



**THE ATTORNEY GENERAL
OF TEXAS**

AUSTIN 11, TEXAS

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October 31, 1962

Honorable D. F. Smallhorst
Executive Secretary
Texas Water Pollution Control Board
1100 West 49th Street
Austin, Texas

Opinion No. WW-1465

Re: Whether Article 762ld, V.C.S., requires that oil operators who desire to dispose of oil field brines, etc., must obtain a permit from the Water Pollution Control Board, and related questions.

Dear Mr. Smallhorst:

We are in receipt of your letter in which you request the opinion of this office concerning the following questions:

"1. Under Article 762ld, V.C.S., is it required that oil operators wishing to dispose of oil field brines, etc. must obtain a permit from the Water Pollution Control Board?

"2. If a permit is required, then will the activities of the Water Pollution Control Board in enforcing the conditions of the permit issued infringe upon the authority of the Railroad Commission under the provisions of Article 6029a, V.C.S.?

"3. Would it be permissible under Article 762ld, V.C.S., and the exemption already mentioned concerning the Railroad Commission and Article 6029a, V.C.S., for the Water Pollution Control Board to assign and delegate all responsibilities for the disposal of oil field brines in such a manner as to protect the surface and underground waters to the Railroad Commission?

"4. Would it be appropriate in view of this apparent conflict of authority for the Water Pollution Control Board to adopt a rule along the following lines: 'In the event of any conflict between statutory provisions contained in Texas statutes or between

provisions of these rules, the Board reserves the right to proceed under that provision of the law or rules, as appropriate, which in the opinion of the Board is for the best interest of the State of Texas and the citizens thereof. This statement might serve as a basis for the Board designating full responsibility for the disposal of oil field wastes to the Railroad Commission in accordance with Article 6029a, V.C.S., and not requiring a permit from the Water Pollution Board.

"5. Since there is an apparent conflict between Section 5 of Article 7621d, V.C.S., which requires 'Within twelve (12) months after the date upon which this law becomes effective, every person who upon such effective date is discharging or permitting to be discharged any waste into or adjacent to the waters of this State shall apply to the Board for a permit to continue such discharge if it is his desire to so continue . . . and the exemption of the Railroad Commission as contained in Section 10, subsection c(4), of Article 7621d, V.C.S., what interpretation and policy do you suggest?"

The water Pollution Control Board was created by House Bill 24 of the 57th Legislature, codified as Article 7621d of Vernon's Civil Statutes. The rather broad scope of this act is reflected in its caption:

"An Act to establish a State Water Pollution Control Board, and to provide for the control, prevention and abatement of pollution of the surface and underground waters of the State.

Subsequent sections of the Act define terminology, prescribe the establishment of the Water Pollution Control Board, prohibit pollution, specify the Board's regulatory powers and enforcement procedures and establish penalties for pollution. A notable exception to the Board's general responsibility and authority for water pollution control is contained in paragraph (c)(4) of Section 10, which provides:

"Notwithstanding any provision of this Act, the Railroad Commission of Texas shall and the Board of Water Engineers shall continue to exercise the authority granted to them in Chapter 82, Acts of the Fifty-seventh Legislature, Regular

Session, 1961, codified as Article 7621(b), Vernon's Annotated Civil Statutes; and the Railroad Commission of Texas shall continue to exercise the authority granted it in Chapter 406, Acts of the Fifty-fourth Legislature, Regular Session, 1955, codified as Article 6029(a)."

The obvious fact ascertainable from the above quoted expression is that the extant law of this State concerning the general subject of water pollution and control consists of at least these three contemporaneous statutes - Article 7621d relating to the Water Pollution Control Board, Article 6029(a) relating exclusively to the Railroad Commission of Texas and Article 7621b relating jointly to the Railroad Commission and the Texas Water Commission. There are other statutes concerned with water pollution and control, but these do not appear material to this opinion request.

Article 6029(a) is the earliest in point of time and basically is a two-paragraph statute. The first paragraph states that--

"The Railroad Commission shall also make and enforce rules, regulations and orders in connection with the drilling of exploratory wells and wells for oil or gas or any purpose in connection therewith; the production of oil or gas; and the operation, abandonment and proper plugging of such wells to prevent the pollution of the streams and public bodies of surface water of the State, and any sub-surface water strata that are capable of producing water suitable for domestic or livestock use, or for irrigation of crops or for industrial use, which would or might result from the escape or release of crude petroleum oil, salt water or other mineralized waters from any such well, or from operations in connection therewith."

The second paragraph relates entirely to execution of bonds by oil industry operators under certain situations to insure plugging of abandoned wells in accordance with rules of the Railroad Commission.

Section 2 of the statute is an emergency clause and states that the fact that the functions and operations of the Railroad Commission are so closely related to the abatement and control of surface and ground water pollution in this State, and the need for enforcement power in such matters by the Commission, creates an emergency, etc. This clause emphasizes that which

seems clear from the language of the statute; namely, that the Railroad Commission's responsibility and authority in this respect is to regulate the oil and gas industry so as to prevent anything which would or might result in pollution of surface or subsurface water.

The Railroad Commission apparently never has taken the view that this particular statute gave the Commission the authority or duty to grant licenses or permits to utilize any particular method of disposal of oil field wastes or to permit pollution of any type or degree.

The prior administrative construction of Article 6029 (a) by the Railroad Commission apparently was recognized and adopted by the 57th Legislature in Article 7621b, Vernon's Civil Statutes. In this statute, the Commission was specifically authorized to issue permits, under certain specified conditions, for injection wells having the purpose of disposal of salt water or other wastes arising out of or incidental to the drilling for or the production of oil and gas. (Art. 7621b, Sec. 2-c). The same statute grants a similar authority to the Texas Water Commission to permit injection wells for the disposal of other industrial and municipal wastes. (Art. 7621b, Sec. 2-b).

Section 1(h) of Article 7621b defines an injection well, as follows:

"'Injection well' is an artificial excavation or opening into the ground, made by means of digging, boring, drilling, jetting, driving or otherwise, and made for the purpose of injecting, transmitting, or disposing of industrial and municipal waste into a subsurface stratum. An injection well shall also include wells initially drilled for the purpose of producing oil and gas when used for the purpose of transmitting, injecting, or disposing of industrial and municipal waste into a subsurface stratum. An injection well shall not include any surface pit, excavation or natural depression used to dispose of industrial and municipal waste."
(Emphasis added).

The term "industrial and municipal waste" is defined in Section 1(e) of Article 7621b, as follows:

"'Industrial and municipal waste' is any liquid, gaseous, solid or other waste substance or a combination thereof resulting from any process of industry, manufacturing, trade, or business or from the development or recovery of any natural resources, or resulting from the

disposal of sewage or other wastes of cities, towns, villages, communities, water districts and other municipal corporations, which may cause or might reasonably be expected to cause pollution of fresh water." (Emphasis added).

Both the extent and limit of the Railroad Commission's and the Texas Water Commission's responsibility and authority in this respect are demonstrated by these definitions. And plainly excepted from the permit jurisdiction of both agencies is "any surface pit, excavation or natural depression used to dispose of industrial and municipal waste," which includes waste from the oil and gas industry.

Turning now to the request for opinion, we find that each question submitted presupposes that a conflict does or may exist between the responsibility and authority granted by the three contemporaneous statutes to the respective agencies of the State. The Legislature has provided in Section 6 of Article 10, Vernon's Civil Statutes, that the following rule shall govern in the construction of civil statutes:

"In all interpretations, the court shall look diligently for the intention of the Legislature, keeping in view at all times the old law, the evil and the remedy."

Stating the rule slightly differently, 82 Corpus Juris Secundum, page 560, Section 321, provides:

"The fundamental rule of statutory construction is to ascertain and, if possible, give effect to the intention or purpose of the legislature as expressed in the statute."

Where contemporaneous statutes relate to the same general subject, as is the case here, the following additional rule of construction stated in 82 Corpus Juris Secundum, page 801, Section 366, shall be considered:

"Statutes which relate to the same person or thing, or to the same class of persons or things, or which have a common purpose are in pari materia, and it is a general rule that in the construction of a particular statute, or in the interpretation of its provisions, all other statutes in pari materia should be read in connection with it, as together constituting one law, and they should be harmonized, if possible."

Adverting to these rules of statutory construction and the three statutes concerned with the same subject matter, we observe that reference is made to the "old law" and the "evil" in Section 18 of Article 7621d. There the Legislature stated:

"The fact that pollution of the surface and underground waters of this State constitutes a serious health and sanitation problem which should be corrected without delay and the further fact that there is an urgent need that some State agency be given the authority to give a prospective new industry a definite answer in regard to what it can do in disposing of its effluent create an emergency and an imperative public necessity that the Constitutional Rule requiring bills to be read on three several days in each House be suspended, and this Rule is hereby suspended."

The "remedy" was the establishment of the Water Pollution Control Board in Article 7621d, together with the delegation of authority to the Railroad Commission and the Texas Water Commission in Article 7621b to issue permits for injection wells utilized in the disposal of industrial and municipal wastes.

Considering each of the three contemporaneous statutes to be in pari materia and together constituting one body of law, the next step is to ascertain whether the parts of the body of law are harmonious. Section 4(a) of Article 7621d, the Water Pollution Control Act, states that the Water Pollution Control Board shall administer the Act and have the authority to abate and prevent pollution of the waters of the State under the conditions prescribed in the Act. Section 4(b) states that the Board, after notice to affected parties, and public hearing, may issue permits for the discharge of waste into or adjacent to the waters of the State.

The pertinent terms to which this authority is directed are defined in Section 2 of the Act, as follows:

o "(b) 'Waters' shall be construed to be underground waters and lakes, bays, ponds, impounding reservoirs, springs, rivers, streams, creeks, estuaries, marshes, inlets, canals, the Gulf of Mexico within the territorial limits of the State of Texas, and all other public bodies of surface water, natural or artificial, inland or coastal, fresh or salt, that are wholly or partially within or bordering the State or within its jurisdiction.

"(c) 'Waste' means sewage, industrial waste, and other wastes, or any of them, as hereinbelow defined.

"(d) 'Sewage' means the water-carried human or animal wastes from residences, buildings, industrial establishments, cities, towns, or other places, together with such ground water infiltration and surface waters with which it may be commingled. The admixture with sewage, as above defined, of industrial wastes or other wastes, as hereinafter defined, shall also be considered 'sewage' within the meaning of this Act.

"(e) 'Industrial waste' means any water-borne liquid, gaseous, solid, or other waste substance or a combination thereof resulting from any process of industry, manufacturing, trade, or business.

"(f) 'Other wastes' means garbage, refuse, decayed wood, sawdust, shavings, bark, sand, lime, cinders, ashes, offal, oil, tar, dye stuffs, acids, chemicals, salt water, and all other substances not sewage or industrial waste that may cause or tend to cause pollution of the waters of the State.

"(g) 'Pollution' means any discharge or deposit of waste into or adjacent to the waters of the State, or any act or omission in connection therewith, that by itself, or in conjunction with any other act or omission or acts or omissions, causes or continues to cause or will cause such waters to be unclean, noxious, odorous, impure, contaminated, altered or otherwise affected to such an extent that they are rendered harmful, detrimental or injurious to public health, safety or welfare, or to terrestrial or aquatic life, or the growth and propagation thereof, or to the use of such waters for domestic, commercial, industrial, agricultural, recreational or other lawful reasonable use."

The first question propounded is as follows:

"Under Article 762ld, V.C.S., is it required that oil operators wishing to dispose of oil field brines, etc. must obtain a permit from the Water Pollution Control Board?"

As has been pointed out previously, Article 6029(a) does not authorize the Railroad Commission to grant licenses or permits to utilize any particular method of disposal of oil field wastes. Consequently, the exclusion of the Commission's authority under this statute from the provisions of the Water Pollution Control Act does not deny the permit jurisdiction of the Water Pollution Control Board over the disposal of oil field brines, etc., if such jurisdiction otherwise exists in the Act. By the express language of the exception contained in paragraph (c)(4) of Article 762ld, however, the issuance of permits for injection wells utilized in the disposal of industrial and municipal wastes in accordance with Article 762lb is committed to the jurisdiction of the Railroad Commission and the Texas Water Commission. Since the statutory definition of an injection well specifically excludes "any surface pit, excavation or natural depression used to dispose of industrial and municipal waste," disposal of wastes utilizing these methods is not within the permit jurisdiction of the Railroad Commission and the Texas Water Commission.

On the other hand, oil field brines, etc., must surely be within the all inclusive definition of "other wastes" contained in Section 2(f) of the Water Pollution Control Act, which specifically includes:

" . . . oil, tar, acids, chemicals, salt water, and all other substances not sewage or industrial waste that may cause or tend to cause pollution of the waters of the State "

In answer to your first question, therefore, we are of the opinion that the discharge of oil field brines, etc., into or adjacent to the waters of the State, as defined in Section 2 (b) of Article 762ld, that may cause or tend to cause pollution, as defined in Section 2(g) of Article 762ld, of the waters of the State, shall be unlawful on and after the effective date of the Water Pollution Control Act unless the same shall be done pursuant to and in accordance with a then-existing permit issued by the Water Pollution Control Board. Excepted from this answer and the jurisdiction of the Board is the issuance of permits for injection wells utilized in the disposal of industrial and municipal wastes, as defined in Article 762lb.

Your second question inquires whether the activities of the Water Pollution Control Board in enforcing the conditions of a permit issued for the disposal of oil field brines, etc., would infringe upon the authority of the Railroad Commission under the provisions of Article 6029(a). As previously discussed in this opinion, Article 6029(a) authorizes the Commission to make and

enforce rules, regulations and orders in connection with the discovery and production of oil and gas so as to prevent the pollution of surface and subsurface water, which would or might result from the escape or release of crude petroleum oil, salt water or other mineralized waters. But pollution has been defined by the Legislature in the later enacted Article 762ld, Section 9, as follows:

"It shall hereafter be unlawful for any person to throw, drain, run or otherwise discharge into the waters of this State, or to cause, permit or suffer to be thrown, run, drained, allowed to seep or otherwise enter such waters, any waste, unless pursuant to and in accordance with a then-existing permit that shall cause a condition of pollution as defined in Subsection (g) of Section 2 of this Act." (Emphasis added).

The Legislature having thus defined the discharge of waste into waters of the State pursuant to and in accordance with a then-existing permit as not constituting pollution, the possession of such a permit would constitute a defense to a charge of pollution by a State agency. We digress here sufficiently to note that the provision of Section 14 of Article 762ld, which states that "no permit issued by the Water Pollution Control Board shall be admissible in evidence against nor raise any presumption against the exercise of the power and authority of water districts in pollution control," apparently was intended to deny this defense as against river authorities and water districts.

By the same definition quoted above, the discharge of waste into or adjacent to the waters of the State without a permit or pursuant to but not in accordance with a permit would constitute unlawful pollution. Where the pollution under either circumstance occurs as a result of the discovery and production of oil and gas, both the enforcement power of the Railroad Commission pursuant to Article 6029(a) and the Water Pollution Control Board pursuant to Article 762ld could be utilized to abate the pollution. No reason is perceived why the existence of a dual enforcement power should conflict with or infringe upon the responsibility and authority of either agency.

Your third question inquires whether the Water Pollution Control Board could assign and delegate all responsibilities to the Railroad Commission for the disposal of oil field brines in such a manner as to protect surface and underground waters.

We answer this question in the negative for the same reason stated in Attorney General Opinion No. WW-66, which states:

"It is a general rule that public duties must be performed and governmental powers exercised by the public official or body designated by law. Such duties are in the nature of a public trust and cannot be delegated to others. Green v. San Antonio Water Supply Co., 193 S.W. 453, Civ.App. (1917) Reh.den.; Horne Zoological Arena Co. v. City of Dallas, Civ.App., Reh.den. (1937), 45 S.W.2d 714, and cases there cited."

Your fourth and fifth questions are both predicated upon an apparent conflict between the responsibility and authority of the Railroad Commission pursuant to Article 6029(a) and the Water Pollution Control Board pursuant to Article 7621d. Having found no conflict between the two statutes, there is no occasion or need to answer questions four and five.

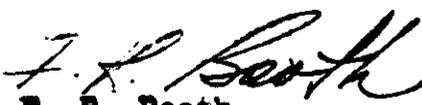
SUMMARY

The provisions of Articles 6029(a), 7621b and 7621d of Vernon's Civil Statutes are in pari materia and should be read together as constituting one body of law relating to water pollution control and prevention. All three statutes are found to be harmonious when correctly construed.

Disposal through injection wells of wastes from the discovery and production of oil and gas is under the exclusive permit jurisdiction of the Railroad Commission; disposal through injection wells of any other industrial and municipal waste is under the exclusive permit jurisdiction of the Texas Water Commission. Discharge into or adjacent to the waters of the State of all industrial and municipal wastes, including but not limited to waste from the oil and gas industry, by any means other than injection wells must be pursuant to and in accordance with a permit issued by the Water Pollution Control Board.

Yours very truly,

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