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When Construction Projects Head to Municipal Court: Storm Water Enforcement

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There is some truth in the old saying: “Texas is so dry, the catfish are bringing canteens.” But those who seek to construct roads, bridges, commercial buildings, and homes in Texas know that the great state is subject to unpredictable and extreme weather. Likewise, storm water enforcement of federal, state, and local regulatory and permit programs – which is aimed directly at the construction industry - can be both unpredictable and extreme. Much of the day-to-day storm water enforcement activity occurs at the local level. This means that if you are the owner or operator of a construction project in Texas, you may find yourself headed to a municipal court. This alert discusses the authority of the municipal courts and your options if your construction project is the subject of a municipal storm water enforcement action.

Municipal Storm Water Authority

Texas has primacy over implementation and enforcement of the federal Clean Water Act storm water permitting program for construction activity. The Texas Commission on Environmental Quality (“TCEQ”) has issued a Construction General Permit under which discharges of storm water from construction activities are authorized under the Texas Water Code. TCEQ is the state enforcer of that permit, but is not the sole enforcer.

Under TCEQ’s delegated storm water program, Municipal Separate Storm Water Sewer Systems (“MS4s”) are, themselves, required to obtain storm water permits. Those MS4 permits call for the municipal permit holders to implement measures to control the quality of storm water discharged by construction activities into the municipal storm drains. Municipalities typically use their city code/city ordinances to establish construction storm water requirements. Most often, such provisions almost entirely overlap the state program, calling for compliance with TCEQ’s Construction General Permit. The Construction General Permit then becomes independently enforceable by the municipality under its city ordinance.

Municipal Court Jurisdiction

Municipal courts in Texas have exclusive jurisdiction over cases arising under municipal ordinances. Violations of the construction storm water provisions of municipal ordinances largely are classified as Class C misdemeanors and are punishable by a fine only. Misdemeanors are non-felony crimes, and a Class C misdemeanor is the least serious Class. (At least 1 municipality has enacted a civil process that can be used for resolving storm water violations.) A violation of storm water ordinance provisions often is classified by a municipality as a public health violation for which the fine can be up to \$2,000 per violation.

The Path to the Courthouse

Most alleged violations of a municipal ordinance's storm water provisions begin with a municipal storm water inspector's visit to a construction site. Any apparent non-compliance with the provisions of the Construction General Permit can result in issuance of a citation or a complaint, either of which is docketed with the municipal court.

Following is a list of non-compliances that often appear in municipal enforcement actions:

1. Paperwork Issues

- Failure to file a NOI, and failure to post the appropriate information at the construction site.
- Failure to have the required notice posted at the project.
- Failure to keep the SWPPP updated as the project progresses (e.g. showing a new construction entrance), and failure to have the updated copy at the construction site for inspection.
- Failure to file appropriate forms such as the Delegation of Authority letter to allow persons other than corporate officials to sign compliance documents like inspection forms.
- Failure to include the qualifications of the inspectors in the SWPPP.
- Failure to document any corrective action taken as a result of an inspection recommendation.
- Failure to have all of the appropriate parties sign on to the SWPPP.
- Failure to file the Notice of Termination at the appropriate time.

2. Non-paperwork Issues

- Off-site tracking of dirt by vehicles leaving the construction site.
- Actual non-storm water discharges into the storm water sewer system.
- Best Management Practices are not implemented (e.g. missing silt fences or inlet protection), or are deemed to be ineffective.

Any one of these issues is likely to result in a citation by a municipal inspector.

The Citation

A citation alleging a Class C misdemeanor storm water violation at a construction site often looks similar to a traffic ticket. Like a traffic ticket, the citation requires the defendant to enter a plea of not guilty, guilty, or no contest by a certain date. Some municipalities will not allow a corporation to enter a plea without an attorney. Many municipal courts maintain an “attorney docket” that only handles cases in which the defendant is represented by outside counsel.

If you or your company receives a storm water citation, there are a number of options available for resolving them:

- 1. Pay the Fine.** Like a traffic ticket, one option is simply to pay the citation before the initial pre-trial date. Easy to do - but there are other considerations that may outweigh this option. For example, in order to pay the citation, the defendant enters a plea of guilty or no contest. In either case, these are legally equivalent to guilty pleas in a criminal case which may need to be disclosed in future project bid documents. Also, it is not unusual for a construction project to receive multiple (and sometime numerous) citations, resulting in a staggeringly high total fine.
- 2. Seek Deferred Adjudication.** Deferred adjudication is a mechanism for staying a judgment on a case for a certain period of time. At the expiration of that period, if the defendant has not had additional violations, the matter is dismissed without any judgment. Most municipal city prosecutors will require payment of an administrative “fee” for deferred adjudication, but that fee is usually significantly lower than the original citation fine. A caution about deferred adjudication: a violation during the stay will result in a guilty finding. Also note that most municipalities will not offer deferred adjudication unless the defendant is an individual.
- 3. Seek a Compliance Order.** In some cases, the parties can reach agreement for the defendant to engage in certain compliance actions to resolve a citation. A compliance order can be a useful tool for establishing a process to handle any future violations. Due to the temporary nature of construction projects, compliance order typically are short-term agreement. Experienced outside environmental counsel can assist in negotiating and evaluating compliance agreement provisions.
- 4. Seek Dismissal/Reduction of Fine.** This is an option where use of an experienced outside environmental lawyer is a necessity. In many cases, we find that the alleged violations are based on an inspectors mistakes of fact or misunderstandings of the precise legal requirements under the Construction General Permit. Our long experience with the guidance documents and interpretations of the Construction General Permit are invaluable in identifying allegations that may not survive scrutiny by the municipal court or a jury. Your environmental lawyer can work directly with the prosecutor to identify and help the prosecutor understand the weaknesses in the prosecutor’s case. This process

can result in outright dismissal of some or all of the citations or a reduction in the fine.

- 5. Go to Trial.** If, in consultation with your environmental lawyer, you believe a citation was issued in error, you can plead not guilty and your case will automatically be set on the municipal court's trial docket. You are entitled to a jury trial but can choose to waive that right. When your case is set for a trial, your attorney has the opportunity to continue discussions with the prosecutor and most cases settle prior to a trial. Additionally, during the pre-trial phase, your attorney can evaluate and move forward on any potential errors by the prosecution. If your case does proceed to trial, the prosecution has the burden of proving that every element of the alleged violation occurred beyond a reasonable doubt. Municipal court trials typically do not take over a day in court. There are appeals available from municipal court decisions including a trial de novo if the municipal court is not a court of record.

Takeaways

Municipalities are aggressive independent enforcers of storm water requirements imposed on construction project operators by municipal ordinances. The enforcement process takes place in municipal courts, all of which have their own procedural rules. Identifying fact and law weaknesses in the prosecution's case can result in dismissals or reduction in fines. In order to understand the available options for responding to a municipal citation, it is essential to have environmental counsel with significant experience in the application of the Construction General Permit by municipalities at construction projects.

This is one in a series of occasional pieces discussing environmental issues of current interest to clients and friends of the firm. This material is not intended as legal advice. Readers should not act upon information discussed in this material without consulting an attorney.

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