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Defense to Responsibility for Scrap Metal Recycling:

TCEQ Findings and Legislative Recommendation Required by House Bill 3224

Remediation and Litigation Divisions

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

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Prepared by
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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY · PO BOX 13087 · AUSTIN, TX 78711-3087

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Contents

Summary of the Legislative Recommendation....2
Purpose of the Report....2
Program Overview....3
Legal Context....3
Core Issue....5
Workgroup Findings....5
Possible Impacts of the Legislative Recommendation....8
Proposed Statutory Amendment....9
Relevant Legislative History of House Bill 3224....13
Conclusion....13

Summary of the Legislative Recommendation

The legislation proposed in this report would create a defense to responsibility[1] for solid waste under Texas Health and Safety Code Section 361.271 (THSC 361.271) for scrap metal recycling transactions occurring after November 29, 1999. Largely modeled after a similar defense in federal Superfund law (Comprehensive Environmental Response, Compensation, and Liability Act, CERCLA),[2] the proposed legislation differs from the federal law in two central respects.

- It provides a defense solely for recycling of scrap metal as opposed to a wider lot of recyclable materials.
- The defense is available for transactions occurring after the date the CERCLA exemption was created rather than relating back in time indefinitely.

Purpose of the Report

This report was prepared for the Texas Legislature by Texas Commission on Environmental Quality (TCEQ) as required by House Bill 3224[3], (HB 3224), which was passed during the 86th Texas Legislative Session. HB 3224 requires TCEQ to submit the findings and legislative recommendation contained in this report to the Texas Legislature by January 15, 2021. HB 3224 directs TCEQ to conduct a study to evaluate the possibility of adopting a recyclable materials defense into state Superfund law[4] similar to that found in federal Superfund law.[5] Namely, the Texas Legislature directed TCEQ to study the potential impacts of creating a defense to responsibility under THSC 361.271 for persons who meet the CERCLA recyclable materials defense criteria established under 42 U.S.C. § 9627 (CERCLA 127). HB 3224 charged TCEQ to conduct the study in consultation with industry stakeholders via the formation of a workgroup.

As specified by HB 3224, TCEQ established a workgroup that included industry stakeholders for the purpose of evaluating the recyclable materials defense. In addition to TCEQ staff from the Offices of Legal Services and Waste, the workgroup comprises members from the Office of the Attorney General, the Recycling Council of Texas (RCoT), the State of Texas Alliance for Recycling (STAR), and the Texas Association of Regional Councils (TARC). Additionally, TCEQ invited workgroup involvement from the individual registered as opposed to HB 3224 during a committee hearing of the 86th Legislative Session, and this individual participated in the initial workgroup meeting. The workgroup convened for four meetings (including virtually) from January to August 2020, and dynamically considered the issues raised by the draft bill ultimately recommended in this report.

[1] As detailed in the section below titled "Legal Context," certain parties may be held responsible for necessary response actions related to solid waste. THSC 361.271.
[2] 42 U.S.C. § 9601, et seq.
[3] Tex. H.B. 3224, 86th Leg., R.S. (2019).
[4] THSC § 361.181, et seq.
[5] 42 U.S.C. § 9601, et seq.

The workgroup members reached consensus on most issues evaluated throughout the study. However, members diverged somewhat on the appropriate time frame of recycling transactions to which the recycling defense would apply. The workgroup discussed the issue at length and developed a compromise that is reflected in the draft bill contained in this report. This report provides a synopsis of the workgroup's study:

- An overview of the Superfund program, including relevant legal context.
- The workgroup's findings.
- Possible impacts from the legislative recommendation.
- Legislative recommendation in the form of a proposed bill (workgroup bill).

Program Overview

Legal Context

In accordance with the THSC, TCEQ administers the state Superfund program to address facilities that may constitute an imminent and substantial endangerment to public health and safety or the environment due to a release or threatened release of hazardous substances. TCEQ operates the Superfund program from appropriated monies derived from certain fees, penalties, interest, grant money, and expended Superfund money that has been recovered from parties potentially liable for the cleanup.[6] From Superfund program eligibility to cleanup completion, TCEQ follows a detailed statutory and regulatory process that may involve input from the public, affected community, potentially responsible parties (PRPs), and the TCEQ Commissioners.

Generally, Superfund law authorizes TCEQ to address sites posing an imminent and substantial endangerment in one of two ways. First, TCEQ may utilize administrative or civil tools to compel PRPs to address the relevant site. Notably, those PRPs who conduct a TCEQ-approved removal or remedial action that is necessary to address a release or threatened release may bring suit in a district court for contribution to recover reasonable costs against other PRPs. Second, TCEQ may conduct environmental response actions utilizing the state Superfund and thereafter litigate to recover expended costs from PRPs. Pursuing cost recovery from PRPs is statutorily mandated,[7] and as noted above, these recovered funds provide for the replenishment of the Superfund so that other sites causing an imminent and substantial endangerment can be addressed.[8]

THSC 361.271 establishes the PRPs for solid waste: current owners or operators of the site; former owners or operators of the site at time of processing, storage or disposal; parties who arranged to process, store or dispose of waste (arrangers); and

[6] THSC §361.133.
[7] THSC § 361.197(a) and (d).
[8] THSC § 361.133(b)(3).

transporters of the waste who selected the site for disposal (transporters). Consistent with CERCLA 127, the liability at issue in the workgroup bill solely relates to that of arrangers and transporters of solid waste.

Texas Superfund law already contains liability protection for certain recycling transactions involving scrap metal.[9] For example, excluded scrap metal being recycled generally would not form the basis of liability for Texas Superfund sites as it is not included within the definition of solid waste[10] for which a PRP could be liable. Notwithstanding, some representatives from the scrap metal recycling industry posit that the existing protections do not completely address the liability concerns of the scrap metal recycling industry (*e.g.,* hazardous substances remaining from the scrap metal after being recycled would not be protected under existing law). Therefore, recycling industry advocates have petitioned for a CERCLA 127 equivalent to be adopted into state law to supplement the existing liability protection for scrap metal under THSC. At least eight other states have adopted a defense for recycling,[11] and industry representatives have pointed to the liability protections in other states as a justification for Texas to provide additional protection for scrap metal recyclers in THSC.

CERCLA 127[12] protects certain arrangers and transporters of recyclable materials from federal Superfund liability.[13] Under CERCLA, recyclable materials include scrap paper, scrap plastic, scrap glass, scrap textiles, scrap rubber (other than whole tires), scrap metal, or spent lead-acid, spent nickel-cadmium, and other spent batteries. The type of recyclable material in question dictates the proof required of the party seeking the liability protection. For example, CERCLA 127 requires that recyclers of any recyclable materials demonstrate by a preponderance of the evidence that the materials for which liability protection is sought met a commercial specification grade and a market

9 As noted, liability for the remediation of Texas Superfund sites is statutorily defined to include certain parties that sent solid waste to the subject facility. THSC 361.271. However, the definition of solid waste found in THSC 361.003(34) is limited by the exclusions of Title 40, Code of Federal Regulations (CFR) § 261.4(a) (40 C.F.R. 261.4(a)). Under 40 C.F.R. 261.4(a), certain materials (generally 27 enumerated sets of materials) are excluded from the definition of solid wastes, and those materials that are excluded from the definition of solid waste by 40 C.F.R. 261.4(a) cannot be the basis of Texas Superfund liability. "Excluded scrap metal (processed scrap metal, unprocessed home scrap metal, and unprocessed prompt scrap metal) being recycled" is a set of materials among those that are excluded from the definition of solid waste. 40 C.F.R. 261.4(a)(13). In other words, parties that have sent materials found to be excluded scrap metal being recycled pursuant to 40 C.F.R. 261.4(a)(13) would not be liable for that material under existing Texas Superfund law.

10 THSC § 361.003(34).

11 Arkansas: A.C.A. § 8-7-524(a)(5); Florida: Fla. Stat. sec 403.727(8); Georgia: O.C.G.A. § 12-8-92(9)(C); Michigan: M.C.L. § 324.20126(1)(d)(i)&(ii); North Carolina: N.C. Gen. Stat. § 130A-310.7(b1); Pennsylvania: 35 Pa. Stat. sec. 6020.701(b)(5); Tennessee: Tenn. Code Ann. § 68-212-202(a)(4)(E)(i); South Carolina: S.C. Code Ann. § 44-56-200(3);

12 42 U.S.C. § 9627 (CERCLA 127).

13 The liability framework established by CERCLA is similar to THSC 361.271. CERCLA establishes liability of potentially responsible parties in 42 U.S.C. § 9607: current owners and operators of a facility, owners and operators of a facility at the time of disposal of hazardous substances, arrangers for disposal or treatment of hazardous substances, and certain transporters of hazardous substances for disposal or treatment.

existed for the material, *inter alia*;[14] however, only scrap metal recyclers must prove that the material was not melted prior to the transaction.[15]

The date of the recycling transaction in question further dictates the proof required of the party seeking the liability protection, and the enactment date of CERCLA 127 is controlling. Transactions that occurred before the enactment date of November 29, 1999 require proof of fewer elements to receive liability protection. For example, for transactions that occur after November 29, 1999, recyclers must also prove by a preponderance of the evidence that the person exercised reasonable care to determine that the consuming facility was in compliance with applicable state, federal, and local environmental laws.[16]

Core Issue

Throughout the study, the workgroup balanced the goals of fostering both responsible recycling and the long-term stability of the state Superfund program. Those advocating for a state equivalent of CERCLA 127 cited the public policy goal of encouraging recycling, reasoning that setting aside liability for arrangers and transporters involved in certain recycling transactions would diminish a market preference for virgin- over recycled-feedstocks. Likewise, the agency stressed that the public policy of encouraging recycling must be considered along with the potential fiscal impacts to the Superfund program. Incorporating a CERCLA 127 defense into state law would create a greater risk to the state of cost recovery shortfall, undermining a significant funding source for the remediation of sites that pose an imminent and substantial endangerment to public health and the environment. Therefore, the workgroup sought to structure a bill that would provide similar protection to CERCLA 127 while accounting for the differences in state law.

Workgroup Findings

The study conducted by the workgroup produced the findings below, which guided the drafting of the workgroup bill.

1. *Any proposed legislation creating a recycling defense should be drafted to be self-contained and Texas-specific rather than a wholesale incorporation of CERCLA 127 into state law by cross-reference.*

   The law establishing Texas Superfund liability is similar, though far from identical, to CERCLA, and broad application of CERCLA liability exclusions related to recyclable materials could create unintended consequences in Texas. For example, the Texas legislature crafted Texas Superfund law to allow ordering environmental response activities and cost recovery from parties responsible for solid waste as well as hazardous substances, whereas the federal Superfund law solely deals with hazardous substances. Creating a

[14] 42 U.S.C. § 9627(c).
[15] 42 U.S.C. § 9627(d)(1)(C).
[16] 42 U.S.C. § 9627(c)(5).

recycling defense in Texas law by citing directly to CERCLA 127 could create an unclear situation where seemingly inapplicable federal legal precedent relating to one type of waste may confound state law matters on waste of another type. Rather than relying on incorporation by reference, the workgroup bill is tailored to meet the needs that were the focus of the workgroup's study so that the proposed legislation can work independently of CERCLA. In addition to preventing misapplied precedent, this strategy also avoids a situation whereby Texas law would be changed unnecessarily if Congress were to amend or repeal provisions of CERCLA incorporated directly into Texas law.

2. *Narrowing the scope of the proposed defense solely to scrap metal recycling, as opposed to CERCLA's wide-ranging category of recyclable materials, appropriately addresses the most clearly defined recycling industry concerns related to Superfund responsibility.*

   As noted above, early versions of the bills propounded by the recycling industry during prior legislative sessions mirrored CERCLA 127 and protected a broad category of recyclable materials, including scrap paper, glass, textiles, plastics, metal, certain rubber, and spent batteries. However, to reduce the unpredictable negative implications to the state Superfund program, the list of covered materials was refined at various points during the prior legislative sessions to focus the bills solely on scrap metal recycling. Similarly, although the workgroup's membership included representatives from a broad spectrum of the recycling industry, through the course of the workgroup study it became clear that the most well-defined and understood Superfund liability concerns were related to the scrap metal recycling industry. Given that and the unknowns surrounding the likely fiscal implications of adopting liability protection for the broader class of materials, the workgroup agreed to limit the bill's application to the recycling of scrap metal.

   As previously highlighted, certain scrap metal recycling is already afforded a measure of liability protection in existing state law since it is excluded from the definition of solid waste. The existing statutory exclusion demonstrates a legislative objective to protect scrap metal recycling from THSC 361.271 responsibility; therefore, the workgroup recommends further reducing liability gaps remaining for scrap metal recycling. Parties not excluded from responsibility via the definition of solid waste may nevertheless demonstrate the criteria contained in the workgroup bill to defend against Superfund liability.

3. *Rather than creating a defense that potentially relates back indefinitely to historical transactions never intended to be recycling, the workgroup bill provides that the defense applies retroactively only for transactions occurring after the effective date CERCLA 127: November 29, 1999. This calculated retroactivity reflects a legally supportable compromise between the options of an unfettered retroactive application and an exclusively prospective application of the defense.*

Under Texas law, a statute is presumed to be prospective in its application unless expressly made retrospective.[17] Further, the Texas Constitution prohibits retrospective laws to grant protection against an arbitrary use of legislative power.[18] The Supreme Court of Texas established and recently affirmed three factors for courts to use when analyzing whether a retrospective law is in violation of the Constitution: (1) "the nature and strength of the public interest served by the statute as evidenced by the legislature's factual finding;" (2) "the nature of the prior right impaired by the statute;" and (3) "the extent of the impairment."[19] Courts have repeatedly held that procedural, remedial, and/or jurisdictional statutes applied retroactively do not violate the Texas Constitution.[20]

The first factor, the nature and strength of the public interest, acknowledges a heavy presumption against retroactive laws because it "requir[es] a compelling public interest to overcome the presumption."[21] The workgroup bill is drafted to serve a compelling public interest: encouraging responsible recycling rather than a preference for virgin feedstocks. Further, service to the public interest is strengthened by the limited temporal application of the recycling defense contained in the workgroup bill. Since the controlling date relates to the time at which CERCLA underscored an expected standard of care in the recycling market, the bill's retroactivity is consistent with the public interest it's structured to serve. Limiting the defense's reach to a time where CERCLA recognized the recycling market will also reduce the likelihood of frivolous lawsuits related to historical transactions, never intended as recycling, that would unnecessarily burden judicial and state resources, as well as those of private parties.

The second factor requires an analysis of the previous right held under the statute, and the third factor evaluates the extent of the impairment of the previously held right. These factors call to mind pending contribution suits filed by responsible parties that would possibly be impaired to the extent scrap metal recyclers were removed from the pool of PRPs. This could give rise to a constitutional challenge in certain fact settings. However, the Texas Supreme Court has held that even though a plaintiff's right of recovery was extinguished, the statute prohibiting recovery was not unconstitutional where it was enacted before the plaintiff filed the case and because it furthered a legitimate public interest.[22] Further, the Court has also considered whether the statute includes a grace period before extinguishing the ability of a plaintiff to

[17] Tex. Gov't Code § 311.022.
[18] Art. 1, Sec. 16 of the Texas Constitution; *Mellinger v. Houston*, 3 S.W. 249, 252, 68 Tex. 37, 42 (Tex. 1887).
[19] *Robinson v. Crown Cork & Seal Co.*, 335 S.W.3d 126, 145 (Tex. 2010); *In re Occidental Chem. Corp.*, 516 S.W.3d 146, 161 (Tex. 2018).
[20] *E.g., Occidental*, 516 S.W.3d at 161, *Bryant v. State*, 457 S.W.2d 72, 78 (Tex. Civ. App. 1970); *Aetna Ins. Co. v. Richardelle*, 528 S.W.2d 280, 284 (Tex. Civ. App. 1975) (stating that retroactive laws that are merely a change in remedy, and that do not destroy a vested right, are typically upheld);
[21] *Tenet Hosps. Ltd. v. Rivera*, 445 S.W.3d 698, 707 (Tex. 2014).
[22] *Union Carbide Corp. v. Synatzske*, 438 S.W.3d 39, 58 (Tex. 2014).

bring a claim. A statute is unlikely to be found unconstitutionally retroactive if affected parties were given the opportunity to protect their interests.[23]

Taking these considerations into account, the workgroup bill includes clear language indicating a legislative intent for the statute to apply retroactively for transactions occurring after November 29, 1999. Further, the legislative history should include a recitation of the compelling public interest for the statute and for its retroactive application. To fortify the constitutionality of the defense, the legislature could include a grace period before the defense is effective so that parties have the opportunity to protect their interests. If the statute's retroactive application is challenged, the court will likely also consider the right affected by the retroactive application of a statute and to what extent that right is impeded, but case law demonstrates that compelling public interest and/or existence of a grace period can allow a retroactive statute to be upheld even if a legal right is extinguished.

Possible Impacts of the Legislative Recommendation

Parties likely to be interested in or affected by the proposal would include 1) entities engaged in the scrap metal recycling industry, 2) those deemed to be responsible parties for the response costs incurred at state Superfund sites, and 3) entities engaged in recycling materials other than scrap metal. Additionally, the workgroup evaluated likely impacts to TCEQ in the administration of the Superfund program, as well. Some of the potential impacts are highlighted below.

1) Scrap Metal Recyclers: Members of the scrap metal recycling industry will likely favor the proposal as it provides another layer of defense against responsibility under THSC 361.271 for solid waste. Some in the industry may be dissatisfied that the legislative recommendation does not relate back indefinitely to discharge liability for transactions occurring before November 29, 1999. As indicated above, the workgroup evaluated the defensibility of a retroactive proposal, and the TCEQ determined that the most legally sound approach would be liability protection for scrap metal recycling that relates back to transactions occurring after the effective date of CERCLA 127 (November 29, 1999).

2) Superfund Responsible Parties: As described in more detail above, parties who conduct a TCEQ-approved removal or remedial action may pursue litigation for contribution toward their response costs from other responsible parties. Consequently, responsible parties for sites where contamination from scrap metal recycling contributed to the response costs may be frustrated by the proposed legislation since a reduction in the number of liable parties from whom contribution costs could be pursued would increase their overall liability and financial burden.

3) Recyclers of Other Materials: As previously noted, CERCLA 127 provides a defense for a wider net of recyclable materials than that contained in the workgroup bill.

[23] *Texas Water Rights Comm. v. Wright*, 464 S.W.2d 642, 648 (Tex. 1971).

Recyclers of materials other than scrap metal [i.e., paper, plastic, glass, textiles, rubber (other than whole tires), and certain spent batteries] might be dissatisfied that these other materials are not covered by the proposed liability defense. The workgroup recommends a bill focused solely on the recycling of scrap metal since 1) the problems encountered by that industry have been the most well-defined, 2) amendments of recycling bills throughout the prior legislative sessions focused on scrap metal, and 3) the Texas Legislature had demonstrated an intent to protect scrap metal recycling through the exclusion of certain aspects of that industry from the definition of solid waste.

4) TCEQ: The proposed amendment may result in fiscal implications where TCEQ spends or has spent Superfund money to remediate a site involving contamination from scrap metal recycling and is required to seek cost recovery. If a party raises the new recycling defense, TCEQ could incur much higher litigation costs in defending any appeals of administrative orders and pursuing cost recovery. Additionally, TCEQ could experience a cost recovery shortfall, depending on the facts of the case, which could deplete the Superfund. Fiscal implications may also occur where TCEQ seeks to compel PRPs to perform response activities who are exempted from responsibility under the workgroup bill. Those remediation projects may need to be performed with state funds instead. If additional sites require state resources, it may be necessary to reprioritize site cleanups and/or phase them over longer periods of time.

Proposed Statutory Amendment

Subchapter I of Chapter 361 of Texas Health and Safety Code would be amended to add a new section as follows:

Sec. 361.380. Scrap Metal Recycling Transactions

(a) Liability clarification

(1) As provided in subsections (b) and (c), a person who arranged for recycling of scrap metal shall not be liable under Sections 361.271(a)(3) and 361.271(a)(4) with respect to such scrap metal for transactions occurring after November 29, 1999.

(2) A determination whether or not any person shall be liable under Sections 361.271(a)(3) or 361.271(a)(4) for any material that is not scrap metal as that term is defined in subsection (b) of this section shall be made, without regard to subsections (b) and (c) of this section.

(b) Scrap metal defined

For purposes of this section, the term "scrap metal" means, bits and pieces of metal parts (e.g., bars, turnings, rods, sheets, wire) or metal pieces that may be combined together with bolts or soldering (e.g., radiators, scrap automobiles, railroad box cars), which when worn or superfluous can be recycled, except for scrap metals that are excluded from this definition by state or federal regulation. The term scrap metal shall not include--

(1) shipping containers of a capacity from 30 liters to 3,000 liters, whether intact or not, having any hazardous substance (but not metal bits and pieces or hazardous substance that form an integral part of the container) contained in or adhering thereto; or

(2) any item of material that contained polychlorinated biphenyls at a concentration in excess of 50 parts per million or any new standard promulgated pursuant to applicable federal laws.

(c) Transactions involving scrap metal

Transactions involving scrap metal that occur after November 29, 1999, shall be deemed to be arranging for recycling if the person who arranged for the transaction (by selling scrap metal or otherwise arranging for the recycling of scrap metal) can demonstrate by a preponderance of the evidence that all of the following criteria were met at the time of the recycling transaction:

(1) The scrap metal met a commercial specification grade.

(2) A market existed for the scrap metal.

(3) A substantial portion of the scrap metal was made available for use as feedstock for the manufacture of a new saleable product.

(4) The scrap metal could have been a replacement or substitute for a virgin raw material, or the product to be made from the scrap metal could have been a replacement or substitute for a product made, in whole or in part, from a virgin raw material.

(5) The person was in compliance with any applicable regulations or standards regarding the storage, transport, management, or other activities associated with the recycling of scrap metal.

(6) The person did not melt the scrap metal prior to the transaction. Thermal separation of 2 or more materials due to differences in their melting points (referred to as "sweating") does not constitute melting for purposes of this subsection; and

(7) The person exercised reasonable care to determine that the facility where the scrap metal was handled, processed, reclaimed, or otherwise managed by another

person (hereinafter in this section referred to as a "consuming facility") was in compliance with substantive provisions of any federal, state, or local environmental law or regulation, or compliance order or decree issued pursuant thereto, applicable to the handling, processing, reclamation, storage, or other management activities associated with scrap metal.

(8) For purposes of this subsection, "reasonable care" shall be determined using criteria that include (but are not limited to)--

(A) the price paid in the recycling transaction;

(B) the ability of the person to detect the nature of the consuming facility's operations concerning its handling, processing, reclamation, or other management activities associated with scrap metal; and

(C) the result of inquiries made to the appropriate federal, state, or local environmental agency (or agencies) regarding the consuming facility's past and current compliance with substantive provisions of any federal, state, or local environmental law or regulation, or compliance order or decree issued pursuant thereto, applicable to the handling, processing, reclamation, storage, or other management activities associated with the scrap metal. For the purposes of this paragraph, a requirement to obtain a permit applicable to the handling, processing, reclamation, or other management activity associated with the scrap metal shall be deemed to be a substantive provision.

(d) Exclusions

(1) The exemption set forth in subsection (c) shall not apply if--

(A) the person had an objectively reasonable basis to believe at the time of the recycling transaction--

(i) that the scrap metal would not be recycled;

(ii) that the scrap metal would be burned as fuel, or for energy recovery or incineration; or

(iii) that the consuming facility was not in compliance with a substantive provision of any federal, state, or local environmental law or regulation, or compliance order or decree issued pursuant thereto, applicable to the handling, processing, reclamation, or other management activities associated with the scrap metal;

(B) the person had reason to believe that hazardous substances had been added to the scrap metal for purposes other than processing for recycling; or

(C) the person failed to exercise reasonable care with respect to the management and handling of the scrap metal (including adhering to

customary industry practices current at the time of the recycling transaction designed to minimize, through source control, contamination of the scrap metal by hazardous substances).

(2) For purposes of this subsection, an objectively reasonable basis for belief shall be determined using criteria that include (but are not limited to) the size of the person's business, customary industry practices (including customary industry practices current at the time of the recycling transaction designed to minimize, through source control, contamination of the scrap metal by hazardous substances), the price paid in the recycling transaction, and the ability of the person to detect the nature of the consuming facility's operations concerning its handling, processing, reclamation, or other management activities associated with the scrap metal.

(3) For purposes of this subsection, a requirement to obtain a permit applicable to the handling, processing, reclamation, or other management activities associated with scrap metal shall be deemed to be a substantive provision.

(e) Effect on other liability

Nothing in this section shall be deemed to affect the liability of a person under paragraph (1) or (2) of Section 361.271(a).

(f) Regulations

The commission may adopt rules concerning this section.

(g) The exemptions provided in this section shall not affect any concluded judicial or administrative action or any pending action initiated by the commission prior to September 1, 2021.

(h) Liability for attorney's fees for certain actions

Any person who commences an action in contribution against a person who is not liable by operation of this section shall be liable to that person for all reasonable costs of defending that action, including all reasonable attorney's and expert witness fees.

(i) Relationship to liability under other laws

Nothing in this section shall affect--

(1) liability under any other federal, state, or local statute or regulation promulgated pursuant to any such statute; or

(2) the ability of the commission to promulgate regulations under any other statute.

(j) Limitation on statutory construction

Nothing in this section shall be construed to--

(1) affect any defenses or liabilities of any person to whom subsection (a)(1) does not apply; or

(2) create any presumption of liability against any person to whom subsection (a)(1) does not apply.

Relevant Legislative History of HB3224

The introduced version of HB 3224 sought to create a defense to liability for persons responsible for recyclable material [such as scrap paper, glass, textiles, plastics, metal, rubber (non-tires), and spent batteries] by incorporating by reference the terms from federal Superfund law, CERCLA. During the legislative session, the bill was substantially amended on the floor by removing the statutory defense language and replacing it with the requirement for TCEQ to conduct a study, and ultimately a legislative recommendation, regarding the potential impacts of adopting such a defense into state law.

During the 84th and 85th Legislative sessions, bills substantially similar to the introduced version of HB 3224 were filed (HB 1569 and HB 1856 respectively) but not passed. In response to the prospect of incorporating the recyclable metals defense into state law during the 84th-86th Legislative Sessions, TCEQ raised possible fiscal implications related to precluding the state's ability to recover Superfund costs from certain potentially responsible parties. Throughout the legislative history of these bills, the legislature proposed amendments to focus the liability protection to scrap metal recycling only.

In 2011, the 5th Circuit Court of Appeals held that recyclers who sent solid waste to a Texas

Superfund site were not protected from state law claims for contribution by CERCLA 127.[24] This case is likely the impetus for adoption of a CERCLA 127 equivalent into state law.

Conclusion

In light of the liability concerns urged by the recycling industry, TCEQ recommends that the Texas Legislature adopt legislation that would create a defense to liability for solid waste under THSC 361.271 for scrap metal recycling transactions occurring after November 29, 1999. TCEQ has drafted the bill language contained in this report to address the matters highlighted in the workgroup's findings.

[24] *Del-ray Battery Co., et al. v. Douglas Battery Co., et al.*, No. 10-40515 (5th Cir. 2011).