

The Environmental Crimes Division



Historical Perspective

- Began in the mid to late 1970s
- Only one person was assigned to the division
- At that time we were called “The Pollution Division”
- In the mid-1990s it was changed to the Environmental Crimes Division.

Back in the groovy 70s, how did law enforcement bring environmental cases?

- Received most, if not all cases from Harris County Pollution Control Department (HCPCD)
- Responsible for the prosecution of two seminal cases:
 - *American Plant Food Corp v. State* (held that water in a drainage ditch is “state water”)
 - *Exxon Co. USA v. State* (strict liability in air pollution cases is constitutional – the mere act of doing the act constitutes the offense)

Our Division still makes case law with almost every trial:

L.B. Foster v. State: The term "disposal" does not include the passive disposal of hazardous wastes. In other words, a "disposal" of hazardous waste under section 7.162 requires more than the passive migration of waste through the soil unaided by affirmative human conduct.

Watts v. State: Although we find that the trial judge's interpretation of our holding in *American Plant Food* was essentially correct, it was for the jury to decide if the *drainage ditch* water in *this* case constituted "water in the State."

What do WE Prosecute?

Solid Waste – Chapters 361 and 365 of the Health and Safety Code

Air Pollution – Texas Clean Air Act – §7.177 – §7.183 of the Texas Water Code

Water Pollution – Chapter 7 of the Texas Water Code

Hazardous Waste Violations - §7.163 of the Texas Water Code. Consult 40CFR for definition of hazardous waste

Texas Parks and Wildlife Cases – sewage discharges from boats; industrial waste discharges (fish houses / seafood processors); prohibited species cases (non-native fish / plant life)

Texas Courts Turn to the Texas Health and Safety Code to Define Terms in the Texas Water Code by Default

“The Water Code does not define the phrase “disposed of”...The Code Construction Act permits us to construe a provision in light of existing statutes covering the same or similar subjects. Tex. Gov't Code Ann. § 311.023(4). The Texas Solid Waste Disposal Act (TSWDA)^[4] defines “disposal” as follows: ‘Disposal’ means the discharging, depositing, injecting, dumping, spilling, leaking, or placing of solid waste or hazardous waste, whether containerized or uncontainerized, into or on land or water so that the solid waste or hazardous waste or any constituent thereof may be emitted into the air, discharged into surface water or groundwater, or introduced into the environment in any other manner. Tex. Health & Safety Code Ann. § 361.003(7) (Vernon 2001). Here, the trial court defined “disposal” for the jury in accordance with this statutory definition.” *L.B. Foster Company v. The State of Texas*, 106 S.W.3d 194 (Tex. App. – Houston [1st Dist.] 2003).

WHO INVESTIGATES ENVIRONMENTAL CRIMES?

- HCPCD (HCPHES) – HCPCS (1956): Merged with the health department.
- HPD/EIU (Major Offenders)
- HCCO, Precincts 1 and 2
- Texas Parks & Wildlife Department
- TCEQ
- EPA
- County Attorney's Office

Areas where TCEQ Ties Our Hands...

TWC, Section 7.203 / Criminal Enforcement Review: Before a Peace Officer...may refer any alleged criminal environmental violation by a person holding a permit issued by the commission or an employee of that person of this code, of the Health and Safety Code, or of any other statute, rule, order permit, or other decision of the commission that is within the commission's jurisdiction to a prosecuting attorney for criminal prosecution, the peace officer shall notify the commission in writing of the alleged criminal environmental violation and include with the notification a report describing the facts and circumstances of the alleged environmental violation

TCEQ then has 45 days to evaluate the report, determine whether a violation exists, and whether administrative or civil remedies would be more appropriate than criminal charges.

Interesting Statistics at HCDO

- 344 Illegal Dumping Cases were filed and disposed of in 2016
- 51% (175) had no prior criminal record in Harris County
- 47% (165) had a prior conviction for a non-environmental crime in Harris County
- 1% (4) had a prior environmental crime conviction in Harris County

What is mostly being dumped?

- Household Litter
- **Tires**
- Couches
- Construction Materials
- **Dirt**

LITTER



Kim Ogg's Clean Green Pretrial Diversion Program (CGPD)

- The Harris County District Attorney's Office (HCDAO) is committed to public safety, responsible use of taxpayer money, and equal justice for all. Accordingly, this office is instituting a new policy affecting the prosecution of persons who are first-time environmental offenders for misdemeanor illegal dumping of nonhazardous solid waste as defined by Sections 361 and 365 of the Texas Health and Safety Code.

Pretrial Intervention and S.E.P

- Not all discarded waste poses the same public safety risk;
- Not all environmental crimes are committed by greedy people...some people are just trying to scrape living and don't take the time to appreciate their conduct;
- A first environmental violation is an opportunity for the D.A.'s office to remediate and implement a company wide training program;
- **S.E.P Fund** = Supplemental Environmental Project Funds

Harris County IS the Leader in Prosecuting Environmental Crime

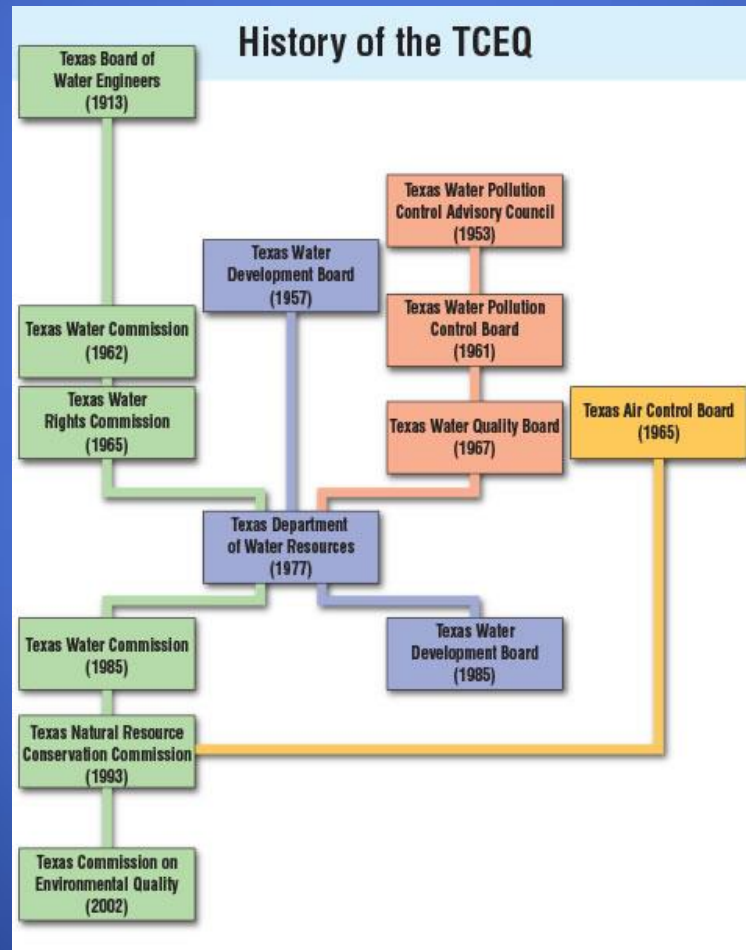
- No other county in Texas does what Harris County does
- No other county in Texas has more than one prosecutor assigned to environmental
- The vast majority of criminal environmental case law has come and continues to come from Harris County
- Harris County is the leader in Texas on environmental crimes

PROJECTS

1. History of the Texas Commission on

Environmental Quality (TCEQ): This project is designed for the legal historian. The project is a study of the history of TCEQ, including but not limited to the circumstances and conditions that led to its creation, who (or what) created it, how the commission has changed (both in name and purpose) over the years, and what events and / or circumstances led to these changes. The project should address the perception by some that the commission is more concerned with protecting licensed companies from criminal prosecution than assisting prosecutors seeking charges.

<https://www.tceq.texas.gov/agency/organization/tceqhistory.html>



2. The Constitutionality of TCEQ's Criminal Enforcement Review Under Texas Water

Code, Section 7.203: Section 7.203 of the Texas Water Code requires that a peace officer give TCEQ 45 days notice of its intention to refer a case to the prosecution for criminal charges. During this 45 day review period TCEQ has the right to impose a civil penalty, or from time to time, TCEQ may refer the case for criminal prosecution. Is this provision of the water code constitutional? If not why? Could this constitute a violation of the separation of powers? Remember, TCEQ is made up of 3 commissioners appointed by the Governor of the State of Texas (executive branch) to promulgate and assist the legislature (congressional branch) with passing laws in the area of environmental law in Texas. Is this the executive branch of government taking over the legislative branch? If so, is it at the consent of the legislature? And finally, can the executive branch use this statute to interfere in areas that would otherwise be the governed by the judiciary? Can TCEQ prevent the enforcement branch of government from filing a case, and then if filed, use this statute to tell the judiciary, "you have no right to hear this case"?

3. Is it possible to make the water pollution statutes more narrow and just? If you were the legislature, how would you accomplish this? How would you amend Sections 7.145 and 7.147 of the Texas Water Code? I believe there should be ways to simplify these statutes to draw on distinctions between pollutants and / or wastes that pose a public health risk, and those that do not. Furthermore, where such a distinction is drawn, the law should reflect a different penalty and / or remedy for enforcement. Perhaps environmental pollution that poses no public health risk should not be subject to criminal enforcement? For example, “company X” pours elemer’s glue into the storm drain. It is a non-toxic, eco-friendly substance. Or is it? How can we draft a new water pollution law to account for this difference. Should we account for this difference with a new law?