

**LEGAL ISSUES IN THE OPERATION AND MANAGEMENT
OF WATER DISTRICTS AND WATER ASSOCIATIONS**

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* The opinions expressed in this outline are solely the author's and do not necessarily reflect those of the Public Service Commission or any other person employed by the Public Service Commission.

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I. REFERENCES

- A. KRS 58.010 -.190 (Revenue Bonds)
- B. KRS 61.101-.103 (Whistleblower Act)
- C. KRS 65.200-.2006 (Claims Against Local Government Act)
- D. KRS 65.805-.830 (Special Districts)
- E. KRS Chapter 74 (Water Districts)
- F. KRS 96.930- 943 (Collection of Municipal Sewage Bills)
- G. KRS Chapter 106 (Acquisition of Waterworks by Cities and Water Districts)
- H. KRS 107.700-770 (Kentucky Privatization Act)
- I. KRS Chapter 273 (Religious, Charitable and Educational Societies – Nonstock, Nonprofit Corporations)
- J. KRS 337.505-.550 (Prevailing Wage Rate)
- K. KRS Chapter 416 (Eminent Domain)
- L. KRS 424.260 (Bidding Requirements)
- M. Opinions of Attorney General
 1. KRS 15.020: The Attorney General is “the chief law officer of the Commonwealth of Kentucky and all of its departments, commissions, agencies, and political subdivisions, and the legal adviser of all state officers, departments, commissions, and agencies, and when requested in writing shall furnish to them his written opinion touching any of their official duties . . .”
 2. See York v. Commonwealth, 815 S.W.2d 415, 417 (Ky.App. 1991) (“An attorney general's opinion is highly persuasive, but not binding on the recipient.”).

II. ORGANIZATION: LEGAL NATURE OF A WATER DISTRICT

A. A water district is “a political subdivision.” Louisville Extension Water District v. Diehl Pumping & Supply Co., 246 S.W.2d 586 (Ky.1952). Water “districts are political subdivisions of county government.” Public Service Com'n of Kentucky v. Dewitt Water Dist., 720 S.W.2d 725, 731 (Ky. 1986). “[A] water district is a type of special district which constitutes a political subdivision of the commonwealth.” Davis v. Powell's Valley Water Dist., 920 S.W.2d 75, 78 (Ky.App.1995).

B. “**Special district** means any agency, authority, or political subdivision of the state which exercises less than statewide jurisdiction and which is organized for the purpose of performing governmental or other prescribed functions within limited boundaries. It includes all political subdivisions of the state except a city, a county, or a school district.” KRS 65.005.

C. Significance

1. Open Records Act/Open Meetings Act – Applies to all public agencies. Special districts are included within the definition of public agency. KRS 61.870(1); KRS 61.805(1).

2. Claims Against Local Government Act applicable to water districts. Special districts are included within the definition of “local government.” KRS 65.200.

3. Whistleblower Act applicable to water districts. KRS 61.101(2) (“**Employer** means the Commonwealth of Kentucky or any of its political subdivisions.”).

4. Bidding Requirements. KRS 424.260 requires “districts” to make newspaper advertisement of bids for services and materials exceeding \$20,000.

5. Sovereign Immunity Implications.

6. Exemption from some taxes (e.g., motor vehicle usage tax). See, e.g., OAG 71-376.

7. Other water utilities (investor-owned utilities, water associations) are not subject to these requirements.

III. CREATION OF A WATER DISTRICT

A. Petition to PSC (KRS 74.012)

1. Not less than 5 resident freeholders of the geographical area sought to be served must make formal application to the PSC for authority to

petition the county judge/executive for establishment of a water district. See Letcher County Water and Sewer District (Ky. PSC Nov. 26, 1996) (Application of County Judge/Executive for creation of water district does not accord with KRS 74.012 and must be rejected).

2. PSC must set matter for hearing and notify all other water suppliers (private or public; jurisdictional or non-jurisdictional), planning and zoning or other regulatory agencies or agencies with the authority in general area. But see Application of Jonathan Creek Water Association, Case No. 91-144 (Ky. PSC Jun. 19, 1991) (application for creation of water district to replace an existing water association does not require that a hearing).

3. To approve the application, the PSC must find that “that the geographical area sought to be served by such proposed water district or water association cannot be feasibly served by any existing water supplier, whether publicly or privately owned, and whether or not subject to the regulatory jurisdiction of the commission.” KRS 74.012(3).

4. Purpose of PSC Review: Discourage the proliferation of unneeded water districts. KRS 74.012 enacted during the same session of the General Assembly as KRS 74.361 (Water District Merger Statute) wherein General Assembly found “the reduction of the number of operating water districts in the Commonwealth will be in the public interest.”

5. PSC has liberally interpreted “cannot be feasibly served”.

a. Case No. 90-159, Rockcastle County Water Association (Ky. PSC May 14, 1991). Despite finding that an existing water association could feasibly serve the proposed area, PSC found the water association was unwilling to serve and therefore statutory prerequisites met. (“Feasible’ is defined in Webster’s New World Dictionary as ‘capable of being done or carried out; practicable; . . . probable.’ When the circumstances are viewed as a whole, it is clear that the formation of the proposed association represents the only means by which the residents proposed to be served by the new association will be able to obtain water service.”)

b. Case No. 96-515, Letcher County Water and Sewer District (Ky. PSC May 19, 1997). While recognizing that nearby cities could serve the unincorporated areas of Letcher County, Kentucky, the PSC found that no cities had expressed an interest in serving these customers and that it could not force municipalities to extend service. It therefore found that area could not be feasibly served by any existing water supplier.

c. Case No. 98-502, Breathitt County Water District (Ky. PSC Dec. 2, 1999) (finding that no existing water supplier could feasibly serve the proposed water district’s area even though a municipal

utility served the general vicinity and had agreed to be the wholesale water supplier to the proposed water district).

6. PSC approval is also required for creation of a water association. Incorporators must first obtain PSC approval prior to filing incorporation documents with Secretary of State. See, e.g., Case No. 90-159, Rockcastle County Water Association (Ky. PSC May 14, 1991).

B. Fiscal Court Action (KRS 65.805 -.830)

1. KRS 74.010: "Subject to the provisions of KRS 74.012, a fiscal court may create a water district in accordance with the procedures of KRS 65.810."

2. Petition to Fiscal Court

a. Must be signed by a number of registered voters at least equal to 20 percent of an average of the voters living in the proposed service area and voting in the last 4 general elections.

b. Must state the statutory authority under which the district is created.

c. Must state demographic characteristics of the area.

d. Must contain description of the area, including population of service area; metes and bounds description; anticipated date of beginning of service; projected effect of providing service; and projected growth of service demand.

3. Notice given to all planning commissions, cities, and area development districts within proposed area.

4. Public Hearing held. Testimony of interested persons taken and recommendations of any planning commissions, cities, and area development districts solicited.

5. Fiscal Court sets forth its written findings of fact and shall approve or disapprove the formation of the district to provide service as described in the plan of service.

6. If Fiscal Court approves, it must also adopt an ordinance creating the water district.

7. **Practice Pointer:** Water district should maintain copies of all fiscal court ordinances and county judge/executive addressing the creation and subsequent changes to the water district. Do not rely upon the County Clerk.

IV. MANAGEMENT – WHO ARE THE PLAYERS?

A. Board of Commissioners: “A water district shall be administered by a board of commissioners which shall control and manage the affairs of the district.” KRS 74.020(1).

1. Number

a. Single County Districts – 3 or 5 (Solely within the County Judge/Executive’s discretion).

b. Single County (Merged) Districts – County Judge/Executive may appoint 2 additional commissioners.

c. Single County District extends service into other counties pursuant to KRS 74.115:

(1) Into One County: County Judge/Executive of adjoining county appoints 2 additional members to serve on board of commissioners (to represent the new portion of district).

(2) Into Two or More Counties: Respective County Judge/Executives appoint two additional members from the original area and two members from the extended area.

(3) Exception: No new members need to be added where single county district makes the expansion and less than 25 percent of the district’s distribution assets will be located in the adjoining county where service is extended.

d. **Practice Pointer**: Before making an extension into another county, board should consider the effect that the expansion will have on its composition.

2. Qualifications:

a. Residence Requirements:

(1) “Members of the board shall be residents of the district, or of any incorporated or unincorporated area served by the district.” KRS 74.020(1). Residence means “actual residence at a place, coupled with the intent to remain at such place.” OAG 85-41.

(2) Do not need to be a customer of water district. OAG 84-228 (Water District by-laws may not require commissioners to be customers.).

b. Compatibility of Office – May a person be a water district commissioner and hold another public office?

(1) Incompatibility of office exists when “two offices are inherently inconsistent or repugnant, or when the occupancy of the two offices is detrimental to the public interest. . . . The question is whether one office is subordinated to the other, or whether the functions of the two are inherently inconsistent or repugnant, or whether the occupancy of both offices is detrimental to the public interest.” See LaGrange City Council v. Halls Bros. Of Oldham County, Inc., Ky.App., 3 S.W.2d 765, 769-770.

(2) The offices of water district commissioner and mayor of a city located within the water district’s boundaries are not incompatible. OAG 84-279.

(3) A person may serve on a water district’s board of commissioners and also serve as a member of a city council. OAG 82-635.

(4) A county judge/executive cannot legally serve at the same time as a water district commissioner. OAG 78-651.

(5) No member of fiscal court (magistrates or commissioners) can legally serve at the same time as a water district commissioner. OAG 78-651.

(6) Person who holds office of trust with Federal Government cannot serve as a water district commissioner. Ky. Const. §237; OAG 80-234 (opining that a postmaster may not serve as water district commissioner while holding position of postmaster).

(7) Water district commissioner cannot hold the position of superintendent or manager of the water district. See Letter from Thomas M. Dorman, Executive Director, Public Service Commission, to Barbara May, Chairman, Marion County Water District (Dec. 10, 2002).

(8) Effect of accepting incompatible office. See KRS 61.090 (“The acceptance by one (1) in office of another office or employment incompatible with the one (1) he holds shall operate to vacate the first.”)

c. Felony Conviction - Ky. Constitution §150 – Any person convicted of a felony is disqualified from holding public office.

d. Subsequent Disqualification - If disqualifying event occurs (e.g., moving residence outside district), can person continue to hold office?

(1) A member moving outside of district's territory does not automatically vacate his office but makes member subject to removal. He would continue to serve as de facto officer until he resigns or removed. OAG 76-381.

(2) Actions of disqualified member are still valid as to third parties. (E.g., a contract that water district award based upon the vote of a disqualified member is not invalid.) OAG 85-41.

3. Term of Office

a. 4 years in length

b. Initial Appointment of Commissioners – Terms are staggered to ensure continuity of operations and institutional experience.

c. Unexpired terms. Appointee serves only to completion of unexpired term, then must be reappointed. KRS 74.020(4).

d. No limitation on the number of terms that a commissioner may serve. Fiscal Court has no authority to limit the number of terms to which a person may be appointed. OAG 85-116.

e. Completion of term. Commissioners continue to serve until their successors are appointed and qualified. KRS 65.008. See also OAG 82-176 (“[A] member of the Water District Board can hold over after the expiration of his term only where there is no regularly elected and qualified successor. Where such officers hold over, their official acts are valid until their successors are appointed and qualified.”)

4. Appointments – Who appoints the Commissioners?

a. County Judge/Executive appoints. Approval of the Fiscal Court of the appointment must be obtained. “[T]he fiscal cannot disapprove of such appointment on whimsical, unreasonable, or arbitrary grounds.” OAG 82-176.

b. Public Service Commission.

(1) A vacancy resulting from the expiration of a term shall be filled by the PSC if within 90 days of the expiration of the term the vacancy has not been filled by the appropriate county judge. KRS 74.020(4).

(2) If 90-day period has run and the PSC has not acted, County Judge/Executive may still make appointment to fill vacancy. The PSC may adopt or affirm the County Judge/Executive's action. See Letter from David Edward Spenard, Asst. Attorney General, to Alisa B. Gatten, Office Manager, Nebo Water District (Nov. 18, 1998).

(3) Mountain Water District, Case No. 2001-00379 (Ky.PSC Dec. 7, 2001). When 90 days elapsed after the terms of two water district commissioners, the commissioners and the water district applied to PSC for the reappointment of these commissioners. County Judge/Executive requested that no action be taken pending completion of legal action by Judge/Executive against members of Fiscal Court. Held: If no appointments and approvals are made within 90 days, PSC must act. "[T]he General Assembly intended to cut short any period of uncertainty regarding water commissioner appointments." Given the construction program that water district has undertaken, uncertainty over membership of board of commissioners would be counterproductive. Finding no allegation that the persons whose terms have expired are not competent to serve, they should be reappointed.

(4) Mountain Water District, Case No. 2001-00379 (Ky.PSC Jan. 29, 2002) (on rehearing). County Judge/Executive argues that her nominees should have preference in any PSC appointment. Held: Appointment of incumbents is a more reasonable course of action. PSC notes in response to assertions that preference to elected officials desires should be given preference over those of an unelected Board of Commissioners that "[I]t is perhaps for that reason that the General Assembly gave this Commission the duty to appoint commissioners when the initial appointment process, which is conducted by elected officials, results in deadlock."

(5) Western Fleming Water District, Case No. 2005-00462 (Ky. PSC Feb. 1, 2006). County Judge/Executive requested PSC appointment of his nominee when Fiscal Court refused to approve. The incumbent commissioner requested reappointment. Although noting that it was not required to defer to the preferences of the county judge/executive, members of fiscal court or commissioners of the water district, the PSC refused to reappoint because the member had "lost the confidence a majority of the members of . . . [the board of commissioner and

county/judge executive] and that his reappointment may have a divisive effect on the water district's management."

(6) Ledbetter Water District, Case No. 2005-00384 (Ky. PSC Mar. 30, 2006). County Judge/Executive requested PSC appointment of his nominee when Fiscal Court refused to approve. The current office holder requested reappointment. Despite finding no statutory preference for an incumbent commissioner, PSC noted that there was no allegation that incumbent was less than competent to fulfill his role as commissioner and that "reappointment of an experienced, proven commissioner constitutes the most reasonable and expeditious resolution to the current impasse."

c. Fiscal Court cannot appoint water district commissioners.

(1) "There is no statutory authority for such an appointment to be made by a magistrate, acting unilaterally, or by the superintendent of the water district. The county judge/executive will have to keep recommending and nominating persons for the position until a name is submitted which meets the approval of the fiscal court. The appointment procedure is a joint process involving the county judge/executive and the fiscal court and the statute contemplates an appointment acceptable to both." OAG 78-341,

2. "Fiscal Court has no authority to nominate or initially appoint . . . [water district] commissioners. They can either approve or disapprove of . . . specific appointments of such commissioners." OAG 84-206.

d. **Practice Pointer:** At least sixty (60) days before the expiration of the term of office of an appointed member of a district's governing body, the district shall notify the appointing authority of the forthcoming expiration of the term of the appointed member of the district's governing body. KRS 65.008.

e. **Practice Pointer:** The Water District should maintain a record of all appointment orders.

5. Removal of Commissioners

a. County Judge/Executive. (KRS 65.007)

(1) Grounds

- (a) Inefficiency
- (b) Neglect of duty
- (c) Malfeasance
- (d) Conflict of interest
- (e) A commissioner who participates in any official action by the water district board of commissioners that results in a direct financial benefit to him may be removed. KRS 74.020(3).

(2) Procedure

- (a) Written notice of charges and removal proceedings presented by County Judge/Executive.
- (b) Public Hearing chaired by County Judge/Executive.
- (c) Right to employ counsel
- (d) Record of hearing required
- (e) Decision to remove subject to Fiscal Court approval.
- (f) Right to appeal to circuit court.

b. Public Service Commission (KRS 74.455). See also OAG 78-215 (holding that PSC may remove any water district commissioner for good cause.)

(1) Grounds – “Good Cause Standard”

- (a) Incompetence
- (b) Neglect of duty
- (c) Gross immorality
- (d) Nonfeasance (nonperformance of duty)
- (e) Misfeasance (improper doing of an act that a person can lawfully do)

(f) Malfeasance (the commission of an act which is positively unlawful)

(g) Failure to comply with the rules, regulations, and orders issued by the Public Service Commission.

(2) Procedure

(a) Follow the Commission's rules of procedure

(b) Public hearing on the merits

(c) Opportunity to appear – with or without legal counsel.

(d) Right to file briefs, memoranda and motions

(e) Right to cross-examine witnesses and examine exhibits

(f) Right to present evidence

(3) **No right to appeal. PSC's decision is final.**

(4) PSC's right of removal also extends to directors and trustees of water associations.

6. Resignations.

a. Must be made in writing. KRS 63.010.

b. Must be tendered to the court "required to fill the vacancy." KRS 63.010. For water district commissioners, the resignation must be tendered to County Fiscal Court (As County Judge Executive appoints and Fiscal Court must approve the appointment, Fiscal Court fills the vacancy.)

c. Resignation is not effective until it is accepted by the appointing authority and is recorded in its minutes. See OAG 78-161; OAG 61-742. It may be withdrawn at any time prior to acceptance.

7. Positions. Commissioners elected a Chairman, Treasurer, and Secretary. Few duties specifically assigned to the actual position.

a. Chairman: Signs warrants (KRS 74.050)

b. Secretary: Countersigns warrants (KRS 74.050)

c. Treasurer:

- (1) Pays properly signed warrants. KRS 74.050.
 - (2) If proper safeguards are in place, Treasurer is not required to sign checks issued by the water district.
 - d. May one commissioner hold more than one position on the board of commissioners? KRS 74.020(5) suggests that a different person must hold each position. See Letter from William H. Bowker, Deputy Executive Director, Public Service Commission, to Barbara May, Chairman, Marion County Water District (Dec. 16, 2002).
8. Bonds. Each commissioner is required to execute a bond for the faithful performance of his duties. KRS 74.020(5).
- a. County Judge/Executive approves the bond. KRS 74.020(5).
 - b. Bond must be given within 30 days of appointment. KRS 62.050(3).
 - c. As approving officer, County Judge/Executive must determine the appropriate amount of the bond. KRS 62.060(1).
 - d. Failure to have performance bond.
 - (1) Penalty of not less than \$500 and not more than \$1,000. KRS 62.990.
 - (2) Creates a vacancy in the office. See, e.g., Reynolds v. Floyd County Fiscal Court, 90 S.W.2d 694 (Ky.App. 1935).
9. Salaries
- a. Established by County Judge/Executive with the approval of fiscal court. **Board of Commissioners does not set its own salary. It may make recommendations to County Judge and Fiscal Court.**
 - b. Maximum limits
 - (1) \$3,600 annual salary. KRS 74.020(6).
 - (2) \$6,000 annual salary if 6 hours of PSC-certified water district management training completed. KRS 74.020(6).
 - (3) Treasurer may receive an additional \$200 annually for his services

c. **Practice Pointer:** Have a copy of the Fiscal Court ordinance approving current salary levels. Maintain proof of water district management training.

d. **Practical Consideration:** Failure to obtain approvals will subject water district to disallowance on salary issue; potential ratepayer suits.

e. Retroactive approval of salaries permitted. Fiscal Court may enter an order ratifying the past salary levels. OAG 77-425.

f. Water District Commissioner Training Expenses. Regardless of whether higher compensation is provided for attending training, the water district must cover cost of training. KRS 74.020(7)(a).

g. Salary limits do not include fringe benefits. See Caldwell County Fiscal Court v. Paris, 945 S.W.2d 952, 954 (Ky.App. 1997) (“‘compensation’ and ‘salary’ . . . mean the actual salary or fees paid to an officer”). See also, Hardin County Water District No. 1, Case No. 2001-00211 (Ky. PSC Mar. 1, 2002) (salary limits do not prevent water district from furnishing health insurance coverage to commissioners). Payment of fringe benefit may be included in salary if part of scheme “to raise the salary of a particular official through the subterfuge of paying certain benefits for him not uniformly available to similarly situated officials. Caldwell County Fiscal Court at 955.

10. Liability Insurance

a. A water district may purchase liability insurance out of its own funds for its commissioners or other employees.

b. KRS 65.150(1): “A county or city or urban-county government and any board, commission, agency or authority of a county, city or urban-county government may expend funds necessary to insure any of its employees, officials and property against any liability or property damage arising out of an act or omission committed in the scope and course of performing legal duties.”

11. Free Water Service

a. KRS 278.170(2)

Any utility may grant free or reduced rate service to its officers, agents, or employees, and may exchange

free or reduced rate service with other utilities for the benefit of the officers, agents, and employees of both utilities. Any utility may grant free or reduced rate service to the United States, to charitable and eleemosynary institutions, and to persons engaged in charitable and eleemosynary work, and may grant free or reduced rate service for the purpose of providing relief in case of flood, epidemic, pestilence, or other calamity. The terms "officers" and "employees," as used in this subsection, include furloughed, pensioned, and superannuated officers and employees, and persons who have become disabled or infirm in the service of the utility. **Notice must be given to the commission and its agreement obtained** for such reduced rate service except in case of an emergency, in which case the commission shall be notified at least five (5) days after the service is rendered.

b. General Rule: Utilities may provide free service to their employees and officers. Prior Commission approval of such service must be obtained.

c. Exception for Water Districts and Water Associations. The Commission has historically refused to permit water districts to provide free service to their employees or customers.

(1) Cumberland Falls Highway Water District, Case No. 94-054 (April 7, 1994) at 2. PSC rejected a request to approve free service to water district commissioners who were not paid any salary. Held: "Employee concession service should not be allowed for public corporations such as water districts and water associations. Such publicly owned utilities have no shareholders to whom the foregone revenues can be charged, which can only occur with investor-owned utilities."

(2) East Logan Water District, Case No. 92-094 (March 16, 1992) at 1.

(3) The PSC, however, has allowed some water districts to provide free water service to their commissioners. See, e.g., Muhlenberg County Water District Tariff Sheet 1 (issued May 13, 1985).

(4) Rationale for PSC prohibition:

(a) Appearance of impropriety. Free water to water district officials creates the impression that private persons are benefiting from their position and are being treated more favorably than others.

(b) Use of free service or reduced rates to circumvent the compensation limits set forth in KRS 74.020. But see Caldwell County Fiscal Court v. Paris, 945 S.W.2d 952, 954 (Ky.App. 1997).

d. Possible Consequences of Failure to Comply. See, e.g., Case No. 95-107, North Marshall County Water District (Ky.PSC Oct. 13, 1995).

(1) Penalties assessed against water district and commissioners.

(2) Required collection/billing of undercharges.

(3) Removal of water district commissioners.

B. Superintendent/General Manager (KRS 74.040)

1. Commission may appoint a **competent** person as superintendent of water districts.

2. Superintendent shall be subject to the orders of the commission.

3. May, with **the approval and consent** of the commission, employ all necessary labor and assistance in the performance of his duties.

4. Superintendent **shall report all** expenses incurred.

5. Commission fixes superintendent's salary (no limitation).

C. Water District Counsel

1. General: County Attorney shall act as counsel for the water district. KRS 74.030.

2. Practical Realities: County Attorney seldom will represent water districts.

a. Limited experience in regulatory and financing areas

b. Limited resources that must be used for other priorities

c. County attorney not entitled to extra compensation from water district for his services, but must perform services as part of the duties of his office.

(1) “KRS 74.030 requires the County Attorney to act as counsel to the water commission without extra compensation.” OAG 78-13.

(2) Since KRS 74.030 “specifically designates that the county attorney shall represent water districts in his official capacity, it is the conclusion of this office that he is not entitled to extra compensation from the funds of a water district but must perform the duties as part of his office.” 1958 OAG 42,590.

(3) “[W]e do not believe that the commission can employ the county attorney as private counsel and pay him accordingly and at the same time receive his services free as part of his duties as county attorney” OAG 66-315.

3. Retention of Private Counsel.

a. KRS 74.030: “Commission may, subject to approval of the county judge/executive employ counsel whose compensation shall be paid from water district funds.”

b. ***Practice Pointers:***

(1) Document that County Attorney is unable or unwilling to provide legal services; or that water district believes that specialized legal expertise is required. Examples: Letter to County Attorney; Memorandum for Record; Letter to County Judge/Executive setting forth the need for private legal counsel; Fiscal Court Ordinance.

(2) Document County Judge/Executive’s approval (e.g., Letter from County Judge Executive, Fiscal Court Ordinance).

(3) Periodically update both.

(4) Attorney Selection

(a) Bidding for services is not required, but is recommended.

(b) If non-competitive process is used, prepare a memorandum for record explaining the reasons for selection.

(5) Water District should have a retainer agreement with its private counsel that sets forth the duties and responsibilities, billing practices, hourly fees, and any other arrangements.

c. Role of County Attorney Once Private Attorney Hired. “[T]he county attorney must at least continue to advise the commission on all legal matters, but may be assisted by special counsel employed by the commission, in the performance of duties that possibly consume a considerable amount of time, such as the financing of the district and the institution of condemnation suits.” OAG 66-315.

d. ***Practical Considerations:***

(1) Civil suits against commissioners for unauthorized or unapproved expenditures. Personal liability.

(2) Removal for cause.

(3) Rate case problems. If payments were not lawful, the PSC could disallow the expense. Water district could fail to obtain recovery of expense through its rates.

D. Chain of Command

1. **To whom are Commissioners responsible?** Outside of the removal authorities, they are responsible to no official. Must exercise their independent judgment. They are not required to follow the dictates of any elected official in the operation of water district except as required by law.

2. Commissioners cannot delegate responsibility for water district's operations to General Manager. Responsibility for District's operations ultimately rests with Commissioners.

3. **Role of the Chairman: First Among Equals?**

4. ***Practice Pointer:*** Commissioners should have evidence demonstrating approval of all employees, should be requiring monthly reports of all expenses from Superintendent, and should be retaining evidence that expenses have been reviewed. They should also document the basis for their decisions.

V. GENERAL POWERS AND RESPONSIBILITIES

A. General Powers

1. Acquire/install pipe and water laterals (KRS 74.070).
2. Operate a water system (KRS 74.070).
3. Make contracts (KRS 74.070).
4. Hire necessary employees (KRS 74.070).
5. Prosecute and defend suits (KRS 74.070).
6. Contract with any city, water district or sewer construction district for operation of a water system or sanitary sewer system or both.
7. Condemn needed property that cannot be acquired through purchase (KRS 74.090).
8. Perform all acts necessary (KRS 74.070).
9. Establish water rates and make reasonable regulations for the disposition and consumption of water (KRS 74.080).

B. Funding

1. Taxing Powers

a. Water districts have no taxing powers except to make assessments against benefited properties. See OAG 77-334 (“[T]he General Assembly has not yet delegated the tax levying authority in the strict constitutional sense, to water districts.”).

b. Water districts are excluded the definition of “taxing district” and are not expressly authorized to levy ad valorem taxes. KRS 65.180.

2. Assessments

a. To construct facilities, water districts may issue assessments to the owners of property benefiting from the proposed facilities. Assessments are “local burdens laid on property made for a public purpose, but fixed in amount once and for all time with reference to the special benefit which such property derives from the cost of the project.” Krumpelman v. Louisville & Jefferson County Metropolitan Sewer Dist., Ky., 314 S.W.2d 557, 561 (1958). They are “an enforced contribution on the property owner for the public benefit.”

b. Procedure:

(1) The water district examines the real estate that may be affected by the proposed facilities and places each piece of real estate into one of five classes based upon the benefit received from the construction and operation of the proposed facilities. The real estate that receives the greatest benefit is placed in Class A. The real estate that receives the least benefit is placed in Class E. All real estate that actually receives water service as a result of the facilities will be placed into Class A. KRS 74.130(1). Assessments shall be based upon the following ratios:

Class A – 5
Class B – 4
Class C – 3
Class D – 2
Class E – 1

(2) The water district prepares a written report containing a statement of the estimated cost of facilities, a description of real estate in the affected area, the amount of real estate in each class, the names of the owners, and a statement of the estimated benefits that will accrue to each class as a result of the construction. KRS 74.130(2).

(3) The water district submits the report to county judge/executive. County judge/executive reviews report for sufficiency. If report is sufficient, he accepts and holds a final hearing on the report. Public notice of hearing must be given. Pending hearing, the report is made available for public inspection in the office of the county clerk. Any land owner subject to assessment may file exceptions to the report. If county judge/executive deems the report be to insufficient, he returns to the water district with instructions to gather more information.

(4) Following public hearing, county judge/executive confirms or rejects the report.

(5) If report confirmed, the water district prepares an assessment roll. The assessment roll contains a description of all the land, the name of the owner, and the amount of the assessment against each tract. Assessment roll is filed with the county clerk.

(6) County judge/executive conducts a public hearing on the proposed assessments. Notice of public hearing is

required. At hearing county judge/executive hears all objections to the cost of the improvement and to the assessments on real estate. County judge/executive may direct changes. Final assessment roll is filed with the county clerk and county treasurer. KRS 74.150. Assessment serves as a lien upon the landowner's property. KRS 74.220.

(7) Notice of assessments made upon landowners. If payment not made in 30 days, the landowner is deemed to have consented to the issuance of bonds or taking of loan to be paid out of assessment revenues. KRS 74.170.

c. Assessments create a lien upon real estate and may be enforced by filing of an action in circuit court. KRS 74.220.

d. Assessments are not subject to PSC jurisdiction. See Daut v. Boone County Water District, Case No. 97-056 (Oct. 9, 1997) ("As an assessment is neither a rate nor a practice or act related to utility service, and as no provision of KRS Chapter 278 expressly authorizes our review of a water district's use of assessments to finance system improvements, the Commission finds that the complaint [about use of assessments] involves a matter outside the Commission's jurisdiction and should be dismissed . . .").

e. Assessment process is seldom used. Most water districts have found it to be cumbersome and ineffective. It, however, may be effective in areas where development is expected and water district wishes to place the cost of facilities onto new development. Since the improvements will enhance the value of real estate and make it more attractive to development, placing the cost of improvements on those who will directly benefit may be more equitable than current system for financing improvements.

3. Issuance of Revenue Bonds (KRS 74.280 – 74.340)

a. Water District is expressly authorized to issue negotiable bonds to construct additions, extensions, and all necessary appurtenances to the water system. KRS 74.290(1).

b. Bonds may not be issued for a period to exceed 50 years. KRS 74.290(2)

c. Bonds not subject to taxation. KRS 74.290(3).

d. Rates must be sufficient to provide for payment of principal and interest and for the operation and maintenance of facilities and **an adequate depreciation account**. KRS 74.300.

e. KRS Chapter 58 permits a water district to issue revenue bonds and also governs the issuance of revenue bonds and bond anticipation notes.

3. Temporary Surcharge (KRS 74.395)

a. Water District may assess a temporary surcharge over a 5-year period to finance an extension project.

b. Procedure

(1) Water District develops expansion project plan. Plan must include:

(a) The design and estimated cost of each element of expansion

(b) A time schedule for each step in the project

(c) The proposed financing

(d) The amount of surcharge to water district rates needed to collect amount to finance project

(2) Board of Commissioners formally approves.

(3) Review by Public Service Commission

(a) Public hearing required.

(b) PSC may modify plan.

(c) PSC establishes a surcharge to accomplish plan. Surcharge may not exceed 5 years.

(d) PSC must require the water district to maintain records that will permit refunds of surcharge if necessary.

c. Handling of Surcharge Collections

(1) All funds must be placed in a separate reserve account and may be invested only in securities issued or guaranteed by the United States Government. Interest on these securities is part of this reserve account.

(2) Funds in the separate reserve account may be used solely for the expansions in the approved plan.

(3) If construction has not begun within 5 years after implementation of the surcharge, all monies (including interest and earnings) must be refunded.

(4) Amendments may be made to original plan, but “may not violate the intent of the initial plan and must be approved by PSC.

d. These surcharges should not be confused with those assessed through the general rate adjustment process.

4. Assistance from County Governments

a. KRS 74.350 authorizes counties, by resolution of fiscal court, to pay “any part of the costs of establishing or purchasing a water line or water system.”

b. KRS 67.083 authorizes county fiscal courts to appropriate funds to cooperate with other governmental units for the provision of utility service.

c. A county may transfer ownership of a water line to a water district without compensation. OAG 86-30.

d. A county may furnish county funds to a water district for the construction of a water main which will be owned and operated by the water district. OAG 76-240.

C. Acquisition and operation of sewage disposal systems

1. KRS 74.407 provides:

Water districts are hereby authorized to acquire, develop, maintain and operate sewage disposal systems within the confines of their respective districts except that such sewer systems shall not include territory within the boundaries of existing municipal corporations having the authority to provide such sewer services without the consent of such municipal corporations. . . . The water district commissioners shall have all of the powers and authority, as regards sewer systems that are conferred upon them for the purpose of furnishing a water supply under KRS 74.010 to 74.390.

2. Water District may act **without additional approval from county judge/executive or fiscal court.**

3. Sewage system may only operate within the water district's boundaries.

4. A water district does not have the authority to regulate private or independent sewer systems within its territory.

a. Boone County Water and Sewer District developed a master plan for providing sewer services in Boone County, Kentucky. Plan would have permitted the water district to control the development of sanitary sewer systems within Boone County. Contending that KRS 74.407 authorized the development of a sewage disposal system and that control of private sewage disposal systems was incidental to this power, the water district promulgated regulations concerning sewage disposal which the PSC rejected.

b. OAG 69-562: AG found the PSC acted properly. "[I]t is our view that the Water Commission has no authority to regulate or control private or independent sewage systems in the District area. The Water Commission has authority to control only its own sewage system. Even after a water district sewage system is installed, the Water Commission can then only regulate its own system, but not private or independent systems in the District area."

D. Acquisition and Development of a Gas System

1. KRS 74.400(1) provides:

Any county judge/executive, except in counties containing a city of the first class, upon petition of seventy-five (75) resident freeholders of a water district organized under the provisions of KRS 74.010, may authorize said water district to acquire, develop, maintain, and operate a system for the distribution of gas to the citizens of the county.

2. Restriction: Source of gas must be within the water district's territory. The existence of natural gas transmission mains within area is not sufficient to meet this requirement.

E. Power to Compel Connection to Water System

1. No statutory provision that permits a water district to compel a person to connect to the water district's water system.

2. OAG 84-148: A water district is created for the purpose of preserving and promoting the public health, convenience, and welfare and to provide fire protection. It, through its board of commissioners, may do all acts necessary to carry on its authorized work. Under the police power of a water district, property owners could be compelled to connect to and use the system where the public health and welfare is involved.

F. Fire Protection

1. Water District has the authority to create fire protection district (KRS 74.075).

2. Installation and Removal of Fire Hydrants

a. KRS 74.415

(1) The commissioners of a water district, or the governing body of a water association referred to in KRS 74.012(1), in order to provide adequate means of fire protection, may consider the installation of fire hydrants on new or extended water lines within their area. They may investigate the availability of supplementary funding to pay the incremental costs of line sizing and hydrant installation. The commissioners or governing body shall not eliminate fire hydrants from new or extended water lines unless they determine that hydrants are not feasible. Their analysis shall include consideration of the incremental costs of adequately sized pipe and associated pumps and towers, and the benefits of real estate development, water sales, the availability of fire protection insurance, and the reduced fire insurance premiums which may result from the installation of hydrants at specified intervals.

(2) If a private real estate subdivision developer has not included adequately sized pipe and fire hydrants in his development plan, the commissioners of a water district or the governing body of a water association which has the capacity to supply adequate water for fire hydrants shall require, at the time the developer applies for permission to hook into the district's water lines, an analysis by the developer of the incremental cost of hydrants and piping adequately sized for hydrants, the effect of hydrants on the cost and availability of fire protection insurance, and conclusions as to why the installation of hydrants is not feasible.

- b. Removal of fire hydrants from proposed extensions.
 - (1) A water district cannot remove fire hydrants from new or extended water mains unless it determines that hydrants are not feasible.
 - (2) Analysis must consider:
 - (a) Incremental costs of adequately sized pipe and associated pumps and towers
 - (b) Benefits of real estate development
 - (c) Water sales
 - (d) Availability of fire protection insurance
 - (e) Reduced fire insurance premiums that may result from the installation of hydrants at specified intervals.
 - c. Private developments that fail to provide for hydrants where water district can provide fire protection service.
 - a. Water district must require the developer to provide an analysis why the installation of fire hydrants is not feasible before permitting the developer to hook into the water district's lines.
 - b. Analysis must include:
 - (1) The incremental cost of hydrants and piping adequately sized for hydrants
 - (2) The effect of hydrants on the cost and availability of fire protection insurance
 - (3) Conclusions as to why the installation of hydrants is not feasible
4. Planning Commission's Authority to Compel Water District to Install Fire Hydrants
- a. KRS 100.324 exempts public utilities from any requirement for the approval of a local planning and zoning commission for the location or relocation of any service facility.

b. Utilities are not exempted from **any other planning and zoning commission requirement**. “[T]he size of the pipe and dimension of water mains [within a subdivision] would remain within the jurisdiction of the planning commission pursuant to its subdivision regulations and the commission could therefore compel the water district by mandamus, if necessary, to comply with its regulations.” OAG 78-253.

c. Planning and zoning commission may require a water district to attach fire hydrants to existing water lines or future water lines. “Fire hydrants are nothing more than discharge pipes attached to the water main and would be . . . a part of the equipment, design and specification of the water system subject to the subdivision regulation and control of the planning commission.” OAG 78-790.

d. Where quality of service is affected or directly conflict with PSC regulations, PSC jurisdiction may supersede planning and zoning commission’s authority. See Benzinger v. Union Light, Heat & Power Co., 293 Ky. 747, 170 S.W.2d 38 (1943).

5. Free Service to Fire Departments

a. OAG 84-147. “[A]t the present time there is no authority for requiring the water district to furnish water free of charge to a fire protection district.”

b. Upon obtaining commission approval of a tariff setting forth terms and conditions of service the commission deems necessary, a utility as defined in KRS 278.010(3)(d) may grant free or reduced rate service for the purpose of fighting fires or training firefighters to any city, county, urban-county, charter county, fire protection district, or volunteer fire protection district. Any tariff under this section shall require the water user to maintain estimates of the amount of water used for fire protection and training, and to report this water usage to the utility on a regular basis.

KRS 278.170(3).

VI. WATER DISTRICT OPERATIONS: SERVICE TERRITORY

A. General Considerations

1. Water District has defined territory limits. It may provide water service only within those limits. Olson v. Preston Street Water Dist. No. 1, 291 Ky. 155, 163 S.W.2d 307 (1942).

2. Implied Obligation: Water District has the duty to serve all within territory if service can be reasonably extended. KRS 278.280. See also OAG 75-719 (a “water district is under an obligation to serve all inhabitants, including the subject applicant, within its geographical area of service as fixed under KRS 74.010 and as defined by the certificate of convenience and necessity”).

B. Defining Territory Limits

1. Fiscal Court ordinance creating Water District establishes the boundaries of the water district.

2. Extensions/Changes in Limits

a. General Procedure – KRS 74.110

(1) Water District petitions county judge executive for annexation or deletion of territory. Petition states the reasons for the change. Notice must be given to the residents of the affected area.

(2) Residents of the affected area may file objections on the proposed action.

(3) County Judge/Executive holds hearing on the petition.

(4) If County Judge/Executive finds the proposed action is reasonably necessary, he enters order annexing or striking the territory. If he finds that it is unnecessary, he dismisses petition.

(5) Water district and residents have right to appeal to circuit court.

b. Extension Into An Adjoining County – KRS 74.115.

(1) Water District is authorized to petition the county judge/executive of an adjoining county to extend its territory into the adjoining county.

(2) Procedures are the same as in KRS 74.110 but one additional requirement imposed. Water district must receive a written request from 2 or more freeholders in the adjoining county.

c. County Judge/Executive, not fiscal court, is the principal decision maker. Statutes provide no role for fiscal court.

d. Water District may not acquire the territory of another water district. OAG 63-666. See also OAG 76-285 (suggesting that a water district may not annex the territory of another water district.) Two water districts may, however, simultaneously follow the procedures in KRS 74.110 for one district to deannex the territory in question and the other district to annex that territory.

3. No requirement for continuous service territory. KRS 74.115(2) (“Water districts may be established and extended regardless of whether the entire territory is continuous, provided that such territory lies in a county or counties in which the district has been authorized to serve.”).

4. No role for the Public Service Commission in the process. See City of Shepherdsville, Ky. v. Kentucky Turnpike Water District, Case No. 8244 (Sept. 28, 1981) (“KRS 74.110 provides that the county judge/executive is vested with the authority to change water district boundaries and the procedure set forth in that statute does not provide for any participation therein by this Commission.”).

5. PSC, however, may direct water district to seek an expansion of existing boundaries to make reasonable extensions of service. See, e.g., Christian County Water District, Case No. 90-220 (Feb. 20, 1991).

6. Territory cannot include a city unless the city consents to its inclusion. KRS 74.120(1). Governing body of city must provide its consent by resolution or ordinance. Consent may be limited to a term of years. (Similar to a franchise agreement.).

7. City’s Annexation of Water District’s Territory. If water district facilities are in place, then water district may continue to serve even if city refuses to consent. KRS 96.538 provides:

Any utility providing water, sewer or gas service in any area annexed, subsequent to July 15, 1980, by any municipality shall have the dominant right to continue to provide water, sewer or gas service in said area to consumers then being served and to new consumers located nearer to its facilities than to the facilities of any other utility as all those facilities were located immediately prior to annexation.

C. Contracting to Provide Service in Another Water District’s Territory

1. OAG 63-666: A water district may not annex the territory of another water district. Effectively holds that two districts may not possess the same territory.

2. KRS 74.414 permits a water district to contract with another to provide water service to its territory.

a. Water District may contract with a water district, city, or sewer construction district to operate a water system or sanitary sewer system regardless of whether the water district will have any ownership rights in the operated system.

b. No compensation for operating the system is required so long as there is a general benefit which accrues to the water district from having more water or sewer customers and consequent increased use of water or sewer services.

D. Territory Disputes

1. Grant of territory is not a grant of an exclusive right to serve. City of Cold Springs v. Campbell County Water District, Ky. 334 S.W.2d 269 (1958).

2. The Public Service Commission has recognized that no exclusive right to serve exists for water utilities. Auxier Water Company v. City of Prestonsburg, Case No. 96-362 (April 2, 1997). See also Kentucky Utilities Co. v. Pub. Serv. Com'n, Ky. 390 S.W.2d 168, 175 (1965) (stating that existing utilities do not "have any right to be free of competition").

3. Limited restrictions upon encroachments of water district's territory

a. Encroachments by municipal utilities

(1) If water district is serving the area, a city is restricted from extending service into the water district's territory unless the water district consents. KRS 96.150(1).

Any city that owns or operates a water supply or sanitary sewer system may extend the system into, and furnish and sell water and provide sanitary sewers to any person within, any territory contiguous to the city, and may install within that territory necessary apparatus; provided, **however, that the extension of a water supply or sanitary sewer system shall not enter into any territory served by an existing water supply or sanitary sewer district unless such district requests the extension of water or sewer services from a city.** For these purposes the city or sanitation authority established by an inter-local agreement may condemn or otherwise acquire

franchises, rights, and rights-of-way, as private corporations may do.

(2) If the water district facilities are not in place and serving the area, then municipal utility may have a claim to serve the disputed area. Note that KRS 96.150 is not applicable since it applies only to extra-territorial actions by municipal utility and not to provision of service within the municipality's boundaries.

(3) Forum to enforce right is circuit court.

b. Title 7, Section 1926(b) of the U.S. Code

(1) "The service provided or made available through any such association shall not be curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body, or by the granting of any private franchise for similar service within such area during the term of such loan; nor shall the happening of any such event be the basis of requiring such association to secure any franchise, license, or permit as a condition to continuing to serve the area served by the association at the time of the occurrence of such event."

(2) Coverage: Water districts (or water associations) that receive funding from the U.S. Department of Agriculture are protected from encroachments upon their service territory by municipalities. Municipal utility may not attempt to provide service to an area to which the water district has **made service available**. Municipality cannot annex territory and deprive water district's right to serve.

(3) Purpose of the statute is to protect U.S. Government's interest as water district's creditor. Ensure that the water district will have an adequate customer base to pay off debt.

(4) Venue for enforcement is U.S. District Court.

4. PSC has no jurisdiction over municipal utility-water district service area disputes. City of Lawrenceburg, Ky. v. South Anderson Water District, Case No. 96-256 (June 11, 1998).

D. ***Practice Pointers:***

1. Know your service territory. Maintain current service territory map. Update with any change in territory boundaries.

2. Retain a copy of all fiscal court ordinances and county judge/executive orders addressing service territory. If you don't currently have them, assemble them.

VII. WATER DISTRICT OPERATIONS: BIDDING

A. Construction Work (KRS 74.260) - **(Repealed by 2006 General Assembly)**

B. Construction/Goods and Services.

1. Water district may not make a contract, lease, or other agreement for materials, supplies except perishable meat, fish, and vegetables, equipment, or for contractual services other than professional, involving an expenditure of **more than twenty thousand dollars (\$20,000)** without first making newspaper advertisement for bids. (KRS 424.260).

2. What are professional services?

a. General Definition:

(1) “[A] profession includes any occupation or vocation in which a professed knowledge of some department of science or learning is used by its practical application to the affairs of others, either advising, guiding or teaching them, and in serving their interests or welfare in the practice of an art founded on it. The word implies attainments in professional knowledge, as distinguished from mere skill, and the application of such knowledge to uses for others as a vocation.” City of New Rochelle v. Friedman, 190 Misc. 654, 78 N.Y.S.2d 681 (1947).

(2) KRS 274.005:

"Professional service" means any type of personal service to the public which requires as a condition precedent to the rendering of such service the obtaining of a license or other legal authorization and which, prior to the passage of this chapter and by reason of law or a professional code of ethics, could not be performed by a corporation. The personal services which come within the provisions of this chapter are the personal services rendered by, but not limited to, certified public accountants, public accountants, chiropractors, osteopaths, physicians and surgeons, doctors of medicine, doctors of dentistry, podiatrists,

chiropractors, architects, veterinarians, optometrists and attorneys-at-law.

- b. Types of services held **not** to be professional services.
 - (1) Computer billing services (OAG 78-725).
 - (2) Construction inspector (OAG 92-114).
- c. Types of services held as professional services.
 - (1) Construction manager services (OAG 79-501).
 - (2) Public accountant or certified public accountant (OAG 80-624).
 - (3) Insurance services contracts (OAG 81-117; OAG 82-337).
 - (4) Legal Services (OAG 78-725).
 - (5) Engineering Services (OAG 78-725).
 - (6) Architect (OAG 78-725).

3. Dividing/Severing Purchases or Services

- a. Issue: May a water district evade the requirements of KRS 424.260 for a single project or purchase by severing portions of the project and treating those purchases as individual transactions?
- b. Where a public entity is prohibited from letting contracts of more than a specified sum using competitive bidding, it cannot divide the work and let it under several contracts, the amount for each falling below the amount required for competitive bidding. Bd. of Education of Floyd County v. Hall, Ky., 353 S.W.2d 194 (1962). See also OAG 84-274.

4. Effect of Failure to Comply

- a. Contracts are rendered voidable. Costs of bringing proceeding to void contract or to enjoin agency from entering contract, including attorney fees, may be assessed to unsuccessful party. KRS 424.380.
- b. Criminal Penalty of not less than \$50 and not more than \$500 for each official who violates the statute. KRS 424.990.

c. Civil forfeiture of not less than \$50 and not more than \$500 from each official. Recovery is made in civil suit and may be brought by any citizen. Party bringing suit may also recover reasonable attorney fees.

5. Purchases from Federal Government are exempted from bidding requirements. KRS 66.470.

VIII. WATER DISTRICT OPERATIONS: PREVAILING WAGE LAWS

A. General Rule: No **public authority** may advertise for bids or enter into a contract for **construction of public works** unless the bids or contract requires that all laborers, workmen, and mechanics performing work under the contract are paid the prevailing rate of wages. KRS 337.510.

B. Coverage

1. Public authority

a. Statutory Definition: “[A]ny officer, board or commission of this state, or any public subdivision or department thereof in the state, or any institution supported in whole or in part by public funds, including publicly owned or controlled corporations, authorized by law to enter into any contract for the construction of public works and any nonprofit corporation funded to act as an agency and instrumentality of the government agency in connection with the construction of public works . . .” KRS 337.010(3)(d).

b. Water districts are public authorities and subject to Prevailing Wage Act. See OAG 65-312.

2. Public works: “[A]ll buildings, roads, streets, alleys, **sewers, ditches, sewage disposal plants, waterworks**, and all other structures or work, including ‘adult correctional facilities’, as defined in KRS 197.500, constructed under contract with any public authority.” KRS 337.010(3)(e).

3. Construction.

a. Statutory Definition: “[C]onstruction, reconstruction, improvement, enlargement, alteration or repair of any public works project by contract **fairly estimated to cost more than two hundred fifty thousand dollars (\$250,000)**.” KRS 337.010(3)(a).

b. Act applies only if the cost of project exceeds \$250,000.

c. A public authority may not divide the project into smaller projects to avoid compliance with the Act. KRS 337.010(3)(a).

4. Where public authority uses its own employees, the Prevailing Wage Act is not applicable. See OAG 79-427 (“the fiscal court may use county government employees to construct the county building without advertising for bids for such labor and without the application of the prevailing wage law.”).

5. Where the federal government or an agency of the federal government requires a predetermined prevailing wage rate to a project otherwise subject to Prevailing Wage Act, then water district should follow the wage rate for each classification that is the higher. KRS 337.010(4).

6. Prevailing wage rates apply to contractor and **all subcontractors**.

C. Determination of Prevailing Wage Rate

D. Water District’s Duties Under Act

1. Before advertising for bids or entering contract on project covered by Act, water district must notify the Department of Workplace Standards (Labor Cabinet) **in writing** of the project and obtain the prevailing wage rate in the locality for each classification of laborers, workmen, and mechanics for each class of work called for in the project. KRS 337.510(1).

2. The water district must attach the schedule of the prevailing rate of wages to and make it part of the specifications for work and of every contract for the construction. KRS 337.510(1).

3. The water district must cause to be inserted in the proposal and contract a “stipulation to the effect that not less than the prevailing hourly rate of wages . . . shall be paid to all laborers, workmen, and mechanics performing work under the contract.” KRS 337.510(2).

4. If contracts are not awarded within 90 days of the offering for bids, the water district must ascertain the prevailing wage rates at the time of awarding the contract and make those a part of the contract. KRS 337.520(4).

5. The water district must require in all contractor bonds that the contractor include such provisions as will guarantee the faithful performance of the hourly wage clause. KRS 337.510(2)

6. The water district shall take notice of all complaints of violation of the prevailing wage rates, and when making payments to the contractor, withhold and retain all sums and amounts due and owing as a result of any violation. KRS 337.510(2)

E. Water District Commissioner's Duty Under Act. He shall not **vote for the award** of any contract for the construction of public works or **vote for the disbursement of any funds** on account of the construction of public works unless the water district has first ascertained the prevailing wage rates and made those rates part of the proposal specifications and contract. KRS 337.512(2).

F. Failure to Comply

1. Penalties – KRS 337.990(13)

a. Penalty of not less than \$100 nor more than \$1,000 for each offense.

b. Each day of violation constitutes a separate offense.

c. Any public authority, public official or member of a public authority who **willfully** fails to comply or to require compliance with Prevailing Wage Act is subject to penalty.

2. Civil Liability - If public authority, public official or member of a public authority **willfully** or **negligently** fails to comply with law, and failure results in damages, injury or loss to any person, public authority, public official or member of a public authority may be held liable for the loss.

IX. WATER DISTRICT OPERATIONS: MISCELLANEOUS REQUIREMENTS

A. Reporting Requirements

1. Expiration of Terms of Water District Commissioners: At least sixty (60) days before the expiration of the term of office of an appointed member of a district's governing body, the district shall notify the appointing authority of the forthcoming expiration of the term of the appointed member of the district's governing body. KRS 65.008

2. Notice to County Clerk. KRS 65.070(1)(a). Water District must file within 30 days of the close of each fiscal year with the county clerk of each county with territory in the district a certification showing that any of the following information has changed since the last filing –

(a) Name of district

(b) A map or general description of service area

(c) Statutory authority under which it was created

(d) The names, addresses and the date of expiration of the terms of office of the water district's board of commissioners.

3. Notice to Fiscal Court. KRS 65.070(1)(b). Water district must submit with 30 days of the close of each fiscal year to the fiscal court of each county with territory in the district a copy of the water district's summary financial statement.

4. Public Notice. KRS 65.070(1)(c). Water district must publish within 30 days of the close of each fiscal year in a newspaper of general circulation the names and addresses of its commissioners and either a summary financial statement, which includes the location of supporting documents, or the location of district financial records which may be examined by the public.

B. Budgets – KRS 65.065(1)

1. Water district must prepare a budget annually and submit to fiscal court of the county in which it is located. (For multi-county districts, the budget must be filed with the fiscal court of each county.)

2. Budget will not become effective until filed with fiscal court.

3. **No moneys may be expended from any funds or any sources except in accordance with a filed budget.** If budget is not filed before start of fiscal year, the water district must cease spending its funds.

4. If water district fails to file within 30 days of the start of the water district's fiscal year, then fiscal court is required to notify county attorney who must notify the water district and take action to prevent the water district from expending any funds until water district's compliance.

C. Financial Statements/Audits

1. Water districts with annual income or expenses exceeding \$400,000 are required to employ an independent certified public accountant or contract with the Auditor of Public Accounts to perform an annual audit of the funds in its budget. KRS 65.065(3).

2. Audits must conform to generally-accepted governmental auditing standards. At a minimum, these standards must be consistent with the requirements of the Comptroller General of the United States and the Auditor of Public Accounts. KRS 65.065(4).

3. Water districts with annual income and expenses less than \$400,000 must submit annually to the county judge/executive and to the state local finance officer a copy of their annual report to the Public Service Commission in lieu of having an audit conducted annually. These districts must provide for the performance of an audit every four years. KRS 65.065(2) and (5).

C. Miscellaneous Operating Requirements.

1. Water District must maintain an account of the time spent by all employees and each item of expense incurred in connection with the water district. KRS 74.240(1).
2. Must prepare and make to available water district customers an annual statement of receipts and disbursements and any floating or bonded indebtedness. The report must show the cost of water, material, labor, other salaries, and any other expense incidental to operation and maintenance. KRS 74.240(2).
3. Must make **all** water district books **open for inspection** during normal business hours. KRS 74.240(3). **This requirement is in addition to an Open Record Act requirement.**

X. WATER DISTRICT OPERATIONS: CLAIMS AGAINST LOCAL GOVERNMENT ACT

- A. Generally: As political subdivisions of the state, water districts have sovereign immunity. They cannot be sued for damages except where the state has expressly authorized suit.
1. Kentucky Constitution, § 231: “The General Assembly may, by law, direct in what manner and in what courts suits may be brought against the Commonwealth.”
 2. While the General Assembly has created the Board of Claims and enacted a limited waiver of liability with regard to state agencies and commissions, it did not include political subdivisions of the state. In the absence of language including political subdivisions, these political subdivisions are not subject to suit.
 3. It is unclear whether water district’s immunity still exists. Kentucky Supreme Court no longer permits the application of sovereign immunity where the entity is a municipal corporation.

Municipal corporations are local entities created by the act of the General Assembly and not agencies performing the services of central state government. As such they do not qualify for sovereign immunity. The term ‘municipal corporation is not limited to a city, and it is not only a city that ‘is no longer immune from suit for tort liability’ [A] **‘municipal corporation’ means nothing more than a local government entity created by the state to carry out ‘designated’ functions** The line between what is a state agency and what is a municipal corporation is not

divided by whether the entity created by state statute is or is not a city, but whether, when viewed as a whole, **the entity is carrying out a function integral to state government**

Kentucky Center for the Arts v. Bern, Ky., 801 S.W.2d 327, 331-332 (1990) (emphasis added). Under this definition, water districts would likely be considered municipal corporations. See also Calvert Investments, Inc. v. Louisville & Jefferson County Metropolitan Sewer District, Ky., 805 S.W.2d 133 (1991).

B. Claims Against Local Government Act (KRS 65.200-.2006)

1. Definition of "Local Government" includes water district.

"Local government" means any city incorporated under the law of this Commonwealth, the offices and agencies thereof, any county government or fiscal court, **any special district** or special taxing district created or controlled by a local government.

KRS 65.200.

2. Limitations on Liability. KRS 65.2002. Local Governments shall not be liable for injuries or losses resulting from any claim arising from the exercise of judicial, quasi-judicial, legislative or quasi-legislative authority or others, exercise of judgment or discretion vested in the local government, which shall include by example, but not be limited to:

a. The adoption or failure to adopt any ordinance, resolution, order, regulation, or rule

b. The failure to enforce any law

c. The issuance, denial, suspension, revocation of, or failure or refusal to issue, deny, suspend or revoke any permit, license, certificate, approval, order or similar authorization

d. The exercise of discretion when in the face of competing demands, the local government determines whether and how to utilize or apply existing resources

e. Failure to make an inspection.

3. Local governments are not exempted from liability any action in tort for:

- a. Any defect or hazardous condition in public lands, buildings or other public property including personalty
 - b. Negligence arising out of acts or omissions of its employees in carrying out their ministerial duties.
 - c. Any act or omission of a person other than an employee for which the local government is or may be liable.
4. Aside from these areas, the existing state of common law immunity continues to apply. Nothing in the Claims Against Local Government Act “shall in any way be construed to expand the existing common law concerning municipal tort liability as of July 15, 1988, nor eliminate or abrogate the defense of governmental immunity for county governments.” KRS 65.2001(2).
5. Who is an Employee? KRS 65.200(3)
- a. Any elected or appointed officer of a local government
 - b. Any paid or unpaid employee or agent of a local government
 - c. **Does not include** any independent contractor nor employee nor agent of an independent contractor
6. Defense of Employees
- a. Local Government is obligated to provide for the defense of any employee by an attorney chosen by the local government in any action in tort arising out of an act or omission occurring within the scope of his employment of which proper notice has been given.
 - b. Proper Notice: Within 10 days of receipt of service of a summons and complaint of an action in tort, employee must give written notice of such action in tort to the executive authority of the local government. KRS 65.2005(2).
 - b. The local government shall pay any judgment based thereon or any compromise or settlement of the action.
 - c. Exceptions
 - (1) Does not cover any express limitations on local government’s liability set forth in KRS 65.2002.

(2) Local government may refuse to pay judgment or settlement, or recover the payment of judgment or claim and costs from an employee if:

(a) The employee acted or failed to act because of fraud, malice, or corruption

(b) The action was outside the actual or apparent scope of his employment

(c) The employee willfully failed or refused to assist the defense of the cause of action, including the failure to give notice to the executive authority of the local government

(d) The employee compromised or settled the claim without the approval of the governing body of the local government

(e) The employee obtained private counsel without the consent of the local government, in which case, the local government may also refuse to pay any legal fees incurred by the employee.

7. Periodic Payments – KRS 65.2004

a. Local government may request that judgment be paid over a period of time not to exceed 10 years. Such judgment shall bear interest from the final date of order.

b. Eligibility for Periodic Payments. Court must find

(1) Payment of the judgment is not totally covered by insurance; and

(2) Funds for the current budget year and other funds of the local government which lawfully may be utilized to pay judgments are insufficient to finance both the adopted budget of expenditures for the year and the payment of that portion of the judgment not covered by insurance.

XI. WATER DISTRICT OPERATIONS: WHISTLEBLOWER STATUTE (KRS 61.101-.103)

A. Employer may not engage in reprisal actions against employee who makes good faith disclosure to appropriate authorities regarding improper activities.

B. Employer's Activities prohibited. May not "subject to reprisal, or directly or indirectly use, or threaten to use, any official authority or influence, in any manner whatsoever, which tends to discourage, restrain, depress, dissuade, deter, prevent, interfere with, coerce, or discriminate" against any employee.

C. Employee Disclosures Protected

1. To whom: Kentucky Legislative Ethics Commission, the Attorney General, the Auditor of Public Accounts, the General Assembly of the Commonwealth of Kentucky or any of its members or employees, the Legislative Research Commission or any of its committees, members or employees, the judiciary or any member or employee of the judiciary, any law enforcement agency or its employees, or any other appropriate body or authority

2. Subject of Disclosure - any facts or information relative to

a. An actual or suspected violation of any law, statute, executive order, administrative regulation, mandate, rule, or ordinance of the United States, the Commonwealth of Kentucky, or any of its political subdivisions

b. Actual or suspected mismanagement, waste, fraud, abuse of authority

c. Substantial and specific danger to public health or safety.

3. Disclosures must be in good faith

D. No employer may require any employee to give notice prior to making a report, disclosure or divulgence.

E. No employer shall subject to reprisal or discriminate against, or use any official authority or influence to cause reprisal or discrimination by others against, any person who supports, aids, or substantiates any employee who makes public any wrongdoing listed in the Act.

F. Enforcement

1. Criminal Sanctions: Any person who willfully violates Whistleblower Act is guilty of a Class A misdemeanor.

2. Civil Sanctions

a. Reinstatement of the employee

b. Payment of back wages

- c. Full reinstatement of fringe benefits and seniority rights
- d. Exemplary or punitive damages
- e. Costs of litigation, including reasonable attorney fees and witness fees.

XII. Collection of Municipal Utility Sewage Bills (KRS 96.930- 938)

A. Legislative Declaration (KRS 96.930)

The General Assembly hereby recognizes and declares that the use of water in any manner tending to contaminate it, raises a correlative public duty to provide for the proper disposition thereof according to the highest public health standards, and that such public duty includes full responsibility for paying the cost of such disposition.

B. Cities may enforce collection of lawful rates and charges for the use of municipal sewer facilities by requiring that water service, whether provided publicly or privately, be discontinued until payment is made or some satisfactory arrangement is reached.

C. Procedure:

1. City must notify the water supplier in writing directing the discontinuance of water service to the designated customer's premises until notified otherwise. Notice must be sufficient to designate the customer. Upon receipt of such notice, the water supplier shall discontinue water service to the premises until notified otherwise by the sewer body.

2. Water supplier may require an authorized agent of the city be present when water service is terminated. It may also require the payment of reasonable fees for discontinuing service. Requirements must be in writing.

3. If written requirement for presence of an authorized agent, water supplier does not need to discontinue service until that agent is present.

4. Water supplier is also entitled to fee for discontinuance if its employee prepares to terminate and the billing dispute is resolved.

D. Water Supplier's Liability

1. **To Customer** for termination of service. No liability except for its own negligence or other improper conduct. KRS 96.942.

2. **To Sewer Body:** “Any water supplier which wrongfully fails or refuses to discontinue water service pursuant to an order properly made to it by a sewer body and continues such failure or refusal for a period of thirty (30) days after receipt of the notice, shall be liable to the sewer body for any amount due from the sewer user involved.” KRS 96.943.

E. City and Water suppliers may enter into contract providing for such services.

1. Kentucky-American Water Co., Case No. 95-238 (June 30, 1995). Held: KRS 96.930-.941 controls where there is a conflict with PSC regulations. Agreements between cities and jurisdictional suppliers must be given full effect. No deviation from PSC regulations is required.

2. Similar provisions exist for sewer construction districts (KRS 76.368), metropolitan sewer districts (KRS 76.640), and sanitation districts (KRS 220.510).

3. Administrative Case No. 347, An Investigation into the Collection and Billing Practices of Privately-Owned Sewer Utilities (January 9, 1995) at 8 (“those sewer and water utilities which agree to the discontinuance of water service for delinquent sewer service bills may petition the Commission for a deviation from Commission Regulation 807 KAR 5:006, Section 14. Absent unusual circumstances, the Commission will favorably consider such petitions.”)

F. ***Practice Pointers:***

1. ***Water District counsel should examine each written request for discontinuance to ensure compliance with contract or statutes.***

2. ***Ensure that information is correct.***

3. ***Demand presence of authorized agent and establish a schedule of required fees for this service.***

4. ***Timely comply with requests.***

5. ***Any contracts with privately owned sewer utilities should be filed with the PSC and an application for deviation should be requested. Indemnification provisions and enhanced supervision are essential for these types of agreements.***

XIII. DISSOLUTION OF A WATER DISTRICT

A. Procedure for dissolving water district. (KRS 74.367).

1. Petition of 5 freeholders to PSC for dissolution

2. PSC holds proceeding similar to KRS 74.012. Must determine whether another water supplier rendering services in the general area could feasibly serve the water district's residents.

3. If PSC finds that another water supplier could feasibly serve the area, **more than 50 percent** of freeholders within the district may file petition with county judge/executive requesting discontinuance of water district.

4. County judge/executive must hold public hearings.

5. If county judge/executive determines that discontinuance is in the best interest of the district, he may order dissolution of the water district.

B. Special District Dissolution (KRS 65.166) – Alternative Dissolution Procedure.

C. Distinguish from Merger or Transfer of Assets to another entity

XIV. MERGER OF WATER DISTRICTS

A. KRS 74.361(1) - Legislative Finding of the 1972 General Assembly:

[R]eduction of the number of operating water districts in the Commonwealth will be in the public interest, in that mergers of such districts will tend to eliminate wasteful duplication of costs and efforts, result in a sounder and more businesslike degree of management, and ultimately result in greater economies, less cost, and a higher degree of service to the general public; and that the public policy favors the merger of water districts wherever feasible.

B. Involuntary Mergers: PSC may order water districts/water associations to merge. KRS 74.361.

1. Procedure

a. Feasibility Study.

(1) “[T]he Public Service Commission shall cause to be prepared in writing a feasibility report and study regarding the proposed merger, containing such studies, investigations, facts, historical data, and projections as in the circumstances may be required in order to enable the commission to formulate a proper decision regarding such merger.

(2) Who pays for study? Not subjects of the study. See Pub. Serv. Comm'n v. Attorney General, Ky. App., 860 S.W.2d 296 (1993) ("Commission was not authorized to charge water districts for cost of management and operations audit conducted as part of merger feasibility study.")

(3) If a management audit is performed before any merger proceeding is conducted, then the costs of that audit can be assessed to water district and the results of audit may be included in a feasibility study. Pub. Serv. Comm'n v. Attorney General, Ky. App., 860 S.W.2d at 298 ("an audit properly conducted by the PSC under its regulatory function and authorized by KRS 278.255 could subsequently be used if merger was considered.")

(4) Historically Commission Staff has prepared the feasibility study.

b. Based upon written report and study, PSC proposes the merger by order. Affected water districts, the commissioners of each district, and the county judge/executive of each county where water districts located are served a copy of the order.

c. Public hearing - Water Districts have the following rights:

(1) Make appearance

(2) Present evidence

(3) Examine all exhibits and testimony

(4) Cross-examine all witnesses

(5) Submit such memoranda, written evidence, and briefs as may be desired.

d. At conclusion, PSC shall enter its order, either merging the water districts which are the subject of the merger proceedings into a single water district, or abandoning the merger proposal.

e. PSC may also make Orders related to rates, rentals and charges for services rendered to be levied by the water district which remains in existence following such merger.

f. PSC's Orders subject to judicial review

2. Results of merger proceeding

a. Merger occurs

b. Water Districts' outstanding financial obligations remain separate. Outstanding debt secured by assessments, bond instruments, pledge of income shall continue to be retired from such moneys and funds as shall be collected from the users of facilities operated by such merged water districts in the original water district area in accordance with the terms and provisions of the enabling laws and the authorizing resolutions or indentures under which the outstanding obligations were issued, until all such obligations have been retired. **Practical Consideration:** Three sets of Books, two sets of rates.

c. Water District Commissioners:

(1) All commissioners continue to serve out their remaining term.

(2) Upon expiration of terms, special rules for the appointment of commissioners apply. KRS 74.020(1).

C. Voluntary Mergers – KRS 74.363

1. Boards of Commissioners may agree to voluntary merger

2. Required approvals

a. Approval of a majority of the membership of the board of each district. KRS 74.363(2).

b. PSC Approval. KRS 278.020(4) and (5).

c. **Approval of county judge/executives or voters is not required.** However, approval of county judge/executives is necessary to amend boundaries/service territories of the merged district.

3. Composition of Board of Commissioners after Merger

a. All current members serve 1 year after the approval of merger by PSC regardless of their normal term expiration.

b. Within 1 county: 3 – 7 members to be appointed by county judge/executive with staggered terms. One-third of members appointed initially for 2 years. One-third of members appointed initially for 3 years. One-third of members appointed initially for 4 years.

c. Multi-county Districts: 6 or more members. County judge/executive of the county in which the greatest portion of the district's population resides selects 4 members. County judge/executive of the county in which the next greatest portion of the district's population resides selects 2 members. County judge/executives from the remaining counties will select one each. Member must be a resident of the water district and the county from which he or she is selected. Same staggering of terms.

4. Assets and Liabilities. Title to all property vests in the new district. Existing debt and other obligations will continue to be funded from the same area or assessment plan until the old obligations extinguished. ***Practical Consideration:*** Three sets of books, two sets of rates. Need to refinance debt and totally merge finances.

XV. SUMMARY