



Protecting Texas
by Reducing and
Preventing Pollution

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DATE: November 6, 2006

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TO: Name Fredda Benton
Organization Envirophase
FAX Number 817-275-9553

FROM: TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Name Susan Palachek
Division/Region Remediation/Voluntary Cleanup Program
Telephone Number 512-239-1831
FAX Number 512-239-1212

NOTES:
Fredda,

Attached are the official procedures for TCEQ assistance gaining off-site access. Please look over them and submit your three access attempt letter and receipt documentation along with a written request for TCEQ assistance.

Sincerely,

Susan Palachek
Project Manager
Voluntary Clean-Up Program

Procedures for Gaining Access to Off-Site Properties
Texas Commission on Environmental Quality
Remediation Division
July 16, 2004

1. Person Conducting Investigation Requests Assistance for Access

The Procedures set forth in this document only apply if the person conducting the investigation, hereafter referred to as "Person," has reached an impasse with an off-site property owner regarding access to their property for the purpose of conducting work that we have required of the Person. If the Texas Commission on Environmental Quality (TCEQ) gets involved in such a dispute, the resolution we will seek is an access agreement which will contain at a minimum the provisions detailed below. The Person need not obtain an access agreement with these provisions if the parties reach a resolution regarding access outside of this process.

If seeking TCEQ assistance in resolving an access dispute, the Person must first show that they have provided to the off-site property owner a work plan for the investigation to be conducted on the off-site property and an access agreement. The access agreement must include, at a minimum, the following provisions: (1) the Person may not interfere with the normal use of the property; (2) payment of reasonable compensation for access to the property; and (3) the off-site property owner is indemnified from liability for an intentional or negligent act of the Person arising from the Person's access to and use of the property (Tex. H & S Code §361.752).

If the off-site property owner denies access or if the off-site owner is non-responsive,¹ the Person must submit a written request for assistance to the Remediation Division (RMD) Project Manager (PM). The request must include the name, the correct and current mailing address and phone number of the off-site property owner, as well as the physical address of the potentially-affected off-site property. The Person must provide documentation that the work plan and access agreement were submitted to the off-site property owner and the off-site property owner has denied access or has not responded. A letter denying access is acceptable documentation that the off-site property owner has denied access. If the property owner is non-responsive, the Person must show that they have sent the required written documentation (work plan and access agreement) at least twice and have attempted to contact the off-site property owner by telephone.

Prior to providing assistance, the RMD PM must approve the work plan and ensure the access agreement contains the required provisions.

2. RMD PM Contacts Off-Site Property Owner

¹ A non-responsive property owner is different from a property owner that can not be located. A non-responsive property owner is someone whose contact information is available to the Person. A non-responsive property owner may become responsive when contacted by RMD PM. If a property owner can not be located, meaning that there is no known contact information, RMD PM should contact the staff attorney assigned to the matter.

Prior to contacting the Off-site property owner, RMD PM must request that a staff attorney be assigned to the case. The request should be sent via email to the appropriate Senior Attorney in the Office of Legal Services and copy RMD Section Manager. The staff attorney does not have to be assigned prior to RMD PM contacting off-site owner. However, the RMD PM should brief staff attorney of all activities upon assignment.

RMD PM will contact the off-site property owner first via telephone to explain why access is being requested, to determine why access is being denied, and, if possible, resolve any technical issues. Staff should also explain the process that will follow which may include either party being referred to enforcement for failure to respond to TCEQ directives, resolution of the technical issues by RMD PM, or both parties being referred to the Alternative Dispute Resolution (ADR) Program for assistance in settling the dispute through mediation, and as needed, resolution of the issue by the Off-Site Access Committee, hereafter referred to as "Committee" (see Item 6 for additional information regarding the Committee). Staff should give notice of the forthcoming Access Letter (Letter #1) to be sent by the TCEQ. The Access Letter should be sent to the off-site property owner certified mail return receipt requested.

If the off-site property owner does not respond to the Access Letter within 30 days, RMD PM will refer the matter for enforcement.

3. Request for Proposal for Disputed Items of the Access Agreement from Both Parties

If RMD PM receives a response to Letter #1 from the off-site property owner which contains an explanation as to why access is being denied, RMD PM will send both parties a "Request for Proposal" letter (Letters #2A and 2B). The "Request for Proposal" letter will request each party to provide a proposal to resolve the disputed items of the access agreement which shall include a detailed analysis supporting the proposal. The analysis should include information such as property appraisals, technical studies, itemized costs of providing or obtaining access, and a discussion of other disputed access terms.

4. Resolution of Technical Issues

As stated under Item 1, the Person must submit a work plan to the off-site property owner. Resolution of technical issues related to the work plan will be overseen by RMD PM. RMD PM should review data submitted by both parties to determine the best technical solution. The work plan may be modified, based on comments, for final TCEQ approval. The parties shall comply with the resolution of the technical issues as determined by RMD PM and supervisors.

If there are no other issues in dispute and either party does not comply with the RMD directive regarding the technical requirements, RMD PM will refer the non-compliant party(ies) to enforcement.

5. Referral to Alternate Dispute Resolution (ADR) Program

If both parties respond to the "Request for Proposal" letter and the dispute includes non-technical issues, RMD PM will send the "Notice of Referral to Alternate Dispute Resolution" letter (Letters #3A and 3B) to both parties certified mail return receipt requested. The "Notice of Referral to Alternate Dispute Resolution" letter will inform the parties they will be contacted shortly by ADR to obtain their voluntary consent to mediate and, if both parties agree, to schedule a mediation settlement conference.

RMD PM will refer the matter to ADR using the attached Corrective Action Referral Form (CARF). Mediation efforts will be concluded no later than 90 days from the CARF date unless TCEQ staff determine a 30-day extension is warranted. ADR will notify the RMD PM and staff attorney via e-mail if both parties do not agree to mediate. If both parties agree to mediate, ADR will submit a letter to both parties confirming the date and location of the mediation settlement conference. RMD PM and staff attorney will be copied on the letter and will attend the settlement conference.

6. Referral to Off-Site Access Committee

The issue will be referred to the Off-Site Access Committee (Committee) by the RMD PM if either party does not want to participate in ADR or if settlement by mediation is not achieved within 90 days. The Committee will consist of representatives from the Litigation Division, Enforcement Division, and the Financial Administration Division, as well as the assigned staff attorney from the Office of Legal Services and the RMD PM. The RMD PM will send an e-mail to the Directors of the Enforcement Division, Litigation Division, and the Financial Administration Division requesting that a representative be assigned to the Committee. The RMD PM is responsible for coordinating and scheduling the Committee meeting(s).

The decision made by the Committee will constitute the Executive Director's position regarding what constitutes "reasonable access." The RMD PM will notify both parties, in writing, of the decision. If one or both parties do not comply with the Committee's decision within 60 days, the non-compliant party(ies) will be referred to enforcement.

7. Referral to Enforcement

For the reasons described above, the non-responsive or non-compliant party(ies) will be referred to Enforcement for violation of Section 26.121 of the Texas Water Code. The RMD PM will send a "Notice of Referral to Enforcement" letter (Letter #4) to the non-compliant party by certified mail return receipt requested. The RMD PM will complete an Enforcement Action Referral (EAR) Form. Instructions for completing an EAR and the EAR form may be found at <http://home.tnrcc.state.tx.us/cgi-bin/internal/enforcement/fod.pl>. The RMD PM will submit the EAR to the Enforcement Division along with proof that the notification letter

Procedures for Gaining Access to Off-Site Properties
Corrective Action Section
July 16, 2004
Page 4 of 4

was received.

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