

***“First, they came for...”***

The North Carolina Legislature’s Assault on  
the Public ©

*Blue Ridge Environmental Defense League*

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Lou Zeller  
Therese Vick

January 2012

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## Introduction

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German clergyman Martin Niemöller's famous quote<sup>1</sup> can be found in various versions and is hard to pin down; however his meaning is crystal clear: if we as a society refuse to address oppression of the "other", who will be left to speak for us when we become "other?" This has seldom been clearer than demonstrated by recent private meetings between the North Carolina Division of Air Quality, legislative staff, and industry. Although not all of the documents have been provided, what is clear is that deals are being made outside of public view, in order to benefit certain industries. Research has shown repeatedly that polluting industry locates in areas that are less affluent who have little political power. Thus, it stands to reason that the current deregulatory frenzy at the North Carolina State House will not affect those with uptown addresses. Communities of Color and the poor will continue to bear the costs of stripping regulations designed to protect public health.

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<sup>1</sup> <http://www.history.ucsb.edu/faculty/marcuse/niem.htm>

# The History of the North Carolina Air Toxics Program

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Louis Zeller, Science Director

In the 1980's North Carolina established regulations for the reduction of toxic air pollutants—chemicals which are irritants, acute or chronic toxicants, or carcinogens. The change was prompted by rising levels of public concern about pollution and health. The NC Environmental Management Commission was empowered by state law and executive order to control toxic air pollution.<sup>2</sup> This authority flows from North Carolina policy which states that “water and air resources of the State belong to the people” and that “Standards of water and air purity shall be designed to protect human health, to prevent injury to plant and animal life, to prevent damage to public and private property, to insure the continued enjoyment of the natural attractions of the State, to encourage the expansion of employment opportunities, to provide a permanent foundation for healthy industrial development and to secure for the people of North Carolina, now and in the future, the beneficial uses of these great natural resources.”<sup>3</sup>

In 1985, the NC Division of Environmental Management<sup>4</sup> began to develop a program to reduce toxic air pollutants. At the request of DEM, the NC Academy of Sciences developed a method

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<sup>2</sup> NC General Statute § 143-215.107, Air quality standards and classifications

<sup>3</sup> Article 21, Water and Air Resources, Part 1. Organization and Powers Generally; Control of Pollution, § 143-211, Declaration of public policy

<sup>4</sup> The NC Division of Environmental Management was later reorganized to become the NC Department of Environment and Natural Resources with divisions for air quality, water quality, etc.

of establishing acceptable ambient levels of air toxins for the protection of public health. The North Carolina Air Toxics Program evolved from this study. The program's guidelines were based on the categorization of pollutants by toxicity at ambient levels; that is, the actual level in the air we breathe.

The principal requirement of the TAP regulation was that facilities “shall not emit any listed toxic air pollutant in such quantities that may cause or contribute beyond the premises (adjacent property boundary) to any significant ambient concentration that may adversely affect human health.”<sup>5</sup> This law included a list of regulated pollutants and specific AALs, or acceptable ambient levels, for periods of 1-hour, 24-hour or annual averaging periods.

The NC Academy of Sciences recommended a combined technology and risk assessment based system for setting each toxic air pollutant level. For known carcinogens, the level was an additional risk of one-in-a-million, for probable carcinogens, one in 100 thousand. For irritants and toxicants, the level was no-observed-effects-levels.

In 1988, North Carolina commissioned a study of the economic impacts of state regulations limiting the emission of toxic air pollutants.<sup>6</sup> The study selected 325 of the 3000 permitted air pollution sources across the state and found that 26% emitted air toxics above trace amounts but that only 3% would experience significant economic impacts if required to meet the new limits.

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<sup>5</sup> NC regulation 15A NCAC 2D.1104, “Toxic Air Pollutant Guidelines.” The current language is identical to that in the Radian Corporation report cited in footnote 2.

<sup>6</sup> *Assessment of the Economic Impacts of North Carolina's Proposed Air Toxics Regulation—Final Report*, Radian Corporation, Research Triangle Park, NC, April 27, 1988

The study was conservative and targeted the most likely sources of toxics for this study; in other words, a smaller percentage of emitters and significant economic impacts would be found overall.

In 1990, the Scientific Advisory Board on Toxic Air Pollutants (SAB) was established. The role of the SAB was to evaluate chemical toxins and recommend AALs based on its analysis of scientific, peer-reviewed health studies.

Under pressure from major industry groups, in 1995 the NC General Assembly directed the Environmental Review Commission, a legislative body, to reevaluate the existing TAP program and to eliminate possible overlap or duplication with the 1990 amendments to Title III of the Clean Air Act which regulates hazardous air pollutants.<sup>7</sup> The federal law sets maximum achievable control technology, or MACT, standards for 187 air toxins, a list which includes all but 21 NC TAPs. However, the toxins regulated by North Carolina but unregulated by the Clean Air Act include irritants, toxicants and carcinogens such as nitric acid, mercury vapor and hexachlorodibenzo-p-dioxin. The ERC's Air Toxics Working Group—with representatives from industry, government, law firms and environmental groups—investigated ways to “reduce the regulatory burden permittees face” in meeting the state standards. In short, industry representatives sought to eliminate state regulation of as many TAPs as possible, whether they were regulated by the federal Clean Air Act or not. But some members of the Working Group held firm, stating:

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<sup>7</sup> NC General Assembly Studies Act of 1995, Part XVIII, Chapter 52, 1995 Session Laws—House Bill 898

“The AALs implemented by the North Carolina Air Toxics Program are specifically designed and established to protect human health. Federal MACT standards, in contrast, merely implement currently available technology in selected industries emitting large quantities of HAPs nationally. The MACT standards are not based upon a measurement of hazardous air pollutant concentration outside the premises of the permittee’s facility, as the North Carolina AALs are.”<sup>8</sup>

The Working Group did recommend altering the process by which AALs are evaluated, with DENR referring chemicals for study, the SAB providing risk assessment and the Environmental Management Commission responsible for risk management. Risk assessment is the measurement of hazard presented by a chemical or physical agent. Risk management is the decision making process for reducing risk to a given level. Over the years the original list of 116 TAPs has been reduced to 97, but the program remains largely intact.

North Carolina’s health-based air toxics rules and the federal MACT are neither duplicative nor equivalent. The Environmental Protection Agency’s method of setting maximum achievable control technologies to reduce toxins does not do what North Carolina’s health-based AAL standards do. Federal regulations do not protect public health as well as North Carolina’s because a pollution source 100 yards away from a community will have a vastly greater impact than the same pollution source 200 yards, 500 yards or 1000 yards away. For this reason, regulating pollution levels strictly by setting technology standards can never provide the same

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<sup>8</sup> *Final Report to the North Carolina Environmental Management Commission, Air Toxics Working Group, A Study Directed by the Environmental Review Commission Pursuant to the Studies Act of 1995*

level of protection as controlling the actual amount of pollution in the air. North Carolina's acceptable ambient levels take into account the distance of smokestacks from property lines and from people's homes.

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# Fast Forward to 2012: A is for Arsenic

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Therese Vick-Community Organizer

“If you poison us, do we not die?”

-Shylock, in William Shakespeare’s *The Merchant of Venice*

Arsenic has been much in the news lately, recently found in eggs, chicken and apple juice. A quick search on Google news turns up dozens of results. However, the arsenic story of most concern to North Carolinians, an example of the assault on North Carolina’s health-based air toxics regulations is not being told. To see a snapshot of what is ahead for North Carolina’s air toxics standards, one has only to look at what has been occurring at the state level regarding this well-known poison and carcinogen; increasingly shown to have alarming endocrine disrupting effects.<sup>9</sup>

On Thursday, October 13 2011, the North Carolina Division of Air Quality (DAQ) published the North Carolina Science Advisory Board’s (SAB) “Draft Risk Assessment for Arsenic and Inorganic Arsenic Compounds” to their website for public comment. The SAB recommends increasing North Carolina’s current acceptable ambient level<sup>10</sup> (AAL) for arsenic “9-fold.”<sup>11</sup> The

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<sup>9</sup> [Dartmouth Toxic Metals Superfund Research Project: Arsenic as an endocrine disruptor-Project leader Joshua W. Hamilton Ph.D. Senior Scientist](#)

<sup>10</sup> Acceptable Ambient Level (AAL) is the ambient concentration of a toxic pollutant at the property boundary. <http://daq.state.nc.us/rules/rules/Q0709.pdf>

<sup>11</sup> [Risk Assessment for Arsenic: Draft for Public Comment](#)

North Carolina Science Advisory Board (SAB) on Toxic air Pollutants “was chartered by the Secretary of the Department of Environment and Natural Resources to make recommendations to the Environmental Management Commission (EMC) to **minimize the potential health hazards resulting from toxic air pollution** [emphasis added].”<sup>12</sup> The charter itself defines this responsibility further:

*Section II. Functions*

*(2) The Board shall have the following duties:*

*(e) To recommend airborne concentrations of toxic air pollutants in a “range of risks” to the Director of the Division of Air Quality and to the Environmental Management Commission (EMC) for regulation that will **minimize adverse health responses in the exposed citizenry** and to advise the EMC of the scientific basis of these recommendations [emphasis added]...*<sup>13</sup>

The SAB is comprised of six members, all with toxicological, epidemiological and/or medical backgrounds. The current members are:

Thomas B. Starr, Ph.D. Chair

Woodhall Stopford, MD, MSPH

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<sup>12</sup> [Science Advisory Board on Toxic Air Pollutants](#)

<sup>13</sup> [Science Advisory Board Charter](#)

Elaina M. Kenyon, Ph.D., DABT

Ivan Rusyn, MD, Ph.D.

Helen Cunny, Ph.D., DABT

David Dorman, DVM, Ph.D., DABVT, DABT

BREDL submitted comments opposing the SAB's recommendation pointing out arsenic's toxic effects as well as asking the question, "What industry (or industries) are behind the impetus" (to change the acceptable ambient level of arsenic).<sup>14</sup> This recommendation was scheduled to be voted on by the Board November 30, 2011 at the 161<sup>st</sup> meeting, which was held by teleconference. Because of BREDL comments, it was decided to postpone the decision until the January 2012 meeting. During the public comment portion of the teleconference BREDL staff person Therese Vick asked where this request initially came from. Dr. Starr answered that the request had come from the North Carolina Division of Air Quality. It was explained that certain areas in North Carolina "routinely exceed the current AAL for arsenic."<sup>15,16</sup> The "2009 Annual Air Toxics Report" states that: "...median arsenic concentrations measured across the state in 2009 exceed the AAL for arsenic by 3–4 times."<sup>17</sup>

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<sup>14</sup> [BREDL Comments Arsenic AAL](#)

<sup>15</sup> From Therese Vick's notes of the 161<sup>st</sup> meeting of the Director's Science Advisory Board, November 30, 2011. The minutes from the meeting have not yet been published.

<sup>16</sup> [One Hundred Fifty-Fourth Meeting of the Science Advisory Board on Toxic Air Pollutants-Proceedings of the October 27, 2010 Teleconference](#)

<sup>17</sup> ["2009 Annual Air Toxics Report" Division of Air Quality Toxics Protection Branch October 2010](#)

This admission was shocking—DAQ was acknowledging that rather than investigating ways to bring these areas into compliance with the current, more protective standard, they were *proposing to change the standard instead*. Even members of the SAB pointed out that the lower bound of the proposed AAL was “coincidentally close to the measured concentrations at monitoring sites around NC.”<sup>18</sup>

### “Even the Cat’s in on it!”

-Mortimer Brewster *Arsenic and Old Lace*

Because of these troubling admissions, BREDL staffer Therese Vick began investigating the history behind the reevaluation. After a review of DAQ documents and several web searches, it became clear that the impetus behind the requested change was likely coming from influences outside of NC DENR. For example, in the “PSD Preliminary Review – modification 300 construction/operation permit (Draft Revision 8, July 2011 – Assistant Secretary)” for Carolinas Cement Company LLC (aka Titan Cement) proposed to be located in Castle Hayne, North Carolina, the modeled arsenic levels are at 30% of the AAL— according to the company’s own modeling and after pollution control. The amount of arsenic potentially emitted into the air of the surrounding community is significant and dangerous. In the Draft Revision, DAQ attempts to diminish the potential concern over these levels by saying “Finally, the Scientific<sup>19</sup> Advisory

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<sup>18</sup> [Comment by Dr. Ivan Rusyn, SAB member, One hundred Sixtieth Meeting of the Science Advisory Board on Toxic Air Pollutants-Proceedings of the October 11, 2011 Teleconference](#)

<sup>19</sup> Historical Note: The “Science Advisory Board” was known as “The Scientific Advisory Board” prior to 2004.

Board is considering adjusting the Arsenic AAL.”<sup>20</sup> As troubling as 30% is, it pales in comparison to the almost 48% of the AAL modeled in an earlier draft.<sup>21</sup>

Industry is certainly following this proposed change very closely, and their relationship with the DAQ is inappropriate at best. Industry admits that sources are having problems meeting the arsenic AAL. Trinity Consultants, a North Carolina environmental consulting firm posted this on their website:

“For a variety of emission source(s), particularly combustion sources, the arsenic AAL has often been problematic in TAP air dispersion modeling. *In some cases, affected facilities have had to improve pollution control systems, increase stack heights or place operational limits to demonstrate compliance with the arsenic AA(L)*[emphasis added].”<sup>22</sup>

At the November 2010 meeting of the SAB, Brendan Davey, DAQ staff from the Asheville Regional Office, remarked that “there are a few combustion sources in the Asheville region that are having difficulty complying with the AAL for arsenic given current regulations”,<sup>23</sup> and that

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<sup>20</sup> [North Carolina Division of Air Quality: PSD Preliminary Review Draft Revision 8 July 2011](#)

<sup>21</sup> “The air toxics modeling indicated that arsenic was at 47.83% of the Significant Ambient Air Concentration (SAAC) at some locations along the facility property line.” [North Carolina Division of Air Quality: PSD Preliminary Review Draft Revision 9 September 2009](#)

<sup>22</sup> [Trinity Consultants News: Increased AAL for Arsenic](#)

<sup>23</sup> In a January 5, 2012 email to Therese Vick, Brendan Davey listed these three companies as exceeding the arsenic AAL: **Blue Ridge Paper in Canton, Jackson Paper Manufacturing Company in Silva, and Zickgraf Hardwood Flooring Company in Franklin**

“the control technology for these emissions is insufficient...”<sup>24</sup>Mr. Davey was speaking of Blue Ridge Paper in Canton, Jackson Paper Manufacturing Company in Silva, and Zickgraf Hardwood Flooring Company in Franklin, NC (See footnote 23). At a later meeting, SAB member Dr. Woodhall Stopford ask why the arsenic AAL was being reviewed. He was told that “DAQ needs to have the arsenic AAL reviewed because ambient concentrations are above the AAL across the state and the DAQ has been tasked by the EMC (Environmental Management Commission) to do a combustion source evaluation because ***boilers have been exempt from Toxics regulations.***”<sup>25</sup> Operating facilities are not the only companies which have an interest in higher arsenic AAL’s. The North Carolina Legislature requires that power companies generate a certain percentage of electricity from poultry manure.<sup>26</sup> Fibrowatt, a company that has been attempting to locate in Sampson County, and Poultry Power, who has proposed a facility in Montgomery County both stand to benefit from a higher limit of arsenic emissions.

The Division of Air Quality performed a “Toxics Emissions Evaluation from Poultry/Turkey Litter.”<sup>27</sup> The modeling DAQ evaluated showed that:

*“The model results provide that the arsenic emissions are the limiting pollutant with*

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<sup>24</sup> [One Hundred Fifty-Fifth Meeting of the Science Advisory Board on Toxic Air Pollutants- Proceedings of the November 17, 2010 Teleconference](#)

<sup>25</sup> Dr. Reginald Jordan, DAQ Toxics Protection Branch [One Hundred Fifty-Sixth Meeting of the Science Advisory Board on Toxic Air Pollutants- Proceedings of the January 26, 2011 Teleconference](#)

<sup>26</sup> ["NC poultry litter-fired generating plants under consideration"](#)

<sup>27</sup> [Agenda Item 13 March 2009](#)

*NC Toxics based on the estimated emissions. For the given plant characteristics, the arsenic emissions resulted in an ambient concentration that is 277% of the AAL [emphasis added].”*

“Look, you can't do things like that! Now, I don't know how I can explain this to you. But, it's not only against the law, its wrong!”

-Mortimer Brewster *Arsenic and Old Lace*

At the November 16, 2011 meeting of the Air Quality Committee of the EMC, DAQ Director Sheila Holman remarked that directed by the Chairs of the Environmental Review Commission, DAQ was meeting with industry looking at the air toxics regulations. The revolving door must be spinning wildly. Meeting attendees included representatives from Duke Energy and the Manufacturers and Chemical Industry Council of North Carolina (MCIC). Former NC DENR employees; George Everett, currently with Duke Power (formerly with MCIC), was the Director of the North Carolina Division of Environmental Management, and Preston Howard, currently with MCIC, was the Director of the Division of Water Quality and a DENR employee for over 20 years.<sup>28</sup> Legislative staff facilitates these meetings. By statute, the meetings can be private, and some documents held confidential. However, information obtained by BREDL tells the tale. On October 26, 2011, DAQ Director Sheila Holman made note of this question:

“How many sources would have exceeded the AAL’s- w/new As AAL?”<sup>29</sup>

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<sup>28</sup> [Preston Howard](#) ,[George Everett](#)

<sup>29</sup> Notes provided to BREDL by the North Carolina Division of Air Quality

While the question is not attributed to any one person, it is indicative of the tone throughout meeting notes and emails; industry is rewriting the rules.

"I couldn't do that. Could you do that? Why can they do it? Who are those guys?"

-Butch Cassidy to the Sundance Kid

Science Advisory Board members are charged with protecting the public health of the people of North Carolina. However, conflicts of interest can occur, and some members of the current Board have their own skeletons. Dr. Thomas Starr is the NC SAB chairman. Dr. Starr has been a paid consultant for Philip Morris<sup>30,31</sup>, a constant critic of the US Environmental Protection Agency's dioxin reassessment<sup>32,33,34,35,36</sup>, and, as recently as 2010, a consultant to the American

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<sup>30</sup> [Health Effects of Exposure to Environmental Tobacco Smoke Appendix B Summary of Public Comments and Responses on the February 1997 Draft- \(California\) Office of Environmental Health Hazard Assessment](#)

<sup>31</sup> [Legacy Tobacco Documents Library- Philip Morris Glossary of Names](#)

<sup>32</sup> [Letter to Dr. Kenneth Olden, Director, National Institute for Environmental Health Sciences, February 12, 1999](#)

<sup>33</sup> [Bo Walhjalt-"A Scientific Journal with Industrial Bias as its Specialty, December 2002"](#)

<sup>34</sup> [Thomas B. Starr Ph.D. "Significant Shortcomings of the U.S. Environmental Protection Agency's Latest Draft Risk Characterization for Dioxin-Like Compounds" June 2001](#)

<sup>35</sup> ["Scientific Debate Continues on Dioxin Risk"](#)

<sup>36</sup> [External Peer Review of Recommended Toxicity Equivalency Factors \(TEF's\) for Human Health Risk Assessments of Dioxin and Dioxin-Like Compounds November 4, 2009](#)

Forest and Paper Association.<sup>37</sup> The American Forest and Paper Association opposes US EPA's boiler regulations.<sup>38</sup> Dr. Starr has also opposed attempts to regulate particulate matter (PM) on behalf of the American Petroleum Institute in testimony before the United States Senate. Dr. Starr ended his testimony with this statement: "Implementation of the new standards could well make things worse rather than better."<sup>39</sup> Dr. Starr is not the only SAB member with interesting connections. Dr. Woodhall Stopford was retained by the Corn Refiners Association to examine claims that mercury was found in products that contained high fructose corn syrup. Dr. Stopford found no evidence of mercury.<sup>40</sup> Dr. Stopford's connection to the CRA was not disclosed at the time his report was released.<sup>41</sup>

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<sup>37</sup> [American Forest and Paper Association re: EPA's Reanalysis of Key Issues Related to Dioxin Toxicity and Response to NAS Comments July 7, 2010](#)

<sup>38</sup> Conference call January 20, 2011 [earthjustice.org](http://earthjustice.org)

<sup>39</sup> [Testimony of Thomas B Starr, Ph.D. Principal, ENVIRON Corporation, Raleigh NC before the Senate Subcommittee on Clean Air, Wetlands, Private Property, and Nuclear Safety](#)

<sup>40</sup> ["Assessment of Test Results for Mercury in High Fructose Corn Syrup"](#)

<sup>41</sup> ["In These Times, January 2011"](#)

## “Everything’s Bigger in Texas”

- Unknown

To support their rationale, the NC SAB is relying heavily on the studies used in a draft report evaluating arsenic health risk by the Texas Commission on Environmental Quality (TCEQ). SAB Chair Dr. Thomas Starr made the recommendation.<sup>42</sup> The TCEQ has come under fire for refusing to allow climate change and human health effects language in a report on Galveston Bay,<sup>43</sup> is in a “to the death” battle with the US Environmental Protection Agency (EPA) over the State Implementation Plan (SIP),<sup>44</sup> and Texas facilities are high on EPA’s national “Watch List” of high-priority polluters whose violations are not being enforced properly by state regulatory agencies.<sup>45</sup>

A controversial figure, TCEQ’s chief toxicologist, Dr. Michael Honeycutt is listed as an author on the arsenic report.<sup>46</sup> Dr. Honeycutt has long been a critic of the US EPA, not because the federal agency isn’t strict enough; indeed, Dr. Honeycutt believes just the opposite- that federal

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<sup>42</sup> [One Hundred Fifty-Seventh Meeting of the Science Advisory Board on Toxic Air Pollutants- Proceedings of the March 30, 2011 Teleconference](#)

<sup>43</sup> [Censored scientist John Anderson on how to restore sound policy-making to Texas and \(maybe\) save the Texas coast](#)

<sup>44</sup> [Correspondence between EPA and TCEQ regarding Texas Air Permitting Program](#)

<sup>45</sup> ["Poisoned Places: Toxic Air, Neglected Communities"](#)

<sup>46</sup> ["TCEQ-At it Again"](#)

standards are too stringent. Two glaring examples: Honeycutt testified against tougher ozone and particulate matter standards in 2011,<sup>47</sup> and discounts EPA's concern about the developmental effects of mercury, stating that, "On the contrary, the Japanese population consumes ten times more fish than the US population but only shows positive outcomes; they have lower rates of coronary heart disease and high IQ scores." <sup>48</sup>

"Arsenic is edible. Only once."

-Unknown

North Carolina's air toxics program is in danger, and forces outside of the public interest are pushing the NC Division of Air Quality to "decriminalize" arsenic poisoning. Communities that will be living with increased toxic pollution have not been given a seat at the table where their rights to clean air are being cut away. In order to bring industry into compliance and protect corporate profits, the Science Advisory Board was implicitly tasked with finding justification for a decision already made—to increase the acceptable ambient level for arsenic. We can no longer stomach this manipulation of science to benefit corporate greed.

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<sup>47</sup> ["Texas regulator critical of EPA"](#)

<sup>48</sup> [Comments by Michael Honeycutt, Ph.D., with the Texas Commission on Environmental Quality Regarding the Primary National Ambient Air Standards for Ozone and PM, and the Utility Mact](#)

