



# Hazardous Materials in Project Development

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Laws, Regulations and Agencies

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**Section 1 - Overview**

**Federal Laws and Regulations**

For hazardous substances, wastes and materials, the following primary federal laws impact TxDOT project development:

<b>Table B-1: Federal Laws and Regulations</b>			
<b>Act or Statute</b>	<b>Abbreviation</b>	<b>Regulatory Agency</b>	<b>Code or Regulation</b>
Resource Conservation and Recovery Act of 1976	RCRA	U.S. Environmental Protection Agency (USEPA)	42 USC §6901 et seq. 40 CFR 260-263 40 CFR 268 40 CFR 280
Hazardous and Solid Waste Amendments of 1984	HSWA	USEPA	42 USC §6901 et seq.
Comprehensive Environmental Response Compensation and Liability Act of 1980	CERCLA	USEPA	42 USC §9601 et seq. 40 CFR 300-374
Superfund Amendments and Reauthorization Act of 1986	SARA	USEPA	42 USC §9601 et seq.
Small Business Liability Relief and Brownfields Revitalization Act of 2002	Brownfields Amendments	USEPA	42 USC §9601 et seq.
Hazardous Materials Transportation Act	HMTA	U.S. Department of Transportation (USDOT)	49 USC §5101 et seq. 49 CFR 100 – 185
Occupational Safety and Health Act of 1971	OSHA	Occupational Safety and Health Administration (OSHA)	29 USC §651 et seq. 29 CFR 1910 29 CFR 1926
Clean Air Act of 1974, amended 1990.	CAA	USEPA	42 USC §7401 et seq. 40 CFR 61
USC = United States Code CFR = Code of Federal Regulations			

**State Statutes**

For hazardous substances, wastes and materials, the following primary state statutes, administered by the Texas Commission on Environmental Quality (TCEQ) and Texas Department of Health (TDH), impact TxDOT project development:

<b>Table B-2: Texas Statutes</b>			
<b>Statute</b>	<b>Abbreviation</b>	<b>Regulatory Agency</b>	<b>Chapter</b>
Texas Health and Safety Code, Solid Waste Disposal Act	THSC or TSWDA	TCEQ	THSC Chapter 361
Texas Water Code, Prohibition Against Pollution; Enforcement	TWC	TCEQ	TWC Chapter 26, Subchapter D, §26.121 et seq.
Texas Water Code, Texas Hazardous Substances Spill Prevention and Control Act	TWC	TCEQ	TWC Chapter 26, Subchapter G, §26.261 et seq.
Texas Water Code, Underground and Aboveground Storage Tanks	TWC	TCEQ	TWC Chapter 26, Subchapter I, §26.341 et seq.
Vernon's Texas Civil Statutes, Texas Asbestos Health Protection Act	TAHPA	TDH	Vernon's Texas Civil Statutes, Title 71, Art. 4477-3a

## **Section 2 - Federal Law Summary**

### ***Resource Conservation and Recovery Act***

The Resource Conservation and Recovery Act (RCRA) was enacted in 1976 and includes several amendments. It addresses the management of non-hazardous solid waste, hazardous waste and underground storage tanks (USTs). As defined under RCRA, hazardous waste characteristics are ignitable, corrosive, reactive, toxic or listed (contain certain amounts of toxic chemicals). EPA has listed 500 specific hazardous wastes.

The RCRA program regulates:

- solid waste recycling and disposal
- federal procurement of products containing recycled materials
- waste minimization
- hazardous waste generators and transporters
- hazardous waste treatment, storage and disposal facilities (TSDFs).

The Hazardous and Solid Waste Amendments of 1984 (HSWA) broadened the scope of RCRA and authorized the EPA to regulate USTs containing petroleum products and hazardous substances. Primarily, states and territories implement the UST program. The resulting UST program includes provisions governing:

- design and installation of USTs
- release detection
- release response
- corrective action
- financial responsibility
- closure.

RCRA also established the generator's responsibility or liability for hazardous waste management and disposal. Hazardous waste cleanup under RCRA, referred to as the Corrective Action Program, is different from Superfund (discussed below). The Corrective Action Program concerns sites with viable operators and ongoing operations. It encompasses active or soon-to-be-active facilities that are permitted or seek a permit to treat, store or dispose of hazardous waste. To obtain an RCRA operating permit, these active facilities are required to clean up any contaminants that are released from their facilities or have been released in the past. The RCRA facility owner/operator must pay for the cleanup at the site.

***TxDOT's Perspective on RCRA:*** There is no defense to liability under RCRA, but liability might be avoided if appropriate inquiry is performed and identifies known or possible hazardous waste contamination and regulated facilities. Closure of hazardous waste disposal units within any proposed right of way should be coordinated with the owner/operator of the RCRA facility and adhere to applicable TCEQ and EPA requirements. Post-closure care requirements may also apply. Any generated hazardous wastes must be handled according to applicable regulations either prior to or during construction.

### ***Comprehensive Environmental Response Compensation and Liability Act***

The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), commonly referred to as Superfund, was enacted on December 11, 1980. CERCLA authorizes the EPA to respond to releases or threatened releases of hazardous substances, pollutants or contaminants that may endanger human health or the environment. Superfund was designed to remedy past hazardous waste management mistakes at abandoned sites or sites or where a sole responsible party cannot be identified. The EPA follows National Contingency Plan (NCP) procedures to respond to releases and threatened releases of hazardous substances, pollutants or contaminants. CERCLA also requires the EPA to maintain the National Priorities List (NPL), a list of sites across the United States that require remedial action due to releases or threatened releases of hazardous substances. Finally, CERCLA requires that releases be reported, establishes the liability of persons responsible for releases of hazardous substances and initiates a trust fund to provide for cleanup when no responsible party can be identified. It should be noted that the term “hazardous substances” excludes petroleum products, including crude oil or any fraction thereof, natural gas, natural gas liquids, liquefied natural gas or synthetic gas usable for fuel.

***Potentially responsible parties (PRP):*** Under CERCLA, potentially responsible parties (PRP) include:

- the owner and operator of a vessel or a facility
- 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
- 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, or 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
- 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.

Liability shall be for:

- all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the NCP
- any other necessary costs of response incurred by any other person consistent with the NCP
- 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
- the costs of any health assessment or health effects study carried out under section 42 USC 9604(i).

***Defenses to Liability:*** Defenses to liability were created under the Superfund Amendments and Reauthorization Act of 1986 (SARA) and were amended under the Small Business Liability Relief and Brownfields Revitalization Act (Brownfields Amendments) of 2002. There shall be no liability for a person who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by an act or omission of a third party. A third party is someone 1) other than an employee or agent of the defendant or 2) other than one whose act or omission occurs in connection with a contractual

relationship with the defendant. The term "contractual relationship" includes, but is not limited to, land contracts, deeds or other instruments transferring title or possession.

For private property transfers, there are the landowner liability protections. There is an "***innocent land owner protection***." The defendant must demonstrate that, at the time of acquisition, he/she did not know and had no reason to know that any hazardous substance was disposed of on, in or at the facility. To establish that the defendant had no reason to know, he/she must have undertaken all appropriate inquiry into the previous ownership and previous uses of the property consistent with good commercial or customary practice at the time of acquisition. The innocent land owner defense can also be used for hazardous substances which migrate from adjacent properties.

For government entities, an "***eminent domain defense***" can apply when acquisition occurs after hazardous substances have been disposed of or placed on, in or at the facility. A government entity has a defense to liability if the facility was acquired by escheat, through any other involuntary transfer/acquisition or through the exercise of eminent domain authority by purchase or condemnation.

There is no defense to liability if the defendant obtained actual knowledge of the release or threatened release of a hazardous substance and then subsequently transferred ownership of the property to another person without disclosing such knowledge. Most importantly, neither the innocent landowner nor eminent domain defense shall affect the liability under CERCLA if a defendant who, by any act or omission, caused or contributed to the release or threatened release of a hazardous substance.

Any government entity that acquires right of way through the exercise of eminent domain authority by purchase or condemnation may assert a defense to liability for any hazardous substances on the property prior to acquisition. However, the use of the eminent domain defense has not been sufficiently tested through litigation. It may also be possible to assert the innocent land owner defense if hazardous substances migrated from adjacent properties onto existing right of way.

The highest potential for liability exists if hazardous substances are mishandled. TxDOT must use "due care" and "take precautions" against possible consequences of disposal, treatment or transportation of hazardous substances after acquisition. TxDOT especially does not want to cause or contribute to the release or threatened release of hazardous substances. Therefore, an appropriate inquiry to identify concerns is needed. Significant coordination with federal and state agencies such as EPA and TCEQ will be necessary if a project requires the acquisition of or may affect listed sites or sites under investigation/assessment for Superfund. The project should be designed to avoid further releases of hazardous substances during or after construction. Due to the significant costs involved and possibility of litigation, avoidance and minimization should be considered early in project development.

### ***Hazardous Materials Transportation Act***

The Hazardous Materials Transportation Act (HMTA) 49 USC §5101 et seq. designated regulations for transportation of hazardous materials in commerce. Regulated by the USDOT, "hazardous materials" are defined as materials of a particular quantity and form that may pose an unreasonable risk to health, safety or property. Hazardous materials may include, but are not limited to, explosives, radioactive materials, etiologic agents, flammable liquids or solids, combustible liquids or solids, oxidizing or corrosive materials, poisons and compressed gases. Transportation of hazardous materials must meet applicable USDOT regulations.

### ***Occupational Safety & Health Act***

The Occupational Safety and Health Act (OSHA) was established for the regulation of site safety procedures, worker or employee training and worker safety and health standards. OSHA includes provisions for:

- occupational safety and health standards
- inspections, investigations and record keeping
- citations
- procedure for enforcement
- training
- employee education.

OSHA regulations include Hazardous Waste Operations and Emergency Response (HAZWOPER) 29 CFR 1910; 1926.65.

Under OSHA, the employer is responsible for employee health and safety. Considerations for occupational safety and health in accordance with applicable OSHA regulations are required when hazardous substances, materials and waste are involved.

### ***Clean Air Act***

The Clean Air Act (CAA) was established to regulate air pollutants and air emissions. The Clean Air Act required the EPA to establish national emission standards for hazardous air pollutants to which no ambient air quality standard applies. Pollutants in this category are usually emitted by very specific industrial sources and include asbestos, beryllium, mercury, vinyl chloride and benzene.

The National Emissions Standards for Hazardous Air Pollutants (NESHAP) are established in 40 CFR §61. NESHAP requires an asbestos inspection to be conducted prior to renovation or demolition of a commercial building. Additional information on asbestos in buildings or structures within the right of way is provided in Chapter 3 (Right of Way).

## **Section 3 - Texas Statute Summary**

### ***Texas Health and Safety Code***

The Texas Health and Safety Code, Solid Waste Disposal Act, controls the management of solid and hazardous waste by requiring hazardous waste to be stored, processed and disposed of only at permitted hazardous industrial solid waste facilities.

The previous owner or operator of a facility is liable for the release or threatened release of a hazardous substance. Similar to CERCLA, TxDOT must exercise due care and take precautions against potential consequences. A defendant is not liable if he/she acquired the real property on which the facility requiring the remedial action is located after the disposal or placement of the hazardous substance on, in or at the facility, or if the defendant is a governmental entity that acquired the facility by escheat, by other involuntary transfer/acquisition or by the exercise of the power of eminent domain. It should be noted that the Texas Health and Safety Code does not include the language “by purchase or condemnation” when discussing eminent domain.



If the defendant obtained actual knowledge of the release or threatened release of a hazardous substance at a facility while owning the real property on which the facility is located, and subsequently transferred ownership of the property to another person without disclosing that knowledge, the defendant is liable. Also, there is no defense to liability for a defendant who, by an act or omission, caused or contributed to the release or threatened release of a hazardous substance that is the subject of the action concerning the facility.

### ***Texas Water Code***

The Texas Water Code provides for the conservation and development of the state's natural resources. As defined under the Texas Water Code, "water" or "water in the state" means *groundwater, percolating or otherwise, lakes, bays, ponds, impounding reservoirs, springs, rivers, streams, creeks, estuaries, marshes, inlets, canals, the Gulf of Mexico inside the territorial limits of the state, and all other bodies of surface water, natural or artificial, inland or coastal, fresh or salt, navigable or nonnavigable, and including the beds and banks of all watercourses and bodies of surface water, that are wholly or partially inside or bordering the state or inside the jurisdiction of the state.*

Under Chapter 26, Subchapter G of the Texas Water Code, Texas Hazardous Substances Spill Prevention and Control Act, a "person responsible" or "responsible person" for discharges or spills of hazardous substances may include:

- the owner, operator or demise charterer of a vessel from which a spill emanates
- the owner or operator of a facility from which a spill emanates
- any other person who causes, suffers, allows or permits a spill or discharge.

Under Chapter 26, Subchapter D, of the Texas Water Code, no person may cause or allow a discharge of any waste or pollutant into or adjacent to the waters of the state, in violation of this statute or of any rule, regulation, permit or other order of the TCEQ.

Ultimately, the current property owner is responsible for any contamination leaving the property or affecting groundwater. As with RCRA and CERCLA, appropriate inquiry must be performed for existing and proposed right of way to identify any special considerations to avoid unauthorized discharges.

Additional information on liability associated with leaking petroleum storage tanks is provided in Chapter 3 (Right of Way).

### ***Texas Asbestos Health Protection Act***

The Texas Asbestos Health Protection Act pertains to any public building that requires notification similar to NESHAP. It also includes further requirements, such as licensed persons to perform the survey and to remove the asbestos.

Licenses are required to perform asbestos-related work in public buildings in Texas for contractors, supervisors, workers, consultants, management planners, inspectors, air monitors, laboratories, transporters and training providers.

Additional information on asbestos in buildings or structures within the right of way is provided in Chapter 3 (Right of Way).

**Section 4 - Texas Regulatory Agencies**

**Texas Commission on Environmental Quality (TCEQ)**

The state of Texas is responsible for implementing and enforcing the federal law with support, if needed, from the Environmental Protection Agency. The legislature has enacted state laws and the TCEQ has adopted rules in compliance with federal code and regulations. USC §9614 permits states to impose additional liability or requirements with respect to releases of hazardous substances in the state.

The TCEQ administers both state and federally mandated programs including:

- the Resource Conservation and Recovery Act
- the Comprehensive Environmental Response, Compensation and Liability Act
- the Clean Water Act
- the Safe Drinking Water Act
- the development of state management plans for groundwater under the Federal Insecticide, Fungicide and Rodenticide Act.

The following table summarizes some of the notification and authorization requirements for TCEQ activities involving regulated sites:

Table B-3: TCEQ's Notification and Approval Requirements		
Type of Facility	Requirement Summary	Statute or Code
State Superfund Registry	TCEQ should be notified of any substantial change in the use of the facility. A substantial change in use is defined as a physical or functional alteration of a facility, the effect of which is to interfere significantly with a proposed or ongoing remedial investigation/ feasibility study (RI/FS) or similar study, or to expose public health and safety or the environment to a significantly increased threat of harm.	Texas Solid Waste Disposal Act, Section 361.190; 30 TAC §335.341 et seq.  Note: Substantial change includes, but is not limited to, actions such as the erection or razing of a building or other structure at the facility, the paving over of a facility, the creation of a park or other public or private recreational use on the facility, and any other alteration of the site or activity which could interfere with the performance of a RI/FS or remedial action.
	Advance written authorization from TCEQ is required before any partial or total removal activities or on-site sampling, testing or preliminary investigations can be performed.	Texas Health and Safety Code, Texas Solid Waste Disposal Act, Section 361.186; 30 TAC §335.346

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Municipal Solid Waste Landfill	The owner or operator must submit to TCEQ any plans for proposed construction activities or structural improvements located on closed Municipal Solid Waste Landfill (MSWLF) units or MSW sites (not associated with approved solid waste disposal activities), with supporting documentation, for review and approval.	30 TAC §330.255
	Any engineer who conducts a soil test and determines that part of the tract overlies a closed municipal solid waste landfill (CMSWLF) is required to submit notifications to the TCEQ and others designated by rule within 30 days from test completion.	Texas Health and Safety Code, Section 361.538(c); 30 TAC §330.953
Petroleum Storage Tank	Any person intending to: (1) install a new or replacement underground storage tank, (2) remove an underground storage tank from the ground or (3) conduct a permanent abandonment in-place of an underground storage tank must comply with the notification requirements prior to initiating such activity.	30 TAC §334.6 Construction Notification
	At least 24 hours prior to initiating a discharge of water contaminated by gasoline, jet fuel, kerosene or other petroleum substances, the responsible party shall notify the appropriate TCEQ regional office. Additionally, a registration form must be completed and submitted to the TCEQ prior to discharge. A responsible party is defined in this chapter as the operator, owner or any person responsible for or exercising control over activities.	Discharge to Surface Waters from Treatment of Petroleum Substance Contaminated Waters, 30 TAC §321.133; 30 TAC §321.134
	Tank owners and operators must report underground storage tank (UST) and aboveground storage tank (AST) releases in the	30 TAC §334.129; 30 TAC §334.72 Reporting of Suspected Releases

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Petroleum Storage Tank (continued)	surrounding area, such as the presence of free product or vapors in soils, sewer and utility lines, basements and nearby surface water to the appropriate TCEQ office within 24 hours of discovery.	
	TCEQ can require owners and operators of UST systems to follow release investigation and confirmation steps to determine if the UST system is the source of offsite impacts.	30 TAC §334.73
	Owners and operators must notify affected landowner(s) of contamination releases which have migrated offsite. Documentation that the notice has been provided to the affected landowners must be provided to TCEQ.	30 TAC §334.82(b)
	Prior approval from TCEQ is required for contaminated soil management or reuse of petroleum product contaminated soil.	30 TAC §334.482
	Record keeping, reporting and shipping procedures and requirements apply to generators and transporters of petroleum- substance waste.	30 TAC §§334.496-499
Industrial Solid Waste and Municipal Hazardous Waste	Any person who intends to store, process or dispose of industrial solid waste without a permit, transports hazardous or Class 1 waste unless exempted, or conducts or intends to conduct the recycling of industrial solid waste or municipal hazardous waste as defined in 30 TAC §335.24 shall notify TCEQ.	30 TAC §335.6 General Notification Requirements

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Interim and Permitted Industrial and Hazardous Waste Facilities	Emergency situations must be reported to TCEQ.	30 TAC §335.113; 30 TAC §335.153
Accidental Discharge or Spill	Any individual operating, in charge of or responsible for the activity or facility shall notify the TCEQ as soon as possible (and not more than 24 hours) after the occurrence of an accidental discharge or spill occurring at or from any activity or facility which causes pollution. Accidental discharge is defined as an act or omission through which wastes or other substances are inadvertently discharged into water in the state. A spill is defined as an act or omission through which waste or other substances are deposited where, unless controlled or removed, they will drain, seep, run or otherwise enter water in the state.	Texas Water Code §26.039 and 30 TAC §327.1-327.5  Notes: A reportable discharge or spill is a discharge or spill of oil, petroleum product, used oil, hazardous substance, industrial solid waste or other substance into the environment in a quantity equal to or greater than the reportable quantity listed in 30 TAC §327.4 in any 24-hour period.  The Texas Natural Resource Conservation Commission affirms that the spill reporting rules 30 TAC §§327.1-327.5 do not apply to historical contamination. 21 Texas Register 4228 dated May 14, 1996

### ***Texas Department of Health (TDH)***

The TDH Bureau of Radiation Control (BRC) regulates radioactive materials in Texas under the authority of the Atomic Energy Act of 1954, as amended. Generally, TDH has jurisdiction over the licensing of receipt, possession, use, processing, storage, transport and disposal of radioactive materials and any low-level radioactive waste that is not preemptively regulated by the federal government. The BRC will intermittently sample groundwater in response to an incident, complaint or situation where groundwater contamination may be present.

TDH's Asbestos Programs Branch, Toxic Substances Control Division has two programs which regulate asbestos. The TDH Licensing Program issues licenses to persons qualified to perform asbestos-related work in public buildings. The Enforcement Program makes regional inspectors available to monitor asbestos removal in buildings, and to minimize public exposure in response to community concerns. However, the disposal of asbestos-containing material is regulated by TCEQ.

### ***Railroad Commission of Texas (RRC)***

The Surface Mining and Reclamation Division of the Railroad Commission of Texas (RRC) is authorized to enforce laws and regulations consistent with the Texas Surface Coal Mining and Reclamation Act and the Texas Uranium Surface Mining and Reclamation Act.

The RRC Oil and Gas Division is responsible for activities related to the drilling, exploration and production of oil, gas and geothermal resources, the underground storage of hydrocarbons and the solution mining of brine. A list of oil and gas activities subject to the RRC jurisdiction appears in the Texas Natural Resources Code, Section 91.101. The RRC adopted this list by rule in 16 TAC §3.8.

Generally, the RRC has jurisdiction over the discharge, storage, handling, transportation, reclamation or disposal of waste materials resulting from activities associated with the exploration, development or production of oil, gas or geothermal resources. These waste materials may be disposed of at a solid waste facility permitted by TCEQ with the concurrence of the facility owner or operator and the agency having jurisdiction over the facility, provided the RRC has either permitted the disposal or authorized the disposal by rule.

The RRC also responds to spills from pipelines under its jurisdiction and to other emergencies related to the production and transportation of oil and gas. Lastly, the RRC handles citizen complaints regarding alleged groundwater contamination from oil and gas activities and to alleged unauthorized activities that may endanger groundwater.

## **Section 5 - Local Entities**

### ***Applicability of Local Laws and Ordinances***

The Attorney General has ruled in numerous instances that municipalities are creations of the State and have no power to exert their authority over the State, unless the legislature specifically grants them that authority. Therefore, it is rare that a state agency would be subject to ordinances of these local entities; TxDOT transportation projects are not subject to local ordinances and regulations. Construction contractors working on TxDOT transportation projects are considered TxDOT agents and are also not subject to local ordinances and regulations.

### ***Texas Alliance of Groundwater Districts (TAGD)***

The Texas Alliance of Groundwater Districts (TAGD) is the umbrella organization of groundwater conservation districts within the state. Its membership is restricted to groundwater conservation districts with the powers and duties to manage groundwater as it is defined in Chapter 52 of the Texas Water Code. The districts were created by the Legislature or by the TCEQ to preserve and protect groundwater. The districts are local or regional in their jurisdictions and have, for the most part, elected boards of directors. Among their legislatively granted authorities is the power to monitor groundwater quality. A number of districts are also authorized to bring civil court proceedings for injunctive relief against an entity causing groundwater contamination.

### ***Local Publicly Owned Treatment Works (POTW)***

Local Publicly Owned Treatment Works (POTWs) or wastewater treatment plants should be contacted for requirements and possible permitting or pre-treatment of any discharges into city, county or locally-owned sanitary sewers.

## **Appendix A**

The following table shows the revision history for this guidance document.

<b>Revision History</b>	
<b>Effective Date Month, Year</b>	<b>Reason for and Description of Change</b>
February 2014	Version 1 release