

Civil Environmental Enforcement in the State of Texas
Environmental Superconference 2024
David A. Terry, Counsel
Hunton Andrews Kurth LLP

This article provides an overview of the civil environmental enforcement process in the State of Texas. In Texas, the Texas Commission on Environmental Quality (“TCEQ”) is the chief environmental regulatory agency for the State. This article will examine the process by which TCEQ refers enforcement matters to the Office of the Attorney General of Texas (“OAG”) for civil enforcement in state district court as well as the relief the Agency can pursue in the civil context. In such instances, a defendant will be dealing with the TCEQ by and through its attorneys at OAG.

The article will lay out the relevant statutes and caselaw when dealing with an enforcement action that has been referred to the Texas Attorney General’s Office, as well as provide some practical tips and things to avoid when dealing with OAG and TCEQ on civil enforcement matters.

I. Two Enforcement Paths: Administrative vs. Civil

To best understand how the civil enforcement process works, it is important to note the differences between the two enforcement paths available to the TCEQ. The enforcement mechanisms available to the TCEQ are codified under Chapter 7 of the Texas Water Code. Subchapter C, Chapter 7 of the Texas Water Code (“Subchapter C”) pertains to administrative enforcement proceedings. Subchapter D, Chapter 7 of the Texas Water Code (“Subchapter D”) specifies the process for civil enforcement. When TCEQ’s Enforcement Division receives an enforcement referral from one of its regional offices or program divisions, it has wide latitude to direct the case through the administrative process under Subchapter C or for civil enforcement under Subchapter D. Which enforcement path the TCEQ routes a matter through has major implications for a respondent or defendant.

A. Administrative Enforcement under Subchapter C

The vast majority of enforcement actions initiated by the TCEQ are handled administratively under Subchapter C. Administrative enforcement actions are expedited proceedings that are handled at the Agency level. Through Subchapter C, the TCEQ is authorized to seek and assess administrative penalties and corrective action against a respondent alleged to have violated an environmental statute or regulation within TCEQ’s jurisdiction. If a respondent wishes to agreeably resolve the matter with the TCEQ, the respondent has the option to enter into an agreed order provided to it by either the Enforcement Division or Litigation Division of the TCEQ. The agreed order is then approved by the TCEQ through an open meeting referred to as the Commissioner’s Agenda.

Administrative penalties are assessed under Texas Water Code section 7.051, which provides that the TCEQ *may* assess an administrative penalty against a respondent for violating an environmental statute or regulation. Absent the limited scenarios provided in Texas Water Code section 7.052(c), the TCEQ may assess an administrative penalty of up to \$25,000 per day per

violation. Tex. Water Code § 7.052. The TCEQ is also required to consider statutory factors codified in Texas Water Code section 7.053.

Administrative penalties are calculated by the Enforcement Division of the TCEQ. In order to calculate penalties consistently, as well as to formulate a process to consider the requisite statutory factors located in section 7.053, the TCEQ has developed a penalty policy to aid in the calculation of administrative penalties. The TCEQ Penalty Policy applies a formulistic approach to calculate administrative penalties, and TCEQ has developed penalty calculation worksheets based on the policy that, more or less, make the penalty calculation somewhat automatic upon entering the data into the worksheets.

Additionally, in administrative enforcement, a party entering into an agreed resolution of a matter may be eligible to undertake a Supplemental Environmental Project. Tex. Water Code § 7.067. Under such scenarios, a party may contribute a portion of the assessed administrative penalty to an environmentally beneficial project approved by the TCEQ. *Id.*

If a respondent chooses to challenge the enforcement matter, the penalty calculated by the TCEQ, and/or the corrective action sought, the matter will be litigated in an administrative proceeding before the State Office of Administrative Hearings (“SOAH”). The proceeding, referred to as an “evidentiary hearing,” functions much like a bench trial, with an administrative law judge (“ALJ”) presiding and the TCEQ’s Litigation Division prosecuting the enforcement matter. The ALJ will issue a decision on the matter in the form of a Proposal for Decision, which is then presented to the TCEQ Commissioners at a Commissioner’s Agenda meeting. The TCEQ Commissioners have discretion to adopt, modify, or decline the ALJ’s Proposal for Decision as they see fit, and their decision will be memorialized in a Final Commissioner’s Order.

B. Civil Enforcement under Subchapter D

Civil enforcement is viewed as an escalation from the administrative process. The TCEQ may request OAG to file a civil lawsuit against an alleged violator of environmental laws and regulations. Tex. Water Cod § 7.105. When initiating a civil enforcement matter, OAG files a lawsuit on behalf of the TCEQ in the name of the State and may seek civil penalties and injunctive relief at TCEQ’s request. *Id.* Additionally, OAG is entitled to its reasonable attorney’s fees in prosecuting the matter. Tex. Water Code § 7.108.

The Texas Water Code grants the State venue in Travis County District Court or the district court of the county where the alleged violation took place. Tex. Water Code § 7.105(c). However, in practice, OAG’s default preference is to file the lawsuit in Travis County. Once filed, the civil enforcement lawsuit proceeds as any civil lawsuit, with the TCEQ, represented by OAG, in the plaintiff’s chair and the alleged violator sitting as defendant. Further, the lawsuit is subject to the Texas Rules of Civil Procedure as well as the local rules of the district court.

The TCEQ Penalty Policy does not apply to civil enforcement actions, nor does the TCEQ “calculate” civil penalties. Pursuant to Tex. Water Code § 7.102, it is the *factfinder*—i.e., the judge or jury, depending on whether it is a bench trial or jury trial—who is the ultimate decisionmaker in civil proceedings and, if a violation is found, the factfinder *must* assess a civil penalty of at least \$50 per day, up to \$25,000 per day for each day of each violation. Penalties in the \$50 to \$25,000

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.).

Any settlement of a civil enforcement action with TCEQ is negotiated through its attorneys at OAG and must be in the form of an agreed final judgment. While the Attorney General of Texas is given statutory authority of final approval of a settlement offer, in practice, it is the TCEQ as the client-agency that will authorize any settlement amount, and any final settlement agreement presented to the Attorney General of Texas will have already been approved by the TCEQ. *See* Tex. Water Code § 7.110(c). Once an agreement is reached and approved by TCEQ and OAG executive management, notice of the settlement agreement is published in the Texas Register for a 30-day comment period. Only after the 30-day comment period is extinguished may the agreed final judgment be presented to the court for entering. Tex. Water Code § 7.110(a). Accordingly, it is the court that has true final approval of any agreed final judgment negotiated on behalf of the TCEQ. Further, Supplemental Environmental Projects are not available for civil settlements.

C. Key Differences between Administrative and Civil Enforcement

The below list highlights the key differences between the administrative and civil processes when approaching a civil enforcement matter:

- In an administrative proceeding, the TCEQ Commissioners are the final decisionmakers. In the civil context, the factfinder, i.e., the judge or jury, has ultimate decision-making authority.
- While administrative penalties are discretionary, civil penalties are mandatory and must be assessed within the statutorily prescribed penalty range.
- OAG is entitled to recoup its reasonable attorney's fees in civil enforcement matters.
- The TCEQ Penalty Policy does not apply to civil penalties, nor do the statutory factors prescribed in Tex. Water Code § 7.053. There is no penalty policy for civil enforcement matters and, in an adjudicative proceeding, the factfinder may consider any presented facts it deems relevant.
- While TCEQ authorizes settlement authority in the civil context, any settlement agreement is subject to the approval of the Attorney General of Texas and it is the court that has ultimate and final approval of any agreed final judgment.
- Supplemental Environmental Projects are not applicable or available in civil enforcement matters.

II. Referral to OAG and Post-referral Relationship with TCEQ

Civil enforcement referrals are governed by Texas Water Code section 7.105. Under Texas Water Code section 7.105(b), the Legislature prescribes a list of situations where TCEQ referral to OAG for civil enforcement is mandatory. However, a matter that meets the requirement for

mandatory referral to OAG for civil enforcement may be handled administratively through Subchapter C upon agreement between OAG and TCEQ. Tex. Water Code § 7.106.

In addition to mandatory referrals, TCEQ is granted unbridled discretion to refer any violation. Texas Water Code section 7.105(a) states: “[o]n the request of the [TCEQ], the attorney general *shall* institute a suit” for civil penalty and/or injunctive relief.” (emphasis added). As illustrated by the mandatory language contained in TCEQ’s civil referral statute, a true attorney-client relationship exists between TCEQ and OAG, where OAG derives its prosecutorial authority from TCEQ. As it relates to environmental enforcement, it is TCEQ, not OAG, which holds ultimate enforcement discretion.

Accordingly, when approaching a civil enforcement matter from the defense side, it is important to recognize the separate roles of OAG and TCEQ as being a relationship between an attorney and its client. While the negotiation of a civil enforcement matter will be by and through OAG, both prosecutorial and settlement authority stem from TCEQ, and it is ultimately the TCEQ that will authorize the terms of any settlement offer.

III. Injunctive Relief

In the civil context, any corrective or remedial measure to be undertaken will be pursued in the form of an injunction. Texas Water Code section 7.032 provides the TCEQ the ability to seek a court order to enjoin any violation *or threat* of violation, and the court may grant any prohibitory or mandatory injunction.

The statutory injunction available to the State in the environmental enforcement context is a very powerful tool. It allows the State to seek a permanent injunction in a final judgment *or* a temporary injunction during the pendency of the suit. 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.). Additionally, if a violation is found, the court has a duty to enjoin the violation and there is no balancing of the equities. *State v. Tex. Pet Foods, Inc.*, 591 S.W.2d 800, 805 (Tex. 1979).

For a temporary injunction, the State can seek all injunctive relief it would be entitled to after a full trial on the merits 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.). As a result, if the facts are warranted, the State can seek a temporary injunction at any time before the final trial on the merits and may obtain all the injunctive relief it is seeking in the lawsuit through a temporary injunction. In such a scenario, an evidentiary hearing is held before the district court that functions much like a bench trial. There are opening and closing statements, and both the State and the defendant may enter evidence and put up witnesses for direct and cross-examination.

If the State is successful in obtaining a temporary injunction, the court will enter an enforceable order against the defendant with proscriptive relief that may require the defendant to do certain actions or prohibit the defendant from certain actions. The temporary injunction will

also include a trial setting date for the final trial on the merits. If the defendant fails to comply with the temporary injunction, the defendant may be subject to a contempt proceeding.

IV. Contempt

A permanent or temporary injunction is an enforceable order that is subject to a contempt action by the State. The Texas Rules of Civil Procedure state: “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. Further, the Texas Government Code provides that the punishment for contempt of court is a fine of not more than \$500 or confinement in the county jail for not more than six months. Tex. Gov’t Code § 21.002(b).

In the context of an environmental enforcement action, it is the TCEQ’s decision whether or not to pursue a contempt action on an injunction. If the TCEQ elects to pursue contempt, it will send a supplemental refer to OAG requesting that OAG file a motion for contempt. After a motion for contempt is filed, OAG will obtain a show cause order from the court which sets a hearing on the motion for the contempt. The show cause order is served on the contemnor and mandates the physical presence of the contemnor at the contempt hearing. If the contemnor fails to show up for the contempt hearing, the State may seek a bench warrant or writ of attachment seeking the contemnor’s arrest. In such a scenario, the contemnor will be arrested by the local constable and forcibly brought into court for the contempt hearing at a later date.

V. Officer/Director Liability

While Texas jurisprudence has not explicitly adopted the responsible corporate actor doctrine in name, it has provided for officer/director liability in instances where an officer/director personally participated in the violation. In *State v. Morello*, 547 S.W.3d 881, 888 (Tex. 2018), the Texas Supreme Court found that, if a corporate officer personally participated in the conduct that violates the statute, that individual may be held personally liable. Similarly, in the context of a contempt action, the Texas Supreme Court has found that 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).

VI. Local Government Enforcement

Local governments are granted ancillary authority to bring civil enforcement actions for violations of state law. Tex. Water Code § 7.351(a). Section 7.351 of the Texas Water Code allows local governments to bring civil suits in the same manner as the TCEQ. Tex. Water Code § 7.351(a). If a local government institutes such a suit, TCEQ is a necessary and indispensable party and is represented by OAG in the matter. Tex. Water Code § 7.353.

Pursuant to section 7.351(a), local governments can recover civil penalties and seek injunctive relief where applicable, but are not entitled to recover attorney’s fees. Only the State is entitled to recover attorney’s fees. Tex. Water Code § 7.108. Any “civil penalty recovered in a suit brought under this subchapter [Subchapter D] by a local government shall be equally divided as follows: (1) the first \$4.3 million of the amount recovered shall be divided equally between...state and...the

local government that brought the suit; and (2) any amount recovered in excess of \$4.3 million shall be awarded to the state.” Tex. Water Code § 7.107. Further, the authority of a local government to initiate suit is limited to first obtaining a resolution from its governing body authorizing use of the enforcement power provided by the statute prior to initiating suit. Tex. Water Code § 7.352.

Texas Water Code section 7.3511 requires local governments to provide both TCEQ and the Texas Attorney General at least 90-days’ notice prior to filing a suit for civil penalties pursuant to section 7.351(a) of the Texas Water Code. If TCEQ or the Texas Attorney General has instituted an enforcement action pursuant to Chapter 7 sometime before the 90th day after notice is received, the local government is barred from seeking civil penalties related to the matters subject to the State enforcement action. Tex. Water Code § 7.3511(d). The legislation only applies to violations occurring on or after September 1, 2017. Act of May 24, 2017, 85th Leg., R.S., ch. 857, § 4, 2017 Tex. Gen. Laws 3558, 3559 (codified at Tex. Water Code § 7.3511).

Additionally, as opposed to civil suits initiated by TCEQ through OAG, in civil suits initiated by local governments, the factfinder is instructed to consider the same penalty factors that TCEQ must consider in administrative enforcement actions under section 7.053 of the Texas Water Code. Tex. Water Code § 7.359. Local governments also face a five-year statute of limitations where violations have previously been subject to a TCEQ notice of enforcement or were otherwise disclosed to the TCEQ. Tex. Water Code § 7.360.

While local governments may hire outside counsel to bring environmental enforcement cases, the Texas Legislature has granted OAG the authority for final approval of outside counsel contingency fee contracts. Subchapter C of section 2254 of the Texas Government Code requires that political subdivisions must obtain OAG approval of a contingency fee contract prior to retaining outside contingency fee counsel. Tex. Gov’t Code § 2254.1038. OAG has broad authority to disapprove of a contingency fee contract and may refuse a contract if: (1) the legal matter subject to the contract presents one or more questions of law or fact that are in common with a matter the State has already addressed or is pursuing; and (2) pursuit of the matter by the political subdivision will not promote the just and efficient resolution of the matter. Tex. Gov’t Code § 2254.1038(b)(3). If the local government fails to obtain approval for the contingency contract, the contract is effectively rendered void as a matter of law. Tex. Gov’t Code § 2254.110.