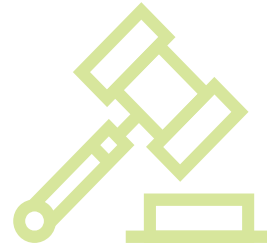

Civil Environmental Enforcement in Texas

Texas Environmental Superconference

August 1, 2024



Approximately 30 attorneys overall

Enforcement
Team

Defense & Natural
Resources Team

Utilities
Team

Two Enforcement Paths Codified in Chapter 7 of the Texas Water Code

Subchapter C Administrative Enforcement

- Expedited actions where TCEQ Commissioners are final decisionmakers
- Results in administrative orders that can assess administrative penalties and corrective action
- Most TCEQ enforcement actions are handled administratively

Subchapter D Civil Enforcement

- An escalation from the administrative process
- District Court lawsuit seeking civil penalties and injunctive relief
- Factfinder is the decisionmaker



- TCEQ granted broad authority and discretion to refer any violation to the Texas Attorney General (OAG) to bring suit “in the name of the state” for civil penalties and or injunctive relief. TWC § 7.105(a)
- TWC § 7.105(b) lists scenarios where TCEQ referral to OAG is mandatory
- OAG does not have any independent enforcement authority apart from TCEQ

- Travis County District Court granted venue (or where violation took place)
- TWC § 7.101: “no person may, cause, suffer, allow, or permit” a violation
- TWC § 7.102: factfinder **must** assess a civil penalty no less than \$50, nor no greater than \$25,000 for each day of each violation.
 - Judge or jury decides ultimate penalty within the statutory range
 - Each continuing day of each violation is a separate violation
 - Penalties within the statutory range are mandatory, not discretionary. *State v. City of Greenville*, 726 S.W.2d 162, 170 (Tex. App.—Dallas 1986, writ ref’d n.r.e.)
- TWC § 7.108: the State is entitled to recover its reasonable attorney’s fees

Key Differences: Administrative Penalties v. Civil Penalties

Administrative Penalties

- Discretionary, *may assess* \$0-\$25,000 per day (or up to \$40,000 if certain statutory factors met).
- Must consider statutory factors
- Calculated by TCEQ using Penalty Policy
- May be eligible for a SEP
- Settlement through an AO or Field Citation

Civil Penalties

- Mandatory, \$50-\$25,000 per day per violation
- Statutory factors do not apply
- Penalty Policy does not apply
- If adjudicated, penalty is decided by the factfinder
- SEPs are not available
- Settlement must be in form of AFJ

- TWC § 7.032: court may enjoin a violation or threat of violation and may grant any prohibitory or mandatory injunction
- Very powerful tool:
 - Common law requirements of showing imminent threat, irreparable injury, and other equitable considerations do not apply to a statutory injunction to enforce state law. *8100 North Freeway Ltd. v. City of Houston*, 329 S.W.3d 858, 861 (Tex. App.—Houston [14th Dist.] 2010, no pet.).
 - There is no balancing of the equities—if a violation is found, the court has a duty to enjoin the violation. *State v. Tex. Pet Foods, Inc.*, 591 S.W.2d 800, 805 (Tex. 1979).
 - “Status quo” is not a course of conduct that is in violation of the law and “courts are not required to bide their time and wait until parties see fit to discontinue their unlawful acts.” *Magnolia Petroleum Co. v. State*, 218 S.W.2d 855, 860 (Tex. Civ. App.—Austin 1949, writ ref’d n.r.e.)

- Must be in the form of an Agreed Final Judgment
- Three main components: civil penalties, injunctive relief, and attorney's fees
- OAG policy to not agree to any releases
- Notice must be published in Texas Register for 30-day comment period
- Requires final approval by the Attorney General before being presented to the Court
- SEPs are not available

- Affirmative Defenses under 30 Tex. Admin. Code § 101.222 for non-excessive emissions events
- Act of God under Tex. Water Code § 7.251 and 30 Tex. Admin. Code § 70.7
- Other defenses under Subchapter F of the Water Code:
 - Nuisance or trespass for greenhouse gas emissions
 - Solid waste violations caused by a third-party
 - Violation due to compliance with OSHA standards
 - Prosecution of endangerment and used oil offenses

Contempt

- Disobedience of an injunction may be punished by the court...as a contempt... [the court] may commit such person to jail without bail until he purges himself of such contempt. Tex. R. Civ. P. 692.
- The punishment for contempt of a court other than a justice court or municipal court is a fine of not more than \$500 or confinement in the county jail for not more than six months, or both such a fine and confinement in jail. Tex. Gov't Code § 21.002(b).



Corporate Officer Liability

- If corporate officer personally participated in the conduct that violates the statute, that individually may be held personally liable. *State v. Morello*, 547 S.W.3d 881, 888 (Tex. 2018).
- A corporate agent that has knowledge of an injunction directed against a corporation, and that personally participates in or encourages violations of the injunction, may be held individually in contempt of court. *Ex parte Chambers*, 898 S.W.2d 257, 260 (Tex. 1995).



- Subchapter H, Ch. 7 of TWC
 - TWC § 7.351: Local gov't can institute civil suit under Subchapter D “in the same manner as the [TCEQ]” by its own attorney for civil penalties or injunctive relief.
 - TWC § 7.353: the TCEQ is a statutory “necessary and indispensable party”
 - Violation must occur within the local gov't's territorial jurisdiction
 - Local gov't is not entitled to its attorney's fees
- Local gov't must first obtain authorization from its governing body.
- Division of Penalty:
 - First \$4.3 million recovered is divided equally between the State and the local gov't that brought the suit
 - Anything in excess of \$4.3 million goes solely to the State

- TWC § 7.3511 provides TCEQ and OAG a statutory 90-day first right of refusal to bring an enforcement action.
- TWC § 7.359 requires the factfinder to consider the required statutory factors for administrative enforcement.
- TWC § 7.360 provides a 5-year SoL against local gov't enforcement for violations that were subject to a TCEQ NOE or otherwise disclosed.
- Tex. Gov't Code § 2254.110 requires that contingency contracts be approved by OAG.

- Contact your attorney as soon as NOE is issued
- Be responsive and communicative
- Be willing and prepared to share measures you have taken to address the underlying issues
- Be aware of the penalty range pled in the petition and do not look to TCEQ administrative orders or the Penalty Policy for guidance
- If temporary injunction pursued, attempt to negotiate an agreed temporary injunction

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Thank you!



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