

Anatomy of a TCEQ Enforcement Action

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One of your city departments receives a notice of violation (NOV) following an inspection by the Texas Commission on Environmental Quality (TCEQ). As the City Attorney you probably first become aware of the NOV when the Mayor is notified of the NOV by letter and gives it to the City Manager, along with a few choice observations.

What happened? What do you do now? How do you respond to the City Manager and the Mayor? First, do not assume the allegations in the NOV are true. You are the city's defense attorney and need to keep that in mind. This may be a situation you can handle yourself or you may need to call in outside counsel. It is probably too early in the process to make that decision. Now is the time to remember that criminal procedure course from law school – the one you swore you would never use. This is really no different than being a municipal prosecutor except that your role is reversed.

In this paper I will provide you with an overview of the TCEQ's enforcement procedures and a recent case experience to help you better understand how to respond to the above situation. While the TCEQ's investigators generally do a good job of enforcing TCEQ regulations, they are not always right. There is significant investigator "interpretation" involved in the enforcement of many of those regulations. It is your job as the city's defense attorney to determine if there was a regulatory violation. If there was a violation, you then need to negotiate a reasonable settlement which may include a monetary penalty. If there was no violation, you need to assure the NOV is dismissed. A basic understanding of TCEQ enforcement procedure is critical in making your initial determination of how to proceed.

A TCEQ investigation is initiated in a number of ways. A records review of all reports, data, etc. that the city is required to submit for a water treatment facility, a wastewater treatment facility, a compost facility, or another type of regulated entity is probably the most frequent basis for an enforcement action. Routine inspections of city facilities will almost always result in some type of NOV for minor infractions. An investigation that is the direct result of a complaint is more focused and usually more serious. Regardless of the reason for the inspection or investigation, the enforcement process remains the same.

When a violation is "noted" by a TCEQ investigator during an inspection, the enforcement process begins, although it frequently remains somewhat informal at this point. The TCEQ investigator will normally advise a city employee during an exit interview of the violations noted and the corrective actions required. **Rest assured, you will not hear about the investigation from the city employee at this time.** Following the inspection, the TCEQ investigator will mail a letter to the city detailing the inspection, identifying all violations alleged, noting any immediate corrective actions

taken by the city, listing all corrective actions that still need to be taken, and providing a due date for compliance. Sometimes additional matters are noted that are not considered violations, but that the investigator thinks are problems. The NOV requires a written response, usually within ten days, to the local TCEQ office. This gives you a very short period of time to investigate and determine whether to challenge the allegations or begin corrective actions if the allegations are true. A call to the local TCEQ office at this point sometimes results in an informal resolution of the matter.

The NOV will be a formal statement of specific charges if the city (1) does not, or cannot, correct the violation(s) within fourteen calendar days, or (2) the violation involved an actual emission or discharge, or (3) the City has been cited for the same violation(s) in the last twelve months. The NOV will contain a statement that an Enforcement Review Meeting (ERM) can be requested if the city wishes to present additional information. If the matter cannot be resolved with a phone call, an ERM should always be requested whether you have additional information or not. To request an ERM you must meet the NOV response date requirement. The TCEQ local office will sometimes deny the ERM request if no additional information is presented in the request letter. I cannot imagine any situation where you intend to contest an allegation that does not provide a legitimate basis for an ERM. The “additional facts” may simply be a statement that the allegation does not constitute a regulatory violation because the TCEQ investigator did not properly interpret the regulation at issue. Such errors happen on a regular basis in certain TCEQ program areas where the regulations are written very broadly.

If the NOV is not resolved at this point, a Notice of Enforcement (NOE) will be mailed to the city. The NOE is the formal notice of charges (similar to an indictment in the criminal context) and moves the matter from the local TCEQ staff to the Austin legal staff. The NOE will contain, in most cases, a proposed Agreed Order (AO) that contains a penalty calculation and compliance schedule. The city can either accept the proposed AO or request a meeting with the TCEQ attorney in charge to negotiate changes in the proposed AO. If the city chooses to accept the proposed (or modified) AO, the city executes the AO and transmits it along with the penalty payment to TCEQ. The AO will then be published and placed on the Commission Agenda for final TCEQ approval.

I note at this point that, depending on the circumstances of the violation(s), the city may have options to reduce or eliminate the penalty payment. The city may elect to perform a Supplemental Environmental Project (SEP) in lieu of making a penalty payment. There are two types of SEPs, pre-approved and custom. Be forewarned that there are some caveats in the SEP rules that may limit its applicability. At that point during your initial NOV investigation when the city decides it is not going to contest the alleged violation(s), you should contact the TCEQ’s SEP coordinator for specific details on applicability to your situation. If the NOV is for a Sanitary Sewer Overflow (SSO), the city may qualify for the TCEQ’s SSO Initiative. Participating in the SSO Initiative allows the city to spend its resources on correction of the SSO rather than payment of a penalty. Participation also ensures that a city’s regulatory compliance history is not

affected by the SSO. If a City has received an NOV for a SSO violation, you should contact the local TCEQ office to discuss the possibility of an SSO Initiative plan.

If the city cannot resolve the allegations and chooses to not accept the AO, the TCEQ will prepare an Executive Director's Preliminary Report and Petition (EDPRP). Once the city receives the EDPRP, you have twenty calendar days to request a contested case hearing. Note that the contested case hearing request must be done within 60 days of the date on the cover letter transmitting the AO, so you are actually working within two administrative deadlines. If the city fails to meet these administrative deadlines, the TCEQ may seek a default order against the city. Once a contested case hearing is requested, the TCEQ chief clerk refers the matter to the State Office of Administrative Hearings (SOAH) to begin the evidentiary proceeding. All of these procedures fall within the strictures of the Texas Administrative Procedures Act and you should be familiar with administrative law if you intend to defend the city at the contested case hearing.

A SOAH judge will be assigned to preside over the matter and a preliminary hearing will be held. At the preliminary hearing a procedural schedule will be established. The city is entitled to all aspects of discovery including live depositions of all investigators, supervisors, witnesses, etc. involved in the case. If there are any inconsistencies documented in the investigative report and the EDPRP, depositions should be sought to flesh out those inconsistencies. At the conclusion of discovery there will be a full evidentiary hearing on the merits in Austin. This hearing is a courtroom type proceeding with associated motion and evidentiary practice. Some time after conclusion of the evidentiary hearing, the ALJ will issue a Proposal for Decision (PFD) and proposed order. All parties will have the opportunity to file exceptions to the PFD as well as replies to the exceptions. The matter will be then placed on the Commission Agenda for the three TCEQ Commissioners to adopt, deny, or amend the ALJ's PFD and Proposed Order. The Commissioners final decision is subject to appeal through the State judicial system.

The contested case process can easily take two years, not counting judicial appeals. Don't think so? Well then, let's take a look at an actual recent case.

The object of the TCEQ's attention in this case was Texas Landfill Management's (TLM) Comal County compost and mulch facility. This facility is typical of the type many municipalities own. In fact, TLM is the contract operator for a number of similar municipal facilities around the State. TLM purchased the facility in December 2000. Prior to that time the facility had not been properly operated and had been causing a problem for area landowners. The facility location is formerly a rural area that is rapidly becoming a commercial/residential mix. Three local landowners were the source of constant complaints to the local TCEQ office both before and after TLM purchased the facility. There are no homes closer than about one half mile from the facility boundary.

When TLM purchased the facility, it immediately upgraded operations to maintain compliance with TCEQ regulations. TLM is a recognized industry leader in

that regard. However, some neighbors simply wanted the facility to close, so the complaints to TCEQ continued. Multiple TCEQ inspections from May 2001 to July 2006 confirmed that the TLM facility was operating in compliance with all TCEQ regulations.

On August 3, 2006, two local TCEQ investigators conducted an inspection of the facility. A TLM employee accompanied the TCEQ investigators and did not notice any operational problems during the investigation. The TCEQ investigators took photos at the facility and at the complainant's house. The TCEQ investigators also took tape lift samples of dust at the facility and at the complainant's house.

On August 22, 2006, the TCEQ local office issued a NOE without first issuing a NOV. The NOE alleged that TLM mulching operations the day of the investigation, and at other times, created nuisance level dust at the complainant's house, as confirmed by photos and tape lift samples. The allegations contained in the NOE came as a surprise to TLM given the observed operational conditions during the August inspection, and other inspections, that confirmed no nuisance dust levels were being generated.

A detailed review of the allegations indicated the investigators' notes were in error and normal investigation documentation was missing. The review also indicated significant investigator errors in regulatory interpretation and investigative procedures. Following multiple phone calls with the local TCEQ office, TLM attorneys requested an ERM. The TCEQ local office refused the request for an ERM. Finally, in December 2006 a meeting was held between TLM representatives and local TCEQ officials. During the December meeting, TLM's General Counsel requested copies of the investigators' photos and other documentation. At this point TLM also retained R & R to defend it against the TCEQ charges.

In January 2007 TLM requested a referral of the matter to the TCEQ's legal division in Austin and subsequently requested a direct referral of the matter to SOAH for a contested case hearing. However, the TCEQ did not file its EDPRP, including the assessment of a \$3,700 penalty, until May 2007. TLM then filed a General Denial and again requested an evidentiary hearing. In August 2007 the TCEQ referred the matter to SOAH for a contested case hearing. At no point during this extended time period would the TCEQ respond to TLM's concerns about the investigators' errors and the missing documents. Note that the actual referral to SOAH was almost eight months after TLM's original request for such a referral.

During this same time period R & R conducted an extensive internal investigation of the TLM operation and developed the evidentiary parameters of the defense. TLM hired the TCEQ's former Chief Engineer as an expert witness on air emission testing and modeling. TLM also hired another former TCEQ engineer who was an expert on tape lift sampling and related lab testing procedures. Multiple site visits and extensive review of TCEQ and EPA guidance documents provided TLM's experts with a sound basis for their written opinions that the entire TCEQ investigation was fatally flawed.

A Preliminary Hearing was held at SOAH in Austin on September 27, 2007. A procedural schedule was set with a tentative hearing date in 2008. Written discovery was initiated by both sides and multiple hearings were held to argue over the scope of discovery and prefiled testimony. The TCEQ did not want any depositions of employees other than the investigators and its designated expert witness. TLM wanted depositions of all TCEQ employees involved in the matter up to and including upper level management. TLM eventually prevailed on the scope of discovery.

Depositions began on March 4, 2008 and ended on May 14, 2008, when the case was dismissed. TLM deposed the complainant, the two TCEQ investigators, two TCEQ lab supervisors, the TCEQ's designated expert, the TCEQ's regional director, and the TCEQ enforcement director. TLM's primary deposition exhibit was a satellite photo of the facility and surrounding area with all relevant information from the investigation shown on the photo. Many TCEQ documents were also introduced during the depositions. The TCEQ only deposed TLM's two expert witnesses.

During the course of the depositions TLM uncovered major problems not only with this investigation, but the entire TCEQ enforcement training program. TLM discovered that there was no standard investigation protocol, no standards instrumentation, no standard reporting form, no standard procedure for taking and testing tape lift samples – basically no standard anything. The TCEQ's lab supervisors admitted that there was no tape sample use or testing protocol. The TCEQ's own expert witness admitted that he really did not know anything about the case and he was simply assigned by his supervisor to be an expert witness. The TCEQ investigators admitted they were not sure of the wind direction or exactly where they took many of their photos. Neither of the investigators were trained in standard EPA particulate emission testing protocols. At one point during his deposition, the TCEQ's primary investigator stated that he did not need an instrument to measure wind velocity because his face was calibrated to detect wind velocity variations as small as 3 mph. Face calibration immediately became a new term of investigative science. At that point the TCEQ's entire case went rapidly downhill. The case abruptly ended during the subsequent deposition of the TCEQ's enforcement division director. To his credit, when he realized how bad the situation really was, he dismissed the case on the spot.

As a result of this case, the TCEQ has completely overhauled its enforcement training procedures and investigation protocols. There has also been a restructuring of the enforcement procedures to allow quicker resolution of enforcement issues. This case was something of a worst case scenario, but only because TLM was not willing to admit guilt when it was not guilty of any regulatory violation. It cost TLM well over \$300,000 to resolve a \$3,700 penalty situation and prove its innocence.

The enforcement process which began in August 2006 ended in May 2008. Remember when I said to expect two years to work through the enforcement process? If this enforcement action had not been terminated by the TCEQ, it could easily have taken three years for a final Commission decision.

What lessons can you learn from TLM's experience? Perhaps the best lesson is not to assume TCEQ investigators are always right in their interpretation of TCEQ regulations. Most of the time they are right, but not always. Also understand that it may consume significant time and resources to contest an alleged violation. Here are some specific suggestions that should make the process easier for you:

- Have a written investigation protocol in place for each city department that is subject to TCEQ regulations.
- Assure that a city employee accompanies the TCEQ investigator during any site inspection.
- Assure that you are notified immediately when there is a TCEQ inspection.
- Have the city employee take photos during the inspection.
- Have the city employee request split samples of any samples taken during the inspection.
- Have a city employee record all relevant information during an inspection on an internal checklist designed for each city department.
- Always request an exit interview with the TCEQ investigator to go over the investigator's findings.
- Request that the investigator provide you with a copy of all photos and other information collected during the inspection.
- Follow the inspection with an internal city staff meeting to discuss the inspection and make sure everyone understands the importance of timely responses to all subsequent TCEQ contacts.

The TCEQ is no different from any other government agency, or city for that matter. Most of the folks really are there to help the regulated community maintain regulatory compliance. A few of them are there just to assert their authority. Which one you encounter will dictate the level of difficulty you will have in defending your city. In our experience, when you encounter a difficult local TCEQ representative, it is best to immediately bring the matter to the attention of upper level TCEQ management in Austin. It is rare to find anyone in upper level TCEQ management that does not want to help resolve a problem as quickly and easily as possible.

Attached to this paper are some links to TCEQ documents that you may find to be helpful. Also attached is an overview outline of the TCEQ enforcement process described in this paper. If you would like more information on TCEQ enforcement procedures or the TLM case, please give me or Art Rodriguez a call at (512) 930-1317.

Helpful Links to TCEQ Documents

- All forms and guidance docs: <http://www.tceq.state.tx.us/legal/sep/forms.html>
- The TCEQ has Inspected Your Business: http://www.tceq.state.tx.us/files/rg-344.pdf_4444074.pdf
- SEP guideline handout: http://www.tceq.state.tx.us/files/gi-352.pdf_4470808.pdf
- Statewide preapproved SEPs:
http://www.tceq.state.tx.us/files/StatewideProjects_4-27-09.pdf_4486588.pdf
- County specific SEPs: http://www.tceq.state.tx.us/legal/sep/sep_county.html
- Enforcement Process Review:
http://www.tceq.state.tx.us/assets/public/comm_exec/epreview/epr_recc.pdf
- Penalty Policy: http://www.tceq.state.tx.us/files/rg-253.pdf_4447450.pdf
- Enforcement Initiation Criteria:
http://www.tceq.state.tx.us/assets/public/agency/eic_rev_12_07-01-08.pdf

TCEQ Enforcement Process Brief Outline

- ❖ Facility/records inspection
- ❖ Mailed Notice of Violation (NOV)
- ❖ Enforcement Review Meeting (ERM), if requested
- ❖ Mailed Notice of Enforcement (NOE) with proposed Agreed Order (AO)
- ❖ Execute Agreed Order (and pay penalty or use Supplemental Environmental Project (SEP) in lieu of penalty) or contest enforcement action
- ❖ Mailed Executive Director's Preliminary Report and Petition (EDPRP), if contested
- ❖ Written general denial and request for contested case hearing within 20 days of the date of the EDPRP
- ❖ TCEQ referral to the State Office of Administrative Hearings (SOAH)
- ❖ Preliminary Hearing / procedural schedule
- ❖ Discovery period
- ❖ Evidentiary Hearing on the Merits and related pleadings
- ❖ Administrative Law Judge's (ALJ's) Proposal for Decision (PFD)
- ❖ Written exceptions to the PFD
- ❖ TCEQ Commission Agenda decision on the PFD
- ❖ Motion to Overturn Commission's Final Order
- ❖ Judicial appeal to Travis County District Court, Court of Appeals, Supreme Court

FIRM RESUME

RUSSELL & RODRIGUEZ, L.L.P. practices in the areas of municipal, environmental, water, administrative, oil and gas, and utility law before federal and state agencies, in both federal and state courts, and other regulatory bodies. In addition to the private practice of law, attorneys with R&R have been employed with various municipalities and federal agencies.

Attorneys with R&R practice in the following areas:

GENERAL MUNICIPAL LAW

DRAFTING & MONITORING OF MUNICIPAL ORDINANCES

LAND USE LAW

PERMITS FOR MUNICIPAL SOLID WASTE LANDFILLS

PERMITS FOR WASTEWATER TREATMENT PLANTS,
WATER TREATMENT PLANTS AND STORM WATER DISCHARGES

WATER & WASTEWATER UTILITIES RATES & REGULATION

HAZARDOUS & SOLID WASTE, AIR, AND WASTEWATER REGULATION & ENFORCEMENT

ENDANGERED SPECIES AND WETLANDS ISSUES

ENVIRONMENTAL COMPLIANCE & TRANSACTION AUDITS

ENVIRONMENTAL & TOXIC TORT LITIGATION

UNDERGROUND & ABOVEGROUND STORAGE TANK
REGULATION & ENFORCEMENT

INJECTION WELL REGULATION

ELECTRIC & TELECOMMUNICATION UTILITIES FRANCHISES, RATES & REGULATIONS

CREATION & MANAGEMENT OF UTILITY DISTRICTS

FIRM BIOGRAPHIES

KERRY E. RUSSELL, born Austin, Texas, August 16, 1945; admitted to bar, 1990, Texas; 1994, Colorado; U.S. District Court, Eastern District of Texas, Northern District of Texas, Southern District of Texas, Western District of Texas. Education: University of Texas (B.S.M.E., 1987); University of Wyoming (J.D., 1990). Author: *A Research Guide to Natural Resource Damages Under CERCLA*, Wyoming Land and Water Law Review, reprinted in the Public Land and Resources Digest; *Natural Resource Damage: A Major Expansion of CERCLA Liability*, Vol. 55 St. B. Tex. Envtl. L.J. 458 (1992); Contributor, *West's Texas Practical Guide on Environmental Law*. Member: American Bar Association; State Bar of Texas; Travis County Bar Association; Williamson County Bar Association; American Society of Mechanical Engineers; Solid Waste Association of North America; Colorado Bar Association; The College of the State Bar of Texas; Water Environment Association of Texas; Texas City Attorneys Association.

ARTURO D. RODRIGUEZ, JR., born San Antonio, Texas, June 5, 1970; admitted to bar, 1994, Texas; 1999, U.S. District Court, Western District of Texas. Education: University of Texas at Austin (B.B.A. with honors, 1991); St. Mary's University (J.D., 1994). Delta Theta Phi. Assistant City Attorney, City of San Antonio, 1995-1998; Assistant City Attorney, City of Georgetown, 1998-2000. Member: International Municipal Lawyers Association; Texas City Attorneys Association; The College of the State Bar of Texas; Williamson County Bar Association; Travis County Bar Association; Hispanic National Bar Association; State Bar of Texas; American Bar Association.

PROFESSIONAL EXPERIENCE SUMMARY

RUSSELL & RODRIGUEZ, L.L.P. practices in the areas of environmental, municipal, water, administrative, oil and gas, and utility law. Attorneys with R&R have extensive experience in these areas, gained in part by working for municipalities and federal agencies.

MUNICIPAL LAW

R&R has broad experience in the representation of municipalities. This experience includes a working knowledge of the state and federal statutes that affect the daily affairs of municipalities and their various departments and activities. This practice area includes many of the individual practice areas noted below, as well as drafting ordinances, drafting and negotiating contracts, and general procedural and legal advice to city councils, planning and zoning commissions, economic development corporations, local government corporations, municipal courts, and code enforcement departments.

PUBLIC UTILITIES

R&R provides expertise in public utility law, including electric, telecommunication, water, and sewer utilities. This practice area includes ratemaking, certification, rulemaking, compliance counseling, environmental regulation, contracts, construction contracts and litigation, and legislative counseling.

R&R attorneys represent or have represented numerous water and sewer utility clients, including municipalities, districts, non-profit supply corporations, and corporations. R&R attorneys are well qualified to provide a wide range of services to water and sewer utilities, including formation of the utility, assistance in obtaining funding from various state and federal agencies, and representation before regulatory agencies concerning rates, certificates, and compliance. Also, because of its broad experience in environmental law, R&R is able to serve water and sewer utility clients in various environmental matters affecting their businesses.

R&R attorneys were instrumental in the drafting and commenting on legislation relating to water and sewer utility service territory (certificates of convenience and necessity or CCNs). R&R worked with a coalition of cities to affect the manner in which the CCN rules would be applied to cities.

WATER DISTRICTS

Conservation and reclamation districts may be utilized to facilitate development of land for residential or commercial use by providing a flexible conduit to finance and construct necessary water, sewer, and drainage facilities through the issuance of tax and/or revenue bonds. The use of districts can provide for relatively long-term, low interest financing of utility development.

The water district creation process is stringently regulated by statute, TCEQ rules, and Attorney General regulation. Therefore, this process requires experienced legal and engineering assistance to ensure compliance with all necessary steps. Attorneys with R&R have actively participated in all areas of water district representation as general counsel during the creation of districts.

WATER QUALITY

R&R attorneys represent a variety of clients in wastewater discharge permitting and enforcement matters before the TCEQ and EPA. Attorneys with R&R have successfully represented municipal, industrial, and developer clients in securing authorization for wastewater discharges from these agencies. These projects have ranged from very small plants to regional treatment facilities. This representation typically calls for firm attorneys to assist in the preparation of applications for wastewater discharge permits as well as preparation of client responses to enforcement actions. In addition, R&R attorneys assist clients with the development and implementation of pretreatment programs.

R&R attorneys also represent affected clientele by participating in rulemaking proceedings before TCEQ. In many instances, such proceedings involve proposals for the adoption of water quality standards for particular water bodies. In representing its clients in such matters, R&R attorneys are called upon to address both legal and technical issues associated with water quality modeling and waste load allocations.

R&R attorneys represent a number of clients requiring storm water permit coverage. This practice area involves consultation with clients and their technical consultants concerning best management practices to minimize the impact of storm water runoff on receiving streams, as well as assisting with the preparation of applications and negotiations with TCEQ staff concerning implementation of permit conditions. Attorneys with R&R have been active in the development of State storm water permits affecting municipal, industrial, and construction storm water discharges.

HAZARDOUS AND SOLID WASTE

R&R provides permitting and enforcement services in the areas of municipal solid waste and industrial and hazardous solid waste, and is routinely involved in representing clients in proceedings before TCEQ, EPA, and in state and federal courts.

R&R attorneys have represented clients in obtaining initial permits, renewals, and amendments before all major environmental agencies in Texas, including TCEQ and EPA. This representation includes assistance in the strategy planning process, preparation and editing of permit applications, and legal representation in contested case hearings before these agencies. Some of R&R's recent clients have been the North Texas Municipal Water District and the Texoma Area Solid Waste Authority, Inc., both of which received municipal solid waste permits after lengthy contested case hearings.

Other areas of R&R's solid waste practice relate to enforcement activities. The firm has represented numerous clients in negotiating and litigating both the amount of civil penalties and injunctive relief sought by the Texas Attorney General's Office, the EPA, and the United States Department of Justice. R&R attorneys have negotiated administrative penalties and technical requirements with staff of TCEQ and have participated in agency enforcement hearings. These negotiations and hearings typically include resolution of technical issues relating to closure and/or remedial activities.

ADDITIONAL REGULATORY PRACTICE

Attorneys at R&R routinely receive notice and review copies of new regulations and statutes and have a practice of advising affected clients of these changes. Our attorneys also maintain files of recent agency enforcement orders.

R&R assists clients in drafting model rules for adoption by state agencies. With the recent enactment of significant amendments to several of the major environmental statutes, new regulations and administrative changes occur at the agencies with increasing frequency. R&R attorneys keep abreast of these regulatory activities by attending and speaking at relevant short courses and conferences on a regular basis and by making contributions to legal and technical environmental journals.