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The Environmental Law FirmSM

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New Law Shortens Big Stick of Local Government

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Local governments have long been allowed by the Texas Water Code to bring lawsuits for civil penalties against those who violated Texas' environmental laws, essentially standing in the shoes of the state. However, environmental enforcement dramatically changed in the last several years with local governments seeking millions of dollars in civil penalties against polluters and owners of contaminated sites. For example, Harris County brought a \$173 million civil penalty case against a dry cleaner and the owners of a shopping center. The penalties sought by local governments are often much higher than the penalties that would have been sought by the Texas Commission on Environmental Quality (TCEQ). As a result of such lawsuits, there has been an outcry from the business community that the punishment (penalties sought) does not fit the crime (alleged violations). The 84th Texas Legislature amended the Water Code to limit civil penalty cases brought by local governments.

Section 7.351 of the Water Code grants enforcement authority to local governments that is concurrent with that of the TCEQ. Texas Register public notices for case resolutions reveals healthy use of section 7.351 by counties in the last several years. To date, the big kahuna of settlements occurred in a case brought by Harris County against McGinnes Industrial and others seeking penalties for discharge of paper mill waste into the San Jacinto River. At trial, two defendants settled for approximately \$29 million. Of that amount, the state and Harris County equally split \$20 million, and the attorneys received \$9 million.

The maximum penalty that may be sought in a section 7.351 case is \$25,000 per violation per day the violation exists. Statutory maximum penalties are not the typical end result in most cases. Harris County, the clear leader in bringing section 7.351 cases, has averaged \$61,000 in penalties per case overall if the outliers, like McGinnes, are excluded. Smaller counties, such as Ector and Hunt, have dramatically smaller average recoveries of less than \$10,000 per case.

The 84th Texas Legislature addressed concerns that the extremely high amount of civil penalties being sought by counties "pose[d] a grave threat to the fairness of Texas' environmental enforcement system and, in the long run, Texas' economic competitiveness." Accordingly, the legislature amended section 7.107 of the Water Code so that the first \$4.3 million of the amount recovered is divided equally between the state and the local government. Any amount recovered in excess of \$4.3 million is awarded to the state. A local government's recovery of civil penalties in a section 7.351 case is now capped at \$2.15 million. This cap likely will be a disincentive to counties hiring outside counsel, often on a contingency fee basis, to bring section 7.351 cases.

Section 7.359 was added requiring the trier of fact to consider the same factors in assessing a penalty that the TCEQ considers. This includes factors that could cause a trier of fact to award only minimal amounts such as lack of previous violations, degree of culpability, and good faith actions in rectifying violations. Without such exculpatory factors to consider, a trier of fact could more easily be convinced to award maximum civil penalties.

Finally, new section 7.360 establishes a five year statute of limitations for section 7.351 cases. Suit must be brought no later than the fifth anniversary of the earlier of the date the violator (1) notifies the TCEQ in writing of the violation, or (2) receives a notice of enforcement from the TCEQ. In most cases, this statute of limitations eventually will have the effect of limiting local governments to seeking civil penalties for only five years of a continued violation.

The foregoing changes in the law apply to violations that occur on or after September 1, 2015. Violations that occurred before the effective date are governed by the law in effect on the date the violation occurred. It is currently unclear how cases will be handled involving violations that began before September 1, 2015 but that continue after that date.

Even with the recent legislation, section 7.351 probably will remain viable as a revenue source for local governments and as a method to curb environmental violations despite the fact that the chance for a local government to win a Powerball lottery will be over. For the time being, however, there are still many potential section 7.351 cases which will be governed by old law because the violations at issue occurred before September 1, 2015.

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.

Guida, Slavich & Flores, P.C. provides legal representation to businesses and individuals in the planning, strategy-setting and execution of their business objectives within the complex maze of environmental laws, including regulatory compliance counseling, structuring and negotiation of contaminated property transactions and litigation.

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