in deciding if that site is eligible to be placed on the federal National Priorities List. The HRS score assigned to the Site by the TCEQ was not sufficient to qualify the Site as a federal Superfund Site. Instead, the Site was referred in 1995 to the United States Environmental Protection Agency ("USEPA") for an immediate removal action to address the TCEQ's belief that the Site presented an imminent and substantial endangerment to public health and the environment.

13. A USEPA Action Memorandum, dated March 27, 1996, documented that, in addition to the presence of hazardous substances, the Site received crude oil. The USEPA Action Memorandum

¹ During some of the events outlined in the Factual Background, the TCEQ was known as the Texas Natural Resource Conservation Commission. For convenience, the agency is referred to throughout this document by its current name, the TCEQ.

also noted the presence of large quantities of oil that were subject to the Clean Water Act and the Oil Pollution Act and not to CERCLA.

14. In 1996, the USEPA removed drums of grease or oily wastes, drums of corrosive wastes, aboveground storage tanks, and contaminated soils from the Site. Fencing was also installed around the Site at this time to restrict public access to the Site to ensure public health and safety.

15. In December 1997, after the removal action was complete, USEPA's contractor sampled both on-site soils and groundwater as part of a post-removal action assessment. USEPA's contractor found that the removal action had minimized the threat of direct human contact and inhalation threats that may have been present pre-removal.

16. The USEPA then sought recovery of the costs it incurred in undertaking this removal action, and in 1999 and 2000, the USEPA settled with a number of companies that the USEPA had named as potentially responsible parties ("PRPs") for the Site, including some but not all of the persons named as responsible parties in the Order.

17. According to the sworn statements of Mr. Voda, taken by the USEPA, and upon the Plaintiff's information and belief, during the relevant time frame, different sections of the property were operated by two separated entities — Voda Petroleum and Ultra Oil. Ultra Oil conducted operations on approximately one acre of the property (also known as the "Southwest Tank Farm"). While the Southwest Tank Farm was eventually purchased by Mr. Voda, there were no Voda Petroleum operations on the Southwest Tank Farm at any time. The USEPA stated that the PRPs who sent materials to the Site would not be liable for the USEPA's costs associated with the Ultra Oil operations at the Site. USEPA further agreed that certain other PRPs, some of the RPs named in the TCEQ Administrative Order, would not be responsible for the costs of disposal for certain materials sent to the Site or for remediation of commercial products found at the Site. *See* December

31, 1998 USEPA letter to E. Webb and attached Notice at Section 1; *see also* July 22, 1996 USEPA letter to recipients of the USEPA Notice of Liability (Voda Site), at 4.

18. TCEQ had knowledge of the USEPA's removal action, post-removal sampling and assessment results, and of the USEPA settlement. Plaintiff is unaware of any TCEQ correspondence commenting on or disputing the sufficiency of the USEPA removal action at the time of the removal action itself or immediately following the removal action.

19. Three years after the USEPA removal action was completed, and without re-scoring the Site under the HRS, the TCEQ proposed the Site for listing on the State Superfund Registry on November 17, 2000 and published a Notice of that proposal in the Texas Register. 25 Tex. Reg. 11594–11595 (2000).

20. In November, 2000, the TCEQ also sent correspondence to certain persons it believed had historically shipped materials to the Site. That correspondence asserted that the recipient was considered by the TCEQ to be a PRP at the Site as defined in TEXAS HEALTH & SAFETY CODE §361.271 (the Texas Superfund Statute), and therefore potentially responsible for environmental investigation and eventual remediation at the Site. The correspondence informed the recipients of the Site's proposed listing on the State Registry and the date for submitting comments on the proposed listing. The correspondence included a Notice of Opportunity to Make Good Faith Offer to conduct a Remedial Investigation/Feasibility Study ("RI/FS") at the Site. This correspondence was not sent to every person now listed by the TCEQ as a responsible party for the Site in the TCEQ Administrative Order. Several of the persons identified in the Order as responsible parties who were sent the TCEQ correspondence submitted written comments and objections, particularly complaining that there was no empirical data to support TCEQ's imminent and substantial endangerment finding and no evidence to support listing the Site on the State Superfund Registry.

21. Upon information and belief, despite the statutory requirement to notify all persons potentially responsible for the Site's contamination, the November 2000 Notice of an opportunity to conduct the RI/FS was not provided to approximately 150 persons for which the TCEQ then had records in its possession allegedly identifying these companies as persons that allegedly shipped materials to the Site (herein after the "No-Notice Persons"). Accordingly, the No-Notice Persons had no knowledge of, and, therefore, no opportunity to participate in, the TCEQ's proposed RI/FS or to provide comments on the Site's proposed listing on the State Registry, despite TCEQ's knowledge of their alleged shipments to the Site.

22. On or about March 6, 2001, the TCEQ sent correspondence to several entities who had allegedly shipped significant quantities of material to the Site and who had received the TCEQ RI/FS Notice as PRPs. That correspondence informed each of those entities that TCEQ decided to remove them from the TCEQ's PRP list, effectively releasing these entities from liability related to the Site without payment of any costs associated with the Site. In several of these letters, TCEQ cited the so-called CERCLA "petroleum exclusion" as the reason for removing the PRP, an exclusion TCEQ staff members currently deny exists under the TEXAS HEALTH AND SAFETY CODE. The entities receiving these letters are not named as parties to the Order.

23. According to its records, the TCEQ undertook remedial investigations and a feasibility study at the Site from 2001 through 2008.

24. In June, 2008, the TCEQ issued a Remedy Selection Document. This document provides a discussion of, and the TCEQ's conclusions regarding, a proposed remedy for the Site. The remedy proposed by TCEQ consists of soil removal and off-site disposal, together with the installation of a bio-reactive barrier in the groundwater. TCEQ estimates that this remedy will cost \$1.2 Million dollars.

25. On February 12, 2010, the Commission issued its unilateral Order with respect to the Site to 350 parties, including the Plaintiff. There was no evidentiary hearing held before the Order was issued, nor was there an opportunity for such an evidentiary hearing.

26. The Order makes various Findings of Fact, including listing persons identified by the Commission as PRPs for the solid waste and/or hazardous substances at the Site. The Order further includes a Conclusion of Law that the PRPs are responsible parties ("RPs"). Among those listed as RPs is the Plaintiff.

27. The Administrative Order purports to establish, among other things, (1) the RPs for the Site, (2) the existence of a release or threatened release of a hazardous substance or solid waste, and (3) that there is an imminent and substantial endangerment. It then orders the RPs to reimburse the TCEQ for all costs related to the RI/FS, to reimburse the TCEQ's past and future costs in some unspecified amount, to undertake remedial activities based on the Remedy Selection Document, and to provide post-construction financial assurance, among other responsibilities. The Order also asserts that stipulated penalties accrue for failure to comply with the Order or its deadlines. The Order does not specify the amount of the TCEQ costs, or explain why they are reasonable or appropriate or why the TCEQ's actions were necessary or appropriate. Rather, the Order states that the RPs will receive at some time in the future a demand letter from the TCEQ stating the amount owed. As authority for the Order, the Commission cites to the TEXAS HEALTH AND SAFETY CODE, Chapter 361, §§ 361.188 (Final Administrative Order) and 361.272 (Administrative Orders Concerning Imminent and Substantial Endangerment).

V. DENIALS

28. Plaintiff demands TCEQ meets its burden of proof that: (i) the Site constitutes an imminent and substantial endangerment and (ii) that Plaintiff is liable for Site-related environmental

remediation and/or associated costs as required in TEXAS HEALTH AND SAFETY CODE § 361.322(g).

29. Plaintiff denies that it has caused or contributed to the alleged release or threatened release of any solid waste or hazardous substances from or at the Site that are causing or contributing to alleged environmental contamination at the Site.

30. Plaintiff denies that it has committed acts or omissions which have resulted in any release or threatened release of solid waste or hazardous substances from or at the Site.

31. Plaintiff denies that it is a PRP or a RP as defined in the Order. The evidence relied upon by the Commission to establish that Plaintiff contributed any amount of solid waste and/or hazardous substances to the Site is inherently unreliable, is hearsay, and is not supported by any other corroborating documentary evidence. Further, Plaintiff was given no opportunity to challenge or rebut this so-called "evidence" in violation of its due process and other legal rights.

32. Plaintiff denies that it sent solid wastes to the Site as defined by relevant law.

33. Plaintiff denies that the contamination at the Site constitutes an "actual or threatened release of solid waste that presents an imminent and substantial endangerment to the public health and safety or the environment" as required to support Order issuance by TEXAS HEALTH & SAFETY CODE §§ 361.272(a) and 361.188(a)(1). The definition of imminent and substantial endangerment as defined in the TCEQ's rules at 30 TEXAS ADMINISTRATIVE CODE § 335.342 is as follows: "[a] danger is imminent if, given the entire circumstances surrounding each case, exposure of persons or the environment to hazardous substances is more likely than not to occur in the absence of preventive action. A danger is substantial if, given the current state of scientific knowledge, the harm to public health and safety or the environment which would result from exposure could cause adverse environmental or health effects." Plaintiff denies that this Site met this standard at the time the Order was issued because, among other things:

- a. Exposure of persons or the environment to hazardous substances was not "more likely than not" because the USEPA contractor's assessment found that the 1997 USEPA removal action had minimized the threat of direct human contact and inhalation threats that may have been present pre-removal; residual contamination was covered with clean soil and grass; and the Site was fenced to preclude public access;
- b. TCEQ's 2009 Remedy Selection Document at p. 3-4, states that the Site is not a threat to ecological resources because there are insignificant ecological exposure pathways at the Site;
- c. Exposure from contaminated groundwater is not likely, due to gradient direction and plume stability data provided to TCEQ documenting that constituents of concern have not continued to migrate and in fact may be attenuating significantly;
- d. TCEQ's 2009 Remedy Selection Document at p. 2 acknowledges that the USEPA response action "removed the immediate threat to human health and the environment"; and
- e. Upon information and belief, although TCEQ has studied the Site, the TCEQ has not taken any remedial actions to protect humans or the environment from potential exposure pathways from 1997 until the present, including a three-year period between the USEPA removal action and the TCEQ proposed listing on the State Superfund Registry and an eight year RI/FS period.

34. Plaintiff denies that proper statutory notice of the RI/FS was given to Plaintiff or many of the other persons named as RPs in the Order, and thus denies that the Order is reasonable.

35. Plaintiff denies that the Order is supported by the preponderance of the evidence as to the TCEQ's claims of necessity, appropriateness, and reasonableness of past and future investigations

and remedial and removal costs incurred by the TCEQ. This includes the TCEQ determinations related to imminent and substantial endangerment.

36. Plaintiff denies that materials it is alleged to have sent to the Site have caused or contributed to the remedial activities ordered to be conducted by the TCEQ in the Order.

37. Plaintiff denies that it is liable for remedial actions or costs associated with the Southwest Tank Farm, also known as Ultra Oil.

38. Plaintiff denies that it is liable for remedial actions or costs of remedial actions associated with the paraffin materials sent to the Site or the commercial products sent to the Site.

39. Plaintiff denies it is an "arranger" for purposes of liability under the Texas Solid Waste Disposal Act, based on the Supreme Court ruling in Burlington Northern & Santa Fe Railway Co., et al. v. United States ("BNSF") as the requisite intent was not present.

40. Plaintiff denies it is an "transporter" for purposes of liability under the Texas Solid Waste Disposal Act.

41. In the alternative, Plaintiff asserts it is no more than a *de minimis* contributor to any contamination at the Site.

42. For all the reasons stated in this Petition, the Plaintiff denies that the Order is reasonable. Therefore, it must be overturned pursuant to TEXAS HEALTH & SAFETY CODE § 361.321(e).

VI. ORDER IS INVALID

43. The Order lacks finality because it requires additional, discretionary actions by the TCEQ. Specifically, the Order requires the TCEQ to make discretionary decisions in the future about the eligibility, necessity, appropriateness, and reasonableness of past and future TCEQ costs to be paid by Plaintiff as an RP, and even the amount of those costs. Accordingly, the Order is neither effective nor enforceable against the Plaintiff, and is of no legal effect. Plaintiff seeks a declaratory judgment recognizing that the Order is of no legal effect.

44. At no time prior to the issuance of the Order did the TCEQ afford Plaintiff an opportunity for an adjudicative hearing as to its status as a PRP or RP. As a result, Plaintiff has had no opportunity to protect its interests before being adversely affected by the actions taken by the authority of the Order. The Order violates due process rights afforded by the U.S. Constitution (U.S. CONST. art. XIV) and Texas Constitution (TEX. CONST. art. I, § 19).

45. The Order further violates Plaintiff's United States and Texas due process rights because it does not afford Plaintiff the opportunity for an adjudicative hearing as to the necessity, appropriateness, and reasonableness of past and future investigation and remedial costs incurred by the TCEQ for which it seeks a reimbursement. As a result, Plaintiff has had no opportunity to protect its interests before being adversely affected by the actions taken by the authority of the Order. At no time prior to the issuance of the Order was the Plaintiff afforded an opportunity to prove by a preponderance of the evidence that the release or threatened release is divisible pursuant to TEXAS HEALTH & SAFETY CODE § 361.276. As a result, Plaintiff has had no opportunity to protect its interests before being adversely affected by the actions taken by the authority of the Order.

46. The Order imposes liability on certain RPs who are in the same position as other entities who were released by the TCEQ from liability under the so-called "petroleum exclusion" exception of CERCLA. This violates the equal protection clauses of both the United States and Texas Constitutions.

47. The Order constitutes an *ultra vires* act by the TCEQ on several grounds, including the following:

- a. The Order is not properly limited in scope as contemplated by the various applicable statutory provisions of the TEXAS HEALTH AND SAFETY CODE, such as §§ 361.191(d) and 361.192, both of which limit the TCEQ's recovery to "reasonable" costs.

b. The Order names many RPs who did not receive the required statutory notice (referred to previously as the No-Notice Persons) that was provided to some of the named RPs via the November 6, 2000, Notice of Opportunity to Make a Good Faith Offer for the RI/FS. TEXAS HEALTH & SAFETY CODE §§ 361.184(b) and 361.185 require the TCEQ to make "all reasonable efforts" to identify PRPs and to provide identified PRPs with written notice of an opportunity to make a Good Faith Offer to fund or perform the RI/FS. While the TCEQ did send correspondence to some of the PRPs seeking a good faith offer to fund or perform the RI/FS, on information and belief, approximately 150 companies (or close to 50% of the PRPs), including the No-Notice Persons, did not receive an opportunity to make a good faith offer, even though the TCEQ has acknowledged that it had in its actual possession since 1998 records containing the names of those companies as allegedly shipping materials to the Site. The TCEQ did not undertake the minimal effort of reviewing the documents in its possession to make a list of those companies and include them as recipients of the November 6, 2000 Notice and thus allow them an opportunity to participate in the RI/FS process. This defect impacts the Plaintiff in at least two significant ways. First, the TCEQ unilaterally performed the RI/FS over a period of almost eight years, incurred costs, and is now seeking reimbursement of those costs from those it failed to properly notify. Second, the RI/FS process is so fundamental to the remedy selection process that a flaw in the RI/FS process unavoidably and profoundly taints the remedy process. The TEXAS HEALTH & SAFETY CODE creates a statutory scheme in which the culmination of the RI/FS process -- the proposed remedy -- is what serves as the basis for the Remedy Order. The TCEQ's RI/FS

Notice defects means that approximately 50% of the identifiable PRPs at this Site had no opportunity to participate in the RI/FS process through public comments or otherwise. Had all of the PRPs been properly notified and allowed to participate in the development and evaluation of the alternative remedies, a remedy significantly different from the one chosen by the TCEQ could have been studied, selected and implemented in an agreed manner by the parties. The failure to comply with the fundamental statutory notice requirements related to the RI/FS Notice thus renders the Order invalid, arbitrary, and unreasonable, and outside the scope of the TCEQ's statutory authority.

- c. Certain of the RPs contribution to the Site (if any) consists of materials regulated by the Texas Railroad Commission. TEXAS HEALTH & SAFETY CODE § 361.003 (34)(iii) defines "solid waste" that is subject to the Texas Solid Waste Disposal Act to specifically exclude: "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...." These materials generally include waste associated with the exploration and production of oil and gas. To the extent the TCEQ is attempting to assert jurisdiction over these materials, the TCEQ is acting beyond the scope of its regulatory authority.
- d. The Order is invalid because the remedy selected does not comply with the standards found in TEXAS HEALTH & SAFETY CODE §§ 361.193 and 361.322(h). Section 361.193 states that the TCEQ is required to select the "lowest cost alternative that is technologically feasible and reliable and that effectively mitigates and minimizes

damage to and provides adequate protection of the public health and safety or the environment." TEX. HEALTH & SAFETY CODE § 361.193.

- i. The TCEQ has classified the groundwater at the Site to be Class I groundwater, when in fact it should be Class II. If the proper classification had been used by the TCEQ, the appropriate remedy for this Site would very likely have been the lowest cost alternative that is technologically feasible and reliable and that effectively mitigates and minimizes damage to and provides adequate protection of the public health and safety or the environment. The most recent data acquired from the Site indicates that an alternative remedy would be appropriate because the groundwater plume boundary has not grown and the concentrations of the constituents of concern identified by the TCEQ have actually decreased over time.
- ii. Effective on May 25, 2007, the Municipal Settings Designation ("MSD") statute was amended to allow small municipalities to have the benefit of the MSD certification. The MSD statute allows municipalities to enforce specific deed restrictions on properties within their city limits restricting the use of the groundwater beneath the property so that it cannot be used as drinking water. The deed restriction acts as an institutional control to protect human health, but at a fraction of the costs of a groundwater remediation plan. The Site is within the City of Clarksville and thus is potentially eligible for an MSD. The MSD is recognized by statute to be protective of human health and the environment. No statute or regulation prohibits the application of an MSD at a state Superfund Site. The Feasibility Study was issued in

January of 2008 and the Remedy Selection Document was issued in June 2008. Neither document even evaluated the MSD option, which at that point in time was certainly available for consideration and which could very well be the lowest cost remedy for groundwater at the Site. Thus, the TCEQ's Order is invalid in that it selects a remedy that is arbitrary and unreasonable and therefore cannot be upheld pursuant to TEXAS HEALTH AND SAFETY CODE § 361.323(h).

- e. Plaintiff has asserted previously in this Petition that the Order violates certain of the Plaintiff's constitutional equal protection rights because the TCEQ relieved certain PRPs, but not others similarly situated, from liability based on the CERCLA "petroleum exclusion." Without waiving that argument, Plaintiff alternatively asserts that, if the released PRPs are not entitled to the petroleum exclusion, those PRPs must be named in the Order as an RP. TEXAS HEALTH & SAFETY CODE § 361.188 (a)(4) and (6) states that the final administrative order *must* list the Responsible Parties and order the Responsible Parties to remediate the facility and reimburse the TCEQ's RI/FS costs. Nothing in that statutory provision allows the TCEQ to ignore certain otherwise Responsible Parties. In fact, Section 361.1875 states exactly when the TCEQ can exclude certain PRPs from liability associated with a Site, and none of the particular exclusions apply here. The Order is invalid for failure to name all RPs.
- f. The TCEQ's unilateral order of the payment of stipulated penalties is beyond the authority of the TCEQ.

48. The Order is invalid under § 361.188(a)(1) because it does not establish the Site as an

imminent and substantial endangerment as needed to support listing on the State Superfund Registry. There is no evidence of imminent and substantial endangerment. Any imminent and substantial endangerment was abated by the 1996 USEPA's removal action.

49. The Order should be deemed invalid as to Plaintiff because the TCEQ did not otherwise properly carry out its statutory and regulatory duties to fully investigate and identify PRPs, RPs, and *de minimis* parties prior to naming Plaintiff as an RP.

50. For all of the reasons previously stated in this Petition, the Order is invalid, arbitrary, and unreasonable pursuant to TEXAS HEALTH & SAFETY CODE § 361.321(e).

VII. AFFIRMATIVE DEFENSES

51. Certain RPs contributed materials to the Site that are the same as those materials contributed by entities that have been released by the TCEQ pursuant to the "Petroleum Exclusion" of CERCLA and thus are also entitled to such a release.

52. Even if Plaintiff had contributed any materials to the Site, those materials were sold as a useful product, and did not constitute an arrangement for the processing, storing, or disposal of a solid waste, and did not contribute to the release or threatened release to the environment.

53. Plaintiff did not intend for waste or hazardous substances to be disposed of at the Site.

54. Plaintiff asserts that it is not a RP, but in the alternative assert it is no more than a *de minimis* contributor to any contamination at the Site.

55. Plaintiff is not liable for remedial actions or costs associated with the Southwest Tank Farm, also known as Ultra Oil.

56. Plaintiff denies that it is liable for remedial actions or costs of remedial actions associated with the paraffin materials sent to the Site or the commercial products sent to the Site

57. The evidence demonstrates that the Site does not pose an imminent and substantial endangerment.

58. The TCEQ failed to provide the required notices necessary to support recovery of investigation costs from the PRPs.

59. The facts do not support listing the Site on the State Superfund registry or the use of the Texas Solid Waste Disposal Act to impose liability upon Plaintiff.

60. In the alternative, even if Plaintiff contributed solid waste or hazardous substances to the Site, the costs are subject to apportionment under the TEXAS HEALTH AND SAFETY CODE § 361.343.

61. To the extent any RP named in the Order has gone through bankruptcy or otherwise became insolvent between 2000 and 2010, thus creating an "orphan share" for that party's liability and volume of materials sent to the Site, the Plaintiff does not bear responsibility for such orphan share(s).

VIII. COSTS AND ATTORNEYS FEES

62. Plaintiff has had to employ legal counsel to contest the Order. TCEQ is liable for Plaintiff's reasonable attorney's fees and reasonable costs pursuant to the UDJA and TEXAS HEALTH & SAFETY CODE § 361.342.

IX. JURY DEMAND

63. Plaintiff requests a jury as the trier of fact for this matter.

X. PRAYER

64. WHEREFORE, Plaintiff prays that the TCEQ be cited to appear and answer and that the TCEQ be required to prove its allegations against Plaintiff by a preponderance of the evidence and that the Court on final trial enter an order that:

- a. Declaring that the TCEQ's Order lacks finality, is of no legal effect, and is not enforceable; and/or
- b. Declaring that the TCEQ's Order violates the due process laws and/or equal protection laws of the United States and Texas Constitutions and is therefore invalid,

and not enforceable; and/or

- c. Declaring that the TCEQ's Order is *ultra vires*, and is therefore invalid, of no legal effect, and is not enforceable; and/or
- d. Declaring that the TCEQ's Order is invalid, arbitrary, or unreasonable and therefore must be overturned pursuant to TEXAS HEALTH & SAFETY CODE § 361.321(e).

65. ALTERNATIVELY, the Plaintiff prays that the Court enter an order that:

- a. Invalidates the portion of the TCEQ's Order that purports to establish Plaintiff as a PRP or RP; and
- b. Declares that Plaintiff is not a responsible party in any way liable for the environmental conditions existing at the Site or responsible for any response costs.

66. ALTERNATIVELY, Plaintiff prays that the Court enter an Order that:

- a. Pursuant to the TEXAS HEALTH AND SAFETY CODE, Plaintiff is a *de minimus* party and its equitable and legal responsibility for those costs should not exceed a nominal share.

67. Plaintiff further prays for reasonable attorney's fees and reasonable costs pursuant to TEXAS CIVIL PRACTICE AND REMEDIES CODE § 37.009 and TEXAS HEALTH & SAFETY CODE § 361.342, and for any other relief Plaintiff may show itself to be justly entitled.

Respectfully submitted,

THE TERRILL FIRM, P.C.

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WASTE OIL CO., INC.

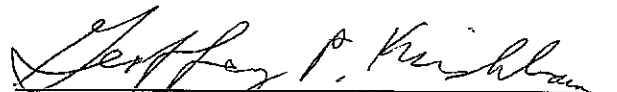
CERTIFICATE OF SERVICE

I do hereby certify that on March 15, 2010, a true and correct copy of the foregoing was served on the following counsel of record via the method indicated.

Les Trobman
General Counsel
TCEQ
P.O. Box 3087
MC-101
Austin, TX 78711-3087

via fax to (512) 239-5533

ATTORNEYS FOR TCEQ COMMISSIONERS BRYAN SHAW,
BUDDY GARCIA AND CARLOS RUBENSTEIN


Geoffrey P. Kirshbaum