1990

Water Law

Douglas G. Caroom
Newlands Newlands
William D. Dugat III

Follow this and additional works at: https://scholar.smu.edu/smulr

Recommended Citation
Douglas G. Caroom, et al., Water Law, 44 Sw L.J. 441 (1990)
https://scholar.smu.edu/smulr/vol44/iss1/15
WATER LAW

By

Douglas G. Caroom*
Marcia Newlands**
and
William D. Dugat III***

THIS Article reviews judicial and legislative developments in the area of water law during the Survey period. The cases and statutes discussed address such topics as underground water, the Texas Open Beaches Act, municipal water and sewer fees, water quality, county sewage plants and utility rates.

I. JUDICIAL DEVELOPMENTS

A. Rights in Underground Water

Groundwater percolating beneath the soil is the property of the owner of the surface. In the absence of malice, the owner may appropriate such water while on his premises and make whatever use of it he pleases even though the use will cut off the flow of water to adjoining land.1 In Denis v. Kickapoo Land Co.2, the court of appeals in Austin considered the authority of a landowner to intercept and appropriate water from an underground spring before it reached the surface. Kickapoo Springs, which is located on the Mathews ranch in Concho County, is the principal source of water for Kickapoo Creek. After passing through the Mathews ranch, the creek continues onto the Denis ranch. In 1983 Mathews initiated an irrigation project by drilling into the earth and stone adjacent to Kickapoo Springs. Mathews placed a suction pipe through the excavation into the underground spring water that enabled him to capture water from the spring before it reached the surface. After being captured and measured, the water was channelled

---

* B.A., M.A., University of Texas; J.D. University of Texas. Attorney at Law, Bickerstaff, Heath & Smiley, Austin, Texas.
*** B.B.A., Texas A&M University; M.B.A., University of Missouri; J.D., University of Texas. Attorney at Law. Bickerstaff, Heath & Smiley, Austin, Texas.

1. City of Corpus Christi v. City of Pleasanton, 154 Tex. 289, 276 S.W.2d 798 (1955). In Corpus Christi, the court adopted the English rule expressed over 145 years ago in Acton v. Blundell, 12 Mees. & W. 324, 152 E.R. 1223 (Ex. 1843) and held that flowing artesian well water into a river bed to transport the water through the river bed over 118 miles to Corpus Christi was a lawful use of water. Id. at 804.
2. 771 S.W.2d 235 (Tex. App.—Austin 1989, writ denied).
into Kickapoo Creek. More than a mile downstream, Mathews withdrew a like amount of water from the creek for irrigation purposes.

Denis and other landowners sought a declaration from the court that Mathews lacked authority to appropriate water from the Springs for irrigation purposes without the State's permission and that Mathews' appropriation was a derogation of riparian water rights and an unlawful use of state waters in violation of section 11.081(a) of the Water Code. Mathews responded with a motion for summary judgment asserting that water from Kickapoo Springs was percolating groundwater that he, as the landowner, had the absolute right to use. Denis resisted the motion for summary judgment, reasoning that the water in Kickapoo Springs was not percolating water because it flowed in a defined subterranean stream that contributed perceptibly to the flow of Kickapoo Creek and benefited the downstream riparian owners. Thus, the state, not Mathews, owned the water.

The Austin court of appeals noted that in Texas the presumption is that subterranean water is percolating water. The court further noted that the Texas Supreme Court in *Houston T.C. Railway Co. v. East* adopted the English rule for such percolating ground water. Under the English common law, percolating waters supplying a natural spring were treated as part of the soil where found and the waters belonged absolutely to the surface owner, while waters supplying a spring through a well-defined and known subterranean channel might be regarded as surface water. For water to qualify as surface water, the subterranean water course must have contained all the characteristics of surface water courses, including beds, banks forming a channel, and a current of water. The court in *Denis* also recognized that the legislature had adopted the same English rule in section 52.002 of the Water Code by acknowledging the surface owner's rights in underground water.

---

3. **TEX. WATER CODE ANN.** § 11.081(a) (Vernon 1988). The section provides that a person may not wilfully take, divert, or appropriate any state-owned water for any purpose without complying with the requirements of Chapter 11 of the Water Code. *Id.*

4. 771 S.W.2d at 237 (citing Texas Co. v. Burkett, 117 Tex. 1629, 296 S.W. 273, 278 (1927)). In *Burkett*, the supreme court determined that the landowner was the absolute owner of springs fed by percolating waters. *Id.*

5. 98 Tex. 146, 81 S.W. 279 (1904). The *East* court upheld the railroad's capture of percolating water in water wells for use in locomotives, which capture completely cut off the supply of water that had been entering East's well. *Id.* at 281-82.

6. 771 S.W.2d at 236.

7. *Id.* See also Texas Co. v. Burkett, 117 Tex. 16, 296 S.W.2d 273, 278 (1927) (waters obtained from underground streams with defined channels may be subject to limited use or correlative rights).

8. 771 S.W.2d at 236-37, (citing C. KINNEY, A TREATISE ON THE LAW OF IRRIGATION AND WATER RIGHTS §§ 1195, 1196 at 2167-68 (2nd ed. 1912)).

9. *Id.* at 237. **TEX. WATER CODE ANN.** § 52.002 (Vernon Supp. 1990) provides: The ownership and rights of the owner of the land and his lessees and assigns in underground water are hereby recognized, and nothing in this code shall be construed as depriving or divesting the owner or his lessees and assigns of the ownership or rights, subject to the rules promulgated by a district under this chapter. 

*See also City of Sherman v. Public Utility Commission 643 S.W.2d 681, 686 (Tex. 1983) ("[t]he Texas Water Code confirms private rights in underground water, and is the sole source of statutory regulation of groundwater production." (footnotes omitted)). City of Sherman represents the supreme court's most recent reaffirmation of the English rule.*
Defined subterranean streams and the underflow of rivers, however, are not protected by the Water Code as underground water and thus are state water.\(^\text{10}\)

The court disagreed with the appellants' argument that the water in Kickapoo Springs flowed in a defined subterranean stream. Instead, the court concluded that Denis' expert witness admitted that the source of water from Kickapoo Springs was percolating water.\(^\text{11}\) Further, Denis' expert failed to establish that the water supplying Kickapoo Springs flowed through a subterranean water course possessing all the characteristics of surface water courses.\(^\text{12}\) Additionally, the court relied upon the presumption that groundwater is percolating water.\(^\text{13}\)

In overruling the appellants' other contention that Kickapoo Springs is state water governed by surface water law because it contributes perceptibly to the flow of Kickapoo Creek and benefits downstream riparian owners, the Austin court of appeals distinguished the supreme court's opinion in Texas Co. v. Burkett.\(^\text{14}\) The court dismissed as dicta the supreme court's implication that if percolating waters contributed to a surface water course, then the English rule of absolute ownership might not apply.\(^\text{15}\) The court held that

---

\(^{10}\) 771 S.W.2d at 237. See TEX. WATER CODE ANN. § 52.001(6) (Vernon Supp. 1990). That section defines underground water as: "water percolating below the surface of the earth and that is suitable for agricultural, gardening, domestic or stock raising purposes, but does not include defined subterranean streams or the underflow of river." (emphasis added)

\(^{11}\) 771 S.W.2d at 237. In support of a motion for summary judgment Denis provided an affidavit of an hydrologist in which the hydrologist stated:

> It appears, from the description by [Mathews] to me, that the well terminated in a cavity and that the well pump merely diverts spring flow through the pump and does not add to or augment the spring flow. It appears that the well has penetrated the orifice of the spring, that point where the percolating ground water has accumulated in a cavity thence to issue into the drainage channel. This collection point of the percolating ground water into a central cavity, or well-defined subterranean channel, comprises an orifice of the spring which would in my expert opinion, be the point at which the percolating ground water ceases to be ground water but becomes State or surface water. This then provides the basis for my determination that the water produced from the well is State or surface water. (emphasis added).

\(^{12}\) 771 S.W.2d at 238. Denis urged that the cavity referred to by the hydrologist constitute a well-defined subterranean channel that caused the water to be classified as surface water. The court disagreed stating: "that water collects in the cavity does not demonstrate a current exists. Unlike percolating water which may seep in from many directions, current is a flow of water in a discernible direction." Id. n.3.

\(^{13}\) Id. at 238.

\(^{14}\) 117 Tex. 16, 296 S.W. 273 (1927).

\(^{15}\) 771 S.W.2d at 238. The Denis court was referring to the portion of the opinion in Burkett where the supreme court observed:

> We are unable to say, from the evidence, whether or not the spring, or springs, from these percolating waters, was, or were, of sufficient magnitude to be of any value to riparian proprietors, or added perceptibly to the general volume of water in the bed of the stream, and we therefore assume that they were springs of such character that Burkett plainly had the right to grant access to them and the use of their waters for any purpose . . . insofar as the record discloses, they were neither surface water nor subsurface streams with defined channels, nor riparian water in any form, and therefore, were the exclusive property of Burkett . . . .

296 S.W. at 278.
the supreme court's dicta was not Texas law because in effect it was a statement similar to the American rule on percolating groundwater, rather than the English rule that the supreme court had previously adopted.¹⁶

B. Texas Open Beaches

During the Survey period two courts of appeals decisions involved application of the Open Beaches Act.¹⁷ The Act expressly recognizes that the public may acquire an easement to use privately owned upland beach areas.¹⁸ In Arrington v. Mattox,¹⁹ the Austin court of appeals, considering the Open Beaches Act, upheld the trial court's recognition that the public possesses a preexisting easement in property which is seaward of the natural vegetation line, not by virtue of the Open Beaches Act, but through prescription, dedication, and custom.²⁰ This public easement migrates and moves landward or seaward with the natural movements of the natural line of vegetation and the line of mean low tide.²¹ In Arrington, the court affirmed the judgment of the trial court ordering Arrington to remove items erected on the seaward side of the vegetation line.²²

In August, 1983, Hurricane Alicia struck the Texas coast and moved the vegetation line to a point landward of Arrington's property. Arrington then erected various improvements on the seaward side of the vegetation line as it existed after the hurricane. The trial court affirmed the Attorney General's assertion that a public easement and right of use existed on the seaward side of the natural vegetation line across Arrington's property.²³ The court also found that Arrington encroached upon that right of use by placing structures and objects on the easement.²⁴

In a sole point of error, Arrington complained that the government had unconstitutionally taken his property without compensation. The court noted a fundamental distinction between a governmental taking of an easement through an act of sovereignty and judicial recognition of a common law easement acquired through historical public use.²⁵ Because of Open

¹⁶. 771 S.W.2d at 238. For a discussion of the supreme court case adopting the English rule see Houston T.C. Ry. Co. v. East, 98 Tex. 146, 81 S.W. 279 (1904). Under the so-called American rule the landowner's rights in percolating water are correlative and governed by rules analogous to those governing riparian rights in surface streams. Id. at 236, n.2.


¹⁹. 767 S.W.2d 957, 958 (Tex. App.—Austin 1989, writ denied).

²⁰. Id.

²¹. Id. See Matcha v. Mattox, 711 S.W.2d 95 (Tex. App.—Austin 1986, writ ref'd n.r.e.), cert. denied, 481 U.S. 1024 (1987); Caroom & Fero, supra note 17, at 368.

²². 767 S.W.2d at 958.

²³. Id.

²⁴. Id.

²⁵. Id. In Feinman v. State, 717 S.W.2d 106 (Tex. App.—Houston [1st Dist] 1986, writ ref'd n.r.e.) the public right to open beaches was based upon an implied dedication, and in Seaway Co. v. Attorney General, 375 S.W.2d 923 (Tex. Civ. App.—Houston [1st Dist.] 1964, writ ref'd n.r.e.) the right was based upon prescription. See also Caroom and Fero, supra note 17, at 366-67 (discussing common law easement acquired through historical public use).
Beaches Act did not empower the Attorney General to take rights from an owner of land, but merely furnished a means for the public to enforce its existing collective rights, the trial court’s order to remove improvements placed on the easement did not involve a taking of the landowner’s property without compensation.26

The second case addressing the Open Beaches Act during the Survey period was Executive Condominiums, Inc. v. State.27 In Executive Condominiums, the court upheld a summary judgment that refused to set aside a deed conveying land to the State in exchange for the State’s forbearance from suing on an alleged violation of the Open Beaches Act.28 The primary significance of the case is its affirmation of the Attorney General’s authority to compromise and settle disputes under the Open Beaches Act through entry of agreed judgments.

In 1978 the Attorney General notified Executive Condominiums that the location of a condominium construction project potentially violated the Open Beaches Act and suggested that the company postpone construction pending a judicial determination as to whether the location of the property actually violated the Act. The court entered an agreed judgment reflecting settlement of the potential dispute which required Executive Condominiums to convey another piece of property to the State that would permit greater access to the beach by the public.29 In exchange, the State promised not to interfere with construction on the original condominium site.

Following construction of the project in 1980, Executive Condominiums attempted to set aside the conveyance of land on the basis that the state obtained the deed by fraud and duress. The company also argued that the conveyance failed for lack of consideration. Initially, the trial court’s judgment for Executive Condominiums was reversed on appeal because of the failure by Executive Condominiums to obtain consent to sue the State.30 Executive Condominiums then sought and received permission to sue the State and brought another suit to set aside the 1978 conveyance because of fraud, duress and lack of consideration.31 In the second trial the court granted summary judgment for the State.32

On appeal, Executive Condominiums asserted that it built the condominium project in a location landward of any area intended by the Legislature to be subject to a public easement and that the State’s representation to the contrary was false and fraudulent. The court held that the State’s representation that the company was constructing the condominium partly on an “open beach” reserved to the public constituted a legal position founded on

26. Id. (citing Seaway Co. v. Attorney General, 375 S.W.2d 923 (Tex. Civ. App.—Houston [1st Dist.] 1964, writ ref’d n.r.e.).
27. 764 S.W.2d 899 (Tex. App.—Corpus Christi 1989, writ denied).
28. Id. at 903.
29. Id.
30. State v. Executive Condominiums, Inc., 673 S.W.2d 330, 334 (Tex. App.—Corpus Christi 1984, writ ref’d n.r.e.).
31. Tex. H.R. CON. RES. 1, 69th Leg. (June 8, 1985).
32. 764 S.W.2d at 899.
facts available to both parties. As such, the court held that the representation would not give rise to an actionable fraud.

Executive Condominiums further asserted that the Attorney General lacked authority under the Open Beaches Act to "negotiate away" the public's right of easement by settling a lawsuit. The court noted that statutory law precluded the Attorney General from settling a lawsuit for less than that to which the State was clearly entitled as a result of a judgment. The State, therefore, could not be prejudiced by an admission, agreement or waiver made by the Attorney General outside the scope of his power in an action or suit to which the State was a party. The court held that the State had the authority to settle the dispute by agreed judgment because the rights of the State had not been predefined by a judgment and because Executive Condominiums failed to cite authority for the proposition that the Attorney General could not compromise and settle claims by agreed judgment.

Executive Condominiums also argued that the conveyance should be set aside because it was made under duress. The court held that there could be no duress because the Attorney General clearly possessed a duty to enforce the Open Beaches Act and to prevent encroachment upon the public's right to beaches. The court also held that, as a matter of law, the threat of civil suit does not constitute duress. Finally, in response to Executive Condominiums' claim that permission to build on the public easement constituted insufficient consideration for the conveyance because the condominiums did not encroach on the easement, the court held that the State's forbearance to sue on its claim constituted sufficient consideration for the conveyance.

C. Municipal Water and Sewer Fees

A municipality has the statutory authority to assess fees in connection with its water and sewer systems. In City of Coppell v. General Homes

33. 764 S.W.2d at 902.
34. Id. Generally fraud cannot be predicated on representations concerning matters of law. Fina Supply, Inc. v. Abilene Nat'l Bank, 726 S.W.2d 537, 540 (Tex. 1987).
35. 764 S.W.2d at 902 (citing Bell v. State, 727 S.W.2d 806 (Tex. App.—Austin 1987, no writ)).
36. Id. TEX. GOV'T. CODE ANN. § 402.004 (Vernon Supp. 1990) states that "an admission, agreement, or waiver made by the attorney general in an action or suit to which the state is a party does not prejudice the rights of the state."
37. 764 S.W.2d at 902.
38. Id. at 903. See TEX. NAT. RES. CODE ANN. § 61.018(a) (Vernon 1978) which provides in part:
The attorney general . . . shall file in a district court of Travis County, or in the county in which the property is located, a suit to obtain either a temporary or permanent court order or injunction to remove any obstruction or barrier or to prohibit any restraint or interference which restricts the right of the public, individually or collectively, to free and unrestricted ingress and egress to and from any area described in Section 61.012 of this code or any property abutting on or contiguous to the state-owned beach on which the public has acquired a prescriptive right.
39. 764 S.W.2d at 902 (citing Continental Casualty Co. v. Huizar, 740 S.W.2d 429, 430 (Tex. 1987)).
40. Id.
41. TEX. LOCAL GOV'T. CODE ANN. § 402.001(b) (Vernon 1988) provides that "[a] mu-
Corp.,42 the Dallas court of appeals considered the City of Coppell’s authority to impose fees by ordinance on property developed within a municipal utility district. In the 1970s, Coppell consented to the creation of the Coppell Municipal Utilities District No. 1 (CMUD) which was authorized to construct, own, operate and maintain all equipment necessary to supply water and dispose of waste within the district.43 The area serviced by CMUD was wholly within Coppell’s corporate limits but was undeveloped and without organized water and sewer service. Coppell continued to operate its own water and sewer system after CMUD’s creation.

In the early 1980s General Homes developed property within the CMUD and, under an agreement with the District, constructed mains and service lines connecting to CMUD’s water distribution system. CMUD’s water distribution system was then integrated with Coppell’s waterworks system. Water purchased from the City of Dallas flowed through Coppell’s system into CMUD’s water distribution system and then through the service lines to the residences built by General Homes.

General Homes also built sewer service lines and mains to carry the sewage from the residences to CMUD’s sewer collection system. The sewage then emptied into CMUD’s sewer trunk main and was transported to the Trinity River Authority for disposal. Except for twenty-four homes which were connected to a ten-inch city sewer main, none of the sewage from the development would ever pass through a city-owned sewer pipe.

In May 1984, the City began to collect sewer tap, water tap and water meter fees from General Homes, and in January 1985 it began collecting water availability and utility inspection fees. General Homes paid all fees under protest and after exhausting its relief from the City, the developer sued in district court for recovery of its fees and a declaration that the fees were unauthorized. The trial court granted summary judgment against the city for monetary damages, prejudgment interest, and attorney’s fees and granted a declaratory judgment that the fees charged to General Homes violated Texas statutes and common law, as well as the developer’s vested rights.44

In support of the summary judgment, General Homes asserted on appeal, that the City lacked authority under existing ordinances to collect the disputed fees and that, absent enabling ordinances, the fees violated Texas municipal may purchase, construct, or operate a utility system . . . and may regulate the system in a manner that protects the interests of the municipality.” TEX. LOCAL GOV’T. CODE ANN. § 402.002(b) (Vernon 1988) provides in part that “[a] home-rule municipality may . . . own . . . and maintain and operate a . . . sewage plant . . . and receive compensation for services furnished . . . .” TEX. LOCAL GOV’T. CODE ANN. § 402.017(a) (Vernon 1988) provides that “[a] home-rule municipality may exercise that exclusive right to own, construct, and operate a water system for the use of the municipality and its residents. The municipality may regulate the system and may prescribe rates for the water furnished.”

42. 763 S.W.2d 448 (Tex. App.—Dallas 1988, writ denied).
44. 763 S.W.2d at 448.
The City responded by asserting that Ordinances 180 and 274 am-

45. Id. at 452.

46. Coppell, Tex. Ordinance 180 (May 23, 1978) provides in relevant part:

WR-3 APPLICATION FOR CONNECTION: It shall be unlawful for any
person to make any connection to the mains or pipes of the Waterworks System
without first making application to the City, stating fully the several and various
uses for which water is wanted, giving the name of the property, the number of
the lot and block, name of the street and house number. Upon the payment of
the tapping fee, the Superintendent shall make, or have made, the necessary
connections and furnish a curb stop box and curb cock, the cost of which
is included in the tapping fee, and every premises not now equipped with the curb
stop box and curb cock and connected with any water main, or being supplied
with any water from the Waterworks, shall have a separate service connection,
curb stop box and curb cock—installed by and at the expense of the owner of
the premises. If the application is approved by the Superintendent of Water-
works, a permit will be issued. All fees and charges shall be paid for at amounts
and rates fixed by Section WR-14 of this Code.

WR-14 TAPPING CITY MAINS

(A) Water: The tapping fee for connection with the Waterworks System
shall be:

<table>
<thead>
<tr>
<th>Diameter (Inches)</th>
<th>Fee</th>
</tr>
</thead>
<tbody>
<tr>
<td>3/4'</td>
<td>$175.00</td>
</tr>
<tr>
<td>1'</td>
<td>$200.00 plus cost of materials and labor</td>
</tr>
<tr>
<td>1-1/2'</td>
<td>$250.00 plus cost of materials and labor</td>
</tr>
<tr>
<td>2' and over</td>
<td>Total cost of materials and labor</td>
</tr>
</tbody>
</table>

SR-1 SECTION 2. "SR" (SEWER REGULATIONS)

CONNECTION TO SEWER REQUIRED: All owners or occupants of
buildings, or agents for the owners, situated in any section of the City where a
sanitary sewer now exists, or where it may hereafter exist, and where the prop-
erty line of the land on which any such building is situated approaches or ex-
tends to within one hundred feet (100') of any such sewer are hereby required to
construct or cause to be constructed suitable water closets on their property, and
connect the same with the City sewer, under the supervision of Plumbing In-
Spec tor . . .

SR-4 TAPPING CITY MAINS

(A) Sewer: The tapping fee for connection with the Sanitary Sewer System
shall be:

<table>
<thead>
<tr>
<th>Diameter (Inches)</th>
<th>Fee</th>
</tr>
</thead>
<tbody>
<tr>
<td>4'</td>
<td>$150.00</td>
</tr>
<tr>
<td>6' and larger</td>
<td>Total cost of materials and labor</td>
</tr>
</tbody>
</table>

47. Coppell, Tex., Ordinance 274 (Nov. 9, 1982) amended Ordinance 180 by adding in
relevant part:

The owner of any property desiring to connect with the City Water Works Sys-
tem shall be responsible for opening the hole to the water main and leaving it open
and protecting it until the water connection is made by City personnel.

The owner of any property desiring to connect with the City Sewer System shall
be responsible for opening the hole to the sewer main and leaving it open and
thorized it to collect water tap and sever tap fees from General Homes. After examining the ordinances the court determined that the purpose of Ordinance 180 was to defray the City's costs in making actual, direct connection to the sewer and water systems. Likewise, the court noted that the purpose of Ordinance 274 was to reimburse Coppell for its cost in making a direct connection to water and sewer mains. Although the systems of Coppell and CMUD were interconnected, the City incurred no material or labor costs when a builder connected to CMUD's system. Therefore, the court held that neither Ordinance 180 nor Ordinance 274 was intended to authorize Coppell to collect tap fees from the developer for lines that did not connect into the City's system. While the two ordinances could be read to authorize Coppell to collect sewer tapping fees from General Homes for the twenty-four homes connected directly to Coppell's ten-inch sewer main, an earlier agreement to connect the homes to Coppell's main without charge prevented Coppell from collecting a sewer tap fee for the twenty-four homes.

The City further asserted that its Ordinance 341, which included a Fee Schedule requiring payment of water and sewer availability fees, author-

---

48. 763 S.W.2d at 454.
49. Id.
50. Id.
51. Id.
52. Id. Tex. Local Gov't. Code Ann. § 402.014 (Vernon 1988) authorizes a municipality to contract with a water district.
53. Id. at 455. Coppell, Tex., Ordinance 341 (Oct. 9, 1985) provides in relevant part:

No person shall create a subdivision of land . . . within the corporate limits of the City or within the extraterritorial jurisdiction of the City, without complying with the provisions of these regulations. All plats and subdivisions of any such land shall conform to the rules and regulations herein adopted.

SECTION XIII—ACCEPTANCE OF THE SUBDIVISION

A. After completion of all items required in the plans and specifications, the Contractor shall submit to the City a bond in the amount of ten percent (10%) of the Contract amount guaranteeing workmanship and materials for a period of one year from the date of final acceptance by the City. The City Engineer shall verify that all items have been completed, including the filing of the plat and all related easements and documents, payment of pro rata fees for streets, water and sewer services, payment of the water and sanitary sewer availability charge, etc. The City Engineer, or his designated agent, shall conduct a final inspection of the project and, if all work is found to be acceptable, shall issue a Letter of acceptance. Any items of exception noted in the acceptance letter shall be immediately satisfied.

The court assumed that this ordinance was properly adopted. 763 S.W.2d at 454. 54. The Fee Schedule contained in section 16 of Ordinance 341 provides:

SECTION XVI—FEES

The following schedules of fees and charges shall be paid to the City when any plat is submitted to the Planning and Zoning Commission or any other authorized board or agency of the City. Each of the fees and charges provided herein shall be paid in advance, except as provided herein, and the Planning and Zoning Commission or any other authorized board shall take no action until said fees and charges have been received by the officer designated herein. All final plats shall show sufficient information to calculate the fees described below.
ized the City to collect water meter fees, inspection fees and water/sewer availability fees. The court noted that Ordinance 341 was a typical subdivision ordinance prohibiting any person from creating a subdivision without first complying with the ordinance requirements.55 The court rejected the city's argument, holding that General Homes created its subdivisions before the effective date of Ordinance 341 and the Fee Schedule.56 Consequently, the Ordinance did not authorize the City to collect fees from General Homes.57

Finally, the City contended that a May 8, 1984, administrative decision by the City Administrator and Ordinance 312 authorized it to collect water meter fees. Ordinance 312 authorized the City to collect, among other things, water meter fees.58 The administrative decision purportedly set the price of water meters prior to enactment of Ordinance 312. Because the administrative decision was not a resolution or ordinance of the City's governing body, the court held that it was not a proper exercise of Coppell's municipal authority and, thus, did not authorize the City to collect fees.59

B. WATER AND SEWER AVAILABILITY FEE:

The City Manager shall determine the above fee based on the following schedule:

1. Single Family/Duplex/Mobile Home $440 per unit
2. Townhouse/Multi-Family $300 per unit
3. Retail and Commercial $120 per 1000 s.f. of building area
4. Industrial $60 per 1000 s.f. of building area
5. Other non-residential $120 per 1000 s.f. of building area

50% of the above fee shall be paid prior to approval of the final plat by the City Council. The remaining 50% shall be paid prior to issuance of any building permit for the development.

C. WATER TAP FEES:

Generally, the developer shall install water meters and make the necessary water taps, using City-approved meters. An inspection fee of $100.00 per meter shall be charged. In special circumstance, the City Manager may vary the above procedure and fee to allow water taps by City forces.

D. SEWER CONNECTION FEES:

An inspection fee of $100.00 per building sewer connection shall be charged.

Coppell, Tex., Ordinance 341, § 16 (May 28, 1985). Coppell adopted the Fee Schedule four months before adopting the rest of Ordinance 341.

55. 763 S.W.2d at 456.
56. Id.
57. Id.
58. The section cited by the City provided that water meters “shall be purchased from the City.” Coppell, Tex., Ordinance 312, Appendix A. § IV(A)(5) (July 24, 1984).
59. Id. at 457.
While Coppell's governing body adopted Ordinance 312, it was merely a subdivision ordinance enacted subsequent to the creation of General Homes' subdivisions and, as such, it did not authorize the City to collect fees from General Homes.60

D. Water Quality

The Water Commission sets water quality standards for the water in the State.61 Before approval of an application for a wastewater discharge permit, the Commission must ensure compliance with the water quality standards set forth in its rules.62 In City of League City v. Texas Water Commission,63 the Austin court of appeals upheld a district court judgment affirming an order of the Texas Water Commission that denied an application for a wastewater discharge permit.

In 1986 the City of League City and the Galveston County Municipal Utility District No. 14 applied to the Commission for a wastewater discharge permit to serve a residential and commercial development known as Bay Colony.64 The proposed Bay Colony Wastewater Treatment Plant would discharge approximately one million gallons per day of treated effluent into Borden's Gulley, an intermittent stream that enters into the tidal section of Dickinson Bayou.65

The co-applicants challenged the Commission's denial of their application as not supported by substantial evidence, arbitrary and capricious, an abuse of discretion and in excess of the Commission's statutory authority. The court found substantial evidence to support three of the Commission's Findings of Fact:66 (a) that in the absence of an analysis of possible tidal effects

---

60. Id.
63. 777 S.W.2d 802 (Tex. App.—Austin 1989, no writ).
64. Tex. Water Code Ann. § 26.027(a) (Vernon 1988) provides that “[t]he commission may issue permits . . . for the discharge of waste . . . into or adjacent to water in the state.”
65. The major surface waters of the state are classified as segments for purposes of water quality management and designation of site specific standards. See 31 Tex. Admin. Code § 307.2(b)(2) and 307.10, Appendix A (West 1989). Dickinson Bayou is a segment of the San Jacinto-Brazos Coastal Basin. Id.
66. Id. at 804, 806. The three findings provide:

**FINDING OF FACT NO. 6**

6. The Streeter-Phelps water quality analysis of Borden's Gully failed to account for the tidal effects within the gully, which directly affect dissolved oxygen (DO) levels, and therefore the analysis fails to establish that the water quality of the receiving body of water would not be impaired.

**FINDING OF FACT NO. 7**

7. The applicants' expert's testimony concerning taste and odor was speculative and contradictory and failed to establish that the discharge could meet the General Criteria of the Commission, as established in 31 Tex. Admin. Code 333.17(a)(1) [now 31 Tex. Admin. Code § 307.4(b)(1)].

**FINDING OF FACT NO. 8**

8. A Qual-Tex dissolved oxygen analysis of Dickinson Bayou at low flow, high temperature conditions indicates D.O. of 2.0 milligrams per liter (mg/l) at the
on the discharge and receiving water it could not be established that the water quality would not be impaired;67 (b) that the co-applicants failed to establish that the proposed discharge would satisfy taste and odor requirements of the Commission's general criteria applicable to new permits;68 and, (c) that the addition of a relatively small amount of biochemical oxygen demand to the already poor water quality in Dickinson Bayou would further impede achievement of Dickinson Bayou water quality standards.69 The court held that these three findings supported at least one conclusion of law and formed a sufficient basis for upholding the Commission's order.70 The court did not address the Commission's alternative basis for rejecting the

confluence of the bayou and Borden's Gully. The D.O. water quality standard for Dickinson Bayou is 4.0 mg/l. The water quality is already 50 percent lower than the standard and, therefore, militates against issuance of a new discharge permit that would result in more oxygen demanding material (BOD) entering Dickinson Bayou.

Id. at 804-806. Justice Powers' concurring opinion disputes the characterization of Findings 6-8 as "Findings of Fact" and would not review the Findings under a substantial evidence standard. Id. at 807-809. See generally Powers, Judicial Review of the Findings of Fact by Texas Administrative Agencies in Contested Cases, 16 Tex. Tech. L. Rev. 475, 477-78 (1985).

67. 777 S.W.2d at 805-806. The specific uses of Dickinson Bayou are designated as contact recreation and high aquatic life. 31 Tex. Admin. Code §§ 307.7 and 307.10 Appendices A-C (West 1989). The minimum dissolved oxygen criteria for such uses is set at 4.0 milligrams per liter. 31 Tex. Admin. Code § 307.7(b)(3)(A) (West 1989). In Finding of Fact No. 6, the Commission determined that League City's expert witness failed to establish that the water quality of Dickinson Bayou would meet these standards. 777 S.W.2d at 806.

68. 777 S.W.2d at 806. 31 Tex. Admin. Code § 307.4 (West 1989) contains various general criteria for surface water in the state. Section 307.4(b) labeled "Aesthetic Parameters" provides:

Concentrations of taste and odor producing substances shall not interfere with the production of potable water by reasonable water treatment methods, impart unpalatable flavor to food fish including shellfish, result in offensive odors arising from the waters, or otherwise interfere with the reasonable use of the water in the state.

31 Tex. Admin. Code, § 307.4(b) (West 1989). In Finding of Fact No. 7, the Commission determined that League City failed to establish that the proposed discharges would meet the taste and odor portion of the general criteria. 777 S.W.2d at 806.

69. 777 S.W.2d at 806. In Finding of Fact No. 8 the Commission determined that adding even a relatively small amount of oxygen demand to the already substandard conditions of Dickinson Bayou would not be in the best interest of water quality standards. Id.

70. Id. Conclusion of Law No. 3 provides:

CONCLUSION OF LAW NO. 3

3. The proposed discharge of effluent would not maintain the quality of water in the State consistent with the public health and enjoyment, the propagation and protection of terrestrial and aquatic life, the operation of existing industries, or the economic development of the State.

777 S.W.2d at 804. This conclusion of law is consistent with Section 26.003 of the Water Code which provides:

It is the policy of this state and the purpose of this subchapter to maintain the quality of water in the state consistent with the public health and enjoyment, the propagation and protection of terrestrial and aquatic life, the operation of existing industries, and the economic development of the state; to encourage and promote the development and use of regional and areawide waste collection, treatment, and disposal systems to serve the waste disposal needs of the citizens of the state; and to require the use of all reasonable methods to implement this policy.

application, that it was inconsistent with state policies favoring regionalized sewage treatment.

E. County Operated Sewage Treatment Plant

In Estate of Scott v. Victoria County71 the Corpus Christi court of appeals agreed with the County that a seven year moratorium on new sewer hookups did not constitute a taking of private property for public use without adequate compensation proscribed by the fifth and fourteenth amendments to the United States Constitution and article I, section 17 of the Texas Constitution.72

In 1963 the federal government conveyed to Victoria County 17.59 acres of land containing, among other things, an airfield and a sewage treatment plant. The Victoria County Commissioners appointed an Airport Commission to oversee the operation of the sewer plant. Herndon Scott, the Airport Commission chairman, and others acquired undeveloped property in the vicinity of the plant to develop a residential subdivision, Quail Creek. In 1977 and 1978 the Commissioners’ Court approved the map and plat for the subdivision and dedicated the designated water and sewer lines to the county. There was, however, no agreement between the county and the developers for county-supplied sewer service.

Until 1979 all developed tracts in the subdivision were permitted to connect to the county’s sewage treatment plant. The sewage treatment plant, however, became overloaded because of an increase in the number of homes serviced by the sewer system. On May 18, 1979, the County issued an order prohibiting the authorization of additional connections to the sewer system. Despite the County’s efforts to remedy the condition, the sewer plant continued to operate at an overloaded level until 1984, when the county brought the plant into compliance with its permit.73 In 1986 the moratorium terminated after the county transferred ownership of the sewer plant to a utility district formed by the developers.

At trial the developers argued the theory that the moratorium was unreasonable or arbitrary because it rendered their property wholly useless for seven and a half years, that the moratorium was unreasonable in its duration, and that the County had a duty to upgrade the sewer to accommodate the development.74 In an instructed verdict the trial court held that a temporary taking of the developers’ property by the county had occurred.75 The jury, however, found that no damages resulted from the taking, and the court entered a take nothing judgment in favor of the County.76

The appellate court affirmed the judgment in favor of the County, because

---

71. 778 S.W.2d 585 (Tex. App.—Corpus Christi 1989, no writ).
72. Id.
73. Id.
74. The county held a wastewater discharge permit pursuant to TEX. WATER CODE ANN. § 26.027 (Vernon 1988). See supra note 64 for an explanation of the permit process.
75. 778 S.W.2d at 585.
76. Id. at 587.
as a matter of law the developers did not establish a taking.\textsuperscript{77} The court reasoned that a governing body that adopts reasonable regulations to promote the health, safety and welfare of its people engages in a valid exercise of its police power.\textsuperscript{78} Furthermore, property loss resulting from a valid exercise of police power does not require compensation.\textsuperscript{79} The question of whether a police power regulation is proper and does not constitute a compensable taking is one of law.\textsuperscript{80} The regulation must be adopted to accomplish a legitimate goal substantially related to the health, safety and welfare of the people and it must be reasonable and not arbitrary.\textsuperscript{81}

The court determined that the County adopted the moratorium for the legitimate purpose of preventing further hazard to the health and safety of the public which resulted when the sewer plant overloaded and released raw sewage into a nearby creek.\textsuperscript{82} Further, the County did not prohibit additional sewer hookups for its own advantage or purpose.\textsuperscript{83} The court noted that the moratorium was not arbitrary and unreasonable in terms of its effect on the developers' property because it neither rendered the developers' property wholly useless nor caused a total destruction of the land's economic value.\textsuperscript{84} Further, the moratorium was not unreasonable in terms of duration because the sewer plant was not in compliance with its permit until 1984.\textsuperscript{85}

The court dealt with the developers' contention that the county had a duty to upgrade the sewer system by stating that the developers' "mere expectancy" that sewage service would be provided did not amount to a vested

\textsuperscript{77} Id. at 589.
\textsuperscript{78} Id. at 590 (citing City of College Station v. Turtle Rock Corp., 680 S.W.2d 802, 805 (Tex. 1984). In City of College Station, the Supreme Court considered a constitutional challenge to an ordinance requiring park land dedication as a condition to subdivision plat approval. City of College Station v. Turtle Rock Corp., 680 S.W.2d 802, 803 (Tex. 1984).
\textsuperscript{79} 778 S.W.2d at 590 (citing City of College Station v. Turtle Rock Corp., 680 S.W.2d 802, 804 (Tex. 1984)).
\textsuperscript{80} Id. (citing City of College Station v. Turtle Rock Corp., 680 S.W.2d 802, 804 (Tex. 1984)).
\textsuperscript{81} Id. at 591 (citing City of College Station v. Turtle Rock Corp., 680 S.W.2d 802, 805 (Tex. 1984)).
\textsuperscript{82} Id. An employee of the Texas Water Control Board testified at trial that the plant was releasing between 150,000 and 900,000 gallons of raw sewage per month into a nearby creek. Id. at 589.
\textsuperscript{83} Id. at 591. During oral arguments, the developers asserted that the county did not upgrade the system because it did not want to expend any more funds on the plant. Id. at 591, n.4. The Court noted, however, that the Attorney General issued an opinion in 1982 stating that the County had no authority to incur indebtedness to expend funds on the plant. Id. Without reviewing the validity of the 1982 Attorney General's opinion, the court noted that the Attorney General opinion stated that the County had no authority to operate the sewer system. Id. Our reading of a 1982 attorney general opinion on the subject is that a county acting alone cannot exercise sewage disposal powers or construct a sewage system. See Op. Tex. Att'y Gen. No. MW-500 (1982). In a previous Attorney General opinion specifically cited and not overruled in MW-500, the Attorney General determined that "Victoria County is authorized to operate and maintain a sewage treatment plant located on property ceded to the county by the federal government in 1963." Op. Tex. Att'y Gen. No. MW-115 (1979).
\textsuperscript{84} 778 S.W.2d at 591-592.
\textsuperscript{85} Id. at 591. The court failed to address the reasonableness of the moratorium during the two year period between 1984 and 1986 when the sewer plant was apparently operating in compliance with its permit.
property right requiring compensation. In the absence of a contractual agreement between the parties, the County was not obligated to provide sewer service.

F. Utility Rates

The Commission’s failure to consider statutorily mandated factors in arriving at a utility’s rate of return is arbitrary and capricious and constitutes an abuse of discretion. Prior to March 1, 1986, the Public Utility Commission possessed ratemaking jurisdiction over water and wastewater utilities. In Consumers Water, Inc. v. Public Utility Commission, the Austin court of appeals reversed a district court judgment affirming an order of the Public Utility Commission which fixed Consumers’ water and sewer rates. The court agreed with Consumers’ assertion that the Commission’s failure to consider the adjusted value of invested capital in determining the utility’s fair rate of return was arbitrary and capricious and constituted an abuse of discretion.

At the time of the Consumers’ rate case, section 40(a) of the Public Utility Regulatory Act (PURA) precluded the Commission from prescribing any rate which would yield more than a fair return upon the adjusted value of invested capital used and useful in rendering service to the public. Former section 41(a) of PURA prescribed the standards an agency should consider in determining the adjusted value of invested capital. Although Consumers

86. Id. at 592.
87. Id.
89. See Historical Note in TEX. WATER CODE ANN. § 13.001 (Vernon 1988). The Texas Water Commission currently regulates water and sewer utilities. Id.
90. 774 S.W.2d 719 (Tex. App.—Austin 1989, no writ).
91. Id. at 722.
92. Id.
93. TEX. REV. CIV. STAT. ANN. art. 1446c, § 40(a) (Vernon 1980) formerly provided:
   The regulatory authority shall not prescribe any rate which will yield more than a fair return upon the adjusted value of the invested capital used and useful in rendering service to the public.

94. TEX. REV. CIV. STAT. ANN. art. 1446c, § 41(a) formerly provided:
Sec. 41. The components of adjusted value of invested capital shall be determined according to the following rules: Adjusted Value of Invested Capital. Utility rates shall be based upon the adjusted value of property used by and useful to the public utility in providing service [...] including where necessary to the financial integrity of the utility [...] construction work in progress at cost as recorded on the books of the utility. The adjusted value of such property shall be a reasonable balance between original cost less depreciation and current cost less an adjustment for both present age and condition. The [Commission] shall have the discretion to determine a reasonable balance that reflects not less than 60% nor more than 75% original cost, that is, the actual money cost, or the actual money value of any consideration paid other than money, of the property at the time it shall have been dedicated to public use, whether by the utility which is the present owner or by a predecessor, less depreciation, and not less than 25% nor more than 40% current cost less an adjustment for both present age and condition. The [Commission] may consider inflation, deflation, quality
offered evidence of adjusted value of invested capital, the hearings examiner rejected the utility's calculations. Instead of using adjusted value of invested capital, the Commission based its order fixing Consumers' rates on total invested capital as calculated by the agency staff. The court held that the Commission's failure to use statutorily prescribed standards, i.e. "total invested capital" instead of "adjusted value of invested capital," was arbitrary and capricious and an abuse of discretion. The court additionally ruled that the agency's failure to make findings on the statutorily required criteria of adjusted value of invested capital or its elements set out in section 41(a) was arbitrary and capricious.

II. LEGISLATIVE DEVELOPMENTS

The growing concern in the State of Texas with water, its protection and continued availability, was reflected in legislation passed by the 71st Legislature addressing water rights, water rates, and water protection.

A. Water Rights

The Legislature added subchapter J, commonly known as the "Wetlands Act," to Chapter 11 of the Water Code. The Act establishes a single definition for wetlands for purposes of state law and several federal programs. In cases in which the definition conflicts with the federal definition, however, the latter prevails. The existence of a wetland is determined primarily by plant growth. Thus, the Act defines a wetland as an area containing a predominance of hydric soils sufficient to support the growth of hydrophytic vegetation.

The Act, however, specifically excludes irrigated acreage used as farmland, man-made wetlands of less than one acre, and man-made wetlands not constructed with wetland creation as the stated objective.

B. Water Rates and Services

In one of its major pieces of water-related legislation, the 71st Legislature undertook an omnibus revision of Chapter 13 of the Water Code. The
amendments expanded the Texas Water Commission's regulatory authority under Chapter 13 from “water and sewer utilities” to “public utilities.” The latter term includes municipalities, political subdivisions, and cooperatively owned water and sewer service corporations. Additionally, the legislature modified the definition of “test year” in section 13.002 to require that a utility rate filing must be based on a test year that ended less than twelve months before making the rate filing. The legislature also amended section 13.041 of the Water Code to authorize the Commission to compel a utility to provide an emergency interconnection for temporary service when a neighboring utility's service has been disconnected, seriously impaired, or when such a threat is imminent.

In 1989 the legislature enacted section 13.0421 to address the issue of surcharge fees in the Austin metropolitan area. It states that the City of Austin (or any other municipally-owned water and sewer utility that on January 1, 1989 required wholesale customers to assess a surcharge for service against residential customers residing outside the municipality's boundary) is prohibited from requiring the municipal utility district to assess a surcharge against users of the water and sewer service as a precondition to annexing the municipal utility district.

Further, the legislature amended section 13.043 of the Code to clarify appellate hearing procedures. The Legislature also added section 13.044 to clarify the Commission's jurisdiction to regulate rates charged by a municipality to a water district or residents of that district.

The Water Commission, under amended section 13.183, may authorize the collection of a surcharge from the utility customers as part of a rate proceeding. The purpose of the surcharge is to fund capital improvement necessary to provide adequate utility service. The utility, however, must provide an accurate accounting of the collection and use of the funds. Further, any facility constructed with surcharge funds is considered customer contributed capital or contributions in aid of construction, and, as such, the facility may not be included in the utility's invested capital. Also, depreciation expense will not be allowed on the facility.

Additionally, the legislature amended section 13.185 to permit the inclusion of depreciation expense in the cost of service on all currently used and depreciable utility property owned by the utility, except for property pro-


104. Id. §§ 13.001, 13.002(19).
105. Id. § 13.002(22).
106. Id. § 13.041(d).
107. Id. § 13.0421.
108. Id. § 13.043(c).
109. Id. § 13.044.
110. Id. § 13.183(b).
111. Id.
112. Id.
113. Id.
114. Id.
vided by explicit customer agreement or funded by customer contributions in aid of construction.\textsuperscript{115} Depreciation on any property contributed by developers or governmental entities, however, will be allowed in the cost of service.\textsuperscript{116}

The Texas Legislature made several changes to section 13.187 of the Code. The regulatory authority is now authorized to disallow any costs and expenses shown in a rate application that are not supported by necessary documentation or other evidence.\textsuperscript{117} In fact, the regulatory authority may reject the entire application and suspend the effective date of the rate change upon determining that the application is incomplete or does not comply with Water Commission rules and regulations.\textsuperscript{118} In order to set a rate proceeding for hearing, the Commission must receive a complaint within sixty days of the effective date of the rate change signed by the lesser of 1,000 or 10\% of the ratepayers of the utility.\textsuperscript{119} Previously, only 250 signatures were required.\textsuperscript{120} The Commission must set the hearing within 120 days after the effective date of the rate change.\textsuperscript{121} If the Water Commission establishes an interim rate or an escrow account, the Commission must make a final determination on the rates within 215 days after the effective date establishing the interim rates or the escrow account; otherwise the rates requested by the utility will be automatically approved.\textsuperscript{122}

The new amendments require water supply corporations and sewer service corporations to obtain certificates of convenience and necessity before providing retail water or utility sewer service.\textsuperscript{123} Existing water and sewer supply corporations, previously exempted, must now apply for a certificate of public convenience and necessity no later than September 1, 1990.\textsuperscript{124}

The legislature added a new subsection to section 13.301 requiring written disclosure to a purchaser or transferee if a utility facility or system is sold and the facility or system was wholly or partially constructed with customer contributions in aid of construction derived from Commission-approved surcharges.\textsuperscript{125} The utility must disclose to the purchaser the total amount of contributions and the method of handling such improvements in the rate base.\textsuperscript{126}

\textbf{C. Water Finance}

The 71st Legislature passed a significant bill relating to water finance.

\textsuperscript{115} Id. § 13.185(j).
\textsuperscript{116} Id.
\textsuperscript{117} Id. § 13.187(a).
\textsuperscript{118} Id.
\textsuperscript{119} Id. § 13.187(b).
\textsuperscript{121} Id.
\textsuperscript{122} Id. § 13.187(c).
\textsuperscript{123} Id. § 13.242(a).
\textsuperscript{124} Id. § 13.242(c).
\textsuperscript{125} Id. § 13.301(e).
\textsuperscript{126} Id.
The “colonias” bill will probably have more of an effect on the quality of life along the State’s border settlements than any other legislation passed this session. The bill provides $100 million in State funds over a four-year period to subsidize the installation of water and sewer lines in the colonias. The colonias are settlements that have proliferated outside city limits and thus have been able to escape municipal subdivision requirements. Few of the colonias residents have water, and most have no sewer service. Under the bill, the Texas Water Development Board is authorized to contract with local bodies, municipalities, counties, and water districts, to provide water and sewage service. The improvements are paid for through subsidized loans. Half of these loans will eventually be repaid by the colonias residents who will be billed monthly according to their ability to pay.

In addition, the legislature amended section 15.471 of the Water Code to permit the Texas Water Development Board to make grants for equipment purchases. The Board will use the equipment to test and evaluate water quality as well as to demonstrate and evaluate chemical application systems.

D. Water Quality

The 71st Legislature addressed the problem of potential groundwater contamination from fuel storage tanks by several amendments to Chapter 26 of the Texas Water Code. The legislature established a petroleum storage tank cleanup fund to be funded by fees received from the delivery of petroleum products, interest on and penalties for late payment of those fees, and from monies received from the cost recovery for petroleum storage tank corrective actions and enforcement actions. Additionally, the Act extends coverage of the Water Commission regulations regarding storage tanks to aboveground tanks. The legislature granted the Water Commission primary regulatory authority to direct the remediation of the release and to administer the fund for cleanups. The Commission can order owners to take corrective action or initiate action on its own. Although the Water Commission may pay cleanup costs of up to $1 million from the fund, the first $10,000 of each cleanup must be paid by the tank owner or owners. The Act also provides for the apportionment of liability where there are mul-

131. Id.
134. Id. § 26.3441.
135. Id. § 26.351.
136. Id. §§ 26.351, 26.3511.
137. Id. § 26.3512.
multiple owners and operators. In addition, another amendment to Chapter 26 confirmed the Water Commission's existing practice of considering conditions of need, including the availability of proposed or existing regional treatment facilities in issuing or amending wastewater discharge permits.

The Texas Legislature also amended various provisions of Chapter 26 to enable the Water Commission to obtain delegation of the federal National Pollutant Discharge Elimination System (NPDES) regulatory authority. The legislature added section 26.0291 to provide for a waste treatment inspection fee to be imposed on permitees for waste discharge permits. The legislature enacted section 26.1211 to provide for the administration of a program of pretreatment effluent standards by the Commission after delegation of the NPDES program. In enforcing NPDES permits, the Commission is not permitted to consider the state of existing technology, economic feasibility, or quality requirements of the water that might be affected.

Taking a step towards a state revolving door policy, the legislature amended the Clean Air Act, the Water Code, and the Solid Waste Disposal Act. The Water Code, for example, provides that the Water Commission shall deny an application for an issuance, amendment, renewal, or transfer of a permit if a former employee substantially participated in the agency's review, evaluation, and processing of the application during his employment, and, after leaving the agency, assisted with the application. The Commission will, however, provides the applicant with an opportunity for a hearing before denying the application. The amendment applies only to applications submitted on or after September 1, 1989, or applications pending for consideration on September 1, 1989. The legislature enacted similar amendments to the Clean Air Act and Solid Waste Disposal Act. No other revolving door legislation pertaining to administrative agencies was passed by the 71st Legislature.

The legislature amended section 26.177 of the Water Code to give the Commission closer supervision over city programs. Section 26.177 autho-

138. Id. § 26.3513.
139. Id. § 26.0282. This issue was not addressed by the Austin court of appeals in City of League City v. Texas Water Comm'n., 777 S.W.2d 802 (Tex. App.—Austin 1989, no writ); see supra notes 61-70.
142. Id. § 26.1211.
143. Id. § 26.121(b).
147. TEX. WATER CODE ANN. § 26.0283(b)(1) and (2) (Vernon Supp. 1990).
148. Id. § 26.0283(c).
149. Id. § 26.0283.
150. See supra notes 144 and 146.
rizes cities with a population of 5,000 or more to establish and maintain a water pollution control and abatement program. This statute provides one of the few vehicles available to control non-point source pollution. The amendments require a city to submit a proposed program to the Texas Water Commission for review and approval. Further, the Water Commission may promulgate rules establishing criteria for these programs and provide for a procedure to review and approve such programs.

The legislature further amended Chapter 26 of the Water Code by adding subchapter J to address groundwater protection. Section 26.401 sets out legislative findings regarding the need for groundwater protection for the future protection of the environment and the public health and welfare, as well as the legislative determination that the goal of the groundwater policy is to protect the existing quality of groundwater. The goal of nondegradation, however, does not mean zero contaminant discharge. Rather, according to the legislature, it is the State's policy that waste disposal and pollutant discharge neither impair the potential uses of groundwater nor pose a threat to public health. To this end, the legislature established the Texas Groundwater Protection Committee. This interagency committee will coordinate the groundwater protection activities of the various agencies represented and report such studies and findings to the legislature before each session with recommendations for groundwater protection programs to be undertaken by the State. The Act further provides for the publication of an annual groundwater monitoring and contamination report. The Water Commission is the lead agency for the Groundwater Protection Committee and is required to administer the activities of the Committee. As such, the Commission is required to develop plans to protect and enhance water quality.

E. Water Districts

The 71st Legislature made several changes to Chapter 50 of the Water Code, which addresses water districts and their authority. The legislature added section 50.063 to Chapter 50 to permit a district or water supply corporation to purchase, own, lease, or otherwise acquire sources of water sup-

---

153. Id.
154. Id.
155. Id. § 26.401(a), (b).
156. Id. § 26.401(b).
157. Id. Section 26.401(c) provides:
   (1) discharges of pollutants, disposal of wastes, or other activities subject to regulation by state agencies be conducted in a manner that will maintain present uses and not impair potential uses of groundwater or pose a public health hazard; and
   (2) the quality of groundwater be restored if feasible.
158. Id. § 26.403.
159. Id. § 26.405.
160. Id. § 26.406.
161. Id. § 26.403(b).
162. Id. § 26.407.
ply and to build systems for the transmission of water or the collection of sewage.\textsuperscript{164} Further, a district or water supply corporation possesses the power to acquire land or make the improvements necessary for flood control and drainage.\textsuperscript{165} A district or water supply corporation may exercise the power of eminent domain in order to acquire fee simple, an easement, or other interest in land necessary for carrying out any of its projects.\textsuperscript{166}

A legislative amendment to section 50.026 expands the current restrictions on director eligibility for water districts to all districts that include less than all the territory in at least one county and whose principal functions are the provision of water, sewer, drainage, and flood control or protection services.\textsuperscript{167}

In order to distribute a portion of the cost burden of installing and maintaining water and sewer facilities, particularly in districts in which development is not occurring as rapidly as anticipated, the legislature authorized the imposition of a standby fee by certain water districts with prior Commission approval.\textsuperscript{168} The Commission may impose the standby fee on undeveloped property only if water and sewer facilities and services are available and the capacity is sufficient to serve the undeveloped property.\textsuperscript{169} Further, the facilities and services available must have been financed by the district.\textsuperscript{170} The amount of fee may vary to reflect the type of facilities and services available to the particular property.\textsuperscript{171} Revenues collected from the standby fees go to operation and maintenance expense and/or to debt service on the bonds of the district.\textsuperscript{172} Upon application for the imposition of a standby fee, the executive director is required to examine the financial condition of the district and prepare a written report.\textsuperscript{173} The Commission is required to hold a hearing on an application for the imposition of the fee\textsuperscript{174} and may approve the application only if the Commission finds that the fee maintains the financial integrity of the district and allocates the costs of facilities and services fairly among property owners of the district.\textsuperscript{175} The fee is the personal obligation of the owner of undeveloped property on January 1 of the year for which the fee is assessed, and the fee does not transfer with transfer of title to that property.\textsuperscript{176} Further, a lien may be attached to secure payment of the standby fee, and such a lien has the same priority as a lien for district taxes.\textsuperscript{177} The legislature has provided the district with enforcement author-

\begin{flushright}
\textsuperscript{164.} Id. at § 50.063.  \\
\textsuperscript{165.} Id.  \\
\textsuperscript{166.} Id.  \\
\textsuperscript{167.} Id. § 50.026(a).  \\
\textsuperscript{168.} Id. § 50.056.  \\
\textsuperscript{169.} Id. § 50.056(a).  \\
\textsuperscript{170.} Id. § 50.056(b).  \\
\textsuperscript{171.} Id.  \\
\textsuperscript{172.} Id.  \\
\textsuperscript{173.} Id. § 50.056(d).  \\
\textsuperscript{174.} Id. § 50.056(e).  \\
\textsuperscript{175.} Id. § 50.056(f).  \\
\textsuperscript{176.} Id. § 50.056(k).  \\
\textsuperscript{177.} Id. § 50.056(l).
\end{flushright}
ity in the legislation. The legislature amended the Water Code to provide that districts of less than a single county may not issue bonds that are partially or totally secured by taxes without prior Commission approval. A district is exempted if it was created by a special act and if it is located entirely within one county and one or more home rule municipality, the total residential property values are less than 25% of the total value of the district, and the district was not previously required to obtain Commission approval of bonds.

The legislature added section 50.3811 to Chapter 50 to permit wholesale customers of a district to review and comment on the district’s annual budget as it applies to services the customers receive before the budget is adopted.

Further, the legislature amended section 50.453 of the Water Code to require that the boards of two or more municipal districts, or at least 20% of the total number of municipal districts included, must jointly petition the Commission for the creation of a regional water district.

The legislature added section 50.4541 to the Water Code to restrict the sources of matching funds that may be required as a precondition to receiving a Texas Water Development Board grant or loan. Such matching funds may not be provided through a guarantee by any individual with a financial interest in the regional district. Further, the funds may not be provided by an individual who will receive any direct financial benefit from the regional district project.

The legislature undertook an omnibus revision of Chapter 52 of the Water Code, relating to the creation, administration, and operation of underground water conservation districts and management and critical areas. The legislature specifically defined “underground water conservation district” as any district or authority created under Article III, Section 52 or Article XVI, Section 59 of the Texas Constitution that regulates the spacing of water wells or production from water wells, including those districts created under Chapter 52. The legislature expanded the definition of waste to include groundwater pumped for irrigation that escapes as irrigation tailwater onto a non-owner’s land.

The provisions for creating an underground water conservation district and an underground water management area are now codified in Chapter 52.
rather than incorporated from Chapter 51 by reference. Section 52.024(3) contains a requirement that management areas be designated through a rulemaking rather than adjudicatory hearing. The revisions to subchapter C provide for the identification and creation of critical areas through a rulemaking procedure. The legislature revised subchapter D of Chapter 52 by adding sections 52.104 through 52.121. These sections include provisions dealing with the board of directors, meetings, contracting, and the management and hiring of employees of the district. The legislature revised section 52.160 to require a comprehensive management plan to be developed by each underground water district, as well as the adoption of any rules necessary to implement the plan. Both the plan and the rules are required to be filed with the Commission. The legislature also added sections for adding territory to districts, consolidating two or more districts, and dissolving a district.

F. Miscellaneous

1. Impact Fees

The 71st Legislature revised prior legislation regulating the adoption of impact fees or capital recovery fees by a political subdivision. The revisions to the Local Government Code permit the adoption of land use assumptions on a systemwide basis rather than by service area. In addition, the revisions permit the consolidation and simultaneous adoption of a land use assumptions and capital improvements plan. Finally, the bill adds section 395.0575 to the Code, which provides that a governing body may waive impact fees, update requirements and capital improvement plans if the body so desires.

2. Double Taxation Repeal

The legislature repealed legislation passed by the 70th Legislature in 1987 that allowed a city, after annexing a district, to continue its board and taxing authority for ten years.

190. Id. §§ 52.021-52.026, 52.031-52.033, 52.041-52.045 (provisions governing creation of an underground water conservation district and an underground water management area).

191. Id. § 52.024(e).

192. Id. §§ 52.051-52.065.

193. Id. § 52.104-52.121.

194. Id.

195. Id. § 52.160.

196. Id.

197. Id. §§ 52.521-52.531.

198. Id. §§ 52.541-52.548.

199. Id. § 52.502.


202. Id.

203. Id. § 395.0575.

3. *Groundwater Quality*

A revision to article 4590f of Texas Revised Civil Statutes gives the Texas Department of Health the authority to adopt and enforce groundwater standards that are compatible with those adopted under the Atomic Energy Act. The revised statute also provides for prior review by the Texas Water Commission for compatibility of any standards adopted by the Department of Health pertaining to non-radioactive constituents.\(^{205}\)

---
