Texas House Bill 1794: A Just Limitation on Local Governments' Authority to Assess Environmental Fines? Or the Beginning of the End of Environmental Compliance?

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July 2015

Background

On June 16, 2015, Texas Governor Greg Abbott signed into law a unique piece of State legislation effectively limiting local governments' authority to recover fines and penalties for environmental violations alleged against regulated actors. By all accounts, the legislation is one of the first of its type in the country and has sparked sharp debate between the regulated community, local governmental officials, and environmental advocacy groups. Proponents suggest HB 1794 was necessary to circumscribe efforts by local governments to bring suits against business owners seeking penalties disproportionate with the alleged violation. Those opposed to the legislation suggest it is potentially a Pandora's Box – opening the door to undeterred non-compliance.

At issue is the extent of fines and penalties that may be recovered by a local government for environmental infractions occurring within its jurisdiction. HB 1794 basically establishes a cap of 2.15 million dollars in fines and penalties that may be recovered by a local authority in a lawsuit it brings. It also clarifies what factors may be considered when determining penalties in such lawsuits and establishes a better defined limitations period during which such suit may be brought.

Many believe that HB 1794 was directed at Harris County, Texas – but why? Harris County is the home to Houston – which contains one of the largest heavy industrial complexes in the nation. Historically, the Texas legislature authorized local governments, like Harris County, to bring independent suits against regulated entities for environmental violations with or without corresponding action by the State regulatory agency[1] – now the Texas Commission on Environmental Quality (TCEQ). Harris County has become an aggressive plaintiff in these actions. Public accounts indicate the County has brought "about 10 such cases per year, with penalties averaging about $61,000 per case."[2] Recently, Harris County settled two matters for significant amounts – AT&T reportedly paid $5 million in fines and penalties relating to leaking USTs; and McGinnes Industrial Maintenance Corp. and Waste Management, Inc. reached a settlement for $29.2 million relating to claims for fines and penalties (not response action) associated with a local federal Superfund Site known as the San Jacinto River Waste Pits.[3]

The lawsuit, however, that particularly caught the eye of the regulated community involved alleged violations concerning discharge to groundwater at a former retail dry cleaning facility in Houston, Texas. In that lawsuit, Harris County brought claims for fines and penalties against the heirs (including, trustees and estate executors) of a landlord (Melcher), which had leased space in a shopping center to a dry cleaner that operated there perhaps dating back over 20 years.[4] The County brought suit seeking fines and penalties of up to $173 million[5] against the heirs (i.e., the current owner/landlord of the shopping center). Importantly, while the lawsuit seeks injunctive relief to compel cleanup, it also sought up to $173 million in fines and penalties against the landlord and heirs, which only leased space to the specific dry cleaner within the shopping center. At the time of the lawsuit, the dry cleaner continued to operate within the shopping center. The gist of the claims against the passive shopping center owner was that it and its deceased predecessor both caused water pollution or allowed releases or threatened releases to groundwater to continue at the dry cleaner from approximately September 1, 1985 to present and, accordingly, fines and penalties of $25,000 per day should be paid for that period by the landlord defendants. Again, the County's suit seeks fines and penalties against a retail landlord for releases related to a tenant's operations, and also an affirmative injunction to compel response.

What the Statute Does and Does Not Do

HB 1794 is a relatively straight forward two page statute. On its face, the statute:

(1) Caps the recovery of a local government at $2.15 million for civil penalties in a suit it brings. Specifically, the first $4.3 million are split between the State and local government and amounts recovered in excess of $4.3 million are awarded to the State.

(2) Requires the finder of fact to consider the same factors in assessing a penalty that the TCEQ must consider in determining penalties.[6] Note, HB 1794 does not on its face require the factors listed in the Water Code to be exclusively used, but does require their consideration. Prior to HB 1794, there was no reference point or penalty matrix that a judge or jury would have to consider in determining appropriate penalties. Thus, the specter of penalties materially atypical with the violation alleged was at issue in these local governmental suits.[7]

(3) The law establishes a five year statute of limitations beginning on the earlier of the date the regulated entity (i) notifies the TCEQ of a violation or (ii) receives a notice of enforcement from the TCEQ. Stated simply, the language establishing the accrual date for a claim requires the local governmental authority to take action within five years after it has knowledge of a violation. The language, however, is not drafted with sufficient precision to make clear whether it would preclude claims for alleged continuing violations that initiated in time periods prior to the trigger dates mentioned above, which was likely the drafter's intent.

(4) The law is not retroactive. By its terms it does not apply to violations occurring before its September 1, 2015 effective date.

The law is relatively narrow and does not:

(1) Preclude enforcement action by the TCEQ or the State Attorney General, nor cap penalties the State may seek or recover.

(2) Affect the rights of private litigants to bring claims under state or federal environmental statutes.

(3) Affect the TCEQ's right to compel cleanup under the Texas Health and Safety Code or otherwise.

(4) Affect the State or a local government from bringing a criminal action or seeking criminal penalties.

Analysis

It is not unreasonable to conclude that the net effect of HB 1794 may be to focus tax payers' funding of local government expenses on lawsuits addressing environmental conditions, as opposed to being a revenue driver. That is, the law will not affect any governmental authority, whether state or local, from bringing suit seeking appropriate environmental response to address contamination or facility compliance. Moreover, the vast majority of penalties sought by regulatory authorities are well under $2.15 million and are determined with some level of consistency by state environmental authorities using precedent and publicly available penalty matrixes. A far different result could occur in state court actions where a judge or jury unfamiliar with environmental penalty assessments could assign unreasonably disproportionate penalties to a defendant, which typically may not even be exposed to significant penalties for the matter at issue.

Opponents of the legislation have suggested that the penalty limits contained in HB 1794 could "encourage some companies to make a business decision to plan on paying penalties if the cost of preventing or remediating an environmental problem were higher."[8] While this perspective may rhetorically sound reasonable, in reality it is somewhat naïve to suggest that sophisticated businesses and the individuals managing them would prefer to be exposed to criminal liability for committing knowing violations once the intended violations are brought to light, which can happen in any number of ways at any time.

In conclusion, HB 1794 does not limit the State's authority to bring actions or recover penalties, nor does it hinder actions to compel cleanup. Moreover, it does not limit any authority – state or local – to pursue criminal actions for environmental infractions. Thus, HB 1794 largely leaves intact the deterrent effect of environmental regulation. By limiting potential outer lying claims and better establishing a framework for penalty assessments in suits brought by local government, the Act potentially serves a valuable function to both the regulated community and those charged with regulatory oversight. That is, predictability in enforcement will often lead to greater compliance, including disclosure and rectification of violations. Where potential impediments to this process of violation identification and rectification exist, compliance – particularly for smaller enterprises is potentially jeopardized, which benefits no one. This could be an unforeseen consequence of local governmental suits seeking penalties that are either unpredictable or potentially materially disproportionate to the alleged violations or activities at issue.

Endnotes

1 *While the State of Texas must be joined as a necessary party in these local lawsuits, it is without the necessity of the State first bringing a claim or alleging an independent environmental fine or penalty. Under Section 7.353 of the Texas Water Code, the State is a necessary and indispensable party to these suits.*

2 *See J. Malewitz, "Abbott Signs Bill to Limit Pollution Lawsuits," The Texas Tribune, June 16, 2015.*

3 *With regard to the AT&T settlement, the suit sought fines and penalties, notwithstanding AT&T's ongoing response efforts. The San Jacinto River Waste Pit lawsuit reportedly settled in November 2014. A third defendant, International Paper, did not settle and instead proceeded to trial where a jury held in favor of the company. Harris County sought fines of $25,000 per day for the period of February 1973 to March 2008. International Paper successfully argued, among other things, that it should not be responsible for fines and penalties relating to waste management practices of a third party after it had contracted with that party for disposal of its wastes.*

4 *The County also joined the owner of the dry cleaner in the suit.*

5 *The County alleges per diem fines between the statutory limits of $50 and $25,000.*

6 *Under The Texas Water Code, factors the TCEQ must consider in determining an administrative penalty are:*

- *the nature, circumstances, extent, duration, and gravity of the violation;*
- *the impact of the violation on the environment and persons;*
- *the alleged violator's:*
  - *prior compliance history,*
  - *degree of culpably,*
  - *good faith, including corrective measures, and*
  - *economic benefit;*
- *the amount needed as a deterrent; and*
- *other factors "that justice may require." See Tex. Water Code § 7.053 (2014).*

7 *As a point of context, the claims brought against the "Melcher" defendants by the County would seem to fall into this category. It is the rare (perhaps unicorn-like scenario) where a passive landlord, who did not operate the specific business giving rise to the historic pollution, is sued for fines and penalties relating to a tenant's/third party's release. Again, this is a very different issue than a suit against a landowner seeking injunctive relief to compel cleanup or abatement of an imminent and substantial endangerment that are contemplated, common, and available under traditional environmental laws.*

8 *See House Research Organization Bill Analysis, HB 1794, at 5.*

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Gerry Pels has been one of the leaders of the Texas environmental legal community for over 30 years. His diverse practice focuses on the areas of environmental compliance, counseling, and litigation. During his career, Gerry has consistently lead teams working on cutting edge matters of environmental law, including resolving the well-known Cooper v. Aviall litigation and arguing Clean Air Act issues before the 5th Circuit in litigation involving the Texas SIP. Gerry has been consistently recognized in Chambers USA since 2004 as well as in The Best Lawyers in America for Environmental Law. He was also an adjunct law professor for seven years teaching both environmental law and an advanced RCRA seminar.