

NO. CV1813081

LIBERTY COUNTY, TEXAS	§	IN THE DISTRICT COURT
Plaintiff,	§	
	§	
and the	§	
	§	
STATE OF TEXAS,	§	
acting by and through the Texas	§	
Commission on Environmental Quality,	§	<u>253RD</u> JUDICIAL DISTRICT
a Necessary and Indispensable Party	§	
	§	
V.	§	
	§	
ARKEMA, INC.	§	
Defendant	§	OF LIBERTY COUNTY, TEXAS

PLAINTIFF LIBERTY COUNTY, TEXAS'
ORIGINAL PETITION, REQUEST FOR DISCLOSURE, AND
APPLICATION FOR TEMPORARY AND PERMANENT INJUNCTION

TO THE HONORABLE JUDGE OF SAID COURT:

Plaintiff Liberty County, Texas (“Liberty County”) files its Original Petition, Request for Disclosure, and Application for Temporary and Permanent Injunction against Defendant Arkema, Inc. (“Arkema”) and shows the Court the following:

DISCOVERY

1. Liberty County will conduct discovery under Level 3 of Texas Rule of Civil Procedure 190.4.

2. Pursuant to Texas Rule of Civil Procedure 194, Liberty County requests that Arkema disclose, within 50 days of the service of this petition and request, the information or material described in Rule 194(a) - (l).

RULE 47(c) DISCLOSURE

3. Liberty County seeks monetary relief in excess of \$1,000,000, plus reasonable attorney’s fees, reasonable investigative costs incurred, court costs, and injunctive relief. The

monetary relief requested is within the jurisdictional limits of this court. In addition, Liberty County seeks a temporary and permanent injunction requiring Arkema to clean up to contamination in Liberty County that it caused, suffered, allowed, or permitted.

PARTIES

4. Plaintiff Liberty County, Texas, is a political subdivision of the State of Texas and is authorized to bring this action by virtue of the authority granted under Texas Water Code §7.351.¹

5. The State of Texas, acting through the Texas Commission on Environmental Quality (“TCEQ”), is a necessary and indispensable party to this suit.²

6. Defendant Arkema, Inc. is a Pennsylvania corporation which owns and operates a chemical manufacturing plant at 18000 Crosby Eastgate Road, Crosby, Texas 77532. It may be served with citation by serving its Registered Agent, Corporation Service Company, at 211 East 7th Street, Suite 620, Austin, Texas 77701, or wherever it may be found.

JURISDICTION AND VENUE

7. This Court has subject matter jurisdiction over this case pursuant to Texas Water Code §7.351.

8. Venue is proper in Liberty County under Texas Water Code §7.105(c).

9. Liberty County has standing to bring this suit under §7.351(a) of the Texas Water Code.

¹ Although this lawsuit is brought to enforce the Texas Clean Air Act, the Texas Solid Waste Disposal Act, the Texas Water Code, and associated rules and regulations, the Texas Water Code contains the enforcement provisions.

² TEX. WATER CODE § 7.353.

STATEMENT OF FACTS

10. Arkema owns and operates a plant that manufactures liquid organic peroxides at 18000 Crosby Eastgate Road, Crosby, Texas 77532 (the “Site”). Among the products that Arkema manufactures at the Site is a category of organic peroxides that have a self-accelerating decomposition temperature (“SADT”), which is the lowest temperature at which the product will begin a chemical decomposition process that leads to rapid burning. Products with a SADT must be refrigerated to temperatures lower than their SADT.

11. On August 25, 2017, Hurricane Harvey made landfall in Texas. For the next several days, the storm dropped over 50 inches of rain on parts of the Houston area, in line with weather forecasts from the previous week predicting massive rainfall. The region saw widespread flooding, and among the properties that flooded was the Arkema Site. Rainwater accumulated in two wastewater tanks at the Site until the tanks overflowed into their containment dikes, which subsequently also exceeded their capacity. The wastewater contents thus mingled with floodwaters on the rest of the property, contaminating water in Liberty County.

12. The tank overflows also resulted in unpermitted air releases, contaminating the air in Liberty County. Records show that from August 29, 2017, through August 31, 2017, Arkema emitted thousands of pounds of chemicals without authorization. These included releases of ethylbenzene, mineral spirit, naphtha, naphthalene, organic peroxide, 1,2,4-trimethylbenzene, tert-butyl alcohol, and unspecified volatile organic compounds.

13. Also as a result of the flooding, Arkema’s primary and backup power systems went offline on August 27, 2017. Arkema personnel moved liquid organic peroxides into eight refrigerated trailers, which also flooded and ceased cooling. Without refrigeration, the temperature in the trailers began to rise toward the organic peroxides’ SADT. On August 30, 2017, fire broke

out at the Arkema Site. The fire continued through at least August 31, 2017. The fire created black smoke, which caused nausea, vomiting, and difficulty breathing in those exposed. Records show that Arkema emitted thousands of pounds of chemicals without authorization through the August 30, 2017, and August 31, 2017, contaminating the air in Liberty County. These included releases of 2-ethylhexanol, acetone, acetophenone, carbon monoxide, ethane, nitrogen dioxide, nonane, nonene, particulate matter, sulfur dioxide, and unspecified volatile organic compounds.

14. In addition, on May 10, 2011, Arkema emitted at least 1,600 pounds of isobutylene, which was far in excess of its permitted 100 pounds, contaminating the air in Liberty County.

CAUSES OF ACTION

15. Under its authority to enforce environmental laws and rules pursuant to Texas Water Code §7.351(a), Liberty County sues Arkema for civil penalties for violations of the Texas Clean Air Act, the Texas Water Code, the Texas Health and Safety Code, and the rules issued pursuant to each statute.

16. Liberty County is not seeking civil penalties for any violation that took place on or after September 1, 2017.

First Cause of Action: Texas Clean Air Act Violations

17. The Texas Clean Air Act is found in Chapter 382 of the Texas Health and Safety Code. The purpose of the Texas Clean Air Act is to safeguard the state's air resources from pollution by controlling or abating air pollution and emissions of air contaminants, consistent with the protection of public health, general welfare, and physical property, including the esthetic enjoyment of air resources by the public and the maintenance of adequate visibility.³

³ TEX. HEALTH & SAFETY CODE § 382.002.

18. The Texas Clean Air Act authorizes the TCEQ to adopt rules to carry out the intent and purposes of the Act.⁴ The TCEQ has promulgated rules based on that authority, found in chapters 101-122 of Title 30 of the Texas Administrative Code.

19. Texas Health and Safety Code § 382.003 states:

“Air contaminant” means particulate matter, radioactive material, dust, fumes, gas, mist, smoke, vapor, or odor, including any combination of those items, produced by processes other than natural.⁵

20. Arkema has violated Texas Health and Safety Code §§ 382.085(a) and (b).

a. Under Texas Health and Safety Code § 382.085(a), it is a violation to “cause, suffer, allow, or permit the emission of any air contaminant or the performance of any activity that causes or contributes to, or that will cause or contribute to, air pollution.”⁶

b. Under Texas Health and Safety Code § 382.085(b), it is a violation to “cause, suffer, allow, or permit the emission of any air contaminant or the performance of any activity in violation of this chapter or of any commission rule or order.”⁷

21. Arkema has engaged in acts and practices which are unlawful under Texas Health and Safety Code §§ 382.085(a) and (b). Arkema has caused, suffered, allowed or permitted the emission of air contaminants at the Site that caused or contributed to pollution. Arkema also

⁴ TEX. HEALTH & SAFETY CODE § 382.017.

⁵ TEX. HEALTH & SAFETY CODE § 382.003.

⁶ TEX. HEALTH & SAFETY CODE § 382.085(a).

⁷ TEX. HEALTH & SAFETY CODE § 382.085(b).

caused, suffered, allowed or permitted the emission of air contaminants at the Site in violation of Chapter 382 of the Texas Health and Safety Code and TCEQ rules.

22. Arkema has violated TCEQ Rules 30 TAC §§ 101.4 and 111.201.

a. Under 30 TAC § 101.4, it is a violation to “discharge from any source whatsoever one or more air contaminants or combinations thereof, in such concentration and of such duration as are or may tend to be injurious to or to adversely affect human health or welfare, animal life, vegetation, or property, or as to interfere with the normal use and enjoyment of animal life, vegetation, or property.”⁸

b. Under 30 TAC § 111.201, it is a violation to “cause, suffer, allow, or permit any outdoor burning⁹ within the State of Texas, except as provided by this subchapter or by orders or permits of the commission.”¹⁰

23. Arkema has engaged in acts and practices which are unlawful under 30 TAC §§ 101.4 and 111.201. Arkema has discharged air contaminants that are known to adversely affect human health at the Site. Arkema has discharged air contaminants that cause or have a tendency to cause a traffic hazard or an interference with normal road use at the Site. Arkema has caused, suffered, allowed, or permitted unauthorized outdoor burning at the Site.

⁸ 30 TAC § 101.4.

⁹ “Outdoor burning” means any fire or smoke-producing process that is not conducted in a combustion unit. 30 TAC § 101.1(75). “Combustion unit” means any boiler plant, furnace, incinerator, flare, engine, or other device or system used to oxidize solid, liquid, or gaseous fuels, but excluding motors and engines used in propelling land, water, and air vehicles. 30 TAC § 101.1(13).

¹⁰ 30 TAC § 111.201.

Second Cause of Action: Texas Water Code Violations

24. Texas Water Code § 26.121(a) provides that that “[e]xcept as authorized by the commission, no person may: (1) discharge sewage, municipal waste, recreational waste, agricultural waste, or industrial waste into or adjacent to any water in the state; (2) discharge other waste into or adjacent to any water in the state which in itself or in conjunction with any other discharge or activity causes, continues to cause, or will cause pollution of any of the water in the state, unless the discharge complies with a person’s: (A) certified water quality management plan approved by the State Soil and Water Conservation Board as provided by Section 201.026, Agriculture Code; or (B) water pollution and abatement plan approved by the commission; or (3) commit any other act or engage in any other activity which in itself or in conjunction with any other discharge or activity causes, continues to cause, or will cause pollution of any of the water in the state....” Arkema violated Texas Water Code § 26.121(a) when it caused pollution of the water of the state.

25. Texas Water Code § 26.121(c) provides that “[n]o person may cause, suffer, allow, or permit the discharge of any waste or the performance of any activity in violation of this chapter or of any permit or order of the commission.” Arkema violated Texas Water Code § 26.121(c) when it discharged waste into the water of the state.

Third Cause of Action: Texas Health and Safety Code Violations

26. Chapter 361 of the Texas Health and Safety Code contains the Texas Solid Waste Disposal Act. The purpose of the Texas Solid Waste Disposal Act is to safeguard the health, welfare, and physical property of the people and to protect the environment by controlling the management of solid waste.¹¹ Under Texas Health and Safety Code § 361.024, the TCEQ may

¹¹ TEX. HEALTH & SAFETY CODE § 361.002.

adopt rules consistent with the Texas Solid Waste Disposal Act. These rules are found in Title 30 of the Texas Administrative Code.

27. Arkema has violated TCEQ Rules 30 TAC § 335.2(a) and 30 TAC § 335.4.
- a. Under 30 TAC § 335.2(a), it is a violation to “cause, suffer, allow, or permit any activity of storage, processing, or disposal¹² of any industrial solid waste¹³ or municipal hazardous waste unless such activity is authorized by a permit, amended permit, or other authorization from the commission.”¹⁴
 - b. Under 30 TAC § 335.4, it is a violation to “cause, suffer, allow, or permit the collection, handling, storage, processing, or disposal of industrial solid waste or municipal hazardous waste in such a manner so as to cause: (1) the discharge or imminent threat of discharge of industrial solid waste or municipal hazardous waste into or adjacent to the waters in the state without obtaining specific authorization for such a discharge from the Texas Natural Resources Conservation Commission; (2) the creation and maintenance of a nuisance; or (3) the endangerment of public health and welfare.”¹⁵

¹² “Disposal” means the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste (whether containerized or uncontainerized) into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including groundwaters. 30 TAC § 335.1(45).

¹³ “Industrial solid waste” means solid waste resulting from or incidental to any process of industry or manufacturing, or mining or agricultural operation, which may include hazardous waste. 30 TAC § 335.1(80).

¹⁴ 30 TAC § 335.2(a).

¹⁵ 30 TAC § 335.4. Pursuant to 30 TAC § 335.24(h), “industrial solid wastes that are non-hazardous recyclable materials and recyclable materials listed in subsections (b)(4) and (c)(2) of this section remain subject to the requirements of § 335.4.”

28. Arkema has engaged in acts and practices that are unlawful under 30 Texas Administrative Code § 335.2(a). Arkema caused, suffered, allowed or permitted the disposal of industrial solid waste at the Site without a permit or other authorization from the TCEQ.

29. Arkema has engaged in acts and practices that are unlawful under 30 Texas Administrative Code § 335.4. Arkema has caused, suffered, allowed or permitted the disposal of industrial solid waste in such a manner as to cause the discharge of that waste into or adjacent to the water in the state without the proper authorization; the creation and maintenance of a nuisance; and/or the endangerment of the public health and welfare.

30. Arkema has violated TCEQ Rules 30 TAC § 330.7(a). Under 30 TAC § 330.7(a), it is a violation to “cause, suffer, allow, or permit any activity of storage, processing, removal, or disposal of any solid waste unless such activity is authorized by a permit or other authorization from the commission.” Arkema caused, suffered, allowed or permitted the disposal of solid waste at the Site without a permit or other authorization from the TCEQ, in violation of 30 TAC § 330.7(a).

Fourth Cause of Action: Common Law Nuisance

31. Arkema caused an unreasonable interference with rights common to the Liberty County general public. Arkema, therefore, created a public nuisance.

32. Liberty County seeks damages for Arkema’s public nuisance.

CIVIL PENALTIES

33. A person may not cause, suffer, allow, or permit a violation of a statute within the commission’s jurisdiction or a rule adopted or an order or permit issued under such a statute.¹⁶

¹⁶ TEX. WATER CODE § 7.101.

34. A person or entity that violates any provision of Texas Health and Safety Code Chapter 382, Texas Water Code Chapter 26, Texas Health and Safety Code Chapter 361, or the provisions of the Texas Administrative Code adopted thereunder, is subject to a civil penalty of not less than \$50 nor more than \$25,000 for each day of each violation.¹⁷ Each day of a continuing violation is a separate violation.¹⁸ Each person who commits a violation is subject to a separate civil penalty within the statutory range for each day that person violated the applicable statute or rule.

35. In addition, pursuant to Texas Water Code § 7.108, Liberty County asks this Court to award Liberty County its attorney's fees, court costs and investigative costs incurred in relation to this proceeding. If there is an appeal to the Court of Appeals or to the Supreme Court of Texas, Liberty County seeks its additional attorney's fees and court costs on appeal.

**APPLICATION FOR TEMPORARY
RESTRAINING ORDER, TEMPORARY AND PERMANENT INJUNCTION**

36. Liberty County requests this Court to issue a Temporary Restraining Order, a Temporary Injunction and a Permanent Injunction requiring Arkema to clean up to contamination in Liberty County that it caused, suffered, allowed, or permitted. Texas Water Code § 7.351(a) authorizes Liberty County to seek injunctive relief for the same violations of the Health and Safety Code and TCEQ Rules.

37. Liberty County does not have an adequate remedy at law. The injury to Liberty County if Arkema continues the conduct described above would outweigh any injury the restraining order and injunction might cause Arkema, and issuance of the injunction would not disserve the public interest.

¹⁷ TEX. WATER CODE § 7.102.

¹⁸ *Id.*

38. All conditions precedent have been performed or have occurred.

PRAYER

39. For these reasons, Liberty County prays for the following:

- a. That this Court issue a temporary restraining order and temporary injunction against Arkema as requested herein by Liberty County;
- b. That upon final trial in this cause, the Court grant a money judgment against Arkema and in favor of Liberty County for the civil penalties and damages as permitted by law as set forth above;
- c. That upon final trial in this cause, the Court grant a permanent injunction as requested herein by Liberty County;
- d. That upon final trial in this cause, the Court grant Liberty County its reasonable attorney's fees, and reimbursement for court costs and investigative fees in connection with this action and any appeal;
- e. That upon final trial in this cause the Court grant Liberty County pre-judgment and post-judgment interest as allowed by law; and
- f. That the Court grant such other and further relief to which Liberty County may be justly entitled.

Respectfully submitted,

/s/ Matthew Poston

Matthew Poston
Texas Bar No. 24056157
Liberty County Attorney
1923 Sam Houston, Suite 202
Liberty, Texas 77575
Tel. (936) 336-4650
Fax. (936) 336-4658
countyattorney@co.liberty.tx.us

BAKER • WOTRING LLP

/s/ Earnest W. Wotring

Earnest W. Wotring
State Bar No. 22012400
John Muir
State Bar No. 14630477
David George
State Bar No. 00793212
700 JPMorgan Chase Tower
600 Travis
Houston, Texas 77002
Tel. (713) 980-1700
Fax. (713) 980-1701
ewotring@bakerwotring.com
jmuir@bakerwotring.com
dgeorge@bakerwotring.com

**ABRAHAM, WATKINS, NICHOLS,
SORRELS, AGOSTO & AZIZ**

/s/ Muhammad S. Aziz

Muhammad S. Aziz
Texas Bar No. 24043538
800 Commerce Street
Houston, Texas 77002
Telephone: (713) 222-7211
Facsimile: (713) 225-0827
maziz@abrahamwatkins.com

**COUNSEL FOR PLAINTIFF
LIBERTY COUNTY, TEXAS**