

**ENVIRONMENTAL POLITICS IN TEXAS:
CEMENT KILNS, HAZARDOUS WASTE, AND PUBLIC HEALTH
IN MIDLOTHIAN, 1987-1999**

THESIS

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By

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When I decided to change careers and pursue history in 1997, I embarked on a journey that threw my life into transition, sent me to Texas, and, ultimately, altered my vision of history. None of it would have been possible without the assistance of a number of individuals. The team effort culminated two years later on a warm November night in San Marcos where I was able to discuss my thesis on environmental history, the cement industry, and the community of Midlothian, Texas.

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INTRODUCTION

Since the early 1980s, the federal government has permitted cement corporations to use their kilns for the purpose of hazardous waste incineration. In 1980 and 1984, amendments to the 1976 Resource Conservation and Recovery Act opened the door for cement companies to use waste-derived fuels. Simply put, as long as cement companies produce a marketable by-product, concrete, then the federal government allows them to use hazardous waste in lieu of traditional fossil fuels such as coal, oil, or natural gas. Cement corporations compete with the commercial waste incineration industry, but because burning hazardous waste is considered "recycling," they require less stringent emissions standards. The authorization has been highly profitable, because cement companies, which are also paid to burn hazardous waste, no longer have to pay the high cost of fuel for its energy intensive kilns.¹

During the 1980s, the federal government allowed cement kilns to operate with less stringent emissions standards than commercial hazardous waste incinerators because it was trying to slow the growth of toxic landfills. Incineration, especially in cement kilns, offered a quick-fix solution to the problem. In addition, the temptation for cement corporations to burn hazardous waste was heightened by the high prices of coal and natural gas, coupled with the fact that other companies were also paying them to burn their hazardous waste. In other words, the enticement for cement companies to burn hazardous waste was twofold; cement corporations obtained fuel

¹ U.S. Environmental Protection Agency, Office of Solid Waste, *RCRA Orientation Manual* (Washington, D.C.: U.S. Government Printing Office, 1986), I-8, III-42, III-59, III-66.

to run their kilns for free, and they were paid to do so. Thus, during the recession of the early 1980s, cement companies turned to waste-derived fuel as a profitable source of savings and income to offset the worldwide decline in demand for cement.²

During the eighties, the permit application process to burn hazardous waste in cement kilns was put in the hands of state officials as long as emissions standards met those of the federal government. This policy, consistent with the Ronald Reagan administration's philosophy of deregulation, was strengthened in the mid-1990s when the Republican controlled Congress's "Contract with America" put many aspects of regulation, including environmental and industrial, in the hands of states. Although the U. S. Environmental Protection Agency under the administration of Bill Clinton initially threatened to tighten regulation of the cement industry, it later backed away from imposing stricter standards on dioxin emissions.³

The environmental controversy of burning hazardous waste in cement kilns looms large in Texas and the United States because of the industry's renewed prosperity during the past decade. Texas ranks second in the nation, only behind California, in both production and consumption. No other state claims more cement

² Rod Davis, "Any Way the Wind Blows" *Texas Observer* 2 July 1993, 10; Betsy Carpenter and David Bowermaster, "The Cement Makers' Long Sweet Ride," *U.S. News and World Report*, 19 July 1993, 53; *Texas Environmental Almanac* (Austin: Texas Center for Policy Studies, 1995), 291; Rose Farley, "Ill Wind Blowing," *Dallas Observer*, 12 June 1997, 1; On the industry's use of hazardous waste, see Gregg Andrews, *City of Dust: A Cement Company Town in the Land of Tom Sawyer* (Columbia: University of Missouri Press, 1996), 319-21.

³ For a recent study of the danger of putting environmental policy in the hands of state government because of its reluctance to challenge large corporations, see Scott H. Dewey, "The Fickle Finger of Phosphate: Central Florida Air Pollution and the Failure of Environmental Policy, 1957-1970," *Journal of Southern History* 65 (August 1999): 595-603.

plants; Texas, California, and Pennsylvania each have eleven. Nationally, the cement industry has rebounded economically from the 1980s when the recession stagnated both production and consumption. In 1998, domestic production hit an all-time high in the United States as the industry generated over 85 million tons of cement. Likewise, consumption in the United States exceeded 100 million tons for the first time. Net earnings in 1999 have surpassed expectations. The industry has been able to stay competitive in the world market thanks to low interest rates that have stimulated the residential construction industry, to major Congressional legislation in the form of a 1998 federal transportation bill, and to lower fuel bills from the low-cost substitute of hazardous waste.⁴

At first, cement companies located in rural, working-class communities faced little, if any, resistance in acquiring the necessary permits, but when citizens living near cement plants using waste-derived fuel began experiencing health problems, some communities fought back. The most recent and bitter battle between a local community and a cement corporation occurred in Midlothian, Texas. In 1987, Texas Industries, Incorporated (TXI), the state's largest cement producer, began using waste-derived fuel under a temporary permit. Two years later when it applied for permanent authorization, Ellis County citizens, along with groups such as Downwinders At Risk, the Sierra Club, and the American Lung Association, objected

⁴ United States Geological Survey, United States Department of the Interior, "Mineral Industry Surveys: Cement in June," (August 1999), 1; U.S. Department of the Interior, Bureau of Mines, *Minerals Yearbook, Metals and Minerals*, Vol. 1 (Washington, D.C.: U.S. Government Printing Office, 1997), 15; U.S. Geological Survey, United States Department of the Interior, "Mineral Commodity Summaries:

and began to organize in an attempt to block the issuance.⁵ What evolved over the following decade was an intense, and, oftentimes, bitter feud between the town of Midlothian and TXI. At issue was the 10-year permit that was finally granted by the Texas Natural Resource Conservation Commission (TNRCC) to TXI in March, 1999, after many conflicts over public health concerns and problems in Midlothian, and over the role of the newly-created TNRCC as the state's main agency in charge of environmental protection.

Adding to the controversy of hazardous waste incineration in cement kilns has been the poor overall environmental record in Texas. Throughout the 1990s, the state has had the dubious distinction of leading the nation in toxic releases into the air, water, and land, while ranking near the bottom in per capita environmental expenditures. With the passage of the 1990 Federal Clean Air Act that required individual states to reduce toxic air emissions or else lose federal funding and face federal regulatory intervention, Texas legislators were resigned to implement tougher environmental legislation. What came out of the 72nd Legislature, however, was hardly a panacea to the pollution problems in Texas. Rather, legislation created the TNRCC, an environmental superagency modeled after the EPA but equipped with more deficiencies than regulatory enforcement power. In Midlothian's struggle

Cement," (January 1999), 44-45. All current statistical information by *Minerals Yearbook* found online [<http://minerals.usgs.gov/minerals/pubs/myb.htm>].

⁵ Rose Farley, "Ill Wind Blowing," *Dallas Observer* 12 June 1997, [<http://www.dallasobserver.com/archives/1998/061297/feature-1-1.html?cat=nfc&query=downwinders>] 9.

against TXI, the legislation proved vital because of the agency's role in dealing with the community's health problems and the cement company's permit.

Although the cement industry has played a significant role in the economic development of the United States, it has received limited scholarly attention. However, there are a few notable exceptions. In *City of Dust: A Cement Company Town in the Land of Tom Sawyer*, Gregg Andrews examines the American cement industry, specifically the Atlas Portland Cement Company's creation and eventual destruction of a company town in Ilasco, Missouri. In addition, he introduces the emerging trend of the industry's use of hazardous waste in its cement kilns and emphasizes the close relationship between big business and government.⁶

In a masters thesis, "The Politics of Toxic Cement: The LaFarge Corporation's Fight to Burn Hazardous Waste in New Braunfels, Texas, 1987-1993," Renee Hild analyzes the resistance by the community of New Braunfels to prevent the Lafarge Corporation's use of hazardous waste in its cement kilns as a fuel substitute. In 1987, when the LaFarge Corporation proposed the installation of a hazardous waste incineration facility at its cement plant in New Braunfels, the community protested and, eventually, blocked the issuance of the company's permit in 1992. The community, located approximately twenty-five miles northeast of San Antonio and economically dependent on its natural surroundings for tourism, succeeded in part because of a political alliance of local citizens, grassroots activist groups, small businesses, and local leaders. New Braunfels allied political "conservatives,"

⁶ Andrews, *City of Dust*, 319-21.

“liberals,” and “radicals” because the environmental controversy posed a threat to not only the public’s health, but also to its economic welfare.⁷

Utilizing state and federal government documents, state congressional records, and newspapers, this study examines the public health concerns and problems in Midlothian that emerged in conjunction with cement kiln hazardous waste incineration by Texas Industries, as well as the subsequent reaction by the Texas state government and the United States government. It analyzes the role that the Texas Natural Resource Conservation Commission and the United States Environmental Protection Agency played in the conflict between a working-class community and a powerful cement corporation. Specifically, the study demonstrates how local environmental policy is shaped when the federal government places the power of enforcement and regulation in the hands of state governments. In Midlothian, both the state and the federal government opted to put the economic interests of the cement industry above the community’s public health concerns. The decision, in part, facilitated an unprecedented economic boom in the nation’s cement industry, but it put the public health of Midlothian residents at risk.

⁷ Renee Hild, “The Politics of Toxic Cement: The LaFarge Corporation’s Fight to Burn Hazardous Waste in New Braunfels, Texas, 1987-1993,” (MA thesis, Southwest Texas State University, 1997). To date, New Braunfels is the only community in the United States to prevent a private cement company from using hazardous waste as a fuel source.

CHAPTER 1

GRASSROOTS OPPOSITION TO HAZARDOUS WASTE INCINERATION IN MIDLOTHIAN

The ramifications of Texas's pro-industry environmental policy became apparent to the community of Midlothian in the late 1980s when two of the three local cement plants began using waste-derived fuel. Cement Valley, a neighborhood that lies on sloping land on the west side of Midlothian in the shadow of eight cement kilns, bore the brunt of hardships resulting from the impending controversy. From the kilns, four of which belong to TXI, emissions from the burning of hazardous waste began blowing into Cement Valley in 1987 without the knowledge of its residents. Because of its proximity and economic background, the low-income neighborhood of converted trailers and ranch-style homes found itself at the heart of the controversy. The TXI plant is located on approximately fifteen hundred acres just south of Highway 67 and about two miles southwest of downtown Midlothian. The North Texas Cement Company's plant sits just west of Highway 67, while Holnam Cement Company operates on the east side. Both plants are about two and a half miles north of Midlothian. Thus, with North Texas and Holnam to the east, TXI to the south, and winds generally prevailing from the south, Cement Valley, more often than not, lies directly in the path of emissions from these three sources. Airborne toxins from waste-derived fuel blew into Midlothian even before medical or scientific authorities had a complete understanding of their effects on the environment and its inhabitants.¹

¹ Davis, "Any Way the Wind Blows," 11; Marvin S. Legator, et al., "The Effects of Living near Cement Kilns: A Symptoms Survey in Midlothian, Texas"

For Midlothian, particularly the Cement Valley neighborhood, the struggle against TXI was a veritable example of David versus Goliath. Located approximately twenty-five miles southwest of downtown Dallas in Ellis County, Midlothian, with a population of 5,000, hails itself “The Cement Capital of Texas.” During the 1960s, the agricultural economy of Midlothian yielded to industry as TXI, the first of three cement companies in town, built a plant there to take advantage of growing markets created by an urban construction boom. Because of the demand for concrete in the Southwest, and because of Midlothian’s proximity to the rapidly expanding Dallas-Fort Worth area, the small town soon became home to Gifford Hill (now North Texas) and Box-Crow (now Holnam), as well as TXI.²

Founded in 1951 by East Coast businessman Ralph B. Rogers, TXI grew rapidly. By 1960, it had become the first vertically integrated cement producer in the United States, operating more than fifty concrete-related plants in more than seven states. It established its headquarters in Dallas and began construction of its plant in Midlothian, which at that time welcomed the economic shot in the arm that a new cement company would provide. TXI took advantage of the Austin Limestone

(Galveston: The University of Texas Medical Branch), in *Toxicology and Industrial Health* 14 (December 1998): 834 (hereafter cited as *Legator Report*); Texas Natural Resource Conservation Committee, *Critical Evaluation of the Potential Impact of Emissions From Midlothian Industries: A Summary Report (revised)* (Austin: Office of Air Quality/Toxicology and Risk Assessment Section, 7 June 1996), 1, 6, 22.

² *Ellis County: A Photo History* (Dallas: Taylor Publishing, [1993], 5); “Ellis County,” *The Handbook of Texas Online* [<http://www.tsha.utexas.edu/handbook/online/articles/view/MMhgm6.html>]; “Midlothian,” *The Handbook of Texas Online* [<http://www.tsha.utexas.edu/handbook/online/articles/view/MMhgm6.html>]; Farley, “Ill Wind Blowing,” 1, 3.

reserve, necessary for cement production, that stretched from eastern Oklahoma south through San Antonio and into Mexico. In 1960, cement kiln Number 1 was in operation; cement kilns two, three, and four followed in 1963, 1967, and 1972, respectively. First-year sales in the Midlothian plant topped over \$220,000. In 1964, TXI was listed on the New York Stock Exchange and began to diversify.³

Shortly after the opening of its Midlothian cement plant, TXI got into the real estate market by acquiring Brook Hollow Industrial Park and the Empire Central office complex. In 1975, TXI acquired partial ownership of Chaparral Steel, located next to its Midlothian cement plant. Ten years later, TXI bought it outright, making the steel plant a subsidiary. Innovative production techniques in the steel industry, in conjunction with a diversified portfolio and the public sale of twenty percent of Chaparral Steel in 1988, enabled TXI to succeed in the steel and cement industry while several other companies faltered. The company continued to grow throughout the 1990s. By 1998, TXI boasted net sales of 1.2 billion dollars – an increase of twenty-three percent from the previous year. Individual shareholders enjoyed a 20.5% return on their investments as earnings per share rose by \$4.69.⁴ By the time TXI applied for a permit to use and increase the amount of waste-derived fuel, it had

³ “Texas Industries,” *The Handbook of Texas Online*, [<http://www.tsha.utexas.edu/handbook/online/articles/view/MMhgm6.html>]; Davis, “Any Way the Wind Blows,” 10-11; Stuart Batterman and Yuli Huang, *Evaluation of The Screening Risk Analysis for the Texas Industries (TXI) Facility in Midlothian, Texas* (Ann Arbor: Environmental and Industrial Health, University of Michigan, 1 May 1996), 3 (hereafter cited as *Batterman Report*).

⁴ “Texas Industries,” *The Handbook of Texas Online*; Texas Industries, Incorporated, *TXI 1998 Annual Report* (Dallas: TXI Headquarters), 2-3, 9-11.

become a well-rounded, multimillion dollar company in an influential industry – ready and capable to take on any opposition.

In the early 1990s, several citizens of Midlothian who lived near TXI's cement plant experienced an increasing number of health problems. One of the most disturbing patterns emerged within a ten-square-mile radius of northern Ellis County, including Midlothian, where a higher than normal number of Down syndrome children lived along the same stretch of FM Road 644. Parents of these children became aware of the cluster only when they became acquainted through Step By Step, a Down syndrome family support group. When they discovered that all of the children had been born between 1992 and 1994, they suspected that the cluster was caused by air emissions from nearby cement kilns. "I'm not a rocket scientist," one parent admitted. "I'm just basing it on common sense."⁵

Other nearby residents also began to complain of health problems and to report a pattern of birth defects and irregularities among livestock. Among them was rancher Sue Pope, whose twenty-seven-acre Hidden Valley Ranch just north of Midlothian and TXI's plant. She suffered from attacks of endometriosis, autoimmune syndrome, sinusitis, and respiratory problems, while her husband was plagued by many similar afflictions. Most recently, he was diagnosed with cancer. The health problems were not isolated to Pope and her family, but extended even to prize-winning horses at Hidden Valley Ranch. For example, a \$25,000 stallion that was

⁵ Peter Langlois, "Down Syndrome Cluster in Three Texas Counties, 1992-1994," 24 May 1996, Texas Department of Health, Texas Birth Defects Monitoring Division, Austin; Parent quoted in Alexei Barrionuevo, "Down Syndrome Cases Studied," *Dallas Morning News*, 5 June 1995, 26A (hereafter cited as *DMN*).

born in 1987, the year in which the use of waste derived fuel began in Midlothian, had yet to sire an off spring in the early 1990s. Its most recent attempt resulted in a twinning, a rare multiple birth phenomenon sometimes linked to toxic exposure. Both foals died. In addition, the ranch experienced the death of five foals in 1992. Other horses experienced hormonal irregularities, ovarian cysts, spontaneous premature births, delayed sexual development, uncommon muscular development in the abdomen caused by increased efforts to breath, and chronic glandular inflammations.⁶

Pope's Hidden Valley Ranch was not the only ranch to experience reproductive problems with livestock. Veterinarian Mikel Athon, from neighboring Cedar Hill, informed Pope in 1992 that since 1989, ten different horses belonging to five different ranchers had experienced reproductive problems such as cystic ovaries, decreased conception rates, and aborted twins. He also reported a case in which a foal was born with an enlarged bladder. Athon emphasized, "This appears to be an abnormally high incidence of reproductive problems for such a small area and population of horses." In March 1994, T.L. McLaughlin, a Cedar Hill veterinarian of thirty-four years, also reported an increased number of complaints, abnormalities, and unexplained illnesses in the area over the past four years. Common problems

⁶ Davis, "Any Way the Wind Blows," 2; Sue Pope, interview by the author, 1 October 1999, Austin; Sue Pope to Texas Air Control Board (TACB) Cement Kiln Task Force, 20 November 1992, in Jim Schermbeck, "Smoke and Mirrors: A Critical Analysis of Midlothian Cement Company Claims No Environmental or Public Health Harms From Burning of Hazardous Wastes," Downwinders at Risk Press File (hereafter cited as DARPF), Cedar Hill, Texas, September, 1994.

occurred during the breeding process and continued pregnancies of both horses and cattle. McLaughlin indicated that “these clients are concerned and perhaps rightfully so, about the environments created by the cement plants in their immediate area.”⁷

Frustrated and angry, Sue Pope decided to take action. Over the course of the following decade, she and other Midlothian residents organized a grassroots resistance group to take on TXI, the largest cement producer in Texas. With the assistance of two other organizations – Texans United, and Citizens Aware and United for a Safe Environment – Downwinders At Risk (DAR) emerged as the leading grassroots group to coordinate the fight against burning hazardous waste in Midlothian. At first, Pope seemed an unlikely candidate for spearheading environmental activism; in fact, she had never heard of Greenpeace and did not even know how a state environmental agency operated. As she recalled, “I was so naïve. I thought if I went down to the state and told them I was having health problems [related to hazardous waste burning] they’d do something about it.”⁸

Soon, Pope was joined by Texans United field director Jim Schermbeck. Schermbeck, who was raised in Fort Worth and graduated from Austin College, signed on in the fall of 1994 as DAR’s only paid staff member. With meager financial resources, DAR established headquarters in a residential house in Cedar Hill rented for \$450 a month. Because of a tight budget, the organization at times paid Schermbeck in the form of groceries. For Schermbeck, the arrangement made it

⁷ Mikel Athon to Sue Pope, 19 November 1992 and T.L. McLaughlin to Carol Browner, 7 March 1994, both in “Smoke and Mirrors: A Critical Analysis,” DARPF.

⁸ Farley, “Ill Wind Blowing,” 11.

“awfully hard to live this way,” but as he once noted, “. . . I don’t like to walk away from a fight.”⁹ In time, the Dallas Sierra Club, the American Lung Association, and the Texas Parent Teacher Association joined forces with DAR to strengthen the opposition to TXI.

The first strategy of DAR was to collect data on the amassing health problems in Midlothian and inform the public of its findings. Its efforts revealed that since 1990, 150 complaints, ranging from coughing attacks, nausea, fatigue, and chest tightness to burning sensations in the eyes, noses, throats, and lungs, were filed against TXI, one of the most targeted companies in regard to health and odor problems in Texas. One such complaint came from the Rivers family, who moved into the area in 1995. Shortly thereafter, traces of tungsten and trichlorethylene showed up in the blood of six-year-old Shawn Rivers. Shawn, an epileptic and autistic child, had his seizures under control in 1995, but as the family settled into their house across from TXI, his health began to deteriorate so rapidly that within two years he had trouble making it through the day without lapsing into blank stares, losing his balance, and collapsing to the ground. The seizures recurred so frequently that Shawn had to be fitted for a helmet in order to prevent head injuries. Jeanne Rivers, who had seen the white dust coming from the cement kilns and often smelled noxious odors, suspected that emissions from TXI were the cause of her son’s failing

⁹ Davis, “Any Way the Wind Blows,” 13; Schermbeck quoted in Farley, “Ill Wind Blowing,” 6, 7.

health.¹⁰

In Midlothian and Cement Valley, other related complaints surfaced. For example, Ivy Howard recalled a night when she first experienced a TXI “upset” – an excess burst of emissions from the cement kilns that occurs most often during the weekend and at nights when plant officials want to clear their stacks of excess dust. Howard recalled how the “upset” turned “the sky ketchup red.” The next day, she discovered that her house was covered with red dust. “It took three days to clean my mother-in-law’s windows,” she complained. While covering the story for the *Texas Observer*, even journalist Rod Davis experienced eye, nose, and throat irritation, as well as a headache that persisted for the rest of the day. Likewise, his photographer, who was downwind of TXI for only thirty minutes, reported a burning sensation in his eyes and nose.¹¹

The problems that Terry Atchison and her family experienced were even more dramatic. Located in the same area as Pope’s ranch, she complained of migraine headaches at least three times a week. In addition, she suffered from Fibercystic disease, and at the age of twenty-nine underwent a hysterectomy. Her children developed health problems as well. Her youngest son was born with jaundice and frequently complained of headaches. Her oldest son suffered chronically from

¹⁰ Rose Farley, “Something in the Air,” *Dallas Observer*, 19 June 1997 [<http://www.dallasobserver.com/archives/1998/061997/feature-1-1.html?cat=nfc&query=downwinders>] 1, 4-6.

¹¹ Ivy Howard quoted in Davis, “Any Way the Wind Blows,” 11, 14.

streptococcus and sinus problems. After leaving the area and moving to Aubrey, Texas, the Atchison family later reported that the recurring symptoms had abated.¹²

Atchison's neighbor, Tex Low, told a similar story. She was diagnosed with Toxic Shock Syndrome, Graves disease, mononucleosis, bronchitis, walking pneumonia, chronic Laryngitis, and a uterine tumor that eventually led to a hysterectomy. Another Low family member was treated for Chronic Fatigue Syndrome and various respiratory infections. Karla Wilcoxson, a Cedar Hill resident of twenty-seven years, complained that in the early 1990s, she and her husband, too, experienced migraine headaches, allergies, and fatigue. After moving to Arkansas in 1992, she and her husband reported that they were free of health problems. When Wilcoxson first heard that the cement plant emissions were causing the area's illnesses, she was skeptical, but after her relocation to Arkansas she became "a firm believer that these problems are a direct result from the toxic waste being burned in that area."¹³

Health problems also deepened in the area's animal population. Local ostrich rancher Don Holley woke up one morning in 1996 and found a number of his birds lying dead in the pen. There was evidence of reproductive problems as well. One ostrich was hatched so horribly deformed that he described it as a "bizarre space alien." On another occasion, Holley found a purplish ooze seeping from an egg.

¹² Terry Atchison to the TACB Cement Kiln Task Force, undated letter in "Smoke and Mirrors: A Critical Analysis," DARPF.

¹³ Tex Low to "To Whom It May Concern," 15 November 1992, and Karla Wilcoxson to "To Whom It May Concern," 11 November 1992, both in "Smoke and Mirrors: A Critical Analysis," DARPF.

Debra Booth, another area resident, reported that the Doberman Pinschers that she was raising at the time experienced birth defects and premature deaths. While Karla Wilcoxson was still living in Cedar Hill, her horses suffered from a number of health problems. One horse had teeth growing one inch above the normal gum line and into its lip, and another one-and-a-half-year-old horse had no teeth at all. Some mares suffered from reproductive problems. One had persistent cysts and experienced a twinning that resulted in the death of a foal. Another miscarried and never foaled while in Cedar Hill.¹⁴

During this time, residents and DAR turned to local authorities for assistance only to find that their complaints fell on deaf ears. When the Texas Air Control Board (TACB) asked permission to place a pollution monitor outside a school downwind of TXI for an upcoming study, the school district superintendent Jim Norris refused, insisting that he did not want to embroil the school district in an emotional, political issue. Stunned parents pointed to the nearly fifty percent tax base that TXI provided for the district, and to the 1,300 employees who live in Midlothian as the reason for Norris's decision. Speaking for DAR, Jim Schermbeck added, "This is indicative of the kind of company town atmosphere that exists in Midlothian."¹⁵

A TACB study, the first of many losses for DAR, was applauded by TXI and community leaders when it was released in May 1992. Based on hundreds of air and

¹⁴ Farley, "Something in the Air," 2, 9-11; Wilcoxson to "To Whom it May Concern."

¹⁵ Schermbeck quoted in Mede Nix, "School Doesn't Want Air Monitor, Trouble," *Times Herald* (Dallas), 1 February 1991, A1.

soil samples and completed by a team of TACB engineers from the Fort Worth Regional office in 1991, they collected samples throughout the Midlothian area out of a mobile inspection laboratory. The collection process was relatively brief, lasting only one week. Ultimately, the team of engineers declared that the emissions met the required standards set by the EPA as well as the state of Texas: "The measured levels have been compared to guideline concentrations which are far below levels which the scientific literature reports human health effects occur." Therefore, they concluded that the "measured concentrations of contaminants are unlikely to cause adverse health effects in the general public."¹⁶

Retired Southern Methodist University professor of physics George Crawford was more than skeptical of the TACB's methodology. He argued that "there is no way waste can be burned without increasing the levels of air pollution" He criticized the TACB's procedures in measuring the quality of air in Midlothian. He pointed out that the TACB used an arithmetic mean to average the results of air quality measurements. In order to get more accurate results, the TACB should have used a concentrated weight mean. In other words, if a person breathed high levels of contaminants for five hours and no levels of contaminants for the next ten hours, the average hourly measurements, using the TACB's arithmetic mean, would be averaged over fifteen hours and, therefore, reflect a misleadingly low number. In reality, the figures would not show that a person was exposed to dangerously high levels of

¹⁶ "Sampling and Analysis of the Ambient Air in the Vicinity of the Texas Industries, Inc. (TXI), North Texas, and Box Crow Cement Plants and Chaparral Steel Plant, Midlothian, Ellis County, Texas" (Austin: Texas Air Control Board, Technical Operations, Sampling and Analysis Program, March 1992), 1.

contaminants for five of the fifteen hours. That fact, according to Crawford, was essential in monitoring illnesses brought on by air pollution. "Average has no meaning at all," Crawford reasoned. "It's the sudden increases that cause the illness response. That's quite a different approach to the subject."¹⁷

Randall Jones, TXI spokesman, applauded the ruling: "We need to deal in fact and not perceptions. I'm very, very encouraged with the openness of the Air Control Board." Mayor Maurice Osborn, who was also on TXI's payroll as a public relations agent, declared that "All is well in Midlothian. We have good industry here. They [TXI] work well and have been as open as anybody expects them to be." Likewise Roy Bohl, a twenty-seven-year family practitioner in Midlothian who performed all employee physicals for TXI, praised the TACB, insisting that he did not "personally . . . know of a single documented case of any illness that has been caused by any pollution, imagined or real, in our area. It just doesn't exist."¹⁸

Despite such assurances, James T. Doty, a TACB engineer who helped to conduct the very report that Jones, Osborn, and Bohl had lauded, complained in a letter to his superior that even he experienced adverse health effects while monitoring air samples in Cement Valley. On November 15, 1991, as Doty was setting up equipment with a strong wind gust coming from the south, he inhaled a breath of air

¹⁷ Crawford quoted in Davis "Any Way the Wind Blows," 16; Jim Schermbeck, "How Not to Burn Hazardous Waste," *DMN*, 28 January 1994, 36A.

¹⁸ Jones, Osborn, and Bohl quoted in John Yearwood, "Air Near Midlothian Plants Safe, Panel Says," *DMN*, 21 May 1992, 36A; TACB, "Sampling and Analysis of the Ambient Air in the Vicinity of the Texas Industries, Inc. (TXI), North Texas, and Box Crow Cement Plants and Chaparral Steel Plant, Midlothian, Ellis County, Texas" (Austin: TACB, Technical Operations, Sampling and Analysis Program, March 1992), 1.

that “instantly caused a throat irritation accompanied by a tightness in . . . [his] chest.” A strong odor of sulfur dioxide accompanied the wind. Doty’s throat irritation was accompanied by a persistent cough that continued through the night, causing interruptions in his sleep. The “disagreeable symptoms” continued throughout the next day and well into the evening. Doty included this information in the evaluation, but it failed to influence the findings of the TACB.¹⁹

As the conflict continued, Mayor Osborn did not hide his disdain for environmentalists such as DAR while Dr. Bohl offered real estate advice rather than medical treatment to patients who complained about cement plant emissions. “In my dealings with these people, in ten years,” Osborn observed, “I do not trust ‘em at all – as far as I can throw ‘em. Put the truth out on the table . . . Let’s investigate it, but don’t do it at someone else’s expense. Don’t do it at the community’s expense.” Although he was a TXI spokesman, he insisted that he represented “the views of most of the people in the community and the approach that our city wants to take.”²⁰ When Ivy Howard, who had experienced the TXI “upset,” visited Dr. Bohl for health problems, he warned her, “Listen to you, maybe you need to pack your bags and move.”²¹

¹⁹ James T. Doty to David Carmichael, 16 December 1991, in TACB, “Sampling and Analysis of Ambient Air,” 6.

²⁰ Osborn quoted in Farley, “Ill Wind Blowing,” 11.

²¹ Bohl quoted in Davis, “Any Way the Wind Blows,” 11.

Though thin on medical analysis, Bohl's real estate tip was not practical for Cement Valley residents. By 1993, property values in Cement Valley had dropped as much as fifty percent. Howard's property, once valued at \$150,000 dollars, was now appraised at only \$75,000. The neighbor's house across the street had been on the market for nearly three years. And, in 1995, one group of citizens filed a civil lawsuit against TXI, claiming that the cement plant threatened their health and lowered their property value. The lawsuit was eventually dropped in 1996 because the complainants believed that a long, drawn-out case would drain them financially.²²

For residents in Cement Valley like Ivy Howard, relocating is not only impractical, but also it would have emotional drawbacks. "This is home . . . This is where my husband moved when he was in the third grade. I went to all twelve years of school here. I couldn't be any prouder of where I live. If I moved somewhere else, it wouldn't be home. It would be hard to leave here. My daddy even worked at TXI. I knew about the dust, but not all this other stuff," Howard complained. "Why should we have to give up our home for the crap they're doing now?"²³

With the avenues of help from local authorities closed, Midlothian residents hoped for assistance at the state level, only to find the appropriate agencies even less useful. For example, after a parent notified the Texas Department of Health in 1995, the agency assigned Dr. Peter Langlois, senior epidemiologist of the Texas Birth

²² Davis, "Any Way the Wind Blows," 11; Alexei Barrionuevo, "Midlothian Residents Sue Firm Over Emissions From Two Plants," *DMN*, 14 September 1995, 26A; Jim Schermbeck, telephone conversation with author, 7 April 1999.

²³ Quoted in Davis, "Any Way the Wind Blows," 12, 13.

Defects Monitoring Division, to investigate why there were nearly three times the expected number of Down syndrome cases in such a small area. In June 1996, he announced his findings and concluded that the “study did not provide evidence that environmental factors were associated with the excess occurrence of Down syndrome cases”²⁴ In other words, the investigation was inconclusive. It could not explain the abnormally high number of Down syndrome children in Ellis County.

Although Langlois described the cluster as “statistically significant,” the number was too small to lead to any fundamental conclusions, in spite of the discovery that several of the mothers in Ellis County had experienced medical problems during their pregnancies such as “allergies, asthma or hay fever, or respiratory illness.” Though apprised of the increasing number of health complaints in the area, Langlois not only dismissed the possibility of air pollution as a link, but also failed to recommend a follow-up investigation. This decision was particularly distressing because of an EPA preliminary finding in 1993 that showed how a single dose of dioxin in pregnant laboratory animals damaged the developmental, hormonal, and immune systems. Instead, Langlois only recommended that the Texas Birth Defect Registry expand its coverage to include Ellis County in 1997, and he added that he would “periodically conduct an in-depth analysis of Down syndrome occurrence”²⁵

²⁴ Langlois, “Down Syndrome Cluster in Three Texas Counties, 1992-1994,” 12.

²⁵ Langlois, “Down Syndrome Cluster in Three Texas Counties,” 7, 12; “Dioxin Tied to Reproductive Woes,” *DMN*, 28 August 1993, 11A; “Dioxin Poses Greater Health Threat Than Previously Thought, Study Says,” *DMN*, 12 September 1994, 32A.

Although the results of the Langlois study disillusioned the citizens of Midlothian, the Department of Health was not the only state agency to whom they could turn. Prior to the creation of the Texas Natural Resource Conservation Commission (TNRCC) in September 1993, residents with health complaints were encouraged to contact the Texas Air Control Board. Although Senate Bill 2 stipulated the abolition of the agency on September 1, 1993, the TACB, under the leadership of commissioner Kirk Watson, made the most of its terminal condition. Watson endorsed an energetic and progressive policy in regard to air pollution: "In Texas we've always understood water and land. Air, on the other hand, we've not thought about. So when you say 'Let's clean up the land or the water,' the response is 'Oh, we'll burn it.' That's the way we've always approached things in Texas. If we can't bury it or haul it away, we burn it. It's just in the air. But it's a short-term solution."²⁶

With the exception of the 1992 risk analysis of Midlothian industries, the TACB had taken an unprecedented environmentalist approach culminating in 1992 when it denied the Lafarge Corporation a permit to burn hazardous waste in its cement kilns in New Braunfels. In July 1992, Watson set up a task force to undertake a comprehensive investigation of the cement industry's burning of hazardous waste. The task force consisted of eighteen members of diverse backgrounds, including TXI official Randall Jones, LaFarge Cement Company executive Duncan Gage, and former Shell Oil engineer Chuck Rivers, as well as environmental lobbyist Edward

²⁶ Hild, "The Politics of Toxic Cement," 2; Watson quoted in Davis, "Any Way the Wind Blows," 15.

Kleppinger, Midlothian Citizens Aware and United for a Safe Environment member Cynthia Fave, and New Braunfels city council member Paul Fraser. The appointments of Gage and Fraser were particularly significant because both men had been on opposite sides of a similar struggle between the community of New Braunfels and the LaFarge Cement Company.²⁷

In February of 1993, the panel released its findings and recommendations. The task force failed to require the labeling of cement produced from waste-derived fuel or to define cement kiln dust as a hazardous waste, but it did make some groundbreaking proposals. It concluded that the incineration capacity in the state of Texas could be handled by the commercial incineration industry. Therefore, the evaluation of permit applications should be scrutinized more carefully to “ensure the implementation of the most efficient, effective, and environmentally sound method of waste disposal.” Additionally, since there was no immediate or future need for excess disposal capacity, the cement kilns burning hazardous waste should be held to the same emissions standards as commercial incinerators.²⁸

In addition to the cement kiln and hazardous waste incineration task force, Watson played an instrumental role in setting up an environmental equity and justice task force. The task force, also led by Texas Water Commissioner John Hall, investigated whether or not a disproportionate distribution of environmental hazards

²⁷ Davis, “Any Way the Wind Blows,” 14; Hild, “The Politics of Toxic Cement.”

²⁸ Kirk Watson to Carol M. Browner, 26 May 1993, in “Smoke and Mirrors: A Critical Analysis,” DARPF; Jim Schermbeck, “How Not To Burn Hazardous Waste,” *DMN*, 28 January 1994, 36A.

existed in minority and less affluent communities throughout the state while it searched for possible solutions for allocating the state's environmental resources more equitably. The report by the task force, which preceded the EPA's similar study on environmental justice by one year, relied less on pure statistics and more on historical and anecdotal analysis. Most importantly, the task force touched on an issue that was debated in the Texas Legislature a year earlier: an independent Office of Public Counsel. The task force believed that in order to solve the problem of environmental discrimination, a separate agency needed to be set up in order to better represent minority and poorer communities. It was vital that the Office of Public Counsel be established with a staff and a budget that was independent of the TNRCC. In addition, the office would have the power to appeal any decision handed down by the TNRCC in order to ensure due process of the law to all citizens of Texas regardless of race or class background.²⁹ With its recommendations, the task force recognized the need to put smaller and less powerful communities on more equitable ground concerning environmental regulation and enforcement.

When the "Texas Environmental Equity and Justice Task Force Report" was released in August 1993, the TNRCC was just weeks away from opening its doors officially. The recommendations by the task force may have suffered from bad timing or, simply, fell on deaf ears. Whatever the case, an independent Office of Public Counsel was never established. Local communities were not without representation; the former Office of Public Counsel from the Texas Water Commission transferred to

²⁹ TNRCC "Texas Environmental Equity and Justice Task Force Report" (August 1993), TNRCC Library, Austin.

the TNRCC, but remained limited because of its financial dependence as well as its inability to appeal final decisions. The fact that Midlothian citizens were not going to be able to be represented by an independent and strong Office of Public Counsel would come back to haunt them when the TNRCC later made its final decision regarding TXI's permit.

The creation of the TNRCC was a step backward for opponents of the cement industry's use of waste-derived fuel because residents of Midlothian lost a powerful ally in the TACB and began to experience the limits of dealing with a streamlined, centralized environmental superagency. As health problems in Midlothian worsened during the 1990s, local residents who filed complaints had to deal with the legacy of Senate Bill 2: the TNRCC. By 1995, two years after its inception, the agency had set up a policy in which field agents would investigate complaints immediately upon notification, but the agency's procedures were riddled with flaws. For example, if a complaint was called in during the evening or weekend hours, the TNRCC could not respond until a field agent was in the office. In reality, many odor nuisances were never confirmed because by the time a TNRCC official arrived, either the wind had shifted or the odor had dispersed. Through its own investigation of TNRCC reports, DAR revealed that, on average, it took the agency just over seven days to respond to local complaints. For example, on February 24 and February 27, 1998, a Midlothian resident contacted the TNRCC Region 4 field office to register an odor nuisance. Six days later, the TNRCC sent out two agents to investigate the report. By the time they arrived, the wind was blowing from the west, and they could not detect an odor in the air. They filed the complaint as unconfirmed. In another incident reported on

September 27, 1998, a resident complained of strong odors from the TXI cement plant. TNRCC investigators arrived three days later, only to find that the protestant was not home. Since no odors were present at the time, they did not confirm the complaint.³⁰

When investigators did arrive on the scene of a reported nuisance promptly, it did not always result in a confirmation by the TNRCC. For instance, when one resident reported strong chemical odors, TNRCC field agents arrived within one hour. The agents confirmed faint whiffs of sulfur odors, but concluded that the odors were “very intermittent, and therefore not the nuisance level.”³¹ The morning after Ivy Howard experienced the emissions “upset” in 1988, TACB investigators arrived at her home, tape-lifted the red chalk, and told her that the residue was harmless. One investigator was even antagonistic, asking her, “Don’t you think this is in your mind?”³²

Many complainants were discouraged by the attitudes of state agents. To date, only four of the 150 complaints on file at the TNRCC are listed as “confirmed.” Between 1992 and 1993, the TACB received more than thirty odor complaints, but five years later, frustrated Midlothian residents filed only seven complaints within a one-year period. At a public meeting on March 10, 1999, when the TNRCC

³⁰ Jim Schermbeck, telephone conversation with author, 7 April 1999; TNRCC/ Account/ Investigation/ Violation Form, “Investigation number 124831A,” 5 March 1998, TNRCC Records Division, Austin; TNRCC Account/ Investigation/ Violation Form, “Investigation number 137150A,” 30 September 1998.

³¹ TNRCC Account/Investigation/Violation Form, “Investigation number 125409A,” 11 March 1998.

³² Quoted in Davis, “Any Way the Wind Blows,” 11.

Commissioners voted to issue TXI its permit, many Midlothian residents in attendance voiced their disapproval with boos and hisses when the discussion turned to investigation procedures by the TNRCC's field agents.³³

Although Midlothian residents were frustrated by the ineffectiveness of field agents from the TACB in the early 1990s, they were encouraged by the legislative action regarding hazardous waste incineration in cement kilns that took shape about the same time. In fact, by the time the Regular Session of the 72nd Legislature ended in June 1991, they had won a few small victories – a harbinger of impending legislation regarding state environmental regulation and enforcement. More importantly, the attempted legislation indicated that the use of hazardous waste in cement kilns was an emerging and controversial issue that caught the attention of the state's top lawmakers.

By the time the Regular Session ended, however, and before the major changes in environmental protection were about to begin, Midlothian residents and air pollution activists had more reasons for concern than celebration. On January 16, 1991, Republican Representative Edmund Kuempel, of Seguin, filed House Bill 420, which proposed a two-year moratorium on burning hazardous waste in all kilns except ones that the state already had authorized with a permit.³⁴ Kuempel had sound

³³ Farley, "Something in the Air," 8; "TACB Complaint List 1992-93" DARPF; TNRCC Master Accounts Log 1997-98, TNRCC Records Division, Austin; Public Agenda Meeting for TXI Permit, TNRCC Headquarters, Building E, Auditorium, 10 March 1999, notes by author, Austin.

³⁴ *Legislative Information System, 72nd Regular Session, 1991 Master Bill History Report*, 163-64, Texas Legislative Reference Library, Austin (hereafter cited as *1991 Bill History Report*); *House Research Organization, Daily Floor Reports*,

reason to propose such legislation; his district included New Braunfels, which was embroiled in a dispute over the permit application of the Lafarge Corporation to use waste-derived fuel in its cement kilns. Kuempel's bill did not apply to Midlothian because, although TXI only had a temporary permit, it still had official state authorization to use waste-derived fuel. This bill, therefore, left Midlothian residents in a Catch-22. On the one hand, there was no way they could oppose the bill because it would put them effectively on the side of the cement industry. On the other hand, House Bill 420 excluded TXI, their environmental opponent.

In March, however, Midlothian residents realized that they were not alone in their struggle to prevent the use of waste-derived fuel in TXI's cement kilns. In response to House Bill 420, Democrat Keith Oakley, Midlothian's state representative, filed House Bill 2325 on March 7, 1991. Oakley's bill proposed a two-year moratorium on all cement kilns using waste-derived fuel, regardless of its permit status.³⁵ In short, the legislation was the same as Kuempel's, except that it included TXI's cement kilns in Midlothian.

While House Bills 420 and 2325 went into committees, Democrat Senator Steve Carriker introduced Senate Bill 1099 on March 12, 1991. The bill presented a one-year moratorium on issuing new permits to commercial hazardous waste disposal facilities. The purpose of the moratorium was to allow the Air Control Board and the Water Commission enough time to develop plans and establish reasonable goals

Bill Analysis, 13 May 1991, 129, Texas Legislative Reference Library, Austin (hereafter cited as *Daily Floor Reports*).

³⁵ *1991 Bill History Report*, 854; *Daily Floor Reports*, 13 May 1991, 132.

concerning the management of hazardous waste in Texas. The bill did not include TXI's cement kilns because its permit already had been issued. However, supporters viewed the bill as an opportunity for the state to set precedents by taking local concerns into account. Since the TXI permit was temporary and since the company was in the process of upgrading it for permanent authorization, Midlothian citizens supported Senate Bill 1099. They saw it as proactive legislation and an effective means to combat TXI in the future. In addition, the bill put restrictions on the location of the hazardous waste facilities in communities; they could not be located within two-thirds of a mile of schools, homes, churches, parks, or water supplies.³⁶

Not only was Senate Bill 1099 more comprehensive than the other bills regarding hazardous waste incineration, but also it had a powerful political ally: Ann Richards. The governor had already been an outspoken critic of industrial pollution and the exploitation of small communities by big business. In her State of the State address on February 6, 1991, Governor Richards blasted the existing system of environmental enforcement in regard to hazardous waste management, and she suggested that the permit process was in need of reform. She proposed a two-year moratorium on issuing permits to commercial hazardous waste incinerators so that the

³⁶ *1991 Bill History Report*, 513; Texas Senate, Natural Resources Committee, Steve Carriker testimony on Senate Bill 1099, taped transcription, 20 March 1991, Legislative Reference Library, tapes located in Texas State Library, Austin; *Daily Floor Reports*, 31 May 1991, 68,133; Mary Lenz, "Hazardous Waste Disposal Permit to Expire Wednesday," *Houston Post*, 1 October 1991, A 10; Bruce Hight, "Moratorium on Hazardous Waste Licenses Sought," *Austin American Statesman*, 21 March 1991, B2 (hereafter cited as *AAS*); Senate, Natural Resources Committee, Ann Richards testimony on Senate Bill 1099, 20 March 1991.

state would have time to review the industry and amend the system. Indicating the need for participation from local communities in the permit process, Governor Richards did not mince words, warning, "No more will hazardous waste facilities be rammed through the permit process over the objections of local communities. No more will they be located near schools or residential areas or water supplies."³⁷ The following month, Governor Richards outlined her support of Senate Bill 1099 in the Senate Natural Resources Committee. On March 20, she lashed out at the industry's past indiscretions and admitted that "we will never solve the problems of waste disposal by doing end runs around local communities and telling them what they don't know won't hurt them."³⁸

By the end of the Regular Session of the 72nd Legislature in June 1991, it was clear, however, that environmental legislation in Texas would favor big business. The House Environmental Affairs Committee handed Midlothian citizens their first loss on May 7 when they rejected House Bill 2325. After a brief public hearing, Representative Robert Saunders, a Democrat who would later co-author the House bill creating the TNRCC, motioned to leave the bill pending.³⁹

³⁷ Laylan Copelin, "Richards Lashes Out in Address," *AAS*, 7 February 1991, A5.

³⁸ Senate, Natural Resources Committee, Ann Richards testimony on Senate Bill 1099, 20 March 1991.

³⁹ *1991 Bill History Report*, 854; Texas House of Representatives, Committee on Environmental Affairs, Robert Saunders motion to leave pending House Bill 2325, taped transcription, 7 May 1991, Legislative Reference Library, tapes located in John H. Reagan Building, Austin.

The defeat did not deter Oakley from trying to protect his district when House Bill 420 was introduced for debate. When it was read on the House floor for the second time, Oakley attempted to amend it by including Midlothian in the moratorium. "There are people there getting sick right now. They knew they were moving next to a cement kiln," he pleaded, "but they didn't know they were going to move next to one of the largest hazardous waste incinerators in the nation." Despite his impassioned pleas, Oakley could not persuade his colleagues, and the amendment was tabled.⁴⁰

Kuempel's legislation fared better than House Bill 2325, but met ultimately with a similar fate: Two days later, the bill was passed in the House and sent to the Senate. Like House Bill 2325, however, Kuempel's bill failed to make it past committee. The following week, it was tagged in committee and died.⁴¹

Those who favored restricting the use of hazardous waste in cement kilns had one chance left: Senate Bill 1099. On the last day of the Regular Session, Senate Bill 1099 passed both houses, but not without major concessions. For instance, the moratorium on issuing permits was whittled down to 120 days. Discouraged environmental groups referred to the legislation as "a summer vacation" for the hazardous waste incineration industry. Ann Richards, disagreed, calling it a "green letter day" in Texas. She praised the legislation, in particular, because it did not abolish the requirement that new permits could not be issued to facilities located

⁴⁰ *1991 Bill History Report*, 162-63; Debbie Graves, "House Bill Bars Kiln in Burning Hazards," *AAS*, 16 May 1991, E5.

⁴¹ *1991 Bill History Report*, 162-63; Debbie Graves, "House Bill Bars Kiln in Burning Hazards," *AAS*, 16 May 1991, E5.

within a half-mile of schools, parks, or water supplies. “The environmental steps taken during the 72nd Legislative Session are the most unbelievable when you consider Texas history,” rejoiced the governor.⁴²

The environmental legislation that came out of the 72nd Legislature may have been unique, but Senate Bill 1099 was ultimately ephemeral. By the end of September 1991, the 120-day moratorium would be over. Senate Bill 1099 was an example of the reluctance by Texas legislators to enact environmental legislation necessary to protect local communities at the expense of big business. For Midlothian residents, the bill was another setback in a series of legislative defeats. Within two months in the First Called Session of the 72nd Legislature, unprecedented environmental legislation emerged in the form of Senate Bill 2. This time, the effects of the environmental legislation would not be so fleeting, leaving small communities, such as Midlothian, susceptible to industrial pollution.

The failure of the cement kiln legislation of the early 1990s was inconsequential compared to the overhaul of the TNRCC’s leadership later in the decade. When George W. Bush was elected governor in 1994, he replaced Richards’s TNRCC Commissioners with his own choices. In 1997, the agency’s new commissioners decided to rule on the TXI permit, and set a public hearing date for the

⁴² *1991 Bill History Report*, 513-14; *Daily Floor Reports*, 68; “‘Green Letter Day’ for State Environment,” *AAS*, 8 June 1991, B1, B6; Mary Lenz, “Hazardous Waste Disposal Permit Moratorium Expires Wednesday,” *Houston Post*, 1 October 1991, A10; Richards quoted in “Governor Signs Environmental Bills,” *DMN*, 8 June 1991, A35.

following year. The ruling on TXI's permit to burn hazardous waste in its cement kilns, therefore was now in the hands of industry-friendly state officials.

CHAPTER 2

POLITICS AND THE CREATION OF THE TEXAS NATURAL RESOURCE CONSERVATION COMMISSION

In order to understand how the creation of the Texas Natural Resource Conservation Commission (TNRCC) was a step backward for Midlothian residents in their fight against Texas Industries (TXI), an in-depth look at the political process behind Senate Bill 2 is necessary. The idea behind the legislation was to consolidate a number of smaller state environmental agencies that would pool their resources in order to improve environmental regulation and enforcement. Governor Richards, legislators, and environmental activist organizations rallied behind the bill in the hopes of improving the Texas environment. At first the legislation filled proponents of pollution control with hope, but after amendments, it reduced the environmental agency to an impotent, streamlined state office that better served big business than the citizens of Texas. With the passage of a revised Senate Bill 2, the message was clear: the majority of Texas legislators favored economic growth and industry over environmental protection and local communities. This would have a direct impact on communities such as Midlothian that faced pollution from powerful companies. For Midlothian residents, who at the time were just beginning their fight against TXI's permit to burn hazardous waste in its cement kilns, the 72nd Legislature offered little assistance.

The impetus for the legislation emanated from the changing relationship between the federal government and the state of Texas over environmental regulation and enforcement. After the passage of the Federal Clean Air Act of 1990, state

governments were given a federal mandate not only to meet new national ambient air quality standards, but also to submit state implementation plans in order to show how they intended to enforce the criteria. If state plans were not approved by the EPA, then the state would face federal intervention. In addition, states faced either losing federal grants, such as highway funding, or being hit with supplementary federal emissions regulations.¹ The possibility of federal intrusion or, even worse, the loss of federal monies drove individual states to mold their environmental policy in the image of the EPA.

In Texas, environmental policy was only one of many issues that state representatives and senators faced as they entered the 72nd Legislature in 1991. When Ann Richards took the governor's office that year, she promised a "New Texas" that consisted of tougher environmental laws in harmony with economic growth and a stronger, more active state government.² By 1990, the Texas economy had begun to rebound from the recession of the previous decade, but it was far from a complete

¹ Denise Scheberle, "Partners in Policymaking: Forging Effective Federal-State Relations," *Environment* 40 (December 1998): 16-17; For an in-depth discussion concerning the shift in environmental regulation and enforcement from the federal government to the state level, see James P. Lester, *A New Federalism? Environmental Policy in the States, Environmental Policy in the 1990s*, 2nd ed., by Norman J. Vig and Michael E. Kraft (Washington, D.C.: Congressional Quarterly Press, 1994), 51-68; Marc K. Landy, Marc J. Roberts, and Stephen R. Thomas, *The Environmental Protection Agency: Asking the Wrong Question from Nixon to Clinton* (New York: Oxford University Press, 1994), 245-306; For additional discussion concerning the Clean Air Act of 1990, see Gary C. Bryner, *Blue Skies, Green Politics: The Clean Air Act of 1990* (Washington, D.C.: Congressional Quarterly Press, 1993), 123-183.

² David Elliott, "'New Texas' Waiting in the Wings," *AAS*, 11 November 1990, A1, A16.

recovery. By year's end, the state anticipated a deficit of 4.6 billion dollars.³ Texas could not risk losing any federal funding by not meeting the standards of the Federal Clean Air Act. Furthermore, the state ranked first in the amount of pollutants released into the air, water, and land; it was responsible for nearly ten percent of the nation's toxic air emissions. Texas spent well under one percent of its budget on the environment, which gave it the dubious honor of finishing last in per capita environmental expenditures.⁴ In the air, besides a large amount of toxins, was a sense of a need for drastic change in the state's environmental policy. "We cannot condone the luxury of doing business as usual," warned Lieutenant Governor Bob Bullock, "because these are not usual times."⁵

The Legislature wasted little time, and with Bullock's influence, passed Senate Bill 111 in early 1991. The provisions of the bill delegated John Sharp, the State Comptroller, to assemble a team of auditors for a massive study of the Texas state government, and to advise the Legislature on how to run the government more efficiently – all within five months. Sharp took the opportunity to make drastic recommendations, including a major reorganization of the decentralized and

³ John Sharp, *Breaking the Mold: New Ways to Govern Texas. A Report from the Texas Performance Review*, Vol. 1, July 1991, Texas State Archives, Austin, 1 (hereafter cited as *Texas Performance Review*).

⁴ Bob Hall and Mary Lee Kerr, *1991-1992 Green Index: A State-by-State Guide to the Nation's Environmental Health* (Washington, D.C.: Island Press, 1991), 14, 72-74, 148; *TPR*, 3, 5-8; Bob Dart, "Texas, South Rated Environmental Slackers," *AAS*, 12 August 1991, A1, A4.

⁵ Bullock quoted in *Texas Performance Review*, Vol. 1, preface.

fragmented state agencies. The intention was not to revamp the old order, but to create a “brand new system.”⁶

The economic benefits of Sharp’s proposals were impressive; according to conservative estimates, his auditors predicted a savings of 5.2 billion dollars. Most importantly, this consolidation and streamlining would not mean a loss of services to Texas. Rather, as Sharp put it, “. . . these recommendations will go a long way toward improving the quality of services the state provides to its citizens.”⁷

According to him, his recommendations were “breaking the mold.” At the Capitol, these proposals became known, simply, as the *Texas Performance Review*, or the Sharp report, and they served as the impetus for legislation in both the House of Representatives and the Senate during the First Called Session of the 72nd Legislature.

Although Sharp considered his recommendations groundbreaking, the methods by which he intended to implement them were not. The *Texas Performance Review* suggested consolidation as a solution to the overriding problem of decentralization that plagued environmental enforcement agencies. More than fifteen agencies with 7,550 employees involved in nearly sixty environmental and natural resources programs existed throughout the state at that time. The report rebuked the existing system for inefficiency, and pointed to the “fragmentation of environmental

⁶ *Texas Performance Review*, Vol. 1, 1-3, 9, 11, 17, 152-3.

⁷ *Texas Performance Review*, Vol. 1, 152-3; John Sharp to Ann Richards, Bob Bullock, and Gibson D. Lewis, 26 June 1991, *Texas Performance Review*, Vol. 1.

programs among several agencies . . . [as] major roadblocks to implementing an effective statewide environmental program.”⁸

In order to correct the problem, the Sharp report recommended that one superagency, the Department of the Environment (DOE), be created upon the foundation of the Water Commission and in the mold of the EPA, with the responsibility to oversee all environmental regulations and enforcement. In addition, the Air Control Board, the Water Well Drillers Board, the Structural Pest Control Board, and the Solid Waste Division of the Health Department would be abolished, and their responsibilities transferred to the DOE. Omitted from the merger were five powerful natural resources agencies: the General Land Office, the Agriculture Department, the Railroad Commission, the Parks and Wildlife Department, and the Water Development Board. Nonetheless, these groups would still have a voice in the DOE; each agency would send a delegate to comprise a Natural Resources Council to consult with the superagency. The report recommended a two-year phase-in period in order to ensure a smooth transition for all agencies while the Texas Air Control Board was granted enough time and latitude to meet the federal mandates of the Clean Air Act. Officially, the DOE would begin operations on September 1, 1993.⁹

⁸ *Texas Performance Review*, Vol. 2, 3; *Texas Performance Review*, Vol. 1, 53.

⁹ *Texas Performance Review*, Vol. 2, 5-6, 16-17, 20; Texas Senate, Finance Committee, John Sharp testimony on Senate Bill 2, taped transcription, 72nd Legislature, First Called Session, 15 July 1991, Texas Legislative Reference Library, tapes located in Texas State Library, Austin; Texas House of Representatives, Committee on Government Organization, Terry Bleier testimony on Senate Bill 2, taped transcription, 72nd Legislature, First Called Session, 17 July 1991, Texas Legislative Reference Library, tapes located in John H. Reagan Building, Austin.

A primary benefit of consolidation was the centralization of the permitting process for industries throughout Texas. According to the philosophy of “one-stop shopping” for permits, a single agency could enforce pollution standards more closely while expediting the application process at one location for businesses, saving them time and money. The Texas economy would benefit while industries would avoid confusion. As Sharp explained it, businesses would only “go through one set of hearing examiners instead of two, three, or four when you’re moving a major company, for instance, into the state of Texas.”¹⁰

The new permit process under the DOE thus promised to solve a thorny problem: how to balance economic growth and environmental protection. “We recognize the relationship,” admitted Terry Bleier, the Natural Resources team leader for the Sharp report, “I never mean to speak to it as environmental protection versus economic development because the two are compatible and should be The consolidation is an attempt to do the job much better – to improve and increase the environmental protection goal of the state of Texas.”¹¹

Though Sharp and his team preached a balance between economic growth and environmental protection, the recommendations in the *Texas Performance Review* did not always support their rhetoric. For example, one recommendation aimed to toughen the penalties for industrial polluters who violated the law knowingly in order

¹⁰ *Texas Performance Review*, Vol. 2, 5, 15, 20; Senate, Finance Committee, John Sharp testimony on Senate Bill 2, 15 July 1991.

¹¹ House, Committee on Government Organization, Terry Bleier testimony on Senate Bill 2, 17 July 1991.

save money. In short, some businesses found it cheaper to risk state fines, rather than face the high cost of disposing waste properly. The Sharp report suggested that “legislation should be enacted requiring that administrative penalties be assessed at an amount greater than the economic benefit realized by violating the law.”¹² This recommendation not only seemed logical, but also, it suggested a no-nonsense approach to big business. Upon closer inspection, however, the suggestion also implied a strict enforcement of pollution standards against big business in Texas – a state in which the record of enforcement was far from exemplary. Though the recommendation was a step in the right direction for residents in small communities, in particular Midlothian, it was not a guarantee for better environmental protection.

Not all of the recommendations by the Sharp report intended to improve the quality of clean air in Texas. For instance, in order to meet the federal mandates of the Clean Air Act, the *Texas Performance Review* suggested an increase in motor vehicle fees for an estimated annual revenue of nearly 25 million dollars. Additional air emissions fees would increase the total revenues to more than 34 million dollars in 1992 and more than 36 million dollars in 1993. Nonetheless, the generated revenues for enforcement of the Clean Air Act were not to be deposited in a specific air pollution control fund. Rather, the money was to be put into the General Revenue Fund for the DOE.¹³ In other words, the increase in revenue created in order to

¹² *Texas Performance Review*, Vol. 2, 53-55.

¹³ *Texas Performance Review*, Vol. 2, 77-78; House, Committee on Government Organization, Terry Bleier testimony on Senate Bill 2, 17 July 1991.

enforce tighter standards on air pollution in Texas was to be allotted to all aspects of environmental regulation. When questioned about the legality of such a procedure, Bleier indicated that as long as the state met the federal standards of the Clean Air Act, then additional state money may go into general revenues.¹⁴ The idea, though technically legal, would meet with controversy later during the legislative process. Yet the message was clear to environmental activists and Midlothian residents: the DOE, the state's proposed agency responsible for air pollution control, did not consider it a top priority.

Legislators initiated bills in both houses to create the Texas Natural Resource Conservation Commission.¹⁵ Democrat Senator Carl Parker proposed Senate Bill 2 on July 15, 1991, describing it "exactly as the Comptroller's staff proposed it." When it got to the House, Democrats Ron Lewis and Robert Saunders who inherited Senate Bill 2 on July 19, envisioned a different environmental superagency and, subsequently, added major revisions. In the end, the Senate conceded and accepted the House version rather than lose the entire bill outright.¹⁶ The settlement proved to

¹⁴ House, Committee on Government Organization, Terry Bleier testimony on Senate Bill 2, 17 July 1991.

¹⁵ Though the bill passed through both houses and contained different elements, the following discussion will refer to the legislation as Senate Bill 2 regardless of its location. The reader is to assume that the agency or group held the same opinion about it in both houses unless otherwise indicated within the text.

¹⁶ Senate, Finance Committee, Carl Parker testimony on Senate Bill 2, 15 July 1991; *1991 Bill History Report*, 2-4; Terrence Stutz, "Senate Reluctantly OKs Superagency for Environment," *DMN*, 31 July 1991, 23A; Debbie Graves, "Senate OKs Environment Agency Bill," *AAS*, 31 July 1991, B1.

be a costly one for environmental protection in Texas during the 1990s. For Midlothian citizens, it was a critical setback in their tumultuous struggle against TXI.

Ironically, Parker, Lewis, and Saunders agreed on the method of pushing their bills through legislation; each version intended to keep the original bill free from amendments. Parker's bill sought to empower the executive branch by giving the governor the power to appoint an executive director and a six-member board to oversee the direction of the superagency. In addition, the superagency would create an independent Office of Public Counsel in order to represent citizens on environmental complaints. The bill also included a set of indoor air quality standards to be regulated and enforced by the superagency. Finally, it required criminal penalties for industrial polluters. On the other hand, Lewis and Saunders pushed for limiting the governor's power by only granting the authority to appoint a three-person environmental board who would then choose the executive director. They rejected the idea of an independent Office of Public Counsel as well as setting indoor air quality standards, but endorsed criminal penalties for pollution violations.¹⁷

Fundamental differences separated the two houses during the two-week debate over a new, streamlined superagency. Initial opposition by smaller state

¹⁷ 1991 *Bill History Report*, 2-4; *Daily Floor Reports*, 14-17; Jim Oliver to Bruce Gibson, Fiscal Note, 24 July 1991, Senate Bill 2 File, Legislative Reference Library, Austin; Debbie Graves, "Senate Panel OKs Creating Agency for Environment," *AAS*, 19 July 1991, B2; Debbie Graves, "Senate Votes to Empower the Governor," *AAS*, 20 July 1991, B1, B8; Terrence Stutz, "Senate OKs Environmental Agency Merger," *DMN*, 20 July 1991, 32A; Debbie Graves, "Environmental Agency Plan Passes House," *AAS*, 26 July 1991, B1, B4; Anne Marie Kilday, "House OKs Agency Merger," *DMN*, 26 July 1991, 13B; Terrence Stutz, "Senate Reluctantly OKs Superagency for Environment," *DMN*, 31 July 1991, 23A; Debbie Graves, "Senate OKs Environment Agency Bill," *AAS*, 31 July 1991, B1.

environmental agencies to Senate Bill 2 came through the Senate Finance Committee and House Committee on Government Organization. The Rio Grande Compact Commission (RGCC), the Lower Colorado River Authority (LCRA), the Well Water Drillers, and the Structural Pest Control Board opposed the idea of consolidation. Jack Hammond, of the RGCC, complained that this would move too much power away from local authorities and, ultimately, away from the people who received service from the commission. Testifying that the Structural Pest Control Board thrived because of its intimate relationship with the public, Clay Stroope supported Hammond and argued that consolidating his agency would only create inefficient service. Frank Grimes, of the Water Well Drillers Board, indicated that consolidation would create inefficiency by severing the close working relationship that his agency shared with the Water Development Board, an agency not included in the consolidation.¹⁸

Small associations representing specific groups joined the smaller environmental agencies in opposition to Senate Bill 2. Rayford Price, of the Texas Agricultural Aviation Association (TAAA), condemned the attempt to restructure the government, particularly since the bill proposed to put pesticide and herbicide regulation under the new superagency. Additionally, he viewed the consolidation as an attempt to move power away from the public. No one was more outspoken in

¹⁸ House, Committee on Government Organization, testimonies of Mark Rose, Lower Colorado River Authority, Jack Hammond, Rio Grande River Compact, Billy Hammond, Pecos River Authority, Clay Stroope Texas Pest Control Board, and Frank Grimes, Texas Well Water Drillers Board, 19 July 1991.

opposition than Ed Small of the Texas and Southwest Cattle Raisers Association. When asked about which specific parts of the bill that he opposed, he did not hide his disdain: "I'll be glad to condemn it in total." Nonetheless, he did voice a couple of specific complaints. First, without an Office of Public Counsel in the House's version, citizen participation would be eliminated. Second, by consolidating the smaller agencies, the bill would deprive the public of the expertise of state specialists. DOE field agents would be required to have a working knowledge in a number of areas, rather than superior knowledge in a single specific area. For instance, an engineer who was trained in pest control would have minimal insight into the technicalities of well water drilling or air pollution. Small blasted Senate Bill 2 as a step backward for the environment: "You're talkin' about somethin' getting a long way from the people."¹⁹

Not all state agencies opposed the consolidation. The five state environmental and natural resources agencies that were omitted from the consolidation process creating the DOE supported Senate Bill 2. Representatives from the Department of Agriculture, the General Land Office, the Water Development Board, the Department of Parks and Wildlife, and the Railroad Commission testified that consolidation was a good idea – as long as their departments were not involved or their powers limited. For example, Lena Guerrero and Jim Nugent of the Railroad Commission favored the consolidation plan proposed by the Senate, but condemned the House version of

¹⁹ House, Committee on Government Organization, testimonies of Rayford Price, Texas Agricultural Aviation Association and Ed Small, Texas and Southwest Cattle Raisers Association, 19 July 1991.

Senate Bill 2 because it stripped their office of fifty percent of its responsibility over oil and gas injection wells. Craig Pederson, of the Water Development Board, shared Guerrero's concerns on consolidation. Although he favored the plan to create a DOE, he opposed the proposal to move the Water Quality Board from his office to the DOE. Likewise, Rick Perry, of the Department of Agriculture, commended the bill for simplifying the permitting process, but argued against moving the regulation of pesticides and herbicides to the DOE, claiming that the move would cost the state a half-million dollars. Even though he supported the national trailblazing proposals of the Sharp report, Perry pointed out that forty-one out of the fifty states maintained pesticide and herbicide regulation in their respective Departments of Agriculture.²⁰ Consolidation and streamlining made sense to the agencies that were not included in Senate Bill 2, but whenever a proposal suggested consolidating any of their powers, they opposed it.

State agencies that remained outside the immediate scope of environmental protection, but that dealt with related issues, supported Senate Bill 2. The Attorney General's Office believed that consolidation would be economical, efficient, and effective. In addition, the agencies supported stronger penalties for violating environmental laws. The Department of Health (DOH) was unique in that it was the only state agency that was more than happy to give up some of its power. In an

²⁰ Senate, Finance Committee testimonies of Rick Perry, Department of Agriculture, Gary Mauro, General Land Office, Lena Guerrero, Railroad Commission, and Andrew Simpson, Department of Parks and Wildlife, 15 July 1991; House, Committee on Government Organization, testimonies of Perry, Mauro, Guerrero, Paul Shinkawa, Department of Parks and Wildlife, and Craig Pederson, Water Development Board, 19 July 1991.

indication that it was overburdened and poorly funded, the DOH favored consolidation and conceded the loss of its Solid Waste Department to the DOE.²¹ The DOH may also have realized the potential controversy that was emerging concerning the handling of hazardous waste in the state. In fact, it may have heard the rumors, or even seen reports, of growing public health problems in Midlothian and decided to let the DOE handle the problems of hazardous waste management that fell under the auspices of the Solid Waste Department.

Outside the state agencies, strong support for Senate bill 2 came from an unlikely source: environmental activists. Organizations such as the Sierra Club, the Consumers Union, Public Citizen, the American Lung Association, and the Environmental Defense Fund, supported the legislation in both houses. They endorsed consolidation as a sound idea. For example, Reggie James, of the Consumers Union, reasoned that “the only way that we’re going to be able to solve most of our environmental problems . . . is to take a unified look at it.” Tom Smith, of Public Citizen, pointed to the success of a similar superagency in Louisiana, particularly in regard to the reduction of air emissions. Environmental organizations favored transferring control over pesticide and herbicide regulation and water quality rights to the DOE, and they supported the creation of an independent Office of Public Counsel and the placement of revenues generated from emissions fees into a

²¹ House, Committee on Government Organization, testimonies of Nancy Lynch, Attorney General’s Office, and Don Thurman, Department of Health, 19 July 1991; Senate, Finance Committee, Robert McClain, Department of Health, testimony, 15 July 1991.

dedicated air pollution fund. Oddly, environmentalists argued that one-stop permit shopping benefited their cause because its simplicity promoted efficient, centralized enforcement. Optimistic, if not naïve, they envisioned a strong, independent, centralized state regulatory agency that would have “a greater accountability to the people,” enforcing environmental standards as a community watchdog. In addition, consolidation would allow the superagency to “pool” its resources, as well as enhance coordination efforts to deal with the myriad of environmental problems in Texas. In essence, they saw the DOE as the answer to the state’s environmental problems.²²

The Water Commission and the Air Control Board, the two agencies that would be most affected and that would play a leading role in the proposed DOE, had mixed feelings on Senate Bill 2. Each agency viewed the legislation with suspicion. John Hall, executive director of the Water Commission, supported the Senate version if certain amendments were added, but he opposed the House version. Steve Spaw, executive director of the Air Control Board, though “not overjoyed” with the idea of consolidation, favored the plan in both houses if certain provisions were included in it.²³

²² House, Committee on Government Organization, testimonies of Ken Kramer, the Sierra Club, Tom Smith, Reggie James, and Rebecca Herron, the American Lung Association, 19 July 1991; Senate, Finance Committee, testimonies of Kramer, Smith, James, and Herron, 15 July 1991; Ken Kramer, “Texas Needs a Consolidated Agency to Protect Environment,” *AAS*, 15 April 1991, A7.

²³ Senate, Finance Committee, testimonies of John Hall, Steve Spaw, and Warren Roberts, Air Control Board – Arlington, 15 July 1991; House, Committee on Government Organization, testimonies of Hall, Spaw, Roberts, Bob Bailey, Air Control Board – Abilene, and Roberts, 19 July 1991.

According to Hall, the problem with both versions of the legislation was the administrative organization of the DOE. He found fault with the plan to establish a large governing board on the grounds that too many administrators would create “serious problems on implementing environmental policy.” Too many directors would fail to provide sound management, thus leading to inefficiency and conflicting direction. The addition of the representation of the omitted state agencies on the Natural Resources Council would expand the already inflated administration. Hall had reason to fear its power within the DOE, and he questioned the jurisdiction of agencies such as the Railroad Commission or the Department of Agriculture. Finally, Hall sought to expand the proposed agency’s power by ensuring that the legislation provided uniform standards across the state with discretionary latitude to enforce the mandates of the Federal Clean Air Act.²⁴ Hall’s concerns over the organizational structure of the administration of the DOE made sense, since the superagency would be created upon the foundation of the Water Commission and, most likely, under his supervision as its first Executive Director.

Although the Air Control Board faced abolition under the provisions of Senate Bill 2, its executive director expressed only lukewarm resistance to the idea while other members opposed it outright. Spaw emphasized the importance of developing a program that would be able to meet the federal standards of the Clean Air Act. For him, the most important issue in Senate Bill 2 was not consolidation, but implementation of federal mandates to reduce toxic emissions. Critical of the *Texas*

²⁴ Senate, Finance Committee, Hall testimony, 19 July 1991; House, Committee on Government Organization, Hall testimony, 15 July 1991.

Performance Review, he challenged Terry Bleier's statement concerning the location of revenues from auto emissions fees. He pointed out that the revenues collected from emissions fees must go toward a dedicated air control fund as instead of to the General Revenue Fund of the DOE. Unenthusiastic about the merger, Spaw nonetheless supported the fundamental proposal of Senate Bill 2 as long as the federal mandates of the Clean Air Act were met.²⁵

Others on the Air Control Board did not share Spaw's views on consolidation. Bob Bailey criticized the legislation because of its timing. Like Spaw, he emphasized that before the legislature even considered the consolidation of its environmental agencies, Texas should be sure that it met the federal emissions levels of the Clean Air Act. He also blasted the idea of one-stop permit shopping because it would encourage big business to create process specialists.²⁶ In other words, as the DOE lost its experts because of consolidation, industry would develop and train a new level of permit professionals.

Bailey also attacked the Sharp report for its manipulation of statistical information. In particular, he lashed out at it for concluding that consolidation would generate a savings of three million dollars per year. In actuality, Bailey indicated that the additional three million dollars would come from higher emissions fees. Charles Rivers, also of the Air Control Board, joined Bailey in an assault on misleading

²⁵ Senate, Finance Committee, Spaw testimony, 15 July 1991; House, Committee on Government Organization, Spaw testimony, 19 July 1991.

²⁶ House, Committee on Government Organization, Bailey testimony, 19 July 1991.

statistics. Revealing how the *Texas Performance Review* concluded that the current Air Control Board failed to regulate air pollution effectively, he showed how this led to the idea of consolidation, based on the fact that Texas led the nation in toxic emissions. Rivers pointed out that the statistic was based on volume rather than on individual performance. It was true that Texas led the nation in toxic emissions, but this was due to the fact that it also led the nation in production of toxic waste. In reality, Rivers pointed out, Texas ranked 28th in per capita toxic emissions. Because the Sharp report drew conclusions from misleading statistical information, the Air Control Board members believed that the suggestions for a drastic change in environmental policy were irrational. They condemned Senate Bill 2 entirely.²⁷

Carl Parker's version of Senate Bill 2 passed through the Senate with little resistance while the House version by Lewis and Saunders propelled turbulent debate that led to the rejection of numerous amendments. The opposition to the House bill indicated that a substantial number of representatives were uncomfortable with the proposed DOE, renamed Texas Natural Resource Conservation Commission (TNRCC). The environmental superagency that the House version created was much different and weaker than Parker's version in the Senate. Lewis described his vision of the TNRCC as "something that industry can thrive and grow on while protecting the environment."²⁸

²⁷ House, Committee on Government Organization, testimonies of Bailey and Charles Rivers, 19 July 1991.

²⁸ *1991 Bill History Report*, 2; Debbie Graves, "Senate Panel OKs Creating Agency for Environment," *AAS*, 19 July 1991, B2; Debbie Graves, "Senate Votes to

Other representatives disagreed, insisting that the balance between economic expansion and environmental protection was out of sync, and they submitted amendments to restore that balance in favor of the environment. When the amendments came up for debate, however, Lewis and Saunders objected repeatedly, and thwarted the attempts. Specifically, they blocked amendments that proposed an independent Office of Public Counsel, more stringent penalties for convicted polluters, and location requirements for prospective landfills with regard to populated areas. The common thread running through each amendment was the protection of local communities against industrial polluters by strengthening the TNRCC. But, with the passage of an amendment that reduced the workforce of the TNRCC, it became clear that Saunders and Lewis, as well as a number of Texas representatives, planned more on supporting big business and less on protecting the environment.

Mike Martin, a Democrat from Galveston, introduced the first amendment that intended to strengthen the TNRCC. He submitted a proposal for an independent Office of Public Counsel that would represent the people on environmental issues. In other words, if a community objected to a TNRCC decision, they would be able to file a complaint with the Office of Public Counsel, who would then take over the matter as a legal representative. Under the proposed TNRCC, the Office of Public Counsel was simply the same office that already existed in the Texas Water Commission.

Empower the Governor," *AAS*, 20 July 1991, B1, B8; Terrence Stutz, "Senate OKs Environmental Agency Merger," *DMN*, 20 July 1991, 32A; Texas House of Representatives, Floor Debate, Representatives Robert Saunders and Ron Lewis laying out Senate Bill 2, 72nd Legislature, First Called Session, 23 July 1991, taped transcription, Legislative Reference Library, tapes located at John H. Reagan Building, Austin.

That office was funded by the Water Commission and, though it represented the people of Texas, it did not have the legal authority to appeal any of the commission's rulings. An independent Office of Public Counsel, such as the one Martin proposed, would have the authority to appeal any TNRCC decisions, thus giving the public a stronger voice in environmental policies.²⁹

Disagreeing, Democrat John Cook opposed the amendment on grounds that the office and its staff would cost the state too much money. Furthermore, the public would take advantage of the office by inundating it with unnecessary complaints. Joining Cook in opposition was fellow Democrat Bruce Gibson, who worried that small businesses, the "mom and pop" operations, would not be able to meet the legal fees to fight state regulation. Gibson further complained that the Office of Public Counsel would throw off the balance between the growth of the economy and regulation of the environment in Texas. In the end, Martin was unable to put an exact figure on the cost of the office, and the amendment was tabled.³⁰ The actions of Cook and Gibson suggested that many representatives were reluctant to empower local communities at the cost of Texas businesses.

This became even more apparent from the reaction to Houston Democrat Fred Bosse's amendment that proposed to assess a fine to industrial polluters greater than the economic benefit of the violation. In other words, the amendment stated that the

²⁹ House, Floor Debate, Representatives Mike Martin speaking on Public Counsel amendment to Senate Bill 2, 23 July 1991; *1991 Bill History Report*, 2-3.

³⁰ House, Floor Debate, Representatives Mike Martin, John Cook, Bruce Gibson, Saunders, and Lewis speaking on Public Counsel amendment to Senate Bill 2, 23 July 1991; *1991 Bill History Report*, 2-3.

financial loss imposed on a company must be more than what it saved by polluting rather than disposing waste properly. Bosse indicated that this amendment simply provided the TNRCC with another tool to combat pollution, but Ron Lewis disagreed and opposed the amendment immediately, claiming that it was too vague because it failed to define “economic benefit.” In addition, Lewis asked Bosse who the state intended to hold responsible for illegal dumping, the company that produced the waste or the company that disposed of the waste? Bosse clarified the ambiguous language, but to no avail. The amendment was tabled quickly without much discussion.³¹

This was not the only attempt to increase penalties on convicted polluters. Democrat Al Price, of Beaumont, presented an amendment that would have imposed a criminal penalty of imprisonment on employees, including plant managers and corporate officers. Price contended that this amendment would “put teeth in the bill.” Other representatives objected; when they learned that CEOs could also be imprisoned for negligence, a motion to table the amendment was passed immediately. Likewise, Martin introduced an amendment, his second, that attempted to protect industry workers by providing them with a criminal defense against their company for a work-related injury. Drawing on the recent increase in corporate acquittals for workman’s comprehensive coverage injury cases, Martin revealed that companies used the defense that employees “should have known better.” In other words, when

³¹ House, Floor Debate, Representatives Fred Bosse and Lewis speaking on criminal provisions amendment to Senate Bill 2, 23 July 1991; *1991 Bill History Report*, 2-3.

an employee accepted a job in a plant that entailed potentially dangerous work, they were assuming the risks freely. The amendment intended to strip Texas companies of this defense, but once again, an amendment to upgrade Texas's pollution penalties failed when Martin's amendment was tabled.³²

The resistance from representatives to strengthening the TNRCC prohibited even less stringent proposals that intended to protect local communities from potential environmental hazards. For instance, Republican Dalton Smith, of Houston, proposed an amendment prohibiting the location of future landfills within one mile of municipalities, schools, parks, and waterwells. Saunders and Lewis considered the amendment too restrictive. In spite of revisions to the amendment that loosened some of the binding language, the amendment was tabled. When Elliott Naishtat, a Democrat from Austin, introduced an amendment that would empower the TNRCC to set and enforce indoor air quality standards in public places, the bill, even though it contained no supplementary cost, still met immediate resistance. According to Naishtat, the necessity for the amendment became apparent when approximately forty students in a Wimberley public school became ill from poor indoor air quality and the Department of Health did not have the authority prosecute the company responsible for the installation of the ventilation system. Lewis opposed the amendment, citing that it would require additional costs. Republican Jerry Yost also

³² House, Floor Debate, Representatives Al Price, Lewis, and John Willy speaking on polluter imprisonment amendment to Senate Bill 2, 23 July 1991; House, Floor Debate, Representatives Martin, Pete Gallego, Lewis, and Curtis Soileau, speaking on workman's criminal defense amendment to Senate Bill 2, 23 July 1991; *1991 Bill History Report*, 2-3.

argued against the amendment because he feared that the TNRCC might create standards that would go too far and restrict, for example, perfume. Naishtat found an ally in Al Granoff, a Dallas Democrat, who found the opposition ridiculous. He indicated that the bill was not designed to allow the TNRCC to set standards to prohibit the use of perfume. Rather, it would give the TNRCC the ability to regulate indoor air quality at safe levels for the public. Moreover, the amendment would not cost the state money because it merely added supplemental authority to the TNRCC, rather than additional salaried positions. In spite of Granoff's reasoning, the bill, like most of the amendments introduced to the House version of Senate Bill 2, was tabled.³³

As representatives who aimed to improve environmental protection in Texas witnessed the rejection of amendment after amendment, Lewis and Saunders went on the offensive in order to weaken the already feeble TNRCC by approving an amendment that instituted a twenty-percent reduction in its workforce. In other words, along with the consolidation of the state environmental agencies came cutbacks in the form of fewer environmental jobs.³⁴ In essence, the amendment translated to less environmental enforcement. Once again, the state legislature sent a

³³ House, Floor Debate, Representatives Elliott Naishtat, Lewis, Jerry Yost, Al Granoff, John Culberson, and Sherri Greenberg speaking on indoor air quality amendment to Senate Bill 2, 23 July 1991; *1991 Bill History Report*, 2-3.

³⁴ House, Floor Debate, Representative Gwyn Clarkston Shea speaking on workforce reduction amendment to Senate Bill 2, 23 July 1991; *1991 Bill History Report*, 2-3.

message to its constituents that fiscal savings and economic growth outweighed the protection of the environment.

The House version of Senate Bill 2 was sent back to the Senate, and although it passed, there was no doubt that a number of legislators were disappointed with the end result. They viewed the new bill as a trade-off. Representative Gibson, who opposed the amendment establishing an independent Office of Public Counsel, accepted it “as the best compromise that we can get at this time.” Clearly, Senator Carl Parker, the original author of the bill, was displeased. Urging its passage, though reluctantly, he explained that he feared “a real risk of losing this and I’ve never been one to pass up a half a loaf if I can get it.” Similar sentiments of compromise were echoed by Lieutenant Governor Bob Bullock: “Passage of the Texas Natural Resource Conservation Commission bill is bittersweet progress . . . The shortcomings of this bill mean we have a long way to go in effectively implementing good environmental policy.” Undaunted, Parker vowed future legislative action in order to strengthen the House’s diluted version of his bill. Specifically, he and other senators intended to propose stronger criminal penalties for convicted polluters, more stringent clean air amendments, and an Office of Public Counsel.³⁵

Correspondingly, Governor Ann Richards was unhappy with the House revisions of Senate Bill 2. Although she had been outspoken on behalf of protecting local communities from industrial pollution, it was clear that her focus on

³⁵ Gibson quoted in Debbie Graves, “Senate OKs Environmental Bill,” *AAS*, 31 July 1991, B1, B5; Parker and Bullock quoted in Terrence Stutz, “Senate Reluctantly OKs Superagency on Environment,” *DMN*, 31 July 1991, 23A.

strengthening the governor's office with the power to appoint agency directors increased as the debate over Senate Bill 2 began in the First Called Session of the 72nd Legislature. For example, when she addressed both houses on July 15, 1991, she stressed the need for the reorganization and consolidation of the myriad of state agencies. Specifically, she called for legislation to create a cabinet-style government that would give the governor's office the permission to hire and fire directors of state agencies. The power to appoint the head of an environmental superagency in Senate Bill 2 would be the first step in establishing a cabinet-style government, thus expanding the power of the governor's office. The House version of the bill omitted this provision. Instead, it allowed the governor to appoint a three-member governing board of the TNRCC, who would then appoint the executive director. Upon passage of the House version of Senate Bill 2 in both houses, Richards did not hide her displeasure and did not know whether or not she would approve it. Two weeks later, however, she signed Senate Bill 2 into law.³⁶

Other legislators had more trouble compromising. In particular, Representative Mike Martin, who had seen his amendments tabled, denounced Senate Bill 2:

A reduction of the workforce of this agency is simply tragic . . . Texas pollutes more than any other state in the country, yet we're last in the ability of our environmental agencies to carry out and enforce the law . . . Texas is at risk for pollution. We are the heaviest polluting state in the country and we have the least available means and methods to enforce environmental laws . . .

³⁶ David Elliot, "Richards: Saddle up 'Wild' State Government," *AAS*, 16 July 1991, A1, A7; Terrence Stutz, "Senate Reluctantly OKs Superagency on Environment," *DMN*, 31 July 1991, 23A; Debbie Graves, "Senate OKs Environmental Bill," *AAS*, 31 July 1991, B1, B5; *1991 Bill History Report*, 4.

we have destroyed our environment because of our lack of commitment to enforce the laws that we pass . . . and while we're facing these problems, we are cutting the budget of the smallest budget in the state government . . . we have no right to cut an agency that has less than one percent of the budget as it presently reads . . . we must remember that the laws that we pass must have teeth in them. And I'll tell you one thing: This bill ain't got no teeth.³⁷

The disappointment of some legislators seemed mild compared to the devastation of environmental activist groups that had supported Senate Bill 2 previously. After its passage in the Senate with the House revisions, the Sierra Club, Public Citizen, Consumers Union, and the Environmental Defense Fund issued a statement condemning the legislation. From them, Senate Bill 2 gave "the illusion of agency consolidation and environmental progress, but, in reality, [it] protects most of the status quo in environmental regulation – a status quo that benefits industry more than the public."³⁸ Because of their prior support of the legislation, environmental organizations could not help but feel betrayed. Senate Bill 2 had fallen far short of their expectations. The bill failed to protect the industry's workers and the local communities closest to the plants.

With the passage of Senate Bill 2, the Texas Natural Resource Conservation Commission was created, but not without notable deficiencies. The TNRCC, became a streamlined agency with limitations that made it ill-equipped to regulate and enforce strict environmental standards in Texas. Within a few years, the agency's

³⁷ House, Floor Debate, Representative Martin speaking against Senate Bill 2, 23 July 1991.

³⁸ Statement quoted in Debbie Graves, "Senate OKs Environmental Bill," *AAS*, 31 July 1991, B1, B5; Terrence Stutz, "Senate Reluctantly OKs Superagency on Environment," *DMN*, 31 July 1991, 23A.

shortcomings would become apparent to the community of Midlothian, which at that time was in the early stages of its struggle against TXI.

CHAPTER 3

THE TNRCC VERDICT: A STREAMLINED SUPERAGENCY AND ONE-STOP PERMIT SHOPPING IN ACTION

In 1995, Republican George W. Bush replaced Democrat Ann Richards as governor and began replacing the TNRCC Commissioners promptly with his own appointees. Instead of implementing more stringent standards for cement kilns, which the TNRCC had promised under Richards, the agency announced that it would set a public hearing date concerning the issuance of TXI's permit to burn hazardous waste in Midlothian. The hearing would be presided over by two administrative law judges who would eventually make a recommendation to the TNRCC Commissioners.¹

The TXI permit hearing, which took place in Austin from February 9 to May 8, 1998, produced the longest transcript in a contested application regarding air pollution in Texas. It was also the first time that a cement company applying for a permit to burn hazardous waste had been contested in court in the United States. Tommy Broyles and Carol Wood, state-appointed administrative law judges, presided. In order to save time and money, they ruled that only cross-examinations would be permitted during the proceedings. Direct testimony had been submitted in the form of written depositions prior to the hearing. For the most part, only scientific experts were allowed as witnesses in the cross-examination, but two dozen residents

¹ Farley, "Ill Wind Blowing," 8-9.

of Midlothian, considered fact witnesses, testified about odor nuisances and adverse health problems attributed to TXI's emissions.²

Representatives of both TXI and DAR, as well as the TNRCC, testified at the proceedings. The TXI team of lawyers came from Jenkins and Gilchrist, one of Austin's largest legal offices, and consisted of Al Axe, William J. Moltz, and Brian J. O'Toole, who also were shareholders in TXI. The TNRCC Executive Director, whose official recommendation advised granting the permit, was represented by Susan J. White. The Office of Public Counsel of the TNRCC, which had not officially determined a recommendation, designated Anne Rowland and Aldo Gonzalez as counsel. Midlothian citizens, the named protesters in the hearing, were represented by lawyers Stuart Henry and Robert Doggett. Henry, an environmental lawyer whose expenses were being paid by the Dallas Sierra Club, had participated in more than one hundred permit hearings while Doggett, though not an environmental lawyer, had earned a reputation as an environmentalist. The only non-lawyer participating in the hearing was Schermbeck, whose knowledge of the case was invaluable. As Doggett pointed out, "This case would be nowhere without him."³

Before the hearing, both sides made their cases through a battery of analyses, critical reviews, case studies, and witness testimonies. TXI relied in part on TNRCC

² Janet Elliott, "Toxic Tug of War," *Texas Lawyer*, 4 May 1998, [<http://www.texlaw.com/today/050498a.htm>] 1; Hild, "The Politics of Toxic Cement," 2. Although the Lafarge Corporation filed an appeal in federal court, it abandoned its plans before a hearing in the New Braunfels case could take place; Randy Lee Loftis, "Plant's Burning of Toxic Wastes to Get Hearing," *DMN*, 9 February 1998, 17A, 22A.

³ Quoted in Elliott, "Toxic Tug of War," 2.

studies, which had determined that emissions from TXI posed no danger to the surrounding community. Based on thousands of air and soil samples in *Critical Evaluation of the Potential Impact of Emissions From Midlothian Industries: A Summary Report* and in *Screening Risk Analysis for the Texas Industries (TXI) Facility in Midlothian, Texas: Executive Summary*, first published in October and November 1995 respectively, the TNRCC could not find any direct links between TXI's cement plants and the health problems in Midlothian. Thus, in spite of individual complaints from the community to the agency, the TNRCC gave TXI a stamp of approval.⁴

To challenge these studies, DAR relied in part on Stuart Batterman, a University of Michigan environmental health science professor who concluded that emissions from TXI were damaging the health of nearby residents. In a seventy-four-page critical review of the TNRCC's reports, Batterman insisted "that environmental and health impacts have and are likely to occur in the Midlothian area from industrial activity, including combustion of hazardous waste at TXI." He blasted the TNRCC's methodology and claimed that the agency should be "strongly criticized for its tendency to go far beyond what is scientifically supportable by the existing data in making sweeping generalizations regarding the present and future safety of waste combustion in Midlothian." For Batterman, the TNRCC's record of inspection and enforcement was "deeply troubling." He concluded that there were "serious

⁴ TNRCC, *Critical Evaluation: A Summary Report (revised)*, 55; TNRCC, *Screening Risk Analysis for the Texas Industries (TXI) Facility in Midlothian, Texas (revised)* (Austin: TNRCC, Office of Air Quality/Toxicology and Risk Assessment, 10 May 1996), 106.

deficiencies in the . . . ability of the TNRCC to conduct an objective assessment . . . and the record demonstrates significant concerns regarding the effectiveness of the TNRCC in regulating the combustion of hazardous waste at TXI.”⁵

One of the strongest scientific arguments used by DAR to link TXI to the health problems in Midlothian was ruled inadmissible by the administrative law judges because of a technicality. In 1998, the journal *Toxicology and Industrial Health* published “The Health Effects of Living Near Cement Kilns: A Symptom Survey in Midlothian, Texas,” a study completed in the previous year by University of Texas-Galveston toxicologist Marvin Legator. Using a “menu-driven questionnaire that was very extensive and very structured, assuring a uniform administration,” Legator determined that residents living in Midlothian were three times as likely to suffer from respiratory problems as residents living in neighboring Waxahachie. However, the study itself never made it to direct testimony because Legator refused to reveal the names of the participants, citing a confidentiality agreement signed by the participants and himself.⁶

During the public hearing, the administrative law judges allowed testimony from Midlothian residents who had suffered health problems over the past decade, but their testimony played only a minor role in the hearing. The twenty-four fact witnesses, who made up the bulk of the protesters’ list, outnumbered the five expert witnesses called by DAR. In comparison, TXI provided twenty expert witnesses,

⁵ Batterman *Report*, vii-ix.

⁶ “Groups Say Survey Shows More Health Problems,” *Smoke and Mirrors* (winter 1999): 3, DARPF; *DMN*, 18 March 1998, 36A; Legator *Report*, 840.

including Dr. Laura C. Green, a toxicologist who was a consultant to the defendants in the toxic tort case in Woburn, Massachusetts, that detailed in Jonathan Harr's bestseller *A Civil Action*.⁷

Because TXI provided a greater amount of expert testimony, the administrative law judges shifted the burden of proof onto the protesters – a dilemma that helped tilt the ruling in favor of TXI. To prove a scientific link between TXI emissions and the adverse health problems of Midlothian residents was difficult, if not impossible, to do. As Schermbeck had acknowledged, “It’s the hardest thing for the people to prove.” In the end, Henry, Doggett, and Schermbeck could only rebuke the experts in the cross-examinations and admonish them for using their scientific education in the service of TXI.⁸

Because the protesters had failed to provide enough evidence establishing TXI’s emissions as a health threat to the community, the administrative law judges announced their recommendation to approve TXI’s permit on January 15, 1999. In response, TXI executive vice-president Mel Brekhus asserted, “This decision should put to rest once and for all, the inaccurate claims that have been made by our opponents.” Schermbeck blasted the decision and procedure, however. “Under their system,” he complained, “all TXI or the TNRCC had to do was glue any warm body

⁷ Elliott, “Toxic Tug of War,” 2.

⁸ Quoted in Elliott, “Toxic Tug of War,” 2; Davis, “Any Way the Wind Blows,” 13.

with a graduate degree to the witness chair and have him or her recite glorious hosannas to the permit.”⁹

The decision to grant TXI its permit was made easier by the fact that the federal government, though it had earlier promised stricter environmental standards, declined to play an active role in tougher regulation of hazardous waste incineration in the cement industry. When Bill Clinton became president in 1993, he preached tougher environmental policies, including a crackdown on the cement industry, and waged a verbal assault on environmental polluters to distance himself from the preceding Republican administration of Ronald Reagan and George Bush. Although Clinton expressed a desire to streamline the federal government, Carol Browner, the new EPA Administrator, attacked the hazardous waste incineration industry for its blatant disregard for pollution control. On more than one occasion, in fact, she singled out the cement industry’s use of waste-derived fuel and its adverse effects on the public health of local communities. By the second Clinton administration, however, environmentalists were disappointed with the empty promises of a cleaner environment from President Clinton and EPA Administrator Browner. In fact, the EPA by that time was working closely with the cement industry on proposed emission standards. When the EPA did conduct pollution studies, the results failed to implicate local industry as a primary source of pollution, further paving the way for TXI to receive their permit request to burn hazardous waste.

⁹ Brekhus quoted in Randy Lee Loftis, “2 State Judges Back TXI Plant’s Burning of Hazardous Waste,” *DMN*, 16 January 1999, A1; Schermbeck quoted in “Protestants’ Exception to the Proposal for Decision,” 5, DARPF.

As environmental groups drew attention to the potential health problems associated with the use of waste-derived fuels in cement kilns, the federal government had moved to formalize regulations. During the 1980s, cement companies were granted interim permits to burn hazardous waste, with less stringent emissions standards than the commercial incineration industry, until the federal government decided to enact official regulations. For instance, in 1991, approximately seven years after it first permitted cement kilns to burn hazardous waste, the EPA handed down its final classification for the emissions standards. The EPA decided that the emissions levels for cement kilns would be regulated in the same classification as small industrial furnaces as opposed to commercial hazardous waste incinerators.¹⁰ In effect, the EPA's classification established lower emissions standards for cement kilns even though they were burning similar hazardous waste as their counterparts – commercial waste incinerators.

Even more distressing to environmentalists was the suspicion that the U.S. EPA was enacting laws that were designed to benefit the cement industry. President George Bush had attempted to separate himself from the anti-environmentalist administration of Ronald Reagan, but soon after taking office, his environmental reputation was smeared with accusations of favoritism to big business. On December 7, 1990, Hugh Kaufman, an EPA hazardous waste official, sent a letter to EPA Administrator William K. Reilly charging that the agency had struck private deals with cement industry lobbyists. According to Kaufman, the EPA's actions were

¹⁰ U.S. Environmental Protection Agency, "Boiler and Industrial Furnaces: Rules and Regulations," *Federal Register* 56, no. 35 (21 February 1991): 7139-49.

“specially tailored to the financial benefit of the cement kiln hazardous waste incineration industry.” As a result of the relationship, the EPA produced watered-down regulations concerning hazardous waste incineration in cement kilns that “resulted in decreased levels of environmental and human health protection from toxic air emissions” Kaufman’s allegations of unethical activity by the EPA were not new or unfounded. He had been a long time critic of the legislation behind the creation of the Resource Conservation and Recovery Act. In 1978, while testifying before the Oversight Subcommittee of the House Commerce Committee, Kaufman alleged that top EPA officials often ignored hazardous waste enforcement policies in order to stifle any prospective problems.¹¹ Kaufman’s accusations were a stain on the reputation of the EPA under the Bush administration, labeling it as an agency that favored big business over the environment. It was this notoriety that the EPA under Browner attempted to shake throughout the 1990s.

When President Bill Clinton entered the White House in 1993, environmentalists had a number of reasons for optimism. First, he had a committed environmentalist in Al Gore as his vice-president. Environmental groups viewed the Clinton-Gore partnership as a significant departure from the Republican presidential administrations of the previous twelve years and, subsequently, provided considerable financial funding for their campaign. Second, during his first administration, Clinton issued orders and initiated legislation for stricter and more equitable environmental

¹¹ Kaufman quoted in Randy Lee Loftis, *DMN*, 13 December 1990, 37A, 42A; Marc K. Landy, Marc J. Roberts, and Stephen R. Thomas, *The Environmental Protection Agency: Asking the Wrong Questions From Nixon to Clinton* (New York: Oxford University Press, 1994), 92, 104-6.

regulation and enforcement. Finally, Carol Browner, his appointment as EPA Administrator, delivered tough talk on environmental issues, particularly in regard to the burning of hazardous waste in cement kilns.¹²

After his inauguration, Clinton wasted little time in announcing his intentions to reduce the bureaucracy within the federal government. Like Texas two years before, Clinton envisioned a streamlined government that would result in substantial financial savings without a loss of service to the public. "Our goal is to make the entire Federal government both less expensive and more efficient," he promised. "We'll look for ways to streamline our own organizations to reduce unnecessary layers and to improve services." In fact, he praised John Sharp specifically for his *Texas Performance Review* by pointing out how it "saved the taxpayers billions of dollars over the ensuing years [and] made government work better at the same time." The policy of streamlining government organizations had specific implications for the EPA. Clinton disclosed that his administration had done the most to consolidate environmental management without destroying "the standards, the rules, the regulation, and the community empowerment that are keeping our environment clean."¹³

¹² Landy, Roberts, and Thomas, *The Environmental Protection Agency*, 306-7.

¹³ Remarks on Environmental Protection by Bill Clinton in Baltimore, Maryland, "Announcing the Initiative to Streamline Government," 3 March 1993, Weekly Compilation of Presidential Documents from the 1993 and 1995, 29, no. 9, 350, 351 and (8 August 1995) 31, no 32, 1395, Presidential Documents Online [frwais.access.gpo.gov].

During the first Clinton administration, the president showed indications that he was strengthening environmental policies. One year after taking office, he signed the Executive Order 12898, titled “Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations.” The order required that all federal agencies, including the EPA, identify and address any “disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States”¹⁴ The mandate by Clinton was a step in the right direction for more equitable environmental policy throughout the nation and set in motion a series of studies aimed to protect local communities.

Not all of the president’s policies, however, resulted in better environmental protection for the public. Although the 1995 Unfunded Mandates Reform Act, pushed through and signed by Clinton, intended to protect less affluent state and local communities from expensive and demanding Congressional requirements that would result possibly in a loss of federal funds, it had an adverse effect. The bill obligated federal funding to accompany environmental mandates issued by Congress. Some analysts believe that the legislation will mean fewer environmental demands on state governments from the federal government. In essence, during the second half of the

¹⁴ President, Executive Order 12898, “Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations,” *Federal Register* 59, no. 32 (16 February 1994): 7629.

1990s, environmental regulation and enforcement would therefore be primarily in the hands of state and municipal governments with limited financial resources.¹⁵

Shortly following her appointment as EPA Administrator, Carol Browner went on the offensive by expressing the need for stricter regulations on the use of waste-derived fuel in cement kilns. In March, 1993, she criticized the former EPA administration: "There is a fundamental problem in the Agency and I believe it is a direct result of the total lack of management . . . the Agency has far too often failed to give Congress adequate assessments." Although her remarks indicated a change in general policy by the EPA, Browner's statements became more specific in due time. For instance, she promised to "radically change the process by which we have dealt with hazardous waste incineration in this country." Indicating the EPA's new direction, she announced, "It is our goal to make sure that any facility that is burning hazardous waste is doing so in a way that is safe for the public." Two years later, Browner still used tough talk, this time directing threats at the cement industry's use of waste-derived fuel: "We have one set of standards for hazardous waste incinerators. We have another, weaker set of standards for cement kilns . . . which are also burning hazardous waste. It's a combination of toxic soup that is being burned in these facilities . . . and we think it should be done according to standards."¹⁶

¹⁵ Denise Scheberle, *Federalism and Environmental Policy* (Washington, D.C.: Georgetown University Press, 1997), 4-5.

¹⁶ Browner quoted in Landy, Roberts, and Thomas, *The Environmental Protection Agency*, 307; also in Rita Beamish, "Hazardous Waste Burning Subjected to Stricter Rules," *Fort Worth Star-Telegram*, 19 May 1993, A9; and in Farley, "Ill Wind Blowing," 9.

Browner's deeds did not match her rhetoric on tougher environmental enforcement and regulation, however, particularly on the burning of hazardous waste in cement kilns. The most prominent example of the EPA's failure to strengthen environmental regulation came in 1995 with its ruling on cement kiln dust (CKD). Since 1984, cement kiln dust, the powdery residue remaining after incineration, had been exempt temporarily from hazardous waste disposal regulation under the Bevill amendment, in spite of insistence by environmentalists that CKD contained high levels of toxic metals.¹⁷ The Bevill amendment permitted the EPA a period of time to analyze CKD in order to make a final ruling. In 1989 and 1993, the EPA continued to delay its ruling after it requested and received an extension from Congress on the matter. In its 1995 "Report to Congress on Cement Kiln Dust Waste," eleven years after the Bevill amendment, the EPA determined that CKD was not subject to hazardous waste disposal. In spite of environmentalists and scientists who continued to maintain that CKD contained high amounts of toxic metals, the EPA did not require cement companies to dispose of it in designated landfills. Rather, CKD could be deposited anywhere. As a result, TXI does not even send its CKD in Midlothian to a permitted landfill. Instead, it simply dumps the residue in an empty limestone quarry on its own property.¹⁸

¹⁷ For a detailed look at the Bevill amendment, see Bradley S. Hiles, "Bevill Amendment: Burning Hazardous Waste in Cement Kilns," *Missouri Law Review* 55, no. 2 (spring 1990)391-409; For an in-depth analysis on cement kiln dust, see Edward W. Kleppinger, "Cement Clinker: An Environmental Sink for Residues from Hazardous Waste Treatment in Cement Kilns," *Waste Management* 13, no. 8 (1993), 553-572.

¹⁸ U.S. Environmental Protection Agency, "Regulatory Determination on Cement Kiln Dust," *Federal Register* 60 no. 25 (7 February 1995): 7366; Kleppinger,

Most disappointing to environmentalists was the fact that the EPA's reasoning behind the CKD exemption indicated that the agency's main priority was the economic well-being of the cement industry, rather than the public health of affected communities. The 1994 estimated cost of CKD disposal to designated hazardous waste landfills ranged from two to fifteen million dollars per year per plant.¹⁹ Emphasizing that this would amount to six to fifty-six percent of a cement company's gross sales revenue, and ignoring the fact that the CKD only applied to cement companies that burn hazardous waste and that have an option to use traditional fossil fuels, the EPA determined that this "waste-to-product" ratio was simply too high. Despite its own admission that "more stringent regulation of CKD is necessary and desirable," the EPA concluded that to define CKD as a hazardous waste would be "prohibitively burdensome on the cement industry . . . [and] not a feasible regulatory option."²⁰ Thus, Carol Browner missed her first opportunity to send a message to the cement industry that stricter hazardous waste incineration regulation was on the way. Instead, the EPA revealed that the only thing too high was the potential cost of protecting the public's health – especially if it came on the backs of the cement industry.

"Cement Clinker," 556; Jim Schermbeck, interview by author, 27 February 1999; Pope, interview by author 1 October 1999.

¹⁹ U.S. Environmental Protection Agency, "Regulatory Determination on Cement Kiln Dust," *Federal Register* 60 no. 25 (7 February 1995): 7371; Kleppinger, "Cement Clinker," 557.

²⁰ U.S. Environmental Protection Agency, "Regulatory Determination on Cement Kiln Dust," *Federal Register* 60 no. 25 (7 February 1995): 7366, 7371, 7374.

One of the studies that the EPA relied on to determine the CKD exemption was titled, "Race, Ethnicity, and Poverty Status of the Populations Living Near Cement Plants in the United States." Released in August 1994 and mandated in part by Executive Order 12898, the study concluded that twenty-five percent of the people living within a mile of the forty-one cement plants studied, twenty-nine of which burned hazardous waste, had a racial minority population above the national average. The EPA also found that nearly half of the people within one mile of the cement plants had over ten percent of its population living below the poverty level.²¹

In spite of these statistics, the EPA decided not to implement stricter regulations in regard to the cement industry's use of waste-derived fuel. Instead, it stressed that the study had a number of limitations, most notably the inclusion of anecdotal health problems within the communities, that affected its conclusions. For example, because the study analyzed only the spatial relationships between populations and cement plants, it did not conduct a systematic examination of health problems in the communities or explore how living near cement kilns affected one's health. In addition, the EPA revealed that in amassing the demographic data, it did not conduct on-site visits to the community. Rather, the 1994 study relied solely on the available figures from the 1990 Federal Census. Finally, and not surprisingly, the study did not include other relevant information such as a historical profile of the

²¹ U.S. Environmental Protection Agency, "Race, Ethnicity, and Poverty Status of the Populations Living Near Cement Plants in the United States," Regulatory Office of Solid Waste (31 August 1994), Washington, D.C.; For the EPA's statistical summary from the "Race, Ethnicity, and Poverty" report, see *Federal Register* 60 no. 25 (7 February 1995): 7371.

respective cement corporations, the public's role and participation in the political process of permitting the companies that intended to use waste-derived fuel, and performances of local agencies responsible for environmental regulation and enforcement.²²

In addition to the TNRCC's studies that were used to exonerate TXI of any direct links to air pollution in Midlothian, TXI benefited from two EPA studies released in January, 1996. The Region 6 office of the EPA released two findings concerning the possible health risks to the community of Midlothian as the result of emissions from Chaparral Steel, North Texas Cement, Holnam Texas, and TXI. Using the same TNRCC evaluation process that was challenged by SMU professor George Crawford, the "Midlothian Cumulative Risk Assessment" concluded that the industrial plants did not pose a health risk to residents of Midlothian. The EPA assured that "the available site data show that there are no cancer risks or the potential for non-cancer health effects above regulatory levels of concern" Moreover, based on computer modeling, the study concluded that after thirty or forty years, residents were likely to suffer "non-cancer health effects . . . predominately from Chaparral Steel Company, not the three cement manufacturing companies." As EPA spokesman David Bary explained, "There is no long-term risk for cancer associated with any of the industrial facilities in Ellis County."²³

²² U.S. Environmental Protection Agency, "Race, Ethnicity, and Poverty Status of the Populations Living Near Cement Plants in the United States," Regulatory Office of Solid Waste (31 August 1994): 2-3.

²³ U.S. Environmental Protection Agency, "Midlothian Cumulative Risk Assessment," Multimedia and Planning Division (31 January 1996), 1, Region 6,

The EPA study, which analyzed soil samples as well as the drinking water supply system in Midlothian and surrounding towns, determined that the levels of antimony, cadmium, and mercury, common contaminants from the industries, were “in the ‘grey’ [sic] or ‘borderline’ range (equal to or barely over the threshold) in comparison to local and national background levels.” As a result, the EPA declared that it could not “justify the necessity for immediate regulatory action,” thus prompting a frustrated Sue Pope to complain: “There are scads of people out there saying we are in a world of hurt, that we have these problems. The anecdotal evidence is being ignored.”²⁴

Following the risk assessment, the EPA released another report, “Animal Health Survey: Midlothian, Texas,” which studied the health effects of the cement plants on the local animal population in Midlothian. Because of a lack of participation from area ranchers, however, the results of the animal health survey were inconclusive. The EPA emphasized that participation “was so low as to preclude any scientifically valid statistical determinations or conclusions.” Between September 1, 1995, and September 22, 1995, at least 325 ranchers had the option of scheduling an interview or filling out a questionnaire concerning the health of their livestock. The EPA attempted to contact participants through a list submitted by Downwinders at Risk and through a public notice in several local newspapers. Only

Dallas; Alexei Barrionuevo, “EPA Study finds Midlothian Industry No Health Risk,” *DMN*, 1 February 1996, 24A.

²⁴ U.S. Environmental Protection Agency, “Midlothian Cumulative Risk Assessment,” 57-8; Pope quoted in Alexei Barrionuevo, “EPA Study finds Midlothian Industry No Health Risk,” *DMN*, 1 February 1996, 24A.

thirty ranchers responded to the survey, leading Bary to determine that the EPA “couldn’t draw any conclusions that the emissions from the cement plants in Ellis County were contributing to the animal health problems.”²⁵

The results of the animal health survey were distressing to local residents, particularly Pope, who pointed out that the analysis “was the closest thing to any real living human organism we had being studied.” Local residents had begun to notice an unusually high rate of animal health problems in the area in the early 1990s. The EPA was aware of these problems; it admitted that even though it was unable to draw conclusions in the survey, “anecdotal information was submitted detailing certain animal health problems.” But, without a clear explanation, the EPA did not recommend a follow-up risk analysis, despite a proposal by Edward Kleppinger, a national environmental consultant who suggested, “Animals in the field are potentially the canaries in the coal mine If, in fact, animals represent elevated levels, and I say if, if, if, then I’m very concerned about the dairy herds in that area. If the cattle are exposed to it, then that gets in the milk going to Dallas. It would be nice to see the breeding records of those dairy herds, but there’s a better way. Why not just test the damn milk?”²⁶

²⁵ U.S. Environmental Protection Agency, “Animal Health Survey: Midlothian, Texas,” Multimedia and Planning Division (31 January 1996): 1-3; Alexei Barrionuevo, “EPA Study finds Midlothian Industry No Health Risk,” *DMN*, 1 February 1996, 24A.

²⁶ Alexei Barrionuevo, “EPA Study finds Midlothian Industry No Health Risk,” *DMN*, 1 February 1996, 24A; Letter to Sue Pope from Mikel L. Athon, 19 November 1992, DARPF; “Smoke and Mirrors: A Critical Evaluation of Midlothian Cement Company Claims of No Environmental or Public Health harms from the Burning of Hazardous Waste,” DARPF; U.S. Environmental Protection Agency,

By the second Clinton administration, the lobbying efforts of the cement industry officials had begun to pay dividends. They used the law to prevent stricter federal regulations, and they influenced the rule-making process. Specifically, they used the 1980 Regulatory Flexibility Act, which prevented a government agency from imposing mandates that would have a significant economic impact on a substantial number of smaller companies. This meant that the EPA could not require modern, more expensive pollution control devices because the smaller companies could claim that the requirement violated the Regulatory Flexibility Act. In order to establish maximum achievable control technology (MACT) emissions standards for hazardous waste incineration in cement kilns, the EPA turned to the Portland Cement Industry (PCA) for guidance. By 1998, the EPA had established an open dialogue and held regular meetings with cement industry officials “to discuss the development of the rule, exchange information and data, solicit comments on draft rules, and provide a list of the small firms.” In fact, small cement companies formed an organization called the Small Cement Company MACT Coalition in order to be better represented in the meetings between the EPA and the PCA.²⁷ Five years after taking office, the Clinton administration and the EPA were a long way from the promises of stricter environmental regulation and enforcement, particularly when it came to the cement industry’s burning of hazardous waste.

“Animal Health Survey: Midlothian, Texas,” 17; Davis, “Any Way the Wind Blows,” 12.

²⁷ U.S. Environmental Protection Agency, “Standards for the Management of Cement Kiln Dust,” *Federal Register* 63, no. 56 (24 March 1998): 14209.

This left the fate of Midlothian residents in the hands of TNRCC Commissioners, appointees of Republican Governor George W. Bush, as the date for the permit hearing approached. Governor Bush took advantage of the indirect cabinet-style government provided by Senate Bill 2, which gave him the power to appoint the three TNRCC Commissioners, who in turn elected an Executive Director. Governor Bush installed pro-industry officials as TNRCC Commissioners. Barry McBee, Bush's first appointee, had worked previously as an oil specialist in a Dallas law firm. In addition, he had served as Deputy Commissioner of the Department of Agriculture, where he gained notoriety by opposing the "right to know" laws that protected farm laborers from unannounced pesticide spraying. McBee also had served in President George Bush's administration as Associate Director of Cabinet Affairs. Although he stepped down as a TNRCC Commissioner shortly after accepting the position, he has been rumored as the next EPA Administrator if George W. Bush wins the 2000 Presidential election. Following McBee's resignation, Bush replaced him with Robert Huston, a former oil industry consultant who has protested recently to the EPA that the latest ozone standards are too stringent. Bush filled the second vacant TNRCC Commissioner post with John Baker, Jr. who voted repeatedly in favor of prohibiting public hearings for citizens concerning the establishment of new industrial plants.²⁸

The last appointee by Bush solidified his design to establish business-friendly leadership in the TNRCC. The appointment of Ralph Marquez was a blatant slap in

²⁸ Ken Silverstein, "The Polluter's President," *Sierra* (November/December 1999), 8, 10 [www.sierraclub.org/sierra/199911/bush1.htm]; Farley, "Ill Wind

the face to Downwinders At Risk and Midlothian residents because he had worked previously as a paid lobbyist for TXI. Marquez had gained recent attention as the TNRCC official who worked with utility companies to write voluntary air pollution regulations for antiquated and, often outmoded, industrial plants. After the TNRCC posts were filled with like-minded, business-friendly commissioners, an Executive Director was elected by Huston, Baker, Jr., and Marquez. They chose Dan Pearson, a certified public accountant from the comptroller's office who had no prior experience running an environmental agency.²⁹

The TNRCC had thus become a political vehicle for whoever was in office. What Governor Ann Richards had supported in 1991 in order to strengthen the power of her office accomplished just that – the ability for the governor to control the state's environmental superagency. Just six months after its inception, even TNRCC employees confirmed the fact that the agency had political objectives. A poll in February 1994 revealed that nearly three quarters of the TNRCC employees believed that the agency had political motives.³⁰ Consequently, the election of Republican Governor George W. Bush proved fatal to Midlothian residents and Downwinders At Risk in their fight against Texas Industries. This became painfully obvious to them in the late 1990s. By the time that the TNRCC announced its decision to grant TXI its permit to burn hazardous waste in its cement kilns, the ruling was a fait accompli.

Blowing,” 8-9.

²⁹ Silverstein, “The Polluter’s President,” 8, 10; Farley, “Ill Wind Blowing,” 8-9.

³⁰ “Environmental Staff Says Agency Political, Effective,” *DMN*, 7 March 1994, 10A.

The official decision to grant TXI a permit to burn hazardous waste came on March 10, 1999, at a public agenda meeting at the TNRCC headquarters. The TNRCC Commissioners heard twenty-minute statements from the administrative law judges, the Executive Director of the TNRCC, TXI, DAR and the Dallas Sierra Club, and the Office of Public Counsel of the TNRCC, which officially did not recommend the TXI permit, but because it was not independent of the TNRCC could not appeal the decision. Though only a cursory meeting, the commissioners did inquire about a few specific issues, but ended the meeting by unanimously approving the permit. Marquez, who had declared publicly that he would abstain from voting, did, in fact, vote. The new permit authorized TXI to burn twice as much hazardous waste for the next ten years, making TXI's Midlothian plant the largest hazardous waste incineration facility in the United States.³¹

The decade-long struggle that had been characterized with intense emotion from the Midlothian residents who opposed TXI's permit to burn hazardous waste ended without much spectacle. Defeated but not finished fighting, Jim Schermbeck vowed, "We'll have ourselves a good cry, but we'll get up in the morning and go on." A month after the permit was granted, DAR held a "reorganization" meeting to determine the fate of the grassroots group. Depending on financial assistance as well as support from other organizations, DAR might file a civil suit against TXI. Schermbeck remains undaunted because he realizes the importance of this controversy, given the importance of the cement industry in Texas. "What really

³¹ Public Agenda Meeting for TXI Permit at TNRCC Headquarters, notes by author, 10 March 1999.

scares Austin is the explosiveness of this issue,” he declared. “It’s the most dangerous issue of all to the agencies in Austin.”³²

³² Schernbeck quoted in Peter Slover, “Plant Gets Permit To Burn Waste,” *DMN*, 11 March 1999, A1.

CONCLUSION

In September, 1999, the U.S. Environmental Protection Agency presented its Climate Protection Award to Texas Industries. The EPA lauded the cement company, emphasizing that "TXI has shown exceptional leadership, personal dedication, and outstanding technical achievement in protecting the climate." TXI president Robert D. Rogers, thrilled by the award, praised the environmental record of his company: "This outstanding honor from the EPA acknowledges TXI's longstanding and unshakable commitment to protect the environment."¹

Only six months earlier, the Texas Natural Resource Conservation Commission had granted TXI a ten-year permit to burn hazardous waste in its cement kilns. Since then, the value of TXI's individual shares on the New York Stock Exchange has nearly doubled. TXI's permit, coupled with the high demand for cement, resulted in the construction of another cement kiln at its Midlothian plant.

When the residents of Midlothian challenged TXI's permit application to burn hazardous waste in 1989, they did not expect the struggle to span the course of a decade. What came as an even bigger surprise was the lack of support that they received from federal, state, and local environmental authorities. The struggle taught many residents about the limits of regulatory agencies when they collide with the interests of big business. Most importantly, residents realized that the EPA and the

¹ The EPA and Rogers quoted in "TXI Wins EPA's 1999 Climate Protection Award," Texas Industries Press Release, 28 September 1999, [www.txi.prnewswire.com].

TNRCC had put economic growth in the private sector above tighter environmental regulations and enforcement to protect the community's public health.

Residents and activists in Midlothian were not prepared to fight a war of attrition. The fact that TXI employed many of the community's leaders, such as the mayor, a prominent physician, the president of the chamber of commerce, and the leading real estate agent, caused them to shed their naiveté and organize formally. Downwinders At Risk, the grassroots activist group that led the fight against TXI, was not prepared for the long run. Outfitted with plenty of enthusiasm but strapped for financial assistance, DAR realized that the longer the struggle against TXI lasted, the less chance there would be to compete with the powerful and diversified cement company's resources.

Senate Bill 2 had set in motion a chain of events that many environmentalists did not anticipate. It created a streamlined, centralized state environmental protection superagency. The TNRCC, however, was far from a powerful regulatory agency designed to deal with environmental problems. The unified environmental approach that pollution control proponents had envisioned in 1991 as the fruits of Senate Bill 2 never existed. Instead, the agency became a political tool for the governor's office. By 1995, with an industry-friendly governor in George W. Bush, the TNRCC's Commissioners had transformed the agency into one that ensured a more favorable business climate.

In 1990, Texas led the nation in many pollution categories, ranking last in per capita spending and first in toxic releases into the air. Many legislators had used Texas's poor pollution control performance to support the creation of the TNRCC,

but the recent publication of pollution statistics by the EPA indicates that air pollution in Texas is still a problem. In fact, Texas still ranks first in toxic releases into the environment, although it has crept up from last to forty-ninth in per capita spending. In addition, Dallas, Houston, El Paso, and Beaumont have until November 2000 to reduce its toxic emissions or else lose millions of dollars in federal highway funds. By next July, Austin, San Antonio, Tyler, and Longview will be notified that they, too, are in violation of the Federal Clean Air Act. Finally, Houston has supplanted Los Angeles recently as the “smog capital” of the United States.² For all its groundbreaking recommendations concerning pollution control, the Sharp report and its legacy, Senate Bill 2 and the TNRCC, have yet to clear the air.

Even a change in the White House failed to have an impact upon the Midlothian struggle. What started out as tough talk against big business and promises of a cleaner environment from the Clinton administration wound up as empty rhetoric. Most disappointing to Midlothian residents and DAR was the failure of the EPA to regulate the cement industry’s use of hazardous waste. The optimism felt in 1995 when EPA Administrator Carol Browner promised to tighten emissions standards from cement kilns burning hazardous waste gave way to cynicism when residents learned that the EPA and the Portland Cement Association were cooperating to set Maximum Achievable Combustion Technology emissions levels in 1998.

² Rose Farley, “Ill Wind Blowing,” 8-9; Public Agenda Meeting for TXI Permit, notes by author, 10 March 1999, Austin; Robert Bryce, “Cleaning the Air,” *Austin Chronicle*, 22 October 1999, 20; Wayne Slater, “Environmentalists Accuse Bush of Creating Smog Crisis,” *DMN*, 20 October 1999, 35A, 36A; Silverstein, “The Polluter’s President,” 1.

The powerful public relations campaign and the legal and scientific team assembled by TXI, along with increased lobbying efforts by the cement industry on the municipal, state, and federal levels, paid off in Midlothian. With the creation of a streamlined agency such as the TNRCC and the appointment of pro-business members to the agency by Governor George W. Bush, it became easier for a private corporation such as TXI to influence state policy. Despite an enthusiastic campaign led by DAR, the political opposition to TXI failed to galvanize enough support in a small, working-class community heavily dependent on the cement industry for employment.

In the end, TXI won a battle of attrition because it had more resources, particularly money, than DAR. Perhaps Jim Schermbeck put it best. “You don’t need a toxicologist to know which way the wind blows in Cement Valley,” he stressed. “You only have to look out the window and watch the plumes from TXI. Likewise, you don’t need a theoretical computer modeling to tell you that you aren’t getting sick – you only have to witness what happens when those plumes come rolling through your property. If only more Ph. Ds had been living in Cement Valley.”³

³ Farley, “Ill Wind Blowing,” 2; Schermbeck quoted in “Protestants’ Exception to the Proposal for Decision,” 4, DARPF.

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