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PROCEDURAL ASPECTS OF LITIGATION UNDER THE TEXAS ENVIRONMENTAL STATUTES

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Texas having no general environmental statute similar to the National Environmental Policy Act, or those found in several states establishing general environmental rights, it is slightly misleading to speak of "environmental litigation" within the context of Texas law. While Texas has strong, well drafted statutes dealing with the major environmental problems of air pollution,¹ water pollution,² and solid waste disposal,³ litigation under these statutes falls clearly within the established areas of administrative law⁴ and the standard, well-established principles concerning trial preparation and procedure. Thus, while not dealing strictly with "environmental law" this article will relate generally what one could expect if involved in litigation under one of the state's major environmental acts.

ENFORCEMENT

Authority to Enforce

All three statutes provide for enforcement by either the state or local governments.⁵ State action is initiated when the governing board, or the director, of one of the state's environmental agencies, requests the Attorney General to initiate a civil action to enforce the provisions of one of the acts.⁶ Local government suits are instituted

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1. TEX. REV. CIV. STAT. ANN. art. 4477-5, §§ 1.01-6.01 (Vernon 1976).

2. TEX. WATER CODE ANN. §§ 26.001-.268 (Vernon Supp. 1978).

3. TEX. REV. CIV. STAT. ANN. art. 4477-7, §§ 1-11 (Vernon 1976 & Supp. 1978).

4. A substantial amount of the "environmental litigation" in Texas grows out of challenges to agency actions or enforcement of agency regulations and is governed by the Texas Administrative Procedure-Texas Register Act, TEX. REV. CIV. STAT. ANN. art. 6252-13a, §§ 1-23 (Vernon Supp. 1978).

5. TEX. REV. CIV. STAT. ANN. art. 4477-5, § 4.02-.03 (Vernon 1976) (Texas Clean Air Act), & art. 4477-7, § 8 (Vernon Supp. 1978) (Solid Waste Disposal Act); TEX. WATER CODE ANN. §§ 26.123-.124 (Vernon Supp. 1978) (Texas Water Quality Act).

6. TEX. REV. CIV. STAT. ANN. art. 4477-5, § 4.02 (Vernon 1976), & art. 4477-7, § 8(c) (Vernon Supp. 1978); TEX. WATER CODE ANN. § 26.123(d) (Vernon Supp. 1978). The Texas Air Control Board has primary responsibility of the provisions of the Texas Clean Air Act. TEX. REV. CIV. STAT. ANN. art. 4477-5, § 1.05 (Vernon 1976). The Texas Department of Water

upon resolution by the governing body of the local governmental entity and are brought by the attorney for that government.⁷ All three acts provide, however, that the state is a necessary and indispensable party in any action brought by a local government.⁸ Therefore, the state is involved in all civil litigation under these acts, and all actions brought by a local government in effect become joint prosecutions by the Attorney General and that local government.⁹ Litigation under these acts generally involves violation of a rule, regulation, order or permit adopted or issued pursuant to the act.¹⁰ The relief sought in litigation arising under these acts is the granting of an injunction and the imposition of the statutory civil penalty of not less than \$50 nor more than \$1,000 for each act of violation and for each day of violation.¹¹

Injunctive Relief

The acts provide that upon a finding that a person is violating, or threatening to violate, the act or a rule, regulation, permit or other order of the agency, the district court shall grant appropriate injunctive relief as warranted by the facts.¹² The major thrust of the state's enforcement activity focuses on the rule that a prohibitory

Resources administers the provisions of the Texas Water Quality Act, and the industrial solid waste provisions of the Solid Waste Disposal Act. TEX. REV. CIV. STAT. ANN. art. 4477-7, § 3(b) (Vernon Supp. 1978); TEX. WATER CODE ANN. § 26.011 (Vernon Supp. 1978). The Texas Department of Health Resources has primary responsibility for the provisions of the Solid Waste Disposal Act dealing with municipal solid waste. TEX. REV. CIV. STAT. ANN. art. 4477-7, § 3(a) (Vernon Supp. 1978).

7. TEX. REV. CIV. STAT. ANN. art. 4477-5, § 4.03 (Vernon 1976), & art. 4477-7, § 8 (Vernon Supp. 1978); TEX. WATER CODE ANN. § 26.124 (Vernon Supp. 1978). The types of "governmental entities" capable of instituting suit under these statutes vary according to statute, but can include "an incorporated city, a county, a river authority, or a water district. . . ." TEX. WATER CODE ANN. § 26.001 (18) (Vernon Supp. 1978); see TEX. REV. CIV. STAT. ANN. art. 4477-5, § 1.03(7) (Vernon 1976), & art. 4477-7, § 2(4) (Vernon Supp. 1978).

8. TEX. REV. CIV. STAT. ANN. art. 4477-5, § 4.03 (Vernon 1976), & art. 4477-7, § 8 (Vernon Supp. 1978); TEX. WATER CODE ANN. § 26.124 (Vernon Supp. 1978).

9. Compare TEX. WATER CODE ANN. § 26.124 (b) (Vernon Supp. 1978) with *id.* § 5.012 (the Board is a necessary party to the action and the Board is an agency of the state).

10. In addition to enforcing specific rules, regulations, orders and permits, local governments can also bring nuisance actions under the statutes. TEX. REV. CIV. STAT. ANN. art. 4477-5, § 5.05(a)(1) (Vernon 1976); see TEX. REV. CIV. STAT. ANN. art. 4477-7, § 8(e) (Vernon Supp. 1978).

11. TEX. REV. CIV. STAT. ANN. art. 4477-5, §§ 4.01(c), 4.02(a) (Vernon 1976), & art. 4477-7, § 8(c) (Vernon Supp. 1978); TEX. WATER CODE ANN. § 26.122 (Vernon Supp. 1978).

12. TEX. REV. CIV. STAT. ANN. art. 4477-5, § 4.02(a) (Vernon 1976), & art. 4477-7, § 8(c) (Vernon Supp. 1978); TEX. WATER CODE ANN. § 26.123 (Vernon Supp. 1978). See generally Newsom, *State Court Injunctions and Their Enforcement in Environmental Litigation*, 9 ST. MARY'S L.J. 821 (1978).

injunction shall issue upon proof of a violation without regard to equitable considerations.¹³ The rule was most recently stated in the case of *Texas Pet Foods, Inc. v. State*,¹⁴ where the court said:

The defendant stands charged with violations of state statutes. The same statutes which condemn the activity charged against the defendant also provide for its prohibition by injunction. Under these circumstances, if a continuing violation of the statute is established, the rule for the balancing of equities has no application.¹⁵

Further, it is clear that in order to obtain injunctive relief the state need not prove scienter.¹⁶

Jurisdiction to Challenge Statute or Rule

Along with eliminating the "balancing of equities" and the element of scienter, the courts have also precluded an attack on the reasonableness or constitutionality of the rule, regulation, order or permit involved.¹⁷ The statutes provide that such attacks may only be brought in the District Court of Travis County within thirty days of the adoption of the rule, regulation or permit.¹⁸ Holding that this is the sole method of attack, the Texas Supreme Court in *Alpha Petroleum Co. v. Terrell*,¹⁹ stated as follows:

13. While the state often seeks mandatory relief to correct certain conditions created by the defendant, the primary relief sought is a prohibitory injunction against the violations alleged.

14. 529 S.W.2d 820 (Tex. Civ. App.—Waco 1975, writ ref'd n.r.e.).

15. *Id.* at 830. See also *City of Galveston v. State*, 518 S.W.2d 413, 419 (Tex. Civ. App.—Houston [14th Dist.] 1975, no writ); *Houston Compressed Steel Corp. v. State*, 456 S.W.2d 768, 775 (Tex. Civ. App.—Houston [1st Dist.] 1970, no writ).

16. *City of Galveston v. State*, 518 S.W.2d 413, 416 (Tex. Civ. App.—Houston [14th Dist.] 1975, no writ) (not necessary to show that the violation was done "knowingly or intentionally").

17. Such attacks are permitted only in the manner expressly provided by statute and are not defensive matters in suits for enforcement or compliance. See, e.g., *Mingus v. Wadley*, 115 Tex. 551, 554, 285 S.W. 1084, 1087-88 (1926) (venue provision of workmen's compensation statute jurisdictional); *Schwartz v. Texas Dept. of Public Safety*, 415 S.W.2d 12, 15-16 (Tex. Civ. App.—Waco 1967, writ ref'd) (venue provision of driver's license revocation statute confers exclusive jurisdiction); *American Canal Co. v. Dow Chemical Co.*, 380 S.W.2d 662, 665 (Tex. Civ. App.—Houston 1964, writ dism'd) (venue provision for review of water adjudication statute confers exclusive jurisdiction).

18. TEX. REV. CIV. STAT. ANN. art. 4477-5, § 6.01(a), (b) (Vernon 1976), & art. 4477-7, § 9 (Vernon Supp. 1978); see TEX. WATER CODE ANN. §§ 5.131(c), 5.262(b) (Vernon Supp. 1978) (Water Board and Water Commission rulemaking review is pursuant to the Administrative Procedure and Texas Register Act, TEX. REV. CIV. STAT. ANN. art. 6252-13a, § 12 (Vernon Supp. 1978)).

19. 122 Tex. 257, 59 S.W.2d 364 (1933).

[W]e are compelled to hold that any suit which seeks to annul, modify, or set aside any rule of the commission valid on its face, . . . must be brought in a district court of Travis County, Tex., and that this requirement is one of jurisdiction, and not a mere question of venue. We further hold that, if the rule is one utterly void on its face, it may be attacked in any court otherwise having jurisdiction of the case. We finally hold, however, that, if it requires evidence to show the invalidity of the rule, it is not void on its face, and is not subject to collateral attack or to attack in any court, except a district court of Travis County.²⁰

THREE MAJOR ISSUES

With "intent," "balancing of equities," and "reasonableness of the regulation" not being subjects for consideration (except possibly in mitigation of civil penalties), environmental litigation in Texas involves essentially three issues: (1) the fact of violation, (2) the number of days of violation, and (3) the amount of civil penalty to be imposed.

Fact of Violation

Initially, the existence of the regulation must be established. Generally, this does not present a problem since the two major acts provide that certified copies of records of the Texas Air Control Board and Texas Department of Water Resources are admissible as evidence in court.²¹ In addition, the provisions of article 3731a provide for introduction in court of official state documents.²² While proof of the existence of a regulation may not be difficult, the length, technical nature, and frequent amendments characterizing the regulations and permits, require that a great deal of care be taken to insure that the document being introduced is current, applicable to the defendant in question, and reflects that proper procedures were followed in its adoption.

20. *Id.* at 265, 59 S.W.2d at 367.

21. TEX. REV. CIV. STAT. ANN. art. 4477-5, § 2.14 (Vernon 1976); TEX. WATER CODE ANN. § 5.052 (Vernon Supp. 1978). Before being admissible, the copies must have "the seal of the board and the signature of the chairman of the board or the executive secretary . . ." TEX. REV. CIV. STAT. ANN. art. 4477-5, § 2.14 (Vernon 1976).

22. See TEX. REV. CIV. STAT. ANN. art. 3731a, § 1 (Vernon Supp. 1978) (provides for introduction in court of "[a]ny written instrument, certificate, record, . . . return, report, . . . made by an officer of this state or of any governmental subdivision thereof, or by his deputy, . . . or employee . . . in the performance of the functions of his office and employment . . ." as long as the document is relevant).

Proof of violation generally involves highly technical sampling procedures. Each case is unique and it is difficult to discuss litigation tactics or procedures other than to point out that the following evidentiary rules must be adhered to.

(A) The type of apparatus purporting to be constructed on scientific principles must be accepted as dependable for the proposed purpose by the profession concerned in that branch of science or its related art. This can be evidenced by qualified expert testimony; or, if notorious, it will be judicially noticed by the judge without evidence.

(B) The particular apparatus used by the witness must be one constructed according to an accepted type and must be in good condition for accurate work. This may be evidenced by a qualified expert.

(C) The witness using the apparatus as the source of his testimony must be qualified for its use by training and experience.²³

Additionally, extreme care should be exercised in the handling of an evidentiary sample which will be used to establish the fact of violation. It is essential that those enforcing the statute be able to clearly establish the chain of custody from the time the sample is collected until laboratory analysis is complete and documented.

A major problem in environmental litigation is presenting highly technical testimony in a manner that is understandable to a jury of laymen. Again, techniques vary from case to case but generally involve the use of simple, understandable lay language and the introduction of photographs, charts, movies, and on occasion, the testing equipment itself.²⁴

Number of Days of Violation

The second issue, the number of days of violation, is generally established by proof of day-to-day violations. Such proof is not always necessary, however, for the state has been able to obtain a jury verdict finding violations on days other than when the sampling occurred.²⁵ This was done by offering a sample showing a violation well in excess of the limits of the regulation, thus eliminating ques-

23. *Wilson v. State*, 168 Tex. Crim. 439, 443, 328 S.W.2d 311, 313-14 (1959); *Harrington v. State*, 385 S.W.2d 411, 423 (Tex. Civ. App.—Austin 1964), *rev'd on other grounds*, 407 S.W.2d 467 (Tex. 1966).

24. For a discussion of some of the strategies and problems inherent in the presentation of evidence see Fleming, *Environmental Litigation: An Analysis of Basic Strategies, Procedures, Substantive Rights and Their Effects*, 9 ST. MARY'S L.J. 749, 766 (1978).

25. *State v. Cellotex*, No. 3967 (Dist. Ct. of Fisher County, 32nd Judicial Dist. of Texas, Dec. 12, 1974).

tions of error in the sample. Next, the state introduced evidence obtained on discovery showing the number of days the particular facility had been in operation. Expert testimony established that this particular facility, when in operation, would not vary in the amount of pollutant being emitted and that such emissions would be comparable on all days to those on the day the sampling was done.²⁶ Obviously, the key factors in establishing day-to-day violations are the polluting facility's variable conditions of operation and the possible margin of error in the sampling. As a result, proof of day-to-day violations is not possible in all cases where direct sampling evidence does not exist.

Civil Penalties

The third issue, civil penalties, does not offer as clear cut a factual issue as the previous two. The legislature has provided for a civil penalty of between \$50 and \$1,000 for each day of violation and each act of violation.²⁷ The statutes, however, give no guidance—and the courts have given little more—as to what should be considered by the jury in arriving at a proper figure. Concerning the question of penalties, the Austin Court of Civil Appeals in *Harrington v. State*²⁸ made the following observations:

The basic rule may be said to be that the amount to be awarded in any case is measured by the rule of just punishment, rather than that of fair compensation. And the amount of the award depends, among other things, on the nature of the wrong, the character of the conduct involved, the degree of culpability of the wrongdoer, the situation and sensibility of the parties concerned, and the extent to which such conduct offends a public sense of justice and propriety. Although the amount should be large enough to command respect for the law and to deter others from similar infractions, it should not be excessive or oppressive.²⁹

It would thus appear that there is a rather broad range of testimony that could be introduced on the issue of penalties. Mitigating circumstances, which may have no relevance on the question of violation, may be extremely relevant on the limited issue of penal-

26. *Id.*

27. TEX. REV. CIV. STAT. ANN. art. 4477-5, §§ 4.01(c), 4.02(a) (Vernon 1976), & art. 4477-7, § 8(b), (c) (Vernon Supp. 1978); TEX. WATER CODE ANN. § 26.122 (Vernon Supp. 1978).

28. 385 S.W.2d 411 (Tex. Civ. App.—Austin 1964), *rev'd on other grounds*, 407 S.W.2d 467 (Tex. 1966).

29. *Id.* at 432 (citing 17 TEX. JUR. 2d *Damages* § 186 (1960)).

ties. One area of testimony that has been restricted, however, concerns the financial resources of the defendant.³⁰ In excluding evidence concerning the gross receipts and assets of the defendant, the Dallas Court of Civil Appeals stated as follows:

We conclude that any logical relevance of defendant's total asset and gross receipts to the amount of the penalties is slight and is more than offset by its prejudicial affect. This kind of evidence is likely to divert the jury's attention from the gravity of the violation and focus it on the defendant's finances.³¹

The court did not, however, totally preclude the introduction of evidence concerning the defendant's financial condition. As stated by Justice Guittard:

A different question would be presented, for instance, if evidence were offered of defendant's revenues from the particular plant in question and the profits resulting from defendant's operation of that plant in violation of the Board's regulations. Conceivably, such evidence might be relevant to show the gravity of the violation and the magnitude of the penalty necessary to deter future violations.³²

This procedure would require a great deal of discovery of the financial records of the defendant and a detailed analysis of the defendant's income tax returns. Generally, it is necessary for the state to produce such records, since in order for the jury to assess a civil penalty that will act as a deterrent, without being unduly oppressive, knowledge of the financial situation of the defendant is required.

A factor increasingly being used to determine civil penalties in federal environmental cases, and required in some instances by the Federal Clean Air Act,³³ is the economic savings that have accrued to the defendant by his failure to install and properly operate the required pollution abatement equipment.³⁴ The Environmental Pro-

30. See *P.J. Willis & Bro. v. McNeill*, 57 Tex. 465, 474-75 (1882); *McCollum Exploration Co. v. Reaugh*, 146 S.W.2d 1109, 1112 (Tex. Civ. App.—San Antonio 1940), *aff'd*, 139 Tex. 485, 163 S.W.2d 620 (1942); *Texas Public Utilities Corp. v. Edwards*, 99 S.W.2d 420, 427 (Tex. Civ. App.—Austin 1936, writ *dism'd*). These cases were all discussing the issue as it relates to exemplary damages rather than civil penalties.

31. *Lloyd A. Fry Roofing Co. v. State*, 524 S.W.2d 313, 321 (Tex. Civ. App.—Dallas 1975, writ *ref'd n.r.e.*).

32. *Id.* at 322.

33. See 42 U.S.C.A. § 7420(a)(2)(A)(iii), (d)(2) (Supp. 3 1977 & Supp. 4 1978). "In the case of a penalty . . . the costs . . . shall be the economic value of non-compliance with the interim emission control requirement . . ." *Id.*

34. *Id.* § 7420(a)(2)(A)(iii). See also *id.* § 7413(b).

tection Agency is strongly urging all state programs to use this factor as a major consideration in arriving at civil penalties. It appears this is a factor that can certainly be considered under the court's holding in *State v. Harrington*,³⁵ and is consistent with *Lloyd Fry Roofing Co. v. State*³⁶ as well. This method of calculating appropriate fines will most probably become a major factor in the imposition of both negotiated and jury or court assessed civil penalties.

CONCLUSION

In summary, it can be said that environmental litigation in Texas involves straightforward simple legal issues and clearly defined factual issues. Proof of these factual issues involves highly complex technical testimony requiring a great deal of preparation and full discovery. This discovery and preparation will vary from case to case and does not lend itself to simple rules and guidelines that can be followed in every case.

35. See note 27 & accompanying text *supra*.

36. See *Lloyd A. Fry Roofing Co. v. State*, 524 S.W.2d 313, 322 (Tex. Civ. App.—Dallas 1975, writ ref'd n.r.e.). This case was reheard on a later appeal after remand in the above opinion. The latter opinion does not, however, discuss penalties. See *Lloyd A. Fry Roofing Co. v. State*, 541 S.W.2d 639 (Tex. Civ. App.—Dallas 1976, writ ref'd n.r.e.).