

**THE 79TH LEGISLATURE'S WATER LAW LEGACY
[WITH SELECTED FORMS]**

J. MARK MCPHERSON

MCPHERSON & ASSOCIATES, PC

WWW.MCTEXLAW.COM

17400 DALLAS PARKWAY, SUITE 112

DALLAS, TEXAS 75287

(972) 381-9800 [OFFICE]

(972) 381-9802 [FACSIMILE]

MARK@MCTEXLAW.COM

State Bar of Texas
**7TH ANNUAL THE CHANGING FACE
OF WATER RIGHTS IN TEXAS**

May18-19, 2006

San Antonio

CHAPTER 11



J. MARK MCPHERSON

17400 DALLAS PARKWAY, SUITE 112

DALLAS, TEXAS 75287

972-381-9800

972-381-9802 [FACSIMILE]

MARK@MCTEXLAW.COM

EDUCATION

Washington & Lee University School of Law
Lexington, Virginia
J.D., 1990

Belmont University
Nashville, Tennessee
B.S., Political Science, *Cum Laude*, 1987

PROFESSIONAL PUBLICATIONS

Author, WHAT EVERY TEXAS LAWYER SHOULD KNOW ABOUT TEXAS WATER LAW AS OF 1-1-06 (2006)

Author, THE 79TH LEGISLATURE'S WATER LAW LEGACY [WITH SELECTED FORMS] (2006)

Co-Author, FORM UPDATES RESULTING FROM LEGISLATIVE CHANGES (2006)

Author, WHAT THIS LEGISLATURE HATH WROUGHT: EVALUATING THE CRYSTAL BALL PREDICTIONS OF THE 79TH LEGISLATURE (2005)

Editor-in-Chief, LEGISLATIVE UPDATE – SIGNIFICANT BILLS OF THE 79TH LEGISLATURE AFFECTING REAL ESTATE, LENDING, AND OTHER COMMERCIAL MATTERS (2005)

Author, REAL ESTATE LEGISLATION IN THE 79TH LEGISLATURE'S REGULAR SESSION: THE CRYSTAL BALL APPROACH (2005)

Co-Author, LEGISLATIVE UPDATE – SIGNIFICANT BILLS OF THE 78TH LEGISLATURE AFFECTING REAL ESTATE, LENDING, AND OTHER COMMERCIAL MATTERS (2003)

PROFESSIONAL ACTIVITIES

Chair, State Bar of Texas Real Estate, Probate and Trust Law Section (“REPTL”) Real Estate Legislative Affairs Committee

Author, the MCTEXLAW E-MAIL ALERT

A periodic newsletter circulated to clients and colleagues, and posted on www.mctexlaw.com, concerning recent Texas legal developments affecting business owners and commercial real estate, with circulation of approximately 743 as of May 1, 2006. Free subscriptions available at www.mctexlaw.com/emailalerts.com

Administrator and Host, the MCTEXLAW REAL ESTATE E-MAIL DISCUSSION GROUP

An E-mail based discussion group for professionals in the Texas real estate industry, with approximately 177 members as of May 1, 2006. Free subscriptions available to qualified individuals upon request to mark@mctexlaw.com

Frequent Lecturer for the State Bar of Texas and other Professional Groups

PROFESSIONAL ORGANIZATIONS

Member, State Bar of Texas (Real Estate, Probate and Trust Law Section)

Member, Dallas Bar Association (Real Property Section)

TABLE OF CONTENTS

I. BRIEF HISTORY OF THE 79TH LEGISLATURE 1

II. THE ROLE OF THE LEGISLATURE IN WATER MATTERS 1

 A. PRIVATE SECTOR 1

 B. QUASI-PUBLIC SECTOR 2

 C. PUBLIC SECTOR 2

 D. COMMISSIONED STUDIES 2

 1. House Bill 1224 2

 2. House Bill 2430 2

III. SIGNIFICANT TRENDS IN THE 79TH LEGISLATURE 3

 A. MORE NOTICE TO AND INVOLVEMENT OF ADDITIONAL PERSONS IN THE REGULATORY
 PROCESS 3

 1. House Bill 2876 3

 2. House Bill 1763 5

 3. House Bill 2140 6

 4. House Bill 1207 6

 B. MORE POWER TO QUASI-PUBLIC ENTITIES 6

 1. House Bill 1644 6

 2. House Bill 340 7

 3. Senate Bill 1786 7

 4. House Bill 1673 7

 5. House Bill 769 7

 6. Senate Bill 945 7

 7. House Bill 2267 8

 8. Senate Bill 1045 8

 9. House Bill 1935 8

 C. REIGNING IN QUASI-PUBLIC ENTITIES 8

 1. Senate Bill 693 8

 2. House Bill 1208 8

 D. MORE ENFORCEMENT 9

 1. House Bill 1462 9

 2. Senate Bill 739 9

 3. House Bill 2815 9

 4. House Bill 1358 9

 5. Senate Bill 1354 10

 6. Senate Bill 1297 10

 7. House Bill 2966 10

 E. COLONIAS AND RELATED ISSUES 10

 1. House Bill 467 10

 2. House Bill 3029 10

 3. Senate Bill 509 10

 4. House Bill 1657 11

 5. Senate Bill 425 11

 F. MORE CENTRALIZATION / STANDARDIZATION 11

 1. House Bill 1358 11

 2. House Bill 578 11

 3. House Bill 1763 11

 G. REGIONALIZATION 11

 1. House Bill 2876 11

 2. House Bill 1644 12

 H. CONVERSIONS 12

 1. House Bill 1673 12

2. The Broader Statutory Context 12

IV. THE SPECIFIC WATER CODE CHANGES FROM THE 79th LEGISLATURE 13

V. THE TEXAS BUSINESS ORGANIZATIONS CODE 13

A. APPLICABILITY OF THE TBOC 13

B. NEW TBOC TERMINOLOGY 14

C. TRANSITION PLANNING 15

D. WHETHER TO ELECT EARLY APPLICATION 15

1. Contemplation of our Electronic World 15

2. Mergers 16

3. Sales of Assets 16

4. Indemnification 16

5. Dissolution 17

E. TIMING THE TRANSITION 17

VI. CONCLUSION 17

APPENDIX A 19

APPENDIX B 29

THE 79TH LEGISLATURE’S WATER LAW LEGACY [WITH SELECTED FORMS]

I. BRIEF HISTORY OF THE 79TH LEGISLATURE

The Real Estate Legislative Affairs Committee (“RELACs”) is a standing committee of the Real Estate, Probate and Trust Law Section of the State Bar of Texas (“REPTL”) that monitors bills filed in each legislative session, and identifies and summarizes each new law affecting real estate and other related commercial matters. I am the current Chair of RELACs.

By my count, based on data reported by the Texas Legislative Service (“Telicon”), in the 79th Regular Legislative Session the Texas Legislature passed and sent to the Governor the following number of bills and resolutions:

House Bills	868
House Joint Resolutions	5
House Concurrent Resolutions	168
Senate Bills	501
Senate Joint Resolutions	4
Senate Concurrent Resolutions	26
TOTAL PASSED:	1,572

Below is a chart comparing the volume of legislation filed in each of the last two legislative regular sessions.

78 th	Type	79 th	Change
3,634	HBs	3,592	-42
100	HJR	102	+2
306	HCR	250	-56
1,956	SB	1,900	-56
61	SJR	43	-18
75	SCR	43	-32
6,219	TOTAL	5,992	-227 -3.6%

Of the 5,992 pieces of legislation filed in the 79th Legislature’s regular session, RELACs tracked 2,198 bills and summarized 296 new laws passed that affected Texas real estate, lending and other commercial matters. The full legislative report of the Committee, entitled *Legislative Update: Significant Bills of the 79th Legislature Affecting Real Estate, Lending and Other Commercial Matters* (2005) (the “Full Report”), is available for download from the “Legislative Committee

Projects” page in the members section of the REPTL website:

www.reptl.org

and also from McPherson & Associates, PC’s 2005 Legislation website page:

www.mctexlaw.com/2005Legislation.asp

This paper addresses the 79th Legislature’s new laws that relate to water and water rights. Attached as Appendix A to this paper is an excerpt from the Full Report of the new laws affecting the Texas Water Code, re-arranged from the Full Report to be generally in order of Texas Water Code sections. There are forty-one (41) bills in this excerpt.

All references to legislative history, author/sponsor statement of intent, and similar anecdotal background information, are derived from information as reported by Telicon unless otherwise specifically stated herein.

II. THE ROLE OF THE LEGISLATURE IN WATER MATTERS

Before reviewing the specific changes to the Water Code enacted by the 79th Legislature, it is helpful to consider the role played by the Legislature in water law. This allows one to better evaluate a legislative session, understand the interest generated by specific bills, and predict future action.

Water rights and operations exist in one or more of three distinct areas: (1) the private sector; (2) the quasi-public sector; or (3) the public sector. The Legislature defines the boundaries of each of these sectors, and delegates regulatory responsibility and authority among them as well. It also commissions various studies of water-related matters for use in formulating future water policy.

A. PRIVATE SECTOR

The Legislature typically affects the private sector the least, and does so primarily by subjecting land to regulation by the quasi-public sector or the public sector. A prime example of this is the Legislature’s creation of quasi-public entities and delegation to them of regulatory authority and responsibility, such as groundwater conservation districts (“GCDs”).

An example of proposed legislation that would have significantly affected the private sector is Senate Bill 3 introduced in the 79th Legislature. Among other things, this bill would have subjected all Texas land to a GCD. Each GCD would have been responsible for regulating

the amount of water that a landowner could use. Because of the scope of its application and effect on redefining the boundary of the private sector, this would have been a substantial change in Texas water law. It did not pass in the 79th Legislature, but may be re-introduced in the 80th Legislature.

B. QUASI-PUBLIC SECTOR

In the quasi-public sector, the Legislature creates and manages quasi-public entities and gives general direction as to how and what to regulate. The Legislature also often deals with cooperation between, and interaction with, the various quasi-public entities. Furthermore, for many of the quasi-public entities, the Legislature writes, and changes, their entity governance rules, a statutory equivalent to a private corporation's bylaws. These are generally referred to as enabling statutes. A substantial number of bills passed in the 79th Legislature fall into this category.

Entities in the Quasi-Public Sector include: non-profit water supply and sewer service corporations, municipal utility districts ("MUDs"), Fresh Water Supply Districts, GCDs, conservation and reclamation districts, water improvement districts, water control and improvement districts ("WCIDs"), navigation districts, port authorities, special utility districts, the South Texas Watermaster Program, Concho River Watermaster Program, and Edwards Aquifer Authority.

C. PUBLIC SECTOR

Similarly, in the public sector, the Legislature creates and manages public agencies, mainly the Texas Water Development Board ("TWDB"), and the Texas Commission on Environmental Quality ("TCEQ"), and deals with issues of inter-agency cooperation. The Legislature has not historically micro-managed water resources, tending instead to use the agencies and entities that already operate in both the public and quasi-public sectors. However, from time to time the Legislature acts directly in the public sector by giving specific direction to agencies and entities to achieve particular goals, and by defining criminal acts involving water.

Somewhat behind the scenes, the Legislature also affects state water policy through the budgets approved for the public agencies. The effect of Legislative budget directives on water resource management and governance is less obvious but can often indicate future policy changes and additions.

D. COMMISSIONED STUDIES

Finally, the Legislature directs the undertaking and publication of reports and analyses, with the intention to use the results in the formulation of future water policy. These efforts can be particularly useful in predicting areas of future legislative action. The 79th Legislature

passed two of these bills, House Bill 1224 and House Bill 2430.

1. House Bill 1224

"Take-or-pay" contracts are typically long-term contracts between a wholesale water supplier and a retail water supplier or user for the provision of water. They require the retail supplier or buyer to pay for a minimum amount of water in a given period of time irrespective of actual usage. Obviously, this sort of arrangement does not provide an economic incentive to conserve water for buyers facing the prospect of paying for water they do not use.

In 2003, the 78th Legislature passed Senate Bill 1094, creating the Water Conservation Implementation Task Force. The task force was directed to review, evaluate and recommend optimum levels of water-use efficiency and conservation. The Task Force finished its report and submitted it to the 79th Legislature in November of 2005. One of the task force's recommendations was to have the TWDB study "take-or-pay" contracts to determine if they discouraged water conservation, which was the genesis of House Bill 1224. The report is due no later than January 1, 2007.

Interestingly, the City of Houston reports on its public works website,

<http://www.publicworks.cityofhouston.gov/utilities/conservation/>), that it removed the "take or pay" provision from its model contract for industrial and municipal customers in 1994. However, take or pay contracts continue to affect Texas water rights. See Chapter 7 of this Course, *Surface Water Conveyancing: Guidance in Negotiations and Transactions*, for further information on take-or-pay contracts as currently used.

Although House Bill 1244 is silent on the Legislature's opinion regarding take-or-pay contracts, one can surmise that the Legislature prefers that water providers cease to include take-or-pay contractual terms, and may enact legislation to curb their use. A more challenging question is whether the Legislature may in the future go so far as to void, or implement a mandatory phase-out of, take-or-pay terms.

2. House Bill 2430

The second study commissioned by the 79th Legislature, in House Bill 2430, directed the TWDB to establish a "Rainwater Harvesting Evaluation Committee" to study the feasibility of using rainwater as a source of water supply. The four person committee is comprised of the following persons, appointed by the agency in parentheses: (1) Dr. Hari J. Krishna (TWDB), Chair; (2) Tony Bennett (TCEQ); (3) Ken Ofunrein (Department of State Health Services), and (4) Nora Mullarkey (Texas section of the American Water Works

Association's Conservation and Reuse Division). This report is due no later than December 1, 2006.

House Bill 2430 also adds Section 341.042 to the Health and Safety Code, requiring the TCEQ to establish recommended standards relating to the domestic use of harvested rainwater, including health and safety standards for treatment and collection methods for harvested rainwater intended for drinking, cooking or bathing. The TCEQ must adopt standards as required by Health and Safety Code Section 341.042, not later than December 1, 2006. It therefore appears likely that TCEQ will regulate the collection and treatment of rainwater to be used for domestic uses such as drinking, cooking, and bathing, no later than December 1, 2006, prior to or simultaneously with the date the Rainwater Harvesting Evaluation Committee presents its report to the 80th Legislature.

III. SIGNIFICANT TRENDS IN THE 79th LEGISLATURE

Of the water related bills passed by the 79th Legislature, eight trends emerge that identify the more significant areas of legislative concern and change. The new laws discussed in this Article III are not all-inclusive of the water-related bills listed in Appendix A to this paper. These trends are in no particular order of importance or scope of application. While I have attempted to be objective in identifying these trends, my choices were still somewhat influenced by my experience with and practice involving water-related laws, and your opinions on these trends will be affected by your experience as well.

I did not merely characterize new laws into the various trends, and then choose the categories with the most new laws. Rather, the trends were identified based on the scope and effect of the change as well as the number of changes. As you will note, these are "big picture" trends and I have included specific illustrative examples in each, so you can see both the proverbial "forest" as well as the "trees."

A. MORE NOTICE TO AND INVOLVEMENT OF ADDITIONAL PERSONS IN THE REGULATORY PROCESS

Two of the most important water bills passed by the 79th Legislature fall into this category, House Bill 2876, regarding certificates of convenience and necessity ("CCNs"), and House Bill 1763, regarding GCDs. These are two fairly unique bills that substantially change the process, and procedural due process rights, in each area. The Legislature is not likely to repeat, on this same large scale, the scope and breadth of these changes to CCNs and GCDs in the near future. There may be technical corrections to the new CCN statute in the next regular session. While the Legislature has indicated some interest in continuing to expand the realm of GCDs, it

will likely be in the creation of GCDs as compared to the procedural due process rights enacted by the 79th Legislature.

1. House Bill 2876

House Bill 2876 is 22 pages long, and it spawned regulations that run 29 pages in the *Texas Register*. Those regulations resulted from comments that totaled something in excess of 250 pages, including a few by the author.

Historically, landowners had very few rights to receive notice of and participate in the granting, amendment or termination of a CCN for the CCNs that affected the landowner's property. In several instances, persons sought and obtained CCNs over vast geographic areas while having little to no financial ability to provide the Certificated Area with continuous and adequate water or sewer service. Prior to House Bill 2876, once land was included in a CCN Certificated Area, a landowner could not remove his land without going through a costly and time-consuming contested case proceeding. As a result the CCN holder could (and in several instances did) require hefty payments from landowners as consideration for allowing them to remove their land from a Certificated Area without using the contested case process.

House Bill 2876 accomplishes the goal of providing additional notice to landowners by amending the definition of "affected person" in Water Code Section 13.002(1) and adding Section 13.002(1-a), to read as follows (additions are double underlined):

(1) "Affected person" means any landowner within an area for which a certificate of public convenience and necessity is filed, any retail public utility affected by any action of the regulatory authority, any person or corporation whose utility service or rates are affected by any proceeding before the regulatory authority, or any person or corporation that is a competitor of a retail public utility with respect to any service performed by the retail public utility with respect to any service performed by the retail public utility or that desires to enter into competition.

(1-a) "Landowner," "owner of a tract of land," and "owners of each tract of land" include multiple owners of a single deeded tract of land.

The effect of these changes comes from the directive of Water Code Section 13.246(a):

If an application for a certificate of public convenience and necessity or for an amendment to a certificate is filed, the commission shall cause notice of the application to be given to affected parties and, if requested, shall fix a time and place for a hearing and give notice of the hearing. Any person affected by the application may intervene at the hearing.

The result is that all landowners within the certificated area of a CCN for which amendment is being sought, or situated in the proposed certificated area of a CCN being sought, will now have the statutory right to intervene and participate in the decision-making process.

Notwithstanding the foregoing, however, not all landowners will receive direct notice of the filing of an application to obtain or amend a CCN. Pursuant to new Water Code Section 13.246(a-1), only those landowners of 50 acre or larger tracts are entitled by law to receive notice by mail of the CCN application. The TCEQ may require mailed notice to other affected persons.

Exhibit 1 is the notice form promulgated by the TCEQ that a landowner will receive in the event someone files an application to obtain or amend a CCN, or decertify a portion of the CCN certificated area, which affects their land. **Exhibit 2** is the notice form promulgated by the TCEQ that a landowner will receive in the event an investor owned utility files an application to obtain or amend a CCN, or decertify a portion of the CCN certificated area. In each instance, the TCEQ sends the notice to the owner of the tract according to the most current tax appraisal rolls of the applicable central appraisal district at the time the TCEQ received the application for the certificate of amendment. A landowner must file a notice with the TCEQ in a timely manner to obtain party status in the matter. **NOTE:** these notices come from the TCEQ, via first class mail, and they do not necessarily have the appearance of a formal proceeding.

Certain landowners have the right, upon receipt of a notice of an application for a new or amended CCN, to remove their land from the Certificated Area of the proposed CCN. Pursuant to new Water Code Section 13.246(h), a landowner of 25 or more acres that is situated wholly or partially within the proposed service area, may elect to exclude some or all of their land from the proposed certificated area. **Exhibit 3** is a sample form for a landowner of a qualifying tract to exercise its election to remove the land from a CCN's Certificated Area upon receipt of a notice (Exhibits 1 or 2).

However, a landowner may not make this election if the proposed service area is located within the boundaries or extra-territorial jurisdiction ("ETJ") of a municipality with a population of more than 500,000 and the

municipality or a retail public utility owned by the municipality is the applicant. Pursuant to new Water Code Section 13.264(I), in that case, the owner is limited to contesting the inclusion of its land in the CCN certificated area, at the hearing held by the TCEQ regarding the application. **Exhibit 4** is a sample form for a landowner of a qualifying tract of land to file, in response to a notice (Exhibit 1 or 2), seeking to exclude its land from a CCN's Certificated Area

House Bill 2876 also adds Texas Water Code Sections 13.254(a-1) and (a-2) to include a process by which an owner of a tract of land that is at least fifty (50) acres and that is not in a platted subdivision actually receiving water or sewer service may petition for expedited release from a CCN service area. **Exhibit 5** is a sample petition for use by a landowner who seeks expedited release of qualifying land from the Certificated Area of a CCN. Pursuant to new Water Code Section 13.254(a-3), within 90 calendar days from the date the TCEQ determines that such a petition is administratively complete, the TCEQ "shall" grant the petition.

However, pursuant to new Water Code Section 13.254(a-2), the owner of a tract of land that is at least fifty (50) acres is limited to contesting the involuntary certification of its property in a hearing held by the TCEQ if the property is located: (1) within the boundaries of a municipality or the ETJ of a municipality with a population of more than 500,000 and the municipality or a retail public utility owned by the municipality is the holder of the CCN; or (2) in a platted subdivision actually receiving water or sewer service. Basically, the owner of a tract of land within the description of Water Code Section 13.254(a-2), does not have the automatic right to the exclusion of his land as otherwise afforded by Water Code Section 13.254(a-3). **Exhibit 6** is a sample petition for use by a landowner who seeks to remove qualifying land from a CCN Certificated Area pursuant to Water Code Section 13.254(a-2).

Another Water Code section added by House Bill 2876 that affects the public notice of CCNs is Water Code Section 13.257(r), which provides:

A utility service provider shall:

- (1) record in the real property records of each county in which the service area or a portion of the service area is located a certified copy of the map of the certificate of public convenience and necessity and of any amendment to the certificate as contained in the commission's records, and a boundary description of the service area by:

- (A) a metes and bounds survey certified by a licensed state land surveyor or a registered professional land surveyor;
 - (B) the Texas State Plane Coordinate System;
 - (C) verifiable landmarks, including a road, creek or railroad line; or
 - (D) if a recorded plat of the area exists, lot and block number; and
- (2) submit to the executive director evidence of the recording.

Pursuant to new Water Code Section 13.257(r), applicants to obtain or amend a CCN must file the required map in the county real property records within 31 days after the date the applicant receives a final order from the TCEQ granting the applications the request. For existing CCNs, newly adopted 30 TAC 291.106(h) provides:

The recording required by this section for holders of certificates of public convenience and necessity already in existence as of September 1, 2005 must be completed not later than January 1, 2007.

As these maps are filed in the county real property records, title commitments and policies may now include on "Schedule B" a notice that the property is included in a CCN's Certificated Area. **Exhibit 7** is a representative sample of what a CCN-related notice may look like on a policy commitment. These notices will look similar to water district or Municipal Utility District notices. **NOTE:** If you represent the purchaser of real estate in a purchase and sale contract, do not object to a CCN-related item on a title commitment for the purpose of having the title company remove the item, as it cannot be removed. If your client wants to terminate the contract based on the CCN, it may be advisable to either terminate the contract within the Inspection Period, if any, based on the item, or object to/reject the Title Commitment for the purpose of terminating the contract based on rejection of title. Alternatively, it may be advisable to review the representations and warranties in the sales contract to determine if a lack of representation and warranty as to the existence of the CCN support termination of the contract for cause.

Title policies will also include on "Schedule C" a requirement that the statutory notice be given prior to closing. The Texas Real Estate Commission has promulgated a draft form for use in disclosing the possibility that the land may be in a CCN's Certificated Area. **Exhibit 8** is the TREC form as proposed in its draft (and as of press time, unadopted) form. This is a

statutorily-prescribed form set out in Water Code Section 13.257(d).

We can expect future Legislative action in one particular regard. The TCEQ proposed to add 30 TAC Section 291.105(c)(2), which would have automatically voided the portion of any CCN that extended beyond the ETJ of a municipality without the consent of the landowner as of September 1, 2005. A significant number of persons filing comments objected to that provision, and so the TCEQ did not include this language in the rule as adopted, its position being that the second sentence in [Texas Water Code] Section 13.2451(b), as enacted by the 79th Legislature, is self-implementing and does not require any further action by the commission. The Legislature may more definitively resolve this particular issue again in the near future.

There are two general effects of House Bill 2876. First, more members of the public will be notified of the CCN process. Second, more people will be allowed to participate in the CCN process. The overall effect of these changes should be to return some amount of control over land back to the landowners.

For additional information on CCNs and the new regulations, please see Chapter 8 of this Course, *Open Range: the Square-Off Between Utilities and Landowners in the Turf Battle over Certificated Service Area*.

2. House Bill 1763

House Bill 1763 provides substantial additional notice and procedural due process to the rulemaking process undertaken by GCDs. This bill is accurately characterized as an "omnibus" bill in that it affects GCDs in many different ways. Among other things, it amends Water Code Section 36.101(d) and (e) to provide:

- (d) Not later than the 20th day before the date of a rulemaking hearing, the general manager or board shall:
 - (1) post notice in a place readily accessible to the public at the district office;
 - (2) provide notice to the county clerk of each county in the district;
 - (3) publish notice in one or more newspapers of general circulation in the county or counties in which the district is located;
 - (4) provide notice by mail, facsimile, or electronic mail to any person who has requested notice under Subsection (i); and
 - (5) make available a copy of all proposed rules at a place accessible to the public during normal business hours and, if the district has a website, post an electronic

copy on a generally accessible Internet site.

(e) The notice provided under Subsection (d) must include:

- (1) the time, date, and location of the rulemaking hearing;
- (2) a brief explanation of the subject of the rulemaking hearing; and
- (3) a location or Internet site at which a copy of the proposed rules may be reviewed or copied.

New Water Code Section 36.404(b) details the information required in a notice, and subsection (c) states the amount of notice required.

The effect of these new subsections can be seen when they are read in conjunction with Water Code Section 36.101(a), which authorizes GCDs to:

...make and enforce rules, including rules limiting groundwater production based on tract size or the spacing of wells, to provide for conserving, preserving, protecting, and recharging of the groundwater or of a groundwater reservoir or its subdivisions in order to control subsidence, prevent degradation of water quality, or prevent waste of groundwater and to carry out the powers and duties provided by this chapter.

In addition, new Water Code Section 36.114(a) and (b) requires each GCD to determine by rule each activity regulated by the GCD for which a permit or permit amendment is required, and determine whether a hearing on particular permits or permit amendment application is required.

Thus, House Bill 1763 has now invited more members of the public to the rulemaking process of the GCDs. For additional information on GCDs, please see Mary Sah's article in Chapter 1 of this Course, *Groundwater Conservation Districts: The Legislature's Preferred and Localized Method of Regulation*.

3. House Bill 2140

House Bill 2140 also illustrates this trend of more notice given to affected parties. House Bill 2140 adds Water Code Section 11.124(f), requiring an applicant seeking to construct a storage reservoir to mail notice of the application to each member of the governing body of each county and municipality in which the reservoir, or any part of it, will be located. Again, the new statute enlarges the class of persons receiving notice.

4. House Bill 1207

In 2003 the 78th Legislature attempted to provide a mechanism to landowners, within a water district of 5,000 acres or more who had not received service from the district for 28 years, to remove their land from the district. Water Code Section 49.3076, gave landowners until August 31, 2005, to submit petitions to remove their land from these districts. House Bill 1207 extends the August 31, 2005, deadline to August 31, 2007.

House Bill 1207 also adds Water Code Section 49.3076 (a-1), which extends this right to petition for removal of land from the district, to landowners in water districts that have a total area of more than 1,000 acres but less than 5,000 acres, if the land has been included in the district for more than 40 years.

B. MORE POWER TO QUASI-PUBLIC ENTITIES

At least seven (7) bills fall into this category, and that number alone is an accurate indication of the strength of this trend. The provision of adequate and safe water is so important that the Legislature continues to expand the abilities of the various quasi-public entities to meet that goal. As a result, this is one of the most likely areas for additional legislative action as well.

1. House Bill 1644

House Bill 1644 is a fairly intricate bill with the overall effect of increasing the statutory powers of WCIDs and MUDs. First, it adds Water Code Section 51.150 and 54.2351 to expressly permit WCIDs and MUDs, respectively, to convey water, sewer and/or drainage facilities to any other retail public utility and for the purpose of making service available in the districts. This is intended, among other things, to overrule a letter opinion by the Attorney General's office which states that a MUD does not have the authority to issue bonds to finance facilities or pay costs that will be conveyed to or owned by a third party CCN holder.

House Bill 1644 also amends Water Code Section 51.402 to clarify that WCIDs may issue bonds for any purpose authorized by Chapters 51 or 49, necessary to provide improvements and maintenance of improvements to achieve the purposes for which the WCID was created. Similarly, House Bill 1644 amends Water Code Section 54.501 to give MUDs this power with reference to Chapters 54, 49, or other applicable laws.

Additionally, House Bill 1644 amends Water Code Section 49.218(c) to clarify that a district (as defined in Water Code Section 49.001) or water supply corporation may acquire CCNs, contractual rights to use capacity in facilities, and contractual rights to acquire facilities, including the issuance of bonds, notes or other obligations to finance such acquisitions.

2. House Bill 340

House Bill 340 adds Water Code Section 60.0775, authorizing the navigation and canal commission of a navigation district that has established a police force to also establish a volunteer police reserve force. This change resulted from several studies of port security conducted after 9-11-01.

3. Senate Bill 1786

Senate Bill 1786 amends Water Code Section 60.412 to exempt navigation districts from competitive bidding requirements and proposal procedures for purchase contracts with the United States or its agencies, or the State of Texas or its agencies. It also enacts new Water Code Section 62.121(a), authorizing navigation districts to contract with any person, including a municipality or other political subdivision in a county adjacent to the navigation district, to accomplish any navigation district purpose or exercise any navigation district power. New subsection (b) of that same section authorizes a navigation district to issue obligations and secure them with ad valorem taxes, to use the process to further the contract authority granted in subsection (a).

4. House Bill 1673

Special Utility Districts are created by converting an existing non-profit water supply or sewer services corporation into a political subdivision under Water Code Chapter 65. For years it was thought that these conversion applications did not require a contested case hearing because protests did not (and could not) identify any harmful change to customers or neighboring utilities. However, the TCEQ recently determined that a water supply corporation providing only retail water service, seeking to convert to a Special Utility District which would provide the same retail water service, could be forced to go through a contested case hearing if a neighboring utility protested because of concerns the Special Utility District could compete with their sewer service even though the Special Utility District did not seek the authority to provide sewer service. This resulted from a TCEQ determination that the TCEQ has no legal authority to authorize a water supply corporation to convert to a Special Utility District with less than the full powers authorized by Water Code Section 65.012, which includes both water and sewer service.

Special Utility Districts have several advantages over water supply corporations. For example, they are exempt from state sales taxes and may issue tax exempt bond financing under federal law. Special Utility Districts must comply with the Texas Elections Code, and they may participate in cooperative purchasing programs provided by the Texas Building and Procurement Commission.

The 78th Legislature thought they solved this problem in 2003 by passing House Bill 1014, but the TCEQ did not agree on the effect of the solution, and subsequently required the Porter Water Supply Corporation to go through a contested case hearing on its application to convert to a Special Purpose District. In that case the Porter Municipal Utility District filed a protest, thus triggering the contested case process.

The 79th Legislature has now made a second attempt to address this issue, by a series of amendments. First, Water Code Section 65.020(a) limits the TCEQ's inquiry, in the event of a contested case hearing, to a consideration of each purpose specified in the water supply corporation's resolution regarding conversion, and only those purposes. House Bill 1673 also amends Water Code Section 65.021(a) to require the TCEQ to "authorize the creation of the district for the purpose or purposes specified in the resolution, as required by Section 65.015." In the Legislature's opinion, this seems to enable the TCEQ to authorize the creation of Special Utility Districts that only have power to provide water service, or only sewer service.

5. House Bill 769

House Bill 769 gives additional flexibility to navigation districts and port authorities to select contractors for construction, maintenance and repair projects using competitive sealed proposals. This process was first authorized by the 78th Legislature. A competitive sealed proposal allows the navigation district or port authority to consider qualifications for a contract other than the lowest bid, and so an expansion of the ability to use the CSP process is an expansion of the entities' discretion.

The original statute required navigation districts and port authorities to complete their analysis of the bids within 45 days. Experience has shown that there are occasional projects so large or complicated that 45 days is inadequate. House Bill 769 therefore amends Water Code Section 60.463 to give navigation districts and port authorities power to specify a 90 day deadline on some projects, instead of the 45 days.

6. Senate Bill 945

In 2003, the 78th Legislature enacted Water Code Subchapter O (Financial Disclosure by Members of Governing Body). Again, experience in the last two years with this new law has taught that these disclosure provisions are burdensome and costly for volunteer members of the governing bodies of port authorities and navigation districts.

Senate Bill 945 repeals Water Code Subchapter O and replaces it with new Subchapter P (Water Code Sections 60.481 et seq.), which is a similar but less onerous means of ensuring that a member of the board of

a navigation district or port authority does not have a conflict of interest in the work done by the district or port.

7. House Bill 2267

House Bill 2267 provides additional flexibility for the Coastal Water Authority (“CWA”). The stated goal of House Bill 2267 is to better assist the City of Houston in conveying surface water to users in the Harris County area, in order to reduce the need to extract groundwater for such purposes. In furtherance of that goal, House Bill 2267 adds Sections 3A, 3B, 3C and 3D to Chapter 601, Acts of the 60th Legislature, Regular Session, 1967, thereby granting to the CWA the authority to:

1. Become involved in water reclamation and water desalination projects;
2. Use the bed and banks of rivers and streams and bayous of the state to transport surface water;
3. Generate electricity by wind turbines and hydroelectric means for use by the CWA and Houston;
4. Create a local government corporation in the same manner as a city, county or navigation district, to assist the CWA in implementing its projects; and
5. Develop parks and issue unrated bond anticipation notes.

8. Senate Bill 1045

Officers, employees or consultants of general law districts (defined in Water Code Section 49.001) who routinely handle district funds are required to furnish a performance bond issued by a surety company. At the time that statute was written, bonds were the most sensible available option. Today, however, districts can obtain similar coverage from insurance companies at much lower rates, and so Senate Bill 1045 adds Water Code Section 49.057(I) as follows:

The [general law district] board may obtain or require an officer, employee, or consultant of the district to obtain insurance or coverage under an interlocal agreement that covers theft of district funds by officers, employees, or consultants of the district in lieu of requiring a bond under Subsection (e) [prior law’s surety bond requirement] if the board determines that the insurance or coverage under an interlocal agreement would adequately protect the interests of the district.

This was a fairly simple but effective way to increase district flexibility by providing additional powers.

9. House Bill 1935

House Bill 1935 also expands the powers of general law districts by giving them the flexibility to accept credit card payments of water district fees and charges, and impose the fees reasonably related to the expense incurred to process the credit card payment on the payor. Under prior law districts had to absorb these costs, which had the effect of distributing them amongst all customers, most of whom mailed in checks for payment.

C. REIGNING IN QUASI-PUBLIC ENTITIES

Against the larger trend of giving quasi-public entities more authority, responsibilities and powers, the 79th Legislature passed two new laws to prohibit quasi-public entities from engaging in behavior deemed abusive.

1. Senate Bill 693

The practice of “seat jumping” on MUD boards led the Legislature to make an attempt to eliminate that practice by adding Water Code Section 54.103. Seat jumping is best understood by describing the process. A board member facing re-election in the near future resigns his board seat and has himself appointed to a vacant seat on the MUD board to serve out the longer term of the vacant seat, thereby avoiding the necessity of running for re-election.

New Water Code Section 54.103 seeks to curb this practice by prohibiting a MUD board from appointing to a vacant seat a person who:

(1) resigned from the board:

(A) in the two years preceding the vacancy date; or

(B) on or after the vacancy date but before the vacancy is filled; or

(2) was defeated in a directors election held by the district in the two years preceding the vacancy date.

The Legislature was concerned that the seat-jumping process took choice away from voters in the MUD.

2. House Bill 1208

Current law allows MUDs to exercise broad powers of eminent domain to take private property outside its boundaries by condemnation. House Bill 1208 addresses various acts the Legislature considered abusive or at least improper. One specific example from the Bill Analysis was a situation where a MUD platted its entire area within the MUD boundaries for residential or recreational use, and then used its condemnation power to acquire

land outside the MUD for location of its water and wastewater facilities.

House Bill 1208 adds Water Code 54.209, to prohibit a MUD from exercising the power of eminent domain outside the MUD to acquire:

- (1) a site for a water treatment plant, water storage facility, wastewater treatment plant, or wastewater disposal plant;
- (2) a site for a park, swimming pool, or other recreational facility except a trail;
- (3) a site for a trail on real property designated as a homestead as defined by Section 41.002, Property Code; or
- (4) an exclusive easement through a county regional park.

This does not apply to the North Harris County Regional Water Authority.

D. MORE ENFORCEMENT

In addition to five new laws that directly impact regulatory enforcement, there are two new laws that affect enforcement of water-related laws by criminal means.

1. House Bill 1462

Under prior law, the TWDB did not have any authority to refer an applicant for or recipient of financial assistance from the TWDB to any other state agency for investigation or initiation of an enforcement action. House Bill 1462 adds Water Code Section 6.1555 to authorize the TWDB, either as a result of a complaint filed with the TWDB or on the TWDB's own motion, to refer an applicant for or recipient of financial assistance from the TWDB to:

1. The state auditor;
2. The Texas Rangers; or
3. Another state agency, office, or division, as appropriate;

for the investigation of, or the initiation of, an enforcement action against the applicant or recipient.

2. Senate Bill 739

Under prior law, once an enforcement order had been entered by the TCEQ after holding a hearing, the TCEQ had no authority to provide for or accept a payment plan. The fined entity had to pay the fine in full all at once. Senate Bill 739 removes language from Water Code Section 7.052(d), thus allowing the TCEQ discretion to establish an installment payment plan for administrative penalties assessed against a regulated entity after a hearing. According to the Bill Analysis,

this is expected to help the TCEQ collect more money from fines.

3. House Bill 2815

House Bill 2815 is a very specific bill addressing a situation in the vicinity of the town of Zapata. The background story explaining this new law is interesting. In 1954, the federal government built a water and sewer plant as part of the relocation of the town of Zapata to its existing location. The plant's primary purpose was to provide water and sewer service to the Air Force radar installation and to provide the same services to the town's residences. Subsequently, control was turned over to the county government, which apparently served the area pursuant to a CCN. The area's water and sewer needs have outgrown the ability of the current provider, due to age, area population growth, increased demand and new standards for water and sewer service.

With House Bill 2815 the Legislature created the Concho River Watermaster Program, a new quasi-public entity, by adding Water Code Subchapter K (Sections 11.551 et seq.). New Water Code Section 11.552 states that this program is "established to ensure compliance with water rights in the area.."

4. House Bill 1358

House Bill 1358 gives the TCEQ additional power to regulate improperly operated water supply and sewer service corporations. It does so by adding the following new Water Code Section 13.004(a):

Notwithstanding any other law, the commission has the same jurisdiction over a water supply or sewer service corporation that the commission has under this chapter over a water and sewer utility if the commission finds that the water supply or sewer service corporation:

- (1) is failing to conduct annual or special meetings in compliance with Section 67.007; or
- (2) is operating in a manner that does not comply with the requirements for classifications as a nonprofit water supply or sewer service corporation prescribed by Sections 13.002(11) and (24).

Water supply and sewer service corporations are thus better incentivized to have organizational documents that comply with Chapter 67, to conduct annual and special meetings as required by statute, and to otherwise operate in accordance with its articles of incorporation and bylaws.

5. Senate Bill 1354

Senate Bill 1354 is another specific bill with a very limited focus. The TCEQ performed an interim statewide study on non-permitted rock mining operations. As a result, the TCEQ found that mining operations along a 115 mile stretch of the Brazos River and its tributaries in Palo Pinto and Parker Counties were changing the ecology of the river and impacting the quality of surface water. As operators mine limestone, sandstone and other aggregates from the hills and bluffs along the river, bare earth is exposed. Rain washes the exposed soils into the river, causing unnatural islands, sedimentation, bank erosion and damage to fish and game habitat.

To remedy this situation, SB 1354 adds Water Code Subchapter M (Sections 26.551 et seq.), establishing a specific TCEQ permitting and enforcement program for this 115 mile stretch of the Brazos River. Among other things, this pilot program requires individual or general permits for quarries depending on their proximity to the river, and it requires operators to prepare and submit reclamation and restoration plans, as well as to provide financial assurance to mitigate damages.

6. Senate Bill 1297

This is one of the two criminal bills passed by the 79th Legislature. Prior law treated any quantity of used oil present in water discharge as a criminal violation. Enforcement agencies have adopted the standard “visible sheen on the surface of discharge” as the operable definition. Senate Bill 1297 addresses this rather vague, and somewhat subjective, standard by amending Water Code Sections 7.147(a) and 7.176(a)(1) to provide a more objective standard. It does so by creating a “safe harbor”, exempting the discharge of used oil from criminal violation if the concentration of used oil in the water stream is less than 15 parts per million following the discharge, provided the person is authorized to discharge storm water under a general permit issued under Water Code Section 26.040.

7. House Bill 2966

This is the second criminal bill from the 79th Legislature. House Bill 1966 amends Water Code Section 60.078 to increase the maximum fine for violation of ordinances, rules or police regulations of a port authority or water district. Violations of these ordinances, rules and regulations are equivalent to Class C misdemeanors under the Texas Penal Code. However, while the Texas Penal Code now allows a maximum fine of \$500, the Water Code only authorized a maximum fine of \$200. By increasing the maximum fine from \$200 to \$500, House Bill 2966 brings the Water Code into conformity with the Texas Penal Code, thereby enhancing its intended deterrent effect.

E. COLONIAS AND RELATED ISSUES

Texas continues to struggle with controlling and providing basic water and sewer services to colonias. Five separate bills passed the 79th Legislature dealing with colonias. As expected, most of these bills involve the TWDB, the Legislature's preferred agency to deal with colonias issues.

1. House Bill 467

House Bill 467 expands the area eligible for grant or bond assistance under Water Code Chapter 16 (Provisions Generally Applicable to Water Development) and Chapter 17 (Public Funding). The TWDB manages the “economically distressed areas account” to provide financial assistance to political subdivisions for the construction, acquisition or improvement of water supply and sewer services. House Bill 467 redefines “affected county” to include Harris County and adjacent counties.

House Bill 467 also amends Water Code Section 17.927 to allow political subdivisions to file with TWDB an application for assistance from the economically distressed areas account and sets forth basic requirements for such application.

2. House Bill 3029

In 2001, the 77th Legislature created the Pilot Program for Water and Wastewater Services to provide resources for rural communities that need water and wastewater loans. The program applied only to cities, counties and certain districts and authorities with a population of less than 5,000. House Bill 3029 makes this pilot program permanent and expands the program to allow statewide access for certain communities that need water and wastewater services. It clarifies that the fund is not a loan but rather an account in the water assistance fund, which is managed by the TWDB. The TWDB may provide grants to political subdivisions or water supply corporations (an expansion from prior law's “rural communities” limitation) for the construction, acquisition or improvement of water and wastewater projects to provide service to disadvantaged rural communities. This assistance may take the form of grants or loans.

3. Senate Bill 509

Senate Bill 509 repealed Water Code Section 15.974(b). That section limited the TWDB by directing it to use no more than 10% of the annual Water Infrastructure Fund budget for disadvantaged communities or for certain permitting costs. In repealing Section 15.974(b), the TWDB now has “maximum flexibility” (per the bill analysis) in determining which water-related financial needs to address with water infrastructure fund appropriations.

4. House Bill 1657

House Bill 1657 clarifies an ambiguity in Water Code Section 16.093, to expand TWDB authority. The U.S. Congress provides State and Tribal Assistance Grants (“STAG”) for specific purposes, administered by the U.S. Environmental Protection Agency (“EPA”), to be used for water and wastewater projects. The EPA is authorized to use up to 3% of each grant as a grant to the state to administer and oversee the STAG project.

The EPA encouraged the TWDB to apply for STAG projects, but the TWDB interpreted Water Code Section 16.093 as allowing it to apply for STAG funding for water projects, but not for wastewater projects. House Bill 1657's amendment to Water Code Section 16.093 clearly grants TWDB the authority to apply for STAG funding for wastewater projects.

5. Senate Bill 425

Senate Bill 425 is a lengthy bill (14 pages) specifically aimed at colonias. It only amends one section of the Water Code (Water Code Section 16.341(1)) and two sections of the Utilities Code (Utilities Code Sections 37.153, 54.254) with all other affected statutes situated in the Government or Local Government Codes. Pre-amendment law regulating colonias only applied to counties within 50 miles of the Texas-Mexico border. Senate Bill 425 generally extends that area to counties within 100 miles of the border and which contain a city with a population of more than 250,000 (i.e. Nueces County), so that it may now regulate subdivision platting requirements and utility services and receive assistance from the state.

F. MORE CENTRALIZATION / STANDARDIZATION

While GCDs, along with the decentralization inherent in that system, may be the favored method to regulate groundwater, Texas water law continues to evolve in other ways towards increased centralization and standardization. The major focus of standardization are the state water agencies, namely the TCEQ and TWDB, and the quasi-public entities.

1. House Bill 1358

Under prior law, the TCEQ had regulatory jurisdiction over investor-owned water and sewer utilities but only appellate jurisdiction over water supply and sewer service corporations. House Bill 1358 adds Water Code Section 13.004, which gives the TCEQ the same jurisdiction over non-profit water supply and sewer service corporations as it already has over investor-owned water and sewer utilities under Chapter 13, if the TCEQ finds that the water supply or sewer services corporation is failing to conduct annual or special meetings in compliance with Water Code Section 67.007

or is operating in a manner that does not comply with Water Code Section 13.002(11) and (24). The stated purpose of this new law is to provide more consistent regulatory guidelines for water and sewer providers and to ensure the best quality service for all water and sewer customers.

2. House Bill 578

Currently there are no maps detailing the various water pipelines throughout the state. House Bill 578 adds Water Code Section 16.053(e)(3)(D) to require each regional water planning group to submit to the TWDB a plan that identifies existing major water infrastructure facilities that may be used for interconnections in the event of an emergency shortage of water.

3. House Bill 1763

The major GCD legislation from the 79th Legislature standardizes a substantial part of the rulemaking process required of GCDs. See Section III.A.2 above for the details of House Bill 1763.

G. REGIONALIZATION

A continuous and adequate water supply for the entire state requires a water delivery infrastructure system across areas whose borders are defined by need, not by political subdivisions or other artificial borders. This goal is challenged by a high number of small water utilities. More consistent water quality comes from fewer sources producing greater quantities, and water providers profitable enough to afford the necessary treatment and testing resources to ensure the water's quality. The natural consequence of these two principles is to regionalize water resources.

1. House Bill 2876

House Bill 2876, the CCN bill, illustrates this goal in practice. New Water Code Section 13.245 prohibits the TCEQ from granting a CCN to a retail public utility within the boundaries or ETJ of a city without the city's consent, for cities with a population of 500,000 or more. Also, as discussed above in III.A.1., certain landowners may elect to remove their land from a CCN certificated area, whereas that right has been reduced to a request in certain circumstances, namely those that would indicate the presence of a capable water supplier in the area, such as a city with a population of 500,000 or more.

New Water Code Section 13.247(d) allows cities with a population of 500,000 or more to take by eminent domain a substandard water or sewer system if all the facilities are located entirely within the city's boundaries. Also, new Water Code Section 13.2551 gives the TCEQ the power to transfer entire CCN service areas in the event of decertification. It seems to be the presumption that cities with a population of 500,000 or more are best

equipped to provide continuous and adequate water service to its own area as well as its surrounding areas.

2. House Bill 1644

House Bill 1644, discussed in more detail above in III.B.1., also promotes regionalization by enabling cooperation between existing quasi-public entities. It generally allows WCIDs and MUDs to transfer facilities to other area retail public utilities, and otherwise finance costs incurred by other retail public utilities.

H. CONVERSIONS

The Legislature continues to make it more possible and convenient to change the form of water-related entities by using the process of conversion. Conversion is when an entity changes the form of its organization, such as from a non-profit water supply corporation to a special utility district. Generally, all debts, assets, bank accounts, and other characteristics of the converting entity are not changed (including EINs).

1. House Bill 1673

House Bill 1673, discussed in more detail in III.B.4. above, amends Water Code Sections 65.020 and 65.021 to ease the burden on a water supply corporation seeking to convert to a special utility district, by streamlining the contested case process should a protest be filed, and by reducing the ability of parties to file protests that trigger a contested case hearing.

2. The Broader Statutory Context

One must be careful to clearly identify the “client” at the outset of a conversion analysis, because a change of form may apply a different standard to the acts of officers and directors. For example, Texas Business Organizations Code (“TBOC”) Section 3.102 allows directors of a non-profit water supply or sewer services corporation:

...in good faith and with ordinary care, rely on information, opinions, reports, or statements, including financial statements and other financial data, concerning a domestic entity or another person and prepared or presented by:

- (1) an officer or employee of the entity;
- (2) legal counsel
- (3) a certified public accountant;
- (4) an investment banker;
- (5) a person who the governing person reasonably believes possesses professional expertise in the matter; or
- (6) a committee of the governing authority of which the governing person is not a member.

This is supplemented with TBOC Section 22.221, specifically applicable to directors of nonprofit corporations:

22.221. GENERAL STANDARDS FOR DIRECTORS. (a) A director shall discharge the director's duties, including duties as a committee member, in good faith, with ordinary care, and in a manner the director reasonably believes to be in the best interest of the corporation.

(b) A director is not liable to the corporation, a member, or another person for an action taken or not taken as a director if the director acted in compliance with this section. A person seeking to establish liability of a director must prove that the director did not act:

- (1) in good faith;
- (2) with ordinary care; and
- (3) in a manner the director reasonably believed to be in the best interest of the corporation.

Similarly, TBOC Section 22.235 provides the safe harbor to officers. Nothing in Water Code Chapter 67 contradicts or otherwise preempts these provisions. No similar safe harbor is found in the Water Code for the benefit of the directors or officers of any quasi-public entity. The following section of Water Code Chapter 49 is the closest similar provision:

§ 49.235. DISTRICT ACT OR PROCEEDING PRESUMED VALID. (a) A governmental act or proceeding of a district is conclusively presumed, as of the date it occurred, valid and to have occurred in accordance with all applicable statutes and rules if:

- (1) the third anniversary of the effective date of the act or proceeding has expired; and
 - (2) a lawsuit to annul or invalidate the act or proceeding has not been filed on or before that third anniversary.
- (b) This section does not apply to:
- (1) an act or proceeding that was void at the time it occurred;
 - (2) an act or proceeding that, under a statute of this state or the United States, was a misdemeanor or felony

- at the time the act or proceeding occurred;
- (3) a rule that, at the time it was passed, was preempted by a statute of this state or the United States, including Section 1.06 or 109.57, Alcoholic Beverage Code; or
 - (4) a matter that on the effective date of this section:
 - (A) is involved in litigation if the litigation ultimately results in the matter being held invalid by a final judgment of a court; or
 - (B) has been held invalid by a final judgment of a court.

While the entity itself, and its members, may benefit from converting a water supply or sewer services corporation to a quasi-public entity, the officers and directors may see their risk of service increased.

The Water Code law authorizes the following conversions:

<i>Converting Entity Form</i>	<i>Surviving Entity Form</i>	<i>Water Code Source Law</i>
Water Improvement District	WCID	51.040
Levee Improvement District	WCID	51.040
Irrigation District	WCID	51.040
Conservation and Reclamation District (Art. XVI, Sec. 59)	WCID	51.040
WCID	Fresh Water Supply District	51.045
Water Improvement District	MUD	54.030
WCID	MUD	54.030
Fresh Water Supply District	MUD	54.030

Levee Improvement District	MUD	54.030
Irrigation District	MUD	54.030
Another conservation and reclamation district (Art. XVI, Sec. 59)	MUD	54.030
Water Improvement District (Art. III, Sec. 52)	Water Improvement District (Art. XVI, Sec. 59)	55.053
Water Supply or Sewer Services Corp.	Special Utility District	65.020

As the Legislature changes, from time to time, the authorities, powers, discretion, flexibility, and responsibilities of the various water-related quasi-public entities, directors and governing boards should consider whether a conversion may be in their best interest.

IV. THE SPECIFIC WATER CODE CHANGES FROM THE 79th LEGISLATURE

Attached as **Appendix A** are summaries of each bill passed by the 79th Legislature that affected the Water Code (additions, amendments, and repealers). This is an excerpt from the Full Report. However, in the Appendix the bills have been arranged in order of Water Code sections affected, and the Water Code chapter titles have been added, so that the reader can obtain a broader perspective on the changed areas.

V. THE TEXAS BUSINESS ORGANIZATIONS CODE

In addition to changes to the Water Code, changes to Texas business entity statutes, in the form of the TBOC, now affect non-profit water supply and sewer service corporations. If your water-related practice includes representation of non-profit water supply and sewer service corporations, you should become familiar with the TBOC’s application to them, as modified by the Water Code.

A. APPLICABILITY OF THE TBOC

The TBOC was adopted in 2003 by the 78th Legislature. It is the culmination of eight years of work by the drafting committee, and in the author’s opinion is a monumental drafting achievement. It became effective January 1, 2006, and applies to all business entities formed on or after that date, including nonprofit water

supply and sewer service corporations formed under Water Code Chapter 67.

From January 1, 2006, to January 1, 2010, water supply and sewer nonprofit corporations governed by the Texas Non-Profit Corporation Act (“TNPCA”) may choose to be governed by the TBOC, by filing an election with the Secretary of State. An election form based on the form promulgated by the Secretary of State’s office is attached hereto as **Exhibit 9**. All Texas business entities, including water supply and sewer service corporations, formed prior to January 1, 2006, that do not file such an election will automatically be governed by the TBOC beginning on January 1, 2010. On that same date, the underlying statutes (including the TNPCA) will be repealed.

TBOC Section 2.010 provides, in relevant part, as follows:

A nonprofit corporation may not be organized or registered under this code to conduct its affairs in this state to.....(2) engage in water supply or sewer service except as an entity incorporated under Chapter 67, Water Code.

Water Code Section 67.004 provides:

chapter, the Texas Non-Profit Corporation Act (Article 1396-1.01 et seq., Vernon's Texas Civil Statutes) applies to a corporation created under:

- (1) this chapter [Chapter 67]; or
- (2) Chapter 76, Acts of the 43rd Legislature, 1st Called Session, 1933 (Article 1434a, Vernon's Texas Civil Statutes).

Reading these two provisions together, the exclusive manner in which to organize a non-profit corporation for the supply of water or sewer service on or after January 1, 2006, is to form the non-profit corporation pursuant to the TBOC under Water Code Section 67.

The TBOC makes substantive changes to the pre-existing Texas entity statutes, including the TNPCA. Generally, the TBOC consists of thirty (30) chapters divided into eight (8) titles. The TBOC’s non-profit corporation provisions may be found in Title 2. Its general provisions applicable to all entities are in Title 1, and its miscellaneous and transition provisions are in Title 8.

Nonprofit corporations are primarily governed by TBOC Chapter 22. Attached to this paper as **Exhibit 10** is a sample Certificate of Organization for the formation of a water supply corporation under Water Code Chapter 67 that complies with the new TBOC. Since an entity must amend their articles of incorporation if necessary to

bring them into compliance with the TBOC (TBOC Section 402.003), attached as **Exhibit 11** is a Restated Certificate of Organization. While TBOC 402.003 directs the entity to file a “Certificate of Amendment”, as opposed to a Restated Certificate of Organization, the author suggests that TNPCA entities fully conform their former “articles of incorporation” to “certificates of organization” as allowed by TBOC Section 3.057. For the required contents of a certificate of organization for a nonprofit entity, see TBOC Sections 3.059 and 3.061.

TBOC Section 22.357 requires a nonprofit corporation to file a periodic information statement. Attached as **Exhibit 12** is the periodic information statement form promulgated by the Secretary of State. TBOC Section 22.360 provides:

FAILURE TO FILE REPORT. (a) A domestic or foreign corporation that fails to file a report under Sections 22.357 and 22.359 when the report is due forfeits the corporation's right to conduct affairs in this state.

(b) The forfeiture takes effect, without judicial action, when the secretary of state enters on the record of the corporation kept in the office of the secretary of state:

- (1) the words "right to conduct affairs forfeited"; and
- (2) the date of forfeiture.

It is therefore very important to assist your clients in the completion and timely filing of this report when required by the Secretary of State.

B. NEW TBOC TERMINOLOGY

Because Title 1 of the TBOC applies to most business entities, the TBOC defines and uses terminology suitable for generic references as compared to the TNPCA, whose only focus is nonprofit corporations. Since the “old” terms are still used in Water Code Chapter 67, it is necessary to understand the relationship of the Water Code Chapter 67 terminology to the new TBOC terminology.

The following table lists common terms and along with statutory references for their definitions:

<i>Term</i>	<i>Water Code</i>	<i>TBOC</i>
Board of Directors	67.001(1)	1.002(35) (Governing Authority); 22.001(1) (Board of Directors)

Corporation	67.001(1)	1.002(14)
Non-profit Corporation	67.004	1.002(59)
Directors	67.001(3); 67.005	1.002(37) (Governing Person)
Officers	67.006	1.002(61)
Annual Meeting	67.007(a), (b)	22.153
Special Meeting	67.007(b)	22.155
Articles of Incorporation	67.003 (Application for Charter)	1.002(6) (Certificate of Formation)
Bylaws	Not Defined	22.001(2); 22.102
Governing Documents	Not Used	Certificate of Formation, Bylaws
Transfer of Membership	67.016	Not Defined
Distribution of Profits	67.008	22.053
Transfer of Ownership	67.016	Not Addressed

In addition, one should note that Chapter 67 clearly contemplates a non-profit entity that has either members or shareholders. The TBOC does not provide non-profit corporations with this choice. It only allows for members. As such, the TBOC does not provide for non-profit corporations to issue “stock certificates.” It uses the terms “certificated ownership interests” (TBOC Section 1.002(7)) and uncertificated ownership interests (TBOC Section 1.002(87)), either of which is available to a nonprofit corporation. However, TBOC Section 22.151(c) provides: “A [nonprofit] corporation may issue a certificate, card, or other instrument evidencing membership rights, voting rights, or ownership rights as authorized by the certificate of formation or bylaws.” It is presumed that “other instrument” could include the traditional notion of a stock certificate.

This issue affects nonprofit water supply and sewer service corporations formed under the TNPCA differently than newly formed entities under the TBOC. TNPCA entities electing to be governed by the TBOC may be able to continue to use the term “shareholder.” Nonprofit entities formed under the TBOC could, in theory, rely on Water Code Chapter 67's precedence over

the TBOC, and its use of both terms, to have shareholders instead of members. However, since one code has only one choice, while another code allows that choice plus one other, the safer and better practice is to choose the term used by both codes and therefore form new TBOC nonprofit corporations using the term “members” instead of “shareholders.” One should also consider the possibility that Water Code Chapter 67 may be amended in the future to conform it to the TBOC.

C. TRANSITION PLANNING

The transitional provisions of the TBOC are generally found in Chapter 402, which contains 14 sections. Due to the extensive changes enacted by the TBOC, its effectiveness has been delayed. Enacted in 2003, it will not apply mandatorily to all Texas entities until January 1, 2010. From January 1, 2006, to December 31, 2009, non-profit water supply and sewer service corporations formed prior to January 1, 2006, may voluntarily elect to be governed by the TBOC.

D. WHETHER TO ELECT EARLY APPLICATION

Since an entity *may* now “opt in” to the TBOC, the question becomes whether or not a non-profit water supply or sewer services corporation *should* elect to be governed by the TBOC instead of the TNPCA. While this is a very fact-specific inquiry, the answer to which may vary by entity, there are some general guidelines for this inquiry. The reader is also cautioned to answer the question “who is my client?” before proceeding to analyze the effect of the TBOC changes.

1. Contemplation of our Electronic World

One of the most dramatic changes of the TBOC is the recognition and incorporation of the electronic media we have available in 2006. Among other things, it has specific provisions that:

- (1) provide filing procedures and forms that can be completed and filed with the Secretary of State electronically;
- (2) enable owners to use electronic communication methods such as E-mail;
- (3) allow entities to hold meetings electronically in certain circumstances; and
- (4) allow individual to sign documents digitally.

All of these provisions provide added flexibility and convenience for members, shareholders, directors and officers of water supply and sewer services nonprofit corporations.

2. Mergers

The TBOC enacts substantive changes for non-profit corporations that merge with other non-profit corporations, a possible although perhaps unlikely event for two non-profit water supply and sewer services corporations.

Since revisions effected in the 1997 Texas Legislature, the provisions of the Texas Business Corporation Act ("TBCA") and many other entity governance codes relating to mergers, interest exchanges and conversions have been comparable in most respects. The provisions of TBOC Chapter 10 are based on these provisions. However, the provisions of the TNPCA have not been updated to parallel the provisions of these other statutes. This means that TBOC Chapter 10, which harmonizes the merger provisions of non-profit entities with the more modern provisions for-profit entities, represents a substantive change from existing law for non-profit corporations.

3. Sales of Assets

TBOC Sections 10.251 through 10.254 contain provisions regarding the power of domestic entities to transfer, sell and lease their property. These provisions are based generally on similar provisions contained in the TBCA and TNPCA. TBOC Section 22.252(h) clarifies and sets forth a general rule that, except as may be provided elsewhere in the TBOC or in the governing documents of an entity, transfers of property do not require owner or member approval. TBOC Section 22.252 also sets forth the requirements for approval by owners or members of sales of all or substantially all the assets of a nonprofit corporation, which provides in relevant part:

(c) If the management of the affairs of the corporation is vested in its members under Section 22.202, a resolution authorizing a sale of all or substantially all of the assets of the corporation:

- (1) must be submitted to a vote at an annual, regular, or special meeting of the members; and
- (2) must be approved by the members by the vote required by Section 22.164.

(d) If the corporation has members with voting rights:

- (1) the board of directors of the corporation must adopt a resolution that:
 - (A) recommends the sale; and

(B) directs that the resolution be submitted to a vote at an annual or special meeting of the members having voting rights; and

(2) the members must approve the resolution by the vote required by Section 22.164.

(e) At the meeting required by Subsection (c) or (d), in addition to approving the resolution authorizing the sale, the members may set, or authorize the board of directors to set, the terms and conditions of the sale and the consideration to be received by the corporation for the sale by the same vote of members.

(f) After the members authorize a sale under Subsection (d), the board of directors may abandon the sale, subject to the rights of third parties under any contracts relating to the sale, without further action or approval by members.

4. Indemnification

There are at least three substantive changes to the indemnification provisions of the TBOC as compared specifically to the TNPCA:

- (1) In TBOC Section 8.103(a)(2), a determination that the standard for indemnification in Section 8.101(a) has been met may be made by a committee of one disinterested director if no quorum of disinterested directors can be obtained. The TNPCA requires two such directors.
- (2) TBOC Section 8.103(a)(5) has no explicit source in the TNPCA but is implicit in the general principle that all the owners or members of an enterprise may make any disposition of its assets, including indemnification of a governing person.
- (3) TBOC Section 8.105(a)(3) has no explicit source in TNPCA but is implicit in the general principle that the owners or members of an enterprise may make any disposition of its assets for the benefit of a person who is not a governing person.

TBOC Section 402.007 specifies that Chapter 8 of the TBOC governing any proposed indemnification by a domestic entity after the TBOC becomes applicable to that entity will apply regardless of whether the events on which the indemnification is based occurred before or after the TBOC's application to the entity.

The TBOC's indemnification provisions were amended by House Bill 1319 in the 79th Legislature. As amended, a provision relating to indemnification

contained in the governing documents that would otherwise have the effect of limiting the nature or type of indemnification permitted by Chapter 8 may not be construed after the TBOC becomes applicable to the entity as limiting the indemnification authorized by Chapter 8 unless the provision is intended to limit or restrict permissive indemnification under applicable law.

5. Dissolution

Water Code Section 67.052 sets forth a unique dissolution process applicable only to a water supply or sewer service nonprofit corporation and a municipality located in a county: (1) with a population of 650,000 or more; and (2) adjacent to an international border. Since the TBOC applies to water supply and sewer service nonprofit corporations to the extent it does not conflict with Water Code Chapter 67, and Chapter 67 does not otherwise provide for dissolution, all water supply and sewer service nonprofit corporations subject to Chapter 67, but not within the definition of Water Code Section 67.052, are subject to the dissolution provisions of the TBOC.

Generally, the TBOC has more generous provisions that permit survival and reinstatement of an entity after dissolution for various purposes. TBOC Chapter 11 applies to a voluntary winding up and termination proceeding initiated after the date the TBOC first begins to apply to an entity. Any voluntary winding up and termination proceeding initiated before such date will continue to be governed by the TNPCA.

E. TIMING THE TRANSITION

Because of the transitional rules regarding when the TBOC begins to apply to an entity and the acts of its officers and directors, which are generally found in TBOC Chapter 14, transitioning from the TNPCA to the TBOC can be fairly simple, or complex, because some times are more convenient for making the election than others.

TBOC Sections 402.008 and 402.009 provide that the TBOC applies to meetings of owners, members or governing persons held, and to any actions by written consent that take effect, on or after the date that the TBOC becomes applicable to the entity. If a meeting was originally called for a date before the entity elects to be governed by the TBOC, the TNPCA applies to the meeting, regardless of any postponement or adjournment. The simpler process is to call a meeting, hold the meeting, then file the election prior to calling any other meeting, and then set the next meeting.

Chapter 10 of the TBOC (mergers, conversions, sales of assets, etc.) applies to a transaction consummated by an entity after the date the TBOC begins to apply to the entity. However, if required approval of the owners and members of the entity has been given before such

date or has been given after the date but at a meeting of owners or members initially called for a date before such date, the transaction will be governed by the TNPCA and not the TBOC. For simplicity, and for added flexibility, an entity should file the TBOC election prior to initiating a merger, conversion, or sale of assets.

Chapter 11 of the TBOC (dissolution, survival, reinstatement) applies to a voluntary winding up and termination process initiated after the date the TBOC first begins to apply to the entity. Any voluntary winding up and termination proceeding initiated before such date will continue to be governed by the TNPCA, not the TBOC. Again, the simpler process is for the entity to file the TBOC election prior to initiating a dissolution.

Generally, then, a water supply or sewer service nonprofit corporation should adopt the TBOC at a time when little else is occurring. If any reader successfully accomplishes this by convincing their entity or owner client(s) to spend legal fees in the face of no imminent threat, please contact the author of this article to share your story. Alternatively, you should plan to become very familiar with TBOC Chapter 14.

VI. CONCLUSION

The 79th Legislature's water law legacy was one of a few substantial new laws and concepts, with a greater number of minor technical changes. There was also unfinished business, which we can expect the 80th Legislature to at least attempt to address.

Overall, the confluence of the trends discussed above paints the following picture. The Legislature continues to delegate more areas of responsibility and authority to quasi-public entities. At the same time, it is increasing the standardization of processes required by the quasi-public entities, taking away some of their discretion by imposing additional substantive and procedural due process rights of landowners while giving them more powers otherwise to accomplish their goals.

Landowners acquired more abilities and processes to exempt land from quasi-public entities, but generally only when the entity is failing to provide continuous and adequate services, and as long as they do not jeopardize the goal of regionalization. On the flip side, however, landowners were subjected to greater fines and criminal punishment for failure to comply with water regulation.

The result is a water system that is more uniform from top to bottom, while larger at the top as the state serves increased water needs from a larger population, and with the very bottom a bit larger to accommodate greater individual rights. Standardization and greater centralization has increased the rigidity of the middle layers (mostly the public and quasi-public agencies).

The forms are provided as a starting point. Please conform them to the particular facts of your situation and otherwise improve on them before use. To assist you in

ready access to these forms, they are available in Wordperfect form for download from the author's law firm website, www.mctexlaw.com, at the following page address:

www.mctexlaw.com/forms.asp

Statistically speaking, one out of every one human beings requires water for survival. In the United States we rely on a combined system of government and quasi-public entities to provide continuous and adequate, affordable potable water. As water resources continue to be challenged by an increasing population, one can reasonably expect more governmental planning and regulation, more balancing of private rights with public need, and more governmental delegation of authority, power and responsibility to the quasi-public sector to assist in meeting state water needs. As with most legislation, this should continue to provide Texas lawyers with a myriad of billable opportunities.

Please consider joining the McTexLaw E-mail Real Estate Discussion Group by sending an E-mail to mark@mctexlaw.com requesting membership.

APPENDIX AWATER ADMINISTRATIONHouse Bill 2949

Relating to the authority of the Texas Commission on Environmental Quality to issue an emergency order authorizing certain action in the event of a catastrophe

Author: Geren Sponsor: Lucio
Amends section 5.515, Water Code

Grants the TCEQ additional authority to issue emergency orders for certain actions (including the emission of air contaminants) in the event of a catastrophe. Specifically, the TCEQ can now issue orders for the repair or replacement of certain infrastructure improvements, roads and bridges. The TCEQ is further authorized to issue an order allowing a public works project needed for such repair or replacement.

Effective Date: September 1, 2005

Senate Bill 374

Relating to the use by the Water Development Board capital spending plans for certain state-funded water-related programs

Author: Jackson, Mike Sponsor: Callegari
Repeals Section 6.110, Water Code

Repeals the requirement to produce the Capital Spending Plan Report, which is a biennial report produced by the Texas Water Development Board (TWDB) since 2001. It is used to identify water funding needs and set forth a basis for allocating the TWDB's state funds to address those needs. There is no change to the regional water planning, data collection, technical assistance or financial assistance responsibilities of TWDB.

Effective Date: May 17, 2005

House Bill 1462

Relating to the referral by the Water Development Board of certain persons to another state agency, office, or division for investigation or enforcement action

Author: Flores Sponsor: Hinojosa
Adds Section 6.1555 to Subchapter E, Chapter 6, Water Code

Under current law the Texas Water Development Board (TWDB) does not have any authority to refer an applicant for or recipient of financial assistance from the TWDB to any outside state agency for investigation or initiation of

an enforcement action. HB 1462 provides the board the authority to refer a potential problem to the TCEQ, the state auditor's office, the Texas Rangers, or another state agency, office, or division, as appropriate, for the investigation of, or the initiation of an enforcement action against, the applicant or recipient.

Effective Date: September 1, 2005

ENFORCEMENTSenate Bill 739

Relating to the payment of certain administrative penalties assessed by the Texas Commission on Environmental Quality under an installment payment schedule

Author: Lucio Sponsor: Chisum
Amends Section 7.052, Water Code

Permits the TCEQ to allow for a payment plan for fines assessed after an enforcement hearing. Previously, the TCEQ could not allow a payment plan after a hearing had been held.

Effective Date: September 1, 2005

Senate Bill 1297

Relating to the elements of the criminal offense discharging used oil into water in the state

Author: Armbrister Sponsor: Talton
Amends Water Code 7.147 and 7.176

Expands the prohibition of discharging used oil to include a "drainage system" as well as a septic system and a sewer. Also "clears the water" as to the definition of the concentration of used oil which can be discharged to be a fluid consisting 15 parts of oil per million gallons.

Effective Date: September 1, 2005

Senate Bill 485

Relating to the regulation of underground and above ground storage tanks

Author: Armbrister Sponsor: Bonnen
Amends Section 7.156, Water Code and various sections of Chapter 26, Water Code

Extends the deadline for the completion of remediation of a petroleum storage tank site from September 1, 2005

to September 1, 2007, provided certain other deadlines have been met. Extends certain deadlines for reimbursement from the petroleum storage tank remediation account. The bill also gives the TCEQ discretion to postpone considering, processing or paying claims for reimbursement from the petroleum storage tank remediation account for corrective action work begun without prior commission approval after September 1, 1993, that were filed with the commission before January 1, 2005. (Previously, claims for work commenced after September 1, 1993, without prior commission approval were required to be set aside until all other claims for reimbursement for corrective action work pre-approved by the Commission had been considered, processed, and paid.) This bill also specifies that contamination in the soil surrounding an underground storage tank need not trigger a full scale cleanup if the contamination is limited to the soils placed immediately adjacent to the tank when the tank (or tank components) is installed and no free phase product is present. The bill exempts tank owners or operators from liability to the state where the site has been admitted into the petroleum storage tank state-lead program. Also provides that only an owner or operator of underground storage tanks, rather than a transporter of motor fuels, can be liable for failing to provide a valid delivery certificate.

Effective Date: September 1, 2005

WATER RIGHTS

House Bill 2140

Relating to the provision of notice to affected political subdivisions regarding the proposed construction of a reservoir

Author: Phillips Sponsor: Seliger
Adds Section 11.124(f), Water Code

Requires that when an application is filed to construct a storage reservoir, the application must contain evidence that notice of the application has been given to members of the governing bodies of each county and municipality in which the reservoir will be located.

Effective Date: September 1, 2005

House Bill 1225

Relating to the grounds for an exemption from cancellation of a water right for nonuse

Author: Puente Sponsor: Duncan
Amends Section 11.173(b), Water Code

Under current law, the Texas Commission on Environmental Quality (TCEQ) is authorized in Section 11.172, Water Code, to cancel a state surface water right if it has not been put to beneficial use for a period of 10 years. HB 1225 authorizes the TCEQ to exempt a state water right from cancellation for non-use if the non-use resulted from a water conservation measure that was part of a water conservation plan submitted by the water right holder.

Effective Date: June 18, 2005

House Bill 2815

Relating to the Concho River Watermaster Program

Author: Campbell Sponsor: Madla
Adds Subchapter K (Sections 11.551 et seq.), Water Code

Establishes the Concho River Watermaster Program ("CRWP") to ensure compliance with water rights in the Concho River segment of the Colorado River Basin. Appoints the watermaster of the South Texas Watermaster Program as the CRWP's watermaster, with comparable duties and responsibilities. The district formed takes over an area currently covered by a certificate of convenience and necessity.

Effective Date: September 1, 2005

WATER RATES AND SERVICES

House Bill 2876

Relating to certificates of public convenience and necessity for water service and sewer service

Author: Callegari Sponsor: Armbrister
Amends Water Code Chapter 13, Sections 13.002, 13.241(a), 13.244

Amends Water Code Chapter 13 to reform the process by which CCNs are created and maintained. The bill grants TCEQ discretion with regard to its evaluation of CCN applications while giving affected landowners greater latitude in deciding whether or not their land will be included in a certificated area. Amends Section 13.002 to include a landowner as an affected person. This amendment results in each landowner receiving notice of an application requesting or amending a CCN and having standing to intervene at a hearing related to such application. Adds Section 13.244(d) to Chapter 13. Section 13.244(d) requires applicants requesting or amending CCNs to include in their application (1) a description of the proposed service area; (2) a description of any requests for service in the proposed

service area; (3) a capital improvement plan, including a budget and an estimated timeline for construction of all facilities necessary to provide full service to the entire proposed service area; (4) a description of the sources of funding for all facilities; (5) to the extent known, a description of current and projected land uses; (6) a current financial statement of the applicant; (7) a list of the owners of each tract of land that is at least 50 acres and either wholly or partially within the proposed service area; and (8) any other item required by TCEQ. Adds Section 13.245 to Chapter 13. Section 13.245 applies only to a municipality with a population of 500,000 or more. Except as provided in Section 13.245(c), TCEQ may not grant a CCN for a service area within the boundaries or extraterritorial jurisdiction of a municipality without consent of the municipality, which consent may not be unreasonably withheld. TCEQ may grant the CCN, absent the consent required by Section 13.245(b), if TCEQ finds that the municipality does not have the ability to provide service or has failed to make a good faith effort to provide service on reasonable terms and conditions. A good faith effort must provide that construction of service facilities will begin within one year and be substantially completed within two years after the date the applicant requested the municipality's consent. Either the applicant or the municipality may appeal TCEQ's decision to state district court. The court shall hear the petition within 120 days. Adds Section 13.2451 which states that TCEQ may not extend a municipality's CCN outside the municipality's ETJ without the consent of the landowner. The portion of any CCN that extends beyond the ETJ of the municipality without the consent of the landowner is void. Adds Section 13.246(h) which allows a landowner to opt out of a CCN before the 30th day after the date the landowner receives notice of an application for a new or amended CCN unless the proposed service area is within the boundaries or ETJ of a municipality with a population of more than 500,000. The landowner's election to opt out is effective without a hearing or other process by TCEQ and results in the applicant's CCN application being amended to exclude the landowner's property. Adds Section 13.246(I) which allows a landowner to contest the inclusion of the landowner's property within a CCN if the proposed service area is within the boundaries or ETJ of a municipality with a population of more than 500,000. Adds Section 13.247(d) which allows a municipality with a population of more than 500,000 to exercise its power of eminent domain to acquire a substandard water or sewer system, defined as a system that is not in compliance with the municipality's standards for water and wastewater service. The municipality shall pay just and adequate compensation for the system. Amends Section 13.254 to include a process by which an owner of a tract of land that is at least 50 acres and is not receiving

water and sewer service, may petition for decertification or expedited release from a CCN service area. Within 90 calendar days from the date TCEQ determines the petition filed is administratively complete, TCEQ shall grant the petition unless it makes an express finding that the petition failed to satisfy the required elements and supports its finding with separate findings and conclusions for each element based solely on the information provided. If TCEQ grants the petition, it may require an award of compensation to the CCN holder to compensate it for a proportionate share of its facilities intended to serve the petitioner's property. A landowner is not entitled to petition for expedited release from a CCN service area if the landowner's property is located: (a) within the boundaries or ETJ of a municipality with a population of more than 500,000 if the municipality or a retail public utility owned by the municipality is the holder of the CCN; or (b) within a platted subdivision actually receiving water or sewer service.

Effective Date: September 1, 2005.

House Bill 1358

Relating to the jurisdiction of the Texas Commission on Environmental Quality over certain water supply or sewer service corporations

Author: Flores

Sponsor: Armbrister

Adds Section 13.004 to Water Code and Chapter 7201 to Special District Local Laws Code

The TCEQ has different jurisdiction over investor owned water and sewer utilities than over water supply and sewer service corporations. With respect to the latter, the TCEQ has only appellate jurisdiction. HB 1358 provides that the TCEQ will have direct regulatory jurisdiction over certain water supply and sewer service corporations where they fail to follow certain statutory requirements. The bill also creates the La Joya Special Utility District in Hidalgo and Starr Counties.

Effective Date: September 1, 2005

House Bill 2301

Relating to proceedings involving the change of rates of a water and sewer utility

Author: Turner

Sponsor: Ellis

Amends Section 13.187, Water Code

Allows a local regulatory authority to suspend the effective date of a rate change for up to 90 days. Requires written notice for the suspension. Extends the suspension by two days for each day a hearing exceeds

15 days. Requires the local regulatory authority to make a determination on the proposed rate within the suspension period or deems the rate to be approved.

Effective Date: September 1, 2005

**TEXAS WATER ASSISTANCE PROGRAM/
PUBLIC FUNDING**

House Bill 467

Relating to the financing of the water and sewer programs in disadvantaged areas

Author: Bailey Sponsor: Gallegos
Amends Sections 15.407(a), 16.341(1) and (2), 16.343(b) and (c), and various amendments to Chapter 17, Water Code

Authorizes the economically distressed areas program account to be used by the Texas Water Development Board (TWDB) to provide financial assistance to political subdivisions for the construction, acquisition, or improvement of water supply and sewer services, including providing money from the account for the state's participation in federal programs that provide assistance to political subdivisions. If the TWDB determines that the area to be served by a proposed project has a median household income of not more than 75 percent of the median state household income for the most recent year for which statistics are available, then the TWDB by resolution may take certain actions relating to the approval or denial of a plan and application, and the new law includes the requirements of plan and application. Authorizes the TWDB to provide financial assistance to political subdivisions under this subchapter.

Effective Date: September 1, 2005

NOTE: The 79th Legislature amended Water Code Sections 16.341 and 17.923 twice, with passage of House Bill 467 and Senate Bill 425. These two bills were in conflict. The Texas Water Development Board requested an opinion from the Attorney General of Texas to construe the statutes as amended. In response, the Attorney General issued Opinion No. GA-0411.

The Attorney General concluded that the two amendments were in irreconcilable conflict regarding Water Code Section 16.341. Pursuant to Tex. Gov't Code Ann. Section 311.025(b) (Vernon 2005), a later enacted amendment prevails over irreconcilable amendments. The final legislative vote on Senate Bill 425 was taken on May 25, 2005, while the final legislative vote on House Bill 467

was taken on May 27, 2005. Thus, Section 16.341 as adopted by House Bill 467 prevails over the version adopted by Senate Bill 425. Water Code Section 16.341 as adopted by House Bill 467 is set forth in **Appendix B** to this paper.

The Attorney General also concluded that the two amendments to Water Code Section 17.923 were in irreconcilable conflict. Since these bills repealed various portions of Section 17.923, the rules of statutory construction specific to repealers apply. Looking not only at the relative dates of enactment of the amendment and the repealer but also the totality of the circumstances surrounding the adoption of the two provisions, the Attorney General concluded that the complete repeal of Water Code Section 17.923 is most consistent with the Legislature's intent, and so the Attorney General's opinion is that Water Code Section 17.923 has been completely repealed. **According to this opinion, the version published by West Group and Lexis is incorrect.**

House Bill 3029

Relating to eligibility of nonborder areas for certain state assistance

Author: Strama Sponsor: Barrientos
Amends various provisions Section 15.903 et seq. Water Code

In 2001, the Legislature created the Pilot Program for Water and Wastewater Services, a program intended to provide resources for rural communities that need water and wastewater loans. The pilot program applied only to cities, counties, and certain districts and authorities with a population of less than 5,000. HB 3029 makes the pilot program permanent and expands the program to allow statewide access for certain residential communities that need water and wastewater services.

Effective Date: June 18, 2005

Senate Bill 509

Relating to the repeal of the restriction on the amount of money in the water infrastructure fund that may be used for certain purposes in a fiscal year

Author: Armbrister Sponsor: Geren
Repeals Section 15.974(b), Water Code

Current Texas law authorizes the Texas Water Development Board (TWDB) to allocate no more than 10 percent of the annual Water Infrastructure Fund budget for disadvantaged communities or for certain

permitting costs. SB 509 repeals Section 15.974(b), Water Code, in order to provide the TWDB with maximum flexibility in determining which water-related financial needs to address with water infrastructure fund appropriations, if given funding by the legislature.

Effective Date: June 17, 2005

**PROVISIONS GENERALLY APPLICABLE TO
WATER DEVELOPMENT**

House Bill 578

Relating to a statewide emergency water delivery plan

Author: Campbell Sponsor: Armbrister
*Amends Section 16.053(e) and adds Section 16.053(r),
Water Code*

Currently, there are no maps detailing the various water pipelines throughout the state. HB 578 requires all regional planning groups to submit to the Texas Water Development Board a regional water plan that identifies existing major water infrastructure facilities.

Effective Date: September 1, 2005

House Bill 1657

Relating to the administration by the Water Development Board of certain water-related programs financed by federal funds

Author: Hope Sponsor: Averitt
Amends Section 16.093, Water Code

Under current law there is some ambiguity as to whether the Texas Water Development Board (TWDB) has the authority to receive State and Tribal Assistance Grants (STAG) for specific purposes. HB 1657 clarifies and broadens TWDB's authority to receive federal grants, loans, and other assistance from any federal agency for water supply projects, treatment works, or structural or nonstructural flood control measures.

Effective Date: May 9, 2005

Senate Bill 425

Relating to subdivision platting requirements and assistance for certain counties near an international border

Author: Hinojosa Sponsor: Luna
*Amends Sections 212.012, 232.022, 232.029, 232.031,
232.038, 232.040, 232.043, 232.106 and adds Section
232.0291, Local Government Code; amends Sections
775.001 and 775.003, Government Code; amends*

*Sections 37.153 and 54.254, Utilities Code; amends
Sections 16.341 and 17.293, Water Code*

Expands special subdivision regulations (designed to prevent *colonias*) to cover certain counties up to 100 miles from an international border (apparently, this would only cover Nueces County at this time). Generally, the regulations prohibit utilities from extending water, sewer, electricity or gas into areas that are not properly platted, with certain exceptions, and authorize private lawsuits against illegal subdividers. Also provides for interagency coordination on *colonias* and financial assistance in the newly covered counties.

Effective Date: September 1, 2005

NOTE: See the Note under House Bill 467 (p. 22) regarding Attorney General Opinion No. GA-0411, resolving the conflicting amendments to Water Code Sections 16.341 and 17.923 by House Bill 467 and Senate Bill 425.

WATER QUALITY CONTROL

Senate Bill 1354

Relating to the protection of water quality in watersheds threatened by quarry activities

Author: Estes Sponsor: Keffer, Jim
*Adds Subchapter M (Sections 26.551 et seq.) to Chapter
26, Water Code*

Addresses a problem caused by unregulated rock mining operations along a short section of the Brazos River in Palo Pinto and Parker counties, by establishing specific permitting and enforcement programs for this stretch of the Brazos River. Directs the Texas Commission on Environmental Quality to develop and apply a pilot permitting program until 2025 requiring individual or general permits for quarries, depending on their proximity to the river. Requires quarry operators to submit reclamation and restoration plans while providing financial assurances to mitigate damages from unauthorized discharges.

Effective Date: June 17, 2005

SUBSURFACE AREA DRIP DISPERSAL SYSTEM**House Bill 2651**

Relating to the regulation of sub-surface area drip dispersal systems by the Texas Commission on Environmental Quality

Author: Krusee Sponsor: Ogden
Adds Chapter 32 (Sections 32.001, et seq.) to Water Code

In order to address issues raised by the federal underground injection program, HB 2561 requires the TCEQ to implement a permitting and regulatory program specifically addressing subsurface drip dispersal systems (systems that inject processed commercial, industrial, or municipal waste into the ground at a depth of not more than 48 inches and spread the waste over a large enough area that the soil hydrologic absorption rate and crop/plant root absorption rate are not exceeded). Subsurface area drip dispersal systems will be required to obtain a permit from the TCEQ for operation. The permit application will require public notice and the public will have opportunity to request a public hearing. The TCEQ will consider the following factors in determining whether to grant a permit: (1) whether use or installation of the system is in the public interest; (2) whether both subsurface and surface freshwater can be adequately protected from pollution; and (3) whether the applicant has provided for proper operation of the system. The bill directs TCEQ to engage in rulemaking on the implementation of these requirements.

Effective Date: June 17, 2005

GROUNDWATER CONSERVATION DISTRICTS**House Bill 2423**

Relating to discrimination by a groundwater conservation district against landowners whose land is enrolled or participating in a federal conservation program

Author: Puente Sponsor: Armbrister
Adds Section 36.001(4-a), Water Code; Amends Section 36.002, Water Code; Amends Section 36.101(a), Water Code; Adds Section 36.113(h) and (I), Water Code

Prohibits a groundwater conservation district from discriminating against a landowner whose land is enrolled or currently participating in a federal conservation program. If there are conflicts within the governing groundwater conservation district rules then those rules are voided and the district is required to amend its rules accordingly to meet compliance within ninety (90) days of the effective date of the new law.

Effective Date: September 1, 2005

House Bill 1763

Relating to the notice, hearing, rulemaking, and permitting procedures for groundwater conservation districts

Author: Cook, Robby Sponsor: Duncan
Omnibus Water Bill Amending Various Sections of Chapters 16 and 36, Water Code

Under current law, groundwater conservation districts are permitted to promulgate rules and regulations for the issuance of permits related to the regulation and management of groundwater resources located within its boundaries; however, they are not subject to the Administrative Procedures Act, HB 1763 sets forth uniform procedures to be utilized by groundwater conservation districts regarding the notice and hearings process for both rulemaking hearings and permit application hearings, and clarifies that districts may use ADR procedures.

Effective Date: September 1, 2005

GENERAL LAW DISTRICTS**Senate Bill 1045**

Relating to insurance or other coverage in lieu of a bond requirement for officers, employees, and consultants of certain conservation and reclamation districts

Author: Janek Sponsor: Nixon
Amends Section 49.057, Water Code

Currently, Texas law requires water district board officers, employees and consultants who routinely handle district funds to furnish a bond, signed or endorsed by a surety company authorized to do business in Texas, payable to the district, in an amount determined by the board to be sufficient to safeguard the district for the faithful performance of that person's duties. SB 1045 allows districts to obtain coverage from insurance companies or under an interlocal agreement, in lieu of such a bond, upon a board determination that such coverage would adequately protect the interests of the district.

Effective Date: June 17, 2005

House Bill 828

Relating to the authority of the Texas Commission on Environmental Quality over the issuance of certain district bonds

Author: Callegari Sponsor: Fraser
Amends Section 49.181(a), Water Code

The Texas Commission on Environmental Quality is required to determine whether a project is "feasible" on water and wastewater infrastructure projects by water districts where the project is financed by bonds to be sold on the open market. Bills passed during the 78th Legislature created confusion over whether the TCEQ needs to make a determination on refinancing bond issues. HB 828 clarifies that the TCEQ does not need to make a feasibility determination on refunding bonds issued to refund bonds approved by the Farmers Home Administration, the US Department of Agriculture, the North American Development Bank, or the Texas Water Development Board.

Effective Date: May 30, 2005

House Bill 1935

Relating to the acceptance of credit cards by a water district for the payment of fees and charges imposed by the district

Author: Keffer, Jim Sponsor: Averitt
Adds Section 49.2121, Chapter 49, Water Code

Provides that a water district may accept a credit card for the payment of fees and charges imposed by the water district. Water districts may also collect: (1) a fee, not to exceed five percent (5%) of the amount of the fee or charge being paid, if such fee is reasonably related to the expense incurred in processing the payment by credit card; (2) a service charge for the expense incurred in collecting the original fee if payment by credit card is not honored by the credit card company, said service charge not to exceed the amount charged for the collection of a check drawn on insufficient funds; however, the service charge is not collectible if the district is notified at the time of payment that the payment is not honored or if the customer immediately submits an alternative form of payment.

Effective Date: September 1, 2005

House Bill 1599

Relating to certain conservation and reclamation districts' use of money received under a contract with a municipality

Author: Calegari Sponsor: Lindsay
Adds Section 49.2145, Water Code

Provides that this section applies only to a district located in the Harris-Galveston Subsidence District or the Fort

Bend County Subsidence District. Authorizes a district receiving funds from a municipality to use such funds for any purpose of either the district or applicable municipality, unless required otherwise by the applicable contract. Requires the purposes of the district to be construed to include the municipal purposes for which such funds are used by the district.

Effective Date: September 1, 2005

Senate Bill 1498

Relating to the requirement for water district consent to certain actions by municipalities that provide law enforcement or fire protection services

Author: Fraser Sponsor: Hilderbran
Adds Section 49.237, Water Code

Currently, residents of certain districts are fearful that a political subdivision will attempt to include the district within its boundaries without the consent of the district. S.B. 1498 prohibits said districts from being included in the boundaries of another political subdivision other than that of the county in which it is located unless the district consents. Senate Bill 1498 applies only to a district that (1) provides potable water or sewer service; (2) contracts for or employs peace officers; (3) maintains a fire department; (4) has within its boundaries (A) a private airport with a runway exceeding 5,900 feet in length, and (B) a hotel; and (5) is located in two counties.

Effective Date: June 18, 2005

House Bill 1207

Relating to the deadline for filing a petition to exclude land from a water district with outstanding bonds for failure to provide sufficient services

Author: Haggerty Sponsor: Lindsay
Amends Section 49.3076(a)-(c) and adding Subsection (a-1), Water Code

Sets forth the requirements for petitions to exclude land from a water district, and the petition review process to be conducted by the board of a water district. Extends the deadline to file such petitions from August 31, 2005, to August 31, 2007.

Effective Date: June 18, 2005

**WATER CONTROL AND IMPROVEMENT
DISTRICTS**

House Bill 1644

Relating to the authority of a water control and improvement district or a municipal utility district to enter into a contract to convey property to another water district or water supply corporation

Author: Callegari Sponsor: Lindsay
Adds Sections 51.150 and 51.537 and amends 51.402, Chapter 51, Water Code; Adds Sections 54.2351 and 54.813, and amends Section 54.501, Chapter 54, Water Code, Amends Section 49.218(a), Water Code, Chapter 49, Water Code

Under current law, a municipal utility district (MUD) is restricted in its use of revenues generated by the sale of bonds to groundwater district works. A letter opinion issued by the attorney general's office states that a MUD does not have the authority to issue bonds to finance facilities or pay costs that will be conveyed or owned by a third party holder of a Certificate of Convenience and Necessity (CCN). HB 1644 provides, generally, that water control improvement districts and MUDs have the authority to convey facilities to any other retail public utility and otherwise finance costs incurred by another retail public utility for purposes of making service available in the districts just as they are currently authorized to do with a municipal utility under provisions of the Local Government Code. HB 1644 also includes limits on annexation powers of certain municipalities (those which have any portion of which is located in a county with a population of more than 800,000 and less than 1.3 million) in regards to areas situated in a district.

Effective Date: June 18, 2005

MUNICIPAL UTILITY DISTRICTS

Senate Bill 693

Relating to the vacancies on MUD boards

Author: Ogden Sponsor: Gattis
Adds Section 54.103 to Subchapter C, Chapter 54, Water Code

Under current law, a municipal utility district (MUD) board member is able to practice what is called "seat jumping." In seat jumping, MUD board members, who may soon be facing re-election, can resign their seat and have themselves appointed to a vacant seat on the board to serve out the term of the vacant seat, thereby avoiding running for re-election. Senate Bill 693 provides that a board may not appoint a person to fill a vacancy if that

person (A) resigned from the board: (i) in the two years preceding the vacancy date or (ii) on or after the vacancy date but before the vacancy is filled; or (B) was defeated in a directors election in the two years preceding the vacancy date.

Effective Date: May 9, 2005

House Bill 1208

Relating to a limitation on the use of eminent domain by certain conservation and reclamation districts

Author: Gattis Sponsor: Ogden
Adds Section 54.209 to Subchapter D, Chapter 54, Adds Section 4.08(f), to Chapter 1029, Acts of the 76th Legislature, Regular Session, 1999

A conservation or reclamation district may not exercise the power of eminent domain outside the district boundaries to acquire: (1) a site for a water treatment plant, water storage facility, wastewater treatment plant, or wastewater disposal plant; (2) a site for a park, swimming pool, or other recreational facility, except a trail; (3) a site for a trail on real property designated as a homestead; or (4) an exclusive easement through a county regional park. This new Section 54.209, Water Code, does not apply to the North Harris County Regional Water Authority.

Effective Date: June 9, 2005

NAVIGATION DISTRICTS

House Bill 340

Relating to the authority of a navigation district to establish a volunteer police reserve force

Author: Seaman Sponsor: Hinojosa
Adds Section 60.0775, Water Code

Current law authorizes only municipalities, counties, the Dallas and Fort Worth police departments, and the Sabine River Authority to have reserve peace officers. Reserve police officers must hold a peace officer license from the Texas Commission on Law Enforcement Officer Standards and Education, and they are generally required to work at least 8 to 16 hours per month to be in good standing. HB 340 grants port authority police departments the authority to establish a force of reserve police officers. This new law is a direct result of the September 11, 2001, terrorist attacks.

Effective Date: May 17, 2005

House Bill 2966

Relating to the criminal penalty for violating certain statutes enforceable by, or ordinances, rules or regulations of, navigation districts or port authorities

Author: Seaman Sponsor: Hinojosa
Amends Section 60.078, Water Code

Increases the fine for a violation of rules promulgated by a navigation district pursuant to Subchapter D of the Water Code from not more than \$200 to \$500 or less. Increased fines apply to violations occurring after the effective date of this bill.

Effective Date: September 1, 2005

Senate Bill 1786

Relating to the powers and duties of a navigation district or port authority

Author: Gallegos Sponsor: Hamric
Amends Section 60.412, 60.454, 60.459, Water Code;
Adds Section 60.501, 60.121, Water Code

Exempts contracts for items from the United States or Texas from Competitive Bidding Requirements and Proposal Procedures. Authorizes a district contract valued at \$25,000 or more for 12 months with the United States or Texas may be made if it provides the best value for the district. Provides that adoption of new safety or security code does not create new or additional legal duties for the district. Authorizes the district to enter into a contract in order to accomplish any district purpose. Authorizes the district to issue obligations, including those secured by ad valorem taxes.

Effective Date: September 1, 2005

House Bill 769

Relating to the deadline for evaluating and ranking competitive sealed proposals for certain construction services submitted to a navigation district or port authority

Author: Smith, Wayne Sponsor: Janek
Adds Section 60.463(e-1), Water Code

Under current law, Texas navigation districts and port authorities may use an alternative procurement procedure for purchase contracts, known as "competitive sealed proposals" (CSP), which allows them to consider qualifications and award contracts for reasons other than lowest bid. They have 45 days in which to consider submissions. New Water Code Section 60.463(e-1) allows a navigation district or port authority the ability to

extend the 45-day deadline to a maximum of 90 days to evaluate and rank each proposal submitted in relation to the published selection criteria, provided the district or port authority demonstrates that 45 days would be insufficient and further provided the deadline is disclosed in the request for CSP.

Effective Date: September 1, 2005

Senate Bill 945

Relating to the filing of a disclosure statement by a vendor or member of a governing body of a port authority or navigation district; imposing a penalty

Author: Armbrister Sponsor: Morrison
Adds Subchapter P (Sections 60.481 et seq), Water Code, repeals Subchapter O, Chapter 60, Water Code

Replaces Subchapter O's requirements regarding "Financial Disclosure by Members of Governing Body", added by the 78th Legislature, Regular Session, with a similar but less onerous means of disclosing conflicts.

Effective Date: September 1, 2005

SPECIAL UTILITY DISTRICTS**House Bill 1673**

Relating to the conversion of a water supply corporation to a Special Utility District

Author: Robby Cook Sponsor: Armbrister
Amends Section 65.020, 65.021, Water Code

Clarifies that only those powers specified by the water supply corporation in its resolution and application for conversion to a special utility district may be considered in any contested hearing called by the TCEQ, and only those powers specified in the same resolution and application may be included in the TCEQ's order creating the district.

Effective Date: September 1, 2005

MISCELLANEOUS**House Bill 2267**

Relating to the powers of the Coastal Water Authority; providing the authority to impose a tax; affecting the authority to issue bonds

Author: Smith, Wayne Sponsor: Ellis, Rodney
Amends Sections 3 and 4, Chapter 601, Revised Civil Statutes

Requires the Coastal Water Authority (the "Authority") to obtain the approval of the mayor and city council of Houston, as well as TCEQ, before acquiring any water rights. Grants the Authority permission to develop and generate electricity by wind or hydroelectric means, for use by the Authority or the city of Houston. Grants the Authority the ability to form non-profit corporations which have the same powers and tax exemptions as a local government corporation formed under Chapter 341, Transportation Code, except that they may not levy ad valorem taxes or acquire, construct or operate parks or recreational facilities. Allows the Authority to issue bonds to finance its projects, without obtaining ratings for such bonds. Allows the Authority to assess ad valorem taxes or other indebtedness for the purpose of improvement of waterways or to prevent or aid in preventing overflows. Any such taxes or indebtedness must first be approved by 2/3 majority of the voters of the Authority casting votes at an election for such purpose.

Effective Date: June 17, 2005

House Bill 1224

Relating to a study of the effects of take-or-pay contracts on water conservation

Author: Puente

Sponsor: Duncan

Requires the executive administrator to conduct a study on the effects of take-or-pay contracts on water conservation efforts. Take-or-pay water contracts are typically long-term contracts between a wholesale water supplier and a retail water supplier or user for provision of water regardless of whether the purchaser will use the entire volume of water. The purchaser gets no discount for using less than the volume specified.

Effective Date: June 17, 2005

House Bill 2430

Relating to the establishment of a rainwater harvesting evaluation committee

Author: Puente

Sponsor: Armbrister

Adds Section 341.042, Health and Safety Code

Requires the Texas Water Development Board (TWDB) to establish a Rainwater Harvesting Evaluation Committee dedicated to studying the feasibility of using rainwater as a source of water supply. Establishes the composition of such committee, requirements for its report, and a deadline for its report.

Effective Date: June 17, 2005

APPENDIX B

WATER CODE SECTION 16.341(1)

as amended by House Bill 467, 79th Legislature, 2005

(1) "Affected county" means a county~~[-:]~~

~~——— [(A)] that has an economically distressed area which has a median household income that is not greater than 75 percent of the median state household income [a per capita income that averaged 25 percent below the state average for the most recent three consecutive years for which statistics are available and an unemployment rate that averaged 25 percent above the state average for the most recent three consecutive years for which statistics are available; or]~~

~~——— [(B) that is adjacent to an international border].~~

EXHIBIT 1

Notice for Publication
NOTICE OF APPLICATION FOR CERTIFICATE OF CONVENIENCE
AND NECESSITY (CCN) TO PROVIDE WATER/SEWER
UTILITY SERVICE IN COUNTY(IES)

_____ has filed an application for a CCN / to
Name of Applicant
amend CCN No. _____ / and to decertify a portion(s) of (Name of Decertificated Utility) _____ with the
Texas Commission on Environmental Quality to provide _____ (specify 1) water or 2) sewer or
3)water & sewer) utility service in _____ County(ies).

The proposed utility service area is located approximately _____miles _____ [direction] of
downtown _____, [City or Town] Texas, and is generally bounded on the north by
_____; on the east by _____; on the
south by _____; and on the west by _____. The total
area being requested includes approximately _____ acres and _____ current customers.

A copy of the proposed service area map is available at: (Utility Address and Phone Number) _____

A request for a public hearing must be in writing. You must state (1) your name, mailing address, and daytime telephone number; (2) the applicant's name, application number or another recognizable reference to this application; (3) the statement, "I/we request a public hearing"; (4) a brief description of how you or the persons you represent, would be adversely affected by the granting of the application for a CCN; and (5) your proposed adjustment to the application or CCN which would satisfy your concerns and cause you to withdraw your request for a hearing.

Persons who wish to intervene or comment should write the:

Texas Commission on Environmental Quality
Water Supply Division
Utilities and Districts Section, MC-153
P. O. Box 13087
Austin, TX 78711-3087

within thirty (30) days from the date of this publication or notice. A public hearing will be held only if a legally sufficient hearing request is received or if the Commission on its own motion requests a hearing. Only those individuals who submit a written hearing request or a written request to be notified if a hearing is set will receive notice if a hearing is scheduled.

If a public hearing is requested, the Executive Director will not issue the CCN and will forward the Application to the State Office of Administrative Hearings (SOAH) for a hearing. If no settlement is reached and an evidentiary hearing is held, the SOAH will submit a recommendation to the Commission for final decision. If an evidentiary hearing is held, it will be a legal proceeding similar to a civil trial in state district court.

Si desea informacion en Espanol, puede llamar al 512-239-0200.

EXHIBIT 2

Notice to Customers of IOUs in Proposed Area

NOTICE OF APPLICATION FOR CERTIFICATE OF CONVENIENCE AND NECESSITY (CCN)
TO PROVIDE WATER/SEWER UTILITY SERVICE IN _____ COUNTY

Dear Customer: Date Notice Mailed _____, 20__

_____ has filed an application for a CCN to/
Name of Applicant

amend CCN No. _____ and to decertify a portion(s) of _____ Name of Decertificated Utility _____ with the Texas Commission on Environmental Quality to provide _____ (specify 1) water or 2) sewer or 3)water & sewer) utility service in _____ County(ies).

The proposed utility service area is located approximately _____ miles _____ [direction] of downtown _____, [City or Town] Texas.

A copy of the proposed service area map is available at: _____ (Utility Address and Phone Number)

The current utility rates which were first effective on _____, 20__ are:

• Monthly Flat Rate of \$ _____ per connection	<u>Miscellaneous Fees</u>	
-OR-	-Regulatory Assessment	1%
• Monthly Base Rate including gallons per connection for:	-Tap Fee (Average Actual Cost)	\$ _____
5/8" meter \$ _____	-Reconnection fee:	
1" meter \$ _____	-Non Payment (\$25.00 max)	\$ _____
1½" meter \$ _____	-Transfer	\$ _____
2" meter \$ _____	-Customer's request	\$ _____
Other \$ _____	-Late fee	\$5.00 or 10%
	-Returned Check charge	\$ _____
	-Customer Deposit (\$50.00 max)	\$ _____
Gallonage charge of \$ per 1,000 gallons above minimum (same for all meter sizes)	-Meter test fee (Actual Cost not exceed \$25.00)	\$ _____
	-Other Fees	\$ _____

Your utility service rates and fees cannot be changed by this application. If you are currently paying rates, those rates must remain in effect unchanged. Rates may only be increased if the utility files and gives notice of a separate rate change application.

A request for a public hearing must be in writing. You must state (1) your name, mailing address, and daytime telephone number; (2) the applicant's name, application number or another recognizable reference to this application; (3) the statement, "I/we request a public hearing"; (4) a brief description of how you or the persons you represent, would be adversely affected by the granting of the application for a CCN; and (5) your proposed adjustment to the application or CCN which would satisfy your concerns and cause you to withdraw your request for a hearing.

Persons who wish to intervene or comment should write the:

Texas Commission on Environmental Quality
Water Supply Division
Utilities and Districts Section, MC-153
P. O. Box 13087
Austin, TX 78711-3087

within thirty (30) days from the date of this publication or notice. A public hearing will be held only if a legally sufficient hearing request is received or if the Commission on its own motion requests a hearing. Only those individuals who submit a written hearing request or a written request to be notified if a hearing is set will receive notice if a hearing is scheduled.

If a public hearing is requested, the Executive Director will not issue the CCN and will forward the application to the State Office of Administrative Hearings (SOAH) for a hearing. If no settlement is reached and an evidentiary hearing is held, the SOAH will submit a recommendation to the Commission for final decision. If an evidentiary hearing is held, it will be a legal proceeding similar to a civil trial in state district court.

IF A HEARING IS HELD, it is important that you or your representative attend to present your concerns. Your request serves only to cause a hearing to be held and is not used during the hearing.

Si desea informacion en Espanol, puede llamar al 512-239-0200.

EXHIBIT 3

Election by Landowner to Remove Land from a Certificated Area

[Letterhead]

[Date]

**VIA CERTIFIED MAIL,
RETURN RECEIPT REQUESTED,
NO. _____**

Texas Commission on Environmental Quality
Water Supply Division
Utilities and Districts Section, MC-153
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, TX 78711-3087

Re: Application No. _____ (the "Application") for a Certificate of Convenience and Necessity ("CCN") filed by the Deerfield Water Supply Corporation ("Applicant")

To Whom it May Concern:

This law firm represents John Smith ("Smith"), an individual. On or about _____ (date), Smith received notice from the Texas Commission on Environmental Quality ("TCEQ") of the above-referenced Application. Smith is the owner of a certain tract of land approximately __ acres, more or less, situated in ___ County, Texas, and being more particularly described on Exhibit A attached hereto and incorporated herein by reference for all purposes (the "Smith Tract").

This letter is to notify the TCEQ that Smith hereby elects to exclude all of the Smith Tract from the Application's proposed service area. [Alternate: This letter is to notify the TCEQ that Smith hereby elects to exclude some but not all of the Smith Tract from the Application's proposed service area. The area to be excluded is described on Exhibit B attached hereto and incorporated herein by reference for all purposes]

Pursuant to Texas Water Code Section 13.246(h), this election is effective without further hearing or other process by the TCEQ. Please send me a copy of the Application as modified showing that the Smith Tract is not included in the proposed service area.

Sincerely,

Lawyer

cc: John Smith

EXHIBIT 4

Contest by Landowner to Inclusion of Land in a Proposed Service Area

[Letterhead]

[Date]

**VIA CERTIFIED MAIL,
RETURN RECEIPT REQUESTED,
NO. _____**

Texas Commission on Environmental Quality
Water Supply Division
Utilities and Districts Section, MC-153
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, TX 78711-3087

Re: Application No. _____ (the "Application") for a Certificate of Convenience and Necessity ("CCN") filed by the Deerfield Water Supply Corporation ("Applicant")

To Whom it May Concern:

This law firm represents John Smith ("Smith"), an individual. On or about _____ (date), Smith received notice from the Texas Commission on Environmental Quality ("TCEQ") of the above-referenced Application. Smith is the owner of a certain tract of land approximately __ acres, more or less, situated in __ County, Texas, and being more particularly described on Exhibit A attached hereto and incorporated herein by reference for all purposes (the "Smith Tract").

This letter is to notify the TCEQ that Smith hereby objects to and desires to contest the inclusion of the Smith Tract in the Application's proposed service area. [Alternate: This letter is to notify the TCEQ that Smith hereby objects to and desires to contest the inclusion of some but not all of the Smith Tract from the Application's proposed service area. The area to be excluded is described on Exhibit B attached hereto and incorporated herein by reference for all purposes]

The proposed service area as defined in the Application is located within the boundaries of Applicant, a municipality with a population of more than 500,000. [Alternate: The proposed service area as defined in the Application is located within the boundaries of _____, a municipality with a population of more than 500,000 ("City"), and Applicant is a retail public utility owned by City.] Pursuant to Texas Water Code Section 13.246(I), Smith hereby requests that the TCEQ set and hold a public hearing on the Application, and that at such hearing Smith be designated a party and be allowed to contest the inclusion of the Smith Tract in the proposed service area.

Please notify me on behalf of Smith of the setting of the hearing on the Application.

Sincerely,

Lawyer

cc: John Smith

EXHIBIT 5

Landowner Petition for Expedited Release of Land From a CCN's Certificated Area

**LANDOWNER PETITION FOR EXPEDITED RELEASE OF LAND
FROM A CCN'S CERTIFICATED AREA**

Pursuant to Texas Water Code Section 13.254, John Smith ("Petitioner"), the owner of a 50 acre tract of land, more particularly described on Exhibit A which is attached hereto and incorporated herein by reference for all purposes (the "Property"), hereby requests that the Texas Commission on Environmental Quality ("TCEQ") release the Property on an expedited basis, by amending CCN No. 55555 to remove the Property from its Certificated Area, and in support hereof would show the following:

1. Deerfield Water Supply Corporation ("Certificate Holder") currently holds CCN No. 55555.
2. The Property is situated in the Certificated Area of CCN No. 55555 and is not in a platted subdivision actually receiving water or sewer service.
3. This petition was filed so that the Property may receive service from another retail public utility, namely _____.
4. A written request for service, other than a request for standard residential or commercial service, has been submitted to the Certificate Holder, identifying:
 - (A) the area for which service is sought;
 - (B) the timeframe within which service is needed for current and projected service demands in the area;
 - (C) the level and manner of service needed for current and projected service demands in the area; and
 - (D) all additional information requested by the Certificate Holder that was reasonably related to determination of the capacity or cost for providing the service.

A true and correct copy of such request is attached hereto as Exhibit B and incorporated herein by reference for all purposes (the "Request").

5. The Certificate Holder has been allowed at least 90 calendar days to review and respond to the Request and the information it contains.
6. The Certificate Holder (choose one):
 - _____ has refused to provide the service.
 - _____ is not capable of providing the service on a continuous and adequate basis within the timeframe, at the level, or in the manner reasonably needed or requested by current and projected service demands in the area.
 - _____ conditions the provision of service on the payment of costs not properly allocable directly to the petitioner's service request, as determined by the commission.

[Add further factual description and attach supporting documents]

7. The alternate retail public utility from which Petitioner will be requesting service is capable of providing continuous and adequate service within the timeframe, at the level, and in the manner reasonably needed or requested by current and projected service demands in the area, as shown on Exhibit C which is attached hereto and incorporated

herein by reference for all purposes.

WHEREFORE, PREMISES CONSIDERED, Petitioner respectfully requests that TCEQ release the Property from the Certificated Area of CCN No. 55555 on an expedited basis, by amending CCN No. 55555 to remove the Property from its defined Certificated Area, and for such other and further relief to which Petitioner may be justly entitled.

Respectfully submitted,

Lawyer
State Bar No.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above and foregoing was forwarded by Certified Mail, Return Receipt Requested, to:

Deerfield Water Supply Corporation
Address
Address
CMRRR # _____

on _____ (date).

Lawyer
State Bar No. _____

NOTE: As of the date this article was submitted for publication, the TCEQ had not promulgated and published any particular form for this action. This form is loosely based on other petition forms published by the TCEQ, for the primarily for the purpose of illustrating required statutory content. Prior to using this form the reader is encouraged to contact the TCEQ to determine if a particular form has been published.

EXHIBIT 6

Landowner Objection to the Involuntary Inclusion of Land In a CCN’s Certificated Area

**LANDOWNER OBJECTION TO THE INVOLUNTARY INCLUSION OF LAND
IN A CCN’S CERTIFICATED AREA**

Pursuant to Texas Water Code Section 13.254, John Smith (“Petitioner”), the owner of a 50 acre tract of land, more particularly described on Exhibit A which is attached hereto and incorporated herein by reference for all purposes (the “Property”), hereby objects to the involuntary inclusion of the Property in the Certificated Area of Certificate of Convenience and Necessity No. 55555, and in support hereof would show the following:

1. Deerfield Water Supply Corporation (“Certificate Holder”) currently holds CCN No. 55555.
2. The Property is situated in the Certificated Area of CCN No. 55555 and is not in a platted subdivision actually receiving water or sewer service.
3. This petition was filed so that the Property may receive service from another retail public utility, namely _____.
4. A written request for service, other than a request for standard residential or commercial service, has been submitted to the Certificate Holder, identifying:
 - (A) the area for which service is sought;
 - (B) the timeframe within which service is needed for current and projected service demands in the area;
 - (C) the level and manner of service needed for current and projected service demands in the area; and
 - (D) all additional information requested by the Certificate Holder that was reasonably related to determination of the capacity or cost for providing the service.

A true and correct copy of such request is attached hereto as Exhibit B and incorporated herein by reference for all purposes (the “Request”).

5. The Certificate Holder has been allowed at least 90 calendar days to review and respond to the Request and the information it contains.
6. The Certificate Holder (choose one):
 - _____ has refused to provide the service.
 - _____ is not capable of providing the service on a continuous and adequate basis within the timeframe, at the level, or in the manner reasonably needed or requested by current and projected service demands in the area.
 - _____ conditions the provision of service on the payment of costs not properly allocable directly to the petitioner's service request, as determined by the commission.

[Add further factual description and attach supporting documents]

7. The alternate retail public utility from which Petitioner will be requesting service is capable of providing continuous and adequate service within the timeframe, at the level, and in the manner reasonably needed or requested by current and projected service demands in the area, as shown on Exhibit C which is attached hereto and incorporated herein by reference for all purposes.

8. The proposed service area as defined in the Application is located within the boundaries [or extraterritorial jurisdiction] of Applicant, a municipality with a population of more than 500,000. [Alternate 1: The proposed service area as defined in the Application is located within the boundaries [or extraterritorial jurisdiction] of _____, a municipality with a population of more than 500,000 ("City"), and Applicant is a retail public utility owned by City.] [Alternate 2: The Property is located in a platted subdivision actually receiving water or sewer service.]

WHEREFORE, PREMISES CONSIDERED, Petitioner respectfully requests that the TCEQ set and hold a public hearing on the Application, and that at such hearing Smith be designated a party and be allowed to contest the inclusion of the Smith Tract in the proposed service area, and that upon hearing hereof the TCEQ amend the Certificated Area's definition to exclude the Property, and for such other and further relief to which Petitioner may be justly entitled.

Respectfully submitted,

Lawyer
State Bar No.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above and foregoing was forwarded by Certified Mail, Return Receipt Requested, to:

Deerfield Water Supply Corporation
Address
Address
CMRRR # _____

on _____ (date).

Lawyer
State Bar No. _____

NOTE: As of the date this article was submitted for publication, the TCEQ had not promulgated and published any particular form for this action. This form is loosely based on other petition forms published by the TCEQ, for the primarily for the purpose of illustrating required statutory content. Prior to using this form the reader is encouraged to contact the TCEQ to determine if a particular form has been published.

EXHIBIT 7

[Sample Notice of CCN in a Title Commitment/Policy]

T-7 Form Prescribed by Texas Department of Insurance (Rev. 4/4/02)

TITLE TITLE COMPANY**SCHEDULE B****EXCEPTIONS FROM COVERAGE**

File No. _____

In addition to the Exclusions and Conditions and Stipulations, your Policy will not cover loss, costs, attorneys fees, and expenses resulting from:

1. The following restrictive covenants of record itemized below (We must either insert specific recording data or delete this exception):
2. Any discrepancies, conflicts, or shortages in area or boundary lines, or any encroachments or protrusions, or any overlapping of improvements.
3. Homestead or community property or survivorship rights, if any of any spouse of any insured. (Applies to Owner Policy only.)
4. Any titles or rights asserted by anyone, including, but not limited to, persons, the public, corporations, governments or other entities,
 - a. to tidelands, or lands comprising the shores or beds of navigable or perennial rivers and streams, lakes, bays, gulfs or oceans, or
 - b. to lands beyond the line of the harbor or bulkhead lines as established or changed by any government, or
 - c. to filled-in lands, or artificial islands, or
 - d. to statutory water rights, including riparian rights, or
 - e. to the area extending from the line of mean low tide to the line of vegetation or the rights of access to that area or easement along and across that area. (Applies to the Owner Policy only.)
5. Standby fees, taxes and assessments by any taxing authority for the year 05, and subsequent years; and subsequent taxes and assessments by any taxing authority for prior years due to change in land usage or ownership, but not those taxes or assessments for prior years because of an exemption granted to a previous owner of the property under Section 11.13, Texas Tax Code, or because of improvements not assessed for a previous tax year.
6. The terms and conditions of the documents creating your interest in the land.
7. Materials furnished or labor performed in connection with planned construction before signing and delivering the lien document described in Schedule A, if the land is part of the homestead of the owner. (Applies to the Mortgagee Title Policy Binder on Interim Construction Loan only, and may be deleted if satisfactory evidence is furnished to us before a binder is issued.)
8. Liens and leases that affect the title to the land, but that are subordinate to the lien of the insured mortgage. (Applies to Mortgagee Policy only.)
9. The Exceptions from Coverage and Express Insurance in Schedule B of the Texas Short Form Residential Mortgagee Policy of Title Insurance (T-2R). (Applies to Texas Short Form Residential Mortgagee Policy of Title Insurance (T-2R) only. Separate exceptions 1 through 8 of this Schedule B do not apply to the Residential Mortgagee Policy of Title Insurance (T-2R).

10. The following matters and all terms of the documents creating or offering evidence of the matters (We must insert matters or delete this exception.):
 - a. Rights of parties in possession. (Owner Title Policy only.)
 - b. Certificate of Convenience and Necessity No. 110044 issued to the City of Carrollton, Texas, the map of the Certificated Area of which is recorded in Volume __, Page __ of the Deed Records of Denton County, Texas
 - c. Terms, conditions and stipulations of any and all Lease Agreements, amendments and supplements thereto, existing with tenants in possession, whether written or oral and whether recorded or unrecorded.
 - d. This Company shall have no liability nor responsibility to defend any part of the property described herein against any right, title, interest or claim (valid or invalid) of any character had or asserted by the State of Texas or by any other Government or Governmental authority or by the public generally; (1) in and to portions of the above described property which may be within the bed, shore or banks of a perennial stream or lake navigable in fact or by law; or within the bed or shore or the beach adjacent thereto of a body of water affected by the ebb and flow of the tide; and (2) in and to portions of the above described property which may be between the water's edge and a line of vegetation on the upland or for any claim or right for ingress thereto or egress therefrom.

T-7 Form Prescribed by Texas Department of Insurance (Rev. 4/4/02)
TITLE TITLE COMPANY
SCHEDULE C

Your Policy will not cover loss, costs, attorneys fees, and expenses resulting from the following requirements that will appear as Exceptions in Schedule B of the Policy, unless you dispose of these matters to our satisfaction, before the date the Policy is issued:

1. Documents creating your title or interest must be approved by us and must be signed, notarized and filed for record.
2. Satisfactory evidence must be provided that:
 - a. no person occupying the land claims any interest in that land against the persons named in paragraph 3 of Schedule A,
 - b. all standby fees, taxes, assessments and charges against the property have been paid,
 - c. all improvements or repairs to the property are completed and accepted by the owner, and that all contractors, sub-contractors, laborers and suppliers have been fully paid, and that no mechanic's, laborer's or materialmen's liens have attached to the property,
 - d. there is legal right of access to and from the land,
 - e. (on a Mortgagee Policy only) restrictions have not been and will not be violated that affect the validity and priority of the insured mortgage.
3. You must pay the seller or borrower the agreed amount for your property or interest.
4. Any defect, lien or other matter that may affect title to the land or interest insured, that arises or is filed after the effective date of this Commitment.
5. If the Company is furnished a satisfactory current survey (and is paid the required premium where applicable) to amend its "area and boundary" exception, Company may except to encroachments and other matters reflected by the survey. If Company's requirements and guidelines are met, Company may add the following after the description of those encroachments that are acceptable risks: Company insures the insured against loss, if any, sustained by the insured under the terms of this policy by reason of a final, non-appealable judgment of a court of competent jurisdiction that orders the removal of this improvement because it encroaches over or into (described applicable building line or easement). Company agrees to provide defense to the insured in accordance with the terms of this policy if suit is brought against the insured to require the removal of this improvement because it encroaches as herein stated.
6. Require notice of property located in a certificated service area of a utility service provider in accordance with authorizing statute

EXHIBIT 8

Notice of CCN provision for Contract of Sale of Property (TREC Form)

Added to "Title Notices" section of most TREC residential sales contract forms (may also be used as an entirely separate addendum ***provided*** the addendum is dated prior to the sale and is executed by both buyer and seller):

PROPERTY LOCATED IN A CERTIFICATED SERVICE AREA OF A UTILITY SERVICE PROVIDER:
Notice required by §13.257, Water Code: The real property, described in Paragraph 2, that you are about to purchase may be located in a certificated water or sewer service area, which is authorized by law to provide water or sewer service to the properties in the certificated area. If your property is located in a certificated area there may be special costs or charges that you will be required to pay before you can receive water or sewer service. There may be a period required to construct lines or other facilities necessary to provide water or sewer service to your property. You are advised to determine if the property is in a certificated area and contact the utility service provider to determine the cost that you will be required to pay and the period, if any, that is required to provide water or sewer service to your property. The undersigned Buyer hereby acknowledges receipt of the foregoing notice at or before the execution of a binding contract for the purchase of the real property described in Paragraph 2 or at closing of purchase of the real property.

EXHIBIT 9

TEXAS BUSINESS ORGANIZATIONS CODE ELECTION

**EARLY ADOPTION OF THE BUSINESS ORGANIZATIONS CODE
BY AN EXISTING DOMESTIC ENTITY**

**ARTICLE 1
ENTITY INFORMATION**

1. The name of the domestic entity is _____ (the "Corporation").
2. The date of formation of the Corporation is _____.
3. The file number issued to the entity by the Secretary of State is _____.

**ARTICLE 2
ENTITY TYPE**

4. The Corporation is a nonprofit corporation.

**ARTICLE 3
ELECTION TO ADOPT**

5. The Corporation voluntarily elects to adopt and become subject to the Texas Business Organizations Code by filing this statement with the Secretary of State.

**ARTICLE 4
EXECUTION**

6. The undersigned signs this document subject to the penalties imposed by law for the submission of a materially false or fraudulent instrument.

DATE: _____

_____ [name]
a Texas nonprofit corporation

By: _____
[name]

Its: _____

NOTE: The filing fee for a nonprofit corporation is \$5.00. Submit the completed form in duplicate along with the filing fee.

EXHIBIT 10

**TBOC CERTIFICATE OF FORMATION
FOR A NON-PROFIT WATER SUPPLY AND SEWER SERVICES CORPORATION**

**CERTIFICATE OF FORMATION
NONPROFIT CORPORATION**

**ARTICLE 1
ENTITY NAME AND TYPE**

1. The filing entity being formed is a nonprofit corporation pursuant to the Texas Business Organizations Code and Texas Water Code Chapter 67. The name of the entity is _____ Water Supply Corporation (the "Corporation").

**ARTICLE 2
REGISTERED AGENT AND REGISTERED OFFICE**

2. [Choose either]: The initial registered agent is an organization by the name of _____. [or] The initial registered agent is an individual resident of the state whose name is _____.
3. The business address of the registered agent and the registered office address is:

_____, TX _____

**ARTICLE 3
MANAGEMENT**

4. The management of the affairs of the Corporation is vested in the board of directors. The number of directors constituting the initial board of directors and the names and addresses of the persons who are to serve as directors until the first annual meeting of members or until their successors are elected and qualified are as follows:

Director 1 Name	Director 2 Name	Director 3 Name
Director 1 Address	Director 2 Address	Director 3 Address
Director 1 Address	Director 2 Address	Director 3 Address

**ARTICLE 4
MEMBERS**

5. The Corporation shall have members.

**ARTICLE 5
PURPOSE**

6. The Corporation is formed under Texas Water Code Chapter 67, as amended, and to the extent it does not conflict with Texas Water Code Chapter 67, the Corporation is formed for any lawful purpose or purposes not expressly prohibited under chapters 2 and 22 of the Texas Business Organizations Code, including any purpose described by section 2.002 of the Texas Business Organizations Code.

ARTICLE 6
MANNER OF DISTRIBUTION

- 7. The Corporation is authorized on its winding up to distribute the Corporation's assets in a manner other than as provided by section 22.304 of the Texas Business Organizations Code. The manner of distribution shall be as provided in a plan of distribution adopted by the Corporation, the provisions of which shall comply with Texas Water Code Chapter 67, as amended.

ARTICLE 7
SUPPLEMENTAL PROVISIONS

- 8. A dividend will not be paid to the members. All profits of the Corporation will be paid annually to political subdivisions, private corporations, or other persons that have transacted business with the Corporation during the previous year, or as otherwise allowed by Texas Water Code Chapter 67, as amended.

ARTICLE 8
ORGANIZER

- 9. The name and address of the organizer is:

Organizer Name
Organizer Address
Organizer Address

ARTICLE 9
EFFECTIVENESS OF FILING

- 10. [choose:] This document becomes effective when the document is filed by the Secretary of State. [or] This document becomes effective at a later date, which is not more than ninety (90) days from the date of signing. The delayed effective date is: _____. [or] This document takes effect upon the occurrence of a future event or fact, other than the passage of time. The 90th day after the date of signing is _____. The following event or fact will cause the document to take effect in the manner described below:

ARTICLE 10
EXECUTION

- 11. The undersigned signs this document subject to the penalties imposed by law for the submission of a materially false or fraudulent instrument.

DATE: _____

Organizer

EXHIBIT 11

**TBOC RESTATED CERTIFICATE OF ORGANIZATION
FOR A NON-PROFIT WATER SUPPLY AND SEWER SERVICES CORPORATION**

ARTICLE 1
ENTITY INFORMATION

1. The name of the filing entity is: _____ Water Supply Corporation (“the “Corporation”).
2. The Corporation is a nonprofit corporation.
3. The filing number issued to the Corporation by the Secretary of State is: _____.
4. The date of formation of the Corporation is: _____.
5. The Corporation was formed under the Texas Nonprofit Corporation Act. Simultaneously herewith the Corporation has filed an Early Election of the Texas Business Organizations Code. This filing is to bring the Corporation’s former articles of incorporation into compliance with the Texas Business Organizations Code.

ARTICLE 2
AMENDMENTS TO ARTICLES OF INCORPORATION/CERTIFICATE OF FORMATION

6. This restated Certificate of Formation makes new amendments to the certificate of formation. Provided below is an identification by reference or description of each added, altered, or deleted provision.

[Add amendments as necessary]

ARTICLE 3
STATEMENT OF APPROVAL

7. Each new amendment has been made in accordance with the provisions of the Texas Business Organizations Code. The amendments to the Articles of Incorporation n/k/a Certificate of Formation, and the Restated Certificate of Formation have been approved in the manner required by the Texas Business Organizations Code as modified by Texas Water Code Chapter 67, and by the governing documents of the Corporation.

ARTICLE 4
REQUIRED STATEMENTS

8. The restated Certificate of Formation, which is attached to this form, accurately states the text of the certificate of formation being restated and each amendment to the Certificate of Formation being restated that is in effect, and as further amended by the Restated Certificate of Formation. The attached Restated Certificate of Formation does not contain any other change in the Certificate of Formation being restated except for the information permitted to be omitted by the provisions of the Texas Business Organizations Code applicable to the Corporation.

ARTICLE 5
EFFECTIVENESS OF FILING

9. [choose:] This document becomes effective when the document is filed by the Secretary of State. [or] This document becomes effective at a later date, which is not more than ninety (90) days from the date of signing. The delayed effective date is: _____. [or] This document takes effect upon the occurrence of a future event or fact, other than the passage of time. The 90th day after the date of signing is _____. The following event or fact will cause the document

to take effect in the manner described below:

ARTICLE 6
EXECUTION

10. The undersigned signs this document subject to the penalties imposed by law for the submission of a materially false or fraudulent instrument.

DATE: _____

Signature

Title

NOTE: Attach the text of the amended and restated certificate of formation to the completed statement form. Identify the attachment as "Restated Certificate of Formation of [Name of Entity]."

EXHIBIT 12

**TBOC PERIODIC INFORMATION STATEMENT
FOR A NON-PROFIT WATER SUPPLY AND SEWER SERVICES CORPORATION**

Periodic Report of a Nonprofit Corporation

File Number: _____

1. The corporation name is: _____

2. It is incorporated under the laws of: _____

3. The name of the registered agent is:

A. The registered agent is a corporation (cannot be corporation named above) by the name of:

OR

B. The registered agent is an individual resident of the state whose name is:

4. The registered office address, which is identical to the business office address of the registered agent in Texas, is:
(use street or building address) _____

5. If the corporation is a foreign corporation, the address of its principal office in the state or country under the laws
of which it is incorporated is:

6. The names and addresses of all directors of the corporation are: (A Texas corporation must have at least 3 directors.)

7. The names, addresses and titles of all officers of the corporation are: (A Texas corporation must include a president
and a secretary and the same person cannot hold both offices.)

Execution:

The undersigned signs this document subject to the penalties imposed by law for the submission of a materially false or
fraudulent instrument.

DATE: _____

Signature of authorized officer