

Municipal Setting Designations in Texas

By David E. Whitten, Esq.

Many Texas cities and towns have shallow groundwater polluted with low levels of contaminants from historical operations of dry cleaners, gas stations, auto repair shops and other common urban sources.

These environmental impacts are usually compared to drinking water standards to determine whether corrective action is necessary, even though the affected groundwater is not used for potable purposes, if it is used at all. Cleanups governed by drinking water standards are notoriously expensive and time-consuming.

Recognizing that most Texas communities rely on surface water or very deep groundwater for drinking water supplies, Subchapter W of Chapter 361 of the Texas Health & Safety Code now allows municipalities to approve, and the Texas Commission on Environmental Quality (TCEQ) to certify, areas called "municipal setting designations."

An area is eligible for certification as a municipal setting designation (MSD) if it is within the corporate limits or extra-territorial jurisdiction of a municipality with a population of at least 20,000 and an existing public drinking water system supplies drinking water to the area and surrounding properties within a half-mile of the proposed MSD.

If those eligibility criteria are met, an applicant can seek certification of an MSD by:

- 1) Fulfilling TCEQ and municipal notice and application requirements;
- 2) Restricting the use of affected groundwater within the proposed MSD by ordinance or restrictive covenant;
- 3) Obtaining a resolution in support of the ordinance or restrictive covenant from the local municipality, other municipalities within a half-mile of the proposed MSD and the governing authority for any retail public utility with a groundwater supply well located within five miles of the proposed MSD; and

- 4) If necessary, demonstrating to TCEQ that certification of an MSD would not negatively affect the current and future regional water resource needs or obligations of a municipality, retail public utility or private well owner.

Upon certification of an MSD, contaminant impacts are subject to less rigorous investigation and cleanup requirements. In essence, investigation and cleanup requirements are governed only by the risk of actual human exposure to affected groundwater (such as through contact during construction or inhalation of contaminants from the groundwater to the surface) and as necessary to protect ecological resources.

By eliminating investigation and cleanup standards based on human ingestion risk factors, environmental impacts at MSD properties can be resolved more quickly and less expensively. With faster and less expensive cleanups, contaminated sites more easily attract new capital investment that, in turn, promotes redevelopment, the creation of more jobs, higher taxable values and stronger urban cores.

To date, several Texas cities, including Dallas and Fort Worth, have taken steps to support the certification of MSDs. In 2004, Dallas approved the state's first two MSD applications on a pilot basis. These MSD applications ultimately resulted in TCEQ's certification of MSD Nos. 001 and 002.

In January 2005, the city of Fort Worth adopted the state's first procedural ordinance governing the approval and enforcement of MSDs. As the Dallas and Fort Worth MSD programs mature and more Texas cities implement their own MSD programs, MSDs will become an increasingly popular mechanism for facilitating the timely and cost-effective investigation and cleanup of contaminated urban properties. **BFN**

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The search for brownfield resources is not just about finding revenue; it's also about reducing cost. Think broadly when defining potential brownfield resources, and remember that those resources are both monetary and non-monetary. One of the most powerful

The Search for Brownfield Resources

non-monetary resources is the exercise of local regulatory authority to promote cleanup that protects public health and promotes economic growth.

Municipalities in many states, including Illinois and now Texas, have used groundwater withdrawal limitations to rationalize cleanup standards and control cost. These regulatory tools are powerful resources. Remember, however, putting these tools to work requires a strong partnership between state and local governments and private developers.

As importantly, with the exercise of local authority to control costs comes the long-term obligation to make sure that regulatory controls stay in place to guarantee environmental safety. Local governments, particularly, need to make sure that they can follow through on their local ordinances. If they do, they can create the environment for successful and sustainable redevelopment. **BFN**

By Bill Abolt, director of the Chicago office of Shaw Environmental & Infrastructure, Inc.