STANDARD COMMERCIAL LEASE ENVIRONMENTAL TERMS ARE NOT WHAT THEY APPEAR; A Better Approach

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The older I get, the harder it is to keep these professional biographies up to date. I have been practicing commercial real estate, water and environmental law since 1990. So deduct that from this year and you can determine how long I have been practicing law. In billable and other professionally spent hours, I should already be retired, if not dead. My hair now involuntarily stands on end. I have written and spoken extensively for many years, which only means that I apparently prefer fame to fortune.

As of 2010, I have a very unique practice. The bulk of my practice is what I would call "regulatory real estate," representing landowners, contractors, operators and developers where real estate intersects with government, such as water rights, environmental, and development. This allows me to combine my undergraduate degree in political science with a long history of practice in commercial real estate. I deal with the Texas Commission on Environmental Quality (TCEQ) on what seems like a daily basis, defending enforcement cases, assisting clients in bringing sites into compliance, counseling clients how to comply, helping clients obtain and keep permits, and generally trying to keep the TCEQ honest. I am a member of the TCEQ's Small Business Advisory Committee (Dallas).

I volunteer a significant amount of time and services to the Real Estate, Probate and Trust Law Section (REPTL) of the State Bar of Texas. Currently I am Vice Chair of its Water Rights Committee, Editor in Chief of its periodical, THE REPTL REPORTER, and the Political Affairs Advisor to its Real Estate Legislative Affairs Committee. As a solo practitioner (after five years at a "big law" type of law firm), I find that these activities help connect me to my professional colleagues and make me a better lawyer. I strongly encourage every lawyer to find a way to serve this worthy profession.

My wonderful wife and I share all the challenges and joys of a blended family, with the three teenagers between us, all in that wonderful stage of life known as Purgatory. The empty nest just arrived. We are active in our local church, Fellowship Church, Grapevine campus.

To maintain some semblance of sanity and manage the various health challenges generated by my chosen profession, I often get on a bicycle and launch myself on rides so long that eventually my only thoughts become about survival. My wife and I ride the Hotter N Hell Hundred every August in Wichita Falls, Texas. My lawfirm is a corporate sponsor of The Texas Irish Cycling Team (www.texasirishcycling.com), which raises money for various charities, and we have a lot of fun in the process. I don't get to hunt and fish as much as I'd like, but those episodes help clear my head as well. I wear myself out on a jetski every chance I get. And I stop by Graceland to pay my respects every time I pass through Memphis.

I earned my B.S., *cum laude*, in Political Science from Belmont University, Nashville, Tennessee (1987) and my J.D. from Washington & Lee University School of Law, Lexington, Virginia (1990). I've been in Texas ever since. If you are still curious about me, you can find much more information at http://www.texasenvironmentallaw.com/aboutmark.htm. I only ask that you please not attempt to stalk me.

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STANDARD ENVIRONMENTAL LEASE PROVISIONS ARE NOT WHAT THEY APPEAR; A BETTER APPROACH

I. WHAT'S THE PROBLEM?

Sometimes, practitioners and their clients believe that a document, in this case a lease, provides a certain level of legal protection that will prevent or protect a landlord from losing money, by defining prohibited activities and heavily discouraging the tenant from engaging in those scenarios, and by indemnifying the landlord from losses. However, standard environmental lease terms often provide less protection in practice than they appear to provide. This paper will address two main points.

First, when it comes to defining prohibited activities based on environmental statutes and regulations, form lease provisions often do not address state law issues that are separate and different than federal laws issues. Some lease forms do not even cover all federal issues.

Second, the remedy provided to a landlord for a tenant breach of environmental terms is often woefully inadequate and ineffective. Landowners are potentially "responsible parties" ultimately responsible for the property's condition.[1] As such they may be directly liable to the state and federal government for: (1) payment of administrative fines if a tenant violates federal or state law; and (2) undertaking certain action to clean up the property if it is not in compliance with environmental laws. Often the cost of bringing the affected property into compliance far exceeds the amount of the administrative fine. Although tenants maintain primary responsibility for the tenant's acts and omissions, if a tenant cannot or will not bring its operation or the landlord's property into compliance, the state may order the landowner to pay a fine, separately from the tenant, and pay the costs necessary to bring the property into compliance.

Environmental contaminations and administrative enforcement often cause tenants liquidity problems. So, although the vast majority of leases contain broad indemnity provisions, these only work if a tenant is solvent enough to pay for the indemnified expenses. If the costs to bring a tenant's operation and/or the leased property into compliance exceed the tenant's ability to pay those costs while also paying rent and meeting the other financial terms of the lease, the landlord has no functional remedy other than reducing further losses by avoiding additional costs.

Taking the next step, the standard remedies provided in lease forms, as broad as they are, may not provide a relevant remedy to address environmental issues. Many if not most environmental issues begin as non-monetary default events under the lease. Most leases are remarkably lax on non-monetary defaults, allowing the tenant additional time to cure. In the context of environmental contamination, additional time can be the landlord's worst enemy because it may become more costly to clean up the property as more time expires.

This paper will develop these two points by surveying real world scenarios, and then it will discuss a series of new concepts that lawyers advising landlords may want to include in leases with tenants who have environmentally sensitive operations, to better protect a landlord from having to pay environmental compliance costs. For tenants who do not have environmentally sensitive operations today, practitioners should bear in mind that whether an operation is or is not environmentally sensitive is based on statutes and regulations, which may change at the seeming whim of Congress, the Environmental Protection Agency (EPA), the Texas legislature, or the Texas Commission on Environmental Quality (TCEQ). An operation that is not environmentally sensitive today may be so tomorrow simply by changing a definition in a regulation.

Over the past several decades the pattern and trend in environmental regulation is that the regulating agencies, specifically the EPA and TCEQ, are expanding the definition of regulated activity. Under the Obama administration, the pace of federal regulation has accelerated considerably, including change implemented by executive order without any Congressional action. These changes can require state agencies to also change their regulations in order to comply with federal law as determined by the EPA. Change often begets more change.

II. THERE BUT FOR THE GRACE OF GOD GOES MY LANDLORD

My name may not be Joe Friday but I can give you just the facts about two true stories from the files of the TCEQ. These are stories of tenants who managed

[1] *See, e.g.*, Texas Health and Safety Code Sections 361.271 and 361.343 (solid waste), Texas Health and Safety Code Section 341.049 and 341.092 (public water supply); Texas Water Code Sections 7.002 and 7.051. In practice the state generally initiates enforcement against the operator (i.e. tenant), but has been known to proceed against the landowner (landlord) if the tenant refuses to bring the property into compliance. Furthermore, when the lease expires the landlord becomes primarily responsible for the property as both owner and operator of that site. The author has been involved with at least two enforcement cases involving tenants where the TCEQ either directly threatened to assess a separate administrative penalty on a landowner, or actually did assess a separate penalty on a landowner.

regulated materials improperly. As you read these stories, think about whether normal commercial and industrial lease terms are sufficient to protect against this sort of damage.

A. THE CASE OF THE SOLVENT OFFICE LEASE

Location: Near San Antonio. Premises: two story office building. Tenant Use: Administrative offices for a residential property repair company. The multi-tenant commercial office building also housed several professional counselors and a driver training school, not exactly an obvious hotbed of environmental concerns. Problem: Tenant allegedly disposed of paint, thinners, solvents and other toxic substances by placing empty and semi-empty containers of paint and solvents, coated rags, paper towels, etc., in the dumpster provided by Landlord as part of common area management. A strong odor emanated from the dumpster. The dumpster was owned by Allied Waste, and Allied Waste collected the trash in this dumpster and placed it in its landfill, which was not permitted to accept these materials. The TCEQ is taking action against the tenant. The TCEQ also immediately contacted Allied Waste, who immediately temporarily suspended service to this dumpster. The biggest mysteries here are whether the TCEQ will fine Allied Waste for improperly disposing of these materials, and whether Allied Waste will sue the landlord for breaching its contract (which likely restricts the type of material that can be placed in the dumpster bin).

B. THE CASE OF THE FROZEN SEPTIC SYSTEM

Location: Near San Angelo. Premises: 7,000 square foot multi-tenant building with a septic system on a 1 acre of land. Tenant Use: warehouse. Problem: Tenant allegedly poured oil, antifreeze, pesticides, and other regulated materials down a drain (and thus into the septic sewer tank). The septic tank and lines may have to be removed, disposed of in a particular landfill designed for those types of materials, and replaced. At a minimum the septic tank must be cleaned out and the fluids disposed of properly. Other practical problems: If the tenant is at the end of its lease (and in this case a new lease was being drafted), or if the landlord now removes the tenant, the tenant has no motivation to pay for the repairs. The landlord's only practical remedy is to pay for the repairs and otherwise bring the property back into environmental compliance, and then sue the tenant to recover those amounts. An insolvent tenant nullifies this remedy. Reading between the lines of the TCEQ investigation report, it appeared to me as though someone, perhaps a former partner, a co-tenant, or a disgruntled employee of the tenant, walked out of the leased premises and into the TCEQ's regional office, and blew the whistle.

III. TCEQ ENFORCEMENT 101

The TCEQ is interested in assessing and collecting penalties. The TCEQ is a partially self-funded agency, meaning the fines it assesses and collects are used to fund the agency. The TCEQ's budget for 2010-2011 is over one billion dollars ($1,074,503,889).[2] Approximately 89% of these funds come from "fee generating services", which includes enforcement fines and penalties collected by the TCEQ's Enforcement Division.[3] Their 2010 budget request for field inspections and complaints is $43,277,596, an increase of over $8 million from their 2007 actual expenses (most current reported year as of this date)[4]. Additionally, their 2010 budget request for enforcement and compliance support was $12,359,704, an increase of over $1.5 million from their 2007 actual expenses.[5]

Before delving into how landlords may become responsible for paying regulatory penalties for the environmental condition of leased premises, and having to pay the costs to clean up a property at the landlord's expense, it is most helpful to first review the TCEQ's enforcement process. This is a summarized overview to briefly acquaint readers with this fairly complicated process. Because the TCEQ is an agency, it is policy-driven, and most of those policies are in writing. This includes the enforcement process.[6]

A. TCEQ LEADS WITH NOVs AND NOEs

The TCEQ regulates approximately 400,000 public and private facilities and/or individuals in Texas.[7] In fiscal year 2009, the TCEQ conducted more than 106,000 routine investigations, investigated almost 5,000 complaints, and issued 11,407 Notices of Violation (NOV).[8] The NOV is a letter from the TCEQ notifying the respondent of violations of state environmental law being alleged by the TCEQ. Upon receipt of the NOV letter, the receiving party has a limited time period to

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[2]Source: TCEQ, Legislative Appropriations Request for Fiscal Years 2010 and 2011 (Aug. 20, 2008)

[3]*Id.*

[4]*Id.*

[5]*Id.*

[6]The TCEQ enforcement rules are at 30 Tex. Admin. Code Chapter 70.

[7]Source: TCEQ, Annual Enforcement Report, Fiscal Year 2009 (Nov. 2009)

[8]*Id.*

bring the property or operation into compliance, although the TCEQ may exercise some amount of discretion as to the exact amount of time provided.[9]

If the alleged violations in the NOV are not corrected to the satisfaction of the TCEQ within this time period, it then issues a Notice of Enforcement (NOE) letter. The NOE also lists the alleged violations remaining to be completed and notifies the respondent that a penalty will be assessed, although not advising the respondent of the amount of penalty to be assessed. Most often the penalty is calculated and assessed between the time a regulated entity receives the NOE and the time the TCEQ files the EDPRP (described below).

B. OLD FASHIONED PUNISHMENT: TCEQ PENALTIES

The TCEQ calculates the penalty assessed pursuant to a formal, written TCEQ Penalty Policy[10] (herein so called) which sets forth what can only be described as a byzantine mathematical formula. The TCEQ uses Penalty Calculation Worksheets (PCW) to perform the calculation, and staff completes a separate PCW for each alleged violation. PCWs can be challenged later in the administrative process.

One of the factors the TCEQ takes into account in its Penalty Policy is the "good faith effort to comply" by the respondent. This involves two factors: (1) the timeliness of the respondent's remedial actions; and (2) the quality of the respondent's remedial action. A timely, quality response action will reduce the assessed penalty. It is therefore in the best interests of both tenant and landlord that the tenant respond to the violations timely and with either an "extraordinary" or "ordinary" quality of response action, in order to reduce the amount of administrative penalty.[11]

However, in the author's experience this reduction is very hard to obtain. Timeliness means either acts undertaken before the TCEQ even sends out an NOV, or acts taken between the NOV and the EDPRP (discussed below). The determination of quality of response appears very subjective. Large businesses with in-house environmental compliance departments may be better situated to obtain these reductions, whereas smaller businesses often need time to identify and hire consultants and legal counsel, and it is common for businesses to delay hiring counsel (and incurring related costs) until after these time periods have expired.

In the author's opinion, the TCEQ's enforcement philosophy is to promote compliance by punishing non-compliance: TCEQ enforcement tends to see the world as a "stick" and "carrot" world, and TCEQ enforcement is all stick. Once a violation goes into enforcement, the sole purpose of the TCEQ is to assess the penalty pursuant to the EIC and Penalty Policy, and collect the penalty in full. Its practical operating philosophy appears to be that fear of old fashioned punishment is the best deterrent.

The TCEQ may or may not negotiate the amount of the penalty depending on the facts of the particular case. Among other things, some penalty calculation elements are more subjective than others, and in some instances the respondent's information on items used in the penalty calculation may be more accurate than those estimated by the TCEQ. However, practitioners should keep in mind some basic principles of administrative law, as decisions are made concerning these negotiations, including the principle that the TCEQ's Executive Director will need to recommend and justify the proposed penalty to the TCEQ Commissioners based on the agency's policies, for the Commissioners will ultimately approve the penalty.

C. THEN THE TCEQ BRINGS THE EDPRP HEAT

If the violations alleged in the NOE are not timely corrected to the satisfaction of the TCEQ, or if the regulated entity refuses to (or cannot) pay the assessed penalty, the TCEQ then files an Executive Director's Preliminary Report and Petition (EDPRP), which is basically the administrative equivalent of an Original Petition filed in a civil case. The allegedly non-compliant regulated entity or individual must file an answer within twenty days of receipt of the EDPRP.[12]

The EDPRP contains: (1) the specific amount of penalty which the respondent must pay, according to the TCEQ Executive Director (ED), with the PCWs attached to the EDPRP; and (2) the actions the TCEQ believes the respondent must undertake in order to bring the property or operation into environmental compliance, known as "ordering provisions." Often the cost to perform these

[9] Time periods to correct alleged violations are generally set out in the *TCEQ Enforcement Initiation Criteria (EIC)*,Revision No. 12, Effective July 1, 2008. Time periods vary for the type of violation(s). The TCEQ staff may have flexibility in setting time periods for compliance. The longest suggested time period is six months, but even that period may be lengthened in certain circumstances. The EIC generally governs the issuances of NOVs and NOEs and the formal enforcement process during this initial enforcement stage.

[10] TCEQ Penalty Policy Second Revision, Effective September 1, 2002

[11] The penalty policy gives the largest reductions for actions taken to resolve a violation before the TCEQ issues a NOV.

[12] 30 Tex. Admin. Code Rule § 70.105

ordering provisions far outweighs the assessed penalty.

D. AND HERE COMES THE JUDGE

If no answer is timely filed, the TCEQ will obtain a default order from the TCEQ Commissioners that will order the respondent to pay the assessed fine and perform the ordering provisions.[13] If an answer is timely filed and resolution is reached, the agreed order is submitted to the TCEQ Commissioners for consideration and approval.[14] If an answer is timely filed but agreement cannot be reached, the parties then have a"stand still" period (my term) of not less than 30 days.[15] If no resolution is reached, the TCEQ will then submit a written request that the matter be referred to the State Office of Administrative Hearings (SOAH).[16]

The matter then proceeds through a SOAH evidentiary hearing in accordance with contested case rules set forth in 30 Tex. Admin. Code Chapter 80, at the end of which the Administrative Law Judge (ALJ) issues a Proposal for Decision (PFD). The TCEQ Commissioners consider the PFD on their agenda and vote on it. If the respondent and TCEQ have been able to come to an agreement after the case has been referred to SOAH, the case is remanded to the TCEQ and the parties submit the agreed order to the Commissioners for consideration and approval.[17]

The TCEQ will not just go away if it is ignored and its orders are not followed. It may issue additional orders and sanctions, and if administrative orders and penalties issued by the TCEQ do not achieve environmental compliance, the TCEQ may pursue compliance through the Texas Attorney General's Office in state district court.

If a respondent decides to enter into an agreed order to resolve the matter, but then fails to perform that agreed order, violating the agreed order will result in additional (and larger) TCEQ enforcement and penalties. In cases involving leased property, this is the point in time where the TCEQ sometimes begins proceedings against a landowner/landlord if the TCEQ is unsuccessful in attempting to cause a tenant to come into compliance with environmental laws.

A tenant can go through this entire process with the landlord having no knowledge of it: six months or longer after issuance of the NOV, another several months through an NOE, several more months until the EDPRP, then 20 days for the respondent to answer, then the 30 day "stand still" period, then a pre-trial schedule with a hearing in several more months. It may take a few more months to get a PFD set on the Commissioner's agenda. This process can take years.

E. LANDLORDS SUFFER ADMINISTRATIVE HANGOVERS

NOVs, NOEs and EDPRPs can cause at least four headaches for landlords:

1. These communications almost always go to the tenants only and not the landlord, so the landlord most often has no knowledge there is a potential problem and looming penalty. Landlords and tenants have opportunities throughout the process to generate favorable evidence for later use, and to respond/explain negative evidence generated by the TCEQ. However, the reverse is also true. Failing to respond may make resolving the situation more challenging.
2. If the alleged environmental condition involves the condition of the property, the landlord is the ultimately responsible party to bring the property back into compliance.
3. The landlord may be directly assessed an administrative penalty, separate from the penalty assessed against the tenant, for the condition of the property (even though caused by the tenant) if the tenant resists or fails to timely respond to the TCEQ's efforts.
4. Penalty calculations take into account how long a violation continues. The more times a violation occurs, the greater the amount of penalty.
5. In some instances there may be more than one way to bring a property into compliance, and the TCEQ is under no obligation to identify the least expensive option, or include it in the NOV, NOE, or EDPRP. My experience with the TCEQ has been that staff generally will consider alternative methods of compliance, and they generally understand that the role of environmental counsel is to determine how to bring a site or business into compliance, but the respondent generally bears the burden of proving that the alternative method is lawful and allowed by regulation.
6. NOVs, NOEs and EDPRPs are often non-monetary defaults under the leases, which gives the tenant much longer time periods to cure the event before the landlord can trigger a default and remove the tenant from the leased premises.

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[13] 30 Tex. Admin. Code Rule § 70.106

[14] 30 Tex. Admin. Code Rule § 70.10

[15] 30 Tex. Admin. Code Rule § 70.109

[16] *Id.*

[17] 30 Tex. Admin. Code Rule § 80.101

Think back over the description of the administrative process in Section III above. At what point does your commercial lease determine the tenant is in default?

IV. SO WHAT TO DO?

Many standard environmental lease terms appear to provide greater protection of landlords than they provide in practice. This paper will focus on two shortcomings of standard environmental lease terms: (1) they do not adequately define environmental concerns; and (2) they do not provide an adequate remedy for an environmental concern unless the tenant is both willing and financially capable to bring the property into compliance while maintaining compliance with the other lease terms. It will also discuss potential issues in use clauses, and how to better identify environmentally sensitive tenants.

A. IT'S THE DEFINITION, STUPID!

Most leases define environmentally prohibited conduct of tenants by reference to "hazardous materials" or federal environmental law, notably the hazardous materials defined by the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), commonly known as Superfund.[18] **Exhibit 1** includes several sample environmental terms culled from different lease forms. If the lease form treats the world of environmental problems as "hazardous materials are bad, but all other materials are good", from the landlord's perspective the lease has several weaknesses rooted in its narrow definition.

CERCLA allows the EPA to clean up contaminated sites and to compel responsible parties to perform cleanups or reimburse the government for EPA-lead cleanups. CERCLA requires the EPA to prepare a list, in order of priority, of substances that are most commonly found at facilities on the National Priorities List and which are determined to pose the most significant potential threat to human health due to their known or suspected toxicity and potential for human exposure at these National Priorities List sites. CERCLA also requires this list to be revised periodically to reflect additional information on hazardous substances. This process will become more relevant to Texas practitioners as described below (Future Shock).

But CERCLA is not the only federal or state statute that defines materials that are regulated, the misuse of which is punishable by administrative fines and ordering provisions. For example, there are materials regulated by the Texas Solid Waste Disposal Act (SWDA),[19] the federal Resource Conservation and Recovery Act (RCRA),[20] and air contaminants regulated by the federal Clean Air Act[21] and the Texas Clean Air Act.[22] Water pollution is regulated by the federal Clean Water Act[23] and Safe Drinking Water Act,[24] among others. Furthermore, none of these acts regulate petroleum substances. As a beginning point, leases should cover all of the materials regulated by these acts.

Perhaps most importantly, real estate practitioners should be aware of the classification of regulated waste by the SWDA. Most if not all businesses generate waste. It may be municipal solid waste, or industrial waste, or hazardous waste, or it could be inert material.

Municipal solid waste is "[s]olid waste resulting from or incidental to municipal, community, commercial, institutional, and recreational activities, including garbage, rubbish, ashes, street cleanings, dead animals, abandoned automobiles, and all other solid waste other than industrial solid waste."[25] Note that municipal solid waste is partly defined by what it is not: all other solid waste other than industrial solid waste. Industrial solid waste is "[s]olid waste resulting from or incidental to any process of industry or manufacturing, or mining or agricultural operations."[26] Note the breadth of this term, and that it includes significantly subjective elements. Inert material is "natural or man-made nonputrescible, nonhazardous material that is essentially insoluble, usually including, but not limited to, soil, dirt, clay, sand, gravel, brick, glass, concrete with reinforcing steel, and rock."[27]

Facilities defined as "industrial" by the TCEQ generate industrial waste and, as a result, generally must comply with additional waste regulations as compared to non-industrial operations. Attached as **Exhibit 2** is Appendix G to TCEQ Form 00002 "Instructions for Completing the Notification for Hazardous or Industrial Waste Management Form". This Appendix is the

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[18] 42 U.S.C.§§ 9601-9675 (1980, as amended)

[19] Tex. Health and Safety Code Chapter 361

[20] 42 U.S.C.§§ 6901-6991i (1976, as amended)

[21] 42 U.S.C.§§ 7401-7671q (1970, as amended)

[22] Tex. Health and Safety Code Chapter 382

[23] 33 U.S.C.§§ 1251-1387 (1977, as amended)

[24] 42 U.S.C.§§ 300f-300j-26 (1974, as amended)

[25] 30 Tex. Admin. Code § 330.3(88)

[26] 30 Tex. Admin. Code § 330.3(66)

[27] 30 Tex. Admin. Code § 330.3(67)

TCEQ's explanation and definition of "industrial facility".

If a tenant comes within this definition, all wastes it produces are industrial wastes, even common office trash. If a non-industrial facility is located on a site considered industrial, wastes from the entire facility (even the non-industrial operation) are considered industrial wastes. So if, for example, a facility processes materials but also has a retail store for the finished product, the retail store's waste is industrial.

There are three classes of industrial solid waste. In Texas, the generator of waste has the legal obligation to identify its waste, classify its waste, and then manage its waste in accordance with state law.[28] Each type of waste must be managed in accordance with state law. Industrial waste is classified as follows:

Class 1	Any industrial solid waste or mixture of industrial solid wastes which because of its concentration, or physical or chemical characteristics, is toxic, corrosive, flammable, a strong sensitizer or irritant, a generator of sudden pressure by decomposition, heat, or other means, or may pose a substantial present or potential danger to human health or the environment when improperly processed, stored, transported, or disposed of or otherwise managed, as further defined in 30 Tex. Admin. Code §335.505 (relating to Class 1 Waste Determination).[29]
Class 2	Any individual solid waste or combination of industrial solid waste which cannot be described as hazardous, Class 1, or Class 3 as defined in 30 Tex. Admin. Code §335.506 (relating to Class 2 Waste Determination).[30]
Class 3	Inert and essentially insoluble industrial solid waste, usually including, but not limited to, materials such as rock, brick, glass, dirt, and certain plastics and rubber, etc., that are not readily decomposable, as further defined in 30 Tex. Admin Code §335.507 (relating to Class 3 Waste Determination).[31]

Class 1 industrial waste is typically associated with the term "hazardous waste" and, depending on the wording of a lease, can be the only type of waste addressed by the lease. Class 2 is defined in the negative. There are laboratory analytical tests that determine whether a material is Class 1 or Class 3. If it does not meet any of those criteria, it is Class 2. If a lease form contemplates only that "hazardous (i.e. Class 1) wastes are bad", it fails to include Class 2 industrial wastes in its definition and protections.

Class 2 industrial waste must be managed and disposed of in a particular manner. If Class 2 industrial waste is not managed in the leased premises and disposed of properly, the leased premises may become environmentally contaminated and the landlord of that site may become liable to remediate the condition of the leased premises, and have to pay administrative penalties for the condition of the leased premises.

Tenants who lease space for their administrative offices but use regulated materials in their operations, even if the materials are not intended to be brought into the offices, may pose a larger potential risk for landlords than originally perceived. The example discussed above as the "Case of the Solvent Office Lease" shows how regulated wastes and materials used in the field may find their way into the administrative offices. Wise landlords should inquire of prospective tenants what wastes they generate, and how they characterize their waste, so that landlords can determine if a prospective tenant is "industrial," in order to better manage risk by including certain terms in its lease, as explained in this paper.

B. USE ME WITH QUIET ENJOYMENT

Use clauses can be more sensitive in leases with environmentally sensitive tenants. **Exhibit 3** includes several sample use clauses and quiet enjoyment covenants culled from different lease forms. There are two main issues:

1. What does the use clause exclude, as well as include? Use clauses are traditionally more like a shield protecting the landlord. But can the use clause, as drafted, be used by a tenant as a shield to cover activity regulated by the TCEQ or EPA, i.e. is there any ambiguity or vagueness that could be exploited by a tenant? More negative use provisions (i.e. "thou shalt not") may be appropriate.
2. What if a use allowed by a use clause requires a permit issued by the TCEQ that must be signed by the property owner (i.e. the landlord), or it requires the owner to complete and file a Core Data Form (explained below in Section V)? Is the landlord contractually bound to sign the

[28] Cite

[29] 30 Tex. Admin. Code § 335.1(19)

[30] 30 Tex. Admin. Code § 335.1(20)

[31] 30 Tex. Admin. Code § 335.1(21)

permit application or the Core Data Form? If the lease provides that the tenant will obtain all necessary permits to lawfully operate the property, or states this in the negative, such that the tenant will not operate the premises except with all necessary permits, do these otherwise landlord-friendly terms become double edged?

A landlord will breach the covenant of quiet enjoyment of leased premises if: (1) the landlord intends that the tenant no longer enjoy the premises; (2) the landlord commits a material act that substantially interferes with the tenant's intended use and enjoyment of premises; (3) the landlord's act permanently deprives the tenant of the use and enjoyment of the leased premises; and (4) the tenant abandons the premises within a reasonable time after commission of act. *See, e.g., Coleman v. Rotana, Inc.*, 778 S.W.2d 867 (Tex. App.-Dallas 1989, writ den'd). This definition appears to give tenants at least an argument that a landlord who refuses to sign and file necessary TCEQ documents required to allow the tenant to operate in accordance with the use clause in the lease, may breach the lease by such refusal. For environmentally sensitive tenants, practitioners should make sure the use clause is tailored to the particular situation.

C. REMEDY ME THIS

Commercial and industrial leases often distinguish between monetary defaults, such as failure to pay rent, and non-monetary defaults, which are often events that require time to cure, such as repairs and maintenance. When the EPA or TCEQ alleges that a tenant has violated environmental regulations, it does not immediately assess a monetary penalty, and even when it does, the penalty is not immediately payable. It does not become final until the exhaustion of administrative remedies and then the full civil court appeals process.

<u>Exhibit 4</u> includes a sample remedies clause culled from a normal commercial lease form. The language in Sample 1 requires written notice from the landlord to trigger a non-monetary default. This would be ineffectual in practice if the landlord never knew about the environmental violations being alleged by the EPA or TCEQ. However, even assuming the landlord knew about an NOV, NOE or EDPRP, and sent a notice, if the tenant answered the TCEQ communications with denials, and/or mounted a defense to either the ordering provisions or the proposed penalty, taking the matter through an administrative hearing, placing the PFD on a Commissioner's agenda, and then with the tenant appealing the agency's decision into civil district court (and then to the appellate court, and finally the Texas Supreme Court), it could practically take years before the Commission's order assessing a penalty became final, whereupon the tenant may have finally committed an event of default once the tenant fails to comply with the ordering provisions and/or fails to pay the assessed penalty. By this time, the condition of the property may be worse than when the violation first occurred, or the stated lease term may have expired (in which case the tenant could move out and leave the landlord to clean up the property).

Since costs to bring a property back into environmental compliance may be high, a tenant struggling to make rent payments and otherwise comply with lease terms may be unable to pay these costs. In the author's experience, landlords need to be able to identify these situations as quickly as possible, and have the ability pursuant to lease terms to terminate the lease and remove the tenant from the premises immediately upon the occurrence of an alleged environmental violation.

The remedies section of many standard commercial leases may provide a completely ineffective remedy when a tenant violates environmental laws. In the author's experience, landlords need to know about the earliest sign of trouble, and it is in their best interests to monitor the situation closely to make decisions that protect both the leased premises as well as the landlord's cash flow. Commercial and industrial lease terms should be drafted to provide landlords of environmentally sensitive tenants with these opportunities.

D. I.D., PLEASE: THE ENVIRONMENTALLY SENSITIVE TENANT

One of the challenges in this area is accurately identifying the environmentally sensitive tenant. Some of the business operations permitted by the TCEQ (known as "permit by rule" or "PBR") are:

Auto Body
Auto Repair
Auto Salvage
Dry Cleaning
Fleet Maintenance
Foundries
Metal Finishers
Oil and Gas Facilities
Printers
Thermoset Resin/cultured Marble Facilities
Sawmill Operations
Surface Coating
Wood Products Manufacturing

Bear in mind that if any part of the tenant's business includes these sorts of activities, the tenant is likely an environmentally sensitive tenant. For example, if a

services business has a fleet of vehicles that it maintains, it may have permits relating to its fleet maintenance activities even though fleet maintenance is only a supporting part of its operation.

For a more detailed list, please review this page:

http://www.tceq.state.tx.us/nav/permits/business_types/

which lists types of businesses alphabetically. To give readers a flavor for how common these listed businesses can be, the TCEQ has included on these lists bakeries, contractors, florists and nurseries, graphic designers, medical practices, pest control/exterminators, photo finishers, and printers/publishers. The key factor is not what the business does, but what materials the business uses and what sort of solid and fluid wastes, or air contaminants (vapors, odors) the business produces.

E. FUTURE SHOCK

Environmental law is rapidly changing. What is not regulated today may be regulated tomorrow. In fact, environmental regulation is a fairly artificial discipline resting entirely on definitions in statutes, regulations and policies. By simply changing definitions, what was not contaminated today can become contaminated tomorrow.

Taking this principle to its logical conclusion, the federal government has figured out that it can regulate most if not all businesses via environmental regulations. On December 7, 2009, the EPA announced that greenhouse gases (GHGs) threaten the public health and welfare of the American people.[32] EPA also found that GHG emissions from on-road vehicles contribute to that threat. Any tenant using vehicles would fall in this definition. Many currently unregulated activities generate GHG. This paves the way for EPA (and perhaps eventually the TCEQ) to regulate business activities which generate GHGs by requiring those businesses to obtain permits and perhaps to pay a fine for generating GHG (a/k/a cap and trade).

One of the areas in which the EPA is currently studying is vapor intrusion. Sources of harmful vapors may be common things such as dry cleaning fluids in clothes returned from the cleaners (which would affect uniform service businesses as well as businesses whose employees wear dry cleaned uniforms), petroleum products, carpet, glues, paints, solvents, smoke (are BBQ joints safe?), air fresheners, cleaning fluids, furniture polishes, finishes and varnishes. Building maintenance and cleaning service companies use many of these products to clean multi-tenant buildings. Could landlords become liable in the future for the chemicals used to clean the buildings? Could one tenant's harmful vapors that then intrude into other areas of a multi-tenant building generate liability from one tenant to another, or to or from, or through, a landlord? These and other related issues may be coming if EPA or TCEQ establish protective levels of air contaminants for vapors, and penalize businesses that generate excessive contaminants.

But there is a more obvious and present concern about potential future issues. Earlier this paper mentioned the substances on CERCLA's National Priorities List. In Texas, every year the Toxicologist at TCEQ updates the toxicity information from all sources for the Texas Risk Reduction Program (TRRP) calculations to generate a revised Table of Protective Concentration Levels (PCL). The TRRP calculations do not change, but the toxicity data can and does, as more studies are completed and more health information is collected. Property is not "contaminated" unless and until a Chemical of Concern (COC) present on the property exceeds a PCL. The recent and past updates may be viewed here:

http://www.tceq.state.tx.us/remediation/trrp/trrppcls.html

The third link on the page, under "March 2010 Tables" opens an Excel spreadsheet that has as its first tab a summary of all the TCEQ's changes made, by chemical. It lists the chemical and what factor changed. Most of the changes are based upon updated toxicity studies done by EPA. However there are also some other organizations that look at these issues as well.

V. BITTEN BY CORE DATA FORMS OR COMPLIANCE HISTORIES-YET?

In Texas, before or in conjunction with obtaining a permit or license from the TCEQ, or filing a registration or notice of intent to operate under a general permit, the applicant must file a Core Data Form with the TCEQ. This is a deceptively simple form but if it is filled out and filed with incorrect information, it can be expensive to correct, and the TCEQ is not under any obligation to file what a practitioner may believe is a corrected Core Data Form. Depending on the tenant's business, a landlord may also need to fill out and file a Core Data Form.

Core Data Forms are intended to collect generic data like names, addresses, phone numbers, business types and other similar information needed by the TCEQ. However, Core Data Forms also establish relationships between regulated entities, which may include tenants, and potentially responsible parties for those regulated entities, such as certain landlords in their capacity as landowners. Before completing and filing a Core Data Form practitioners should have a complete and accurate understanding of the Core Data Form's effect at the TCEQ and thus on the entity filing the form. Landlords

[32] See EPA Press Release December 7, 2009, and other information, accessed on June 1, 2010: http://www.epa.gov/climatechange/endangerment.html

should also be aware that the TCEQ may enter data into its central registry about a landowner as necessary if the landlord does not do so (these are notoriously known to often contain errors).

Upon receiving and filing Core Data Forms the TCEQ assigns either a "Customer Number" or "Regulated Entity Number" to the filing party. These numbers will remain with that business or location through successive operators and owners. In some instances once a lease terminates, the compliance history (described below) of a tenant may be fully attributed to the landlord, in their capacity as the landowner.

Among other things, the TCEQ uses Core Data forms to determine which regulated entities are related to which customers. A customer's compliance history is affected by every regulated entity associated with that customer. The Core Data forms determine these relationships among the parties, in this case a landlord and its tenants.

The TCEQ rates the compliance history of every owner or operator of a facility that is regulated under certain of the state environmental laws.[33] If a customer is affiliated with more than one regulated entity, then TCEQ develops more than one compliance history rating for that customer, as follows: (1) one rating for the customer's overall compliance history, considering all facilities and activities that TCEQ must consider; and (2) a separate rating for that customer's compliance rating at each regulated entity. The TCEQ re-calculates compliance histories at least once annually and publishes the updated histories on October 1 of each year.

The compliance history is based on many factors. From this history, TCEQ develops a numerical rating (0 is best; the score increases with poorer compliance). This numerical rating is then converted to a general classification. Landlords have a direct vested interest in the compliance history rating of any tenant who is a regulated entity because the TCEQ will use its tenants' compliance history classifications to determine the landlord's compliance history classification.

If the calculated rating is:	*Then the performance is classified as:*	*This classification means that at this site the customer:*
Below 0.10	High	Complies with environmental regulations extremely well
0.10–45.00	Average	Generally complies with environmental regulations
45.01 or greater	Poor	Fails to comply with a significant portion of the relevant environmental regulations

If there is insufficient data to make a compliance history calculation, the TCEQ assigns a rating of 3.01 and the business is classified as "average by default."

A poor compliance history classification has consequences. Among other things, the TCEQ's penalty policy increases penalties for poor performers. There is an administrative process to appeal a "poor" performance classification, but this process can be expensive and the TCEQ is not under any particular obligation to simply agree with an appeal.

Diligent landlords should obtain compliance histories for environmentally sensitive tenants as part of their due diligence in deciding whether to enter into a lease with that prospective tenant, and as part of their evaluation of the condition of the premises upon termination of the lease. Landlords should also consider obtaining and analyzing compliance histories of these tenants annually after the TCEQ's annual re-calculations (i.e. after October 1) during each year of the lease term. Compliance histories may be obtained from the TCEQ upon Email request.

VI. A BETTER APPROACH

As explained above, the environmental terms of many standard commercial lease forms may not protect landlords as much as they appear. To increase protection of landlords, standard lease form environmental terms should often be revised to include some or all of the following:

1. Change the definition of environmental concerns from "hazardous" materials or substances to all environmentally regulated materials (air, water and waste, both state and federal).
2. Include in the "use" clause specific prohibitions on the tenant's use of the premises. Consider specifically prohibiting any duty of a landlord to sign permit applications, making this decision in the landlord's sole discretion.
3. Require tenants to provide landlords immediate notice of any and all communications with the EPA and TCEQ (both to and from), including but not limited to Core Data Forms, issued permits, applications, any NOVs, NOEs, or

[33] 30 Tex. Admin. Code Chapter 60

EDPRPs, as well as all other communications.

4. Add a term that allows the landlord to conduct an environmental audit of the tenant's business, and actually conduct an audit at least once within the first year of the term.
5. Require the tenant to provide environmental insurance for the landlord's benefit.
6. Modify the default provisions to remove alleged environmental violations from the non-monetary default provisions and consider giving the landlord the option to declare an immediate default under the lease anytime the TCEQ or EPA alleges the tenant has committed an environmental violation. Consider what remedy options the landlord should have in such event.
7. If the tenant must put up financial assurance to the TCEQ in order to obtain a permit, think through how the landlord can obtain possession of those funds if necessary from the TCEQ, and what obligations can be drafted into the lease in terms of managing and applying those funds.
8. Make sure the attorneys fees reimbursement clause will cover attorneys fees incurred by a landlord in an administrative proceeding, both administrative proceedings where the tenant is the respondent, and any administrative proceeding where the landlord is the respondent. Also make sure this clause includes the appeal of administrative orders through the civil courts.

Of course, this is an adversarial area where landlords and tenants do not have common concerns, and counsel for environmentally sensitive tenants have a role to play in negotiating lease terms that are practically workable for the tenants and reduce the tenant's risks as well.

VII. CREDITS AND DISCLAIMERS

Environmental issues frequently involve a blend of legal and technical issues. Many thanks to Steve George, P.G., Green Star Environmental, Arlington, Texas, for providing insight on issues in this paper.

For more information about this and related topics please visit one of my websites. For environmental:

For water rights:

END

EXHIBIT 1

LEASE FORM ENVIRONMENTAL PROVISIONS

SAMPLE 1

HAZARDOUS SUBSTANCES

Tenant shall indemnify Landlord from environmental claims pursuant to the terms of the following sections. Except general office supplies typically used in an office area in the ordinary course of business, such as copier toner, liquid paper, glue, ink, and cleaning solvents, for use in the manner for which they were designed, and in such amounts as may be normal for the office business operations conducted by Tenant in the Premises and in amounts which do not require a permit, neither Tenant nor its agents, employees, contractors, licensees, sublessees, assignees, or concessionaires shall use, handle, store, release or dispose of any Hazardous Substances in, on, under or about the Premises or the Building. Tenant shall not cause or permit any Hazardous Substance to be used, stored, generated or disposed of in the Building by Tenant, Tenant's agents, employees or contractors. If any Hazardous Substances are used, stored, generated, or released or disposed of on or in the Premises or Building by Tenant or Tenant's agents, employees or contractors in violation of applicable laws, or if the Premises or Building becomes contaminated in any manner by Tenant, Tenant shall indemnify, defend and hold harmless Landlord from and against any and all claims, damages, fines, judgments, attorneys fees, penalties, costs, liabilities or losses arising during or after the Term of this Lease and arising as a result of such contamination, release or discharge. This indemnification includes any and all reasonable and necessary costs incurred because of any investigation of an environmental act of Tenant that requires any cleanup, remediation, removal or restoration mandated by federal, state or local agency or political subdivision.

Tenant will notify Landlord immediately upon learning that any duty described in this Exhibit “F” of the Lease has been violated; that there has been a release, discharge or disposal of any Hazardous Substance on or about the Premises or the Building; or that the Premises are subject to any third party claim or action, or threat thereof, because of an environmental condition in or originating from the Premises or arising in connection with the operation of Tenant's business. Upon written notice from Landlord to Tenant, Landlord will have the right to perform the removal and abatement of any Hazardous Substances from the Premises or the Building which arise out of Tenant's violation of this exhibit to the Lease, and all costs of abatement or removal of such Hazardous Substances, including environmental consultant fees, will be the obligation of Tenant.

As used herein "Hazardous Substances" means asbestos, any petroleum jelly, polychlorinated biphenyls (PCB's) and any hazardous or toxic substance, material or waste which is or becomes regulated by any local governmental authority, the State of Texas or the United States government, including, but not limited to, any material or substance defined as a "hazardous waste", "extremely hazardous waste", "restricted hazardous waste", "hazardous substances", "hazardous material" or "toxic pollutant" under Texas statutes and/or under the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. Section 9601 et seq.

SAMPLE 2

Hazardous Materials. The term "Hazardous Materials" means any substance, material, or waste which is now or hereafter classified or considered to be hazardous, toxic, or dangerous under any Law relating to pollution or the protection or regulation of human health, natural resources or the environment, or poses or threatens to pose a hazard to the health or safety of persons on the Premises or in the Shopping Center. Tenant shall not use, generate, store, or dispose of, or permit the use, generation, storage or disposal of Hazardous Materials on or about the Premises or the Shopping Center except in a manner and quantity necessary for the ordinary performance of Tenant's business, and then in compliance with all Laws. If Tenant breaches its obligations under this Section 24.(w), Landlord may immediately take any and all action reasonably appropriate to remedy the same, including taking all appropriate action to clean up or remediate any contamination resulting from Tenant's use, generation, storage or disposal of Hazardous Materials. Tenant shall defend, indemnify, and hold harmless Landlord and its representatives and agents from and against any and all claims, demands, liabilities, causes of action, suits, judgments, damages and expenses (including reasonable attorneys' fees and cost of clean up and remediation) arising from Tenant's failure to comply with the provisions of this Section 24.(w). This indemnity provision shall survive termination or expiration of this Lease.

EXHIBIT 2

APPENDIX G TO TCEQ FOR FORM 00002

Appendix G. What Is An Industrial Facility?

Industrial facilities may face additional regulations that do not apply to nonindustrial facilities. Therefore, it is very important to be able to determine whether or not a facility is industrial or nonindustrial.

INDUSTRIAL ACTIVITY DEFINED

You have an industrial facility if you engage in any of the following activities:

- you make a product for wholesale according to an organized plan and with a division of labor;
- change materials by processing* them, or
- substantially support** either of those activities.

If you are involved in any of these industrial activities, all wastes that your facility produces are industrial waste ... even office trash.

* Repackaging by itself is not considered an industrial activity.
** Substantially supportive activities include such activities as transporting products or chemicals to another location so they can become part of a manufacturing operating (for example, transporting refined petroleum chemicals to be used to produce plastics). They do not include activities that are not directly supportive, such as transporting vending machine snacks to a company that manufactures plastics.

EXAMPLES OF TYPICAL INDUSTRIAL FACILITIES

Apparel and accessories manufacturers	Intermediate product/chemical storage facilities
Cabinet and/or furniture manufacturers	Mining operations
Ceramic floor and wall tile manufacturers	Mobile home construction
Chemical and allied products manufacturers	Oil and/or chemical refineries
Electric generating plants	Product testing facilities
Electronic assembly facilities	Product research and development
Electroplating operations	Sawmills and planing mills
Fabricated metal products facilities	Slaughterhouses
Formulating operations (e.g., mixing operations)	Wineries

EXAMPLES OF TYPICAL NONINDUSTRIAL FACILITIES

(Note: If one or more of the following facilities or activities is located on a site considered industrial, wastes from the facility or activity are considered industrial wastes. For example, wastes from a printing operating located on an industrial facility's site are considered industrial wastes.)

Artisans (e.g., custom furniture, custom art)	Household hazardous waste collection
Automobile dealers	Lawn and gardening services
Commercial printers (e.g., business cards, forms)	Meat packaging only (no slaughtering)
Concrete ready mix plants	One-hour eyeglass facilities
Crude oil and natural gas pipelines	Petroleum distributors only
Custom cabinetmakers	Photographic studios
Distribution of electricity (no generation)	Public transportation
Distribution of goods	Publishers/printers/newspapers
Dry cleaning facilities	Repair services
Funeral homes	Retail stores and outlets
Furniture refinishing services	Schools
Gasoline stations	Telecommunications
Grocery and convenience stores	Veterinary services
Health care and allied services	

DIFFERENTIATING BETWEEN INDUSTRIAL AND NONINDUSTRIAL FACILITIES

	INDUSTRIAL	NONINDUSTRIAL
BAKERIES/FOOD SERVICES	facility produces goods for wholesale	only sells to the general public
CORRECTIONAL INSTITUTIONS	does not apply (not considered industrial)	nonindustrial due to their nature and purpose
LABORATORIES	located on an industrial site provides services mainly for production purposes	services provided for the general public (e.g., a laboratory only testing fecal coliform for households would be considered nonindustrial.) services provided to both industrial and nonindustrial customers
WAREHOUSES	located on an industrial site or the materials are to undergo further processing	located on a nonindustrial site and the materials being stored are not to undergo further processing
MACHINE OPERATIONS	machining occurs on an industrial site machining results in production of new parts machining results in remanufactured parts and occurs according to an organized plan and a division of labor	repairs parts for the general public (e.g., automobile engines)
RECYCLING OPERATIONS	recycles industrial materials recycling results in the production of a product (e.g., smelting, plastic lumber)	recycles only nonindustrial materials and does not make products (e.g., city collection centers) separates or combines nonindustrial materials for recycling
TRANSPORTATION	transportation of unfinished goods or goods to be put into a manufacturing process (e.g., shipments of chemicals to manufacturing operation)	transportation of finished products that are not to undergo further processing (e.g., products to a grocery store or service station) transportation of people

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EXHIBIT 3

TYPICAL USE CLAUSES

SAMPLE 1

Tenant's Use. Tenant agrees that the Premises will be used and occupied by Tenant only for those uses permitted by this Lease. Tenant shall not use or permit the use of the Premises for any purpose which is illegal, creates obnoxious odors (including but not limited to tobacco smoke), noises or vibrations, is dangerous to persons or property, could increase Landlord's insurance costs, or which, in Landlord's reasonable opinion, unreasonably disturbs any other tenants of the Building or interferes with the operation of the Building. Except as provided below, the following uses are expressly prohibited in the Premises: (a) any purpose which would, in Landlord's reasonable opinion, (I) impair the reputation or quality of the Building, (ii) overburden any of the Building systems, Common Areas or parking facilities (including but not limited to any use which would create a population density in the Premises which is in excess of one person per 250 square feet of space contained in the Premises), or (iii) impair Landlord's efforts to lease space in the Building; or (b) any purpose which would otherwise interfere with the operation of the Building.

SAMPLE 2

LESSEE will not use or occupy, or permit any portion of the Leased Premises to be used or occupied, (a) in violation of any law, ordinance, order, rule, regulation, certificate of occupancy, or other governmental requirement, or (b) for any disreputable business or purpose. LESSEE shall make all repairs, alterations, additions or replacements to the building and other improvements on the Leased Premises, including without limitation, equipment, facilities, signs and fixtures therein and thereon, required because of LESSEE's use thereof by any law or ordinance or any order or regulation of any public authority having jurisdiction and shall keep the Leased Premises equipped with all safety appliances so required because of such use. LESSEE shall procure any licenses and permits required for any such use.

Tenant shall continuously occupy and use the Premises only for the Permitted Use, using only the Trade Name, and shall comply with all Laws relating to the use, maintenance, condition, access to, and occupancy of the Premises. Tenant shall, in good faith, continuously throughout the Term carry on in the entire Premises the type of business for which the Premises are leased, operating its business with a complete line and sufficient stock of new merchandise of current style and type, attractive displays, and in an efficient and reputable manner, and shall, except during reasonable periods for repairing, cleaning and decorating, keep the Premises open for business with adequate and competent personnel in attendance on all days and during all hours (including evenings) established by Landlord from time to time as store hours for the Shopping Center, and during any other days and hours when the Shopping Center is generally open to the public for business, except to the extent Tenant may be prohibited from being open for business by applicable Law.

TYPICAL QUIET ENJOYMENT CLAUSES

SAMPLE 1

Landlord hereby covenants and agrees that if Tenant shall perform all of the covenants and agreements herein required to be performed on the part of Tenant, Tenant shall, subject to the terms of this Lease, at all times during the continuance of this Lease have the peaceable and quiet enjoyment and possession of the Premises.

SAMPLE 2

Provided Tenant has performed all of its obligations hereunder, Tenant shall peaceably and quietly hold and enjoy the Premises for the Term, without hindrance from Landlord or any party claiming by, through, or under Landlord, but not otherwise, subject to the terms and conditions of this Lease.

EXHIBIT 4

NON-MONETARY DEFAULT PROVISIONS

SAMPLE 1

Non-Monetary Default. If Tenant fails to comply with any term, provision or covenant of this Lease (other than the payment of monetary obligations) within twenty (20) days after written notice from Landlord that Tenant has failed to comply with such term, provision or covenant; provided, that if Tenant's failure to comply cannot reasonably be cured within such twenty (20) day period, Tenant shall be allowed additional time, not to exceed an additional twenty (20) days, as is reasonably necessary to cure the failure so long as: (a) Tenant commences to cure the failure within the initial twenty (20) day period, and (b) Tenant diligently pursues a course of action that will cure the failure and bring Tenant back into compliance with this Lease. However, if Tenant's failure to comply creates a hazardous condition, the failure must be cured immediately upon notice to Tenant. In addition, if Landlord provides Tenant with notice of Tenant's failure to comply with the same specific term, provision or covenant of this Lease on more than two (2) occasions during any period of twelve (12) consecutive months, Tenant's subsequent violation of the same term, provision or covenant shall, at Landlord's option, be an incurable event of default by Tenant.

SAMPLE 2