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TEXAS MUNICIPAL SETTING DESIGNATIONS

John Slavich

Guida, Slavich & Flores, P.C.
750 North St. Paul Street, Suite 200
Dallas, Texas 75201
214.692.0009 phone

slavich@guidaslavichflores.com
www.theenvironmentallawfirm.com

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I. INTRODUCTION

Shallow groundwater contamination is common in urban areas. The contamination can be due to current or historic use of chemicals and other materials on site. Contamination can also arise from migration of contaminants from neighboring property. In many previously developed areas, that contaminated water is not used by property owners because water is available from publically or privately owned water utilities. Nonetheless, risk-based closure standards in Texas and other states require that contamination in the groundwater be addressed in order to achieve regulatory closure. In certain instances, regulatory closure can be achieved using an institutional control that prohibits the use of the groundwater. However, before the State of Texas will consider the use of such an institutional control, contamination in the groundwater plume must be fully delineated. The resulting work needed to "chase the plume" is, in many cases, expensive and time consuming.

In 2003, the Texas Legislature created Municipal Setting Designations ("*MSDs*"). MSDs can be used to obtain regulatory closure from the Texas Commission on Environmental Quality ("*TCEQ*") for a contaminated site more quickly and with more certainty and less cost as compared to other approaches under risk-based corrective action standards. This chapter describes the regulatory context for MSDs and the process for obtaining an MSD. The chapter also considers how MSDs differ from institutional controls. Finally, the chapter looks at how MSDs can be of practical benefit both to current property owners and to purchasers, developers and lenders in connection with a transaction involving a brownfield property.

II. MUNICIPAL SETTING DESIGNATIONS AND REGULATORY CLOSURE

A. Background

The Municipal Setting Designation is not a stand-alone regulatory fix for a contaminated property. An MSD does not substitute for a Certificate of Completion ("*COC*") under the Texas Voluntary Cleanup Program ("*VCP*") or a no further action determination under one of the other Texas remediation programs, such as TCEQ's Corrective Action Program or Petroleum Storage Tank Program. Rather, it is intended to be used as a component part of the State's regulatory closure process. Because the VCP is generally considered to be the regulatory closure program preferred by the real estate market, this chapter will focus on how the MSD works in the context of the VCP.

1. MSD and VCP

The VCP is intended to provide incentive to remediate contaminated property by removing liability of future landowners and lenders.[1] When the necessary investigation and appropriate response actions with respect to a site have been completed and a COC is issued by TCEQ, future owners, operators, and lenders are released (subject to limited exceptions) from liability to the State of Texas with respect to cleanup of contamination present at the site covered

by the COC at the time the COC was issued.[2] Prospective purchasers of contaminated sites that become applicants under the VCP *prior to taking ownership of the property* will also be released from liability upon TCEQ's subsequent issuance of a COC.[3]

2. Texas Risk Reduction Program

The Texas Legislature created the MSD as a legislative amendment of the regulatory cleanup standards established by TCEQ, including the Texas Risk Reduction Program ("*TRRP*"). TRRP serves as TCEQ's "cleanup cookbook" for Texas remediation projects under the VCP and the Corrective Action program. The detailed TRRP regulations,[4] and extensive accompanying guidance issued by TCEQ, provide a comprehensive risk-based approach for assessing and responding to environmental contamination. Although TRRP no longer applies to cleanup of leaking petroleum storage tanks[5], it continues to serve as the principal technical driver for remediation projects related to real estate, and this chapter will consider the interrelationship of TRRP and MSDs.

TRRP requires persons addressing environmental contamination to perform a series of activities with respect to a site. Those activities include:

- Conducting an affected property assessment, classifying groundwater, determining land use, and notifying affected offsite property owners.
- Determining critical protective concentration levels for the affected environmental media (e.g., soil, groundwater, surface water) and potential exposure pathways (e.g. dermal exposure to soil, human ingestion of groundwater, ecological receptors).
- Preparing an Affected Property Assessment Report ("*APAR*") which sets out in detail the information noted above, along with a significant amount of other site-related information called for by TRRP.
- Developing a Response Action Plan that describes how the proposed response objectives will be met.
- Preparing and submitting to TCEQ following completion of response actions, a Response Action Completion Report.[6]

A complete delineation of the lateral and vertical extent of impacts to affected media above TRRP Protective Concentration Levels ("*PCLs*") for "chemicals of concern" is generally required as part of the APAR. Typically the most stringent PCLs for contaminants in soil and groundwater are based directly or indirectly on Federal drinking water standards. Delineation of contaminated groundwater will many times be the most costly and time-consuming component of the TRRP process.

The Texas Legislature created the Municipal Setting Designation as a legislative amendment of the regulatory provisions established by TCEQ in their TRRP standards. It can provide particular relief from the factor typically responsible for the greatest amount of cost and time in addressing environmental impacts at a contaminated site – potential human consumption of contaminated groundwater – where conditions indicate that human consumption of affected

groundwater cannot be reasonably anticipated. With an MSD, persons addressing impacted property may be subject to less stringent soil and groundwater assessment and cleanup requirements than would otherwise be required under TRRP.

B. The Municipal Setting Designation

The Texas Legislature authorized the creation of MSDs in 2003.[7] As adopted, the statute required two criteria for eligibility:

- A public drinking water supply system exists which is capable of supplying drinking water to the MSD property and property within ½ mile of the MSD Property; and
- The property is within the corporate city limits or extraterritorial jurisdiction of a municipality with a population of at least 20,000.[8]

The population criteria was eliminated by further legislative action in 2007 with the purpose of allowing for wider utilization of MSDs in Texas.[9]

An MSD is a specified geographic area that is certified by the TCEQ pursuant to an application by a property owner, municipality, or others. The boundaries of an MSD may or may not be identical to the boundaries of the property owned by the VCP applicant. An MSD can extend beyond the applicant's property and also cover adjacent properties. Generally, such a multi-property MSD will require the authorization of the owners of the covered property. For example, the City of Dallas is sponsoring an MSD along the Singleton Boulevard corridor in West Dallas, but only properties where owners have elected to participate will be included in that MSD. The City of Fort Worth, however, successfully obtained an MSD in 2007 covering approximately 2,000 acres in the Trinity Uptown section of that city without the prior written approval of property owners within the MSD boundaries.

Certification of an MSD affects TRRP standards by changing the applicable assessment and cleanup levels for soil and groundwater with respect to the MSD site. So long as groundwater contamination is not causing, nor is it reasonably anticipated to cause, offsite impacts to human health within a ½ mile buffer zone surrounding the MSD, then soil and groundwater assessment and cleanup levels based directly or indirectly on safe drinking water standards do not apply under TRRP. The determination of actual or potential exposure to contaminated groundwater is based on a survey of existing groundwater wells within the ½ mile buffer zone surrounding the MSD. Even if there are state-registered groundwater wells within the buffer zone surrounding the MSD property, if the groundwater contamination impacting the MSD property is not reasonably anticipated to impact these existing wells, the human ingestion pathway for groundwater will not be considered under TRRP. To justify elimination of the human ingestion risk factor, a city municipal ordinance or deed restriction prohibiting potable use of affected groundwater within an MSD will be required.[10]

If no groundwater wells exist within the buffer zone, or if it can be shown that the contamination is not reasonably anticipated to impact any existing wells, the VCP applicant can eliminate the following PCLs for purposes of assessment and cleanup under TRRP:

- The groundwater PCLs for direct human ingestion of groundwater ($^{GW}GW_{Ing}$).
- The soil PCLs for protection against leaching of contaminants from soils into groundwater at levels that would be unsafe for human ingestion ($^{GW}Soil_{Ing}$).

At sites where an MSD can eliminate the groundwater exposure pathway, the effect on assessment and cleanup standards can be dramatic. For example, many dry cleaner sites are contaminated with the solvent used in dry cleaner operations. Historically, that solvent has been tetrachloroethylene, commonly known as perc. The groundwater PCL, based on ingestion of perc, is 0.005 ppm.[11] That number will be considered the "critical" PCL and groundwater assessment and cleanup to that level would be required. By eliminating the ingestion pathway with an MSD, the critical PCL will no longer be the ingestion pathway but rather the inhalation pathway, of 500 ppm, which is a 100,000 times increase over the non-MSD critical PCL of 0.005 ppm.[12]

Also, although groundwater contamination may be the primary focus at a site, an MSD can also relax soil assessment requirements and reduce the amount of soil that must be removed or otherwise remediated to achieve regulatory closure. When an MSD removes the groundwater ingestion pathway, the critical PCL for soil will be based upon a combined ingestion, dermal and inhalation exposure level rather than a soil-to-groundwater protection level. For example, elimination of the ingestion PCL for perc, at a site with a source area under 0.5 acre can result in an increase in the critical PCL for soil from 0.05 mg/kg ($^{GW}Soil_{Ing}$) to 100 mg/kg $^{(Tot}Soil_{Comb})$[13] for a residential site and 410 mg/kg $^{(Tot}Soil_{Comb})$[14] for a commercial/industrial site.

In many cases, TCEQ can issue a VCP Certificate of Completion for a site with an MSD without requiring remediation of groundwater. Certification of an MSD does not, however, eliminate all assessment and cleanup requirements under TRRP. As noted above, two of the groundwater-related exposure pathways (ingestion, and protection of groundwater from surface and subsurface soil contamination) are eliminated from the risk analysis under TRRP. There are, however, three other groundwater pathways that must still be considered and either eliminated or addressed: inhalation of volatiles; discharge to subsurface water; and ecological protection.[15] Similarly, an MSD does not eliminate all assessment and cleanup requirements for soil contamination. For these and other reasons discussed above, it is important that persons planning to use an MSD strategy to address contamination under TRRP conduct an initial screening investigation to evaluate whether an MSD can be used to meet all TRRP assessment and cleanup requirements.

C. The Municipal Setting Designation Process

The MSD process is made up of a series of requirements at the municipal and state levels.

1. State MSD Requirements

The steps to obtain MSD certification for a site are defined in Subchapter W of the Texas Health & Safety Code.[16] These steps include application and payment of a $1,000 fee; notice of the application (mailed to affected municipalities, municipal and retail public water utilities, and

registered water well owners); public comment period (60 days); staff technical review (90 days); and certification by TCEQ.[17]

2. Municipal MSD Procedures

Before TCEQ may certify an MSD, the applicant must provide documentation evidencing that:

a. The MSD application to TCEQ is accompanied by resolutions in support adopted by (i) the city council of the municipality in which the MSD is located and any other municipalities lying within the boundaries of the MSD and ½ mile buffer zone; and (ii) the governing body of each municipal and retail public utility having a groundwater supply well within 5 miles of the MSD; and

b. The property for which an MSD is sought is subject to either:

(1) a municipal ordinance that prohibits the use of affected groundwater from beneath the property as potable water and that appropriately restricts other uses of and contact with that groundwater; or

(2) a restrictive covenant enforceable by the municipality in which the property is located that prohibits the use of designated groundwater from beneath the property as potable water and appropriately restricts other uses or contact with that groundwater. Restrictive covenants must be approved by municipal resolution.[18]

Various Texas municipalities have adopted MSD procedural ordinances. The municipal MSD programs vary in their approach to application fees, notice requirements, public participation and paperwork required during and after related TCEQ determinations.

Whether the jurisdiction has adopted a procedural ordinance, or whether it would consider an application on a case-to-case basis, an MSD applicant must obtain a resolution in support of the MSD not only from the municipality in which the MSD is located, but also resolutions of support from municipalities and regulated public utilities within the specified distances from the site. This can be a practical challenge since these other entities may not have the same interest in approving the MSD as the host municipality. Consequently, the MSD is, at its heart, a political process, with accompanying environmental technical aspects, and it is imperative that the MSD applicant keep in mind that their project team will need to include professionals that can assist with the political and related legal issues, which are beyond what environmental consultants typically provide.

D. Is an MSD an Institutional Control?

An institutional control is defined by TRRP as "a legal instrument placed in the property records in the form of a deed notice, Voluntary Cleanup Program Certificate of Completion (VCP Certificate of Completion), or restrictive covenant which indicates the limitations on or the

conditions governing the use of the property which ensures protection of human health and the environment or equivalent zoning and governmental ordinances."[19]

By creating a restriction on groundwater use using a municipal ordinance or deed restriction, an MSD has the same practical effect as an institutional control. However, the State of Texas effectively places MSDs in a category separate from institutional controls under TRRP. In order to satisfy cleanup responsibilities at a contaminated property, the various requirements under Remedy Standard A[20] or B[21] promulgated under TRRP are to be used to ensure that the property is rendered protective of human health and the environment.[22]

An institutional control can be used to demonstrate that a property has achieved a Remedy Standard A for commercial/industrial land use.[23] By implication, an institutional control cannot be used for a residential land use under Remedy Standard A. In contrast, TCEQ allows an MSD to be used to obtain a Remedy Standard A residential closure for appropriately remediated property.

One practical effect of that distinction is that the VCP applicant can use a Self Implementation Notice ("*SIN*")[24] under TRRP rules to perform the work necessary to achieve target cleanup levels for a Remedy Standard A residential closure. A SIN allows the VCP applicant to proceed with remediation without requiring submission of a Response Action Plan[25] which, unlike a SIN, will require State approval. Use of a SIN can save time in the remediation schedule, which can be critical to a developer.

E. The Importance of MSDs to Real Estate Deals in Texas

MSDs offer the opportunity to take a new strategic approach at Texas sites that require regulatory closure. The typical brownfield site may present a number of challenges:

- Performing a cleanup that is cost-effective within the context of the property value or cost of redevelopment.
- Dealing with uncertainty as to if and when the State will grant regulatory closure.
- Dealing with situations where contamination sourced on the subject property has migrated offsite or where the source of the contamination is an upgradient site which cannot be controlled by the subject property.

The MSD provides a significant improvement in offering more certainty and finality to projects involving contaminated properties. As noted earlier, an MSD strategy can eliminate the need to "chase the plume" of contamination, which would otherwise be required under TRRP. That is particularly useful in situations where the plume has migrated and impacted offsite properties.

A combined VCP/MSD approach can substitute for an Innocent Owner/Operator program ("*IOP*") strategy for a site. The certificate issued by TCEQ under their IOP program provides a release of liability from the State without addressing regulatory closure of the contamination. In contrast, an MSD/VCP approach can provide regulatory closure and also overcome the primary

drawback of Innocent Owner Certificates ("*IOCs*") to real estate developers: the IOC does not run with the land.

MSDs can also address concerns regarding liability exposure for environmental conditions that may have impacted surrounding properties. MSDs can reduce the potential for tort exposure by demonstrating that levels that exceed TRRP published standards can be left in place and still be deemed protective of human health and the environment under TRRP. MSDs also offer a vehicle for the owners of impacted adjacent property to join with the MSD applicant and extend the boundaries of the MSD to cover that adjacent property.

For the reasons noted above, MSDs provide an important tool for property owners needing an exit strategy for environmentally-impacted properties, and for purchasers and developers dealing with the challenges of redeveloping contaminated property.

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[1] TEX. HEALTH & SAFETY CODE § 361.602 (visited June 24, 2009) http://www.statutes.legis.state.tx.us/SOTWDocs/HS/htm/HS.361.htm#361.602.

[2] *Id.* § 361.610.

[3] *Id.*

[4] 30 TEX. ADMIN. CODE § 350.001 *et seq.* (visited June 24, 2009) http://www.tceq.state.tx.us/rules/indxpdf.html#350.

[5] 30 TEX. ADMIN. CODE § 334.71(a) (visited June 24, 2009) http://www.tceq.state.tx.us/rules/indxpdf.html#334.

[6] *Id.* § 350.3.

[7] Tex. H.B. 3152, 78th Leg., R.S. (2003).

[8] TEX. HEALTH & SAFETY CODE § 361.803 (2003).

[9] Tex. H.B. 2018, 80th Leg., R.S. (2007).

[10] TEX. HEALTH & SAFETY CODE § 361.8065(a)(2).

[11] Table 3, Tier 1 Groundwater PCLs – Residential and Commercial/Industrial, updated Mar. 25, 2009 (visited June 11, 2009) http://www.tceq.state.tx.us/remediation/trrp/trrppcls.html.

[12] *Id.*

[13] *Id.* Table 1, Tier 1 Residential Soil PCLs.

[14] *Id.* Table 2, Tier 1 Commercial/Industrial Soil PCLs.

[15] TEX. HEALTH & SAFETY CODE § 361.808. (visited June 24, 2009) http://www.statutes.legis.state.tx.us/SOTWDocs/HS/htm/HS.361.htm#361.602.

[16] *Id.* § 361.801 *et. seq.*

[17] *Id.* §361.804.

[18] *Id.* § 361.8065.

[19] 30 TEX. ADMIN. CODE § 350.4(a)(47) (visited June 24, 2009) http://www.tceq.state.tx.us/rules/indxpdf.html#350.

[20] 30 TAC § 350.32.

[21] 30 TAC § 350.33.

[22] 30 TAC § 350.31(a).

[23] 30 TAC § 350.111(b)(2).

[24] 30 TAC § 350.92.

[25] 30 TAC § 350.94.