

**SUBJECT:** Limiting penalties in environmental suits brought by local governments

**COMMITTEE:** Environmental Regulation — committee substitute recommended

**VOTE:** 7 ayes — Morrison, E. Rodriguez, Isaac, Kacal, K. King, P. King, E. Thompson

1 nay — Reynolds

1 absent — Lozano

**WITNESSES:** For — Christina Wisdom, Texas Association of Manufacturers; George Christian, Texas Civil Justice League; (*Registered, but did not testify:* Chris Miller, AECT; Jennifer Newton, AGC of Texas - Highway, Heavy; Gary Gibbs, American Electric Power Co.; Adam Burklund, American Insurance Association; Adrian Acevedo, Anadarko Petroleum Corp.; Michael Peterson, AT&T; Dennis Kearns, BNSF Railway and Texas Railroad Association; Charlene Heydinger, BP; Tom Sellers, ConocoPhillips; Kinnan Golemon, Devon Energy, Shell Oil Company, Austin White Lime; Warren Mayberry, DuPont; Martin Allday, Enbridge; Grant Ruckel, Energy Transfer; Samantha Omev, ExxonMobil; Kelly McBeth, Gas Processors Association, Martin Companies; Mike Meroney, Huntsman Corp., BASF Corp., and Sherwin Alumina, Co.; Lee Loftis, Independent Insurance Agents of Texas; Todd Morgan, International Paper; Bill Oswald, Koch Companies; Mance Zachary, Luminant; Steve Carr, National Waste and Recycling Association Texas Chapter, Republic Services; Julie Moore, Occidental Petroleum; Mike Hull, Texans for Lawsuit Reform; Bill Stevens, Texas Alliance of Energy Producers; Stephen Minick, Texas Association of Business; Hector Rivero, Texas Chemical Council; Lisa Kaufman, Texas Civil Justice League; Matt Burgin, Texas Food and Fuel Association; Mari Ruckel, Texas Oil and Gas Association; Donald Ward, Texas Pest Control Association; Thure Cannon, Texas Pipeline Association; Daniel Womack, the Dow Chemical Company; Tara Snowden, Zachry Corporation; Chris Macomb)

Against — Steve Hupp, Bayou Preservation Association; Terence

O'Rourke, Harris County; John Odam and Cathy Sisk, Harris County; R. Jack Cagle, Harris County Precinct 4; Cyrus Reed, Lone Star Chapter; Tom "Smitty" Smith, Public Citizen, Inc.; Jackie Young and Sam Braun, San Jacinto River Coalition; Donald Lee, Texas Conference of Urban Counties; Ryan Fite, Travis County and the Travis County Attorney; (*Registered, but did not testify*: Lindsay Lanagan, City of Houston; David Foster, Clean Water Action; Jim Allison, County Judges and Commissioners Association of Texas; Anne Clark, Environment Texas; Robin Schneider, Texas Campaign for the Environment; David Weinberg, Texas League of Conservation Voters; Ware Wendell, Texas Watch; Deece Eckstein, Travis County Commissioners Court; Debra Baker; Lou Macnaughton)

On — Bryan Blevins, Texas Trial Lawyers Association; (*Registered, but did not testify*: Jon Niermann, Office of the Attorney General; Caroline Sweeney, Texas Commission on Environmental Quality)

**BACKGROUND:** Water Code, ch. 7 authorizes the Texas Commission on Environmental Quality (TCEQ) to enforce certain provisions of the Water Code and the Health and Safety Code, including assessing administrative or civil penalties against violators.

Under sec. 7.053, TCEQ is required to consider certain factors when determining amounts for administrative penalties. These include:

- the nature, circumstances, extent, duration, and gravity of the prohibited act;
- the impact of the violation on certain factors, such as air and water quality; and
- the history and extent of previous violations committed by the alleged violator and the degree of culpability.

Local governments also may institute a civil suit against a person who has committed, is committing, or is threatening to commit certain violations of the Water Code or Health and Safety Code in a district court by its own attorney for injunctive relief, civil penalty, or both, as provided by sec.

7.351. Barring certain exceptions, a civil penalty recovered must be divided equally between the state and the local government that brought the suit, under sec. 7.107.

**DIGEST:**

CSHB 1794 would add new provisions to the enforcement chapter of the Water Code to limit the civil penalty that a person could be assessed resulting from a suit brought by a local government. Total penalties would be limited to \$4.3 million, and daily penalties could be between \$50 and \$25,000 for each day of each violation.

The bill would require the trier of fact in a suit brought by a local government to consider the factors described in Water Code, sec. 7.053, such as the nature of the act and its impact, in determining the appropriate civil penalty.

CSHB 1794 would require that a local government bring a civil suit not later than five years from the date the violator notified the commission of the violation in writing or the date the violator received a notice of enforcement from the commission regarding the violation, whichever was earlier.

The bill would not limit the state's authority to pursue the assessment of a civil penalty under this chapter.

The bill would take effect September 1, 2015, and would apply only to violations that occurred on or after that date.

**SUPPORTERS  
SAY:**

CSHB 1794 would place reasonable limits on the total amount of civil penalties that could be assessed for violations committed by companies or individuals who were responsible for cleaning up environmental violations under the Water Code. Civil penalties, which may be assessed on top of remediation costs or damages paid under other types of suits, take away from the resources an individual or companies could use toward clean-up efforts. They also do not provide a deterrent after the fact. Because the awards go to the local government and state coffers, they also do not assist victims in recovering losses or provide any other benefit

related to the violation.

Companies need certainty regarding regulations, including penalties, and can operate more efficiently and productively when they know what to expect. This bill would help provide that certainty. Being subject to penalties of unlimited amounts for violations that occurred well in the past is unreasonable. Excessive or unpredictable penalties could have a negative effect on the growth of industry in the state and on the willingness of individuals to self-report and remediate violations.

Moreover, because property often changes hands over time, the threat of large monetary penalties will discourage today's businesses from purchasing, cleaning up, and re-purposing land that was contaminated by previous owners. This, in turn, could lead to more abandoned and un-remediated areas.

The bill would preserve TCEQ's authority, both as a delegate of the Environmental Protection Agency to pursue violators of environmental laws and as an entity that can assess penalties outside of the limitations the bill would place on suits brought by local governments.

CSHB 1794 would not prevent local governments from filing suit for past violations, but it would require them to bring such suits within a certain reasonable window. The five-year time limit would be triggered when a violator notified the commission in writing that a violation had occurred or received a notice of enforcement from the commission about an alleged violation. Violations that occurred in the past could be pursued within five years of the date of the earlier of these notifications.

The bill would not interfere with the ability of individuals or local governments to pursue civil or criminal lawsuits for damages to individuals or their property. It would provide some assurance to those who were acting in good faith that they would not be penalized by local governments excessively for past actions, beyond the amount of actual damages. The bill also would leave discretion with the state to pursue additional amounts in civil penalties if warranted.

OPPONENTS  
SAY:

CSHB 1794 would hinder the ability of local governments to hold accountable individuals or companies that had caused harm to the environment or public health. Suing for penalties is different from suing for damages or requiring clean-up efforts, and it has a different purpose — to deter and punish. Local governments sometimes need this enforcement mechanism to send a strong message about protecting the environment. There is no evidence that this power has been abused in the past, and there is no need to limit local governments by capping the amount of penalties they could recover in a suit or by placing time restrictions on pursuing cases.

TCEQ does not have the resources to pursue complex, labor-intensive cases. Local governments should be able to take on that role without hindrance, and the money they recover helps to fund their enforcement efforts. TCEQ is required to be a “necessary, independent party” to any local government’s case of this kind, according to current law, and penalties assessed must be split evenly between the local entity and the state. However, the bill does not address how there could be cap on the amount the local government could recover in penalties but no cap on the amount the state could recover.

Establishing penalty limits could encourage some companies to make a business decision to plan on paying the penalties if the cost of preventing or remediating an environmental problem were higher. Clean-up in some cases of this type can run into the hundreds of millions of dollars.

Federal regulations require certain penalty minimums and maximums for every violation. The bill would set an overall cap for each case, not for each violation, and some cases involve many violations per day over many days. For this reason, some individual violations might not be associated with a penalty amount, which could conflict with the federal requirement for minimum and maximum penalty amounts. This could affect TCEQ’s federally delegated authority over environmental regulation in the state.

The bill would address time restrictions for suits against violators who received a notice of enforcement but not those who received a notice of violation. Therefore, it is not clear how the five-year rule would apply to violators who received a notice of violation, which is much more common.

CSHB 1794 would send a general message that the state takes it easy on polluters. Moreover, although the bill would not hinder individuals from filing suits for damages to their health or property, many do not have the means to hire attorneys and pursue such cases. Therefore, local governments can play a strong role in penalizing polluters in egregious cases.

**NOTES:** The companion bill, SB 1509 by Hancock, is scheduled for public hearing on April 28 in the Senate Natural Resources and Economic Development Committee.