

Reversed and Remanded and Opinion filed July 30, 2020.



In The
Fourteenth Court of Appeals

NO. 14-18-00628-CV

**RICHARD A. HYDE, P.E., IN HIS OFFICIAL CAPACITY AS EXECUTIVE
DIRECTOR OF THE TEXAS COMMISSION ON ENVIRONMENTAL
QUALITY AND THE TEXAS COMMISSION ON ENVIRONMENTAL
QUALITY, Appellants**

V.

HARRISON COUNTY, TEXAS, Appellee

**On Appeal from the 353rd District Court
Travis County, Texas
Trial Court Cause No. D-1-GN-17-002026**

OPINION¹

The Texas Commission on Environmental Quality and its executive director appeal the district court's vacatur and dismissal of the commission's final decision in a contested enforcement action against a Texas county based on the district

¹ Justice Hassan joins this opinion except for subsection 6 of section II.A. Justice Wise joins the opinion in its entirety.

court's determination that the county enjoyed governmental immunity as to the enforcement action and the imposition of an administrative penalty under Texas Water Code section 7.051. The commission and its executive director assert that governmental immunity does not apply in this context or that the Texas Legislature has waived the county's governmental immunity as to enforcement actions seeking imposition of an administrative penalty under this provision. We presume that, absent a waiver, governmental immunity applies in this context. Concluding that the Texas Legislature has waived the county's presumed governmental immunity as to enforcement actions seeking imposition of an administrative penalty under Water Code section 7.051, we reverse and remand.

I. FACTUAL AND PROCEDURAL BACKGROUND

Appellee/petitioner Harrison County (the "County") owns and operates underground storage tanks at its road and bridge department and at the Harrison County Airport (the "Tanks"). An investigator working on behalf of appellant/defendant Texas Commission on Environmental Quality (the "Commission") documented that the County had not provided release detection for the pressurized piping associated with the Tanks, in violation of Texas Water Code section 26.3475(a) and title 30, section 334.50(b)(2) of the Texas Administrative Code. Specifically, the County allegedly had not conducted the required annual line-leak-detector and piping-tightness tests.

Based on these findings, appellant/defendant Richard A. Hyde, P.E., in his official capacity as Executive Director of the Texas Commission on Environmental Quality initiated an administrative enforcement action against the County before the Commission (the "Enforcement Action"). Hyde alleged that the County had violated Water Code section 26.3475(a) and title 30, section 334.50(b)(2) of the Administrative Code. Based on these asserted violations, Hyde sought an

administrative penalty of \$5,626 against the County under Water Code section 7.051.²

The County answered, contested the Enforcement Action, and requested a hearing. The Commission referred the Enforcement Action to the State Office of Administrative Hearings for an evidentiary hearing. The County filed a plea to the jurisdiction, asserting that the Commission lacked subject-matter jurisdiction over the County in the Enforcement Action because the County had immunity from suit under the doctrine of governmental immunity³ and because the Legislature had not waived that immunity. The administrative law judge signed an order denying the plea to the jurisdiction and stating the following conclusions:

- (1) Under Water Code section 7.051, the Commission may assess an administrative penalty against a person who violated a provision of the Water Code or a rule adopted or order issued by the Commission;
- (2) Under Government Code section 311.005, the word “person” as used in Water Code section 7.057 includes governmental subdivisions and agencies;
- (3) Under Government Code section 311.034, a statute may not be construed as a waiver of governmental immunity unless the waiver is effected by clear and unambiguous language;

² Hyde initially requested an administrative penalty of \$8,250, but he later reduced the request to \$5,626.

³ Courts often use the terms “sovereign immunity” and “governmental immunity” interchangeably even though they are two distinct concepts. *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 694 n. 3 (Tex. 2003). “Sovereign immunity” refers to a State’s immunity from suit and liability. *Id.* Its protection extends not only to the State, but also to the varying divisions of state government, including agencies, boards, hospitals, and universities. “Governmental immunity” protects political subdivisions of the State, including counties, cities, and school districts. *Id.* Though the terms differ, the law gives these two immunities the same treatment as to the issues raised in today’s case. *See id.* Thus, we cite cases involving sovereign immunity and cases involving governmental immunity without noting the different type of immunity involved.

(4) Under Government Code section 311.034, the applicability of the definition of “person” from Government Code section 311.005 to a statute does not indicate legislative intent to waive governmental immunity unless the context of the statute indicates no other reasonable construction;

(5) Based on the context of Water Code section 7.051, including Water Code section 7.067(a), (a-1), the only reasonable statutory construction is that the Legislature intended to waive the County’s governmental immunity for the imposition by the Commission of an administrative penalty under Water Code section 7.057; and

(6) the failure to adopt this statutory construction would make Water Code section 7.067(a-1) meaningless.

After the administrative law judge conducted an evidentiary hearing and presented a proposal for decision, the Commission issued its decision in the Enforcement Action in an order assessing \$5,626 in administrative penalties against the County under Water Code section 7.051. The Commission based this decision on its determination that the County violated Water Code section 26.3475(a) and title 30, section 334.50(b)(2) of the Administrative Code. The Commission’s order contained findings of fact, including the following:

- An investigator concluded that the County had failed to provide release detection for the pressurized piping associated with the Tanks, in violation of title 30, section 334.50(b)(2) of the Administrative Code.
- The County had not conducted line-leak-detector and piping-tightness tests for one year prior to June 18, 2015.
- If piping at an underground-storage-tank system fails and is not tested annually, gasoline or diesel fuel can leak undetected into groundwater and surface water where humans and the environment may be exposed to it.
- Undetected leaks from an underground-storage-tank system can be catastrophic because gasoline and diesel fuel are toxic and flammable.
- After the June 18, 2015 inspections, the County had line-leak-detector and piping-tightness tests conducted by a contractor, and the County’s piping passed both tests.

- The County’s compliance history shows that it is generally a high performer; however, the County had a previous alleged violation at one facility that was resolved with an agreed order.

The Commission’s order contained conclusions of law, including the following:

- Under Water Code section 7.051(a)(1)(A),(B), the Commission may assess an administrative penalty against a person who violates a provision of the Water Code within the Commission’s jurisdiction or any rule adopted thereunder.
- Under Government Code section 311.005, as used in Water Code section 7.051, the term “person” covers governmental subdivisions, including counties.
- The context of Water Code section 7.051(a)(1)(A) and (B) indicates that the legislature intended to waive governmental immunity so that the Commission could assess administrative penalties against counties for their violations of the sections of the Water Code that the Commission administers and rules adopted under them, and no other construction of these statutes is reasonable.
- The County violated Water Code section 26.3475(a) and title 30, section 334.50(b)(2) of the Administrative Code.
- Based on consideration of the findings of fact and conclusions of law, the factors set out in Water Code section 7.053 and the Commission’s penalty policy, a total administrative penalty of \$5,626 is justified and should be assessed against the County for the violations in this case.

The County timely moved for rehearing, and the motion was overruled by operation of law. Under Government Code section 2001.171, the County filed a petition for review of the Commission’s decision in the district court below, naming Hyde and the Commission (collectively the “Commission Parties”) as defendants. In its petition the County asserted that governmental immunity applied to the Enforcement Action and that the Legislature had not waived the County’s governmental immunity in this context. Therefore, the County alleged that it

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