NO. 14-20-00146-CV

IN THE COURT OF APPEALS FOURTEENTH DISTRICT
HOUSTON, TEXAS DIVISION

EXXON MOBIL CHEMICAL COMPANY

Appellant

V.

THE STATE OF TEXAS, acting on behalf of the Texas Commission on Environmental Quality, a Necessary and Indispensable Party,

and

HARRIS COUNTY, TEXAS

Appellee

On Appeal from the 190th Judicial District Court Harris County, Texas; the Honorable Beau A. Miller presiding, Trial Court No. 2019-52676

BRIEF OF APPELLEE, HARRIS COUNTY

ORAL ARGUMENT REQUESTED

Rock W. A. Owens
State Bar No. 15382100
Rock.Owens@cao.hctx.net

Special Assistant County Attorney
Environmental Affairs
Harris County Attorney's Office

Eric C. Farrar
State Bar No. 24036549
efarrar@olsonllp.com

OLSON & OLSON, L.L.P.

ATTORNEYS FOR APPELLEE

IDENTITY OF PARTIES AND COUNSEL

The following is a complete list of all parties to the trial court's judgment or order appealed from and the names and addresses of all trial and appellate counsel:

Appellant/Plaintiff:

THE STATE OF TEXAS

Katie B. Hobson
Assistant Attorney General
Phillip Ledbetter
Assistant Attorney General
Jake Brown
Assistant Attorney General
OFFICE OF THE ATTORNEY GENERAL OF TEXAS,
ENVIRONMENTAL PROTECTION DIVISION

P.O. Box 12548, MC-066
Austin, Texas 78711-2548
Telephone: (512)463-2012

Plaintiff/Appellee:

HARRIS COUNTY, TEXAS

Rock W. A. Owens
Special Assistant County Attorney
Environmental Affairs
1019 Congress, 15th Floor
Houston, Texas 77002
Telephone: (713) 274-5129

Eric C. Farrar
OLSON & OLSON LLP
2727 Allen Parkway
Wortham Tower, Suite 600
Houston, Texas 77019
Telephone: (713)533-3800

Defendant in trial court:

EXXON MOBIL CHEMICAL COMPANY

Albert R. Axe
Lisa Dyar
McGINNIS LOCHRIDGE
600 Congress Avenue, Suite 2100
Austin, TX 78701
Telephone: (512) 495-6149

TABLE OF CONTENTS

IDENTITY OF PARTIES AND COUNSEL.....ii

TABLE OF CONTENTS iv

APPENDIX.....vi

INDEX OF AUTHORITIES.....vii

STATEMENT OF THE CASE viii

STATEMENT REGARDING ORAL ARGUMENT ix

ISSUES PRESENTED.....x

STATEMENT OF FACTS.....1

SUMMARY OF THE ARGUMENT 1

ARGUMENT 8

I. Applicable law..... **Error! Bookmark not defined.**

A. Standard of review. ..... **Error! Bookmark not defined.**

B. Governmental immunity and jurisdiction generally..... **Error! Bookmark not defined.**

C. Immunity and jurisdiction in Tax Code cases specifically. **Error! Bookmark not defined.**

II. Analysis..... **Error! Bookmark not defined.**

A. Tax Code protests and procedures generally.**Error! Bookmark not defined.**

B. The trial court lacked jurisdiction over IQ's claim concerning its Section 25.25(d) correction motion because IQ filed the motion after the statutory deadline. .. **Error! Bookmark not defined.**

C. The trial court lacked jurisdiction over IQ's claims concerning its Section 41.411 protests because IQ filed the protests after the statutory deadline. ..... **Error! Bookmark not defined.**

D. IQ's proposed construction of the delinquency date deadline in Section 41.44(c) thwarts the Legislatures' clear intent expressed in the Tax Code as a whole..... **Error! Bookmark not defined.**

PRAYER 28

CERTIFICATE OF COMPLIANCE..... 30

CERTIFICATE OF SERVICE..... 31

APPENDIX

Tex. Tax Code Ann. § 6.01 ..... TAB A

Tex. Tax Code Ann. § 23.55 ..... TAB B

Tex. Tax Code Ann. § 25.19 ..... TAB C

Tex. Tax Code Ann. § 25.24 ..... TAB D

Tex. Tax Code Ann. § 25.25 ..... TAB E

Tex. Tax Code Ann. § 25.26 ..... TAB F

Tex. Tax Code Ann. § 31.02 ..... TAB G

Tex. Tax Code Ann. § 31.03 ..... TAB H

Tex. Tax Code Ann. § 31.04 ..... TAB I

Tex. Tax Code Ann. § 41.41 ..... TAB J

Tex. Tax Code Ann. § 41.411 ..... TAB K

Tex. Tax Code Ann. § 41.4115 ..... TAB L

Tex. Tax Code Ann. § 41.42 ..... TAB M

Tex. Tax Code Ann. § 41.44 ..... TAB N

Tex. Tax Code Ann. § 42.01 ..... TAB O

Tex. Tax Code Ann. § 42.09 ..... TAB P

Tex. Tax Code Ann. § 42.43 ..... TAB Q

Tex. Gov't Code Ann. § 311.034 ..... TAB R

INDEX OF AUTHORITIES

CASES

STATUTES

STATEMENT OF THE CASE

Nature of the Case:	Harris County filed suit against ExxonMobil under the Water Code alleging violations of the State's environmental laws. CR:3-12.
Trial Court:	Trial Court No. 2019-52676 in the 190th Judicial District Court Harris County, Texas; the Honorable Beau A. Miller presiding,
Proceedings below:	Appellee, Harris County, filed a lawsuit against Exxon Mobil Chemical Company under the Water Code alleging violations of the State's environmental laws. CR:3-12. In such suits, the Water Code makes the Texas Commission on Environmental Quality a necessary and indispensable party. The Office of the Attorney General, representing the State of Texas, acting on behalf of the TCEQ, filed a plea to the jurisdiction. CR:17-27. The State asserts that the Harris County Commissioner's Court duly-enacted resolution authorizing the County Attorney to bring environmental enforcement suits is invalid because it does not comply with a timing requirement that the State deems expedient but that is not found in the plain text of the Water Code. The trial court denied the plea. CR:175. The State filed this interlocutory appeal. CR:180-83.

STATEMENT REGARDING ORAL ARGUMENT

Appellee, Harris County, respectfully submits that argument will assist the Court and the parties to focus on the narrow issue at hand, whether conditions not found in the plain language of a statute are jurisdictional prerequisites to suit. As the State points out, the interpretation of the statutes at issue appears to be a question not yet addressed by the courts, although a similar argument made by the State was rejected in *In re Volkswagen Clean Diesel Litigation*, 557 S.W.3d 78 (Tex. App.—Austin 2017, no pet.).

ISSUE PRESENTED

[State's issue: Did Harris County have standing to enforce the Texas Clean Air Act without first obtaining specific authorization from its governing body as required by Texas Water Code section 7.352?]

The Harris County Commissioners Court authorized the County Attorney, on behalf of the County, to exercise the enforcement authority granted to local governments under the Water Code. The issue in this case is whether the Commissioners Court could give general authority to the County Attorney or whether the Water Code requires a specific, case-by-case authorization.

STATEMENT OF FACTS

I. Factual Background.

At issue in this case is an April 30, 2019 resolution ("the Resolution") passed by the Harris County Commissioners Court. The Resolution, set forth below, authorized the Harris County Attorney to file environmental enforcement actions.

> WHEREAS, multiple chemical fires occurred in Harris County during March and April of 2019; and
>
> WHEREAS, Section 7.352 of the Texas Water Code authorizes a local government to bring an enforcement action under the Water Code by adopting a resolution authorizing the exercise of such power; and
>
> WHEREAS, this Commissioners Court finds that this resolution is necessary and proper for Harris County to provide a more robust response to such incidents; and
>
> WHEREAS, recent events demonstrate the need for the County Attorney to file environmental enforcement actions as soon as possible after an event in order to protect the public and the environment, to preserve evidence, and to prevent additional negative impacts to the community.
>
> THEREFORE, IT IS RESOLVED AND ORDERED that the Harris County Commissioners Court hereby authorizes the Harris County Attorney's Office to have authority to file, as it deems necessary, environmental enforcement actions as authorized by Chapter 7, Subchapter H, of the Texas Water Code, including lawsuits related to violations of the Clean Air

Act, Clean Water Act, Solid Waste Disposal Act, and any other civil action that the legislature has authorized a local government to bring in order to protect the public and the environment, to preserve evidence, and to prevent additional negative impacts to the community.

IT IS FURTHER RESOLVED AND ORDERED that the County Attorney is authorized to join in such suit or suits any and all parties he deems proper, to do any and all things reasonable and necessary to compel compliance with the law,. [sic] Pursuant to Tex. Civ. Prac. & Rem. Code Ann. § 6.001, the County Attorney shall be exempt from filing a bond to obtain an injunction.

IT IS RESOLVED AND ORDERED that the Harris County Attorney's Office shall notify the members of Commissioners Court of the filing of environmental enforcement actions on the same day an action is filed pursuant to this Order. The Harris County Attorney's Office shall place the action on the agenda for the next regular meeting of Commissioners Court for approval. The County Attorney shall seek Commissioners Court approval prior to settling an action filed pursuant to this Order.

IT IS RESOLVED AND ORDERED that it is the intention of Harris County Commissioners Court to review this Order during the May Commissioners Court meeting of each year.

All Harris County officials and employees are authorized to do any and all things necessary or convenient to accomplish the purpose of this Order.

CR:42-43.

On July 31, 2019, Exxon Mobil's olefins plant in Baytown, Harris County, Texas, suffered an explosion and fire, resulting in unauthorized emissions into the air. On August 1, 2019, the Harris County Attorney filed suit on behalf of the County seeking injunctive relief under Chapter 7 of the Water Code for violations of the Texas Clean Air Act. CR:3-12; *see* Tex. Health & Safety Code Ann. §§ 382.001-.510. Under the Water Code, the TCEQ is a necessary and indispensable party. Tex. Water Code Ann. § 7.353. The State on behalf of the TCEQ filed a plea to the jurisdiction asserting that Harris County lacked standing. CR:17-27. After briefing and argument, the trial court denied the State's plea. CR:175.

II. Response to State's Statement of Facts.

The State's introduction and statement of facts are argumentative and deal largely with the law. Much of the State's discussion is dedicated to framing matters in ways that it thinks bolster its arguments in this case. The State dwells on purported motivations for the Resolution (and implying the motivations are improper). For example, the State argues that the purpose of the Resolution "was to enable the Harris County

Attorney to beat the State to the courthouse." State's Brief at 1; *see id.* at 7 (ascribing an improper purpose to the Resolution and Harris County's lawsuit over environmental violations). The State also sets up a straw man by characterizing the Resolution as a "Rolling Authorization" both to easily knock it down—because a rolling authorization could never be allowed under the State's construction of the Water Code—and to again imply some improper motive. However, the purported evidence the State uses to justify these tactics is improper under well-established law.

"[S]tatements explaining *an individual legislator's* intent cannot reliably describe *the legislature's* intent." *Tex. Health Presbyterian Hosp. of Denton v. D.A.*, 569 S.W.3d 126, 136 (Tex. 2018) (emphasis in original). "An individual legislator's statements—even those of the bill's author or sponsor—do not and cannot describe the understandings, intentions, or motives of the many other legislators who vote in favor of a bill." *Id.* at 136-37 (citing *AT & T Commc'ns of Tex., L.P. v. Sw. Bell Tel. Co.*, 186 S.W.3d 517, 528–29 (Tex. 2006) and *Molinet v. Kimbrell*, 356 S.W.3d 407, 414 (Tex. 2011)). The motives, understanding, or knowledge of an

individual commissioner has no bearing on the validity or meaning of the Resolution. *See Sheffield Dev. Co., Inc. v. City of Glenn Heights*, 140 S.W.3d 660, 678 & n.91 (Tex. 2004).[1] Therefore, the State's use of the transcripts of the Commissioners Court meeting and statements of individual commissioners or County Attorney Office employees is improper and should be disregarded. The operative language is the language of the Resolution. Stripped of the State's argumentative spin,[2]

---

[1] Note 91 in *Sheffield* compiles a sampling of authority for this well-settled proposition.

> *See, e.g., City of Corpus Christi v. Bayfront Assocs., Ltd.,* 814 S.W.2d 98, 105 (Tex. App.—Corpus Christi 1991, writ denied) ("an individual city council member's mental process, subjective knowledge, or motive is irrelevant to a legislative act of the city, such as the passage of an ordinance"); *Mayhew v. Town of Sunnyvale,* 774 S.W.2d 284, 298 (Tex. App.—Dallas 1989, writ denied) ("the subjective knowledge, motive, or mental process of an individual legislator is irrelevant to a determination of the validity of a legislative act because the legislative act expresses the *collective will* of the legislative body") (quoting *Sosa v. City of Corpus Christi,* 739 S.W.2d 397, 405 (Tex. App.—Corpus Christi 1987, no writ)), *aff'd after remand,* 964 S.W.2d 922 (Tex.1998).

Sheffield Dev. Co., Inc. v. City of Glenn Heights, 140 S.W.3d 660, 678 n.91 (Tex. 2004).

[2] To be sure, in this case, there is an undercurrent of the State's desire to remove power from local governments and consolidate it in Austin. *See, e.g.*, Supp. CR:9-11. However, the Court is not called upon to address that issue. Rather, the issue is one of statutory construction only, as set forth in the argument, i*nfra*.

the plain language of the Resolution and the plain Language of the Water Code demonstrate that the Harris County Commissioners Court properly authorized the filing of this suit to enforce the provisions of the Water Code and Clean Air Act.

SUMMARY OF THE ARGUMENT

The Legislature unequivocally gave local governments like Harris County the power to enforce the Clean Air Act by seeking injunctive relief for violations. However, a local government may not exercise the enforcement power unless its governing body adopts a resolution authorizing the exercise of that power. On April 30, 2019, the Harris County Commissioners Court adopted a resolution authorizing the Harris County Attorney to file suits relating to violations of the Clean Air Act. After the adoption of the Resolution, Harris County filed suit against ExxonMobil seeking injunctive relief for violations of the Clean Air Act. Harris County complied with the plain language of the Water Code.

Assuming the State is correct in classifying Section 7.352 as a jurisdictional requirement, its argument still fails. At its heart, the argument requires adding or modifying the plain language of the statute, which only the Legislature may do. Neither vague policy arguments, legislative history, nor the State's mere say-so authorize this Court to amend the statute.

ARGUMENT

I. Harris County complied with the plain language of Section 7.352. The Commissioners Court authorized the County attorney to bring enforcement actions on behalf of the County.

The Legislature conferred standing[3] on Harris County and other local governments to safeguard the public welfare by bringing lawsuits for violations of environmental and pollution control laws. Section 7.351 of the Texas Water Code provides, in pertinent part:

> [I]f it appears that a violation or threat of violation of Chapter 16, 26, or 28 of this code, Chapter 361, 371, 372, or 382, Health and Safety Code, a provision of Chapter 401, Health and Safety Code, under the commission's jurisdiction, or Chapter 1903, Occupations Code, or a rule adopted or an order or a permit issued under those chapters or provisions has occurred or is occurring in the jurisdiction of a local government, the local government … may institute a civil suit under Subchapter D in the same manner as the commission in a district court by its own attorney for the injunctive relief or civil penalty, or both, as authorized by this chapter against the person who committed, is committing, or is threatening to commit the violation.

Tex. Water Code Ann. § 7.351(a). However, for certain suits, the Legislature imposed a condition.

---

[3] Whether Section 7.352 is a standing requirement is in dispute. *See infra*.

> In the case of a violation of Chapter 26 of this code or Chapter 382, Health and Safety Code, a local government may not exercise the enforcement power authorized by this subchapter unless its governing body adopts a resolution authorizing the exercise of the power.

Id. § 7.352.

Applying the plain language of this statute, there are two requirements in Section 7.352 relevant to this suit:

1) a violation of Chapter 26 of the Water Code or Chapter 382 of the Health and Safety Code; and

2) an adoption of a resolution by a local government's governing body authorizing the exercise of the power to bring suit granted by Water Code Chapter 7, Subchapter H.

In this case, Harris County alleged and the State agrees that a violation of Chapter 382 occurred. The State filed suit in Travis County for such violations, Cause No. D-1-GN-19-004495, *State of Texas v. Exxon Mobil Corporation*, in the 419th District Court of Travis County, alleging, "This matter involves an ethylene manufacturing plant owned and operated by ExxonMobil in the Baytown, Texas area that caught fire and emitted multiple air contaminants without TCEQ authorization." CR:56. The first requirement of Section 7.352 is established.

In this case it is undisputed that the Commissioners Court passed a resolution in April of 2019 authorizing the County attorney "to file, as it deems necessary, environmental enforcement actions as authorized by Chapter 7, Subchapter H, of the Texas Water Code, including lawsuits related to violations of the Clean Air …." CR:42. Thus, the second requirement is also established.

The State briefly argues that, because the Resolution requires the County Attorney to place any suit filed under the authorization of the Resolution to be put on the Commissioners Court meeting agenda "for approval," the Commissioners Court did not authorize filing of suit until such approval. State's Brief at 11. As discussed above, the Resolution meets the requirements of the plain language of Section 7.352. That the Commissioners Court requires the County Attorney to seek approval to continue the suit in no way undoes that fact. The Commissioners Court is the governing body of the County and can decide whether to continue with a lawsuit or not, whether it is a Water Code case or some other type of suit. "As long as the commissioners court does not impinge on the statutory duties of other officials, it ***retains the implied power to***

control litigation and choose its legal remedies." *Guynes v. Galveston County,* 861 S.W.2d 861, 863–64 (Tex. 1993) (emphasis added (citing, *inter alia*, *Looscan v. The County of Harris,* 58 Tex. 511, 514 (1883)). *Cf.* Tex. Const. art. V, § 18(b) ("County Commissioners Court … shall exercise such powers and jurisdiction over all county business, as is conferred by this Constitution and the laws of the State ….); *Santoya v. Pereda*, 75 S.W.3d 487, 490 (Tex. App.—San Antonio 2002, pet. denied) ("Clearly, a commissioners' court has the general authority to settle pending lawsuits.").

Because the undisputed facts show that the only two requirements to filing suit that are found in the plain language of Section 7.352 have been satisfied, Harris County has standing under Chapter 7 of the Water Code.

II. Harris County has standing to sue to enforce environmental laws. The State's argument is one of capacity or authority, not standing.

Standing to sue is different than capacity (or authority) to sue.

> A plaintiff has *standing* when it is personally aggrieved, regardless of whether it is acting with legal authority; a party has *capacity* when it has the legal authority to act, regardless of whether it has a justiciable interest in the controversy.

Austin Nursing Ctr., Inc. v. Lovato, 171 S.W.3d 845, 848–49 (Tex. 2005). "[S]tanding focuses on the issue of *who* may bring an action …." *Waco Indep. Sch. Dist. v. Gibson*, 22 S.W.3d 849, 851 (Tex. 2000).

Local governments, such as Harris County, are expressly within the set of "who" may bring an enforcement action under the Water Code. Chapter 7 of the Water Code, entitled "Enforcement," is primarily about the actions the TCEQ can take, including civil suits. *See, generally*, Tex. Water Code Ann. §§ 7.001-.310. But Chapter 7 also contains Subchapter H ("Suits by Others") concerning ***who***, in addition to the TCEQ, may bring suit. Specifically, for certain violations or threatened violations, "the local government … may institute a civil suit under Subchapter D …." Tex. Water Code Ann. § 7.351(a). In answer to the question "Who may bring an enforcement suit?", the Legislature unequivocally answered, "Local governments." Therefore, Harris County has standing.

Here, the State's argument is about Harris County's "authority," although the State attempts to frame it in terms of "standing."[4] The Water Code provisions that the state relies on address authority, not standing.

> … [T]he local government … may institute a civil suit under Subchapter D in the same manner as the commission …, as authorized by this chapter against the person who committed, is committing, or is threatening to commit the violation.

Tex. Water Code Ann. § 7.351 (emphasis added).

[4] For example, the following references to "authority" are just examples of many throughout the State's arguments in this Court and the trial court. *See* State's Brief at 1 (acknowledging legislature granted "local governments ***authority*** to enforce" environmental laws); at 3 (stating that the Resolution grants "authority to file environmental suits" to Harris County Attorney); at 16 (acknowledging local government has "authority" to file suits but arguing that a "discrete violation" must first occur before the governing body votes); at 18 (acknowledging that Water Code grants local government "enforcement authority," but arguing that there are limits to that authority). CR:21 (State's Plea to the Jurisdiction, stating "Harris County ***lacked authority*** to file suit on August 1, 2019."); CR:103-04 (State's Reply, acknowledging that Water Code "grants enforcement ***authority*** to local governments" but with limitations) (all emphasis added).

> [A] local government may not exercise the enforcement power authorized by this subchapter unless its governing body adopts a resolution authorizing the exercise of the power.

Tex. Water Code Ann. § 7. 352 (emphasis added). "Authorize" means "[t]o give legal authority; to empower." Black's Law Dictionary, "authorize" (11th ed. 2019) (accessed via Westlaw). The Water Code, therefore, expressly addresses authority, not standing.

In contrast, cases cited by the State in the trial court show that when the legislature intends to address statutory standing, that intent is clear. Cases cited by the State provide examples from the Family Code. The Family Code has several provisions addressing standing: § 102.003, "General Standing to File Suit"; § 102.004, "Standing for Grandparent or Other Person"; § 160.602, "Standing to Maintain Proceeding." Here, the statute does not mention standing. Instead it addresses the authority to file suit, which is a "capacity" issue.

Additionally, cases discussing who has statutory standing demonstrate that Section 7.352 is not a standing requirement. To demonstrate statutory standing, "[t]he party seeking relief must allege and establish standing within the parameters of the language used in the

statute." *In Interest of K.S.*, 492 S.W.3d 419, 423 (Tex. App.—Houston [14th Dist.] 2016, pet. denied); *accord In re McDaniel*, 408 S.W.3d 389, 397 (Tex. App.—Houston [1st Dist.] 2011, no pet.); *see also Everett v. TK-Taito, L.L.C.*, 178 S.W.3d 844, 851 (Tex. App.—Fort Worth 2005, no pet.) ("The plaintiff must allege and show how he has been injured or wronged within the parameters of the language used in the statute.") (citing *Scott v. Bd. of Adjustment,* 405 S.W.2d 55, 56 (Tex. 1966)); *see also In re H.G.*, 267 S.W.3d 120, 124 (Tex. App.—San Antonio 2008, pet. denied) (citing *Everett*); *OAIC Commercial Assets, L.L.C. v. Stonegate Vill., L.P.*, 234 S.W.3d 726, 736 (Tex. App.—Dallas 2007, pet. denied) (same); *SCI Tex. Funeral Services, Inc. v. Hijar*, 214 S.W.3d 148, 154 (Tex. App.—El Paso 2007, pet. denied) (same). Here, Section 7.352 does not address how a local government has been injured or wronged; Section 7.351 does. Section 7.351 requires that "a violation or threat of violation … has occurred or is occurring in the jurisdiction of a local government …." Tex. Water Code Ann. § 7.351(a). In this case, both Harris County and the State allege that a violation occurred in Harris County. Harris County therefore has standing. Whether or not

the Resolution meets an unstated timing requirement is one of capacity, not standing.

III. Even if the State is correct that Section 7.352 concerns standing, Harris County complied with the plain language of that statute. There is no jurisdictional timing requirement expressed or implied in the statute.

The State contends that there is a timing requirement implied—but not expressed—in the Water Code that deprives the court of subject matter jurisdiction. Section 7.352, in its entirety, provides:

> In the case of a violation of Chapter 26 of this code or Chapter 382, Health and Safety Code, a local government may not exercise the enforcement power authorized by this subchapter unless its governing body adopts a resolution authorizing the exercise of the power.

Tex. Water Code Ann. § 7.352. The State points to the opening phrase "[i]n the case of a violation" and the reference to exercising "the enforcement powered authorized by" the Water Code to extrapolate that a specific timeline is a jurisdictional prerequisite to a local government filing suit. State's Brief at 14. The State reasons that because Section 7.352 mentions "a violation" and the enforcement power is to file a civil suit "if it appears that a violation or threat of violation … has occurred or is occurring …" then a violation must have first occurred before a local government may

authorize the filing of a suit over that specific violation. State's Brief 14-16.

As set forth above, Harris County met the plain language of Section 7.352. The only requirement is that the Commissioners Court authorize the exercise of enforcement power. *See* Tex. Water Code Ann. § 7.352. There is no express timing requirement that such authorization come after after a specific violation. Furthermore, the plain language of Section 7.352 requires a resolution "authorizing the exercise of the [enforcement] power," not authorizing a specific suit. *See id.* Had the legislature intended the authorization to apply to a specific violation or a specific suit rather than the exercise of power generally, it would have said so.

A court may not "'judicially amend the statute to add an exception not implicitly contained in the language of the statute." *In re Geomet Recycling LLC*, 578 S.W.3d 82, 87 (Tex. 2019). Nor may it "engraft upon the statute any conditions or provisions not placed there by the legislature." *Id.* Rather, a court must "presume that the Legislature chooses a statute's language with care, including each word chosen for a

purpose, while purposefully omitting words not chosen." *TGS–NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 439 (Tex. 2011).

Despite the absence of any such language, the State contends that this statute has "conditions or provisions not placed there by the legislature." The State asserts that Section 7.352 contains a requirement that the resolution authorizing a local government to file suit concerning an environmental violation must occur **after** the violation occurs. In other words, the State contends that this Court should amend the Statute to add the language emphasized in the following:

> In the case of a violation of Chapter 26 of this code or Chapter 382, Health and Safety Code, a local government may not exercise the enforcement power authorized by this subchapter unless its governing body adopts a resolution authorizing the exercise of the power **after the violation that is the subject matter of the enforcement power occurs**.

However, the legislature did not include any such requirement. Courts must presume that the legislature carefully chose its words and purposefully omitted words it did not include. *TGS–NOPEC Geophysical Co.*, 340 S.W.3d at 439. Therefore, the State's argument must be rejected.

The Third Court of Appeals denied a similar attempt by the State to add limitations to the Water Code not found in its plain language. In *In*

re Volkswagen Clean Diesel Litigation, the State contended "that the plain text of the TCAA's enforcement provisions precludes local governments from bringing enforcement suits once the State has initiated a claim …." 557 S.W.3d 78, 85 (Tex. App.—Austin 2017, no pet.). The Third Court unequivocally rejected this contention:

> We disagree. The plain and unambiguous language of the TCAA enforcement provisions authorize local governments to file enforcement suits without regard to the State's filing of an enforcement suit. …. Nothing in the text of the enforcement provisions imposes a limitation on the filing of a local-government suit brought after the State has filed suit or ***implies the existence of a time line***. Nor is there anything in the text of the enforcement provisions that hint at such a limitation. …. Had the Legislature intended to limit TCAA-enforcement actions, it would have included language to that effect in the provision, as it did in other sections of Chapter 7.

Id. (emphasis added). Although the precise "limitation" or "timeline" the State seeks to add to the Water Code is different in this case, the Third Court's analysis is correct and the reasoning is applicable to this case. If the Legislature intended for a strict timeline requirement to apply and divest courts of jurisdiction when not followed, "it would have included language to that effect." *See id.*

III. The State's other arguments for adding restrictions to the plain language of the Water Code are not persuasive.

The executive branch of the state government's desire to divest local governments of enforcement power is no basis for changing the plain language of the Water Code. That is the province of the legislative branch. The State relies on vague policy arguments and prior enactments of the Legislature to support its argument, but these must be rejected.

A. The fact that the Water Code limits local authority in other specific areas does not support changing the plain language of the statute to impose the extra-textual limitation the State proposes in this case.

The State contends that the TCEQ is positioned as the primary enforcement authority for environmental matters and various limitations in the Water Code bolster that primacy.[5] The State argues that it therefore follows from the "context" of the Water Code that the limitation that it proposes in this case must also exist. State's Brief at

[5] This seems similar to a preemption argument. However, preemption requires "unmistakable clarity" from the Legislature that preemption is intended. *City of Laredo v. Laredo Merchants Ass'n*, 550 S.W.3d 586, 593 (Tex. 2018) (quoting *Lower Colorado River Auth. v. City of San Marcos*, 523 S.W.2d 641, 645 (Tex. 1975)). Here, the Legislature indicated there is no preemption with unmistakable clarity; the Water Code expressly allows local governments to file enforcement suits. Tex. Water Code Ann. § 7.351(a)-(b).

16-18. That is the sum of the State's argument. But this purported "contextual" argument cannot change the plain language of the statute. If this argument is sustained, then any limitation the State dreams up could also be imposed, simply because there are other limitations in place.

Although statutes must be read in context, this, too, must be taken in context. As the Supreme Court has recently reiterated:

> [C]ourts must apply the [statute] "as written" and "refrain from rewriting text that lawmakers chose." This means enforcing "the plain meaning of the text ***unless a different meaning*** is supplied by statutory definition, ***is apparent from the context***, or the plain meaning would lead to an absurd or nonsensical result."

Creative Oil & Gas, LLC v. Lona Hills Ranch, LLC, 591 S.W.3d 127, 133 (Tex. 2019) (citations omitted, emphasis added).

> It is the Legislature's prerogative to enact statutes; it is the judiciary's responsibility to interpret those statutes according to the language the Legislature used, ***absent a context indicating a different meaning*** or the result of the plain meaning of the language yielding absurd or nonsensical results.
>
> In interpreting statutes, we must look to the plain language, construing the text in light of the statute as a whole. ….

Silguero v. CSL Plasma, Inc., 579 S.W.3d 53, 59 (Tex. 2019) (citations omitted, emphasis added).

The State's proposed change to the Water Code is not "apparent from the context." Nothing in the provisions cited by the State provide a contextual basis that indicates the plain language of the Water Code must be modified to add another limitation on local governments. Clearly, the Legislature knows how to impose limits on local governments. The fact that it has not imposed the limitation urged by the State in this case is dispositive.

B. Similarly, the legislative history does not support changing the statute as advocated by the State.

The state cites *Ojo v. Farmers Group, Inc.*, 356 S.W.3d 421 (Tex. 2011), to support its foray into legislative history. But that case specifically states, "In addition to the express language of the statute, courts have looked to a statute's legislative history ***when determining whether the statute gives rise to a disparate impact theory of liability***." *Ojo*, 356 S.W.3d at 430. This case has nothing whatever to do with a disparate impact theory of liability. *Ojo*, therefore is not applicable. Rather, a more

recent case from the Texas Supreme Court that is not explicitly tied to a narrow issue is a better guide.

> Constitutionally, it is the courts' responsibility to construe statutes, not the legislature's. In fulfilling that duty, we do not consider legislative history or other extrinsic aides to interpret an unambiguous statute because the statute's plain language most reliably reveals the legislature's intent. We have therefore "repeatedly branded" reliance on extrinsic aids as "'improper' and 'inappropriate' when statutory language is clear."

Tex. Health Presbyterian Hosp. of Denton v. D.A., 569 S.W.3d 126, 136 (Tex. 2018) (footnotes, citations omitted). Similarly, the State also relies on prior versions of the law to support that the current law must have an additional, unexpressed timing requirement. But "prior law and legislative history cannot be used to alter or disregard the express terms of a code provision when its meaning is clear from the code when considered in its entirety …." *Fleming Foods of Tex., Inc. v. Rylander*, 6 S.W.3d 278, 284 (Tex. 1999).

The State does not contend that the statute is ambiguous. To the contrary, it asserts it is unambiguous.[6] State's Brief at 7, 15. Therefore,

[6] "Whether statutory language is ambiguous is a matter of law for courts to decide, and language is ambiguous only if the words yield more than one

the State's legislative history arguments are "inappropriate" and "improper." *See Tex. Health Presbyterian Hosp.*, 569 S.W.3d at 136; *see also Fleming Foods*, 6 S.W.3d at 284.

C. The State's arguments in this case are not entitled to deference from this Court.

The State also contends that, if the Court determines that Sections 7.351 and 7.352 are ambiguous, then the Court should "give serious consideration" to the State's interpretation. In the trial court the State argued that its construction was entitled to deference. CR:105-06. The State cited *R.R. Comm'n of Texas v. Texas Citizens for a Safe Future & Clean Water*, 336 S.W.3d 619 (Tex. 2011) below for its "deference" argument and in this Court for "serious consideration." However, in that case the Supreme Court dealt with a formal decision of the agency in question. *Id.* at 625. The deference accorded to agency constructions of a statute discussed in that case "is tempered by several considerations," the first of which is that such deference "applies to formal opinions

---

reasonable interpretation." *Sw. Royalties, Inc. v. Hegar*, 500 S.W.3d 400, 405 (Tex. 2016). Here, the State's interpretation requiring the addition of conditions and limitations not found in the plain language is not reasonable.

adopted after formal proceedings, not isolated comments during a hearing or opinions [in a court brief]." *Id.* The Supreme Court specifically noted that, because the case involved formal opinions, "we need not determine whether some lesser level of deference would be warranted if the statements were made informally …." *Id.* at n.7. Here, the State has presented no formal opinion. Therefore, the deference or consideration discussed in *Texas Citizens* does not apply. The State has cited no authority that its litigation arguments are entitled to any level of deference or consideration merely because it is the State making the arguments.

Furthermore, any deference or consideration would only apply if the statute is ambiguous. *Id.* at 625. The State has asserted there is no ambiguity in this case and does not identify any ambiguity for the Court. *See* State's Brief at 7, 15.

D. The State's vague assertion of policy purposes presents no basis for changing the plain language of the Water Code.

The State also contends that its interpretation is consistent with the policy purposes of the state's environmental laws. State's Brief at 24-

25. However, the environmental laws have a remedial policy purpose. The Clean Air Act—at issue in this case—states:

> The policy of this state and the purpose of this chapter are to safeguard the state's air resources from pollution by controlling or abating air pollution and emissions of air contaminants, consistent with the protection of public health, general welfare, and physical property, including the esthetic enjoyment of air resources by the public and the maintenance of adequate visibility.

Tex. Health & Safety Code Ann. § 382.002(a). *Cf.* Tex. Health & Safety Code Ann. § 361.002(a) (Solid Waste Disposal Act's policy and purpose is "to safeguard the health, welfare, and physical property of the people and to protect the environment by controlling the management of solid waste"); *R.R. St. & Co. Inc. v. Pilgrim Enterprises, Inc.*, 166 S.W.3d 232, 238 (Tex. 2005) (Solid Waste Disposal Act is remedial in nature). "If a statute is curative or remedial in its nature the rule is generally applied that it be given the most comprehensive and liberal construction possible." *Burch v. City of San Antonio,* 518 S.W.2d 540, 544 (Tex.1975) (cited by *R.R. St. & Co. Inc.*, 166 S.W.3d at 238). Adding limitations to the statute that are meant to hamper the ability of local governments to seeking to enjoin

environmental violations occurring within their jurisdiction does not further the policies of the environmental laws of this state.

E. The Open Meetings Act cannot be used to add restrictions to the Water Code.

The State's final argument is that the Open Meetings Act's emergency meeting provisions would allow the Commissioners Court to meet on short notice to authorize a suit if an environmental violation occurs. But this is beside the point. The plain language of Section 7.352 requires a local governing body to adopt a resolution authorizing the exercise of the power to enforce the environmental laws by filing suit under Chapter 7 of the Water Code before the local government may file the suit. There is no requirement in the Water Code that there be an emergency or that any particular provision of the Open Meetings Act be invoked. Of course, a local governing body must comply with the Open Meetings Act, but that is not at issue in this case. Here, the Commissioners Court adopted the Resolution (at an open meeting). CR:42-43. The Resolution authorizes the County Attorney to file suit to enforce environmental laws. CR:42. Whether or not another resolution could have been adopted during

an emergency meeting consistent with the Open Meetings Act adds nothing to the determination of this case.

PRAYER

Appellee, Harris County, requests this Court affirm the order of the trial court denying the Appellant's plea to the jurisdiction and render judgment remanding this cause.

Respectfully submitted,

VINCE RYAN
Harris County Attorney

/s/Rock A. W. Owens
Special Assistant County Attorney
Environmental Affairs
1019 Congress, 15th Floor
Houston, Texas 77002
Telephone:(713) 274-5121
Facsimile: (713) 437-4211
rock.owens@cao.hctx.net

OLSON & OLSON, L.L.P.

/s/ Eric C. Farrar
Eric C. Farrar
State Bar No. 24036549
efarrar@olsonllp.com
Wortham Tower, Suite 600
2727 Allen Parkway
Houston, Texas 77019
Telephone:(713) 533-3800
Facsimile: (713) 533-3888

ATTORNEYS FOR APPELLANT

CERTIFICATE OF COMPLIANCE

This brief complies with the word-count limitation of Tex. R. App. P. 9.4 because this brief contains 7,789 words, excluding the parts of the brief exempted by Tex. R. App. P. 9.4(i)(1), according to the word count of the word-processing software used to prepare this brief.

This brief complies with the typeface requirements of Tex. R. App. P. 9.4(e) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010.

/s/ Eric C. Farrar
Eric C. Farrar

CERTIFICATE OF SERVICE

I hereby certify that on March ##, 2020, a true and correct copy of the foregoing Appellee Harris County Texas's brief was served via electronic service on parties through counsel of record.

/s/Rock A. W. Owens
Rock A. W. Owens