



KEMPSMITH_{LAW}



**GROUNDWATER CONSERVATION DISTRICT
ENFORCEMENT**

DEBORAH C. TREJO

Kemp Smith LLP

Austin, Texas

ENFORCEMENT AUTHORITY



- Districts are authorized by Chapter 36 to make and *enforce* rules to carry out their purposes. TWC §§ 36.101, .102.
- GCDs may file suit for injunctive relief and civil penalties. TWC §§ 36.101, .102. GCDs may obtain civil penalties based on what's established in their rules (up to \$10,000/day/violation).
- GCDs are required to enforce Tex. Dep't of Licensing and Regulation rules related to plugging abandoned wells. Occ. Code § 1901.255.

ENFORCEMENT AUTHORITY



- The Edwards Aquifer Authority (EAA) has express statutory authority to assess administrative penalties, following the process outlined in the EAA Act, similar to the administrative penalty authority granted to state regulatory agencies, including the Texas Commission on Environmental Quality.

ENFORCEMENT AUTHORITY, CONT.



- Districts authorized to enforce certain state environmental laws by filing suit in state district court for violations of certain chapters of:
 - the Texas Water Code (Chs. 16 (water development), 26 (water quality) and 28 (water wells)),
 - the Texas Occupations Code (Ch. 1903 (irrigators)), and
 - the Texas Health and Safety Code (Chs. 361 (Solid Waste Disposal Act), 371 (Used Oil Collection, Management and Recycling Act), 372 (plumbing fixtures), 382 (Clean Air Act), and 401 (Radiation Control Act)), and rules adopted and permits issued thereunder, occurring within their jurisdiction.

GENERAL MANAGER/STAFF V. BOARD



Responsibilities may be divided between general manager/ staff and board.

General manager and staff may:

- conduct inspections;
- monitor program compliance;
- send enforcement letters; and/or
- offer to/enter into settlements as delegated to do so by the board.

Board may:

- approve settlements and lawsuits.

DISTRICT RIGHT TO ENTER PROPERTY, TWC § 36.123

District employees and agents are entitled to enter any public or private property within the boundaries of the district . . . **at any reasonable time for the purpose of inspecting and investigating conditions relating to the quality of water in the state or the compliance with any rule, regulation, permit, or other order of the district.** District employees or agents acting under this authority who enter private property shall observe the establishment's rules and regulations concerning safety, internal security, and fire protection and shall notify any occupant or management of their presence and shall exhibit proper credentials.

DISTRICT RIGHT TO ENTER PROPERTY, TWC § 26.173



(a) A local government has the same power as the commission has under Section 26.014 of this code to enter public and private property within its territorial jurisdiction to make inspections and investigations of conditions relating to water quality. The local government in exercising this power is subject to the same provisions and restrictions as the commission.

(b) When requested by the executive director, the result of any inspection or investigation made by the local government shall be transmitted to the commission for its consideration.

PRE-CIVIL SUIT COMPLIANCE EFFORTS



Because the primary power districts have to enforce their rules is the right to file a civil law suit, GCD enforcement programs largely involve pre-suit settlement efforts, whereby districts seek to bring persons into compliance with their rules, often requiring the violators to settle the violation and avoid a lawsuit by paying some money to the district.

Often settlement agreements are drafted by a district's staff and attorneys, together with the violator, and then presented to the district's board for approval. Entering into a settlement agreement achieves the parties' desires to avoid litigation and costly civil penalties and attorney's fees.

CIVIL SUITS

Section 36.102 of the Water Code authorizes districts to enforce Chapter 36 and their own rules by filing a suit.

Recovery of civil penalties is mandatory if the district prevails. Moreover, a court must assess at least the minimum penalty applicable for each day the violation occurred.

If a GCD prevails in any suit to enforce its rules, the district may seek and the court shall grant recovery for attorney's fees, costs for expert witnesses, and other costs incurred by the district.

However, lawsuits are expensive to file and litigate so there is incentive on both sides to settle pre-suit, if possible.

INJUNCTIVE RELIEF AND CIVIL PENALTIES



Injunctive relief

- could include injunction on withdrawals, possibly including a requirement that a permittee reduce future withdrawals to offset past overpumping

Civil penalties

- assessed based on the number of violations times the number of days of a violations

- for overpumping violations, penalties are not based on the amount of water overpumped but on the days of overpumping that can be proven

GCD ENFORCEMENT SUITS – SUBJECT MATTER



- Unauthorized withdrawals/overpumping
- Failure to install meter or to report
- Waste through flowing wells or allowing water to discharge to another aquifer or to surface water
- Failure to plug abandoned well
- Failure to pay groundwater pumping fees, non-reporting
- Failure of driller and/or landowner or operator to comply with well construction and plugging rules

EXAMPLE OF ENFORCEMENT SUIT: GCD V. LARGE CORPORATION



Large company failed to obtain permit for groundwater use.

GCD sent enforcement letters in an attempt to obtain compliance.

Letters were ignored.

GCD sued.

Newspaper article published about violations.

Company contacted GCD's counsel.

Company came into compliance with District rules and paid the district to settle the civil penalty claims.

AQUA TEXAS V. HAYS TRINITY GCD



The Hays Trinity GCD regulates groundwater withdrawals in the southwestern part of Hays County and its jurisdiction includes Jacob's well, which receives its source water from the Trinity Aquifer. The district has created the Jacob's well management zone in an attempt to monitor and protect Jacob's well.

Due to persistent drought conditions, the HTGCD has required reductions on permitted withdrawal amounts to conserve groundwater, including special regulations requiring reductions in the Jacob's well management area.

AQUA TEXAS V. HAYS TRINITY GCD



Aqua Texas is a for profit corporation that holds permits from the district to withdraw groundwater from the Trinity Aquifer in Hays County, including within the Jacob's well management area.

Aqua has violated its permits from the district by overpumping its authorized amounts in 2021, 2022 and 2023.

There is no indication that Aqua will come into compliance with limits on its pumping in 2024 or even in the near term.

Impacted community members have repeatedly expressed their concerns about the impacts of Aqua's noncompliance on the Trinity Aquifer, Jacob's well and surrounding well owners.

AQUA TEXAS V. HAYS TRINITY GCD



The district has notified Aqua of its violations and attempted to get Aqua into compliance and resolve the violations for years.

The district has encouraged Aqua to do more to conserve water use, including by expending funds to remedy leaks from its water system and to further encourage its customers to conserve water.

The district has attempted to resolve Aqua's violations by a settlement that would include a payment in lieu of the civil penalties that the district would obtain by filing suit in district court.

AQUA TEXAS V. HAYS TRINITY GCD



Aqua has not renewed some of its permits due to its unresolved violations of the district's rules, therefore, some of its withdrawals are currently not authorized by permits.

In December 2023, following months of attempts to achieve a settlement of the outstanding and ongoing violations, and prior to the district filing an enforcement suit against Aqua, Aqua filed suit in federal district court in Austin to prevent the district from enforcing its rules and asserting that the district's enforcement of its rules constitutes a violation of its civil rights to equal protection, due process and results in a taking of its property. Aqua

AQUA TEXAS V. HAYS TRINITY GCD



has also asserted that because it is required to provide water to its customers within its service area (area of certificate of convenience and necessity), it cannot also comply with the district's rules limiting production to permitted amounts.

AQUA TEXAS V. HAYS TRINITY GCD



The suit is pending but the parties are attempting early mediation in an attempt to achieve a settlement.

BLF LAND V. NORTH PLAINS GCD



The North Plains GCD is the second oldest GCD in the State of Texas and it regulates groundwater withdrawals in several counties in the Panhandle, primarily from the Ogallala Aquifer.

The district's rules require well spacing and limit groundwater withdrawals to 1.5 acre-feet per acre within a “groundwater production unit” – which is a tract of contiguous acreage of up to 1,600 acres owned by a permittee.

BLF is a corporation that holds permits from the district to withdraw groundwater from the Ogallala Aquifer in Dallam and Hartley Counties, for agricultural production on part of more than 50,000 acres that it owns.

BLF LAND V. NORTH PLAINS GCD



BLF has repeatedly violated the district's rules by exceeding the authorized amounts allocated to its groundwater production units, concentrating its pumping in only a few "sweet spots" on its property where it has very productive wells and creating a cone of depression that has impacted adjacent landowners.

BLF has also committed an additional more than 100 violations of the district's rules related to metering and well construction, among other things.

BLF has paid the district monetary settlements for its overpumping violations in prior years.

BLF LAND V. NORTH PLAINS GCD



There is no indication that BLF will come into compliance with limits on its authorized pumping in 2024 or even in the near term.

In August 2023, following months of attempts to achieve a settlement of the outstanding and ongoing violations, and prior to the district filing an enforcement suit against it, BLF filed suit in federal district court in Amarillo to prevent the district from enforcing its rules and asserting that the district's rules are unauthorized by law (*ultra vires*) and that the district's enforcement of its rules constitutes a violation of its civil rights to equal protection, due process and results in a taking of its property.

BLF LAND V. NORTH PLAINS GCD



In response to the suit against it, the district filed a motion to dismiss for failure to state valid claims on numerous grounds and a countersuit bringing enforcement claims for BLF's numerous violations.

The suit is currently pending and discovery is ongoing.



Deborah C. Trejo
Kemp Smith LLP
Austin, Texas
(512) 909-8359
dtrejo@kempsmith.com