

Cause No. D-1-GN-10-000787

SOUTHWESTERN PETROLEUM CORPORATION	§	
	§	
v.	§	126 th JUDICIAL DISTRICT
	§	
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, and BRYAN SHAW, BUDDY GARCIA, and CARLOS RUBINSTEIN, IN THEIR OFFICIAL CAPACITIES	§	
Defendant	§	TRAVIS COUNTY, TEXAS

PLAINTIFF'S FIRST AMENDED PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, Plaintiff, Southwestern Petroleum Corporation (“SWEPCO”), complaining of Defendant the Texas Commission on Environmental Quality (“TCEQ”), and of Defendants Bryan Shaw, Buddy Garcia, and Carlos Rubinstein (“the Commissioners”), in their official capacity as Commissioners of the TCEQ. By this First Amended Petition, SWEPCO seeks declaratory judgments regarding, administrative review of, and a *de novo* review of, the TCEQ’s February 12, 2010 issuance of a unilateral Administrative Order (“AO” or “Order”). The AO seeks payment from roughly 350 entities, including SWEPCO, of an unspecified sum of money to be determined in the future for costs related to investigations undertaken at the “Voda Petroleum State Superfund Site,” and directs all 350 entities to begin a remedial action. The AO was issued without an opportunity for an adjudicative hearing. As grounds for review, SWEPCO would show as follows:

I.
PARTIES

1. SWEPCO is a Texas corporation. Its address is 534 N. Main, Fort Worth, Texas.

2. Defendant TCEQ is an administrative agency of the State of Texas. Service of process may be accomplished by personal delivery of citation to the Executive Director of the TCEQ, Mr. Mark Vickery, P.G., located at 12100 Park 35 Circle, Building F, Austin, Travis County, Texas 78753.
3. Defendants Bryan Shaw, Buddy Garcia, and Carlos Rubinstein are commissioners of the TCEQ. Service of process may be accomplished by personal delivery of citation to the TCEQ, located at 12100 Park 35 Circle, Building F, Austin, Travis County, Texas 78753.

II.
DISCOVERY CONTROL PLAN

4. SWEPCO seeks to conduct discovery under a Level 3 Discovery Control Plan.

III.
JURISDICTION AND VENUE

5. This is a direct appeal of a unilateral Administrative Order issued by the TCEQ on February 12, 2010 (“Order” or “Administrative Order”). A copy of the Order is attached hereto as Exhibit “A.”
6. This action is brought pursuant to § 5.351 of the Texas Water Code, §§ 361.188(b), 361.321, and 361.322 of the Texas Health and Safety Code, and § 37.001, *et. seq.* of the Texas Uniform Declaratory Judgments Act (“TUDJA”).
 - Section 5.351 of the Texas Water Code authorizes a “person affected” by a ruling or order of the TCEQ to file a petition to review, set aside, modify or suspend the TCEQ’s act. Section 361.321 allows a “person affected” by a ruling, order, decision or other act of the TCEQ to appeal said ruling, order, decision, or other act by filing a petition in district court in Travis County. SWEPCO is a “person affected” under § 5.351 and § 361.321 because it is named by the TCEQ in the Order as a party responsible for reimbursing the TCEQ’s expenses related to certain investigations into potential

environmental contamination at a state superfund site, and is also ordered to undertake remedial action.

- Section 361.322 allows any person subject to an administrative order issued pursuant to Texas Health & Safety Code § 361.272 to appeal said order in district court.
- Because the Order at issue was issued pursuant to § 361.271 and § 361.272, and SWEPCO is a person subject to the Order, § 361.188(b) makes the Order subject to appeal under §§ 361.321 and 361.322.
- Finally, the Texas Uniform Declaratory Judgments Act, Texas Civil Practices and Remedy Code § 37.004 authorizes this district court to declare that the Order is invalid, or is an *ultra vires* action by the TCEQ.

7. This action is timely filed under the provisions of §§ 5.351, 361.321 and 361.322.

- Section 5.351 provides that the person affected by a ruling must file his petition within 30 days of the effective date of the ruling, order or decision. The effective date of the Order is February 22, 2010, so this petition is timely under § 5.351.
- Section 361.321 provides that an appeal must be brought not later than the 30th day after the ruling, order, decision, or other act of the governmental entity (here, the TCEQ) whose action is appealed. The TCEQ issued the unilateral order on February 12, 2010. Accordingly, this petition, which is filed within 30 days of that date, is timely under § 361.321.
- Section 361.322 provides that an appeal brought pursuant to that section must be filed before the 46th day after the date of receipt, hand delivery, or publication service of the order that is being appealed. This petition, which is filed within 46 days of the date of publication and receipt, is timely under § 361.322.

8. Venue is proper in Travis County District Court pursuant to § 361.321(a) of the Texas Health and Safety Code. Section 361.321 allows a person affected by a ruling, order, decision or other act of the TCEQ to appeal said ruling, order, decision, or other act to a Travis County District court.

IV. FACTUAL BACKGROUND

9. The tract of land designated by the TCEQ as the “Voda Petroleum State Superfund Site” (the “Site”) is comprised of approximately 6.12 acres located in Gregg County, Texas. According to TCEQ¹ records, the Site was historically used as a waste oil recycling facility from approximately 1981 to 1991, when all operations ceased and the Site was essentially abandoned by the owners and operators.
10. In 1995, the TCEQ conducted an investigation of the Site to determine if the historic operations had resulted in environmental contaminants entering the groundwater and/or soils at the Site. Part of this investigation included a Hazard Ranking System (“HRS”) evaluation of the Site. The HRS is a scoring system used to evaluate potential, relative risk(s) to public health and the environment from releases or threatened releases of hazardous substances. The HRS score assigned to a site as the result of the evaluation is the primary factor in deciding if that site is eligible to be placed on the federal National Priorities List. The Site’s HRS score was not high enough to qualify the Site as a federal Superfund Site under the Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”). Instead, the Site was referred in 1995 to the United States Environmental Protection Agency (“EPA”) for an immediate removal action to address

¹ During some of the events outlined in the Factual Background, the TCEQ was known as the Texas Natural Resource Conservation Commission. For convenience, the agency is referred to throughout this document by its current name, the TCEQ.

the TCEQ's belief that the Site presented an imminent and substantial endangerment to public health and the environment.

11. An EPA Action Memorandum, dated March 27, 1996, documented that, the Site received crude oil in addition to hazardous substances. EPA's Action Memorandum also noted the presence of large quantities of oil that were subject to the Clean Water Act and the Oil Pollution Act rather than to CERCLA.
12. In 1996, EPA removed drums of grease or oily wastes, drums of corrosive wastes, aboveground storage tanks, and contaminated soils. Fencing was also installed around the Site at this time to restrict public access to the Site to insure public health and safety.
13. In December 1997, after the removal action was complete, EPA sampled both on-site soils and groundwater as part of a post-removal action assessment. EPA's assessment found that the removal action had minimized the threat of direct human contact or of inhalation that may have been present pre-removal.
14. EPA then sought recovery of the costs it incurred in undertaking this removal action, and in 1999 and 2000, the EPA settled with a number of companies that it had named as potentially responsible parties ("PRPs") for the Site.
15. According to the sworn statement of Mr. Voda, the operator of Voda Petroleum, during the relevant time frame, different sections of the property were operated by two separate entities – Voda Petroleum and Ultra Oil. Ultra Oil conducted operations on approximately one acre of the property (also known as Southwest Tank Farm). While Mr. Voda eventually purchased the Southwest Tank Farm, there were no Voda Petroleum operations on Southwest Tank Farm at any time. EPA stated that the PRPs who sent materials to the Site would not be liable for EPA's costs associated with Ultra Oil's operations on the property.

16. Based on information in the public record, TCEQ was fully aware of EPA's removal action, post-removal sampling and assessment results, and of EPA's settlement. SWEPCO is unaware of any TCEQ correspondence commenting on or disputing the sufficiency of the EPA removal action at the time of the removal action itself or immediately following the removal action.
17. Three years after EPA's removal action was completed, and without re-scoring the Site under the HRS, the TCEQ proposed the Site for listing on the State Superfund Registry on November 17, 2000 and published a Notice of that proposal in the Texas Register (25 Tex. Reg. 11594).
18. In November 2000, the TCEQ also sent correspondence to certain entities it believed had historically shipped materials to the Site. That correspondence asserted that the TCEQ considers the recipient to be a Potentially Responsible Party ("PRP") at the Site as defined in § 361.271 of the Texas Health & Safety Code (the Texas Superfund Statute), and therefore potentially responsible for environmental investigation and eventual remediation at the Site. The correspondence informed the recipients of the Site's proposed listing on the State Registry and the date for submitting comments on the proposed listing. The correspondence included a Notice of Opportunity to Make Good Faith Offer to conduct a Remedial Investigation/Feasibility Study ("RI/FS") at the Site. This correspondence was not sent to every entity now listed by the TCEQ as a responsible party for the Site. Several of the responsible parties submitted written comments and objections, complaining that there was no empirical data to support TCEQ's imminent and substantial endangerment finding and no evidence to support listing the Site on the State Superfund Registry.

19. Despite the statutory requirement to notify all persons potentially responsible for the Site's contamination, and despite its assertion that SWEPCO is such a person, the TCEQ did not provide SWEPCO with the November 2000 Notice of an opportunity to conduct the RI/FS. Accordingly, SWEPCO had no knowledge of, or opportunity to participate in, the TCEQ's proposed RI/FS or to comment on the Site's proposed listing on the State Registry, despite TCEQ's knowledge of its alleged shipments to the Site.
20. On or about March 6, 2001, the TCEQ sent correspondence to several of the entities who had allegedly shipped significant quantities of material to the Site and who had received the TCEQ RI/FS Notice as PRPs. That correspondence informed each of those entities that the TCEQ had removed them from the TCEQ's PRP list, effectively releasing these entities from liability related to the Site, without payment of any costs associated with the Site. In several of the letters, TCEQ cited the so-called CERCLA "petroleum exclusion," as the reason for removing the entity from the PRP list.
21. According to its records, the TCEQ undertook remedial investigations and a feasibility study at the Site from 2001 through 2008.
22. In June 2008, the TCEQ issued a Remedy Selection Document. This document provides a discussion of, and the TCEQ's conclusions regarding, a proposed remedy for the Site. The remedy proposed by TCEQ consists of soil removal and off-site disposal, together with the installation of a bio-reactive barrier in the groundwater. TCEQ estimates that this remedy will cost \$1.2 million dollars.
23. On February 12, 2010, the Commission issued its unilateral Administrative Order with respect to the Site to roughly 350 parties, including SWEPCO. No evidentiary hearing was held before the Order was issued, nor was there an opportunity for such an evidentiary hearing.

24. The Order makes various Findings of Fact, including listing persons identified by the Commission as PRPs for the solid waste and/or hazardous substances at the Site. The Order further includes a Conclusion of Law that the PRPs, including SWEPCO, are responsible parties (“RPs”).
25. The Order purports to establish, among other things, (1) the RPs for the Site, (2) the existence of a release or threatened release of a hazardous substance or solid waste, and (3) that there is an imminent and substantial endangerment. It then orders the RPs to reimburse the TCEQ for all costs related to the RI/FS, to reimburse the TCEQ’s past and future costs in some unspecified amount, to undertake remedial activities based on the Remedy Selection Document, and to provide post-construction financial assurance, among other responsibilities. The Order also asserts that stipulated penalties accrue for failure to comply with the Administrative Order or its deadlines. The Order does not specify the amount of the TCEQ costs, or explain why they are reasonable or appropriate or why the TCEQ’s actions were necessary or appropriate. Rather, the Order states that the RPs will receive at some time in the future a demand letter from the TCEQ stating the amount owed.
26. The Commission cites to the Texas Health and Safety Code, Chapter 361, §§ 361.188 (Final Administrative Order) and 361.272 (Administrative Orders Concerning Imminent and Substantial Endangerment) as authority for the Order.

V.
DENIALS

27. SWEPCO demands that TCEQ meet its burden of proving by a preponderance of the evidence that the Site constitutes an imminent and substantial endangerment and that SWEPCO is liable for Site-related environmental remediation and/or associated costs as required in § 361.322(g) of the Texas Health and Safety Code.

28. SWEPCO denies that it has caused or contributed to the alleged release or threatened release of any solid waste or hazardous substances from or at the Site that are causing or contributing to alleged environmental contamination at the Site.
29. SWEPCO denies that it has committed acts or omissions that have resulted in any release or threatened release of solid waste or hazardous substances from or at the Site.
30. SWEPCO denies that it is a PRP or a RP as defined in the Order. The evidence the Commission relied upon to establish that SWEPCO contributed any amount of solid waste and/or hazardous substances to the Site is inherently unreliable, is hearsay, and is not supported by any other corroborating documentary evidence. Further, SWEPCO was given no opportunity to challenge or rebut this purported “evidence” in violation of its due process and other legal rights.
31. SWEPCO denies that it sent “solid wastes” to the Site, as defined by relevant law.
32. SWEPCO denies that the contamination at the Site constitutes an “actual or threatened release of solid waste that presents an imminent and substantial endangerment to the public health and safety or the environment,” as required by Texas Health & Safety Code § 361.272(a) and § 361.188(a)(1). Section 335.342 of Title 30 of the Texas Administrative Code defines “imminent and substantial endangerment” as follows: “[a] danger is imminent if, given the entire circumstances surrounding each case, exposure of persons or the environment to hazardous substances is more likely than not to occur in the absence of preventive action. A danger is substantial if, given the current state of scientific knowledge, the harm to public health and safety or the environment which would result from exposure could cause adverse environmental or health effects.” SWEPCO denies that this Site met this standard at the time the Order was issued because, among other things:

- a. Exposure of persons or the environment to hazardous substances was not “more likely than not” because EPA’s assessment found that the 1997 EPA removal action had minimized the threat of direct human contact and inhalation threats that may have been present pre-removal; residual contamination was covered with clean soil and grass; and the Site was fenced to preclude public access.
 - b. TCEQ’s 2009 Remedy Selection Document, at p. 3-4, states that the Site is not a threat to ecological resources because there are insignificant ecological exposure pathways at the Site.
 - c. Exposure from contaminated groundwater is not likely, as shown by gradient direction and plume stability data provided to TCEQ documenting that the constituents of concern have not continued to migrate and in fact may be attenuating significantly.
 - d. TCEQ’s 2009 Remedy Selection Document at p. 2 acknowledges that the EPA response action “removed the immediate threat to human health and the environment.”
 - e. TCEQ has not seen the need to take any actions to protect humans or the environment from potential exposure pathways from 1997 until the present, including a three year period between the EPA removal action and the TCEQ proposed listing on the State Superfund Registry and an eight year RI/FS period.
34. SWEPCO denies that proper statutory notice of the RI/FS was given to it, or to many other putative RPs, and so denies that the Order is reasonable.
 35. SWEPCO denies that the Order is supported by the preponderance of the evidence as to the TCEQ’s claims of necessity, appropriateness, and reasonableness of past and future

investigations and remedial and removal costs incurred by the TCEQ. This includes the TCEQ determinations related to imminent and substantial endangerment.

36. SWEPCO denies that materials it allegedly sent to the Site have caused or contributed to the remedial activities ordered to be conducted by the TCEQ in the Order.
37. SWEPCO denies that it is liable for remedial actions or costs associated with the Southwest Tank Farm, also known as Ultra Oil.
38. SWEPCO denies that it is liable for remedial actions or costs of remedial actions associated with the paraffin materials sent to the Site or the commercial products sent to the Site.
39. SWEPCO denies it is an “arranger” for purposes of liability under the Texas Solid Waste Disposal Act, based on the United States Supreme Court’s ruling in *Burlington Northern & Santa Fe Railway Co., et al. v. United States*, 556 U.S. ___, 129 S.Ct. 1870 (2009), as the requisite intent was not present.
40. In the alternative, SWEPCO asserts that it is no more than a *de minimis* contributor to any contamination at the Site.
41. For all the reasons stated in this Petition, the SWEPCO denies that the Order is reasonable and therefore it must be overturned pursuant to Texas Health & Safety Code § 361.321(e).

VI.
ORDER IS INVALID

42. The Order lacks finality because it requires additional, discretionary actions by the TCEQ. Specifically, the Order requires the TCEQ to make discretionary decisions in the future about the eligibility, necessity, appropriateness, and reasonableness of past and future TCEQ costs to be paid by SWEPCO as a RP, and even the amount of those costs.

Accordingly, the Order is neither effective nor enforceable against any Plaintiff, and has no legal effect. Plaintiffs seek a declaratory judgment recognizing that the Order has no legal effect.

43. At no time prior to the issuance of the Order did the TCEQ afford SWEPCO an opportunity for an adjudicative hearing as to its status as a PRP or RP. As a result, SWEPCO has no opportunity to protect its interests before being adversely affected by the actions taken by the authority of the Order. The Order violates due process rights afforded by the U.S Constitution (U.S. CONST. art. XIV) and Texas Constitution (TEX. CONST. art. I, § 19).
44. The Order further violates SWEPCO's United States and Texas due process rights because it does not afford SWEPCO the opportunity for an adjudicative hearing as to the necessity, appropriateness, and reasonableness of past and future investigation and remedial costs incurred by the TCEQ for which it seeks a reimbursement. As a result, SWEPCO has had no opportunity to protect its interests before being adversely affected by the actions taken by the authority of the Order. At no time before the Order was issued was SWEPCO afforded an opportunity to prove by a preponderance of the evidence that the release or threatened release is divisible pursuant to Texas Health & Safety Code § 361.276. As a result, SWEPCO has had no opportunity to protect its interests before being adversely affected by the Order.
46. The Order imposes liability on SWEPCO, even though SWEPCO is in the same position as other entities who were released by the TCEQ from liability under the so-called "petroleum exclusion" exception of CERCLA. This is arbitrary and capricious and violates the equal protection clauses of both the United States and Texas Constitutions.

47. The Order constitutes an *ultra vires* act by the Commission on several grounds, including the following:

- a. The Order is not properly limited in scope as contemplated by the various applicable statutory provisions of the Texas Health and Safety Code, such as §§ 361.191(d) and 361.192, both of which limit the TCEQ's recovery to "reasonable" costs.
- b. The Order names many RPs who did not receive the required statutory notice that was provided to some of the named RPs via the November 6, 2000, Notice of Opportunity to Make a Good Faith Offer for the RI/FS. Texas Health & Safety Code §§ 361.184(b) and .185 require the TCEQ to make "all reasonable efforts" to identify PRPs and to provide identified PRPs with written notice of an opportunity to make a Good Faith Offer to fund or perform the RI/FS. While the TCEQ did send correspondence to some of the PRPs seeking a good faith offer to fund or perform the RI/FS, on information and belief, approximately 150 companies (or almost 50% of the PRPs), did not receive an opportunity to make a good faith offer. TCEQ did not give the required notice even though it has acknowledged that, since 1998, it had in its actual possession records containing the names of those companies as allegedly shipping materials to the Site. The TCEQ did not undertake the minimal effort of reviewing the documents in its possession to make a list of those companies and include them as recipients of the November 6, 2000 Notice and thus allow them an opportunity to participate in the RI/FS process. This defect impacts SWEPCO in two significant ways. First, the TCEQ unilaterally performed the RI/FS over a period of almost 8 years, incurred costs, and is now seeking reimbursement of those costs from those it failed to

properly notify. Second, the RI/FS process is so fundamental to the remedy selection process that a flaw in the RI/FS process unavoidably and profoundly taints the remedy process. The Texas Health & Safety Code creates a statutory scheme in which the culmination of the RI/FS process—the proposed remedy—serves as the basis for the Remedy Order. The TCEQ’s RI/FS Notice defect means that almost 50% of the identifiable PRPs at this Site had no opportunity to participate in the RI/FS process through public comments or otherwise. Had all of the PRPs been properly notified and allowed to participate in the development and evaluation of the alternative remedies, a remedy significantly different from the one chosen by the TCEQ could have been studied, selected and implemented in an agreed manner by the parties. The failure to comply with the fundamental statutory notice requirements related to the RI/FS Notice renders the Order invalid, arbitrary, and unreasonable, and outside the scope of the TCEQ’s statutory authority.

c. The Order is invalid because the remedy selected does not comply with the standards found in Texas Health & Safety Code § 361.193 and .322(h). Section 361.193 states that the TCEQ is required to select the “lowest cost alternative that is technologically feasible and reliable and that effectively mitigates and minimizes damage to and provides adequate protection of the public health and safety or the environment.” TEX. HEALTH & SAFETY CODE § 361.193.

i. The TCEQ has classified the groundwater at the Site as Class I groundwater, when in fact it should be Class II. If the proper classification had been used by the TCEQ, the appropriate remedy for this Site would very likely have been the lowest cost alternative that is technologically

feasible and reliable and that effectively mitigates and minimizes damage to and provides adequate protection of the public health and safety or the environment. The most recent data acquired from the Site indicates that an alternative remedy would be appropriate because the groundwater plume boundary has not grown and the concentrations of the constituents of concern identified by the TCEQ have actually decreased over time.

- ii. Effective on May 25, 2007, the Municipal Settings Designation (“MSD”) statute was amended to allow small municipalities to have the benefit of the MSD certification. The MSD statute allows municipalities to enforce specific deed restrictions on properties within their city limits restricting the use of the groundwater beneath the property so that it cannot be used as drinking water. The deed restriction acts as an institutional control to protect human health, but at a fraction of the costs of a groundwater remediation plan. The Site is within the City of Clarksville and thus is potentially eligible for an MSD. The MSD is recognized by statute as protective of human health and the environment. No statute or regulation prohibits the application of an MSD at a state Superfund Site. The Feasibility Study was issued in January of 2008 and the Remedy Selection Document was issued in June 2008. Neither document even evaluated the MSD option, which at that point in time was certainly available for consideration and which could very well be the lowest cost remedy for groundwater at the Site. Thus, the TCEQ’s Order is invalid in that it selects a remedy that is arbitrary and unreasonable and

therefore cannot be upheld pursuant to Texas Health and Safety Code § 361.323(h).

- d. SWEPCO has asserted previously in this Petition that the Order violates SWEPCO's constitutional equal protection rights because the TCEQ relieved certain PRPs, but not SWEPCO, from liability based on the CERCLA "petroleum exclusion." Without waiving that argument, SWEPCO alternatively asserts that, if the released PRPs are not entitled to the petroleum exclusion, those PRPs must be named in the Order as an RP. Section 361.188 (a)(4) and (6) of the Texas Health & Safety Code states that that final administrative order *must* list the Responsible Parties and order the Responsible Parties to remediate the facility and reimburse the TCEQ's RI/FS costs. Nothing in that statutory provision allows the TCEQ to ignore certain otherwise Responsible Parties. In fact, § 361.1875 states exactly when the TCEQ can exclude certain PRPs from liability associated with a Site, and none of the particular exclusions apply here. The Order is invalid for failure to name all RPs.
 - e. The TCEQ's unilateral order of the payment of stipulated penalties is beyond the TCEQ's authority.
48. The Order is invalid under § 361.188(a)(1) because the Site does not present an imminent and substantial endangerment as needed to support listing on the State Superfund Registry. Any imminent and substantial endangerment was abated by EPA's 1996 removal action.
49. The Order should be deemed invalid as to SWEPCO because the TCEQ did not otherwise properly carry out its statutory and regulatory duties to fully investigate and identify PRPs, RPs, and *de minimis* parties before naming SWEPCO as an RP.

50. For all of the reasons previously stated in this Petition, the Order is invalid, arbitrary, and unreasonable pursuant to Texas Health & Safety Code § 361.321(e).

VII.
AFFIRMATIVE DEFENSES

51. Any materials contributed to the Site by SWEPCO are the same as those materials contributed by entities that have been released by the TCEQ pursuant to the “Petroleum Exclusion” of CERCLA and thus SWEPCO is also entitled to such a release.
52. Even if SWEPCO had contributed any materials to the Site, those materials were sold as a useful product, and did not constitute an arrangement for the processing, storing, or disposal of a solid waste, and did not contribute to the release or threatened release to the environment.
53. SWEPCO did not intend for waste or hazardous substances to be disposed of at the Site.
54. SWEPCO asserts that it is not an RP, but in the alternative asserts it is no more than a *de minimis* contributor to any contamination at the Site.
55. SWEPCO is not liable for remedial actions or costs associated with the Southwest Tank Farm, also known as Ultra Oil.
56. SWEPCO denies that it is liable for remedial actions or costs of remedial actions associated with the paraffin materials sent to the Site or the commercial products sent to the Site
57. The evidence demonstrates that the Site does not pose an imminent and substantial endangerment.

58. The TCEQ failed to provide the required notices necessary to support recovery of investigation costs from the PRPs.
59. The facts do not support listing the Site on the State Superfund registry or the use of the Texas Solid Waste Disposal Act to impose liability on SWEPCO.
60. In the alternative, even if SWEPCO contributed solid waste or hazardous substances to the Site, the costs are subject to apportionment under the Texas Health and Safety Code § 361.276.
61. To the extent any RP named in the Order has gone through bankruptcy or otherwise became insolvent between 2000 and 2010, thus creating an “orphan share” for that party’s liability and volume of materials sent to the Site, SWEPCO does not bear responsibility for such orphan share(s).

VIII.
COSTS AND ATTORNEY’S FEES

62. SWEPCO has had to employ legal counsel to contest the Order. TCEQ is liable for Plaintiffs’ reasonable attorney’s fees and reasonable costs pursuant to the TUDJA and Texas Health & Safety Code § 361.342.

IX.
JURY DEMAND

63. SWEPCO requests a jury as the trier of fact for this matter.

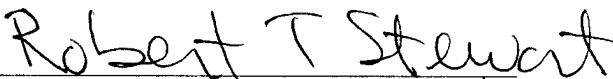
X.
PRAYER

64. WHEREFORE, SWEPCO prays that the TCEQ be cited to appear and answer and that the TCEQ be required to prove its allegations against SWEPCO by a preponderance of the evidence and that the Court on final trial enter an order:

- a. Declaring that the TCEQ's Administrative Order lacks finality, is of no legal effect, and is not enforceable; and/or
 - b. Declaring that the TCEQ's Administrative Order violates the due process laws and/or equal protection laws of the United States and Texas Constitutions and is therefore invalid, and not enforceable; and/or
 - c. Declaring that the TCEQ's Administrative Order is *ultra vires*, and is therefore invalid, of no legal effect, and is not enforceable; and/or
 - d. Declaring that the TCEQ's Administrative Order is invalid, arbitrary, or unreasonable and therefore must be overturned pursuant to Texas Health & Safety Code § 361.321(e).
65. ALTERNATIVELY, SWEPCO prays that the Court enter an order that:
- a. Invalidates the portion of the TCEQ's Order that purports to establish SWEPCO as a PRP or RP; and
 - b. Declares that SWEPCO is not a responsible party in any way liable for the environmental conditions existing at the Site or responsible for any response costs.
66. ALTERNATIVELY, SWEPCO prays that the Court enter an Order that:
- a. Pursuant to the Texas Health and Safety Code, SWEPCO is a *de minimus* party and its equitable and legal responsibility for those costs should not exceed a nominal share.
67. SWEPCO further prays for reasonable attorney's fees and reasonable costs pursuant to Texas Civil Practice and Remedies Code § 37.009 and Texas Health & Safety Code § 361.342, and for any other relief SWEPCO may show itself to be justly entitled.

Respectfully submitted,

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*w/permission
B.L.C.*

**Attorneys for Southwestern
Petroleum Corporation**

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served on all counsel of record, as listed and indicated below, on this 15th day of March, 2010.

Via CMRRR 7006 0810 0002 6115 2274
Texas Commission on Environmental Quality
Mark Vickery, P.G.
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MC-109
Austin, TX 78711


Brenda L. Clayton