

SUBJECT: Amending the penalty for interrupting or impairing a public water supply

COMMITTEE: Criminal Jurisprudence — favorable, without amendment

VOTE: 5 ayes — Keel, Ellis, Denny, Hodge, Talton

0 nays

4 absent — Riddle, Dunnam, P. Moreno, Pena

WITNESSES: For — Ken Peterson, Texas Rural Water Association

Against — None

On — Shannon Edmonds, Texas District and County Attorneys Association

BACKGROUND: Under Penal Code, sec. 28.03(b), the offense of criminal mischief, except for damage to certain public sites, is a Class A misdemeanor (punishable by up to one year in jail and/or a maximum fine of \$4,000) if the amount of pecuniary loss is:

- between \$500 and \$1,500; or
- less than \$1,500 if the actor impaired or interrupted public communications, public transportation, public gas or power supply, or other public service or caused the diversion of any of those services.

The offense of impairing, interrupting, or diverting any public water supply, including by installation or removal of any device, is a Class A misdemeanor regardless of the pecuniary loss.

SB 1174 by Wentworth, enacted by the 77th Legislature in 2001, added the clause referring specifically to public water supply and removed references to water from the list of other public services.

Penal Code, sec. 28.03(b) establishes a state jail felony for criminal mischief if the amount of the pecuniary loss is:

- between \$1,500 and \$20,000;
- less than \$1,500 and the damage or destruction was to a habitation by a firearm or explosive weapon; or
- less than \$1,500 and the property damaged was a fence used to contain livestock or game animals.

DIGEST:

HB 2146 would amend Penal Code 28.03(b) to make criminal mischief a Class A misdemeanor if the amount of the pecuniary loss caused by the offense was:

- between \$500 and \$1,500; or
- less than \$1,500 and an offender caused impairment or interruption of public communications, public transportation, public *water*, gas, power supply, or other public service or caused the diversion of any public communications, public *water*, gas, or power supply.

It would repeal the specific reference in current law qualifying the application of the penalty for impairing, interrupting, or diverting a public water supply.

The bill would take effect September 1, 2003.

SUPPORTERS
SAY:

HB 2146 would remedy an unintentional effect of enacting SB 1174 in 2001. That bill was intended to facilitate prosecution of people who tamper with water meters or tap into public water lines to divert water for their own consumption. Prosecutors had found it difficult to prosecute illegal diversions because determining a penalty depended on knowing the financial loss to the water supplier, which is almost impossible to prove when the supplier does not know how much water has been diverted or when the diversion began. SB 1174 established a Class A misdemeanor for impairing, interrupting, or diverting a public water supply, regardless of the amount of financial loss. Unfortunately, this had the unintended effect of limiting the penalty to a Class A misdemeanor even if the financial loss exceeded \$1,500, which otherwise would have warranted a state jail felony.

A state jail sentence would be appropriate for these offenders since the state jail system was designed for low-level property offenders. In some especially dry parts of Texas, water supply corporations are plagued by people tampering with water meters or making illegal connections to divert water.

This is a costly problem for water suppliers and can represent a significant loss of revenue for small, rural public water suppliers. Most importantly, the tampering creates a risk of contamination to the water supply, affecting all Texans who buy the water. Under current law, however, offenders can be prosecuted only for a Class A misdemeanor, even if they caused thousands of dollars of damage to a public water supply.

HB 2146 would restore the penalty in effect before enactment of SB 1174 by establishing a Class A misdemeanor for causing up to \$1,500 financial loss, thus making a more costly offense punishable by a state jail felony. Restoring the former penalty would not create difficulties for prosecutors, because a court decision since the 2001 session has clarified that, under the former law, the state could prosecute impairing, interrupting, or diverting a public service as a Class A misdemeanor without proving pecuniary loss (*Santana v. State*, 59 S.W.3d 187 (Tex. Crim. App. 2001)). The court's decision makes it clear that tampering with a public water supply can be prosecuted as a Class A misdemeanor without proving financial loss, rendering unnecessary the confusion and unintentional penalty limitation created by SB 1174.

HB 2146 also would clean up dual versions of the statute created by enactment of two bills amending Penal Code, sec. 28.03. SB 1174 and HB 171 by G. Lewis both amended the same section of statute, although HB 171 does not relate directly to tampering with a public water supply. HB 2146 would merge the changes made by both bills to create a single version of Penal Code, sec. 28.03.

**OPPONENTS
SAY:**

A Class A misdemeanor is the most appropriate penalty for tapping into a public water supply, regardless of the financial loss. With the state correctional system already short on funding, people guilty only of diverting water should not take up valuable space in a state jail.

NOTES:

The companion bill, SB 1699 by Wentworth, has been referred to the Senate Criminal Justice Committee.