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Commentary: 82nd State Legislature Regular Session: Summaries of water-related legislative action

Editor's Note: September 1 of every odd-numbered year is the date that new legislation from the Texas Legislature session that ended the previous spring typically goes into effect. With this in mind, the Texas Water Journal invited five organizations that work closely with the Texas Legislature to provide their take on the changes to Texas water policy and law that were made during the 2011 session. The opinions expressed in these summaries are the opinions of the individual organizations and not the opinion of the Texas Water Journal or the Texas Water Resources Institute.

Organizations:

- Sierra Club, Lone Star Chapter
 - Texas Alliance of Groundwater Districts
 - Texas and Southwestern Cattle Raisers Association
 - Texas Farm Bureau
 - Texas Water Conservation Association
-

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SIERRA CLUB: OVERVIEW OF WATER IN THE 82ND TEXAS LEGISLATURE

By Ken Kramer, Director, Lone Star Chapter, Sierra Club

As the state-level arm of the national Sierra Club, the Lone Star Chapter has been following water issues in the Texas Legislature for over 45 years with the assistance of volunteer and professional lobbyists. Each session has its own particular set of circumstances, and attention to water policy by legislators has varied considerably from one session to another. In some sessions water has been a high priority issue, even the dominant one. In other sessions water has been barely a blip on the legislative radar screen. In the 2011 regular session the topic of water was at best a mid-level concern.

There were a relatively large number of bills dealing with water and sewer rates for areas served by private water utilities, and there was also the usual torrent of bills creating yet another utility district to facilitate the provision of water and sewer and sometimes other municipal services to newly developing areas. These are always noted with interest, but in the absence of some major environmental controversy about a private water utility or a real estate development to be served by a special district, these pieces of legislation rarely become the focus of the Sierra Club's attention.

In the 2011 session the water topics of major interest to the Sierra Club were groundwater rights and management, funding for water programs and projects, sunset review of the Texas Water Development Board (TWDB) and the Texas Commission on Environmental Quality (TCEQ), water conservation metrics, and a tax break for water stewardship. Following is a brief overview of the legislative outcome on those topics.

Groundwater Rights and Management

Although a number of bills dealing with groundwater management were introduced, undoubtedly the most controversial groundwater issue of the session was the debate over what constitutes groundwater ownership. For months prior to the opening gavel, a number of groups—including prominently the Texas Farm Bureau and Texas and Southwestern Cattle Raisers Association—were beating the drum for the “vested” right of a landowner to the groundwater under his or her land. Their assertion was that regulatory actions by some groundwater districts and potential outcomes in court cases dealing with groundwater were undermining or threatening to undermine what these groups felt to be a landowner's right to groundwater in place.

Other groups, such as the Sierra Club, countered that the concept of “vested” rights conveyed an absolute right of ownership that did not accurately describe Texas groundwater law. The Club and others believe that the landowner's right is a

right to capture groundwater under the land, subject to regulations and limitations that may be imposed by groundwater districts or the state on that capture, in order to serve important public purposes, such as the conservation of resources (an authority conveyed in part under Article 16, Section 59 of the Texas Constitution).

The focus of this controversy in the Legislature became Senate Bill (SB) 332 by Senator Fraser. That bill initially stated that surface landowners had a vested right to groundwater under their property. The bill was compromised somewhat in the Senate, thanks in large measure to the efforts of Senator Duncan and others, who were able to add language to the bill in an attempt to assure the authority of groundwater districts to regulate groundwater.

The bill passed the Senate and was modified further by Representative Ritter, the House sponsor and chairman of the House Natural Resources Committee. The term “vested” right was dropped and additional language was added to shore up the authority of groundwater districts. Provisions were added to the bill to “exempt” certain groundwater districts—the Edwards Aquifer Authority and coastal subsidence districts—from any limitations on groundwater districts that might be inferred from the assertion of ownership rights. The House version of the bill passed easily and the Senate concurred with the House changes.

What the passage of SB 332 really means, however, is an open question. Some observers believe that it really makes no changes in existing Texas law and will have no effect on groundwater district actions. That begs the question, of course, of what the proponents of the law actually achieved by its passage. Other observers fear the new statutory language will be used by landowners to assert “takings” claims whenever a groundwater district attempts to put restrictions on groundwater use that might reduce its economic value. The Sierra Club shares that concern. Probably the only certain thing that can be said about the impact of SB 332, however, is that its ultimate meaning will be debated in the courts.

Funding for Water Programs and Projects

This topic generated a good bit of attention in the session for a variety of reasons, the most obvious being the initial estimate of a \$27 billion revenue shortfall for the state budget overall for the next two years. As a result of the shortfall and the aversion to new taxes or fees to address that shortfall, the Legislature did not fully fund the baseline budget requests submitted by TWDB and TCEQ. TWDB, for example, was

appropriated about \$15 million (net) less than requested (the agency actually got \$16.7 million less than its baseline request but received an additional \$1.6 million as a result of legislative approval of one of its “exceptional item” requests). The Legislature did authorize TWDB to issue \$100 million in Economically Distressed Areas Program (EDAP) bonds and \$200 million in Water Infrastructure Fund bonds, but only appropriated enough general revenue money to allow the agency to issue approximately half of those bonds.

On the larger issue of funding water infrastructure projects and perhaps other water management strategies in the state water plan, House NR Chairman Ritter took a bold step by introducing legislation to set up new funding mechanisms, including a requirement that at least 20% of a new fund be used for conservation and water reuse projects. The time was not ripe for suggesting new fees to provide that funding, despite the Chairman’s valiant efforts. In the end, opposition by certain groups to specific fee proposals and the overall anti-tax and anti-fee attitude of the majority of legislators in the 82nd Legislature torpedoed those efforts.

Much verbiage has been written bemoaning the lack of legislative willingness to fund the state water plan. From an environmental perspective, however, the situation is somewhat more complicated. The Sierra Club and other environmental groups, plus many landowners and others, question the true need for many of the water infrastructure projects proposed in the state water plan. Even the ones that are needed are likely to be funded for the most part by local or regional entities rather than the state government. Thus, the failure to establish a broad new state funding source for infrastructure is not necessarily a bad outcome, but the fact that the House NR Chairman recognized the need for a major new state funding initiative for conservation and reuse was significant. Hopefully that will continue to be a part of the dialogue on funding the state water plan.

The major development in the 82nd Legislature on funding water projects was the passage by 2/3 of both houses of a proposed constitutional amendment that would authorize the TWDB to issue an additional \$6 billion in bonds that could be used to pay for both water and wastewater projects in the coming years, and to make that authorization “evergreen” (in other words the agency may continue to issue bonds as bond-funded loans are repaid as long as the \$6 billion cap is not exceeded at any one time). The proposed amendment will be on the November 2011 ballot as Proposition 2 and must be approved by the voters in order to take effect. The Sierra Club has not adopted a position on that amendment; the need for more infrastructure money is there, but whether \$6 billion is the right amount and whether TWDB should be given “evergreen” authority are open questions.

Sunset Review of Water Agencies

Both TWDB and TCEQ were up for sunset review in this past cycle (so was the Texas State Soil and Water Conservation Board, but it was not a focus for the Sierra Club). In the final analysis the TWDB continuation legislation (SB 660) turned out to be somewhat of a “yawner,” with no dramatic changes in the agency (probably much to the relief of the TWDB staff and leadership). Despite a lot of angst and prolonged discussion about the appeals process for “desired future conditions” for groundwater resources that resulted from a joint planning process created by the Legislature several sessions ago, the Legislature basically made no major changes in that process, which was a topic in SB 660. Some language related to water conservation metrics was included in SB 660, similar in many respects to language adopted in separate legislation, SB 181, discussed below.

Most of the issues revolving around TCEQ sunset review were not water-related, at least not directly. A couple of exceptions were provisions in House Bill (HB) 2694, the agency continuation bill that passed, to clarify the authority of TCEQ to address surface water shortages in dry times in river basins that do not have “watermasters” (most of the river basins in the state) and provisions added to HB 2694 in the House, and later modified, that made changes in TCEQ’s authority to regulate dam safety. The latter is an issue that will no doubt be back before the Legislature in the next or subsequent sessions as more and more real estate development occurs in here-to-fore rural areas, where homes and businesses could be impacted by the failure of dams on rural properties.

Water Conservation Metrics

One of the ongoing debates in the water realm in Texas in recent years has been over what constitutes appropriate ways of measuring urban water use, which affects how one then measures progress in reducing water use through conservation and efficiency. The biggest controversy is over the metric “per capita water use,” termed “gallons per capita per day” or GPCD. The metric has been criticized as too crude a measure to be used to compare different areas in terms of whether those areas are conservative or profligate in their use of water. Without going into the details of the controversy here, suffice it to say that pretty much everyone agrees we need more and better measures of water use, especially to be able to evaluate industrial, commercial, and institutional water use.

This topic was addressed by the recent legislative session in SB 660, the TWDB continuation bill, and SB 181, a separate bill focused only on this topic. Both passed, with slightly different language, but the thrust is the same. The legislation requires the TWDB and TCEQ, in consultation with the state

Water Conservation Advisory Council (on which Sierra Club is represented), to “develop a uniform, consistent methodology and guidance for calculating water use and conservation to be used by a municipality or water utility in developing water conservation plans and preparing reports required under [the Water Code].” Since this process is already underway, that was a no-brainer.

A concern has been raised by some environmentalists and landowners that the some of the language in the legislation may have been put there to undermine the “water conservation” achievements that must be demonstrated by entities seeking an interbasin transfer (IBT) of surface water. Regardless of whether that intent was there or not, the Sierra Club does not believe the new legislation undermines the water conservation test for IBTs and believes instead that better measurement of water use benefits everyone.

Tax Break for Water Stewardship

Rural landowners engaged in agriculture have long enjoyed a property tax break; their land is valued based on its productivity and not its market value. In the 1990s those landowners who qualified for the agricultural tax break were allowed to

switch to a wildlife management status and maintain the tax break by demonstrating efforts to maintain wildlife habitat. In the 82nd Legislature a proposed constitutional amendment (and accompanying bill) championed by The Nature Conservancy and supported by Sierra Club and others was introduced to extend the tax break to landowners practicing water stewardship (these landowners must qualify for the agricultural tax break first). The proposed amendment passed both houses easily and will be on the November ballot for voter approval as Proposition 8. Rulemaking would have to follow voter approval in order to establish the process for qualifying for a water stewardship tax break.

In summary there were important pieces of water legislation enacted in 2011 but not the dramatic omnibus bills of some past sessions. But water remains a critical issue in Texas, as the current drought demonstrates, and someday water again is likely to be a dominant legislative issue, perhaps even in the next session.

TEXAS ALLIANCE OF GROUNDWATER DISTRICTS: LEGISLATIVE WRAP-UP OF GROUNDWATER-RELATED BILLS

By Stacey A. Steinbach, Executive Director, Texas Alliance of Groundwater Districts

Despite initial beliefs that the 82nd Legislative Session would not be a water session due to large, looming issues, such as the budget and redistricting, the Legislature tackled a handful of wide-ranging and controversial water issues in 2011. This document provides a summary of groundwater-related bills that passed the Legislature during the 82nd Legislative Session. Although it also includes other bills of possible interest to groundwater conservation districts (GCDs or districts), it does not represent an exhaustive list, nor does it include all administrative bills that may affect GCD governance, such as bills amending election, open meetings/public information, and other administrative laws.

Groundwater Ownership

By far, bills related to groundwater ownership received the most media and overall attention of any groundwater bills filed this session. The bill ultimately passed by the Legislature, SB 332, was effective September 1, 2011, and “recognizes that a landowner owns the groundwater below the surface of the landowner’s land as real property.” The right entitles the landowner to drill for and produce groundwater, but not the right to capture a specific amount.

The bill provides that the right reaffirmed in SB 332 is subject to the rule of capture for liability purposes. It is also subject to a new section confirming a district’s ability to limit or prohibit drilling based on spacing or tract size and regulate the production of groundwater as provided in Chapter 36, specifically incorporating sections 36.113 (relating to the ability to grant or deny permits and protect existing users), 36.116 (relating to spacing requirements and historic use protection), and 36.122 (relating to exports) of the Water Code. The new section also expressly notes that districts are not required to allocate groundwater based on a correlative rights approach.

The bill incorporates three additional considerations for districts in adopting rules: groundwater ownership rights, the public interest in conserving and protecting groundwater and controlling subsidence, and goals found in a district’s management plan. It also includes a provision stating that SB 332 does not affect the ability of the Edwards Aquifer Authority, the Harris-Galveston Subsidence District, and the Fort Bend Subsidence District to regulate groundwater pursuant to the enabling legislation of those entities.

Desired Future Conditions, Petitions for Inquiry, and the Texas Water Development Board Sunset Bill

The Texas Water Development Board (TWDB) was subject to sunset review this year, and the Legislature reviewed and reauthorized the agency until 2023 in SB 660.¹ The bill makes a handful of significant changes to Texas groundwater law, including the addition of a groundwater management area (GMA) representative to each applicable regional water planning group (RWPG).²

SB 660 also requires regional water plans (RWPs) to be consistent with applicable desired future conditions (DFCs) and adds additional informational requirements for the state water plan. Notably, the bill requires the TWDB and the Texas Commission on Environmental Quality (TCEQ), in consultation with the Water Conservation Advisory Council (WCAC), to develop a uniform water-use calculation system. These changes are consistent with the changes made by SB 181, discussed below.

Consistent with SB 737 (also discussed below), SB 660 changes the term “managed available groundwater” to “modeled available groundwater” in order to better reflect the meaning of the term. SB 660 also makes comprehensive changes to the process for establishing and adopting DFCs in the various GMAs and filing petitions for inquiry at the TCEQ. Due to the importance of these changes for GCDs, they are discussed in greater detail here. Though two separate proposals for amending the DFC appeals process were introduced during the Legislative Session, neither version passed. As a result, the DFC appeals process at the TWDB remains substantively unchanged.

Establishing DFCs

SB 660 adds a definition for DFCs to Chapter 36 and requires districts to ensure that management plan goals and objectives are consistent with achieving applicable DFCs. The bill adds nine new factors that districts must consider when renewing or establishing DFCs:

1. aquifer uses or conditions within the management area, including conditions that differ substantially from one geographic area to another;

¹Other sunset bills of interest may be HB 1808 (relating to the Texas State Soil and Water Conservation Board) and HB 2694 (relating to the Texas Commission on Environmental Quality).²GMA members are required to appoint a representative as soon as possible after the act’s effective date of September 1, 2011.

2. the water supply needs and water management strategies included in the state water plan;
3. hydrological conditions, including, for each aquifer in the management area, the total estimated recoverable storage as provided by the executive administrator and the average annual recharge, inflows, and discharge;
4. other environmental impacts, including impacts on spring flow and other interactions between groundwater and surface water;
5. the impact on subsidence;
6. socioeconomic impacts reasonably expected to occur;
7. the impact on the interests and rights in private property, including ownership and the rights of management area landowners and their lessees and assigns in groundwater;
8. the feasibility of achieving the DFC; and
9. any other information relevant to the specific DFCs.

Pursuant to the act, DFCs must also “provide a balance between the highest practicable level of groundwater production and the conservation, preservation, protection, recharging, and prevention of waste of groundwater and control of subsidence in the management area.”

The bill also incorporates two changes aimed to improve the information exchange at the GMA level and aid in the development of DFCs. GMA members now have the opportunity to request the TCEQ and the TWDB provide nonvoting technical staff for GMA meetings and may appoint nonvoting advisory committees to represent various interests, such as social, environmental, and economic interests.

Providing Notice of DFCs

It should be noted that SB 660 implements additional notice provisions for considering and adopting DFCs at the GMA and district level. In both instances, notice must be provided pursuant to the Open Meetings Act, plus at least 10 days in advance of the applicable meeting. For GMA meetings, one district may be responsible for fulfilling all notice requirements and providing notice to the Secretary of State, the various county clerks in the GMA, and each district office in the GMA. However, failure or refusal of one or more districts to post notice of a GMA meeting does not invalidate actions at the meeting.

Adopting DFCs

SB 660 requires that two-thirds of all districts in the GMA vote to approve distribution of DFCs to districts in GMA. At that point, a 90-day (minimum) public comment period begins. Each district must hold a public hearing (after giving notice as described above) on the proposed DFCs relevant to the district, making copies of DFC reports available to the public. After the hearing, the district must summarize relevant

comments received and any suggested revisions to the proposed DFC for the next GMA meeting. The district GMA representatives must then meet to consider all information and finally adopt the DFCs for the GMA. Again, two-thirds of all districts in the GMA must vote to adopt the proposed DFCs.

Once the DFCs are adopted, the districts, as part of the GMA, must prepare a detailed “DFC explanatory report” that includes the DFCs adopted, the policy and technical justifications for each adopted DFC, documentation showing how the nine new DFC factors were considered, a list of DFCs considered but not adopted and the reasons why, and an analysis of public comments received. This report must be submitted to the TWDB and all GMA districts with documentation of notice of GMA meetings and the resolution adopting the DFCs. As soon as possible after receiving the report, the individual districts must adopt the applicable DFCs, providing the explanatory report, the DFCs adopted, and proof of notice to the TWDB within 60 days of adoption.

Petitions for Inquiry

The provisions of Chapter 36 related to petitions for inquiry at the TCEQ were also substantively amended by SB 660. For the purposes of a petition, the bill defines “affected person” as: (1) a landowner in the GMA; (2) a district in or adjacent to the GMA; (3) a RWPG with a water management strategy in the GMA; (4) a person who holds or is applying for a permit from a district in the GMA; (5) a person who has groundwater rights in the GMA; or (6) any other person as affected by the TCEQ rule. Affected persons are authorized to file a petition with the TCEQ any time a district fails to comply with the following nine requirements (four original requirements are in italics; the others were added by SB 660):

1. submit a management plan to the TWDB;
2. *participate in joint planning*;
3. adopt rules;
4. adopt applicable DFCs adopted by the GMA;
5. update the management plan within 2 years of adoption of new DFCs;
6. update rules to implement applicable DFCs within a year after updating the management plan;
7. *adopt rules designed to achieve DFCs*;
8. *adopt rules that adequately protect groundwater*; and
9. *enforce rules for the adequate protection of groundwater*.

The process for reviewing petitions remains unchanged. As before, penalties are issued in accordance with Texas Water Code § 36.3011, which has been amended to incorporate the nine provisions listed above.

General Groundwater

In addition to the bills concerning groundwater ownership and desired future conditions, there were a number of bills that made general clarifications and relatively minor changes to Chapter 36. One such example, SB 727, simply cleans up all references to GCD management plans in Chapter 36 to achieve consistency among the statutes. Other legislative changes this session relate to permit requirements and exemptions.

Permit Requirements

One legislative and stakeholder objective this session was to change the term “managed available groundwater” to “modeled available groundwater” (MAG) in order to better reflect the intent of the phrase. SB 737 does just that, defining the MAG as the amount of water that the TWDB determines may be produced on an average annual basis to achieve a DFC. The bill also amends Texas Water Code § 36.1132 to clarify that districts should, to the extent possible, issue permits so that exempt and permitted production achieves applicable DFCs. The amended section also requires districts to consider the following five factors when issuing permits: (1) the MAG; (2) exempt groundwater use; (3) previously authorized withdrawals; (4) actual production; and (5) yearly precipitation and production patterns.

HB 3109 makes a small change to Texas Water Code § 36.121, increasing the maximum population size in the statute from 100,000 to 115,000 for applicable municipalities producing groundwater in counties with a population of less than 14,000. In such instances, GCDs located within the county cannot require these municipalities to obtain a permit to produce water from wells purchased or owned, or to which the municipality held rights to, before the date on which the district was created.³

Finally, SB 693 provides that hearings on the issuance of a groundwater permit application must be conducted by the State Office of Administrative Hearings (SOAH) if requested by a party to the contested case hearing. The requesting party must bear the costs of the SOAH hearing.

Permit Exemptions

The Legislature passed two bills aimed at clarifying permit exemptions in Chapter 36. SB 691 makes clear that groundwater users must meet all factors to satisfy the domestic and livestock exemption found in Texas Water Code § 36.117(b)

³ See also section 181 of HB 2702 (omnibus bracket adjustment bill), which passed this session and incorporates the new ceiling of 115,000, but also includes a municipal population size floor of 100,000 in Texas Water Code § 36.121. It is unclear at this time how this bill and HB 3109 will be read.

(1) (domestic, poultry, or livestock; 10 acres or more; capable of producing no more than 25,000 gallons per day), rather than just one. Similarly, SB 692 (adopted later in time than SB 691) makes generally the same changes to the domestic and livestock exemption but also clarifies § 36.117 overall to specify that the exemptions provided in that section apply to the use of the water rather than the well itself—if the use of the water from the well changes, a permit may be required.

Priority Groundwater Management Areas

Pursuant to Texas Water Code § 35.007(a), the TCEQ and the TWDB are charged with identifying areas of the state expected to experience critical groundwater problems for the next 25 years. As a result of SB 313, the Legislature has expanded this time period to 50 years in order to allow for more comprehensive data and correspond with statewide water planning efforts.

SB 313 also authorizes the TCEQ to adopt certain rules related to priority groundwater management areas (PGMAs) and amends provisions related to the creation of a GCD in a PGMA, allowing for consolidation of adjacent PGMAs in certain instances. Late amendments to the bill address situations in which land within a PGMA is proposed for inclusion in a GCD that has already approved an ad valorem tax.

Oil and Gas

The Legislature adopted three oil and gas-related bills that contemplate notice for GCDs. HB 444 requires the TCEQ to notify applicable GCDs of permit applications and contested case hearings for an injection well to dispose of industrial and municipal waste. Similarly, SB 430 adds applicable GCDs to the list of entities the TCEQ must notify when the agency receives information of a potential public health hazard due to groundwater contamination.

Another bill, HB 3328, received a great deal of attention late in the session. This bill outlines provisions for disclosing chemicals and processes used in hydraulic fracturing operations. Fracturing is the process by which a well operator pumps a liquid at sufficient power into a rock formation in order to break apart the rock and reach oil and gas reservoirs. Pursuant to the new bill, well operators must complete a form on each well and submit it to the Texas Railroad Commission for public availability. The form must include the total volume of water used in the hydraulic fracturing treatment and the information from the material safety data sheet for each hazardous chemical used in the treatment. The operator must also provide the Railroad Commission with a list of all other intentionally used chemical ingredients not listed on the form. Disclosure of incidental, accidental, or unknown ingredients is

not required. Entities may withhold certain trade secret information, subject to procedures found in the Texas Government Code and rules to be adopted by the Railroad Commission. The bill applies only to hydraulic fracturing treatment performed on a well for which an initial drilling permit is issued on or after the date that the Railroad Commission's rules first take effect.

Water Conservation

This section addresses a sample of bills dealing with water conservation. As it relates to rainwater harvesting, the Legislature passed a few bills related to various aspects, including HB 3391, HB 3372, and SB 1073, the most comprehensive of these being HB 3391. This bill allows for loans for developments using harvested rainwater, provides for rainwater harvesting technology to be used in certain new state buildings, and encourages cities and counties to provide rainwater harvesting incentives. The TCEQ is required to adopt rules for the installation and maintenance of rainwater harvesting systems used for indoor potable purposes and connected to a public water supply system, and the TWDB must now provide training on the subject (mandatory for staff in certain municipalities and counties).

SB 181 amends RWPG requirements such that each RWP must now include information on projected water use and conservation and the implementation of projects necessary to meet the state's projected water demands. As mentioned previously, the bill also requires the TCEQ and the TWDB, in consultation with the WCAC, to develop a uniform methodology for calculating water use and conservation that will be used in developing water conservation plans and preparing reports.

Another water conservation bill that passed the Legislature this session is SB 449, the water stewardship tax exemption bill. This bill authorizes a tax exemption for property used for water stewardship purposes, outlining nine methods of water stewardship, including implementation of practices that reduce the amount of water used from exempt wells and allowing for groundwater monitoring for data collection purposes in accordance with GMA planning. The Texas Parks and Wildlife Department, in conjunction with the State Comptroller and, if requested, the Texas AgriLife Extension Service, will develop standards for approving such exemptions. As with the wildlife tax exemption, the property must first be qualified under an open space or timber exemption before qualifying for the water stewardship exemption. SJR 16 is the proposed constitutional amendment that implements SB 449.

Local District Bills

The Legislature also passed a number of bills related to individual GCDs. SB 1147 makes nonsubstantive changes to the enabling legislation of various districts (specifically, Guadalupe County GCD, Brazos Valley GCD, Cow Creek GCD, Gateway GCD, Goliad County GCD, Hays Trinity GCD, Irion County WCD, Middle Pecos GCD, Refugio GCD, and Texana GCD), codifying such language in the Special District Local Laws Code. Other legislation, described below, created new districts, modified district boundaries and fees, and amended provisions regarding directors and elections.

Created Districts

The Legislature authorized the creation of two new single-county GCDs this session: Terrell County Groundwater Conservation District (HB 2859) and Calhoun County Groundwater Conservation District (SB 1290). If confirmed by voters in an election, Terrell County GCD will be a tax- and fee-based district with five directors appointed by the Terrell County Commissioners Court and the authority to issue bonds. The district will be excluded from Texas Water Code § 36.121 (excluding certain municipal wells from GCD regulation) and will have the authority to impose production and export fees.

If confirmed by voters in an election, Calhoun County GCD will be a fee-based district with five elected directors. The district will not be empowered to impose a tax, but it may impose production and import fees. Interestingly, Calhoun County GCD appears to be the first district to have a mitigation provision in its enabling legislation. The bill authorizes the district to "assist in the mediation between landowners regarding the loss of existing groundwater supply of exempt domestic and livestock users due to the groundwater pumping of others."

Boundaries

Two districts will have changed boundaries after the session. Barton Springs-Edwards Aquifer CD will exclude certain territory in Bastrop County from its boundaries that was included in the Lost Pines GCD when that district was created in 1999. This bill (HB 1060) is a result of Texas Attorney General Opinion GA-0792 (August 2010), which held that "two different political subdivisions may not exercise jurisdiction over the same territory at the same time and for the same purpose."

Similarly, pursuant to SB 1225, landowners of certain Caldwell County property that is currently included in both the Gonzales County UWCD and Plum Creek CD will have the option of selecting the district they want to have jurisdiction over their property. If the landowner does not choose

a district, it will automatically fall within Plum Creek CD's boundaries.

Finally, HB 801 repeals a provision of Southern Trinity GCD's enabling legislation that requires the district to include at least one county adjacent to McLennan County in its boundaries by September 1, 2011 or be dissolved by the TCEQ.

Fees

The fee provisions in Northern Trinity GCD's enabling legislation were amended in HB 3818, which sets limits of \$1/acre-foot for agricultural use and \$0.20/1,000 gallons for use other than agricultural use on the district's production fees for authorized withdrawals or the amount of groundwater actually withdrawn.

Directors and Elections

In HB 3866, SB 564, and SB 1895, the Legislature set the uniform election date as the date for electing directors of the Hill Country UWCD, Middle Pecos GCD, and Texana GCD, respectively. SB 1895 also removes Texana GCD's power of eminent domain and a provision authorizing the district to contract with a river authority for performing district functions.

SB 987 amends the precinct method of electing directors for Colorado County GCD. Because the district had trouble finding candidates for office who live within the three small towns included in the district, the bill changes these city-limit positions to at-large positions. The bill also specifies that term limits apply to two "full" terms, specific to a director's position.

Finally, SB 1492 amends the director positions of the Real-Edwards Conservation and Reclamation District, providing for four seats from Edwards County, four seats from Real County, and one at-large seat but allowing for all voters to vote on all positions.

Looking Ahead

Although it is much too early to identify subjects that may be considered during the 83rd Legislative Session, GCDs can bet that DFCs will be on the table again in 2013. The Legislature stopped short of adopting provisions that would amend the DFC appeals process, despite requests from some Legislators and stakeholders to do just that. It is also probable that water conservation will once again be at the forefront of legislative issues, particularly if the drought continues.

**TEXAS AND SOUTHWESTERN CATTLE RAISERS ASSOCIATION:
82ND STATE LEGISLATURE REGULAR SESSION SUMMARY**

By Jason Skaggs, Executive Director, Government and Public Affairs, Texas and Southwestern Cattle Raisers Association

During the 82nd State Legislature Regular Session, the Texas and Southwestern Cattle Raisers Association (TSCRA) was directly involved in approximately 6.5 percent of the 6,009 bills filed during the session. Approximately 23 percent of the bills filed were sent to the Governor.

A summary of important legislation TSCRA supported and helped pass during the 82nd State Legislature Regular Session is below.

Priority legislation

SB 18 by Sen. Craig Estes/Rep. Charlie Geren: Reforms state eminent domain laws.

SB 18 requires:

- A public and record vote to initiate eminent domain proceedings.
- Condemning entities to specifically state the public use for which the land is needed.
- Private property only be condemned for public use.
- Entities with eminent domain authority to register with the Comptroller by December 2012.
- Condemning entities to make a bona fide offer in writing based on an appraisal and, if not, pay the landowner's expenses and attorney fees.
- Landowners to be compensated for damages from a loss of direct access to their property.
- Landowners to receive relocation assistance when forced to move off of their property.
- Condemning entities to provide appraisals of the property to landowners during negotiations.
- Landowners, under certain conditions, the right to repurchase their condemned land at the original price if it is not used for the public use it was condemned for within 10 years.

SB 332 by Sen. Troy Fraser/Rep. Allan Ritter: Strengthens landowners' ownership of groundwater below their land.

SB 332 does the following:

- Reaffirms that landowners own the groundwater below their land as real property.
- Entitles landowners to drill for and produce the groundwater below their land.
- Preserves the rule of capture.
- Recognizes that groundwater may continue to be produced and conserved while ensuring fair and impartial regulation of landowners' groundwater ownership rights.

Other important legislation

HB 1808 by Rep. Byron Cook/Sen. Kirk Watson: Continues the Texas State Soil and Water Conservation Board for twelve years.

HB 2694 by Rep. Wayne Smith/Sen. Joan Huffman: Provides more flexibility in the enforcement of state dam safety standards for dams on rural, private property and classified as low or significant hazard.

SB 573 by Sen. Robert Nichols/Rep. Brandon Creighton: Provides more rights for landowners in highly populated counties to have their land released from certificates of convenience and necessity from water and wastewater.

SB 646 by Sen. Robert Nichols/Rep. Byron Cook: Continues the Texas Forest Service for twelve years.

SB 660 by Sen. Juan "Chuy" Hinojosa/Rep. Allan Ritter: Changes the process to determine the desired future conditions (DFCs) of aquifers. SB 660 requires groundwater conservation districts to:

- Consider the groundwater ownership rights of landowners.
- Balance the highest practicable level of groundwater production with conservation.
- Provide more public notice of meetings regarding DFCs.

SB 691 by Sen. Craig Estes/Rep. Tracy King, SB 692 by Sen. Craig Estes/Rep. Doug Miller: Clarifies the criteria for domestic and livestock groundwater well permit exemptions.

**TEXAS FARM BUREAU:
82ND STATE LEGISLATURE SUMMARY**

By Billy Howe, State Legislative Director, Texas Farm Bureau

For the past two years, it was evident that groundwater management would be a major issue this session. Several factors were converging prior to this legislative session to make it a big one for groundwater management: desired future conditions, the Texas Water Development Board and the Texas Commission on Environmental Quality sunset issue, and the ownership of groundwater.

The first-ever desired future conditions (DFCs) were established by local groundwater conservation districts for each groundwater management area in the state. Once DFCs were established to limit the production of groundwater for the next 50 years, it was inevitable some controversy would ensue. Fortunately, most of the controversy was limited to just two of the 16 management areas. Nevertheless, a group of stakeholders, including the Texas Farm Bureau, worked for the past year to identify and offer recommendations to the legislature on changes to the DFC process. All the recommendations made to the legislature to improve the process were enacted. The most significant change was to establish in law what a DFC was to accomplish—the balancing of the need to produce groundwater for our livelihood with the conservation of the resource for the future. The current law provided no such guidance to the groundwater conservation districts. This language is critical to recognizing that groundwater management is not just about conservation but ensuring that those who depend on groundwater will have access to it.

But, the most controversial DFC issue has not been resolved—the issue of how a DFC can be challenged or appealed. This is a crucial issue that must be addressed before the next DFCs are adopted in 2015. As stated above, DFCs establish the amount of groundwater that can be produced over a 50-year period. It is critical that landowners and other stakeholders have a right to challenge DFCs to protect their rights and provide a balance to the decisions made by the groundwater conservation districts.

When state agencies undergo the sunset review process, everything associated with that agency is subject to change. Therefore, with the two leading water agencies under sunset review, the Texas Water Development Board and the Texas Commission on Environmental Quality, it was imperative to stay alert to changes to water policy that would be detrimental to landowners. To complicate matters, the DFC issue was included in the sunset review of the TWDB. However, this proved to be beneficial because the TWDB sunset bill, supported by the Texas Farm Bureau, passed when the individual DFC bills failed.

Undoubtedly, the groundwater ownership issue became the biggest water issue of the session. The issue became elevated when the Edwards Aquifer Authority argued to the court that landowners did not have any ownership of groundwater prior to its capture. Once that argument was made, Texas Farm Bureau and other landowner organizations became very engaged. Senator Troy Fraser and Representative Allen Ritter committed themselves to recognize that landowners own the groundwater below the surface of the land as real property by passing SB 332—no small accomplishment considering the opposition.

Ownership of groundwater as real property, rather than just as personal property after it is captured, does not and should not prevent its regulation, but it does give every landowner a vested property right to drill for and produce groundwater. This vested property right will prevent unfair regulation biased towards historic use, water utilities, and water projects that would leave landowners without a right to the water under their land. Ownership also gives irrigated farmers a vested property right that will maintain their rights to groundwater regardless of what may happen in the future with groundwater regulation. The passage of SB 332 may be marked as one of the major public policy accomplishments of our organization's history.

**TEXAS WATER CONSERVATION ASSOCIATION:
RECAP OF 2011 REGULAR LEGISLATIVE SESSION**

By Dean Robbins, Assistant General Manager, Texas Water Conservation Association

Who said it wasn't going to be a water session? Even though the State budget and redistricting dominated the news, the legislature still found time to file and pass numerous bills related to issues such as the ownership of groundwater, groundwater management, water and wastewater utility regulation, and the sunset of our two favorite state agencies, the Texas Water Development Board (TWDB) and the Texas Commission on Environmental Quality (TCEQ). Groundwater legislation passed includes virtually all of the recommendations of TWCA's Groundwater Committee. Major eminent domain legislation was also passed as expected as well as legislation related to a number of administrative issues for governmental entities. Included in this article is a chart summarizing bills passed considered to be of general interest to TWCA members.

Statistically, this session was not as active as the 2009 regular session when over 8,000 bills were filed and over 1,700 were passed. By comparison about 6,300 bills were filed this session with about 1,500 passed. TWCA tracked about 340 bills this session, down from about 400 in 2009. Included in this article is a summary of bills considered to be of high priority that passed.

There were also some significant casualties during the session:

- Chairman Ritter's proposal to establish a dedicated source of revenue to fund the State Water Plan failed to pass. However, he was successful in passing a proposed constitutional amendment authorizing the TWDB to issue development fund bonds on a continuing basis such that the aggregate principal amount outstanding does not exceed \$6 billion at any one time. This is a critical component for financing the State Water Plan;
- The sunset bill for the Public Utility Commission (PUC) failed to pass, and with it the proposed transfer of the water and wastewater rate program from the TCEQ to the PUC;
- Representative Callegari's major water district clean-up bill died the last weekend of the session; and
- A proposal to increase fees assessed by water districts and water supply corporations to retail customers was stripped from the TCEQ sunset bill in conference committee.

See TWCA's priority legislation summary on the following pages.

Table 1. Priority Legislation, by TWCA

Bill No.	Author/ Sponsor	Summary
HB 628	Callegari Jackson, Mike	Relating to contracts by governmental entities and related professional services and to public works performance and payment bonds.
		Various codes are amended to consolidate and standardize procurement procedures for governmental entities.
HB 1732	Ritter Hinojosa	Relating to the applicability of the constitutional limit on state debt payable from the general revenues of the state to bonds issued by the Texas Water Development Board.
		Chapter 17, Water Code, is amended to ensure that certain bonds authorized by the TWDB are not considered to be state debt payable from general revenue under the Texas Constitution until the legislature makes an appropriation of general revenue to the board to pay the debt service on the bonds. Chapters 15 and 16, Water Code, are amended to prohibit the financing of certain projects until the applicant has completed a water infrastructure financing survey. Also see SJR4.
HB 2226	Truitt Carona	Relating to authorized investments for governmental entities.
		The Public Funds Investment Act (Chapter 2256, Government Code) is amended to require monitoring of rating changes in investments, to define the 2-year training cycle, and to further address authorized investments.
HB 2694	Smith, Wayne Huffman	Relating to the continuation and functions of the Texas Commission on Environmental Quality (TCEQ) and abolishing the On-site Wastewater Treatment Research Council.
		This is the comprehensive sunset bill for the TCEQ. Issues of particular interest include an exemption from dam safety regulation until 2015 for certain dams in rural areas impounding less than 500 acre-feet; transfer of surface casing determinations for oil and gas wells from the TCEQ to the RRC; utilization of compliance history in enforcement and permitting decisions; clarification of the agency's authority to administer surface water rights during droughts and other emergencies; and a requirement to periodically assess the need for additional watermaster programs.
HB 3090	Creighton Nichols	Relating to the frequency of water audits by certain retail public utilities.
		Chapter 16, Water Code, currently requires a retail public utility providing potable water to perform and file with the TWDB every 5 years a water audit computing the utility's water loss. HB3090 requires those retail public utilities receiving financial assistance from the TWDB to perform the audit annually.
HB 3372	King, Tracy Jackson, Mike	Relating to standards for a structure that is connected to a public water supply system and has a rainwater harvesting system.
		Chapter 341, Health and Safety Code, is amended to require the TCEQ and the Texas Department of Health to develop rules for a rainwater harvesting system used for indoor potable purposes and connected to a public water supply system. A person who installs or maintains such a system must be a licensed plumber and certified as a water supply protection specialist. The owner of the public water supply system must be notified before connecting the rainwater harvesting system to the public water supply system. The public water supply system may not be held liable for any adverse health effects of the connection. Also see SB1073.

Table 1. Continued

HB 3391	Miller, Doug Seliger	Relating to rainwater harvesting and other water conservation initiatives.
		Various codes are amended to allow financial institutions to consider making loans for developments that will use harvested rainwater as the sole source of water supply; to require that rainwater harvesting technology be incorporated into the design and construction of certain new state buildings; to address criteria for the installation and maintenance of rainwater harvesting systems that are used for indoor potable purposes and connected to a public water supply system; to require cities and counties to encourage rainwater harvesting; to address prohibitions on rainwater harvesting by property owners associations; and to incorporate the promotion of rainwater harvesting into the water policies of the state.
SB 18	Estes Geren	Relating to the use of eminent domain authority.
		Various codes relating to eminent domain are amended to ensure that a governmental entity may only exercise the authority of eminent domain for a public use; to require a governmental entity to authorize initiation of an eminent domain proceeding through a public meeting; to require all entities with eminent domain authority to document that authority with the Comptroller by 12/31/2012 (or lose it); to require disclosure of certain appraisal information to a landowner; to require a bona fide offer to a landowner that is equal to or greater than the appraised value; to establish procedures for repurchase of property by a landowner when the condemned land is not used for its intended purpose in 10 years; etc.
SB 181	Shapiro Laubenberg	Relating to the reporting of water conservation measures by municipalities and water utilities.
		Chapter 16, Water Code, is amended to require each regional water planning group to report on projected water use and conservation and the implementation of planned projects. The legislature finds that gallons per capita per day is not an accurate measure of water use or conservation without adjustment for certain variables and requires the TWDB and the TCEQ, in consultation with the Water Conservation Advisory Council, to develop a uniform, consistent methodology and guidance for calculating and reporting water use and conservation by a municipality or water utility. Rule-making is authorized as necessary. Timelines are established.
SB 313	Seliger Price	Relating to priority groundwater management areas.
		Chapter 35, Water Code, is amended to change the planning horizon for the priority groundwater management area (PGMA) process to 50 years (current law is 25 years). Language is added to clarify that the TCEQ's rule-making authority for PGMA's also applies to the critical area process that existed before September 1, 1997. Procedures are added to clarify how financing occurs when a PGMA area is added to an existing district. Conforming changes are made to Chapter 36, Water Code.
SB 332	Fraser Ritter	Relating to the vested ownership interest in groundwater beneath the surface and the right to produce that groundwater.
		Chapter 36, Water Code, is amended to recognize that a landowner owns the groundwater below the surface as real property. The landowner is entitled to drill for and produce groundwater subject to the spacing requirements and production limits of a groundwater district. The existence of common law or other defenses to liability under the rule of capture are unaffected. This section does not affect the ability of the EAA or the subsidence districts to regulate in any manner authorized by enabling legislation.
SB 333	Fraser King, Tracy	Relating to election procedures and qualifications of members of boards of directors for water supply or sewer service corporations.
		Chapter 67, Water Code, is amended to establish qualifications and election procedures for board members of water supply corporations.

Table 1. Continued

SB 449	Watson Ritter	Relating to the appraisal for ad valorem tax purposes of open-space land devoted to water stewardship purposes on the basis of its productive capacity.
		The Tax Code is amended to authorize the appraisal of open-space land on the basis of its productive capacity for water stewardship. Practices that may be implemented to promote and sustain water quality and conservation of water resources are designated. The TPWD, with the assistance of the Comptroller, is required to develop qualifying standards. See SJR 16 for the corresponding constitutional amendment.
SB 512	Hegar Creighton	Relating to the qualification of supervisors of a fresh water supply district.
		Chapter 53, Water Code, is amended. Under prior law only the owner of taxable property in a fresh water supply district is eligible for election as a supervisor. Under this amendment a registered voter of the district would also be eligible.
SB 573	Nichols Creighton	Relating to certificates of public convenience and necessity for water or sewer services.
		Chapter 13, Water Code, is amended to establish procedures for the TCEQ to issue a CCN to a retail public utility within the ETJ of a municipality without the municipality's consent; to prohibit the TCEQ from issuing a CCN to a municipality beyond the municipality's ETJ over the objections of a landowner; and to require the TCEQ to grant a petition by the owner of a tract of 25 acres or more to release the tract from a CCN area when the tract is not receiving water or sewer service. The TCEQ may require compensation to the decertified retail public utility. Each of the provisions are bracketed to include or exclude certain counties.
SB 660	Hinojosa Ritter	Relating to the review and functions of the Texas Water Development Board, including the functions of the board in connection with the process for establishing and appealing desired future conditions in a groundwater area.
		This is the comprehensive TWDB sunset bill. The provisions of HB1732, relating to the agency's bonding authority, and SB181, relating to a uniform, consistent method for calculating and reporting water use and water conservation, are incorporated. The bill also amends Chapter 36, Water Code, to define "desired future condition," to codify criteria that districts must consider in establishing DFCs, and to establish procedural requirements for the DFC process. DFC appeals to the TWDB and the TCEQ are further clarified. Changes to the DFC process generally include recommendations of the TWCA Groundwater Committee.
SB 691	Estes King, Tracy	Relating to the exemption from permitting by groundwater conservation districts for certain water wells used for domestic, livestock, and poultry watering purposes.
		Chapter 36, Water Code, is amended to make grammatical changes to the language prohibiting a groundwater district from requiring a permit for a well used for domestic or livestock purposes if the well is located on a tract larger than 10 acres and incapable of producing more than 25,000 gallons per day. This legislation was recommended by TWCA's Groundwater Committee.
SB 692	Estes Miller, Doug	Relating to exemptions from groundwater conservation district permit requirements.
		Chapter 36, Water Code, is amended to clarify that exemptions from permitting apply to the purpose for which groundwater is used, and not to the well itself. This legislation was recommended by TWCA's Groundwater Committee.

Table 1. Continued

SB 693	Estes Price	Relating to permit application and amendment hearings conducted by groundwater conservation districts and the State Office of Administrative Hearings.
		Chapter 36, Water Code, is amended to require a groundwater district to contract with the State Office of Administrative Hearings (SOAH) to conduct a contested case hearing if requested by the permit applicant or other party to the case provided that the party requesting that SOAH conduct the hearing pay all costs of the SOAH contract. The district may still make a final decision on the matter after considering the SOAH recommendations. This legislation was recommended by TWCA's Groundwater Committee.
SB 727	Seliger Beck	Relating to groundwater conservation district management plans.
		Chapter 36, Water Code, is amended to make all references to groundwater conservation district management plans consistent. This legislation was recommended by TWCA's Groundwater Committee.
SB 737	Hegar Price	Relating to the management of groundwater production by groundwater conservation districts.
		Chapter 36, Water Code, is amended to change the term "managed available groundwater" to "modeled available groundwater" and to address how a district may consider actual groundwater production, including exempt use, in making permitting decisions. This legislation was recommended by TWCA's Groundwater Committee.
SB 1480	Hegar Darby	Relating to the regulation of exotic aquatic species by the Parks and Wildlife Department.
		Chapter 66, Parks and Wildlife Code, is amended to restructure and strengthen TPWD's authority to regulate harmful or potentially harmful exotic aquatic plants not normally found in the public waters of the State. The TPWD is required to develop rules to implement this law.
SJR 4	Hinojosa Ritter	Proposing a constitutional amendment providing for the issuance of additional general obligation bonds by the Texas Water Development Board.
		An amendment to the Texas Constitution is proposed to authorize the TWDB to issue certain development fund bonds on a continuing basis such that the aggregate principal amount outstanding does not exceed \$6 billion at any one time. Also see HB1732.
SJR 16	Estes Ritter	Proposing a constitutional amendment providing for the appraisal for ad valorem tax purposes of open-space land devoted to water stewardship purposes on the basis of its productive capacity.
		A constitutional amendment is proposed to support the appraisal of open-space land on the basis of its productive capacity for water stewardship. See SB449.