

## FUNDAMENTALS OF ENVIRONMENTAL ENFORCEMENT

*By James E. Smith  
Beirne, Maynard & Parsons, L.L.P.*

### **I. Formal Enforcement is Expensive; the Deck is Stacked Against the Defendant, and the Settlement Flexibility is Significantly Restricted.**

- A. Settle matters administratively.
- B. Use internal procedures to minimize or eliminate violations.
- C. Ensure compliance with present and future permits.
  - 1. Make sure operations persons know exactly the compliance requirements.
  - 2. Make sure permit applications represent limits that can be met.

### **II. Enforcement of Permit Requirements.**

- A. If a company is not in compliance with its permit and is sued, a Texas court has no discretion; the court must enjoin the violation. The doctrine of balancing the equities does not apply to environmental enforcement case. *State of Texas v. Texas Pet Foods, Inc.*, 591 S.W.2d 800 (Tex. 1979).
- B. A Texas Court does not have the power to modify permit terms for any period of time. *State of Texas v. Associated Metals and Minerals Corporation, d/b/a Gulf Chemical*, 635 S.W.2D 407 (Tex. 1982).
  - 1. No temporary suspension of permit requirements.
  - 2. No grace period to install new equipment.
  - 3. No compliance plan settling future violations unless:
    - a. Agreed by State;
    - b. With accompanying penalty; and
    - c. Current Attorney General's policy is not to settle future violations, need to settle future violations with agency or risk additional lawsuit and possibility of contempt sanctions.
- C. If you cannot comply with your permit, your only options are:

1. Stop operations.
2. Change operations to comply.
3. Negotiate modifications with the agency, accepting:
  - a. Any penalty demanded;
  - b. Any compliance schedule available; and
  - c. Any accompanying injunctive measures desired by the agency.

### **III. Enforcement Procedures.**

#### **A. Administrative enforcement.**

1. Environmental laws give agencies the power to bring enforcement action through administrative process. TEX. WATER CODE ANN. § 7.051 (Vernon 1997)
2. In general, administrative agencies have the power to assess administrative penalties and to issue orders requiring actions necessary under law.
3. Persons affected by such action have the right to an adjudicatory hearing before an administrative law judge. Texas law provides that administrative law judges who hear TNRCC matters must be trained and separately designated, although they may hear matters relating to other agencies.
  - a. Administrative law judge hears evidence and issues findings of fact and conclusions of law based on the evidence.
  - b. Administrative law judge issues a recommendation for decision to the agency.
  - c. Final agency decision rests with agency, such as the commissioners of the Texas Natural Resources Conservation Commission.
4. Procedures before administrative law judges.
  - a. Non-jury trial.
  - b. Administrative law judges can order discovery.
  - c. Parties submit proposed findings of fact and conclusions of law.

5. Procedure before agency.
  - a. Parties generally are given a brief opportunity to summarize their arguments to the commissioners.
  - b. No evidence taken; decision based on administrative law judge's report, although agency need not accept recommendation.
6. Appeals of administrative enforcement action.
  - a. To Travis County District Court.
  - b. Court's review is similar to an appellate court's review of a trial decision;
  - c. Generally, no evidence at district court.
  - d. District court reviews errors of law and whether substantial evidence supports agency decision.
7. Administrative penalties are generally less than civil penalties.

B. Civil enforcement.

1. Statutes give the attorney general the right to sue for civil penalties and injunctive relief.
2. Both parties have the right to demand a jury trial regarding the number of violations and the amount of civil penalty.
3. State generally seeks injunctive relief.
  - a. Injunction can prohibit acts by the company and by officers and employees.
  - b. Courts can enforce injunctions against officers and employees, as well as the company.
  - c. Courts may commit persons to jail until contempt is purged. Rule 692, Tex. R. Civ. P.
4. Procedure is like any civil suit, with interrogatories, requests for production of documents, depositions, and attorneys' fees - both yours and the State of Texas if you lose the case.

#### **IV. Criminal Enforcement of State Environmental Laws.**

- A. Texas has criminal laws for intentionally or knowingly violating air pollution requirements, including:
  - 1. Permit violation.
    - a. Individual: \$50,000 fine, 180 days in jail.
    - b. Corporation: \$100,000 fine.
  - 2. Failure to pay fees:
    - a. Individual: fine of twice the fee, 90 days in jail.
    - b. Corporation: fine of twice the fee.
  - 3. False statement, failure to notify, tampering with monitoring device:
    - a. Individual: \$100,000 fine, one year in jail.
    - b. Corporation: \$250,000 fine.
  - 4. Intentional or knowing endangerment:
    - a. Individual: \$150,000 fine, five years in jail.
    - b. Corporation: \$300,000 fine.
  - 5. Reckless endangerment:
    - a. Individual: \$100,000 fine, one year in jail.
    - b. Corporation: \$250,000 fine.
- B. Criminal laws for violations of solid waste requirements:
  - 1. The following intentional or knowing acts are punishable by up to \$50,000 fine and five years in jail for an individual, or \$250,000 fine for corporation:
    - a. Transporting hazardous waste without a permit.
    - b. Storing, processing, or disposing of hazardous waste without a permit or in violation of a permit.

2. The following intentional or knowing acts have the same penalties, except jail is limited to two years:
  - a. Omitting material information or making false material statements in required documents.
  - b. Knowingly destroying or not filing required hazardous waste documents.
  - c. Transporting hazardous waste without manifest.
3. The criminal penalties for intentionally or knowingly transporting, storing, or disposing hazardous waste and knowingly placing another in imminent danger of death or serious bodily injury are:
  - a. Individual: \$250,000 fine, 15 years in jail.
  - b. Corporation: \$1,000,000 fine.
  - c. If death or serious bodily injury results: individual - \$500,000 fine, 30 years in jail; corporation - \$1,500,000 fine.
4. For the intentional or knowing release of hazardous waste that places another in imminent danger or serious bodily injury:
  - a. Individual: \$150,000 fine, 5 years in jail.
  - b. Corporation: \$300,000 fine.
  - c. Penalties double if actual injury occurs.
5. For the reckless handling of hazardous waste that places another in imminent danger of death or serious bodily injury:
  - a. Individual: \$100,000 fine, 1 year in jail.
  - b. Corporation: \$2,500,000 fine.
  - c. Penalties double if actual injury occurs.
6. For the intentional or knowing failure to pay fees:
  - a. Individual: fine of twice the fee, 90 days in jail.
  - b. Corporation: fine of twice the fee.

- C. Criminal penalties for violations of water pollution rules:
1. For the intentional or knowing discharge that causes pollution.
    - a. Individual: \$25,000 fine, 1 year in jail.
    - b. Corporation: \$50,000 fine.
  2. For the intentional or knowing violation of rule, permit, or order.
    - a. Individual: \$25,000 fine, 1 year in jail.
    - b. Corporation: \$50,000 fine.
  3. For discharging or permitting a discharge that causes pollution, fine up to \$10,000.
    - a. No intent required.
    - b. Must prove "water pollution."
  4. Other penalties for failure to report, failure to pay fees, making false statements, generally same as for Air Act violations.

**V. Issues from Criminal Environmental Cases.**

- A. Legal definition of "intent":
1. Taking an action with a desired result. TEX. PENAL CODE ANN. § 6.03(a) (Vernon 1994).
  2. Taking an action with a result, although not desired, that the actor knows with substantial certainty will occur, similar to definition of "knowing." TEX. PENAL CODE ANN. § 6.03(b) (Vernon 1994).
  3. Federal appeals court decision approved the following instruction to a jury in a criminal case:

"Knowledge may be established by direct or circumstantial evidence. One may not willfully or intentionally remain ignorant of a fact, material or important to his conduct to escape the consequences of criminal law.

If you find beyond a reasonable doubt that the defendant was aware that there was a high probability that employees of [the defendant's

company] were [violating the environmental laws] but he deliberately and consciously avoided confirming this fact so that he could deny knowledge if apprehended, then you may treat this deliberate avoidance as the equivalent of knowledge, unless you find that the defendant actually believed that [his company's] employees were not [violating the environmental laws]."

The court further stated:

"The element of acting knowingly may also be satisfied if you find beyond a reasonable doubt that the defendant willfully or intentionally remained ignorant of relevant material facts."

*U.S. v. Hopkins*, 40 ERC 1953, 1955 (2nd Cir. 1995).

B. A knowing discharge can include:

1. The person actually opening a valve or dumping a barrel;
2. The person who ordered the activity; and
3. The person who knew of the activity, had the power to try to stop it, and did not. *United States v. Boldt*, 929 F.2d 35 (1st Cir. 1991).
4. Also, in *Boldt*, the defendant testified that he lacked authority to stop plant operations. His ex-boss (Boldt was fired before trial) testified that Boldt did have that authority. The jury believed the ex-boss and the jury convicted Boldt.

C. In hazardous waste and most other pollution cases, government does not have to prove that the defendant knew a material was actually a hazardous waste under RCRA or that the discharge required a permit, only that:

1. The defendant knew the nature of the materials involved, and
2. That these materials were hazardous in the "lay sense" of having "potential to harm others or the environment." *United States v. Baytank (Houston), Inc.*, 934 F.2d 599 (5th Cir. 1991)
3. In *United States v. Ahmad*, 101 F.3d 386 (5th Cir. 1996). The Court remanded for new trial because the trial court refused to allow an instruction to the jury that Ahmad did not knowingly discharge pollutants, because he thought he was discharging only water. Ahmad argued that the court should have given the jury the option of finding him guilty of the lesser included offense of negligent discharge of pollution.
4. *U.S. v. Kelley Technical Coatings, Inc.*, 157 F.3d 432 (6th Cir. 1998).

Government did not need to prove that the defendants knew that they were violating RCRA, but did have to prove that the defendants knew that the materials were waste and that they had the potential to harm others or the environment.

5. *Slott v. State*, 148 S.W.3d 624 (Tex. App. – Hou [14<sup>th</sup> Dist] 2004, pet. ref'd). Appellate court found that jury was correctly instructed that the prosecution is not required to prove that the defendant knew that the material stored, disposed, caused to be stored, or caused to be disposed was a hazardous waste as defined, but rather the prosecution must prove that the defendant knew that the material was waste and had the potential to be harmful to others or the environment.

D. The problem of historical contamination of soils. *L. B. Foster Co. v. State*, 106 S.W. 3d 194 (Tex. App. –Houston [1<sup>st</sup> Dist] 2003, pet. ref'd)

1. Evidence of waste outside its container and on the ground, without more, is legally insufficient to establish disposal within the limitations period (at 203).
2. For criminal prosecutions, “disposal” requires more than passive migration (at 207).
3. Evidence of overturned buckets and oozing sludge from them, along with testimony of ongoing flows of oil onto the ground was sufficient (at 210-211).

E. Recent cases in Harris County, Texas:

1. Knowing disposal of hazardous waste; District Attorney's Office recommended probation in return for a guilty plea. Judge refused to accept the D.A.'s recommendation. Judge insisted on 90 days in the county jail for a guilty plea, or the defendants could go to trial and have a jury assess punishment.
2. Civil case in Harris County, brought by Houston City Attorney's office and Attorney General's office against Euris Carmichael, alleging violations of the fire code and the water code in the storage of paint products and containers. Jury assessed \$20K per day of violations of the water code (less than the max) and \$5K per day for violations of the fire code, with 1,919 and 804 days of violations, respectively, for a total assessment of \$80,780,000.00.
3. *Ex Parte Canady*; Texas appellate court holds that payment of an administrative fine by a corporation precludes criminal charges only against the corporation. The payment did not preclude criminal charges against individuals allegedly involved in the illegal disposal.

4. Chevron Phillips Chemical Company agreed to a \$1.8 million fine and to perform two environmental projects that will cost at least \$1.2 million to settle enforcement actions relating to releases of chemicals in explosions in June 1999 and March 2000.
5. Harris County District Attorney's office takes a very broad view of Texas law – an employee or other person who knows of pollution and fails to report it is guilty of a crime.

F. Other cases of interest:

1. Rockwell pleaded guilty to 10 criminal counts and agreed to pay an \$18.5 million fine. The fine was larger than the company's total profits during the time of the violations. The plea bargain required Rockwell to agree not to seek indemnification of any of the fine amount from the Department of Energy, even though Rockwell's contracts might have given it that right.
2. Chevron pleaded guilty to 65 counts of Clean Water Act violations and agreed to pay \$6.5 million in a criminal fine and \$1.5 million in a civil penalty. The Chevron president was required to personally appear for the sentencing hearing.
3. Sika, Inc. was assessed a \$13.1 million TSCA fine that was reduced to \$1.1 million because of:
  - a. Its ability to pay (\$4.8 million reduction); and
  - b. Its prompt voluntary disclosure of violations and taking steps to mitigate the damage (\$7.2 million reduction).
4. Anax International pleaded guilty and agreed to a recommendation that it pay \$9.4 million for a Pacific Coast oil spill.
5. *Burke v EPA*; court upheld EPA's administrative ruling, preventing him from contracting with the federal government or participating in any federal assistance or loan program for five years, based on a plea of guilty to a Clean Water Act charge.
6. In *U.S. v Hansen*, four defendants pleaded guilty and three defendants were convicted after a five day trial, alleging Clean Water Act and RCRA violations at the Linden Chemical and Plastics plant in Georgia. Allegations included illegal discharges and endangering employees. Those who insisted on a trial received severe sentences; the parent corporation's CEO, 72 years old, received a nine-year sentence. The plant manager received six and one-

half years, and the chief operating officer received nearly four years. Court of appeals affirmed, *U.S. v. Hansen*, 262 F.3d 1217 (11<sup>th</sup> Cir.2001), and adopted the responsible corporate officer standard approved in the *Iverson* case.

7. In *U.S. v Iverson*, 162 F.3d 1015 (9<sup>th</sup> Cir. 1998), a federal appellate court approved an instruction to the jury that it could convict based on the responsible corporate officer doctrine, that is, the jury could convict a person not directly involved in the illegal, not permitted, discharge. The government needed to prove, however, beyond a reasonable doubt, that the defendant knew of the discharge, had the authority and capacity to prevent it, and failed to prevent it. The jury convicted. As in *Boldt*, a key issue can be the level of authority to discontinue operations. Arguably, a person can be convicted for being mistaken regarding that person's level of authority to order the cessation of operations.
8. In *U.S. v Peters*, defendants were found guilty of all five counts and sentenced to 36 months imprisonment and \$50,000.00 fine. They worked at Huntsman in Port Arthur, and Peters had been with the state agency. The 5<sup>th</sup> Circuit reversed and remanded for a new trial, due to improper discussions between the judge and a juror. A copy of the opinion is available. After the reversal, the defendants pleaded guilty and accepted six months' home confinement, five years probation and a \$20,000 fine.
9. *Indiana Department of Environmental Management v RLG Inc.*, 755 N.E.2d 556 (Ind. 2001); Indiana Supreme Court adopts the responsible corporate officer doctrine for an individual who was in a position of responsibility to influence corporate policies or activities, where a nexus exists between the individual and the violation so that the individual could have influenced the actions that were violations, and where the actions or inactions of the individual facilitated the violation.
10. *U.S. v MacDonald*, 339 F.3d 1080 (9<sup>th</sup> cir. 2003); upheld the enhancement of a sentence under the sentencing guidelines due to the disposal of hazardous waste or hazardous substances relating to a methamphetamine production facility on public lands in Montana.
11. *United States v. Harris*; defendant was convicted of illegal importation of Freon and sentenced to 17 years in prison.
12. *U.S. v. Salvagno*; father and son sentenced to 25 years and 20 years in prison for illegal asbestos abatement activity. Case involved significant asbestos exposure to employees.
13. *U.S. v. Illinois Power Company and Dynegy Midwest Generation*; settlement required a \$9 million civil penalty, \$15 million in environmental projects,

and a commitment to install environmental control equipment of approximately \$500 million at five coal fired power plants.

14. EPA 2005 Enforcement Statistics:

- 2,273 penalty orders
- \$154 million in assessed civil penalties
- \$100 million in assessed criminal penalties
- \$10 billion in injunctive relief
- \$57 million in Supplemental Environmental Projects
- 372 criminal investigations; 320 defendants charged, 186 years of incarceration