IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

KIRK GRADY	§	
Plaintiff	§	
	§	
v.	§	
	§	**CIVIL ACTION NO: 3:16-cv-01404-C**
HUNT COUNTY, TEXAS	§	
Defendant	§	

DEFENDANT HUNT COUNTY'S MOTION TO DISMISS UNDER FEDERAL RULES 12(B)(1), 12(B)(6), AND 12(B)(7) AND ABSTENTION DOCTRINES; MOTION FOR MORE DEFINITE STATEMENT UNDER FEDERAL RULE 12(E); AND SUPPORTING BRIEF

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Defendant Hunt County, Texas sued Plaintiff Kirk Grady in Texas state court for violating Texas environmental law.[1] Hunt County sued Grady under the Texas Water Code, seeking civil penalties for his violations of the law.[2]

Instead of defending against Hunt County's claims in the court where they were filed, Grady has decided to claim that Hunt County's state-court environmental enforcement action violates his civil rights.[3] Grady has chosen to take his would be affirmative defenses in the state-court proceeding and turn them into a federal civil rights lawsuit.[4] This Court should reject Grady's attempt at forum shopping and gamesmanship, and should dismiss his claims.

I. Background

Grady previously owned a 50-acre tract of land in Hunt County, Texas, which was later sold to a company called Republic Waste.[5] During the time that Grady owned the property, it was operated for industrial purposes without the required storm water permit.[6] In addition, during the time that Grady owned the property, solid waste was illegally stored and/or disposed of on the property without the required permit.[7] Grady caused, suffered, allowed or permitted the storage of solid waste on his property, creating an unlicensed dump site in Hunt County that he abandoned.

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[1] Doc. 1 Ex. 6 ("Doc. 1" refers ECF Document No. 1 in this case, which is Grady's Original Complaint filed on May 22, 2016); *Hunt County v. Republic Waste Serv. of Tex., Ltd*., No. D-1-GN-002833 (200th Dist. Ct. Travis Cty, Tex.) (the "State Court Lawsuit").

[2] *Id*.

[3] Doc. 1.

[4] Hunt County does not agree that there is any merit to Grady's defenses, whether raised in the State Court Lawsuit or in this case.

[5] Doc. 1 at ¶¶ 12, 17.

[6] Doc. 1 Ex. 6 at ¶ 8.

[7] Doc. 1 Ex. 6 at ¶¶ 8-12.

Grady's conduct violated numerous provisions of Texas environmental law, including Texas Health and Safety Code § 361.024, Texas Water Code § 26.121; Texas Water Code § 26.266; 30 Texas Administrative Code § 281.25; 30 Texas Administrative Code § 330.7; 30 Texas Administrative Code § 335.2; and 30 Texas Administrative Code § 335.4.[8]

In July 2015, Hunt County sued Republic Waste and Grady in the State Court Lawsuit.[9] Hunt County sued under the Texas Water Code, which allows local governments to sue for civil penalties for violations of environmental law in their jurisdictions.[10] Under Texas law, the Texas Commission on Environmental Quality ("TCEQ") is a "necessary and indispensable party" to the local government's lawsuit, so Hunt County joined the TCEQ in the lawsuit.[11]

The Hunt County Commissioners Court authorized the filing of the State Court Lawsuit.[12] Hunt County retained the Baker • Wotring LLP law firm to represent it in the State Court Lawsuit on a contingency-fee basis, which is specifically allowed under Texas law.[13] The Texas Comptroller of Public Accounts approved the fee agreement.[14] The agreement expressly states that the Baker • Wotring LLP law firm is under "the supervision, direction, and control of the Hunt County Judge."[15] The agreement also expressly gives Hunt County "the absolute right to

[8] Doc. 1 Ex. 6 at ¶¶ 15-23.

[9] Doc. 1 Ex. 1. Hunt County sued three Republic Waste entities: Republic Waste Services of Texas, Ltd.; Republic Waste Services of Texas GP, Inc.; and Republic Services, Inc. For convenience, they will be collectively referred to as "Republic Waste."

[10] Doc. 1 Ex. 1; TEX. WATER CODE § 7.351(a).

[11] Doc. 1 Ex. 1; TEX. WATER CODE § 7.353.

[12] Doc. 1 Ex. 7.

[13] Doc. 1 Ex. 7; TEX. GOV'T CODE § 403.0305; TEX. GOV'T CODE § 2254.101.

[14] Doc. 1 Ex. 7; TEX. GOV'T CODE § 403.0305.

[15] Doc. 1 Ex. 7 at ¶ 1.03.

settle the case for no penalty, which would yield no contingent fee" to the Baker • Wotring LLP law firm.[16]

The State Court Lawsuit is proceeding, and it is set for trial in October 2016.[17]

After giving his deposition and litigating in Texas state court for almost eleven months and four months before trial, Grady filed this lawsuit in federal court. He filed this civil-rights lawsuit seeking damages for Hunt County's supposed violations of his civil rights, declaratory judgment, and an injunction stopping Hunt County from continuing the State Court Lawsuit and from using contingency-fee counsel.[18] As a sign of his desire to avoid having to litigate in state court, Grady even dropped his affirmative defenses in the State Court Lawsuit, instead he has evidently decided to litigate those defenses in this case.[19]

As explained below, Grady's complaint is an attempt to convert defenses in a state-court environmental lawsuit into federal civil rights claims. Grady fails to plead claims on which relief may be granted.

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[16] Doc. 1 Ex. 7 at ¶ 2.06.

[17] State Court Lawsuit Scheduling Order (attached as Ex. A); This Court can take judicial notice of the documents filed in the State Court lawsuit when deciding a motion to dismiss. *Norris v. Hearst Trust*, 500 F.3d 454, 461 n.9 (5th Cir. 2007) ("it is clearly proper in deciding a 12(b)(6) motion to take judicial notice of matters of public record").

[18] Doc. 1.

[19] Grady's First Amd. Answer in State Court Lawsuit (attached as Ex. B). Grady's lawyer Michael R. Goldman of the Guida, Slavich & Flores PC law firm appears to be spearheading a strategy of defending environmental lawsuits brought by local governments by suing the governments in federal court, claiming that the state lawsuits have violated his clients' civil rights. In March 2016, Goldman filed a civil rights lawsuit in the Eastern District of Texas against the City of Sulphur Springs, Texas. *SS Seniors, LLC, et al. v. Sulphur Springs*, No. 4:16-CV-00217 (E.D. Tex.) (a copy of the original complaint in that case (without exhibits) is attached as Ex. C). Just like in this case, Goldman claimed that Sulphur Springs' environmental lawsuit violated his client's Due Process and Equal Protection rights and that it was unconstitutional for the local government to bring the state case using counsel retained on a contingency-fee basis. *Id*. In fact, much of the complaint that Goldman drafted in this case is just a cut-and-paste copy of the lawsuit he filed against Sulphur Springs—down to the typographical errors. *Cf*. Doc. 1 *with* Ex. C; Doc. 1 at ¶ 67 (referring to "Hunt County's City attorney," which was copied from Ex. C at ¶ 73, which referred to "Sulphur Springs' City Attorney").

II. This Court should dismiss Grady's claims.

A. This Court should dismiss Counts One and Two under Federal Rule 12(b)(1) because Grady does not have standing to challenge the fee agreement between Hunt County and its attorneys.

In Counts One and Two, Grady attempts to litigate various aspects of the fee agreement between Hunt County and its counsel, which only relate to the State Court Lawsuit, including the contingency-fee provisions of that agreement.[20] Grady alleges that the fee agreement, to which he is not a party, violates his constitutional rights and that it is void under the Texas Constitution and other Texas law.[21] Grady asks this Court to "enjoin further prosecution of [the State Court Lawsuit] under a contingent-fee agreement.[22]

This Court should dismiss Counts One and Two because Grady lacks standing to assert them. Standing consists of two primary components: (1) Article III standing, which enforces the Constitution's case-or-controversy requirement, and (2) prudential standing, which embodies "judicially self-imposed limits on the exercise of federal jurisdiction."[23] Grady lacks both Article III standing and prudential standing.

Article III standing requires (1) injury in fact, (2) causation, and (3) redressability.[24] The Supreme Court has held that this "triad of injury in fact, causation, and redressability constitutes the core of Article III's case-or-controversy requirement, and the party invoking federal jurisdiction bears the burden of establishing its existence."[25] Lack of any of these three requirements is fatal to standing, and Grady lacks all three.

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[20] Doc. 1 at ¶¶ 61-74; Doc. 1 at ¶¶ 75-78.

[21] Doc. 1 at ¶¶ 61-74; Doc. 1 at ¶¶ 75-78.

[22] Doc. 1 at ¶¶ 73, 78.

[23] *Servicios Azucareros De Venezuela, C.A. v. John Deere Thibodeaux, Inc.*, 702 F.3d 794, 801 (5th Cir. 2012).

[24] *Id.* at 799.

[25] *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103-04 (1998).

First, Grady has suffered no injury in fact due to the fee agreement. Grady claims that the fee agreement deprives him of property "without due process of law."[26] But fees are awarded in the State Court Lawsuit only after a decision on the merits. Even then they are subject to an evaluation of reasonableness by the court.[27] So there is no actual due process concern.[28] Grady also claims that the fee agreement in the State Court Lawsuit violates the Texas Constitution by "avoiding the legislative appropriations process," by "shifting public policy making" to "for-profit contingent fee attorneys," and by "diverting monies earmarked for the State's Treasury."[29] However, these are the interests of the Legislature, not of Grady. And, the Legislature is the body that enacted the statutes that allow Hunt County to retain contingency-fee counsel in this case. Furthermore, if the agreement truly violates the law, it is not Grady's concern—Hunt County is the interested party. Grady simply has no concrete, actual injury.

Second, since Grady has no real injury, there is no causation. Third, Grady cannot establish redressability. Grady asks this Court to "enjoin further prosecution of [the State Court Lawsuit] under a contingent-fee agreement.[30] If this Court were to do that, it would not stop the pending State Court Lawsuit. It would not even prevent the award of attorney's fees against Grady in the State Court Lawsuit.[31] It would just change the terms under which Hunt County's counsel are compensated. The requested relief, therefore, would not redress an injury sustained by Grady, so he fails all three requirements for Article III standing.

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[26] Doc. 1 at ¶ 63.

[27] TEX. WATER CODE § 7.354.

[28] *Bowlby v. City of Aberdeen*, 681 F.3d 215, 220 (5th Cir. 2012) (stating that "the Supreme Court has held that '[t]he fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.").

[29] Doc. 1 at ¶ 77.

[30] Doc. 1 at ¶¶ 73, 78.

[31] *See* Tex. Water Code § 7.354.

Similarly, Grady fails to satisfy the requirements for prudential standing. Prudential standing encompasses the general prohibition on a litigant raising another person's legal rights.[32] That is exactly what Grady attempts to do through Counts One and Two. Grady is not a party to the fee agreement and has no rights under it. Instead, the fee agreement is a contract between Hunt County and its counsel, which was created pursuant to the explicit approval of Texas law and was explicitly approved by the Comptroller as required.[33] Because Grady has no rights under the fee agreement, judicial intervention into the fee agreement is unnecessary to protect him.

This Court, therefore, should dismiss Counts One and Two for lack of standing.

B. This Court should dismiss Grady's claims under Federal Rule 12(b)(6) for failure to state a claim

In addition to the defects in standing, this Court should dismiss Counts One through Five because they fail to state a claim pursuant to the standards the United States Supreme Court announced in *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

In order to survive a motion to dismiss, a complaint must state a claim that is plausible on its face.[34] A pleading that offers mere labels and conclusions or "a formulaic recitation of the elements of a cause of action will not do."[35] "Plausibility" requires "more than a sheer possibility that a defendant has acted unlawfully."[36] When a complaint contains allegations that are "merely consistent with" a defendant's liability, the complaint fails to cross the threshold between

[32] *Servicios Azucareros*, 702 F.3d at 801 ("prudential standing encompasses the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked").

[33] Doc. 1 Ex. 7; TEX. GOV'T CODE § 403.0305; TEX. GOV'T CODE § 2254.101.

[34] *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

[35] *Id.*

[36] *Id.*

possibility and plausibility.[37] Determining whether a complaint states a plausible claim for relief is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense."[38]

1. This Court should dismiss Count One for failure to state a claim.

In Count One, Grady claims that the fee agreement between Hunt County and its counsel violates his "due process" rights because it deprives him of a "fair and ethical prosecution."[39] Grady claims that "the fairness of the enforcement has been compromised, and, in turn, Grady's right to due process under the Fifth and Fourteenth Amendment have been infringed."[40] These and Grady's other averments in Count One are nothing more than conclusory statements backed up by formulaic recitations of legal concepts, which the Supreme Court has held is insufficient.[41]

In addition to Grady's failure to sufficiently plead this claim, he has also failed to set forth a plausible claim for at least two reasons. First, Hunt County's lawsuit against Grady is a civil lawsuit—not a criminal prosecution—so the due process provisions governing criminal cases do not apply. Second, Grady has no authority for his claim that a government's use of private counsel on a contingency-fee basis in a civil-penalty case violates the defendant's Due Process rights.

a. The State Court Lawsuit is a civil case, so criminal Due Process provisions do not apply.

Grady's argument that he is entitled to "a fair and ethical prosecution" and that the contingency agreement "improperly delegates prosecutorial discretion to private attorneys" is

[37] *Id.*

[38] *Iqbal*, 556 U.S. at 679.

[39] Doc. 1 at ¶ 63.

[40] Doc. 1 at ¶ 70.

[41] *Iqbal*, 556 U.S. at 678.

based on the mistaken belief that the State Court Lawsuit is a criminal proceeding. It is not. It is a civil lawsuit for civil penalties.

The United States Supreme Court has set out a two-part test for determining whether a penalty is civil or criminal.[42] The Texas Supreme Court applies the same test.[43] Under that test, the court must first determine whether the Legislature has expressly or impliedly identified the penalty as civil or criminal.[44] If the Legislature has identified the penalty as civil, then "only the *clearest proof* will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty."[45]

The Texas Legislature has clearly identified the penalties under Texas Water Code § 7.102 as civil penalties. The Legislature expressly says that the penalty under that statute is "a civil penalty."[46] The subchapter that contains § 7.102 is titled "Civil Penalties." And the chapter that contains § 7.102 has separate subchapters for administrative penalties and criminal penalties.[47] So there is no question that the Legislature has expressly identified the penalties under Texas Water Code § 7.102 as civil penalties. Grady has not even alleged that the "clearest proof" supports his claim that the criminal Due Process protections apply to Hunt County's civil case, let alone met the pleading requirements to make such a claim.

[42] *Hudson v. United States*, 522 U.S. 93, 99-100 (1997).

[43] *In re Commitment of Fisher*, 164 S.W.3d 637, 647 (Tex. 2005).

[44] *Hudson*, 522 U.S. at 99; *Fisher*, 164 S.W.3d at 647.

[45] *Hudson*, 522 U.S. at 100 (emphasis added; internal quotation omitted); *see also Fisher*, 164 S.W.3d at 647.

[46] TEX. WATER CODE § 7.102 ("shall be assessed for each violation a civil penalty not less than $50 nor greater than $5,000 for each day of each violation").

[47] TEX. WATER CODE §§ 7.051-075 (administrative penalties); TEX. WATER CODE §§ 7.141-203 (criminal penalties).

b. The Due Process Clause does not prohibit local governments from using private counsel on a contingency-fee basis to litigate civil-penalty claims.

In addition, Grady has no authority for his claim that a government's use of private counsel on a contingency-fee basis in a civil-penalty case violates the defendant's Due Process rights. The United States Supreme Court has never held that, nor has the Fifth Circuit or any court in Texas—federal or state.[48] The First Court of Appeals in Houston recently considered whether a Texas county's use of private counsel under a contingency-fee agreement to sue for civil penalties under the Texas Water Code violated the defendant's Due Process rights.[49] It noted that it could find no court that "has interpreted the due process clause in the manner urged by [Grady], i.e., as adopting a blanket prohibition against a governmental entity retaining private counsel on a contingent-fee basis to pursue civil litigation in which the only remedy sought is civil penalties."[50] The court then held that the defendants had "not shown that the hiring of outside counsel pursuant to a contingent-fee contract to prosecute a civil enforcement action on a governmental entity's behalf deprives them of a property or liberty interest without procedural due process."[51]

Grady's claims in Count One fail to state a claim, and they should be dismissed.

2. This Court should dismiss Count Two for failure to state a claim.

In Count Two, Grady makes a conclusory claim that the fee agreement between Hunt County and its counsel violates the separation of powers doctrine in the Texas Constitution. Grady's claim in Count Two consists of nothing more than a formulaic recitation of a provision

[48] *Int'l Paper Co. v. Harris County*, 445 S.W.3d 379, 387-97 (Tex. App.—Houston [1st Dist.] 2013, no pet.).

[49] *Id.*

[50] *Id.* at 396.

[51] *Id.*

from the Texas Constitution backed up by some conclusory statements claiming that the fee agreement violates the law.[52] It is deficient for that reason alone.[53]

In addition, the fee agreement has nothing to do with diverting money from the State treasury or allocating money in a way that "avoid[s] the legislative appropriations process normally necessary to prosecute an action such as this" because the agreement expressly provides that any fee will be paid out of Hunt County's portion of the recovery—not the State's portion.[54] The Texas Water Code allows local governments to sue for civil penalties for violations that occur in their jurisdiction.[55] The TCEQ is "a necessary and indispensable party" to the suits brought by local governments.[56] The civil penalties recovered are divided equally between the local government and the State.[57] So any fee that Hunt County pays as a result of the State Court Lawsuit will be from Hunt County's funds, and not from the State's funds.

Also, to the extent that Grady is claiming that the fee agreement violates separation of powers within the Hunt County government, that argument has no merit. While the State of Texas has separation of powers among the executive, legislative, and judicial departments, Texas counties do not. The Texas Supreme Court has made clear that County Commissioners Courts

[52] Doc. 1 at ¶¶ 75-78.

[53] *Iqbal*, 556 U.S. at 678.

[54] Doc. 1 at ¶ 77.

[55] TEX. WATER CODE § 7.351(a).

[56] TEX. WATER CODE § 7.353.

[57] Former TEX. WATER CODE § 7.107 (amended by Acts 2015, 84th Leg., ch. 542, § 1). Texas Water Code § 7.107 was amended in 2015 to limit the local governments' recovery to half of the first $4.3 million in civil penalties, with any amount above $4.3 million awarded to the State. TEX. WATER CODE § 7.107. This new provision applies only to violations that take place on or after September 1, 2015, so it does not apply to this case. Acts 2015, 84th Leg., ch. 542, § 3.

exercise "legislative, executive, administrative, and judicial functions."[58] Therefore, Grady cannot claim that Hunt County violated the Texas Constitution's separation of powers doctrine.

Grady's claims in Count Two fail to state a claim, and they should be dismissed.

3. This Court should dismiss Count Three for failure to state a claim.

In Count Three, Grady claims that Hunt County "has exceeded its authority to assert claims against Grady under Section 7.351(a) of the Texas Water Code."[59] Texas Water Code § 7.351(a) is the statute allows local governments to bring suit for violations of Texas environmental laws that take place in their jurisdiction. The statute provides that the local government:

> [M]ay institute a civil suit under [Texas Water Code] Subchapter D in the same manner as the [Texas Commission on Environmental Quality] in a district court by its own attorney for the injunctive relief or civil penalty, or both, as authorized by this chapter against the person who committed, is committing, or is threatening to commit the violation.[60]

Grady claims—without any support—that Hunt County cannot bring suit unless the Texas Commission on Environmental Quality ("TCEQ") would also have brought suit.[61] Instead, Hunt County can bring suit if the TCEQ *could have* done so; Hunt County does not have to show that the TCEQ *would have* also brought the suit. Because Count Three is based on the mistaken belief that local governments can only sue when the TCEQ would sue, it fails to state a claim.

Texas Water Code Subchapter D prescribes the manner in which the TCEQ may institute civil actions against persons who have caused, suffered, allowed or permitted the violation of any

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[58] *Comm'rs Ct. of Titus County v. Agan*, 940 S.W.2d 77, 79 (Tex. 1997); *see also Harris County v. Nagel*, 349 S.W.3d 769, 794 (Tex. App.—Houston [14th Dist.] 2011, pet. denied). As noted previously, the Hunt County Commissioners' Court approved the filing of the lawsuit against Grady, the retention of Baker●Wotring and the fee agreement. Doc. 1 Ex. 7.

[59] Doc. 1 at ¶ 85.

[60] TEX. WATER CODE § 7.351(a).

[61] Doc. 1 at ¶¶ 81-82.

statute, rule or order under TCEQ's jurisdiction. That subchapter sets a civil penalty range for infractions (TEX. WATER CODE §§ 7.102, 7.103); authorizes suits for civil penalties, injunctive relief, or both (TEX. WATER CODE § 7.105); provides for the award of attorney's fees (TEX. WATER CODE § 7.108); and contains procedural provisions regarding venue and notice and comment for settlements (TEX. WATER CODE § 7.105(c), venue and TEX. WATER CODE § 7.110, public notice). The provision in Texas Water Code § 7.351(a) stating that the local government "may institute a civil suit under Subchapter D in the same manner as the" TCEQ just means that the local government will make use of those procedure listed above, as opposed to the Texas Legislature providing different procedures for the local government to use.

Grady provides no authority for his claim that Texas Water Code § 7.351(a) limits local governments to suing only when the TCEQ *would* file suit. And the TCEQ has expressly rejected that claim. In court filings, the TCEQ has repeatedly stated that local governments can file suit under § 7.351(a) if the TCEQ *could* file suit—not if the TCEQ *would* file suit.[62]

The TCEQ's interpretation of § 7.351(a) makes sense. The TCEQ is an agency with statewide jurisdiction and limited resources. It must prioritize based on the needs of the entire state. As a result, a top priority for a local government may be a lower priority for the TCEQ when compared to the many issues it is addressing across the state. This statutory scheme allows local governments to fill gaps in enforcement that may result from the TCEQ's limited resources. In constructing this statutory scheme almost 50 years ago, the Texas Legislature also recognized that parties to these suits may advance positions or arguments that could adversely impact TCEQ's statewide enforcement. As a result, the TCEQ is a necessary party in local-government civil

[62] TCEQ Resp. to Summary Judgment Mtn at ¶¶ 6.34-6.42 in *Harris County v. Int'l Paper Co.*, No. 2011-76724 (295th Dist Ct., Harris Cty, Tex.) (attached as Ex. D).

enforcement suits, so that the TCEQ, rather than defendants, may raise matters that may negatively impact future state enforcement directly with the court.

In addition, even if Grady were correct in his allegation, he gives no authority or explanation for how this would be a recognized cause of action on which he could seek relief. Whether Hunt County has brought the State Court Lawsuit in the same manner as the State is an issue that Grady can raise in the State Court Lawsuit. This Court should rejec Grady's efforts to make every challenge to a state or local government's action against a person a violation of an alleged Due Process right.

Grady's claims in Count Three fail to state a claim, and they should be dismissed.

4. This Court should dismiss Count Four for failure to state a claim.

In Count Four, Grady claims that Hunt County's claim for civil penalties under the Texas Water Code is really a lawsuit for exemplary damages.[63] Grady contends that Texas Civil Practice and Remedies Code Chapter 41 applies to Hunt County's claims in the State Court Lawsuit.[64] He claims that because Hunt County is not seeking actual damages in the State Court Lawsuit, its claims are barred by the provision of Chapter 41 that requires actual damages in order to recover exemplary damages.[65]

The Texas Supreme Court, however, has held that civil penalty claims brought by government entities are not exemplary damages and are not governed by Texas Civil Practice and Remedies Code Chapter 41. In *Wal-Mart Stores, Inc. v. Forte*, the Texas Supreme Court held that civil penalties sought by private parties are exemplary damages and are governed by Chapter 41.[66]

[63] Doc. 1 at ¶ 88.

[64] Doc. 1 at ¶ 90.

[65] Doc. 1 at ¶ 90.

[66] *Wal-Mart Stores, Inc. v. Forte*, ___ S.W.3d ___, 2016 WL 2985018, at *5-6 (Tex. 2016).

The Texas Supreme Court held that "a private recovery of civil penalties … is subject to Chapter 41."[67] But the Texas Supreme Court rejected the argument that, if Chapter 41 applies to private plaintiffs, then it also applies to the government.[68] Hunt County's claims in the State Court Lawsuit, therefore, are not exemplary damages and are not governed by Chapter 41.

In addition, even if Grady were correct in his allegation, he gives no authority or explanation for how this would be a recognized cause of action on which he could seek relief. Whether Hunt County can recover civil penalties in the State Court Lawsuit is an issue to be resolved in the State Court Lawsuit. It is not a free-standing ground on which Grady can sue Hunt County. Again, Grady should not be permitted to transform every affirmative defense to a state action for civil penalties into a violation of the Due Process Clause, establishing federal jurisdiction over routine matters of state law.

Grady's claims in Count Four fail to state a claim, and they should be dismissed.

5. This Court should dismiss Count Five for failure to state a claim.

In Count Five, Grady contends that Hunt County has engaged in "selective enforcement" in "violation of Grady's rights secured by the Equal Protection Clause of the Fourteenth Amendment."[69] Grady contends that Hunt County has "singled out Grady for individual prosecution" in the State Court Lawsuit.[70] He contends that Hunt County's decision to sue him "was intentional, invidious, and based on impermissible considerations" and that the decision "was irrational and wholly arbitrary."[71] Grady contends that "an illegitimate animus or ill-will

[67] *Id*. at *6.

[68] *Id*. at *5.

[69] Doc. 1 at ¶ 94.

[70] Doc. 1 at ¶ 96.

[71] *Id*.

motivated Hunt County to intentionally treat Grady differently from others similarly situation and no rational basis exists for such treatment."[72]

These and Grady's other averments in Count Five are nothing more than conclusory statements backed up by formulaic recitations of legal concepts, which the Supreme Court has held is insufficient.[73] This Court should dismiss Count Five because it fails to properly state a claim.

Even beyond the conclusory nature of Grady's allegations, he has failed to properly state a claim. Grady's complaint is that Hunt County supposedly chose to sue him for these environmental violations when it has not sued others. Grady gives no reason for why Hunt County allegedly chose to treat him differently, and he does not inform this Court that he was the only person or entity that owned the property at issue throughout the relevant time period. He does not allege that Hunt County did so because of his race, his religion, his exercise of a constitutional right, or any other reason.[74] That is insufficient to support a selective enforcement claim.

The Fifth Circuit has made clear that the "conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation."[75] Just last year, the Fifth Circuit reiterated that the fact that "not all violators are prosecuted does not alone establish a constitutional violation."[76] Instead, the Fifth Circuit has held that "to successfully bring a selective prosecution or enforcement claim, a plaintiff must prove that the government official's acts were motivated by improper considerations, such as race, religion, or the desire to prevent

[72] *Id*.

[73] *Iqbal*, 556 U.S. at 678.

[74] Doc. 1 at ¶¶ 93-103.

[75] *Beeler v. Rounsavall*, 328 F.3d 813, 817 (5th Cir. 2003).

[76] *Knapp v. United States Dept. of Agriculture*, 796 F.3d 445, 467 (5th Cir. 2015).

the exercise of a constitutional right."[77] Because Grady has failed to even allege—let alone sufficiently plead—that Hunt County's decision to sue him in the State Court Lawsuit was motivated by any of those improper considerations, he has failed to sufficiently plead his selective enforcement claim.

Grady's claims in Count Five fail to state a claim, and they should be dismissed.

C. This Court should dismiss Grady's claims under Federal Rule 12(b)(7) because he has not joined the TCEQ, which is an indispensable party to this lawsuit.

Grady has filed suit against only Hunt County, alleging that his rights are being violated by the State Court Lawsuit. Under Texas law, the TCEQ "is a necessary and indispensable party" to the State Court Lawsuit.[78] This Court should dismiss Grady's claims under Federal Rule 12(b)(7) because he has not joined the TCEQ in this lawsuit.

Federal Rule 12(b)(7) provides that federal courts should dismiss a plaintiff's claims when it has failed to join an indispensable party as required by Federal Rule 19. Under Federal Rule 19, a plaintiff must join a party when "in that person's absence, the court cannot accord complete relief among existing parties."[79]

The TCEQ is—by statute—a "necessary and indispensable party" in the State Court Lawsuit, and in this case Grady is attempting to enjoin the State Court Lawsuit. The TCEQ, therefore, is an indispensable party to this lawsuit.[80] This Court should dismiss Grady's claims because he has failed to join the TCEQ.

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[77] *Bryan v. City of Madison*, 213 F.3d 267, 277 (5th Cir. 2000); *see also Beeler*, 328 F.3d at 817 (same).

[78] TEX. WATER CODE § 7.353 ("In a suit brought by a local government under this subchapter, the commission is a necessary and indispensable party.").

[79] FED. R. CIV. P. 12(a)(1)(A).

[80] *Mine Safety Appliances Co. v. Forrestal*, 326 U.S. 371, 374-75 (1945) (holding that government could be indispensable party).

D. This Court should dismiss Grady's claims under abstention doctrines.

In addition to dismissing Grady's claims under Federal Rule 12(b), this Court should also dismiss Grady's claims under the *Brillhart* and *Burford* abstention doctrines.

1. The Court should dismiss all of Grady's claims under the *Brillhart* abstention doctrine.

Grady's complaint asserts a number of defensive declaratory-judgment claims against Hunt County. Counts One and Two seek declarations regarding Grady's criticisms of the fee agreement between Hunt County and its counsel.[81] Count Three seeks a declaration that Hunt County has exceeded its statutory authority under the Texas Water Code by filing suit against Grady.[82] Count Four seeks a declaration that the statutory penalties under the Texas Water Code are a form of exemplary damages.[83] And Count Five seeks a declaration that Hunt County has engaged in selective enforcement in violation of Grady's Equal Protection rights.[84]

All of these declaratory judgment claims directly attack the claims made in the State Court Lawsuit, and all of these claims are essentially defenses that could, if they had any basis in fact, be asserted in the State Court Lawsuit. Under the circumstances, it is apparent that Grady filed these claims as an effort to undermine the state court's jurisdiction. But regardless of the motivation, there is no valid reason why this Court should be burdened by such procedural fencing. Accordingly, pursuant to the Federal Declaratory Judgment Act and the *Brillhart* abstention doctrine, this court should abstain from hearing Counts One through Five.[85]

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[81] Doc. 1 at ¶¶ 61-74; Doc. 1 at ¶¶ 75-78.

[82] Doc. 1 at ¶¶ 79-85.

[83] Doc. 1 at ¶¶ 86-92.

[84] Doc. 1 at ¶¶ 93-103.

[85] 28 U.S.C. § 2201; *Brillhart v. Excess Ins. Co. of Am.*, 316 U.S. 491 (1942).

The Federal Declaratory Judgment Act is an "enabling act," which gives federal courts substantial discretion over whether to exercise jurisdiction and enter judgment on requests for declarations of rights.[86] "In the declaratory-judgment context, the normal principle that federal courts should adjudicate claims within their jurisdiction yields to considerations of practicality and wise judicial administration."[87] It is not uncommon for a party to file an "anticipatory suit" seeking defensive declarations in an effort to deprive a potential plaintiff of the choice of forum. The present case is different in that it seeks an adjudication of defenses that could be or should be a part of a first-filed action in another jurisdiction. Both situations are a type of forum shopping, which the courts are generally advised not to allow. Otherwise, "the wholesome purposes of the declaratory acts would be aborted by its use as an instrument of procedural fencing either to secure delay or to choose a forum."[88]

When evaluating whether to dismiss a declaratory-judgment action, the courts in the Fifth Circuit are to be guided by a three-step process. A federal court must determine:

1. Whether the declaratory action is justiciable;
2. Whether the court has the authority to grant declaratory relief; and
3. Whether to exercise its discretion to decide or dismiss the action.[89]

As explained above, there is no federal jurisdiction over Counts One and Two, and Grady failed to state a claim upon which relief may be granted for any of Counts One through Five. Therefore, the declaratory action is not justiciable and there is no authority to grant declaratory relief. But

[86] *The Sherwin-Williams Co. v. Holmes Cty.*, 343 F.3d 383, 389 (5th Cir. 2003).

[87] *Id.*

[88] *909 Corp. v. Village of Bolingbrook Police. Pension Fund*, 741 F.Supp. 1290, 1293 (S.D. Tex. 1990).

[89] *Sherwin-Williams Co.*, 343 F.3d at 387.

even if Steps One and Two were met, this Court should still abstain from considering Grady's declaratory-judgment claims under Step Three.

In order to guide the evaluation of Step Three above, the Fifth Circuit has directed courts to consider seven additional factors:

> 1. Whether there is a pending state action in which all of the matters in controversy may be fully litigated;
>
> 2. Whether the plaintiff filed suit in anticipation of a lawsuit filed by the defendant;
>
> 3. Whether the plaintiff engaged in forum shopping in bringing the suit;
>
> 4. Whether possible inequities in allowing the declaratory plaintiff to gain precedence in time or to change forums exist;
>
> 5. Whether the federal court is a convenient forum for the parties and witnesses;
>
> 6. Whether retaining the lawsuit would serve the purposes of judicial economy; and
>
> 7. Whether the federal court is being called on to construe a state judicial decree involving the same parties and entered by the court before whom the parallel state suit between the same parties is pending.[90]

These factors were designed to address comity, federalism, fairness, improper forum shopping, and efficiency. These factors weigh heavily in favor of abstention.

Factor One clearly weighs in favor of abstention. All of Grady's claims are defenses that he could raise in the State Court Lawsuit. Even the documents attached to Grady's complaint were taken from documents filed, or discovery exchanged, in the State Court Lawsuit.[91] And, the relief sought seeks to prevent Hunt County from continuing to prosecute its claims in the State Court Lawsuit. When a pending state court suit involves the same issues as a federal declaratory-

[90] *Sherwin-Williams Co.*, 343 F.3d at 388.

[91] *See* Doc. 1 Exs.

judgment action, the primary question for a district court under *Brillhart* is whether the case is better decided in state or federal court.[92] The Fifth Circuit has made clear that a federal "district court may decline to decide 'a declaratory judgment suit where another suit is pending in a state court presenting the same issues, not governed by federal law, between the same parties.'"[93] The State Court Lawsuit is an available forum where all of these issues may be fully litigated. Factor One, therefore, clearly weighs in favor of abstention.

Factors Two, Three, and Four also weigh in favor of abstention. There are times when courts forgive a plaintiff's race to the courthouse. However, it is more problematic when a party engages in forum shopping or "procedural fencing" in an effort to gain an advantage through the filing of a defensive declaratory-judgment action. For example, in this case, Grady could certainly have asserted the concepts he advances in this case as defenses in the State Court Lawsuit, and did assert at least some of them until he recently dismissed them However, Texas law would prevent Grady from filing a declaratory-judgment action to assert those defenses in a separate lawsuit, as he is now attempting to do in this federal proceeding.[94] By filing this case, Grady is attempting to avoid such limitations of Texas law and to convert his defenses into affirmative claims in an effort to obtain some procedural advantage. This type of forum shopping and gamesmanship is inconsistent with the purposes of the Federal Declaratory Judgment Act.[95] Therefore, Factors Two, Three, and Four weigh heavily in favor of abstention.

Factor Five is neutral, to the extent that the hearings and trial are held at the federal courthouse in the Dallas Division.

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[92] *Sherwin-Williams Co.*, 343 F.3d at 392.

[93] *Id.* (quoting *Brillhart*, 316 U.S. at 495).

[94] *E.g., Nat'l Enter., Inc. v. E.N.E. Prop.*, 167 S.W.3d 39, 43 (Tex. App.—Waco 2009, no pet.) (stating that "the Declaratory Judgment Act is not available to settle disputes already pending before the court").

[95] *Sherwin-Williams Co.*, 343 F.3d at 399.

Factor Six weighs in favor of abstention. Litigating Grady's defensive claims to the State Court Lawsuit in an entirely different federal case would not foster efficiency or serve the purposes of judicial economy. The declarations requested through those counts are merely repackaged defenses applicable to the State Court Lawsuit. The requests for declarations on those defenses merely seek to have this Court duplicate the consideration of issues before the state court and possibly issue conflicting rulings on state-law issues that are already before the state court. Grady's filing of this lawsuit does not serve to avoid multiple lawsuits. Instead, this case embodies inefficiency by attempting to re-litigate issues already pending in the State Court Lawsuit.

Factor Seven is neutral since there has been no final state judicial decree.

Therefore, of the seven factors to be considered, five weigh heavily in favor of abstention and two are neutral. No factors weigh in favor of this Court hearing Grady's declaratory-judgment action. This Court, therefore, should dismiss Grady's declaratory-judgment claims under the *Brillhart* abstention doctrine.

2. The Court should dismiss Count Three under the *Burford* abstention doctrine.

As discussed above, Hunt County filed suit against Grady in the State Court Lawsuit pursuant to the authority granted under Texas Water Code § 7.351(a), which empowers a local government to file suit for civil penalties for environmental violations "in the same manner as" the TCEQ.[96] In Count Three, Grady states that the "same manner as" provision means that the local government cannot file suit unless the TCEQ *would have* filed suit. As Hunt County explained

[96] *See* § II(B)(3) above; TEX. WATER CODE § 7.351(a).

above, Grady is wrong and local governments can file suit if the TCEQ *could have* filed suit, regardless whether it *would have* done so.[97]

It appears that there are no Texas appellate cases construing Texas Water Code § 7.351(a)'s "same manner as" provision. But the TCEQ has repeatedly argued in court filings that "same manner as" means that the TCEQ *could have* filed suit, not that the TCEQ *would have* filed suit.[98]

While federal courts generally exercise the jurisdiction granted to them, a federal court may abstain from exercising its jurisdiction when doing exercising it would "be prejudicial to the public interest."[99] In *Burford v. Sun Oil Co.*,[100] the Supreme Court identified "an area of abstention where issues 'so clearly involve basic problems of [State] policy' that the federal courts should avoid entanglement" in them.[101] The Supreme Court has identified the circumstances where *Burford* abstention is appropriate:

> Where timely and adequate state-court review is available, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar;" or (2) where the "exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern."[102]

The Fifth Circuit has instructed courts to consider five factors when deciding whether to abstain under the *Burford* abstention doctrine:

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[97] *See* § II(B)(3) above.

[98] Ex. D at ¶¶ 6.34-6.42.

[99] *Aransas Project. v. Shaw*, 775 F.3d 641, 649 (5th Cir. 2014).

[100] *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943).

[101] *Aransas Project*, 774 F.3d at 649.

[102] *New Orleans Public Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 361 (1989). While the Supreme Court has at times referred to the *Burford* abstention doctrine in the context of "equity," the doctrine is not so limited. The doctrine extends to all cases in which the court has discretion to grant or deny relief, including declaratory judgment actions. *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 718 (1996).

1. Whether the cause of action arises under federal or state law;
2. Whether the case requires inquiry into unsettled issues of state law or into local facts;
3. The importance of the state interest involved;
4. The state's need for a coherent policy in that area; and
5. The presence of a special state forum for judicial review.[103]

The primary concern of the *Burford* doctrine is the involvement of the federal court in deciding issues of essentially state law and policy as is the case herein.[104]

Burford is clearly applicable to the claims in Count Three. Grady is seeking a declaratory judgment that under the Texas Water Code's "same manner as" provision Hunt County and other Texas local governments may not bring suit for civil penalties for environmental violations unless the TCEQ *would have* brought the claim, even if the TCEQ *could have* brought the claim. Grady's claim deals with important issues regarding the State of Texas' system for addressing environmental violations. And the declaration that Grady requests will transcend this case, affecting Texas environmental policy and the ability of all Texas local governments to enforce environmental law in their jurisdictions.

Furthermore, the five factors weigh in favor of abstention. Grady's claims are based entirely on Texas law. The statutory term at issue—"in the same manner as"—has not been construed by a Texas state appellate court. Thus, to the extent there is a true controversy regarding the meaning of that phrase, it is an unsettled issue. The State of Texas has a strong interest in the statutory system created under the Texas Water Code, which seeks to regulate finite resources, and Texas clearly has a strong interest in maintaining a coherent state policy for the enforcement

[103] *Aransas Project*, 775 F.3d at 649.

[104] *Id.* at 650.

of Texas environmental laws.[105] Finally, there is already a forum for judicial review of this issue—the first-filed and pending State Court Lawsuit. This Court, therefore, should abstain from hearing Count Three under the *Burford* abstention doctrine.

III. If this Court does not dismiss all of Grady's claims, then it should require him to replead and provide a more definite statement of his claims under Federal Rule 12(e).

In the event that this Court does not dismiss all of Grady's claims, it should require him to replead and provide a more definite statement of his claims under Federal Rule 12(e). As discussed above, Grady's claims consist primarily of conclusory statements backed up by formulaic recitations of legal concepts. His claims are "so vague or ambiguous that [Hunt County] cannot reasonably prepare a response."[106]

IV. Conclusion

This Court should dismiss Grady's claims against Hunt County. It should dismiss Counts One and Two under Federal Rule 12(b)(1) for lack of jurisdiction. It should dismiss Counts One through Five under Federal Rule 12(b)(6) because they fail to state claims upon which relief may be granted. This Court should dismiss Grady's claims under Federal Rule 12(b)(7) for failure to join the TCEQ. This Court should dismiss Grady's claims under the Federal Declaratory Judgment Act under the *Brillhart* abstention doctrine. This Court should dismiss Count Three under the *Burford* abstention doctrine. If this Court does not dismiss Grady's claims in their entirety, it should require him to replead to provide a more definite statement under Federal Rule 12(e).

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[105] *Id.* at 651.

[106] FED. R. CIV. P. 12(e).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 14, 2016, I electronically filed the foregoing document with the Clerk of the Court for the U.S. District Court, Dallas District of Texas, using the electronic case filing system of the court. The electronic case filing system sent a "Notice of Electronic Filing" to all parties of record who have consented in writing to accept this Notice as service of this document by electronic means.

/s/ *David George*
David George

EXHIBIT A

CAUSE NO. D-1-GN-15-002833

HUNT COUNTY, TEXAS, *PLAINTIFF*, THE STATE OF TEXAS ACTING BY AND THROUGH THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, *A NECESSARY AND INDISPENSABLE PARTY*	§	**IN THE DISTRICT COURT**
vs.	§	**TRAVIS COUNTY, TEXAS**
REPUBLIC WASTE SERVICES OF TEXAS, LTD., REPUBLIC WASTE SERVICES OF TEXAS GP, INC., REPUBLIC SERVICES, INC. AND KIRK GRADY, *DEFENDANTS*	§	**200TH JUDICIAL DISTRICT**

AGREED LEVEL III SCHEDULING ORDER

Pursuant to Rule 190.4 of the Texas Rules of Civil Procedure, the Court orders that the following dates and deadlines shall apply to this case unless modified by the Court. The parties may alter these deadlines by written agreement.

Date	Event
10/31/16	**TRIAL SETTING.** This case is set for trial by jury at 9:00 a.m. on this date.
5/2/16	**ADDITIONAL PARTIES.** No additional parties shall be joined after this date except on motion for leave showing good cause. This paragraph does not otherwise alter the requirements of Rule 38 of the *Texas Rules of Civil Procedure*. The party joining the additional party shall serve a copy of this Order on the new party concurrently with the pleading joining that party.
5/2/16	**PLAINTIFF'S EXPERT WITNESS DESIGNATIONS** Plaintiff's expert witness designations and expert reports shall be served by this date. The designation shall include the information listed in Rule 194.2(f) of the *Texas Rules of Civil Procedure* for all retained testifying experts.
6/2/16	**DEFENDANTS' EXPERT WITNESS DESIGNATIONS.** Defendants' expert witness designations and expert reports shall be served by this date. The

	designation shall include the information listed in Rule 194.2(f) of the *Texas Rules of Civil Procedure* for all retained testifying experts.
7/1/16	**AMENDMENTS TO PLEADINGS.** All amendments and supplementation to pleadings must be served by this date, except for responding to amended pleadings. Parties will have two weeks to serve respond to amended or supplemented pleadings. After which pleadings may be amended only with leave of court.
9/2/16	**DISPOSITIVE MOTIONS.** All dispositive motions shall be served by this date.
8/15/16	**EXPERT CHALLENGES.** Expert challenges shall be filed by this date.
8/1/16	**DISCOVERY.** All discovery, including depositions, shall be completed by this date. Parties seeking discovery must serve requests sufficiently far in advance of the end of the discovery period that the deadline for responding will be within the discovery period. Counsel may conduct discovery beyond this deadline by agreement. Incomplete discovery will not delay the trial in this case and does not constitute good cause for a continuance.
8/8/2016	**MEDIATION.** Mediation shall be held by this date and the parties shall agree up a mediator no less than sixty (60) days prior to this date in order to ensure the agreed upon mediator's schedule will allow a mediation prior to the deadline.
10/17/16	**DESIGNATION OF DEPOSITIONS.** Deposition designations shall be exchanged, filed and served by this date.
10/19/16	**WITNESS LISTS, EXHIBIT LISTS AND EXHIBITS.** Witness Lists, Exhibit Lists and Exhibits shall be exchanged, filed and served by this date.
10/24/16	**PRE-TRIAL MOTIONS AND MATTERS.** All pre-trial motions, including Pleas, Motions, Exceptions, Stipulations of Fact, Objections to Designations of Depositions, Motions in Limine, Proposed Jury Charge Questions, Instruction and Definitions, Possibility of Settlement Instructions and other matters directed by the Court must be exchanged, filed and served by this date.

and heard by the deadlines in Local Rule 4.1.

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This doesn't negate the deadlines set by local rules or standing orders including Local Rule 4.1.

3/10/16 Jane D Boyle
JUDGE PRESIDING

EXHIBIT B

CAUSE NO. D-1-GN-15-002833

HUNT COUNTY, TEXAS, *PLAINTIFF*, THE STATE OF TEXAS ACTING BY AND THROUGH THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, *A NECESSARY AND INDISPENSABLE PARTY*	§	**IN THE DISTRICT COURT**
vs.	§	**TRAVIS COUNTY, TEXAS**
REPUBLIC WASTE SERVICES OF TEXAS, LTD., REPUBLIC WASTE SERVICES OF TEXAS GP, INC., REPUBLIC SERVICES, INC. AND KIRK GRADY, *DEFENDANTS*	§	**200TH JUDICIAL DISTRICT**

DEFENDANT KIRK GRADY'S FIRST AMENDED ANSWER

COMES NOW, Kirk Grady ("Defendant") and files this First Amended Answer, and would respectfully show this Court as follows:

I.
GENERAL DENIAL

As authorized by Rule 92 of the Texas Rules of Civil Procedure, Defendant generally denies each and every, all and singular, the allegations found in Plaintiff's First Amended Petition and any other amendments thereto and, since they are allegations of fact, the Plaintiff should be required to prove the allegations asserted against Defendant by a preponderance of the evidence before the Court and a jury.

PRAYER

WHERFORE, PREMISES CONSIDERED Defendant Kirk Grady, prays that upon final trial and hearing hereof that no recovery be had from Plaintiff, but that he go hence without day

and recover his costs, and for such other and further relief to which he may justly be entitled and will ever pray.

Respectfully submitted,

GUIDA, SLAVICH & FLORES, P.C.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of Defendant Kirk Grady's First Amended Answer was served to Plaintiff's counsel on the 8th day of June, 2016.

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EXHIBIT C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

SS SENIORS, LLC, ACCENT DEVELOPERS, LLC, AND NOORALLAH JOOMA, *Plaintiffs*	§	
	§	CIVIL ACTION NO._____
v.	§	
SULPHUR SPRINGS, TEXAS, *Defendant.*	§	

PLAINTIFFS' ORIGINAL COMPLAINT

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

SS SENIORS, LLC, ACCENT DEVELOPERS, LLC, AND NOORALLAH JOOMA, *Plaintiffs*	§	
	§	CIVIL ACTION NO._____
v.	§	
SULPHUR SPRINGS, TEXAS, *Defendant.*	§	

PLAINTIFFS' ORIGINAL COMPLAINT

COMES NOW SS Seniors, LLC ("SS Seniors"), Accent Developers, LLC ("Accent Developers") and Noorallah Jooma (collectively "Plaintiffs") by and through their undersigned counsel, and hereby file this Original Complaint against Sulphur Springs, Texas ("Sulphur Springs"), and would respectfully show the Court as follows:

I.
STATEMENT OF THE CASE

1. Plaintiff SS Seniors brings this citizen's suit action under Section 505(a)(1) of the federal Clean Water Act ("CWA" or the "Act"), 33 U.SC §1365(a)(1) and in compliance with 40 C.F.R. Part 135, alleging that Sulphur Springs is in violation of its CWA permit and CWA effluent standards or limitations as referenced herein. SS Seniors seeks the imposition of civil penalties, a declaratory judgment, and an award of costs, including attorney and expert witness fees, for Sulphur Springs' repeated and continuing violations and further seeks to compel compliance with the provisions of these statutes and rules promulgated thereunder.

2. Plaintiffs SS Seniors, Accent Developers, and Noorallah Jooma collectively also

bring this action under the laws and Constitution of the United States, to obtain a judgment declaring, among other things, that: (a) Sulphur Springs has violated Plaintiffs' due process rights which are secured by the Fifth and Fourteenth Amendment by entering into an improper contingency fee contract with its outside counsel; and (b) Sulphur Springs' actions in the case styled *Sulphur Springs, Texas v. SS Seniors, LLC, et al*, CV-4205, in the 62nd Judicial District Court of Hopkins County, Texas ("Sulphur Springs' Lawsuit") have amounted to both discriminatory and selective enforcement in violation of Plaintiffs' rights which are secured by the Equal Protection Clause of the Fourteenth Amendment. Plaintiffs have asserted several other claims related to the foregoing and seek their reasonable costs incurred in bringing this action, including attorneys' fees; consequential and compensatory damages for emotional distress, mental anguish, and harm to Plaintiffs' reputation; and punitive damages, as authorized by 42 U.S.C. § 1983, in an amount reasonable and appropriate.

II.
PARTIES

3. SS Seniors, LLC is a limited liability company that is organized under the laws of the State of Texas. Plaintiff SS Seniors, LLC has its principal place of business in the State of Texas.

4. Accent Developers, LLC is a limited liability company that is organized under the laws of the State of Texas. Plaintiff Accent Developers, LLC has its principal place of business in the State of Texas.

5. Noorallah Jooma is a citizen and resident of Denton County, Texas.

6. Sulphur Springs, Texas is a municipality in the State of Texas and may be served by serving the City Secretary, Gale Roberts, Municipal Building, 125 South Davis Street, Sulphur

Springs, Texas 75482.

III.
JURISDICTION AND VENUE

7. This Court has exclusive jurisdiction over the subject matter of this action under Section 505 (a) of the Act, 33 U.S.C. § 1365(a), 28 U.S.C. §§ 1331, 1343, 2201, and 2202, and 42 U.S.C. § 1983. This Court may exercise pendent jurisdiction over any of the Plaintiffs' state law claims on the basis of 28 U.S.C. § 1367.

8. SS Seniors has complied with the notice requirements of the Act. Section 505(b) of the Act requires that at least sixty days prior to commencing an action under Section 505(a) notice of the alleged violation be given to the party violating the Act, the Administrator of the United States Environmental Protection Agency (hereinafter "EPA"), the Regional Administrator of the EPA, and the Texas Commission on Environmental Quality (hereinafter "TCEQ"). 33 U.S.C. § 1365(b)(1)(A). On October 16, 2015, SS Seniors mailed a notice of its intent to file suit to stop Sulphur Springs' violations of its CWA permit and CWA effluent standards or limitations as referenced herein.[1] The notice complied with 33 U.S.C. § 1365(b)(1)(A) and with 40 C.F.R. Part 135, Subpart A. More than 60 days have passed since the notice was served on Sulphur Springs and these agencies.

9. Neither the EPA nor the TCEQ has commenced and is diligently prosecuting a civil or criminal action to redress the violations of Sulphur Springs. In addition, neither EPA nor TCEQ has commenced an administrative civil penalty action under Section 309(g)(6) of the Act, 33 U.S.C. § 1319(g)(6), or under a comparable Texas law, to redress the violations of the CWA by Sulphur Springs.

[1] *See* Exhibit A (Bates Nos. SS 000001-000156).

10. SS Seniors will, immediately upon receipt of a file-stamped copy of this Complaint, mail a copy of this Complaint to the Administrator of the EPA, the Regional Administrator of the EPA Region in which the violations are alleged to have occurred, and the Attorney General of the United States.

11. Venue is proper in the United States District Court for Eastern District of Texas, Sherman Division, pursuant to Section 505(c)(1) of the Act, 33 U.S.C. § 1365(b)(1), because the source of the violations is located within the district as well as under 28 U.S.C. § 1391(b) because a substantial part of the events or omissions giving rise to Plaintiffs' claims and causes of action occurred in the Eastern District of Texas in Hopkins County, Texas. The amount in controversy is in excess of the minimum jurisdictional limits of this Court.

IV.
FACTUAL BACKGROUND

A. CWA VIOLATIONS

12. SS Seniors is a limited liability company organized under the law of the State of Texas, is authorized to do business in the State of Texas, and constitutes a citizen within the meaning of Section 505 of the CWA, 33 U.S.C. §1365. SS Seniors conducts business operations in Sulphur Springs, Texas.

13. Sulphur Springs is an incorporated municipality created by and pursuant to the Texas Local Government Code as recognized by Section 504(4) of the CWA, 33 U.S.C. §1362(4), and constitutes a "person" as defined in Section 502(5) of the CWA, 33 U.S.C. §1362(5).

14. Sulphur Springs provides wastewater treatment services within its jurisdiction. The City of Sulphur Springs owns and operates a wastewater treatment facility located at 360 Thomas Road, Sulphur Springs, Texas and is the owner and/or operator of the associated sanitary

sewer pipe and conveyance system underlying portions or all of Sulphur Springs, all such parts of which constitute a publicly-owned treatment work or "POTW" as defined in 40 C.F.R. §122.2 (collectively the "Sanitary Sewer System").

15. Sulphur Springs is authorized to operate the wastewater treatment facility pursuant to a federal National Pollutant Discharge Elimination System Permit No. WQ0010372001 ("CWA Permit") issued under Section 402 of the CWA, 33 U.S.C. §1342.[2] In connection with such authorization, Sulphur Springs is required, among other things, to administer a pretreatment program designed to ensure compliance with Sulphur Springs' CWA Permit conditions.

16. Section 505 of the CWA provides that any citizen may commence a civil action on his own behalf against any "person" who is alleged to be in violation of "an effluent standard or limitation" under the CWA. 33 U.S.C. §1365(a)(1).

17. Sulphur Springs' CWA Permit imposes certain conditions, including without limitation:

> **Permit Conditions 2.b**. The permittee has a duty to comply with all conditions of the permit. Failure to comply with any permit condition constitutes a violation of the permit and the Texas Water Code or the Texas Health and Safety Code, and is grounds for enforcement action, for permit amendment, revocation, or suspension, or for denial of a permit renewal application or an application for a permit for another facility.
>
> **Permit Conditions 2.d.** The permittee shall take all reasonable steps to minimize or prevent any discharge or sludge use or disposal or other permit violation that has a reasonable likelihood of adversely affecting human health or the environment.
>
> **Permit Condition 2.g.** There shall be no unauthorized discharge of waste or any other waste. For the purpose of this permit, an unauthorized discharge is considered to be any discharge of wastewater into or adjacent to water in the state at any location not permitted as an outfall or otherwise defined in the Other Requirements section of this permit.

[2] *See* Exhibit A, Permit No. WQ0010373001 issued February 10, 2011 by the TCEQ pursuant to its authority delegated by the EPA under the CWA (Bates Nos. SS 000011-000072).

> **Operational Requirements 1.** The permittee shall at all times ensure that the facility **and all of its systems of collection, treatment, and disposal** are properly operated and maintained. (emphasis added)
>
> **Sludge Provisions.** The permittee is authorized to dispose of sludge only at a TCEQ authorized land application site or co-disposal landfill.

18. All of Sulphur Springs' CWA Permit conditions, including those referenced above, constitute effluent standards or limitations as defined by Section 505(f)(6) of the CWA, 33 U.S.C. §1365(f)(6).[3]

19. Available public records from the TCEQ document that Sulphur Springs has a history of complaints concerning sewage problems, sewage overflows, illicit discharges of sewage, and illicit discharges into the Sanitary Sewer System.

20. Moreover, available public records from the TCEQ document over twenty (20) known violations by Sulphur Springs of its CWA Permit effluent limitations for one or more parameter in the last five (5) years. At least one of these violations resulted in entry of an Agreed Order between the City of Sulphur Springs and the Texas Commission on Environmental Quality resolving violations of effluent limits for Carbonaceous Biochemical Oxygen Demand, Ammonia Nitrogen (both daily average and daily maximum concentration).[4]

21. Sanitary sewer overflows ("SSOs"), which constitute violations of the CWA, are under heightened scrutiny nationwide due to the serious threat posed to human health and the environment. The U.S. Environmental Protections Agency has identified SSOs as one of its highest priorities, and has issued a National Enforcement Initiative concerning SSOs that notes:

> Raw sewage overflows and inadequately controlled stormwater discharges from

[3] For purposes of citizen's suit authority, "effluent standard or limitation under [the CWA]" includes "a permit or condition thereof issued under section [502 of the CWA]…" 33 U.S.C. §1365(f)(6).
[4] *See* Exhibit B (Bates Nos. SS 000157-000167).

> municipal sewer systems introduce a variety of harmful pollutants, including disease causing organisms, metals and nutrients that threaten our communities' water quality and can contribute to disease outbreaks, beach and shellfish bed closings, flooding, stream scouring, fishing advisories and basement backups of sewage.
>
> EPA is taking enforcement action at municipal sewer systems with Clean Water Act violations to reduce pollution and volume of stormwater runoff and to reduce unlawful discharges of raw sewage that degrade water quality in communities.[5]

22. The EPA has stated in its "SSO Fact Sheet," that neighborhoods that experience chronic SSOs or perceived impairments to water quality drop in value. SS Seniors is the owner of property located at 668 Gossett Street, Sulphur Springs, Texas 75482 on which an 80 unit high density, low income senior citizens residence is located ("the SS Seniors property" or "Pioneer Crossing Project").

23. In addition to adversely impacting property values, sanitary sewer overflows contain sewage pathogens that have been linked to many illnesses. According to the EPA, such organisms that may be present in sewage include viruses, protozoa such as cryptosporidium, bacteria such as *Escherischia coli*, and helminthes. These organisms could potentially have a serious and detrimental impact on the quality of health of the senior citizens residing in the Pioneer Crossing Project.

24. The SS Seniors property is fronted by a sewer line owned and operated by Sulphur Springs as part of its Sanitary Sewer System. SS Seniors is a customer of Sulphur Springs and a user of the Sanitary Sewer System.

25. Sulphur Springs has an aging Sanitary Sewer System with 140 miles of wastewater lines that, upon information and belief, is plagued by infiltration and blockages, and is sorely in

[5] http://www2.epa.gov/enforcement/national-enforcement-initiative-keeping-raw-sewage-and-contaminated-stormwater-out-our

need of a system-wide upgrade. As with many small municipalities, Sulphur Springs must prioritize municipal projects by budgeting accordingly. Sulphur Springs' own website acknowledges the necessity of improving its sewer system by stating: "We will continue sewer system and manhole rehabilitation working towards the goal of having zero sewer overflows." Unfortunately, that goal is nowhere near being realized at this time and is likely to require significant capital repairs, upgrades, and expansions of the Sanitary Sewer System.

26. Sulphur Springs has failed to comply with its CWA Permit (*i.e.* applicable effluent limitations and standards) by allowing its Sanitary Sewer System to fall into, and remain in, serious disrepair, and allowing introduction of surface waters and pollutants into the Sanitary Sewer System, and discharge of raw untreated sewage into and on surface areas, and receiving waters in violations of the CWA Permit discharge standards. On information and belief, Sulphur Springs has taken only temporary stop-gap measures to address SSOs as they occur rather than implementing the necessary system-wide improvements. As a result, such violations are continuing in nature, and will continue in the future unless corrected. The low income senior citizen residents at Pioneer Crossing will continue to potentially have negative impacts on their health. SS Seniors, as an owner of high density low income senior citizens apartment complex is adjacent to, and a user of, the Sanitary Sewer System is, and will be, affected by these violations.

27. On reasonable belief, the poorly maintained condition of the Sanitary Sewer System is indicative of Sulphur Springs' likely violations of its CWA Permit on a continuing system-wide basis throughout its service area, including immediately adjacent to the SS Seniors Property. A review of the official minutes of the publicly available "Regular Meeting of the City Council" of Sulphur Springs serve as evidence of a continuous and significant pattern of sanitary sewer main blockages, as well as claims by persons harmed by sanitary sewer overflows over the last seven

years (7). A sampling of those recorded issues shown in the minutes include:

- **Minutes of August 4, 2015**: "Unstopped 14 sewer mains;" "Repaired 5 water main ruptures."

- **Minutes of May 5, 2015**: "Unstopped 47 sewer mains;" "Repaired 9 smaller sewer mains;" "Made a major sewer repair to a 24" sewer main passing under College Street which required a new bore."

- **Minutes of January 6, 2015**: "Two liability Claims were filed against the City in December, one for a sewer overflow…"

- **Minutes of November 4, 2014**: "Unstopped 12 sewer mains;" "Repaired 21 sewer mains."

- **Minutes of September 3, 2013**: "Repaired 30 water main ruptures;" "Unstopped 12 sewer mains;" "Repaired 7 sewer mains."

- **Minutes of December 4, 2012**: "TML paid one liability claim on the City's behalf for a sewer overflow in a commercial building that was caused by one of our sewer cleaning crews;" "Unstopped 24 sewer mains."

- **Minutes of May 3, 2011**: "We had one liability claim for sewer flooding in a home on Church Street that occurred while City crews were cleaning the sewer main;" "Unstopped 21 sewer mains."

- **Minutes of January 6, 2009**: "Unstopped 24 sewer lines."

- **Minutes of November 4, 2008**: "Unstopped 18 sewer mains;" "Repaired 6 sewer mains."

- **Minutes of June 3, 2008**: "We received 2 liability claims in May; both were for damages resulting from sewer blockages;" "Unstopped 24 sewer mains."

- **Minutes of Special Meeting January 8, 2008**: "A resident on Moore Street seeks monetary damages from a sewer overflow;" "Unstopped 60 sewer mains."[6]

28. Additionally, in the Fiscal Year 2014-2015 Annual Budget "Budget Message"

[6] *See* Exhibit A (Bates Nos. SS 000073-000139).

dated September 1, 2014, Sulphur Springs indicated that the wastewater treatment plant needs to be modernized to the cost of approximately $12 million, and that the modernization is driven by increased loads and "attention from the EPA and TCEQ."[7] Sulphur Springs' Sanitary Sewer System almost constantly has blockages city-wide, has periodic sanitary sewer overflows substantial enough to cause citizens to make damages claims against Sulphur Springs, and clearly has the potential to cause pollutants to enter surface waters of the state and/or cause effluent limit violations at the wastewater treatment plant. Additionally, Sulphur Springs appears to have weighed the cost of correcting its violations against the level of "attention" it has received from the EPA and the TCEQ.

29. To date, SS Seniors is unaware that any formal enforcement action has been by the EPA or the TCEQ to cause Sulphur Springs to take actions to cease its SSOs in violation of the CWA and the CWA Permit. In particular, no federal or state action has been instituted to compel Sulphur Springs to take actions to prevent SSOs onto or near the SS Seniors Property or into or adjacent to the creek running near the SS Seniors Property.

30. Because neither the EPA nor the TCEQ has yet undertaken enforcement against the City of Sulphur Springs for its violations of Section 301 of the CWA and of its CWA Permit, this citizen's suit is appropriate.

31. Finally, based on available data, approximately 22.5% of the population of Sulphur Springs lives at or below the poverty level. Accordingly, Environmental Justice concerns are high for the population served by Sulphur Springs' Sanitary Sewer System and especially for the low income senior citizens residing at Pioneer Crossing.

[7] *See* Exhibit C (Bates Nos. SS000168-000170).

B. CONSTITUTIONAL VIOLATIONS

32. On January 15, 2015, Defendant filed suit against Plaintiffs (and others) in Hopkins County under Section 7.351 of the Texas Water Code claiming it is entitled to civil penalties of up to $25,000 per day for Plaintiffs' (and others) alleged violations of the Texas Solid Waste Disposal Act ("SWDA") and Stormwater Permitting Requirements, plus attorney's fees.[8]

33. The nature of the claims and the relief requested in the Sulphur Springs' Lawsuit leave no doubt that it is a coercive action brought to punish Plaintiffs (and others) as Sulphur Springs seeks to impose the maximum punishment allowed by law for each alleged violation.

34. Section 7.351 permits governmental units, such as Sulphur Springs, to act "in the same manner as" the TCEQ in enforcing Texas environmental laws. It does not, however, empower governmental units to outsource this enforcement authority to private lawyers hired pursuant to an ad hoc contingency-fee arrangement who act in ways that violate a party's constitutional rights and especially does not act "in the same manner as" the TCEQ.

35. Texas governmental units, such as Sulphur Springs, have a responsibility to see that justice is done for all, including persons, like Plaintiffs, that have been targeted for prosecution. In prosecuting actions to recover civil penalties, Sulphur Springs is obligated to serve the public interest; in some cases, the public interest may call for limiting the scope of the action or abandoning the action altogether rather than seeking to maximize the amount of civil penalties.

36. Nonetheless, on June 12, 2014, Sulphur Springs executed an engagement agreement with Scott & Ray, PLLC (hereinafter, "Contingent Fee Contract") which granted outside contingency counsel a stake in the outcome of the Sulphur Springs' Lawsuit in

[8] *See* Exhibit D, Plaintiff's Third Amended Petition (Bates Nos. 000171-000187).

consideration of their agreement to prosecute that action.[9]

37. On January 22, 2016, Sulphur Springs produced a copy of the Contingent Fee Contract as well as redacted attorney billing invoices through September 2015.[10] This was the first time that Plaintiffs became aware of Contingent Fee Contract and that contingency-counsel were purportedly billing at $950/hour – a rate that is unconscionably higher than ordinarily charged for similar work by similarly qualified counsel. Plaintiffs also learned at that time that Sulphur Springs' outside counsel had billed $501,498.46 through September 2015 on the Sulphur Springs' Lawsuit. It should be noted that the Sulphur Springs' Lawsuit had been stayed by agreement between the parties prior to that time with no depositions or other meaningful discovery having occurred so that the parties could participate in mediation. Sulphur Springs' counsel recently produced additional redacted invoices from September 2015 through January 2016 which confirmed that the total amount billed to date is now a staggering $730,275.27.[11] There still has not been a single deposition in the case and only one hearing for entry of a scheduling order has occurred.

38. Several provisions in the contingent-fee arrangement actually promote inefficient litigation strategies and incentivize contingency-counsel to needlessly drag the lawsuit out as long as possible so that they can seek greater amounts in attorney's fees at trial. That is why Sulphur Springs' contingency-counsel are billing this matter at **$950/hour** and have incurred at least **$730,275.27** prior to the first deposition. The extremely high billing rate and unreasonably high attorney's fees incurred to date (in relationship to the posture of the case) is clear of evidence of

[9] *See* Exhibit E (Both Scott &Ray, PLLC and Cantey Hanger, LLP represent Sulphur Springs in the Sulphur Springs Lawsuit. Sulphur Springs has not produced its engagement agreement with Cantey Hanger, LLP) (Bates Nos. 000188-000197).
[10] *See* Exhibit F (Bates Nos. 000198-000240).
[11] *See* Exhibits F and G (Bates Nos. 000198-000272).

the overreaching and violation of due process by Sulphur Springs.

39. By its actions or inaction, Sulphur Springs has also ceded control over the prosecution of the Sulphur Springs' Lawsuit to its contingency-fee counsel. Contingency-fee counsel are listed as the attorney-in-charge. By virtue of their role in the Sulphur Springs' Lawsuit, contingency-fee counsel have made or influenced a decisions about the prosecution, large and small.

40. To date, contingency-fee counsel have handled all appearances related to the Sulphur Springs' Lawsuit. Sulphur Springs' City Attorney did not appear at the one hearing that has occurred in the Sulphur Springs' Lawsuit and is not listed as counsel of record on any pleadings. In addition, all relevant correspondence and other communications have come from contingency-fee counsel.

41. The contingency-fee arrangement between Sulphur Springs and contingency-fee counsel has injected personal financial interest into the prosecution of the Sulphur Springs' Lawsuit. Indeed, "[a]s any lawyer knows, under a contingency-fee arrangement an attorney effectively bets everything on attainment of victory in litigation." Martin H. Redish, *Private Contingent Fee Lawyers and Public Power: Constitutional and Political Implications*, 18 Sup. Ct. Econ. Rev. 77, 79-80 (2010).

42. Under the contingency-fee arrangement, contingency-fee counsel stand to gain substantial amounts of money based on the outcome of the Sulphur Springs' Lawsuit; these gains would be derived from any civil penalties recovered on behalf of Sulphur Springs from Plaintiffs as well as their inflated attorney's fees. The contingency-fee arrangement thus creates a powerful incentive for contingency-fee counsel to focus single-mindedly on maximizing the amount of civil penalties recovered and attorney's fees incurred from Plaintiffs.

43. Moreover, because of their financial stake in the outcome of the Sulphur Springs' Lawsuit, contingency-fee counsel are disinclined to exercise restraint, such as by limiting the scope of the action if it would advance the public interest to do so and at times have acted with personal vindictiveness.

44. For instance, contingency-counsel (on behalf of Sulphur Springs) have singled out Mr. Jooma for individual prosecution in the Sulphur Springs' Lawsuit even though they have not proceeded against any other individual similarly situated. Mr. Jooma is a US citizen originally from Pakistan and was born to Muslim parents and had no involvement in his individual capacity with the construction of the site. The selectivity of Mr. Jooma was intentional, invidious, and based on impermissible considerations such as Mr. Jooma's race and religion. Alternatively, the decision to single out Mr. Jooma was irrational and wholly arbitrary. In effect, an illegitimate animus or ill-will motivated Sulphur Springs to intentionally treat Mr. Jooma differently from others similarly situated and no rational basis exists for such treatment.

45. The contingency-counsel (on behalf of Sulphur Springs) have also exceeded their authority under Section 7.351(a) of the Texas Water Code. In fact, Sulphur Springs has asserted claims in the Sulphur Springs' Lawsuit the likes of which have never been advanced in the history of Texas environmental litigation by the State of Texas through the TCEQ.

46. Specifically, Sulphur Springs claims that Plaintiffs (and others) violated the SWDA because they failed to obtain the appropriate permits for the discharge of stormwater from the Pioneer Crossing Project.[12] In making this claim, Sulphur Springs must necessarily argue that the stormwater from the site was regulated under the TCEQ's Industrial Solid and Municipal

[12] *See* Exhibit D, page 9-12 (Bates Nos. 000180-000183).

Hazardous Waste Rules under 30 Tex. Admin. Code § 335. However, Section 335.1(140)(a)(iv) states that "solid waste" does not include materials excluded by 40 C.F.R. §§ 261.4(a) and that provision excludes industrial wastewater discharges subject to regulation under Section 402 of the Clean Water Act. Indeed, as asserted by Sulphur Springs itself elsewhere in its claims against Plaintiffs, stormwater from large construction sites is industrial wastewater subject to the Section 402 Clean Water Act permit program. The TCEQ has never taken the position of Sulphur Springs at any construction site in the State of Texas and it is noteworthy that the State of Texas has recently retracted its support of these claims in the Sulphur Springs' Lawsuit.

47. Sulphur Springs also claims that the stormwater that allegedly entered the sanitary sewer system was likewise a violation of the SWDA. Assuming, *arguendo*, that the stormwater qualified as "solid waste," the SWDA nonetheless contains a "Domestic Sewage Exclusion" which clearly states that once a substance enters a sanitary sewer system, that is part of a POTW, it is no longer qualifies as "solid waste."[13] Once again, The TCEQ has never taken the position of Sulphur Springs at any construction site in the State of Texas.

48. Further, when Sulphur Springs built its own municipal airport, it did not obtain the very same permits for itself that it now claims, in error, Plaintiffs should have obtained.[14] That is additional evidence that Sulphur Springs has greatly exceeded the boundaries of the underlying statutory schemes.

49. In addition, Sulphur Springs claims that SS Seniors, Accent Developers, and Mr. Jooma were also "primary operators" in an effort to seek $25,000/day penalty a day for failure to

[13] TEX. HEALTH & SAFETY CODE § 361.003(34)(A)(i) (the term solid waste "does not include ... solid or dis-solved material in domestic sewage").
[14] *See* Exhibit H (Bates Nos. 000273-000274).

timely file a Notice of Intent ("NOI") for over 100 days (totaling $2,500,000) in order to obtain coverage under a stormwater permit from the TCEQ.[15] The State of Texas disagrees with Sulphur Springs on this issue.[16] Instead the State of Texas concluded that SS Seniors, Accent Developers and Mr. Jooma qualify only as "secondary operators." Under the TCEQ penalty policy, the total penalty applicable to Plaintiffs for failure to file an NOI as a secondary operator is *de minimis* – instead of $2,500,000 as claimed by Sulphur Springs' contingency-counsel.

50. Finally, in an effort to bring in irrelevant evidence, Sulphur Springs claims that Section 7.053 of the Texas Water Code concerning the "Factors to be Considered in Determination of Penalty Amount" is applicable.[17] The State of Texas disagrees with Sulphur Springs on this issue as well.[18]

51. Simply put, the contingency-fee arrangement amounts to a biasing influence, which, among other things, increases substantially the risk of overzealous prosecution by a local governmental entity that purports to stand in the shoes of the State of Texas.

52. The contingent-fee arrangement gives private counsel a significant stake in the outcome, resulting in the prosecution of this case being guided by the profit motivations of contingency-fee counsel, rather than the public interest or Plaintiffs' purported culpability. This in turn has compromised the integrity of the prosecution by Sulphur Springs as well as the public's faith in the judicial process. The right of SS Seniors and Accent Developers to their continued operations and existence has been threatened by the Sulphur Springs Lawsuit. In addition,

[15] *See* Exhibit I, Sulphur Springs' Supplemental Responses to Interrogatories Nos. 8-10 (Bates Nos. 000275-000277).
[16] *See* Exhibit J, State of Texas' Supplemental Responses to Interrogatories Nos. 8-10 (Bates Nos. SS 000278-000281); Exhibit K, State of Texas Response to Requests for Admissions No. 69 by SS Seniors, LLC, Accent Developers, LLC and Noorallah Jooma (Bates Nos. SS 000282-000285).
[17] *See* Exhibit L (Bates Nos. 000286-000290).
[18] *See* Exhibit M (Bates Nos. 000291-000293).

Plaintiffs are mismatched in their legal resources as compared to Sulphur Springs.

53. The contingent-fee arrangement has caused the contingency-counsel to disregard the heightened standards to which a lawyer performing government functions is subject. The pernicious consequences of the contingency-fee arrangement are exacerbated by contingency-fee counsel's lack of public accountability.

54. Under these circumstances, contingency-fee counsel's participation in the Sulphur Springs' Lawsuit offends the requirement of fundamental fairness embodied in the Due Process Clause of the Fifth and Fourteenth Amendment. On information and belief, Sulphur Springs intends to permit contingency-fee counsel to continue leading the prosecution of the Sulphur Springs' Lawsuit in the future.

55. Sulphur Springs' actions referenced herein have also amounted to both discriminatory and selective enforcement in violation of Plaintiffs' rights which are secured by the Equal Protection Clause of the Fourteenth Amendment.

V.
CAUSES OF ACTION

COUNT 1: DISCHARGE OF POLLUTANTS TO SURFACE WATERS WITHOUT AN NPDES PERMIT IN VIOLATION OF THE CLEAN WATER ACT

56. Plaintiffs hereby incorporate the allegations in the preceding paragraphs as if fully set forth herein.

57. As stated above, Sulphur Springs has failed to comply with its CWA Permit (i.e. applicable effluent limitations and standards) by allowing its Sanitary Sewer System to fall into, and remain in, serious disrepair, and allowing introduction of surface waters and pollutants into the Sanitary Sewer System, and discharge of raw untreated sewage into and on surface areas, and receiving waters in violations of the CWA Permit discharge standards.

58. On information and belief, Sulphur Springs has taken only temporary stop-gap measures to address SSOs as they occur rather than implementing the necessary system-wide improvements. As a result, such violations are continuing in nature, and will continue in the future unless corrected. SS Seniors, as an owner of property adjacent to, and a user of, the Sanitary Sewer System is, and will be, affected by these violations.

59. The discharges of pollutants from a point source referenced above required an NPDES Permit authorizing such discharges. Sulphur Springs has violated Section 301(a) of the CWA, 33 U.S.C. §1311(a) and should be subject to an enforcement order or injunction ordering Sulphur Springs to cease its discharges of pollutants without an NPDES permit authorizing such discharges.

60. Sulphur Springs should be subject to the assessment of civil penalties for these violations pursuant to Sections 309(d) and 505 of the Act, 33 U.S.C. §§ 1319(d) and 1365. Such penalty amounts shall include, without limitation, the immense economic benefit Sulphur Springs has enjoyed by not undertaking the City-wide improvements to the Sanitary Sewer System to prevent SSOs. Sulphur Springs should be responsible for reimbursement of SS Seniors' litigation costs in bringing this citizen's suit claim pursuant to Section 505(d) of the CWA, 33 U.S.C. §1365(d).

61. For the purpose of assessing the maximum penalty which Sulphur Springs is liable, each day that Sulphur Spring has discharged pollutants without a permit authorizing such discharges constitutes a separate violation of Section 301(a) of the CWA, pursuant to Section 309(d), 33 U.S.C. § 1319(d), for each day on which it has occurred or will occur after the filing of this Complaint.

62. SS Seniors also seeks a declaration that Sulphur Springs should be subject to civil

penalties for its violations of the CWA in the amount of $37,500 per day, per violation, for a total amount to exceed $1,000,000.00.

COUNT 2: VIOLATION OF THE TERMS OF NPDES PERMIT NO. WQ0010372001 IN VIOLATION OF THE CLEAN WATER ACT

63. Plaintiffs hereby incorporate the allegations in the preceding paragraphs as if fully set forth herein.

64. As set forth above, Defendant Sulphur Springs has violated Sections 301(a) and 402 of the CWA, 33 U.S.C. §§ 1311(a) and 1342, as well as rules implementing the Act, by prohibited sewage overflows, illicit discharges of sewage, and illicit discharges into the Sanitary Sewer System.

65. Defendant Sulphur Springs should be subject to an enforcement order or injunction ordering Sulphur Springs to cease its violations of NPDES Permit WQ0010372001.

66. SS Seniors also seeks a declaration that Sulphur Springs should be subject to civil penalties for its violations of the CWA in the amount of $37,500 per day, per violation, for a total amount to exceed $1,000,000.00.

COUNT 3: DUE PROCESS VIOLATIONS

67. Plaintiffs hereby incorporate the allegations in the preceding paragraphs as if fully set forth herein.

68. Sulphur Springs' Contingent Fee Contract violates Plaintiffs' rights under the Due Process Clause of the Fifth and Fourteenth Amendment of the United States Constitution. Section 1983 provides a private right of action against parties acting "under color of any statute, ordinance, regulation, custom, or usage, of any State" to redress the deprivation of rights secured by the United States or federal law.

69. The engagement of contingency counsel deprives Plaintiffs of property without due process of law, namely a fair and ethical prosecution. The contingent-fee arrangement improperly delegates prosecutorial discretion to private attorneys, who are unrestrained by the statutory and constitutional checks on the exercise of state authority.

70. The contingent fee-arrangement has injected personal interests, financial or otherwise into the enforcement process which has brought irrelevant and impermissible factors into the outside contingency-fee counsel's decisions based upon, among other things, race or religion.

71. Further, the contingent-fee arrangement gives private counsel a significant stake in the outcome, resulting in the prosecution of this case being guided by the profit motivations of contingency-fee counsel, rather than the public interest or Plaintiffs' purported culpability. This in turn has compromised the integrity of the prosecution by Sulphur Springs as well as the public's faith in the judicial process. The right of SS Seniors and Accent Developers to their continued operations and existence has been threatened by the Sulphur Springs Lawsuit. In addition, Plaintiffs are mismatched in their legal resources as compared to Sulphur Springs.

72. Several provisions in the contingent-fee arrangement actually promote inefficient litigation strategies and incentivize contingency-counsel to needlessly drag the lawsuit out as long as possible so that they can seek greater amounts in attorney's fees at trial. That is why Sulphur Springs' contingency-counsel are billing this matter at **$950/hour** and have incurred at least **$730,275.27** prior to the first deposition.[19] The extremely high billing rate and unreasonably high attorney's fees incurred to date (in relationship to the posture of the case) is clear of evidence of

[19] *See* Exhibits F and G (Bates Nos. 000198-000272).

the overreaching and violation of due process by Sulphur Springs.

73. The contingent-fee arrangement has caused the contingency-counsel to disregard the heightened standards to which a lawyer performing government functions is subject. In addition, Sulphur Springs' City Attorney does not appear on any pleadings and did not participate at the mediation or any other hearings to date.

74. The contingent-fee contract has caused the contingency-counsel to act improperly or with a bias other than that inherent in the adversarial system, or to otherwise act in a manner contrary to public interest.

75. As a direct and proximate result of the Defendant's actions, coercive powers have been delegated to private lawyers having a clear, direct and substantial financial stake in the outcome of the Sulphur Springs' Lawsuit, an enforcement action that must be prosecuted in the public interest or not at all.

76. Consequently, as a direct and proximate result of Sulphur Springs' actions under color of state law, the fairness of the enforcement action has been compromised, and, in turn, Plaintiffs' right to due process under the Fifth and Fourteenth Amendment have been infringed.

77. The ongoing violation of Plaintiffs' right to due process has caused actual and irreparable harm and will continue causing additional harm until this Court grants the relief to which Plaintiffs are entitled.

78. The prosecution of this case by private, for-profit, contingent-fee counsel in violation of Federal law amounts to the immediate deprivation of Plaintiffs' rights because "merely being forced to defend oneself in a [tainted] proceeding . . . is enough to 'constitute an ongoing injury." *Esso Standard Oil Co. v. Freytes*, 467 F. Supp. 2d 156, 162 (D.P.R. 2006), *aff'd*, 522 F.3d 126 (1st Cir. 2008). Therefore, a declaratory judgment and injunctive relief is appropriate.

79. Plaintiffs request that the Court declare that the contingent-fee contract in this penalties-only enforcement action violates the due process clause of the United States Constitution, and enjoin further prosecution of this action by Sulphur Springs under a contingent-fee agreement.

80. In addition, as a result of Sulphur Springs' conduct, Plaintiffs have sustained damages, including, but not limited to, consequential and compensatory damages, emotional distress, mental anguish, and harm to its reputation, for which they now sue. Furthermore, because Sulphur Springs' conduct involves reckless and callous indifference to Plaintiffs' rights, as well as being motivated by evil motive or intent, Plaintiffs are entitled to punitive damages from Sulphur Springs.

COUNT 4: DECLARATION THAT THE CONTINGENT FEE CONTRACT VIOLATES THE SEPARATION OF POWERS DOCTRINE IN THE TEXAS CONSTITUTION

81. Plaintiffs hereby incorporate the allegations in the preceding paragraphs as if fully set forth herein.

82. Texas has an explicit constitutional provision mandating the separation of powers, stating:

> The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are Legislative to one, those which are Executive to another, and those which are Judicial to another, and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted.

TEX. CONST. art. II, § 1.

83. Sulphur Springs' Contingent Fee Contract violates this mandate by (1) avoiding the legislative appropriations process normally necessary to prosecute an action such as this, (2) shifting public-policy making from the Legislature to unaccountable, for-profit contingent fee

attorneys, and (3) violating legislative function by diverting monies earmarked for the State's Treasury to outside lawyers, without the Legislature's approval or consent.

84. Plaintiffs request that the Court declare that the Contingent Fee Contract runs afoul of separation of powers requirements set forth in the Texas Constitution, and enjoin further prosecution of this action by Sulphur Springs under a contingent-fee agreement.

COUNT 5: DECLARATION THAT THE CONTINGENT FEE CONTRACT, IF ANY, BETWEEN SULPHUR SPRINGS AND CANTEY & HANGER, LLP IS IN VIOLATION OF TEXAS LAW

85. Plaintiffs hereby incorporate the allegations in the preceding paragraphs as if fully set forth herein.

86. Plaintiffs request that the Court: (1) declare that the Contingent Fee Contract, if any, between Sulphur Springs and Cantey & Hanger, LLP is void as it was not approved by the Texas Comptroller in violation of subchapter C of the chapter 2254 of the Government Code, section 403.0305 of the Government Code, and section 30.0003(3) of the Water Code and; (2) enjoin further prosecution of this action by Cantey & Hanger, LLP under a contingent-fee agreement.

COUNT 6: DECLARATION THAT THE SULPHUR SPRINGS' LAWSUIT EXCEEDS THE LIMITS OF THE AUTHORIZING STATUTE

87. Plaintiffs hereby incorporate the allegations in the preceding paragraphs as if fully set forth herein.

88. The sole basis of Sulphur Springs' claims against Plaintiffs is under Section 7.351(a) of the Texas Water Code.[20] Section 7.351(a) provides that:

> If it appears that a violation or threat of violation of Chapter 16, 26, or 28 of this code, Chapter 361, 371, 372, or 382, Health and Safety Code, a provision of

[20] *See* Exhibit D, page 2 at ¶ 3.

> Chapter 401, Health and Safety Code, under the commission's jurisdiction, or Chapter 1903, Occupations Code, or a rule adopted or an order or a permit issued under those chapters or provisions has occurred or is occurring in the jurisdiction of a local government, the local government or, in the case of a violation of Chapter 401, Health and Safety Code, a person affected as defined in that chapter, may institute a civil suit under Subchapter D ***in the same manner as the commission*** in a district court by its own attorney for the injunctive relief or civil penalty, or both, as authorized by this chapter against the person who committed, is committing, or is threatening to commit the violation.[21]

89. Thus, in order to assert any claims against Plaintiffs in the Sulphur Springs' Lawsuit, Sulphur Springs must stand in the shoes of the TCEQ: it can exercise only the authority that the statutes grant the TCEQ, and it must do so only in the "same manner" as the TCEQ would exercise that authority. Notwithstanding this critical limitation on suits by local governments, Sulphur Springs has asserted claims in the Sulphur Springs' Lawsuit the likes of which have never been advanced in the history of Texas environmental litigation by the State of Texas through the TCEQ.

90. For instance, Sulphur Springs claims that Plaintiffs (and others) violated the SWDA because they failed to obtain the appropriate permits for the discharge of stormwater from the Pioneer Crossing Project.[22] In making this claim, Sulphur Springs must necessarily argue that the stormwater from the site was regulated under the TCEQ's Industrial Solid and Municipal Hazardous Waste Rules under 30 Tex. Admin. Code § 335. However, Section 335.1(140)(a)(iv) states that "solid waste" does not include materials excluded by 40 C.F.R. §§ 261.4(a) and that provision excludes industrial wastewater discharges subject to regulation under Section 402 of the Clean Water Act. Indeed, as asserted by Sulphur Springs itself elsewhere in its claims against

[21] TEX. WATER CODE § 7.351(a) (emphasis added); *see also id*. § 7.352 ("in the case of a violation of Chapter 26 … a local government may not exercise ***the enforcement power authorized*** by this subchapter unless its governing body adopts a resolution authorizing the exercise of the power." (emphasis added).
[22] *See* Exhibit D, page 9-12 (Bates Nos. 000180-000183).

Plaintiffs, stormwater from large construction sites is industrial wastewater subject to the Section 402 Clean Water Act permit program. The TCEQ has never taken the position of Sulphur Springs at any construction site and it is noteworthy that the State of Texas has recently retracted its support of these claims in the Sulphur Springs' Lawsuit.

91. Sulphur Springs also claims that the stormwater that allegedly entered the sanitary sewer system was likewise a violation of the SWDA. Assuming, *arguendo*, that the stormwater qualified as "solid waste," the SWDA nonetheless contains a "Domestic Sewage Exclusion" which clearly states that once a substance enters a sanitary sewer system, that is part of a POTW, it is no longer qualifies as "solid waste."[23] Once again, The TCEQ has never taken the position of Sulphur Springs at any construction site in the State of Texas.

92. Further, when Sulphur Springs built its own municipal airport, it did not obtain the very same permits for itself that it now claims, in error, Plaintiffs should have obtained.[24] That is additional evidence that Sulphur Springs has greatly exceeded the boundaries of the underlying statutory schemes.

93. In addition, Sulphur Springs claims that SS Seniors, Accent Developers, and Mr. Jooma were also "primary operators" in an effort to seek $25,000/day penalty a day for failure to timely file a Notice of Intent ("NOI") for over 100 days (totaling $2,500,000) in order to obtain coverage under a stormwater permit from the TCEQ.[25] The State of Texas disagrees with Sulphur Springs on this issue.[26] Instead the State of Texas concluded that SS Seniors, Accent

[23] TEX. HEALTH & SAFETY CODE § 361.003(34)(A)(i) (the term solid waste "does not include ... solid or dis-solved material in domestic sewage").
[24] *See* Exhibit H (Bates Nos. 000273-000274).
[25] *See* Exhibit I, Sulphur Springs' Supplemental Responses to Interrogatories Nos. 8-10 (Bates Nos. 000275-000277).
[26] *See* Exhibit J, State of Texas' Supplemental Responses to Interrogatories Nos. 8-10 (Bates Nos. 000278-000281; Exhibit K, State of Texas Response to Requests for Admissions No. 69 by SS Seniors, LLC, Accent Developers,

Developers and Mr. Jooma qualify only as "secondary operators." Under the TCEQ penalty policy, the total penalty applicable to Plaintiffs for failure to file an NOI as a secondary operator is *de minimis* – instead of $2,500,000 as claimed by Sulphur Springs' contingency-counsel.

94. Finally, in an effort to bring in irrelevant evidence, Sulphur Springs claims that Section 7.053 of the Texas Water Code concerning the "Factors to be Considered in Determination of Penalty Amount" is applicable.[27] The State of Texas disagrees with Sulphur Springs on this issue as well.[28]

95. Plaintiffs request that the Court declare that Sulphur Springs has exceeded its authority to assert claims against Plaintiffs under Section 7.351(a) of the Texas Water Code and enjoin further prosecution by Sulphur Springs against Plaintiffs in the Sulphur Springs' lawsuit.

COUNT 7: DECLARATION THAT THE STATUTORY PENALTIES UNDER SECTION 7.351 OF THE WATER CODE ARE A FORM OF EXEMPLARY DAMAGES

96. Plaintiffs hereby incorporate the allegations in the preceding paragraphs as if fully set forth herein.

97. Sulphur Springs does not seek economic damages, but rather statutory civil penalties under Section 7.102 of the Texas Water Code.[29]

98. Statutory civil penalties are a form of exemplary damages. Both in name and substance, the penalties provided by the Texas Water Code are penalties and exemplary damages.

99. Sulphur Springs' penalty claims are barred under common law by the lack of any incurred actual damages and by the waiver of any actual damages sought.

LLC and Noorallah Jooma (Bates Nos. 000286-000290).

[27] *See* Exhibit L (Bates Nos. 000286-000290).

[28] *See* Exhibit M (Bates Nos. 000291-000293).

[29] *See* TEX. WATER CODE § 7.102; Exhibit D (Bates Nos. 000171-000187).

100. The Texas common law rule has been codified in Chapter 41 of the Texas Civil Practice & Remedies Code, which provides that exemplary damages are recoverable only if damages other than nominal damages are awarded. The statutory penalties provided by the Texas Water Code are penalties and are thus subject to the Chapter 41.

101. Section 41.002(d) provides that Chapter 41 does not apply to several listed statutes, however, the Texas Water Code is not one of them and thus is subject to its limits.

102. Because Sulphur Springs has not suffered any actual damages, which are a necessary prerequisite for an award of statutory penalties, Plaintiffs are entitled to a declaratory judgment that Sulphur Springs take nothing by way of their statutory penalty claims against Plaintiffs in the Sulphur Springs' Lawsuit.

COUNT 8: EQUAL PROTECTION VIOLATIONS

103. Plaintiffs hereby incorporate the allegations in the preceding paragraphs as if fully set forth herein.

104. Sulphur Springs, while acting under color of state law, have deprived Plaintiffs of rights secured by the Equal Protection Clause of the Fourteenth Amendment. Section 1983 provides a private right of action against parties acting "under color of any statute, ordinance, regulation, custom, or usage, of any State" to redress the deprivation of rights secured by the United States or federal law.

105. Sulphur Springs' actions in the Sulphur Springs' Lawsuit have amounted to both discriminatory and selective enforcement which are both violations of Plaintiffs' rights secured by the Equal Protection Clause of the Fourteenth Amendment.

106. With respect to discriminatory enforcement, Sulphur Springs have singled out Mr. Jooma for individual prosecution in the Sulphur Springs' Lawsuit even though they have not

proceeded against any other individual similarly situated. Mr. Jooma is a US citizen originally from Pakistan and was born to Muslim parents and had no involvement in his individual capacity with the construction of the site. The selectivity of Mr. Jooma was intentional, invidious, and based on impermissible considerations such as Mr. Jooma's race and religion. Alternatively, the decision to single out Mr. Jooma was irrational and wholly arbitrary. In effect, an illegitimate animus or ill-will motivated Sulphur Springs to intentionally treat Mr. Jooma differently from others similarly situated and no rational basis exists for such treatment.

107. With respect selective enforcement, Sulphur Springs has also exceeded its authority under Section 7.351(a) of the Texas Water Code. In fact, Sulphur Springs has asserted claims in the Sulphur Springs' Lawsuit the likes of which have never been advanced in the history of Texas environmental litigation by the State of Texas through the TCEQ.

108. For instance, Sulphur Springs claims that Plaintiffs (and others) violated the SWDA because they failed to obtain the appropriate permits for the discharge of stormwater from the Pioneer Crossing Project.[30] In making this claim, Sulphur Springs must necessarily argue that the stormwater from the site was regulated under the TCEQ's Industrial Solid and Municipal Hazardous Waste Rules under 30 Tex. Admin. Code § 335. However, Section 335.1(140)(a)(iv) states that "solid waste" does not include materials excluded by 40 C.F.R. §§ 261.4(a) and that provision excludes industrial wastewater discharges subject to regulation under Section 402 of the Clean Water Act. Indeed, as asserted by Sulphur Springs itself elsewhere in its claims against Plaintiffs, stormwater from large construction sites is industrial wastewater subject to the Section 402 Clean Water Act permit program. The TCEQ has never taken the position of Sulphur Springs

[30] *See* Exhibit D, page 9-12 (Bates Nos. 000180-000183).

at any construction site and it is noteworthy that the State of Texas has recently retracted its support of these claims in the Sulphur Springs' Lawsuit.

109. Sulphur Springs also claims that the stormwater that allegedly entered the sanitary sewer system was likewise a violation of the SWDA. Assuming, *arguendo*, that the stormwater qualified as "solid waste", the SWDA nonetheless contains a "Domestic Sewage Exclusion" which clearly states that once a substance enters a sanitary sewer system, that is part of a POTW, it is no longer qualifies as "solid waste."[31] Once again, The TCEQ has never taken the position of Sulphur Springs at any construction site in the State of Texas.

110. Further, when Sulphur Springs built its own municipal airport, it did not obtain the very same permits for itself that it now claims, in error, Plaintiffs should have obtained. That is additional evidence that Sulphur Springs has greatly exceeded the boundaries of the underlying statutory schemes.

111. In addition, Sulphur Springs claims that SS Seniors, Accent Developers, and Mr. Jooma were also "primary operators" in an effort to seek $25,000/day penalty a day for failure to file timely file a Notice of Intent ("NOI") for over 100 days (totaling $2,500,000) in order to obtain coverage under a stormwater permit from the TCEQ.[32] The State of Texas disagrees with Sulphur Springs on this issue.[33] Instead the State of Texas concluded that SS Seniors, Accent Developers and Mr. Jooma qualify only as "secondary operators." Under the TCEQ penalty policy, the total penalty applicable to Plaintiffs for failure to file an NOI as a secondary operator

[31] TEX. HEALTH & SAFETY CODE § 361.003(34)(A)(i) (the term solid waste "does not include ... solid or dis-solved material in domestic sewage").
[32] *See* Exhibit I, Sulphur Springs' Supplemental Responses to Interrogatories Nos. 8-10 (Bates Nos. 000275-000277).
[33] *See* Exhibit J, State of Texas' Supplemental Responses to Interrogatories Nos. 8-10 (Bates Nos. 000278-000281; Exhibit K, State of Texas Response to Requests for Admissions No. 69 by SS Seniors, LLC, Accent Developers, LLC and Noorallah Jooma (Bates Nos. 000286-000290).

is *de minimis* – instead of $2,500,000 as claimed by Sulphur Springs' contingency-counsel.

112. Finally, in an effort to bring in irrelevant evidence, Sulphur Springs claims that Section 7.053 of the Texas Water Code concerning the "Factors to be Considered in Determination of Penalty Amount" is applicable.[34] The State of Texas disagrees with Sulphur Springs on this issue as well.[35]

113. The selective enforcement referenced above was intentional, invidious, and based on impermissible considerations such as race and religion. Alternatively, the decision to single out the Plaintiffs with these claims was irrational and wholly arbitrary. In effect, an illegitimate animus or ill-will motivated Sulphur Springs to intentionally treat Plaintiffs differently from others similarly situated and no rational basis exists for such treatment.

114. Plaintiffs request that the Court declare that Sulphur Springs' actions in the Sulphur Springs' Lawsuit have amounted to both discriminatory and selective enforcement which are both violations of Plaintiffs' rights secured by the Equal Protection Clause of the Fourteenth Amendment and to enjoin further prosecution by Sulphur Springs against Plaintiffs in the Sulphur Springs' lawsuit.

115. In addition, as a result of Sulphur Springs' conduct, Plaintiffs have sustained damages, including, but not limited to, consequential and compensatory damages, emotional distress, mental anguish, and harm to its reputation, for which they now sue. Furthermore, because Sulphur Springs' conduct involves reckless and callous indifference to Plaintiffs' rights, as well as being motivated by evil motive or intent, Plaintiffs are entitled to punitive damages from Sulphur Springs.

[34] *See* Exhibit L (Bates Nos. 000286-000290).
[35] *See* Exhibit M (Bates Nos. 000291-000293).

VI.
JURY DEMAND

116. Under Rule 38(b) of the Federal Rules of Civil Procedure, Plaintiffs demand a trial by jury on all factual issues raised in this action.

VII.
ATTORNEY'S FEES

117. Plaintiffs have retained counsel to defend itself against the Sulphur Springs' civil penalties enforcement action and to represent them in this action. The controlling substantive law of this case allows for the recovery of attorney's fees, therefore, the Court has the discretion to award costs and attorneys' fees as part of a declaratory judgment. An award of reasonable and necessary attorney's fees to Plaintiffs would be equitable and just under these circumstances.

VII.
REQUEST FOR RELIEF

118. WHEREFORE, Plaintiffs respectfully request that the Court enter judgment in its favor and against Sulphur Springs granting the following relief:

a. Enter a declaratory judgment that Sulphur Springs has violated and is in violation of the CWA, 33 U.S.C. §§ 1311(a) and 1342;

b. Order or Enjoin Sulphur Springs to cease the discharge of pollutants from point sources into waters of the United States without an NPDES Permit WQ0010372001;

c. Order Sulphur Springs to comply with all terms and conditions of coverage under its NPDES Permit WQ0010372001;

d. Order Sulphur Springs to pay civil penalties of up to thirty-seven thousand five hundred dollars ($37,500) per day for each day of each violation of the CWA set out in this Complaint, pursuant to Sections 309(d) and 505(a) of the CWA, 33 U.S.C. § 1319(d) and 1365(a);

e. Award Plaintiff SS Seniors its costs, including reasonable attorney and expert witness fees, as authorized by Section 505(d) of the CWA, 33 U.S.C. § 1365(d);

f. Enter a declaratory judgment that Sulphur Springs' Contingent Fee Contract with outside counsel violates Plaintiffs' constitutional rights to due process;

g. Enter a declaratory judgment that Sulphur Springs' Contingent Fee Contract with outside counsel violates the separation of powers mandate in the Texas Constitution;

h. Enter a declaratory judgment that Sulphur Springs' Contingent Fee Contract with Cantey & Hanger, LLP is in violation of Texas Law and is void;

i. Order or Enjoin Sulphur Springs from employing contingency-fee counsel in violation of Texas Government Code Section 403.0305 and Subchapter C of Chapter 2254, Plaintiffs' constitutional due process rights, and Texas' separation of powers doctrine;

j. Order or Enjoin Sulphur Springs from further prosecution of the Sulphur Springs' Lawsuit, in whole or in part, with contingent-fee counsel;

k. Enter a declaratory judgment that Sulphur Springs' Lawsuit exceed the limits of the authorizing statute;

l. Enter a declaratory judgment that the statutory penalties under Section 7.351 of the Texas Water Code are a form of exemplary damages and since Sulphur Springs has not suffered any actual damages in the Sulphur Springs' Lawsuit, Sulphur Springs should take nothing against the Plaintiffs;

m. Enter a declaratory judgment that Sulphur Springs' actions in the Sulphur Springs' Lawsuit have amounted to both discriminatory and selective enforcement which are both violations of Plaintiffs' rights secured by the Equal Protection Clause of the Fourteenth Amendment;

n. Awarding Plaintiffs its reasonable costs incurred in bringing this action, including attorneys' fees;

o. Awarding Plaintiffs consequential and compensatory damages for emotional distress, mental anguish, and harm to Plaintiffs' reputation;

p. Awarding Plaintiffs' punitive damages, as authorized by 42 U.S.C. § 1983, in an amount reasonable and appropriate; and

q. Awarding such other and further relief as the Court deems just and proper.

WHEREFORE, Plaintiff prays for the relief requested above, for costs, attorneys' fees, and

interest as allowed by law and for general relief.

Respectfully submitted,

GUIDA, SLAVICH & FLORES, P.C.

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ATTORNEY FOR PLAINTIFFS SS SENIORS, LLC, ACCENT DEVELOPERS, LLC AND NOORALLAH JOOMA

49510

EXHIBIT D

Cause No. 2011-76724

HARRIS COUNTY, TEXAS, Plaintiffs, and THE STATE OF TEXAS, acting by and through the TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, a necessary and indispensable party, v. INTERNATIONAL PAPER COMPANY McGINNES INDUSTRIAL MAINTENANCE CORPORATION, WASTE MANAGEMENT, INC. and WASTE MANAGEMENT OF TEXAS, INC., Defendants	§ § § § § § § § § § § § § § § §	IN THE DISTRICT COURT HARRIS COUNTY, TEXAS 295th JUDICIAL DISTRICT

Cause No. 2012-58016

DAO VAN PHO, et al., Plaintiffs, v. INTERNATIONAL PAPER COMPANY, et al., Defendants	§ § § § § § §	IN THE DISTRICT COURT HARRIS COUNTY, TEXAS 125th JUDICIAL DISTRICT

Cause No. 2012-66308

JIM HARPSTER AND JENNIFER HARPSTER, et al., Plaintiffs, v. INTERNATIONAL PAPER COMPANY, et al., Defendants	§ § § § § § § §	IN THE DISTRICT COURT HARRIS COUNTY, TEXAS 11th JUDICIAL DISTRICT

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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY'S RESPONSE TO DEFENDANT INTERNATIONAL PAPER'S SUMMARY-JUDGMENT MOTIONS AGAINST HARRIS COUNTY

The Texas Commission on Environmental Quality ("TCEQ"), a necessary and indispensable party in this matter, asks the Court to deny International Paper's ("IP") July 24, 2014 *Traditional and No-evidence Consolidated Motion for Summary Judgment against Harris County* ("*IP's Consolidated MSJ"), Traditional and No-evidence Motion for Summary Judgment on Specific Elements of Harris County's Statutory Claims* ("*IP's Specific Elements MSJ"),* and *Traditional and No-evidence Motion for Summary Judgment on Causation Against Harris County* ("*IP's Causation MSJ"*) for the reasons set forth below.

I. Relief Requested

1.1. For the reasons stated in *Plaintiff Harris County's Response to Defendant International Paper Co.'s Summary-Judgment Motions* ("*Harris County's Response*") to IP's motions and those set out below, the Court should deny IP's motions for summary judgment.

II. Nature of the Case

2.1. This case is an environmental enforcement case filed by Harris County against several companies who polluted the San Jacinto River. Harris County seeks civil penalties and attorney's fees for the violations. The TCEQ is a statutory necessary and indispensable party plaintiff to Harris County's claims arising under the State environmental laws.

III. Scope of the TCEQ's Response

3.1. Because Harris County filed this lawsuit, the TCEQ expects Harris County to file the primary responses to *IP's Consolidated MSJ, IP's Specific Elements MSJ,* and *IP's Causation MSJ*. This response will address some, but not all, of the factual and legal issues raised in IP's motions for summary judgment and is intended as a complement to *Harris County's Response*.

3.2. In addition, the issues in Part IV-B of *IP's Consolidated MSJ* and Part V-A of *IP's Specific Elements MSJ* raise issues about when the conduct, or failure to act, at issue in this case occurred. Similar issues are raised in Parts III-B and III-C of *MIMC's Traditional Motion for Final Summary Judgment (Statutes Violate Constitutional Prohibition against Ex Post Facto Laws, Retroactivity, and Vagueness*) ("*MIMC's Constitutional MSJ*") and Parts III-E and III-F of *MIMC's Traditional and No-Evidence Motion for Summary Judgment* ("*MIMC's MSJ*"). Because *MIMC's Constitutional MSJ* more directly raises issues regarding the alleged retroactive application of statutes by Harris County, this response will focus more on the factual analysis asserted by Part IV-B of *IP's Consolidated MSJ* and Part V-A of *IP's Specific Elements MSJ*. Legal retroactivity issues will largely be addressed by the TCEQ in a separate response to *MIMC's Constitutional MSJ.*

IV. Summary Judgment Evidence

4.1. The TCEQ attaches the following summary judgment evidence in support of its motion:

Exhibit 1: Excerpt from the Deposition of IP's Corporate Representative.

Exhibit 2: February 10, 1965 Champion Papers, Inc. ("Champion") Memorandum regarding sludge disposal. BEND-003327-003366.

Exhibit 3: April 29, 1965 contract between Champion and Ole Peterson Construction Co. ("Ole Peterson"). MIMC-HC121474-121482. Also Exhibit ("Ex.") 21 to IP's *Unified Evidentiary Submission in Support of its Traditional and No-evidence Consolidated Motion for Summary Judgment, Traditional and No-evidence Motion for Summary Judgment on Causation, and Traditional No-evidence Motion for Summary Judgment on Specific Elements of Harris County's Statutory Claims* ("*IP's Unified Evidentiary Submission"*).

Exhibit 4: September 15, 1965 assignment of contract from Ole Peterson to McGinnes Industrial Maintenance Corporation ("MIMC"). IP0002336-2338. Also Ex. 11 to *IP's Unified Evidentiary Submission*.

Exhibit 5: July 29, 1965 Champion Memorandum regarding additional barges for sludge disposal project. IP0002308.

Exhibit 6: December 28, 1965 letter from Harris County Health Department to MIMC and Champion. IP0394132. Also Ex. 5 to *IP's Unified Evidentiary Submission*.

Exhibit 7: Texas Department of Health Memorandum regarding April 22, 1966 investigation of San Jacinto River Waste Pits. MIMC-HC004021-00402. Also Ex. 6 to *IP's Unified Evidentiary Submission*.

Exhibit 8: 1965 letter from Harris County Health Department to Burma Engineering regarding San Jacinto River Waste Pits. IP0002301. Also Ex. 3 to *IP's Unified Evidentiary Submission*.

Exhibit 9: December 30, 1965 Champion memorandum regarding waste sludge disposal. IP0394129-0394132. Also Ex. 5 to *IP's Unified Evidentiary Submission*.

Exhibit 10: July 14, 1966 Champion Appropriation Request and Authorization for a Major Non-Routine Expense. IP0394057.

Exhibit 11: August 19, 1968 Minutes of Special Meeting of the Board of Directors of McGinnes Industrial Maintenance Corporation. MIMC-00084-00088.

Exhibit 12: April 14, 2005 Letter from Texas Parks and Wildlife to TCEQ. IP0417926-0417939.

Exhibit 13: Unilateral Administrative Order for Remedial Investigation/Feasibility Study. IP0000213-0000239.

Exhibit 14: Report of Texas Licensed State Land Surveyor Nedra J. Foster, October 4, 2013.

Exhibit 15: Report of Texas Licensed State Land Surveyor William E. Merten, August 16, 2013.

Exhibit 16: Report of Dr. John H. Pardue.

Exhibit 17: Excerpts from the deposition of Dr. John H. Pardue.

Exhibit 18: Excerpts from the deposition of the Corporate Representative of Harris County, Dr. John H. Pardue.

Exhibit 19: Report of Dr. Phil Bedient.

Exhibit 20: Excerpts from the deposition of Dr. Phil Bedient.

Exhibit 21: Excerpts from the March 6, 2014 deposition of Dr. Phil Bedient.

The TCEQ also incorporates by reference the exhibits attached to *Harris County's Response*.

V. Statement of Facts

5.1. International Paper is the successor to Champion. Ex. 1 at 58:13-25. Champion's paper-making process at its Pasadena paper mill resulted in the production of waste containing dioxin. *Id.* As set forth in greater detail in Harris County's response to IP's motions for summary judgment, waste at the Pasadena paper mill was increasing, and starting in 1955, Champion began to look for alternate means of disposing the waste. *See Harris County's Response*, Part III, Statement of Facts. In exploring these options, it decided upon a proposal by Burma Engineering to remove paper mill waste from the Pasadena mill and barge the waste to a disposal site on the San Jacinto River. Ex. 2 at BEND-003333.

5.2. Champion entered into a contract with Ole Peterson on April 29, 1965 to remove and dispose of waste from the Pasadena Mill. Ex. 3 at MIMC-HC121474-121482. The contract did not transfer title of the waste to Champion's contractor. *See id.*

5.3. On or around September 15, 1965, the Ole Peterson contract was assigned to MIMC. Ex. 4 at IP0002336-0002338. The assignment required MIMC to comply with all of the terms and conditions of the original Ole Peterson contract. *Id.*

5.4. Several provisions of the original contract are particularly relevant to this motion, including:

a. That the waste be disposed of at a location acceptable to Champion, Ex. 3 at MIMC-HC121474, ¶ 1;

b. That the contractor comply with Champion's operating and safety regulations,

which included a provision that all work be coordinated with and inspected by Champion, *Id.* at MIMC-HC121477-121479, ¶ 7; and,

c. That the contractor secure and keep in effect all required permits and licenses and comply with all applicable Federal, State, and local laws, rules and regulations, *Id*.

5.5. Champion inspected the site where the San Jacinto River Waste Pits were to be located and monitored, supervised, and assisted Ole Peterson and MIMC in the operation of the Pits. For example:

a. On July 29, 1965, Champion issued a memorandum discussing its efforts to find barges for Ole Peterson to carry out the removal and transport of the waste under the contract. Ex. 5 at IP0002308.

b. Champion was included in correspondence with Harris County Health Department ("HCHD") official regarding the location and use of the Pits in 1965. Ex. 6 at IP0394132.

c. Champion attended and participated in a Texas Department of Health inspection of the Pits. Ex. 7 at MIMC-HC0040201-0040215.

5.6. Champion was aware that discharges from the San Jacinto River Waste Pits were prohibited by State law, unless a permit was obtained, and knew that discharges from the Pits were a problem. For example:

a. HCHD notified Burma Engineering that the Pits could be used as a spoil pond for Champion's waste only under the condition that the "waste handling operation should be done in a manner which would not allow any liquid waste to leave the property and escape into the river." Ex. 8 at IP0002301.

b. In a December 28, 1965 letter from a HCHD official to MIMC, copying Champion, HCHD observed that MIMC had been releasing liquid from the San Jacinto River Waste Pits "directly into the San Jacinto River." Ex. 6 at IP0394132. "This liquid waste still contains considerable amounts of 'black liquor,' which is highly toxic to marine life." *Id*. HCHD also informed MIMC and Champion that the dikes around the San Jacinto River Waste Pits needed to be repaired. *Id*.

c. In response to the December 28, 1965 letter, Champion reviewed the release from the San Jacinto River Waste Pits and the status of the levees. Ex. 9 at IP0394129. It recognized that "recent heavy rains had washed away a portion of the outside slope so that the top of the levee had been reduced to about one-half its original

width at two points." *Id*. The Pasadena plant manager also stated that "I am sure that we all realize the sensitive nature of this entire operation and the need for special precaution in connection with the disposal of this waste material." *Id*.

d. On April 22, 1966, the Texas Department of Health inspected the San Jacinto River Waste Pits. Ex. 7 at MIMC-HC004021. Representatives of Champion attended and participated in the inspection. *Id*. At that inspection, the impoundments were leaking, and the inspector noted areas where levee maintenance was required. *Id*. at MIMC-HC004022. TDH also discussed the necessity of obtaining a permit with MIMC and Champion. *Id*. at MIMC-HC004024.

e. In a July 14, 1966 Champion appropriation and authorization request, the Pasadena plant manager recognized that "[b]ecause of the pollution problem, it is impractical to consider further dumping at the present location on the San Jacinto River." Ex. 10 at IP0394057.

5.7. On August 19, 1968, MIMC abandoned the Pits, eliminating it as an asset from the corporate books and reducing its value from $50,000 to $1. Ex. 11 at MIMC-00084-00088.

5.8. IP does not contend that Champion or MIMC ever obtained a permit from the State to allow the release of waste from the San Jacinto River Waste Pits into the San Jacinto River.

5.9. In 2005, Texas Parks and Wildlife notified the TCEQ of the possible presence of an abandoned waste site and source of high levels of dioxin in the San Jacinto River. Ex. 12 at IP0417926. TCEQ, in coordination with the Environmental Protection Agency ("EPA"), investigated the area further. As a result of this investigation, on March 19, 2008, the EPA placed the San Jacinto River Waste Pits on the National Priorities List. 73 Fed. Reg. 14,719, 14,722 (March 19, 2008).

5.10. Aerial photographs of the San Jacinto River taken in 1987, 1989, 1992, 1998, 1999, 2002, 2003, and 2005 show that large portions of the Pits were continually inundated by the San Jacinto River, and that the Pits—filled with contaminated waste—were in direct contact with the river water. Ex. 13 at IP0000217, ¶ 22. Surveyors retained by Waste Management, Inc., Waste Management of Texas, Inc., and MIMC have stated that at least 14 of the 20 acres of the San

Jacinto River Waste Pits site have been submerged below the San Jacinto River since at least 1989. *See, generally*, Ex. 14 and Ex. 15.

5.11. Harris County's experts have testified extensively regarding the daily releases from the Pits. Dr. John H. Pardue testified that there were daily releases from each of the three pits on each day from September 1, 1967 through March 1, 2008. *See, generally*, Ex. 16; Ex. 17 at 228:20-229:4, 252:23-254:11 , and 516:5-516:13; 516:15-516:25; 517:2-517:7; and Ex. 18 at 23:7-23:12. He notes the following mechanisms that allowed dioxins to escape containment from the pits: (1) releases from impoundments; (2) leaching or percolation through the levees surrounding the impoundments; (3) overtopping of levees; (4) advection of water; (5) flooding; and (6) tidal action. *Id*. Dr. Pardue also testified that a portion of the San Jacinto River Waste Pits were submerged beginning in 1989. Ex. 17 at 516:5-516:13; 516:15-516:25; 517:2-517:7.

5.12. Dr. Phil Bedient corroborated Dr. Pardue's testimony. *See, generally*, Ex. 19; Ex. 20 at 41:6-43:9, 57:6-67:17; 67:19-68:8; 68:10-74:16; and 83:3-83:16; and Ex. 21 at 417:4-418:18; 418:21-419:18.

5.13. The testimony of Defendants' experts also shows that waste escaped from the San Jacinto River Waste Pits during the September 1, 1967 through March 1, 2008 period. *See Harris County's Response*, Part III, Statement of Facts.

VI. Argument and Authorities

A. Response to International Paper's Traditional and No-evidence Motion for Summary Judgment on Specific Elements of Harris County's Statutory Claims.

1. International Paper is not entitled to summary judgment on the TSWDA because there was actionable "storage" or "disposal" after the statute was enacted.

(In response to *IP's Specific Elements MSJ*, Part V-A, pages 8-11)

6.1. In Part V-A of *IP's Specific Elements MSJ,* IP urges that Harris County's alleged violations of the Texas Solid Waste Disposal Act ("TSWDA")[1] are not viable because there was no actionable storage or disposal after the statute was enacted. This position relies on an unnecessarily myopic view of what constitutes disposal under the TSWDA. IP does not, nor could it, make a similar argument regarding Harris County's claimed violations under Chapter 26 of the Texas Water Code.

6.2. After examining two Texas criminal cases considering what constituted a knowing or intentional disposal and a host of federal cases and law review articles interpreting "disposal," many of which are in the context of holding interim landowners responsible for clean-up costs (*e.g.* making someone who acquired land after the alleged active disposal occurred responsible for subsequent migration of the historical waste), IP concludes that the mechanisms cited by Harris County in this case, including leaching, seepage, tidal action, flooding, subsidence, and levee breech, are passive movements of waste in the environment without aid of human activity that are legally insufficient to constitute a "disposal." *IP's Specific Elements MSJ* at 14. Stating that it is undisputed that the waste disposal activity that did occur at the San Jacinto River Waste Pits occurred in 1965 – 1966, IP concludes that all subsequent "disposals" that occurred must be passive disposals that are outside of the scope of 30 Tex. Admin. Code § 335.4. *Id.* The

[1] The actual violation is of the administrative rule 30 Tex Admin. Code § 335.4.

argument that Harris County's 30 Tex. Admin. Code § 335.4 claim (also referred to by IP as a TSWDA claim) is premised on the incorrect beliefs that all of the disposals therefore occurred before the November 25, 1975 effective date of the rule, and that proof of a disposal is a required element of Harris County's cause of action.

6.3. IP's position, however, is undermined by the TCEQ's own interpretation of its regulation and the context in which it is applied in civil enforcement, as opposed to criminal enforcement or the federal Comprehensive Environmental Response and Clean-up Liability Act, 42 U.S.C. §§9601, *et seq*. ("CERCLA"). *IP's Specific Elements MSJ* completely ignores the TCEQ's interpretation of 30 Tex. Admin. Code § 335.4 and glosses over the contextual differences in the application of the rule (or statutes containing similar language) in the cases it cites.

6.4. Before embarking on a more detailed analysis of the shortcomings of IP's arguments, however, it may be helpful to note that when referring to "passive" migration or "passive" disposal, cases may use the term to address two distinct concepts: (1) the movement through soil or groundwater of waste previously disposed of, such as leaching, or (2) the on-going spill or release of materials from a confining vessel or impoundment without further human activity, *e.g*. new or on-going leaks from an impoundment in which waste had been historically disposed. Where this distinction is relevant to the discussion, the TCEQ will refer generally to the former as "passive leaching" and the latter as "passive leaking." Many of the mechanisms described in this case, flooding, tidal action, levee breach, and subsidence, are in the nature of "passive leaking" involving the on-going escape or removal of waste from confinements (the San Jacinto River Waste Pits) rather than mere seepage of previously disposed of waste through soil or water.

a. The TCEQ has interpreted disposal under 30 Tex. Admin. Code § 335.4 to include passive migration.

6.5. On legal issues involving statutory construction, an agency's construction of a statute that it is charged with enforcing should be given deference, so long as the interpretation is reasonable and does not contradict the plain language of the statute. *Stanford v. Butler*, 142 Tex. 692, 700, 181 S.W.2d 269, 273 (1944); *Borden, Inc. v. Sharp*, 888 S.W.2d 614, 620 (Tex. App. – Austin 1994, writ denied). "[I]f the statute can reasonably be read as the agency has ruled, and that reading is in harmony with the rest of the statute, then the court is bound to accept that interpretation even if other reasonable interpretations exist." *City of Plano v. Public Utility Comm'n*, 953 S.W.2d 416, 421 (Tex. App. – Austin 1997, no writ).

6.6. An agency's interpretation of its rules is controlling unless it is plainly erroneous or inconsistent with the language of the rules. *Cont'l Cas. Co. v. Rivera*, 124 S.W.3d 705, 710 (Tex. App. – Austin 2003, pet. denied); *H.G. Sledge, Inc. v. Prospective Inv. & Trading Co.*, 36 S.W.3d 597, 604 (Tex. App.–Austin 2000, pet. denied). A court should accept the agency's reasonable interpretation, even if another reasonable interpretation exists. *Gene Hamon Ford, Inc. v. David McDavid Nissan, Inc.*, 997 S.W.2d 298, 305 (Tex. App. – Austin 1999, pet. denied). That is especially true when the agency has special, relevant expertise. *Berry v. State Farm Mut. Ins. Co.*, 9 S.W.3d 884, 890 (Tex. App. – Austin 2000, no pet.); *see also Phillips Petroleum Co. v. Tex. Comm'n on Envtl. Quality*, 121 S.W. 3d 502, 507 (Tex. App. – Austin 2003, no pet.) ("We recognize that the Legislature intends an agency created to centralize expertise in a certain regulatory area 'be given a large degree of latitude in the methods it uses to accomplish its regulatory function.'"). "[T]he agency interpretation becomes a part of the rule itself and represents the view of a regulatory body that must deal with the practicalities of administering the

rule." *McMillan v. Tex. Nat. Res. Conservation Comm'n*, 983 S.W.2d 359, 362 (Tex. App.–Austin 1998, pet. denied). A court should "determine whether an agency's decision is based on a permissible interpretation of its statutory scheme" and affirm the agency's interpretation unless the agency abused its discretion. *Phillips Petroleum Co.*, 121 S.W.3d at 508; *North Alamo Water Supply Corp. v. Tex. Dep't of Health*, 839 S.W.2d 448, 454-55 (Tex. App.–Austin 1992, writ denied).

6.7. In an *Interim Order concerning the Petition of the Executive Director against Fina Oil and Chemical Company and Fina Pipeline Company, and responding to the Administrative Law Judge's submission of six certified questions*; SOAH Docket No. 582-95-1044; TNRCC Docket No. 95-1004-ISW-E (November 22, 1999) ("Interim Order"),[2] the TCEQ (at the time the Texas Natural Resource Conservation Commission) expressly resolved the question whether passive migration constitutes disposal under 30 Tex. Admin. Code § 335.4:

> "Disposal," as defined in Commission Rule 335.1, and as applied to create liabilities under Commission Rule 335.4, is not limited to the initial release of waste, but includes the subsequent movement of underground contaminants.

Interim Order at 1.

But the TCEQ went further and noted that:

> The Commission has the legal authority to impose administrative penalties against Fina Oil and Fina Pipe for violations of Water Code Section 26.121 and Commission Rule 335.4, regardless of the time the contamination was originally released into the environment. The terms "discharge" and "disposal" include the passive migration and seepage of contamination through the soil and groundwater. The initial release is not the only act that constitutes a violation of the statute and the Rule.

Id.

[2] A copy of this order is attached to this motion as Attachment 1.

6.8. The TCEQ has considered the very issue raised by *IP's Specific Elements MSJ* and reached a conclusion contrary to the position urged by IP in this case. As the agency responsible for administering the TSWDA and authoring 30 Tex. Admin. Code § 335.4, the TCEQ's interpretation is controlling in resolving the issue.

6.9. IP says that 30 Tex. Admin. Code § 335.4 does not include passive migration as a disposal. The TCEQ says it does. The TCEQ's interpretation controls, and, because the summary judgment evidence shows that there is evidence of passive migration occurring on and after September 25, 1975, *IP's Specific Elements MSJ* fails.

b. <u>The use of "suffer, allow, or permit" in 30 Tex. Admin. Code § 335.4 clearly includes passive omissions, not just active conduct</u>.

6.10. 30 Tex. Admin. Code § 335.4 expressly provides:

> [N]o person may cause, suffer, allow, or permit the collection, handling, storage, processing, or disposal of industrial solid waste or municipal hazardous waste in such a manner so as to cause: (1) the discharge or imminent threat of discharge of industrial solid waste or municipal hazardous waste into or adjacent to the waters in the state without obtaining specific authorization for such a discharge from the Texas Natural Resource Conservation Commission; (2) the creation and maintenance of a nuisance; or (3) the endangerment of the public health and welfare.

6.11. IP focuses on the term "disposal," which it concludes cannot be construed passively, while ignoring the language preceding that term.[3] The predicate for the violation is a person causing, ***suffering, allowing, or permitting*** a disposal that implicates one of the three conditions of 30 Tex. Admin. Code § 335.4 (emphasis added). The highlighted terms are passive

[3] IP argues that Harris County alleges that IP stored or disposed of the waste at the San Jacinto River Waste Pits and storage is a temporary condition inapplicable in this case. Thus, IP concludes that the only issue in this case is that of "disposal." 30 Tex. Admin. Code § 335.4 is broader and also encompasses the collection, handling, and processing of such waste in addition to storage and disposal. The TCEQ will not speculate whether Harris County intended to include those forms of waste management in *Plaintiff Harris County's Third Amended Petition* or whether IP would assert that such terms also require active conduct.

in nature including inaction or omission as a form of a violator's malfeasance. This language undermines that a disposal under the TSWDA requires human activity – the express words also embrace human inactivity.

6.12. Although there is not much jurisprudence interpreting the phrase "cause, suffer, allow or permit," at least one court has considered the meaning of "allow" in the context of a criminal discharge under Tex. Water Code § 7.147. "The term 'allow' is not defined by statute; therefore, we must interpret the term in accordance with its plain meaning and ordinary usage. *See Sanchez v. State,* 995 S.W.2d 677, 683 (Tex.Crim.App.1999) (citing *Boykin v. State,* 818 S.W.2d 782, 785–86 & 786 n.4 (Tex.Crim.App.1991)). The plain meaning of 'allow' is 'to let do or happen; permit' AMERICAN HERITAGE DICTIONARY (4th ed.2000); *see State v. Guevara*, 110 S.W.3d 178, 180–81 (Tex.App.-San Antonio 2003), *rev'd* 137 S.W.3d 55 (Tex.Crim.App.2004) (stating commonly used meaning of 'to allow' is to 'neglect to restrain or prevent')." *Valero Refining-Texas L.P. v. State,* 203 S.W.3d 556, 562 (Tex. App. – Houston [14th Dist.]2006, no pet.).

c. <u>At a minimum, disposal under 30 Tex. Admin. Code § 335.4 in the civil enforcement context includes passive leaking.</u>

6.13. The cases and law review articles cited by IP are all based on comparing the similarity of the definition of "disposal" in the TSWDA, Tex. Health and Safety Code § 361.003(7),[4] and 30 Tex. Admin. Code 335.1(44),[5] with the definitions found in CERCLA, 42

[4] "Disposal" means the discharging, depositing, injecting, dumping, spilling, leaking, or placing of solid waste or hazardous waste, whether containerized or uncontainerized, into or on land or water so that the solid waste or hazardous waste or any constituent thereof may be emitted into the air, discharged into surface water or groundwater, or introduced into the environment in any other manner.

[5] Disposal--The discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste (whether containerized or uncontainerized) into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or

U.S.C. § 9601(29),[6] and the Resource Conservation and Recovery Act ("RCRA" and sometimes referred to as the federal Solid Waste Disposal Act).[7] Although these definitions are not identical, they are sufficiently similar that two Texas courts cited by IP have referred to the CERCLA and RCRA definitions.

d. <u>The Texas cases support passive leaking as disposal in a civil setting</u>.

6.14. In *IP's Specific Elements MSJ* p. 12, IP cites to *L. B. Foster Co. v. State*, 106 S.W.3d 194, 202 (Tex. App. – Houston [1st] Dist. 2003, pet. ref'd), a criminal case, as rejecting the concept that the TSWDA definition of "disposal" includes the passive migration of hazardous waste through the soil.[8] However, the *L. B. Foster Co*. case is not only distinguishable, but also contains language suggesting that "disposal" is not limited to the original, active disposal and could include passive migration. The language of the case opened the door to a different result in a civil enforcement proceeding. The court noted that the issue was whether a person commits an offense if:

> [A]cting intentionally or knowingly with respect to the person's conduct, disposes of, or causes to be disposed of, any hazardous waste without all permits required by the appropriate regulatory agency. Tex. Water Code Ann. § 7.162(a)(2). To determine whether L.B. Foster can be held criminally liable for a passive disposal, we must determine whether the meaning of "disposed of," as found in Water Code subsection 7.162(a)(2), includes the concept of passive disposal, or whether "disposed of" requires active human conduct. This is an issue of first impression in this State.

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discharged into any waters, including groundwaters.

[6] The terms "disposal", "hazardous waste", and "treatment" shall have the meaning provided in section 1004 of the Solid Waste Disposal Act [42 U.S.C.A. § 6903].

[7] The term "disposal" means the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters. 42 U.S.C.A. § 6903(3).

[8] The *L. B. Foster Co*. court addressed the issue of the passive leaching form of passive migration as a means to prove a continuing violation to avoid a criminal limitations issue.

Id. at 202.

After a lengthy discussion of the Code Construction Act along with various definitions of "disposal" in the TSWDA, CERCLA, and RCRA, the court concluded:

> Although we recognize that conduct is defined in the Penal Code as an act *or omission* with the accompanying mental state, the offense set forth in Water Code subsection 7.162(a)(2) is one of commission, not omission. Thus, reading "disposed of" in the context of subsection 7.162(a)(2) shows a legislative intent to require affirmative human conduct. Such a reading precludes interpreting "disposed of" to include passive disposal.

Id. at 205 (emphasis in original) (footnotes omitted).

6.15. Thus, the determination in *L. B. Foster Co.* is limited to the context of a criminal proceeding where an act of commission, not omission, is the basis for liability.[9] The case at bar is not only a civil, rather than criminal, enforcement case, but also involves a rule that expressly includes acts of omission in the list of prohibited conduct.

6.16. And there are even further statements in *L. B. Foster Co.* demonstrating that the court considered the ruling as limited to a criminal setting on the limitations issue and may have reached a different result in the civil context. Consider the following matters raised by the court:

> [W]e find the federal CERCLA cases provide minimal assistance in determining whether a passive disposal can form the basis for criminal liability under Water Code subsection 7.162(a)(2). CERCLA cases discussing the concept of passive disposal involve the civil liability of the suspected polluter, while we are charged with determining whether a passive disposal of hazardous waste can support a criminal conviction. CERCLA is a strict-liability statute, while criminal liability under Water Code section 7.162 requires an intentional or knowing mental state. Significantly, none of the CERCLA cases discussing passive disposal do so in conjunction with a statute of limitations issue.

Id. at 206.

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[9] *See L. B. Foster Co.*, 106 S.W.3d at 207 ("We conclude that, ***for purposes of criminal prosecutions*** under Water Code subsections 7.162(a)(2), the term 'disposal' does not include the passive disposal of hazardous wastes.") (emphasis added).

6.17. After noting that most of the words in the definition of "disposal" in the TSWDA are active verbs that are set in motion by affirmative human conduct, the court segregated out the term "leaking" (also used in the definition) for separate discussion:

> ***Though "leaking" may occur without human action,*** it does not describe passive migration of hazardous waste through the soil. *See* Webster's New Collegiate Dictionary 648, (1981) (defining "leak" as, *inter alia*, "to enter or escape through an opening. . . ." One would never properly say that a hazardous waste is "leaking" through the soil. ***Rather, a hazardous waste leaks from some form of containment.***

Id. at 204 (emphasis added).

6.18. Most significantly, however, is footnote 11 of the court's opinion in which it expressly states that "[t]his is not to say that intentionally or knowingly allowing a hazardous waste to leak or otherwise escape from some form of containment would not be a disposal for which a defendant could be prosecuted." *Id*. at 205, n.11. The court clearly noted that it might even consider "passive" leaking to be a criminal violation if it was intentional or knowing. Of course, in the civil context, the standard is not intentional or knowing, but rather "causing, suffering, allowing, or permitting" – the very conduct Harris County has accused IP of in this case.

6.19. In *IP's Specific Elements MSJ* p. 12 - 13, IP cites to another Texas case, *Slott v. State*, 148 S.W.3d 624 (Tex. App. – Houston [14th Dist.] 2005, pet ref'd.). As with the *L. B. Foster Co*. case, the court conducted a very similar analysis in addressing whether the passive leaching in a criminal case could avoid a limitations issue regarding the initial disposal of hazardous waste. *Slott* at 628. Once again, the court distinguished the federal CERCLA and RCRA cases because they involved the civil liability of polluters. *Id*. at 629.

6.20. Of particular significance is footnote 6 of the *Slott* opinion in which the court discusses an unreported Ohio criminal case holding the continued leaking of the drums constituted the continuing offense of disposal of hazardous waste (*State v. Brothers,* No.2000–T–0085, 2001 WL 1602692, at *1 (Ohio App. 11 Dist. Dec.14, 2001)). The *Slott* court distinguishes the case noting that "[t]he disposal of the sand in this case [*Slott*] was a discrete event. The court in *L.B. Foster* specifically noted that intentionally or knowingly allowing a hazardous waste to leak or otherwise escape from some form of containment could be considered a disposal for which a defendant could be prosecuted. *L.B. Foster Co.,* 106 S.W.3d at 205 n. 11." *Id*. at 629, n.6.

6.21. Thus, even under the heightened standards of criminal law, the *L. B. Foster Co*. and the *Slott* courts acknowledged that allowing waste to leak from containment could give rise to liability. Here, liability is imposed not for "knowing and intentional" conduct but rather when Defendants "cause, suffer, allow, or permit." Harris County alleges, and has offered proof that, these later disposal events occurred from November 25, 1975 to March 2008 on a daily basis. *See generally, Harris County's Response,* Part III, Statement of Facts. *See also,* Ex. 13 at IP0000217, ¶ 22; Ex. 14; Ex. 15; Ex. 16; Ex. 17 at 32-40, 50-51, 60, 228:20-229:4, 252:23-254:11, and 516:5-516:13; 516:15-516:25; 517:2-517:7; Ex. 18 at 23:7-23:12; Ex. 19; Ex. 20 at 41:6-43:9, 57:6-67:17; 67:19-68:8; 68:10-74:16,; 83:3-83:16, and 88; and Ex. 21 at 417:4-418:18; 418:21-419:18.

e. <u>CERCLA and RCRA cases provide little guidance</u>.

6.22. Both the *L. B. Foster Co*. and *Slott* courts dismissed the CERCLA and RCRA guidance as being of little help because the federal cases involved civil liability. Although the case at bar is a civil enforcement case, it is still fundamentally different than the CERCLA and RCRA cases.

6.23. First, neither CERCLA nor RCRA enforcement provisions include the passive, omission or inactivity terms "suffer, allow, or permit" as does 30 Tex. Admin. Code § 335.4. Rather, CERCLA and RCRA enforcement provisions speak in terms of violations. CERCLA, 42 U.S.C. § 9609; RCRA, 42 U.S.C. § 6928. Moreover, many, if not most, of the CERCLA cases involve an issue about imposing liability for clean-up costs on a person who once owned the property but did not actively dispose of waste on the property, did not arrange for disposal of the waste, did not transport the waste to the site, and is not the current owner.[10] For simplicity, the TCEQ will refer to this status as an "interim owner" of the site. The CERCLA litigation has

[10] CERCLA liability is imposed on what are normally referred to as responsible parties as set forth below:

> Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section--
>
> (1) the owner and operator of a vessel or a facility,
>
> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
>
> (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and
>
> (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for--
>
> (A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;
>
> (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;
>
> (C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and
>
> (D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.
>
> The amounts recoverable in an action under this section shall include interest on the amounts recoverable under subparagraphs (A) through (D). Such interest shall accrue from the later of (i) the date payment of a specified amount is demanded in writing, or (ii) the date of the expenditure concerned. The rate of interest on the outstanding unpaid balance of the amounts recoverable under this section shall be the same rate as is specified for interest on investments of the Hazardous Substance Superfund established under subchapter A of chapter 98 of Title 26. For purposes of applying such amendments to interest under this subsection, the term "comparable maturity" shall be determined with reference to the date on which interest accruing under this subsection commences. 42 U.S.C.A. § 9607(a).

centered on whether CERCLA clean-up liability can be predicated solely on the basis of ownership during a time of the passive migration of hazardous wastes at the site, both in context of passive leaching and passive leaking, when the interim owner did not conduct the initial disposal or have any other connection to the hazardous waste on site (unlike IP in this case). There is a CERCLA "innocent landowner" defense that interplays with the liability of an interim owner of a site.

6.24. Even among the federal cases, some courts have found that passive migration may or may not form the basis for a disposal. The Ninth Circuit discussed the differing approaches of the various circuits (referring to many of the cases cited in *IP's Specific Elements MSJ*):

> In sum, although all of the cases reference the active/passive distinction in some manner, there is no clear dichotomy among the cases that have interpreted "disposal." Rather, the cases fall in a continuum, with the Sixth Circuit taking an "active-only" approach in *150 Acres of Land;* the Third Circuit, in *CDMG Realty,* and the Second Circuit, in *ABB Industrial Systems,* addressing only the spread of contamination (and leaving open whether migration must always be "active" to be a "disposal"); and, finally, the Fourth Circuit in *Nurad,* concluding that "disposal" includes passive migration, at least in the context of leaking underground storage tanks.

Carson Harbor Vill., Ltd. v. Unocal Corp., 270 F.3d 863, 876-77 (9th Cir. 2001)

The *Carson Harbor* court ultimately decided that the "plain meaning" approach to CERCLA was that the passive migration of contaminants through soil during the interim owners' ownership was not a "disposal" under CERCLA. *Id*. at 887.

6.25. Yet, in doing so, it declined to conclude that all passive migration would fail to meet the meaning of disposal:

> Examining the facts of this case, we hold that the gradual passive migration of contamination through the soil that allegedly took place during the Partnership Defendants' ownership was not a "discharge, deposit, injection, dumping, spilling, leaking, or placing" and, therefore, was not a "disposal" within the meaning of § 9607(a)(2). . . . If we try to characterize this passive soil migration in plain

> English, a number of words come to mind, including gradual "spreading," "migration," "seeping," "oozing," and possibly "leaching." But certainly none of those words fits within the plain and common meaning of "discharge, . . . injection, dumping, . . . or placing." 42 U.S.C. § 6903(3). Although these words generally connote active conduct, even if we were to infuse passive meanings, these words simply do not describe the passive migration that occurred here. Nor can the gradual spread here be characterized as a "deposit," because there was neither a deposit by someone, nor does the term deposit encompass the gradual spread of contaminants. The term "spilling" is likewise inapposite. Nothing spilled out of or over anything. Unlike the spilling of a barrel or the spilling over of a holding pond, movement of the tar-like and slag materials was not a spill.

Id. at 879 (footnote omitted).

The court continued and declined to hold that disposal always requires active conduct:

> In adopting this plain meaning construction, we are mindful that the statute will be applied in a myriad of circumstances, many of which we cannot predict today. And although most of the terms generally connote active conduct, we agree with the Third Circuit that, for example, "'leaking' and 'spilling' may not require affirmative human conduct, [although] neither word denotes the gradual spreading of contamination alleged here." *CDMG Realty*, 96 F.3d at 714. This approach does not rule out the scenario in which "spilling," "leaking," or perhaps other terms in some circumstances, encompasses passive migration. As discussed below, this approach is consistent with the purpose of CERCLA.

Id. at 880.

6.26. Contrary to IP's contention, it is far from certain that, even under CERCLA and even in the context of interim owners, "disposal" can never include forms of passive migration. Yet, in this case, we address clearly different language more directly supporting the application of disposal to passive context, "suffer, allow or permit," and a TCEQ interpretation of its own rule indicating that passive migration is a disposal under 30 Tex. Admin. Code § 335.4. In a civil enforcement context of 30 Tex. Admin. Code § 335.4 in a Texas court, disposal can be accomplished by passive migration. There is no reason to look beyond the TCEQ interpretation. Furthermore, the two Texas cases addressing the issue are not inconsistent with the TCEQ interpretation (at least with regard to passive leaking).

2. Harris County has evidence upon which the jury can conclude that IP discharged dioxin into or adjacent to the waters of the state continuously from 1967 to 2008.
(In response to *IP's Specific Elements MSJ*, Part V-C, pages 26-28)

6.27. As stated previously, Harris County's evidence establishes seven potential mechanisms by which dioxin entered the San Jacinto River from the San Jacinto Waste Pits: (1) releases from the Pits; (2) leaching or percolation through the levees surrounding the Pits; (3) overtopping of levees; (4) advection of water; (5) flooding; (6) tidal action; and (7) subsidence. Ex. 16; Ex. 17 at 32-40, 50-51, 60, 228:20-229:4, 252:23-254:11, and 516:5-516:13; 516:15-516:25; 517:2-517:7; and Ex. 18 at 23:7-23:12. Harris County has evidence spanning more than four decades that — by and through these mechanisms — IP generated contaminated wastewater and sludge containing dioxin and suffered, allowed, or permitted the discharge of that toxic sludge into the San Jacinto River in violation of the Texas Water Code. IP appears to suggest that Harris County must present direct observational evidence of a discharge on **every single day** of alleged violation, but Harris County does not have to meet this standard for the jury to find sufficient evidence for a continuing violation. Moreover, Harris County's case does not rise or fall on whether it can prove a violation for every single day. If Harris County presents evidence of violations throughout the time period, there is a fact issue for the jury.

a. Harris County does not have to present direct evidence of a discharge on each day that it seeks a continuing violation.

6.28. The landmark case *State v. City of Greenville* establishes that a jury can find continued violation based on observations that occurred on some, but not all, of the days alleged in a petition. 726 S.W.2d 162, 167 (Tex. App.—Dallas 1986, writ ref'd n.r.e.). In *City of Greenville*, the State alleged that the City violated the TSWDA by permitting solid waste to be deposited at a site without providing adequate final cover. The State alleged 1,419 days of violation. For its

evidence, the State put on an investigator who had inspected the site 11 times over the course of four years. Even though the State did not have investigations for every single day of the 1,419 days it alleged, the court held that there was sufficient evidence to prove each day of violation.

6.29. IP cites *Fan-Reed, Inc. v. Upper Neches, City of Galveston v. State,* and *United States v. SCM Corp.* to support its argument that Harris County must submit specific evidence for every alleged day of violation. None of these cases support that conclusion. In *Fan-Reed,* the court upheld a temporary injunction, because the evidence supported a finding that the appellant had violated the Texas Water Code. The court upheld the injunction, finding that "[w]here the record discloses that violations were occurring and continuing up to or near the date of trial, the trial court may conclude that the same course of conduct may continue in the future." *Fan-Reed, Inc. v. Upper Neches River Mun. Water Auth.*, 651 S.W.2d 356, 359 (Tex. App.—Tyler 1983, no writ) (citing *State of Texas v. Texas Pet Foods, Inc.*, 591 S.W.2d 800, 804 (Tex. 1980)). Contrary to IP's interpretation, the *Fan-Reed* court set no standard for the amount of evidence required to allege a continuing violation — if anything, it made clear that a jury can find a continuing violation based on the weight of the evidence. *Id.* Here, Harris County has evidence that waste was placed in the San Jacinto River Waste Pits in the mid-1960's and that, over the intervening years, through releases from the Pits, leaching or percolation through the levees surrounding the Pits, overtopping of levees, advection of water, flooding, tidal action, and subsidence, that material left its containment (the San Jacinto River Waste Pits) and entered the San Jacinto River. Ex. 16; Ex. 17 at 228:20-229:4, 252:23-254:11, 516:5-516:13, 516:15-516:25, and 517:2-517:7; and Ex. 18 at 23:7-23:12.

6.30. Likewise, in *City of Galveston v. State*, the court held that a jury's conclusion that a discharge occurred continuously for 23 days was "not contrary to the great weight and

preponderance of the evidence." *City of Galveston v. State,* 518 S.W.2d 413, 417 (Tex. Civ. App.—Houston [14th Dist.] 1975, no writ). Again, this court's holding does nothing to support IP's position. On the contrary, the court supports the jury's finding based on the weight of the evidence, which includes expert testimony of daily violations. Here, Harris County has presented expert testimony supporting its allegations. *See generally, Harris County's Response,* Part III, Statement of Facts. *See also,* Ex. 13 at IP0000217, ¶ 22; Ex. 14; Ex. 15; Ex. 16; Ex. 17 at, 228:20-229:4, 252:23-254:11, 516:5-516:13, 516:15-516:25, 517:2-517:7; Ex. 18 at 23:7-23:12; Ex. 19; Ex. 20 at 41:6-43:9, 57:6-67:17; 67:19-68:8, 68:10-74:16, and 83:3-83:16; and Ex. 21 at 417:4-418:18 and 418:21-419:18.

6.31. Lastly, IP cites a Clean Air Act case, *United States v. SCM Corp.* 667 F. Supp. 1110 (D. Md. 1987). SCM involved violations of the Clean Air Act for emissions from a kiln that exceeded permit limits. *SCM,* 667 F. Supp. at 1123-24. EPA produced evidence of test results at various intervals indicating violations of the permit on specific days, but did not have daily evidence of excess emissions. *Id.* The court held that EPA must produce evidence of an excess emission on each day. *Id.*at 1124.

6.32. This case is distinguishable. In *SCM,* any number of factors could have affected the amount of emissions on a day-to-day basis. If the plant was not operating or operating at a reduced capacity, SCM may not have exceeded emissions limits on certain days. In this case, Harris County is not required to show that a certain amount of material has been discharged on each day. It need only provide evidence that discharges occurred, and it has made this showing. It is undisputed that waste was initially deposited in the Pits in the 1960's and that some of it is still present there today. Harris County has presented expert testimony that waste was discharged from the Pits through such daily forces as leaching and tidal action. Ex. 16; Ex. 17 at

228:20-229:4, 252:23-254:11, 516:5-516:13, 516:15-516:25, and 517:2-517:7; and Ex. 18 at 23:7-23:12. This is sufficient to raise a fact issue for the jury.

6.33. Under the true standard for continuous violations established in C*ity of Greenville*, Harris County's evidence sufficiently raises a fact issue for the jury that waste was discharged into or adjacent to the San Jacinto River on a daily basis from at least September 1, 1967, to March 2008. Therefore, *IP's Specific Elements MSJ* should be denied.

B. Response to International Paper's Traditional and No-Evidence Consolidated Motion for Summary Judgment Against Harris County.

1. Harris County's suit does not exceed the limits of the authorizing statute.

(In response to *IP's Consolidated MSJ*, Part IV-A, pages 11-17)

a. Tex. Water Code section § 7.351 gives local governments the authority to institute a suit using the same Subchapter D procedures that the TCEQ uses.

6.34. Texas Water Code Chapter 7, Subchapter H, gives local governments like Harris County the authority to bring a civil suit for violations of certain statutory and regulatory provisions under TCEQ's jurisdiction if the TCEQ could bring the same suit. Pursuant to Tex. Water Code § 7.351, local governments may "institute a civil suit under [Water Code Chapter 7,] Subchapter D in the same manner as the commission. . . .". The whole of Subchapter H (*id.* §§ 7.351-7.358) is a procedural mechanism that allows local governments to bring suit for civil penalties, injunctive relief, or both when the TCEQ has not already conducted administrative or civil enforcement.[11]

6.35. Subchapter D prescribes the manner in which the TCEQ (and, for certain violations, Texas Parks and Wildlife Department) may institute civil actions against persons who

[11] For example, Tex. Water Code § 7.068 precludes enforcement of a violation for which an administrative penalty has been assessed and paid.

have caused, suffered, allowed or permitted the violation of any statute, rule or order under TCEQ's jurisdiction. That subchapter sets a civil penalty range for infractions (i*d.* §§ 7.102, 7.103); authorizes suits for civil penalties, injunctive relief, or both (*id.* § 7.105); provides for the award of attorney's fees (i*d.* § 7.108); and contains provisions regarding jurisdiction and venue and public notice for settlements (*id.* §§ 7.105(c), jurisdiction and venue and 7.110, public notice).

6.36. TCEQ is an agency with statewide jurisdiction and limited resources. It must prioritize based on the needs of the entire state. As a result, a top priority for a local government may necessarily be a lower priority for the TCEQ when compared to the many issues it is addressing across the state. This statutory scheme allows local governments to fill gaps in enforcement that may result from TCEQ's limited resources.

6.37. In constructing this statutory scheme, the Legislature also recognized that parties to these suits may advance positions or arguments that could adversely impact TCEQ's statewide enforcement. As a result, TCEQ is a necessary party in local-government civil enforcement suits, so that the TCEQ, rather than defendants, may raise matters that may negatively impact future state enforcement directly with the court.

b. <u>TCEQ's interpretation of Tex. Water Code § 7.351 is reasonable and gives full effect to the plain language of the statute</u>.

6.38. TCEQ's interpretation gives full effect to the language of the statute. The "same manner as the commission" language allows local governments to institute a suit using the same procedures set out for the TCEQ in Subchapter D. This is a natural reading of the statute. Moreover, it does not render the phrase surplusage, as IP urges. For example, Subchapter D also sets forth an additional cause of action for Texas Parks and Wildlife Department. Tex. Water Code § 7.109(b) (creating a cause of action for Texas Parks and Wildlife Department to recover

damages for injuries to aquatic life or wildlife resulting violations of Tex. Water Code § 26.121). By limiting Subchapter D to "the same manner as the commission," the Legislature has excluded local governments from the additional relief set out for Texas Parks and Wildlife Department and directed local governments on the correct procedural manner to institute their suits.

c. <u>By contrast, International Paper's interpretation leads to absurd results</u>.

6.39. IP's interpretation makes it impossible for a local government to bring suit, because no one can definitively prove what TCEQ would have done in any particular case. There are a variety of factors that the TCEQ (or any other potential litigant, for that matter) might evaluate in determining whether, when, and how to file suit.[12] But these decisions are TCEQ's core work product. Therefore, IP has set up an impossible standard of proof for local governments, requiring them to show what TCEQ would have done in the case and why without the benefit of any evidence concerning that decision.

6.40. In reality, all anyone can reasonably show, without delving into the agency's protected work product and attorney-client privileged communications, is that TCEQ did not bring civil suit for the violations in this case, a fact that the entire statutory scheme allowing local governments to institute enforcement cases contemplates. If the Legislature meant for local governments to participate only in suits of local interest that TCEQ had already initiated, it would have provided local governments with the ability to intervene in, rather than institute, suits.

[12] *See State v. Malone Service Co,.* 829 S.W.2d 763, 767 (Tex. 1992) ("[A]n agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and indeed, whether the agency has enough resources to undertake the action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing." citing *Heckler v. Chaney*, 470 U.S. 821, 831 (1985)).

6.41. IP's interpretation also subjects the TCEQ to continuous litigation and examination of its administrative enforcement actions and civil suits.[13] Under IP's theory, a local government cannot bring a suit for a violation or a set of violations unless TCEQ at some point in its past has brought the same violation or set of violations. Setting aside the fact that there are entirely reasonable – and permissible – reasons to bring an "unprecedented" lawsuit,[14] this position would require the TCEQ and other parties to the litigation to review not only every case TCEQ has ever brought but every case it decided not to bring so that those past cases and potential cases could be compared to the current litigation. This would result in incredibly burdensome discovery obligations for the TCEQ and cannot be the intent of Subchapter H.

6.42. Finally, IP's interpretation allows defendants in local government actions to question and opine on the decisions and enforcement positions of the TCEQ. However Tex. Water Code § 7.353 is there to prevent such examination. Under that provision, the TCEQ is made a necessary and indispensable party so that it can ensure coordination and consistency in the interpretation and application of state laws. The TCEQ, as a necessary party in this case, is best situated to let the Court know when the local government's suit may adversely impact state environmental enforcement.

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[13] IP says that TCEQ has never brought a suit like this before so it would never bring a suit like this. Not only is its contention entirely unsupported, it is a logical fallacy. An equally plausible explanation may be that it had never faced a potential case like this one before.

[14] IP's position assumes that statutes must be uniformly enforced, but there are legitimate reasons that this may not be the case. Courts have held that selective enforcement is proper when the case is high-profile and may deter other violations, *Overhead Door Corp. v. Sharp*, 970 S.W.2d 74, 81 (Tex. App. – Austin 1998, no pet.); when the enforcement tests the meaning or constitutionality of a law that is in doubt, *People v. Utica Daw's Drug Co.*, 16 A.D. 2d 12, 21 (N.Y. App. Div. 1962); or when limited resources preclude total enforcement, *U.S. v. Tibbetts*, 646 F.2d 193 (5th Cir. 1983), *Kim-Stan, Inc. v. Department of Waste Management*, 732 F. Supp. 646 (E.D. Va. 1990).

d. Tex. Water Code § 7.105 provides broad authority to initiate civil suit.

6.43. Tex. Water Code § 7.105 provides broad authority for the TCEQ to institute civil suit for violations of environmental laws. Section 7.105(a) sets forth the general authority for the TCEQ to refer any environmental matter to the Attorney General for enforcement. It states "[o]n the request of the executive director or the commission, the attorney general shall institute a suit in the name of the state for injunctive relief under Section 7.032, to recover a civil penalty, or both injunctive relief or civil penalty." Tex. Water Code §7.105(a).

6.44. By contrast, section 7.105(b) sets forth a specific list of situations that require the TCEQ to refer a matter to the Attorney General. IP suggests that this is an exclusive list of the matters that may be referred for civil enforcement. It is wrong. The provision states that the commission "***shall*** refer a matter to the attorney general's office for enforcement through civil suit…." Tex. Water Code § 7.105(b). Therefore, these are the instances that require referral by TCEQ.

6.45. This interpretation is further supported by TCEQ's rules regarding referral for civil suit. 30 Tex. Admin. Code § 70.6(b) sets out five criteria for referral of a case to the Attorney General, only one of which is a required referral under Tex. Water Code §7.105.

e. Administrative enforcement is not a prerequisite to civil enforcement.

6.46. Finally, citing Tex. Water Code §§ 7.054, 7.055, 7.058, and 7.059, IP suggests that it is due administrative process before a local government may institute a civil suit against it. These provisions set out the process for administrative enforcement at TCEQ, but nothing in the statute requires the TCEQ to follow that process before filing a civil suit.[15] To the contrary, the

[15] Section 7.054 starts the process, allowing the executive director to issue a preliminary report recommending a penalty and corrective action if he determines that a violation has occurred. The language in this provision is

Water Code contemplates that local government suits may be initiated before the TCEQ initiates administrative enforcement. Section 7.051(a)(2) says the TCEQ cannot assess an administrative penalty if a local government has initiated and is diligently prosecuting a lawsuit under Subchapter H. In any event, if IP's suggestion were true, it would eviscerate the provision allowing for local government suit. Potential defendants would always have their violations resolved administratively at the TCEQ, and there would be nothing left for local governments to do.

2. <u>International Paper failed to prevent discharges from the San Jacinto River Waste Pits from 1975 to 2008</u>.
(In response to *IP's Consolidated MSJ*, Part IV-B, pages 17-21)

6.47. The gravamen of Part IV-B of *IP's Consolidated MSJ* is that the conduct allegedly at issue in this case all occurred in 1965-1966, before Tex. Water Code §§ 26.121, .266, and 30 Tex. Admin. Code § 335.4 were in effect. IP's characterization of the case is wrong. This case is not based on conduct that occurred in 1965-1966. It is based on the Defendants' abject failure to act while dioxin-laced wastes discharged into and adjacent to the San Jacinto River on a daily basis until March 2008. The precipitating events are not the placement of waste in the San Jacinto River Waste Pits in 1965-1966, but rather the failure to prevent discharges from those Pits at later times.

6.48. Because these events, or rather failures to act by IP occurred ***after*** Tex. Water Code §§ 26.121, .266, and 30 Tex. Admin. Code § 335.4 were in effect, there is simply no issue of whether Harris County is attempting to apply the law retroactively. In fact, Harris County's *Third*

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permissive, not mandatory: ". . . the executive director ***may*** issue a preliminary report…." Tex. Water Code § 7.054 (emphasis added). This report is similar to a petition in a civil suit. The following provision, Tex. Water Code § 7.055, requires the executive director to give notice to the respondent of the report. Tex. Water Code § 7.056 requires a person receiving notice of the report to consent to the recommendations or request a hearing. Section 7.057 provides the authority for a default order. Section 7.058 authorizes administrative hearings. Section 7.059 requires the commission to give notice of its decisions. Moreover, the TCEQ is not required to undergo an administrative process before filing suit. In fact, the Water Code sets forth specific situations that require direct referral. *See, for example*, Tex. Water Code § 7.105(b)(1), (3), (5).

Amended Petition is careful to limit the alleged dates of violations to the discharges and disposals that occurred after the effective dates of each provision:

- **30 Tex. Admin. Code § 335.4**: These TSWDA [30 Tex. Admin. Code § 335.4] violations are continuing in nature beginning on November 25, 1975, the effective date of the 1975 Board Order, and continuing until March 2008. *Harris County's Third Amended Petition* ¶ 155.

- **Tex. Water Code § 26.121**: Each day of these continuing violations from each waste pit are separate violations which, from September 1, 1967, through March 2008, are subject to a civil penalty the range of which is based upon the statutory provision in effect on that date. Therefore, Harris County seeks civil penalties for all violations beginning September 1, 1967, through March 2008. *Harris County's Third Amended Petition* ¶ 149.

- **Tex. Water Code § 26.266**: Those violations [Tex. Water Code § 26.266] are continuing in nature beginning on June 19, 1975, the effective date of the Texas Spill Act, and continuing through March 2008. *Harris County's Third Amended Petition* ¶ 151.

6.49. As shown in the Statement of Facts, above, Harris County has presented evidence of disposals and/or discharges of dioxin-laced waste into the San Jacinto River occurring since at least 1975 to 2008, not just in 1965 – 1966. *See generally, Harris County's Response*, Part III, Statement of Facts. *See also*, Ex. 13 at IP0000217, ¶ 22; Ex. 14; Ex. 15; Ex. 16; Ex. 17 at 228:20-229:4, 252:23-254:11, 516:5-516:13, 516:15-516:25, and 517:2-517:7; Ex. 18 at 23:7-23:12; Ex. 19; Ex. 20 at 41:6-43:9, 57:6-67:17, 67:19-68:8, 68:10-74:16, and 83:3-83:16; and Ex. 21 at 417:4-418:18 and 418:21-419:18. These dates are within the times in which Tex. Water Code §§ 26.121, .266, and 30 Tex. Admin. Code § 335.4 were in effect and implicate no effort to retroactively apply the statutes and regulations.

a. Authorization to construct and operate the San Jacinto River Waste Pits is not relevant – the relevant inquiry is the escape of waste from the Pits to the San Jacinto River.

6.50. At pages 18 – 19 in Part IV-B of *IP's Consolidated MSJ*, IP suggests that its conduct at the time of disposal of its paper mill waste in the San Jacinto River Waste Pits in 1965-1966 was either authorized or not subject to regulation at that time. Yet, Harris County's lawsuit is not seeking civil penalties for the disposal of waste in 1965-1966 or even the location or construction of the San Jacinto River Waste Pits. Rather, Harris County is seeking civil penalties because IP and the other Defendants in this case did nothing to stop the disposal and discharge of waste from the Pits into the San Jacinto River. At all times relevant to this case,[16] IP has not had any authorization to discharge into the San Jacinto River. The 1965 letter to Burma Engineering that IP points to as "authority" to operate the San Jacinto River Waste Pits expressly says "I would like to remind you again that your waste handling operation should be done in a manner which would not allow any liquid waste to leave the property and escape into the river. We believe this could be done easily, but of necessity would require careful handling." Ex. 8, 1965 Letter from HCHD to Burma Engineering, at IP0002301.

b. Harris County does not seek to retroactively apply 30 Tex. Admin. Code § 335.4.

6.51. In response to Part V-A of *IP's Specific Elements MSJ*, above, the TCEQ addressed IP's incorrect premise that all activities of disposal under 30 Tex. Admin. Code § 335.4 occurred in 1965-1966 because IP claimed that "disposal" does not include passive migration. In Texas, "disposal" under 30 Tex. Admin. Code § 335.4 includes passive migration of waste materials from

[16] Defendant IP admits that prior to 1967, the statutory predecessor of the Water Quality Act contained a general prohibition against pollution, citing to Vernon's Civil Statutes, art. 7621(d). *IP's Consolidated MSJ* p. 20. IP can hardly claim any surprise that it was expected to keep its dioxin-laced waste in the San Jacinto River Waste Pits, and not the San Jacinto River, nor is it unfair to penalize that failure.

the San Jacinto River Waste Pits into or adjacent to waters in the state, including the San Jacinto River. Disposal by passive migration occurred on dates after 30 Tex. Admin. Code § 335.4 was in effect and thus there is no attempted retroactive application of that regulation by Harris County in this case. *See* Part VI-A, above.

6.52. Accordingly, Harris County's pleadings and the evidence that it has offered do not state a cause of action to apply 30 Tex. Admin. Code § 335.4 to disposals that occurred in 1965-1966, but rather to IP's failure to prevent later disposals of dioxin-laced waste into or adjacent to the San Jacinto River during the time that 30 Tex. Admin. Code § 335.4 was in effect. Harris County is not "retroactively" applying 30 Tex. Admin. Code § 335.4.

c. Harris County does not seek to retroactively apply Tex. Water Code § 26.121.

6.53. In pertinent part, Tex. Water Code § 26.121 provides:

> (a) Except as authorized by the commission, no person may:
>
> (1) discharge sewage, municipal waste, recreational waste, agricultural waste, or industrial waste into or adjacent to any water in the state;
>
> (2) discharge other waste into or adjacent to any water in the state which in itself or in conjunction with any other discharge or activity causes, continues to cause, or will cause pollution of any of the water in the state, unless the discharge complies with a person's:
>
> > (A) certified water quality management plan approved by the State Soil and Water Conservation Board as provided by Section 201.026, Agriculture Code; or
> > (B) water pollution and abatement plan approved by the commission; or
>
> (3) commit any other act or engage in any other activity which in itself or in conjunction with any other discharge or activity causes, continues to cause, or will cause pollution of any of the water in the state, unless the activity is under the jurisdiction of the Parks and Wildlife Department, the General Land Office, the Department of Agriculture, or the Railroad Commission of Texas, in which case this subdivision does not apply.

Tex. Water Code Ann. § 26.121(a).

6.54. Unlike in 30 Tex. Admin. Code § 335.4, the term "disposal" does not appear in section 26.121 and the express prohibition is on a "discharge" into or adjacent to any water in the state. IP cannot seriously assert that the claimed discharges of dioxin-laced waste from the San Jacinto River Waste Pits occurring after Tex. Water Code § 26.121 became law constitute a retroactive application of the statute.

6.55. The Texas Water Code defines "to discharge" as "to deposit, conduct, drain, emit, throw, run, allow to seep, or otherwise release or dispose of, or to allow, permit, or suffer any of these acts or omissions." Tex. Water Code § 26.001(20). This definition leaves no doubt that later movement of waste from an impoundment into or adjacent to the San Jacinto River constituted a discharge at the time of the discharge.

i. <u>The TCEQ has determined that passive migration constitutes a discharge under Tex. Water Code § 26.121</u>.

6.56. As stated above in Part VI-A, on legal issues involving statutory construction, an agency's construction of a statute that it is charged with enforcing should be given deference, so long as the interpretation is reasonable and does not contradict the plain language of the statute.

In its Interim Order, the TCEQ (at the time the Texas Natural Resource Conservation Commission) expressly noted that:

> The Commission has the legal authority to impose administrative penalties against Fina Oil and Fina Pipe for violations of Water Code Section 26.121 and Commission Rule 335.4, regardless of the time the contamination was originally released into the environment. The terms "discharge" and "disposal" include the passive migration and seepage of contamination through the soil and groundwater. The initial release is not the only act that constitutes a violation of the statute and the Rule.

Interim Order at 1.

ii. Federal courts have determined that the definition of discharge or release in other statutes embraces "seepage" or passive migration.

6.57. The cases cited in *IP's Specific Elements MSJ* in support of the proposition that "disposal" does not include passive migration focused on the fact that CERCLA had separately defined "release," a term that included passive terms such as leaching.

6.58. "Unlike the definition of disposal, release is defined to include 'leaching,' [42 U.S.C.] § 9601(22), which is commonly used to describe passive migration, *see CDMG Realty Co.*, 96 F.3d at 715 & n. 4 (quoting several law journals and cases)." *ABB Indus. Sys., Inc. v. Prime Tech., Inc.*, 120 F.3d 351, 358 (2d Cir. 1997).

> It is especially unjustified to stretch the meanings of "leaking" and "spilling" to encompass the passive migration that generally occurs in landfills in view of the fact that another word used in CERCLA, "release," shows that Congress knew precisely how to refer to this spreading of waste. A prior owner who owned a waste site at the time of "disposal" is only liable in the event of a "release" or "threatened release." 42 U.S.C. § 9607. The definition of "release" is thus broader than that of "disposal": "release" encompasses "disposing" and some elements of the "disposal" definition and also includes some additional terms. Most importantly, the definition of "release" includes the term "leaching," which is not mentioned in the definition of "disposal."

United States v. CDMG Realty Co., 96 F.3d 706, 714-15 (3d Cir. 1996) (CERCLA definition of release omitted).

Finally, "it makes sense of the statutory scheme as well as the words themselves to have 'disposal' stand for activity that precedes the entry of a substance into the environment and 'release' stand for the actual entry of substances into the environment." *United States v. 150 Acres of Land*, 204 F.3d 698, 706 (6th Cir. 2000).

6.59. Although the TCEQ submits that the federal cases do not define Texas law for the reasons already discussed, it is clear that these courts would have determined that "release" includes passive migration after the initial deposit of the waste at issue or "the actual entry of the

substances into the environment." The Texas Water Code § 26.001 definition of discharge includes the term "release" and expressly includes "seepage" much like CERCLA's definition of "release" which includes "leaching." Even if the Court were to determine that 30 Tex. Admin. Code § 335.4 requires human activity to constitute disposal, it is clear that a discharge (which includes "seepage" and "releases" in its definition) under Chapter 26 of the Texas Water Code imposes no such limitation.

d. Harris County does not seek to retroactively apply Tex. Water Code § 26.266.

6.60. In pertinent part, Tex. Water Code § 26.266 provides:

> Any owner, operator, demise charterer, or person in charge of a vessel or of any on-shore facility or off-shore facility shall immediately undertake all reasonable actions to abate and remove the discharge or spill subject to applicable federal and state requirements, and subject to the control of the federal on-scene coordinator.

Tex. Water Code § 26.266(a).

The operative words to impose liability are to abate and remove "the discharge or spill."

6.61. The definition of "discharge" is different than the definition applicable to Tex. Water Code § 26.121(a) discussed in the preceding Part VII-C. Tex. Water Code § 26.263 provides that:

> "Discharge or spill" means an act or omission by which hazardous substances in harmful quantities are spilled, leaked, pumped, poured, emitted, entered, or dumped onto or into waters in this state or by which those substances are deposited where, unless controlled or removed, they may drain, seep, run, or otherwise enter water in this state. The term "discharge" or "spill" under this subchapter shall not include any discharge to which Subchapter C, D, E, F, or G, Chapter 40, Natural Resources Code,[1] applies or any discharge which is authorized by a permit issued pursuant to federal law or any other law of this state or, with the exception of spills in coastal waters, regulated by the Railroad Commission of Texas.

Tex. Water Code § 26.263(1).

6.62. This definition expressly incorporates an act ***or omission*** and, therefore, contemplates human inactivity, *e.g*. a passive migration, would be within the definition of discharge. Moreover, it encompasses such passive terms as "entered," "drain," "seep," "run," or "otherwise enter" water in this state. The allegations in this case are that dioxin-laced paper mill waste entered the San Jacinto River by omissions of IP during periods of time that the Texas Spill Act (Tex. Water Code § 26.266) was in effect, to and including March 2008. Harris County does not seek to apply the Texas Spill Act to the human activity of initial deposit of waste in 1965-1966, the only act discussed in *IP's Consolidated MSJ*. Rather, Harris County seeks to apply the Texas Spill Act to the continuing discharges of paper mill waste from the San Jacinto River Waste Pits resulting from IP's indifference or nonfeasance from the time the Texas Spill Act prohibited such discharges until March 2008. Harris County's claims are not a retroactive application of the Texas Spill Act but rather a contemporaneous application at the time the actionable discharges occurred.

3. <u>The Equitable Defense of Laches does not apply to Harris County or TCEQ</u>.
(In response to *IP's Consolidated MSJ*, Part IV-C, pages 21-26)

a. <u>Equitable defenses do not apply to state agencies or counties</u>.

6.63. As set forth in Harris County's and TCEQ's extensive briefing with respect to *Plaintiff Harris County's Traditional Summary-Judgment Motion on Defendants' Affirmative Defenses*, the equitable doctrine of laches does not apply to state agencies or counties.[17] Nor has

[17] *Plaintiff Harris County's Traditional Summary-Judgment Motion on Defendants' Affirmative Defenses* at 13; *Texas Commission on Environmental Quality's Brief in Support of Harris County's Motion for Traditional Summary Judgment (Corrected)* at 13-15; *Plaintiff Harris County's Reply Supporting its Traditional Summary-Judgment Motion on Defendants' Affirmative Defenses* at 3-4; and *Plaintiff Harris County's Sur-reply Supporting its Traditional Summary Judgment Motion on Defendants' Equitable Affirmative Defenses*.

any Texas state court held that the municipal exception to this rule should be extended to a state agency or county.[18]

b. Even if the municipal exception applied to state agencies or counties, it could not be applied in this case.

6.64. While a limited exception to the general rule exists for municipalities, even if extended to the TCEQ and Harris County, that exception does not apply here. Under the municipal exception, two requirements must be met: (1) the circumstances must demand application to prevent a manifest injustice; and (2) no governmental function can be impaired. *Texas Dep't of Transp. v. A.P.I. Pipe and Supply, LLC*, 397 S.W. 3d 162, 170 (Tex. 2013).

i. There is no deliberate inducement.

6.65. The first criterion is applied only when officials deliberately induce a party to act in a way that benefits the government. *A.P.I. Pipe and Supply*, 397 S.W. 3d at170. The Supreme Court has found that this criterion was met in only two cases, both involving instances where city officials deliberately prevented citizens from providing proper notice of claims until after the notice deadline expired. *Id*.; *see also, Roberts v. Haltom City*, 543 S.W.2d 75, 80 (Tex. 1976), and *City of San Antonio v. Schautteet*, 06 S.W.2d 103, 105 (Tex. 1986).

6.66. No deliberate inducement exists in this case. IP argues that Dr. Quebedaux's approval of the site location and method of disposal meets this criterion. It does not. In *City of White Settlement v. Super Wash, Inc.*, the Supreme Court found that there was no deliberate inducement when the City issued a building permit that conflicted with a city ordinance. 198 S.W.3d 770, 775 (Tex. 2006). The Court reasoned that because the ordinance was a matter of public record that the defendant should have known about, the defendant could not reasonably rely

[18] *See id.*

on the building permit. *Id.* (citing *Davis v. City of Abilene*, 250 S.W.2d 685, 688 (Tex. Civ. App. – Eastland 1952, writ ref'd). The Supreme Court reiterated this concept last year in *Texas Dep't of Transp. v. A.P.I. Pipe and Supply, LLC*, finding that API should have discovered the City's error given the plentiful red flags in the property records. 397 S.W.3d at 170. Similarly, the state laws at issue in this case are a matter of public record that IP should have known about, and it cannot reasonably rely on a letter from a county official to excuse the violation of those laws.

6.67. IP had no reason to rely on the letter for another reason: it explicitly prohibits discharges and recommends careful handling of the waste to prevent discharges. The letter states:

> I would like to remind you again that your waste handling operation should be done in a manner which would not allow any liquid waste to leave the property and escape into the river. We believe this could be done easily, but of necessity would require some careful handling.

Ex. 8 at IP0002301.

6.68. After that, IP had further reason to understand that discharges were prohibited and that the Pits should be maintained in a manner that prevented discharges. After observing discharges in December 1965, Harris County sent MIMC and IP (then Champion) a cease and desist letter. Ex. 6 at IP0394132. And, during a 1967 Texas Department of Health investigation of the Pits, MIMC and IP (then Champion) were instructed to repair levees to ensure containment of materials and were involved in a discussion concerning the necessity of obtaining a permit if they wished to directly discharge from the Pits. Ex. 7 at MIMC-HC004022 and004023-004024.

6.69. IP cannot argue with a straight face that governmental officials induced them to break the law. Therefore, the circumstances in this case do not demand application of the exception to prevent manifest injustice.

ii. Application would impair a governmental function.

6.70. The second criterion – no impairment of a governmental function – is also absent in this case. Enforcing environmental laws is a governmental function. Environmental laws protect public health, safety, and environmental resources. In determining whether a governmental function will be impaired, the Supreme Court says that courts should consider (1) whether application will affect public safety, (2) bar future enforcement of the law, or (3) impede the government's ability to serve the general public. *City of White Settlement*, 198 S.W.3d at 777.

6.71. One of the several important purposes of civil-penalty enforcement is deterrence – for the defendant and similarly-situated members of the community. Application in this case eliminates the deterrent for other, similarly-situated persons. IP allowed the continued pollution of the San Jacinto River for decades and now argues that it should not have to pay a penalty because it was not caught soon enough. If the court adopts such an argument, it will encourage other environmental violators to hide, rather than correct, their infractions. This would adversely affect public health and safety, impair future enforcement, and impede the TCEQ's and Harris County's ability to serve the general public. For these further reasons, the second requirement again fails.

c. International Paper has not met its burden to prove laches.

6.72. Finally, laches does not apply in this case because IP's facts (1) do not show that there was an unreasonable delay and (2) do not show a good-faith change in IP's position based on detrimental reliance.

i. IP's evidence does not show delay – let alone unreasonable delay.

6.73. IP offers no evidence of when Harris County became aware of the violations at issue in this suit that occurred from September 1967 to March 2008. IP suggests that because

Harris County has the authority to inspect solid waste sites, it probably inspected the Pits and knew what was going on. But it points to no evidence that Harris County knew of any discharge at the Pits after 1966. IP suggests that such evidence would exist if there had not been a fire that destroyed certain Harris County records in 1981. But such an inference against Harris County can be made only if one can show that the destruction of evidence was the result of a specific intent to conceal discoverable evidence. *Brookshire Bros., Ltd. v. Aldridge*, No. 10-0846, 2014 WL 2994435 at *10 (Tex. July 3, 2014). IP has not shown this intent. Without any evidence showing when Harris County learned of the discharges, IP cannot show that there was a delay at all in filing this suit, let alone an unreasonable one. Therefore, IP's laches claim fails.

ii. Not getting caught cannot form the basis of a good-faith change in position based on reasonable reliance.

6.74. IP's evidence does not demonstrate a change in position based upon reliance. IP argues that they relied on the fact that Dr. Quebedeaux approved the location and method of disposal. Ex. 8 at IP0002301. But Dr. Quebedeaux also noted that waste should be handled carefully to prevent any discharges into the river, an admonition that was ultimately ignored. *Id.* And, as explained above, IP was further on notice from the Texas Department of Health that the Pits needed to be maintained and discharges needed to be permitted. Ex. 7 at MIMC-HC004022 and 004023-004024. In any event, a defendant cannot reasonably rely on a permit or other approval when it is directly contradicted by state law. *See City of White Settlement*, 198 S.W.3d at 775.

6.75. Next IP argues, without any support, that it relied on the fact that it never received a notice of violation during the period of violations at issue in this case. But a change in position must be made in good faith. A change of position that contradicts a legal obligation is not made in

good faith. *See Green v. Parrack*, 947 S.W.2d 200, 203-4 (Tex. App. – San Antonio 1998, no pet. h.) (defendants' change in position was not in good faith when the conduct was prohibited by court order).

6.76. IP cites two cases for the proposition that municipal inaction can form the basis of the good-faith reliance requirement for a laches defense. Those cases are inapplicable, however, because neither case involves a city's failure to enforce a law affecting public health and safety. Instead, both cases involved the exercise of property or contractual rights. *City of Corpus Christi v. Nueces County Water Control & Improvement Dist. No. 3*, 540 S.W.2d 357 (Tex. App. – Corpus Christi 1976, writ ref'd n.r.e.) (delay in enforcement of water right); *Houston Lighting & Power Co. v. City of Wharton*, 101 S.W.3d 633 (Tex. App. – Houston [1st Dist.] 2003, pet. denied) (delay in enforcement of franchise fee agreement).

6.77. This is an important distinction. The TCEQ and Harris County have limited resources to monitor the regulated community for violations. By allowing inaction to form the good-faith basis of a laches defense in enforcement cases, as IP urges here, violators would be encouraged to hide, rather than correct, their violations.

C. Response to International Paper's Traditional and No-Evidence Motion for Summary Judgment on Causation Against Harris County.

1. International Paper caused, suffered, allowed, or permitted, the violations of Texas environmental laws, so it is responsible for civil penalties.

(In response to *IP's Causation MSJ*, Part IV-A, pages 9-12)

6.78. IP argues that it is not liable for illegal waste disposal under the TSWDA or for unauthorized discharges into state waters under the Water Quality Act. *IP's Causation MSJ* at 9-10. The purpose of the TSWDA and other similar environmental statutes is to facilitate and encourage the prompt cleanup of solid waste and to "force those responsible for creating

hazardous waste problems to bear the cost of their actions." *R.R. Street & Co. v. Pilgrim Enters., Inc.*, 166 S.W.3d 232, 238-39 (Tex. 2005). IP's refusal to accept liability for illegal waste disposal and unauthorized discharges of solid waste into state waters is groundless. Not holding IP liable would allow generators of hazardous waste to avoid all responsibility for their waste by simply contracting around the law. This scenario effectively encourages generators of hazardous waste to bury their heads in the sand, as IP would like to do, when it comes to responsibility for their hazardous waste; a policy which runs completely counter to the purpose of environmental statutes and regulations.

a. <u>International Paper cannot contract away its liability from environmental regulations</u>.

6.79. IP argues that when Champion hired MIMC as an "independent contractor" to remove, transport, and dispose of waste, Champion could no longer be held liable for having caused, suffered, allowed, or permitted an improper disposal of solid waste or an unauthorized discharge of waste into state waters. IP's reliance on the terms of Champion's contract with MIMC is inadequate to avoid liability for later disposals, discharges, and/or spills of its waste. Courts have held that it is against public policy to allow defendants, who are responsible for waste, to contract away liability for the violation of an environmental statute. *United States v. Geppert Bros., Inc.*, 638 F. Supp. 996 (E.D. Pa. 1986) (holding that defendant was liable for Clean Air Act violations despite contracting with another party for the demolition work which resulted in the violation); *United States v. Lambert*, 915 F. Supp. 797 (S.D.W. Va. 1996) (holding that defendant was liable for Clean Water Act violations despite contracting with an independent contractor to perform the construction work which resulted in the violation).

6.80. For example, in *Geppert* , the United States brought an enforcement action for violations of the Clean Air Act resulting from the demolition of buildings. The property owner asserted that it could not be held liable because it had not participated in the actual demolition work but had contracted with a separate demolition company to do the demolition work. 638 F. Supp. at 998. The court said that the purpose of the Clean Air Act is to insure that building owners "act responsibly in disposing of their buildings." *Id.* at 1000. The court held that since the defendant remained the owner of the buildings demolished, it remained liable for the environmental violations resulting from the demolition of the buildings. *Id*.

6.81. In this case, Champion contracted with MIMC for "the removal by Contractor of pulp and paper mill waste sludge material from Champion…" and did not sell the waste to MIMC. Ex. 3 at MIMC-HC121474-121482, and Ex. 4 at IP0002336-0002338. Therefore, MIMC was only contracted for waste disposal services; ownership of the waste did not transfer to MIMC as a result of the contract. As in *Geppert, s*ince Champion remained the owner of the waste disposed of by MIMC, Champion, now IP, remains liable for the environmental violations resulting from the later disposals, discharges, and/or spills of its waste. Allowing IP to avoid liability through Champion's contract with MIMC would permit IP to avoid this responsibility and defeat the purpose of the applicable rules and statutes.

6.82. Similarly, in *Lambert*, the United States brought an enforcement action for violations of the Clean Water Act resulting from construction activities in a river. The defendant landowner claimed that he was not liable under the statute because he had hired an independent contractor to perform the construction on his property, and therefore the independent contractor, who performed the work, was solely responsible for the discharged fill material at issue in the case. The court rejected the defendant's arguments and held that the defendant was liable for violations

of the Clean Water Act because the work resulting in the violations had been paid for by the defendant and "could not have been accomplished without [defendant's] express approval." 915 F. Supp. at 802-803. For the same reasons, IP cannot insulate itself from its regulatory obligations with regard to its waste by contracting with a third party.

b. Champion did engage in the disposal of the waste and the unauthorized discharge of the waste.

6.83. IP argues that Champion cannot be held liable for violations of the applicable environmental rule and statutes because Champion did not own the waste or control the waste disposal methods used by MIMC. IP is wrong.

6.84. IP owned the waste. IP relies on a statement made in a bid letter in which an engineering firm states that the waste becomes the property of the contractor once the waste leaves Champion's premises. *IP's Causation MSJ* at 11. However, the contract between Champion and MIMC provides no such language and, as a result, does not constitute an agreement to sell the waste to Champion. The contract agreement regards only the "removal by Contractor of pulp and paper mill waste sludge material from [Champion]" – not the purchase of waste. *See generally,* Ex. 3 and Ex. 4.

6.85. In *Geppert*, the court held that a contract for the demolition of buildings did not result in the sale of the buildings to a demolition company, and thus, the defendant remained the owner of the buildings and was liable for Clean Air Act violations that occurred after the demolition company's demolition of the buildings. *Geppert*, 638 F. Supp. at 1000. Likewise, because IP remained the owner of the waste it is liable for the disposals, discharges, and/or spills, as well as its failure to immediately address them.

6.86. While IP's ownership of the waste alone is sufficient to subject it to liability, its assertion that it had no ability to control the waste after its initial disposal by MIMC is also false. The contract between Champion and MIMC allowed Champion to approve the location of disposal, coordinate and inspect MIMC's waste disposal activities, to inspect the work materials and equipment purchased by MIMC, and to require that MIMC had the proper licenses and permits for its activities. Ex. 3 at MIMC-HC121474, ¶ 1, MIMC-HC121477-121478, ¶ 7; Ex. 4 at IP0002336-0002338 (requiring MIMC to comply with the terms of the assigned contract). Moreover, evidence shows that Champion exercised these contractual rights. It assisted MIMC's predecessor in locating barges to transport material to the Pits, monitored correspondence with Harris County regarding the location of and activities at the Pits, and attended and participated in a Texas Department of Health inspection of the Pits. Ex. 8 at IP0002301 (barges); Ex. 6 at IP0394132 (correspondence regarding Pit location); Ex. 6 at IP0394132 (correspondence regarding discharges from pits); and Ex. 7 (Texas Department of Health inspection).

2. Harris County has not abrogated common law because general-independent contractor liability principles are not applicable to this case.
(In response to *IP's Causation MSJ*, Part IV-C, pages 19-22)

6.87. IP argues that Harris County has abrogated common law principles related to general-independent contractor liability. However, general-independent contractor liability principles are not applicable to this case, nor does this case change or affect IP's liability with regard to third parties. First, this case is considerably different from traditional general-independent contractor cases found in tort law. Second, as a policy matter, parties should not be able to contract around environmental regulatory statutes. Third, even if general-independent contractor principles applied to this case, IP exercised elements of control over MIMC's activities.

6.88. IP cites no independent contractor cases that are comparable to this case. The general-independent contractor liability principles found in common law and the cases cited by IP relieve the general contractor or property owner of liability when in the course of the independent contractor's work, the independent contractor commits a tort (usually causing injury to an employee). *See Dow Chem. Co. v. Bright*, 89 S.W.3d 602, 606 (Tex. 2002) (holding that property owner was not liable to injured employee of subcontractor when it exercised no control over subcontractor's activities); *Shell Oil Co. v. Khan*, 138 S.W.3 288, 292 (Tex. 2004) (holding that property owner was not liable to injured employee of subcontractor when property owner exercised no control over employee's work). Here, plaintiffs are not injured persons seeking to hold IP liable in tort for the tortious actions of MIMC. Instead, plaintiffs are governmental entities seeking to enforce strict liability environmental regulatory statutes, which explicitly create liability for those who cause, suffer, allow, or permit the violations to occur. And nothing in this case changes IP's tort liability with regard to third parties.

6.89. Also, a party responsible for an environmental hazard should not be able to contract around its liability for that hazard by hiring someone else to deal with it. Federal courts have upheld this policy in cases involving the Clean Air Act and Clean Water Act. *See Geppert*, 638 F. Supp. 996 (holding defendant liable for Clean Air Act violations even though defendant contracted with another party for the work which resulted in the violation) and *Lambert*, 915 F. Supp. 797 (holding defendant liable for Clean Water Act violations even though defendant contracted with another party for the work which resulted in the violation). In this case, Champion generated massive quantities of toxic paper mill waste, exercised many elements of control over the disposal of that waste. It should not simply be allowed to contract away its responsibility for that waste when it later escaped into the San Jacinto River.

6.90. Finally, even if general-independent contractor principles applied to this case, Champion exercised elements of control over MIMC's activities. Texas courts look not only to a contractual right to control an independent contractor's actions, but also to actual control over the independent contractor's actions. *See, e.g., Clayton W. Williams, Jr. Inc. v. Olivo*, 952 S.W.2d 523, 528 (Tex. 1997) (stating that if there is no contractual right to control, general contractor can still be held liable if it exercised actual control); *Koch Refining Co. v. Chapa*, 11 S.W.3d 153, 156 n.3 (Tex. 1999) (stating that premises owner can be liable if it contractually or actually exercises control over independent contractor's work and inquiring whether defendant actually exercised a right of supervision such that independent contractor was not entirely free to do the work on its own).

6.91. Champion had a contractual right to control some of the means, methods or details of MIMC's work. First, Champion had a contractual right to approve the waste site location. Ex. 3 at MIMC-HC121474, ¶ 1. Second, Champion had a contractual right to access the Pits at all times for the purpose of inspecting MIMC's work, materials and equipment. *Id*. at MIMC-HC121477-121479, ¶ 7. Thus, this part of the contract gave Champion the right to control the details, means and methods of MIMC's work through inspecting those details, means and methods.

6.92. Champion also exercised actual control over MIMC's work and the Pits. In deciding how to address its toxic paper mill waste issue, Champion considered various proposals and alternatives from engineering companies. *See, generally*, Ex. 2. Ultimately, Champion accepted Burma Engineering's proposal, barging the paper mill sludge to a disposal site on the San Jacinto River. *Id*. at BEND-003333. Champion decided on this proposal after observing Burma Engineering's operation and inspecting the disposal site. *Id*. Thus, by hiring an engineering

company to design a plan for disposal, Champion pre-determined major aspects of MIMC's disposal activities. By pre-determining how and where MIMC (or its contractual predecessor) would dispose of the waste, Champion ultimately controlled a major portion of MIMC's work.

6.93. IP argues that the applicable statutes should be strictly construed and therefore should not include liability for parties like IP. However, the cases cited by IP are not helpful in properly construing the applicable environmental regulatory statutes. Moreover, the proper construction of the applicable statutes includes liability for persons with a responsible relationship to the violation, like IP.

6.94. IP cites *Brown v. De La Cruz*, 156 S.W.3d 560, 563 (Tex.2004), for its proposition that the statutes should be strictly construed and should not include liability for parties like IP. However, in *Brown*, the plaintiff was a ***private party*** attempting to recover civil penalties under the Property Code. *Brown v. De La Cruz*, 156 S.W.3d at 563. At the time of the offense, the statute provided no authorization for private parties to recover civil penalties. *Id*. Because the statute was completely silent on that point, the Court construed the statute strictly by not reading a private cause of action into the statute. *Id*. at 565. Further, in making its decision, the Court followed existing case law which held that "the legislature may grant private standing to bring such actions, but it must do so clearly." *Id*. at 566.

6.95. Here, the statutes are not silent on who can be liable for environmental harms. Instead, they provide that parties who "cause, suffer, allow or permit" the harms are liable under the statutes. Likewise, there is no case law concerning regulatory statutes, indicating the Legislature must describe in detail the parties who can be liable. In fact, the Houston Court of Appeals indicated that a similar environmental regulatory statute under the Texas Water Code was not vague even when it did not define a particular class of responsible persons. *Valero Ref.-Tex.*

L.P. v. Texas, 203 S.W.3d 556, 563 (Tex. App.—Houston [14th Dist.] 2006, no pet.). The court also stated that with respect to regulatory statutes "it would be 'treacherous to define or even indicate by way of illustration' the class which stands in such a responsible relationship." *Id.*

6.96. IP also cites *In re Hecht*, 213 S.W.3d 547, 572 (Tex. 2006). *IP's Causation MSJ* at 21. Besides stating that statutes that authorize penalties or infringe upon private property or liberty interests require strict construction, the case provides no guidance on construing the applicable statutes. *In re Hecht* did not involve a penalty but a liberty interest, which the court concluded required an exceptionally strict construction. 213 S.W.3d at 572. Here, the applicable statutes involve no liberty interests.

6.97. Regulatory statutes, like those at issue, put "the burden of acting at hazard upon a person otherwise innocent but standing in a responsible relation to a public danger." *Valero*, 203 S.W.3d at 561. Additionally, by using terms like "suffer," "allow" and "permit," the Legislature intended to impose liability not only on those who directly "cause" the harms, but also on parties with a responsible connection to the harms. *See Valero*, 203 S.W.3d at 561-562 (explaining that by using the word "allow" in Section 7.147 of the Texas Water Code, the Legislature incorporated a responsible relationship concept directly into the language of the statute). Here, evidence shows that IP has a responsible relationship or connection to the releases of dioxin into the San Jacinto River.

6.98. Finally, IP argues that Harris County's statutory theory "effectively rewrites the statutes." As discussed above, Harris County does not have a novel common law theory of liability but instead is seeking to enforce environmental regulatory statutes on a defendant, which it alleges has a responsible connection to the prohibited acts and has cause, suffered, allowed and permitted

those acts. Nothing in this case alters in any way third-part tort liability involving independent contractors.

PRAYER

For the reasons stated above and the reasons in *Harris County's Response*, the TCEQ asks the Court to deny each of IP's motions for summary judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the *Texas Commission on Environmental Quality's Response to Defendant International Paper's Summary-Judgment Motions against Harris County* was served on each person listed below e-service and via e-mail, unless otherwise noted, on August 20, 2014.

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

KIRK GRADY	§	
Plaintiff	§	
	§	
v.	§	
	§	**CIVIL ACTION NO: 3:16-cv-01404-C**
HUNT COUNTY, TEXAS	§	
Defendant	§	

ORDER GRANTING DEFENDANT HUNT COUNTY'S MOTION TO DISMISS

Before the Court is Defendant Hunt County's Motion to Dismiss Under Federal Rules of Civil Procedure 12(b)(1), 12(b)(6), and 12(b)(7) and Abstention Doctrines; and Motion for More Definite Statement Under Federal Rule of Civil Procedure 12(e). The Motion is **GRANTED**.

Plaintiff Kirk Grady's claims in Counts One and Two of his Original Complaint (Doc. 1) are **DISMISSED** under Federal Rule 12(b)(1) for lack of jurisdiction because he does not have standing to bring those claims.

Plaintiff Kirk Grady's claims in Counts One through Five of his Original Complaint are **DISMISSED** under Federal Rule of Civil Procedure 12(b)(6) because they fail to state claims upon which relief may be granted.

Plaintiff Kirk Grady's claims in Counts One through Five of his Original Complaint are **DISMISSED** under Federal Rule of Civil Procedure 12(b)(7) for failure to join the Texas Commission on Environmental Quality as a party.

Plaintiff Kirk Grady's claims in Counts One through Five of his Original Complaint for declaratory relief under the Federal Declaratory Judgment Act, 28 U.S.C. § 2201, are **DISMISSED** under the *Brillhart* Abstention Doctrine. *Brillhart v. Excess Ins. Co. of Am.*, 316 U.S. 491 (1942).

Plaintiff Kirk Grady's claims in Count Three of his Original Complaint are **DISMISSED** under the *Burford* Abstention Doctrine. *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943)

Signed _____, 2016.

_____
United States District Judge