What Can Your Local Governments do to Help with Pollution Problems?

A local government, were it so inclined, can assume a fairly active role in enforcement of environmental laws and, even, some role in the regulation of environmental hazards. The following is a summary of some of the more significant powers of local governments.

Adoption and enforcement of ordinances

A home-rule city (generally, a city of population greater than 5,000 residents that has adopted a charter) may pass ordinances defining activities to be nuisances and may prohibit nuisance activities within the city and up to 5,000 feet outside the city. Then, such a city may take whatever enforcement action, for example, district court litigation for an injunction, it feels is necessary to abate a defined nuisance. Tex. Loc. Gov't Code, § 217.042. Obviously, a city may not define just any activity to be a nuisance, but the range of discretion is broad. See, *Addison v. Dallas Indep. Sch. Dist.*, 632 S.W.2d 771 (Tex. App. – Dallas 1982)(legislative direction to school district insulated district from city nuisance claim related to the school bus parking lot). There is a discussion, below, at "Nuisance litigation in state court," that further elaborates on what may be characterized as a "nuisance."

A Type B general-law city (roughly, a city of 201 to 10,000 residents that is not a home-rule city and that meets certain corporate boundary restrictions[1]) has been directed by the legislature to "define and declare what constitutes a nuisance" and to abate and remove a nuisance and to fine the person causing the nuisance. § 217.022, Tex. Loc. Gov't Code. From this grant of authority, it is clear that a Type B general-law city may pass and enforce as necessary ordinances directed to nuisances emanating from within its corporate boundaries.

A Type A general-law city (roughly, a city of more than 600 residents and meets certain corporate boundary conditions[2]) is charged to "prevent to the extent practicable any nuisance within the limits of the municipality" and to remove, at the cost of the person who creates the nuisance, the source of the nuisance. § 217.002, Tex. Loc. Gov't Code. From this charge, a Type A general-law city also may pass and enforce as necessary ordinances directed to nuisances emanating from within its corporate boundaries.

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1 See, Sec. 7.001 of the Texas Local Government Code.

2 See, Sec. 6.001 of the Texas Local Government Code.

A word about oil and gas regulation: The oil and gas industry has always enjoyed a high degree of protection under both federal and State law from citizen interference with its actions. The 2015 Texas Legislature extended that protection when it passed House Bill 40, which added § 81.0523 to the Tex. Nat. Res. Code. Under that legislation, the Railroad Commission has exclusive power to enact and enforce a law that regulates "activity associated with the exploration, development, production, processing, and transportation of oil and gas, including drilling, hydraulic facture stimulation, completion, maintenance, reworking, recompletion, disposal, plugging and abandonment, secondary and tertiary recovery and remediation." There is a small exception for municipal or "other political subdivision" "commercially reasonable" regulation of surface activities related to those just-described oil and gas activities. Emergency services, traffic, lights, noise, public notice and some setback regulations appear to be permissible.

Assuming this law is upheld in court, local governments will have much-reduced powers to act on matters touching oil and gas production, processing and transportation activities.

Inspections

The power to inspect is a powerful one. If a local government can be persuaded to use its resources merely to inspect a polluter's facility, then, the likelihood increases that public opinion can force government to ***do*** something about the problem.

Section 382.111, Tex. Health & Safety Code, gives a municipality, a county or health district described in Chapter 121 of the same code the authority to enter property, review records and inspect for violations that is similar to the authority of TCEQ under § 382.015 of the Health Safety Code, but this local government authority is limited to facilities within the jurisdiction, i.e., generally, within the boundaries, of the local government. (Ch. 382 of the Health & Safety Code is the Texas Clean Air Act.) There are some fairly common-sense courtesies that have to be observed regarding the manner of inspection.

Under § 26.173, Water Code, a "local government" has the same power as does the Texas Commission on Environmental Quality to enter property within the jurisdiction of the local government to inspect "conditions related to water quality." "Local government" is defined[3] to be" an incorporated city, a county, a river authority, or a water district or authority acting under Article III, Section 52, or Article XVI, Section 59, of the Texas Constitution." These last two citations are to constitutional provisions that allow creation of water districts of various stripes; many rural areas are served by these types of districts. There are the same general limitations regarding manner of inspection under the

[3] Sec. 26.001(18), Tex. Water Code.

Water Code as under the Health & Safety Code – mostly, act reasonably. See, § 26.014, Water Code, for the limitations.

Finally, under § 361.032(b)-(e) of the Health & Safety Code, agents and employees of a local government, defined slightly differently from the definition for "local government" as used in § 382.111, may enter property in the government's jurisdiction (including, for a city, its extraterritorial jurisdiction) to inspect for "conditions concerning solid waste management and control." Important: "solid waste" is defined at 30 TAC § 335.1 to *exclude* non-hazardous oil and gas exploration, development or production wastes. "Non-hazardous" is also a defined term. So, § 335.1 excludes most oil and gas wastes that occur at the well site from the restrictions on "solid wastes." But, wastes occurring off the well site are solid wastes, generally, and are subject to inspection.

Civil enforcement actions in state court

First, note the discussion, above, at "Adoption and enforcement of ordinances." Note, also, the cautionary "A word about oil and gas activities," above. The statutes cited, there, would also seem to support civil enforcement actions.

There is a broad legislative grant of authority to cities and counties to sue and otherwise intervene to prevent health threats. Section 121.003(a) of the Health and Safety Code provides: "(a) The governing body of a municipality or the commissioners court of a county may enforce any law that is reasonably necessary to protect the public health."

Sections 7.351-7.353 of the Texas Water Code provide that a local government is authorized to sue for injunctive relief and penalties for violations of:

(1) air or water or solid waste
(2) laws or permits or orders issued under authority of
(3) Chapter 26 of the Water Code, the Texas Clean Air Act, or the Texas Solid Waste Disposal Act (Ch. 361 of the Health & Safety Code).

There are actually other types of violations for which suit may be brought, too, but these three cover those of most interest.

The facility against which suit is brought must, again, be within the jurisdiction of the local government. The local government is standing in the shoes of the Texas Commission on Environmental Quality in these suits, so the local government's power is limited to the TCEQ's power, but that should not restrict the local government in any important way. TCEQ would have to be a party, so it would either have to join the local government as a plaintiff, or it would have to be named as a defendant. For suits alleging

violations of the Texas Clean Air Act or Chapter 26 of the Water Code, the local government must pass a resolution authorizing the exercise of its enforcement powers. Costs of investigation and attorneys' fees are recoverable by the local government, as are half of the first $4.3 million in civil penalties that are assessed.

Violations of Railroad Commission rules or orders that result in damage to local government property are actionable, i.e., the government may sue because of them. The statutory provision is not limited to local governments; anyone whose property interest is damaged may sue. § 85.321, Nat. Res. Code. ("A party who owns an interest in property … that may be damaged by another party violating … a valid rule or order of the [Railroad] commission may sue for and recover damages and have any other relief …"). Both damages and injunctions are theoretically available. If the suit alleges the violation caused "waste" of oil or gas resources, it is a defense that the lease owner or operator was acting as would a "reasonably prudent operator" under the same or similar facts and circumstances. Since most Railroad Commission authority over oil and gas operations turns on conservation of oil and gas resources, i.e., the prevention of waste of those resources, "waste" has become a very broad term in oil and gas law – it covers almost any squandering or inefficient use or failure to conserve the resource. Note that almost surely the local government, itself, must have a property interest that is damaged by the violation in order for the local government to sue for the violation. It is unlikely, in Texas, that a court would allow a local government to sue as the representative of one or more of its citizens. The 2015 legislation discussed, above, likely ***does not*** interfere with the power of a local government with a property interest that is damaged by an oil and gas operator's permit to sue for that violation.

Nuisance litigation in state court

The classic "nuisance" law suit alleges that the defendant is taking some action that interferes with the plaintiff's use and enjoyment of the plaintiff's property. The Texas Supreme Court about a decade ago limited the landowners' rights a bit. It ruled that the action complained of must "substantially" interfere use and enjoyment by "causing unreasonable discomfort or annoyance to persons of ordinary sensibilities." *Schneider National Carriers, Inc., et al., v. Bates, et al*., 147 S.W.3d 264, 269 (Tex. 2004). It is clear that odors and irritating fumes may create, even under the new standard, actionable nuisances. "There is no question that foul odors, dust, noise, and bright lights - if sufficiently extreme - may constitute a nuisance." *Schneider*, above, citing numerous earlier cases involving odors and the like.

So, in addition to any statutory rights a local government may have to initiate litigation to enforce laws related to environmental affronts, it may initiate litigation against a polluter, if that polluter's activities substantially interfere with the local

government's use of its property. (Note, again, it is almost surely necessary that the local government, not just one or two of its citizens, be deprived in a significant way of the use and enjoyment of its property – but, that could occur at a park or could involve various types of government-owned property.)

Criminal Enforcement actions in state court

Chapter 7 of the Water Code provides that many, many violations of the state's air, water and solid waste laws and orders issued pursuant to those laws potentially subject the violator to criminal prosecution. See, §§7.141-7.202, Tex. Water Code. Criminal prosecutions are customarily brought by the county attorney or district attorney with jurisdiction of the place where the violation occurs. (Note that intentional misrepresentations in application forms or intentional mis-reporting of monitoring data, for example, might occur in places other than the location of the source of the pollution.)

There is a caveat, here, however. What was perceived by some to have been overly zealous prosecution by Houston and Harris County in the early 2000s led to the enactment of a limitation on local government criminal prosecution of alleged environmental violators. Section 7.203 of the Texas Water Code now requires that, before a district or county attorney may initiate a criminal prosecution against the holder of a TCEQ "permit" (and, that term will likely be broadly interpreted), there must be submitted to the TCEQ a report setting out the facts of the alleged violation. TCEQ, then, has 45 days to make its own evaluation of the credibility of the allegations and to determine if administrative or civil, rather than criminal, prosecution by the TCEQ would be an adequate means to handle the alleged violations. If TCEQ elects to initiate an administrative or a civil enforcement action, the local criminal prosecutor may not file criminal charges for the violations. However, the local government, if it was "significantly involved" in the prosecution, is generally entitled to receive 30% of any penalties the State collects.

Although this "prepare a report" provision limits the discretion of local prosecutors, it also sets in motion on a fairly short time line a process that may engage the resources of the state in a prosecution and, thereby, lessen the demand on local resources.

Citizen enforcement actions in federal court

The federal solid waste, clean air and clean water acts all provide for citizen enforcement suits in federal court by affected "persons" against violators of environmental permits and polluters who fail to get permits. Local governments can be persons. A complicating issue is that may pollution permits are issued by the State, not the federal, government. Confirming that a particular permit or regulation is one that

may be federally-enforced, even if issued by the State, can be tedious, but, in the end, a great many of them are federally-enforceable. Federal permit or regulation violations are more transparently-enforceable through these citizen suit provisions. See, 42 U.S.C. §§ 6972 (Solid Wastes Disposal Act or "RCRA") and 7604 (Clean Air Act), and 33 U.S.C.§ 1365 (Clean Water Act). The "citizen suit" provisions of other federal environmental laws might also be relevant, depending on the context in which the polluting activity occurs. E.g., the Endangered Species Act, 16 U.S.C. § 1540(g).

The common aspects of suits under any of these federal laws are (1) the plaintiff has to be harmed by the alleged violation (so, a local government would have to, in its own right, be harmed), (2) the alleged violator and various federal and state government officials must be given 60-days' notice of the impending suit, (3) if the federal or state government elects to do so, it may cut off by its own suit the right of the local government (i.e., of the "citizen") to sue, (4) suits for violations that are not ongoing at the time the suit is actually filed are very difficult to maintain, (5) law suits, once filed, may not be settled without prior review of the proposed settlement by the U.S. Justice Department, and (6) the prevailing party has the opportunity to recover its costs of attorneys and expert witnesses from the other side. There are substantial penalties (i.e., currently, up to $37,500/violation/day) theoretically available against violators; these are paid to the U.S. Treasury. There is a provision under most or all of these statutes that allows for a portion of the fine to be offset by a "supplemental environmental project," which is a local project or set of projects that in some vague way address the damage that was done; this obviously opens some possibilities for locally-beneficial remedies for violations.