

Defense to Responsibility for Scrap Metal Recycling: Texas Commission of Environmental Quality Findings and Legislative Recommendation



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The Texas Commission on Environmental Quality (“TCEQ”) issued a document titled:

Defense to Responsibility for Scrap Metal Recycling: TCEQ Findings and Legislative Recommendation Required by House Bill 3224 (“Recommendation”)

TCEQ developed this Recommendation as required by House Bill 3224 (“HB 3224”) which was passed during the 86th Texas Legislative Session.

HB 3224 required that TCEQ conduct a study to evaluate the possibility of adopting a recyclable materials defense into the Texas Superfund law. The recyclable materials defense would be similar to the provision found in the federal Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”) (i.e., Superfund). See 42 U.S.C. § 9601 *et seq.*

The United States Congress amended Superfund a number of years ago to exempt certain recyclers from liability for clean-up costs. Further, such recyclers could be awarded costs and fees if they were found to have been improperly sued for contribution under CERCLA. Former United States Blanche Lincoln of Arkansas was one of the key architects of the recycling exemption.

The rationale for the exemption were scenarios at a number of Superfund sites in which sellers of steel, metals, or other recyclable commodities were held liable under the “generator” or “arranger” provisions of CERCLA. See 42 U.S.C. § 9607(a)(3). The argument was made that virgin materials with the same characteristics were not encompassed by Superfund simply because they were deemed “products.”

In view of the United States’ interest in promoting the use of recyclables to save energy and natural resources the application of such liability of these materials was deemed counterproductive. Recyclers of a number of types of scrap commodities that meet certain eligibility requirements are protected from Superfund liability provisions.

The recyclable materials potentially encompassed by the exemption include scrap paper, plastic, glass, textiles, rubber (other than whole tires), metal or spent lead-acid, nickel-cadmium and batteries. The recycling exemption is found in Section 127 of the Superfund. See 42 U.S.C. § 9627.

The TCEQ Recommendation notes that a number of states have amended their analogous Superfund statutes to incorporate a similar recycling exemption.

Arkansas was one of the first states to do so. The state amended the Arkansas Remedial Action Trust Fund Act shortly after enactment of the Superfund recycling exemption to exempt such transactions. Ark. Code Ann. 8-7-524. Arkansas's exemption utilizes language very similar to the federal Superfund provision.

Additional states that have enacted a similar exemption include:

- Florida - Fla. Stat. sec 403.727(8)
- Georgia - O.C.G.A. § 12-8-92(9)(C)
- Michigan - Michigan: - M.C.L. § 324.20126(1)(d)(i)&(ii)
- North Carolina - N.C. Gen. Stat. § 130A-310.7(b1)
- Pennsylvania - 35 Pa. Stat. sec. 6020.701(b)(5)
- Tennessee - Tenn. Code Ann. § 68-212-202(a)(4)(E)(i)
- South Carolina - S.C. Code Ann. § 44-56-200(3)

The TCEQ Recommendation indicates that the agency established a work group that included industry stakeholders for purposes of evaluating a recyclable materials defense. Staff from TCEQ and members from the Office of the Texas Attorney General also participated. Individuals who were registered as opposed to HB 3224 during the 86th Legislative Session were also included.

The Recommendation includes four parts:

- Overview of the Superfund Program (including relevant legal context)
- Work Group's Findings
- Possible Impacts from the Legislative Recommendation
- Legislative Recommendation in the Form of a Proposed Bill

A copy of the Recommendation can be downloaded [here](#).