



# Texas Water Journal

Volume 12 Number 1 | 2021





# Texas Water Journal

Volume 12, Number 1

2021

ISSN 2160-5319

[texaswaterjournal.org](http://texaswaterjournal.org)

THE TEXAS WATER JOURNAL is an online, peer-reviewed journal devoted to the timely consideration of Texas water resources management, research, and policy issues. The journal provides in-depth analysis of Texas water resources management and policies from a multidisciplinary perspective that integrates science, engineering, law, planning, and other disciplines. It also provides updates on key state legislation and policy changes by Texas administrative agencies.

For more information on TWJ as well as TWJ policies and submission guidelines, please visit [texaswaterjournal.org](http://texaswaterjournal.org). As a 501(c)(3) nonprofit organization, the Texas Water Journal needs your support to provide Texas with an open-accessed, peer-reviewed publication that focuses on Texas water. Please consider [donating](#).

## **Editorial Board**

Todd H. Votteler, Ph.D.

Editor-in-Chief

Collaborative Water Resolution LLC

Kathy A. Alexander, Ph.D.

Gabriel Collins, J.D.

Center for Energy Studies

Baker Institute for Public Policy

Ken A. Rainwater, Ph.D.

Texas Tech University

Rosario Sanchez, Ph.D.

Texas Water Resources Institute

Jude A. Benavides, Ph.D.

University of Texas, Rio Grande Valley

Michael Young, Ph.D.

University of Texas, Austin

## **Managing Editor**

Chantal Cough-Schulze

Texas Water Resources Institute

## **Layout Editor**

Sarah Richardson

Texas Water Resources Institute

## **Staff Editor**

September Martin

Texas Water Resources Institute

Kristina J. Trevino, Ph.D.

Trinity University

The Texas Water Journal is published in cooperation with the Texas Water Resources Institute, part of Texas A&M AgriLife Research, the Texas A&M AgriLife Extension Service, and the College of Agriculture and Life Sciences at Texas A&M University.

  
**Texas Water  
Resources Institute**  
*make every drop count*

*Cover photo:* Llano River with fisherman. ©2018 Ray Uherek.

## **Commentary: 87th Texas State Legislature: Summaries of Water-Related Legislative Action**

Sarah Kirkle<sup>1</sup>, Leah Martinsson<sup>2</sup>, Sarah Rountree Schlessinger<sup>3</sup>, Ken Kramer<sup>4</sup>, Alex Ortiz<sup>4</sup>, Perry L. Fowler<sup>5</sup>, Jeff Chapman<sup>6</sup>, Trent Hightower<sup>7</sup>, Kyle Frazier<sup>8</sup>, Todd Votteler (editor)\*

---

**Editor-in-Chief's Note:** September 1 of every odd-numbered year is the date when most new legislation from the most recent session of the Texas Legislature typically goes into effect. With this in mind, the Texas Water Journal invited seven 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 2021 session. The opinions expressed in these summaries are the opinions of the individual organizations and not the opinions of the Texas Water Journal or the Texas Water Resources Institute.

Organizations:

- Texas Water Conservation Association
  - Texas Alliance of Groundwater Districts
  - Texas Water Foundation
  - Sierra Club, Lone Star Chapter
  - Texas Water Infrastructure Network
  - Texas Rural Water Association
  - Texas Desalination Association
- 

<sup>1</sup> Texas Water Conservation Association

<sup>2</sup> Texas Alliance of Groundwater Districts

<sup>3</sup> Texas Water Foundation

<sup>4</sup> Sierra Club, Lone Star Chapter

<sup>5</sup> Texas Water Infrastructure Network

<sup>6</sup> The Chapman Firm PLLC

<sup>7</sup> Texas Rural Water Association

<sup>8</sup> Texas Desalination Association

\* Corresponding editor: [todd@texaswaterjournal.org](mailto:todd@texaswaterjournal.org)

Received 19 July 2021, Accepted 8 August 2021, Published online 24 August 2021.

Citation: Kirkle S, Martinsson L, Schlessinger SR, Kramer K, Ortiz A, Fowler PL, Chapman J, Hightower T, Frazier K, Votteler T. 2021. Commentary: 87th Texas State Legislature: Summaries of Water-Related Legislative Action. Texas Water Journal. 12(1):109-128. Available from: <https://doi.org/10.21423/twj.v12i1.7137>.

© 2021 Sarah Kirkle, Leah Martinsson, Sarah Rountree Schlessinger, Ken Kramer, Alex Ortiz, Perry L. Fowler, Jeff Chapman, Trent Hightower, Kyle Frazier, Todd Votteler. This work is licensed under the Creative Commons Attribution 4.0 International License. To view a copy of this license, visit <https://creativecommons.org/licenses/by/4.0/> or visit the TWJ [website](#).

## Terms used in paper

<b>Acronym/Initialism</b>	<b>Descriptive Name</b>
CCN	Certificate of Convenience and Necessity
DFC	desired future condition
DIR	Texas Department of Information Resources
EDAP	Economically Distressed Areas Program
EPA	United States Environmental Protection Agency
ESPC	energy savings performance contract
ETJ	extraterritorial jurisdiction
GCD	groundwater conservation district
HB	house bill
PUC	Public Utility Commission
SB	senate bill
SUD	special utility district
TAGD	Texas Alliance of Groundwater Districts
TCEQ	Texas Commission on Environmental Quality
TXD	Texas Desalination Association
TOMA	Texas Open Meetings Act
TPWD	Texas Parks and Wildlife Department
TRWA	Texas Rural Water Association
TWCA	Texas Water Conservation Association
TWDB	Texas Water Development Board
TWF	Texas Water Foundation
WSC	water supply corporation

## TEXAS WATER CONSERVATION ASSOCIATION SUMMARY OF THE 87TH LEGISLATIVE SESSION

By Sarah Kirkle, Director of Policy and Legislative Affairs

The [Texas Water Conservation Association](#) (TWCA) is a non-profit association of water professionals and organizations working to promote sound water policy in Texas. TWCA's members provide water and/or wastewater services to a great majority of the state and include river authorities, cities, groundwater conservation districts, flood/irrigation/drainage/water districts, industries, consultants, and others interested in Texas water policy and development.

After a fast and furious 140 days, the 87th Texas Legislature adjourned *sine die*. Legislators filed 7,327 bills, fewer than in the 86th legislative session but still a high number given expected constraints due to COVID-19. Only 1,175 of those bills passed both chambers by *sine die*, providing for a relatively low 16% bill passage rate (the Legislature passed between 19% and 22% during the last three legislative sessions). Governor Greg Abbott vetoed 20 bills, the fewest number of vetoes since 2005, and only one of which TWCA tracked related to performance bonds for public works contracts.

While the legislative session was expected to focus on the budget, redistricting, and pandemic response, legislative discussions took a sharp right turn after Winter Storm Uri. Discussions around the near failure of the state's electric grid largely dominated the legislative docket, followed by various social issues, such as constitutional carry, abortion, and elections. As in past legislative sessions, TWCA closely followed bills that could impact its members. Staff tracked 569 bills and designated 97 of those bills as high priority. Of TWCA's tracked bills, 81 (about 14%) made it to the finish line, with 15 of those being high priority. Summaries of the most significant bills that may be of interest to water professionals are provided below.

### Emergency water operations

In light of widespread power and water outages resulting from Winter Storm Uri, the Legislature passed Senate Bill (SB) 3 (Schwertner/Paddie), an omnibus bill aimed at increasing power and water reliability through weatherization and emergency operation requirements. While most of the bill relates to electric power, the bill expands requirements for emergency water service during a power outage to any retail public utility, exempt utility, or provider or conveyor of potable or raw water to more than one customer. Requirements for emergency water service during a power outage previously only applied to the Houston area, and the bill keeps requirements around Houston largely the same. In doing so, the bill grants flexibility in

meeting requirements of an emergency operations plan, which must be submitted by affected utilities to the Texas Commission on Environmental Quality (TCEQ) by March 2022 and implemented by July 2022. The bill also prohibits certain retail public utilities from imposing late fees or disconnecting service during an extreme weather emergency. Affected utilities must submit information on water and wastewater facilities that qualify for critical load status by November 1, 2021. The bill is effective immediately.

### Surface and groundwater

TWCA's Surface Water Committee, which has more than 150 members, met in advance of the 87th legislative session and considered four issues, ultimately recommending one proposal move forward as part of TWCA's legislative agenda. SB 997 (Nichols/Harris) is a TWCA-initiated bill that creates certainty for all parties to a wholesale water rate appeal by providing for the immediate judicial review of a public interest determination before the Public Utility Commission (PUC) holds a hearing to prescribe a just and reasonable rate. The bill also promotes settlement of disputes by allowing the parties to amend a contract before PUC begins rate proceedings. The bill is effective for petitions filed on or after September 1, 2021.

TWCA's Groundwater Committee also worked in advance of the session to develop consensus-based legislative proposals. More than 150 TWCA members served on the committee, which took up six issues and ultimately recommended two proposals move forward as part of TWCA's legislative agenda. These proposals, one providing a process to petition a groundwater conservation district (GCD) for rulemaking and another clarifying which desired future condition (DFC) should be included in a management plan when a DFC is petitioned, were both included in SB 152 (Perry/Harris). That bill became the main vehicle for groundwater discussions during the legislative session but ultimately failed to reach the finish line due to disputes among policy makers and stakeholders related to the provision on attorney's fees. This legislative session marks the first session in many years where no key groundwater-specific bills passed the Legislature.

Other notable water-related bills that passed include:

- **House Bill (HB) 531 (Walle/Huffman)** requires a landlord to provide written notice to a tenant detailing whether a leased dwelling is located in a 100-year floodplain and other flood information.
- **HB 2225 (T. King/Zaffirini)** requires the Texas Parks

and Wildlife Department (TPWD) to encourage and facilitate the dedication of water rights in the Texas Water Trust and to manage the rights to maximize environmental benefits.

- **HB 2951 (Jetton/Kolkhorst)** limits the authority of a commissioner's court to fill a vacancy on a board of a levee improvement district to a district with an appointed board and to only remove board members previously appointed by the commissioner's court.
- **SB 387 (Schwertner/Wilson)** further authorizes ratepayers who reside outside the corporate limits of a municipally owned utility to appeal an increase in rates when the municipally owned utility takes over the provision of service to ratepayers previously served by another retail public utility. The bill provides certain exceptions.
- **SB 600 (Perry/T. King)** requires a river authority to provide information to TCEQ regarding the operation and maintenance of each dam under the river authority's control. Prescribed information must be provided each year and in the event of significant changes. TCEQ must create and maintain a website that contains the information, subject to federal and state confidentiality laws.
- **SB 601 (Perry/Burrows)** creates the Texas Produced Water Consortium hosted by Texas Tech University to study the economic, environmental, and public health considerations of beneficial uses of fluid oil and gas waste and technology needed for those uses. The consortium consists of the host university, an agency advisory council, a stakeholder advisory council, a technical and economic steering committee, and private entities. The consortium must produce a report by September 1, 2022, that includes suggested policy changes, an economically feasible pilot project for state participation in a produced water facility, and an economic model for using produced water in an economic and efficient way. The agency advisory council and the host university must create a fee structure for private entities to participate and contribute to research and investigation.
- **SB 905 (Perry/Frank)** requires TCEQ to develop a regulatory guidance manual to explain TCEQ rules that apply to direct potable reuse. Direct potable reuse is defined as the "introduction of treated reclaimed municipal wastewater either: (1) directly into a public water system; or (2) into a raw water supply immediately before the water enters a drinking water treatment plant" ([SB 905 2021](#)).
- **SB 1160 (Taylor/Paul)** creates the Gulf Coast Protection District to establish an instrumentality, including bond, tax, and eminent domain authority, for protecting the coast in Chambers, Galveston, Harris, Jefferson, and Orange counties.

- **SB 1642 (Creighton/Canales)**, among other provisions, authorizes a navigation district to respond to and fight a fire, explosion, or hazardous material incident that occurs on or adjacent to a waterway, channel, or turning basin in the district's territory and to assess fees to cover certain expenses.
- **SB 2154 (Schwertner/Paddie)** increases the PUC from three to five members. At least two commissioners must be qualified in the field of public utilities and utility regulation. The bill prohibits a former commissioner from lobbying for one year after ceasing to be a commissioner.

### Transparency and government operations

Despite anticipation that the Legislature might make permanent the temporary disaster exceptions to the Texas Open Meetings Act (TOMA), all bills that would have granted additional flexibility for public meetings by videoconference died during the legislative session. The Legislature did pass several bills related to open records and transparency:

- **HB 872 (Bernal/Menendez)** excepts certain utility customer information from public disclosure unless requested by the customer.
- **HB 1082 (P. King/Zaffirini)** excepts the personal information of elected public officials from public disclosure.
- **HB 1154 (Jetton/Kolkhorst)** requires certain special purpose districts to post prescribed information on a website and on a water bill and amends requirements for public meeting locations for rural area districts.
- **HB 2723 (Meyer/Bettencourt)** requires the Texas Department of Information Resources (DIR) to develop and maintain an easily accessible website that lists each property tax database maintained by a chief appraiser and includes guidance to assist a property owner in identifying the appropriate tax database for their property.
- **SB 1225 (Huffman/Paddie)** requires a governmental body to continue to respond to requests for public information even when it closes its physical offices but requires staff to continue to work remotely. The bill provides that if a catastrophe prevents a governmental body from complying with requests, the body may suspend responses to requests only once for each catastrophe.

Other key bills that impact the operations of government entities include:

- **HB 692 (Shine/Creighton)** prescribes retainage provisions to be included in a public works contract by a governmental entity. In general, the bill provides that retainage may not exceed 10% of the contract price for a public works contract of less than \$5 million and 5% for a contract of \$5 million or more.

- **HB 1118 (Capriglione/Paxton)** amends cybersecurity training requirements to include appointed officials, in addition to local government employees and elected officials, but limits the requirements to those employees and officials who both have access to a local government computer system or database and use a computer to perform at least 25% of the employee's or official's required duties. The bill provides certain exceptions and requires local governments applying for certain grants to comply with cybersecurity training requirements.
- **HB 2581 (Kacal/Hancock)** prescribes how a governmental entity must value price in its consideration of a proposal for a civil works project. Upon request, a governmental entity must provide certain information about the evaluation of an offeror's submission to a request for qualifications for a construction project.
- **HB 2730 (Deshotel/Kolkhorst)** makes comprehensive reforms to the eminent domain process, including relating to a landowner's bill of rights, licensing requirements for persons involved in negotiations on easements or rights-of-way, and various procedural requirements.
- **SB 19 (Schwertner/Capriglione)** prohibits certain contracts between a governmental entity and a company unless the contract contains a written verification from the company that it does not or will not discriminate against a firearm entity or firearm trade association.
- **SB 58 (Zaffirini/Turner)** adds cloud computing services to the definition of personal property for the purposes of government contracting.
- **SB 157 (Perry/Craddick)** allows certain school districts, municipalities, counties, and water districts to electronically file an abbreviated annual eminent domain report when information previously reported is unchanged.
- **SB 726 (Schwertner/Leman)** increases from two to three the number of actions a condemning entity must take to demonstrate actual progress toward the public use for which the land was condemned for the purposes of determining the right to repurchase condemned real property. The bill makes exceptions for a navigation district, port authority, or a water district implementing a project in the state water plan.
- **SB 968 (Kolkhorst/Klick)** places limitations on the authority of political subdivisions related to a pandemic and prohibits use of a vaccine passport by a governmental entity, among other health-related provisions.

## Looking ahead

As of August 2021, Governor Abbott has called legislators back for two special sessions to address elections and other key topics important to the governor. Because most House Democrats left the state, the House of Representatives has been unable to meet quorum requirements necessary to conduct business. Governor Abbott is expected to call at least one more special session to address redistricting now that the state has received data from the U.S. Census Bureau necessary to update political district maps. While Governor Abbott has not included items on the call that directly impact TWCA members, TWCA continues to monitor bills, such as public funds on lobbying, to see how they might impact TWCA's work in the water policy arena. Also during the interim, all of the key water-related agencies (TCEQ, Texas Water Development Board [TWDB], PUC, and the Texas State Soil and Water Conservation Board [TSSWCB]) are scheduled for review by the Sunset Advisory Commission, a comprehensive review process that identifies key management and statutory changes intended to make the agencies operate more efficiently and effectively. So while the 87th may not have been a water session, the 88th looks like it will be flooded with water issues.

## REFERENCES

- S.B. 905, 87th Legislature, Regular Session (Texas 2021). Available from: <https://capitol.texas.gov/BillLookup/History.aspx?LegSess=87R&Bill=SB905>

## TEXAS ALLIANCE OF GROUNDWATER DISTRICTS SUMMARY OF THE 87TH LEGISLATIVE SESSION

*By Leah Martinsson, Executive Director*

*Texas Alliance of Groundwater Districts (TAGD) is a 501(c)3 created in 1988 to provide to a centralized means for GCDs to stay current on the quickly evolving world of groundwater science, policy and management. TAGD currently has 90 GCD members and 38 associate members.*

The 87th Texas Legislature adjourned *sine die* on May 31 after a legislative session that was truly like no other. The early months of the legislative session were notably lacking in both ceremonial and social activities as a result of COVID-19 restrictions. Indeed, COVID-19 cast a long shadow throughout the legislative session. The first order of business was establishing COVID-19 pandemic protocols for the two chambers to ensure safe functioning. After a few weeks with most everyone entering the capitol getting tested and wearing masks, protocols began to change with increases in vaccination rates and the removal of the mask mandate. As anyone walking the halls of the capitol could attest, the pandemic impacted access and participation in the legislative process throughout the legislative session. Early on, many anticipated that the COVID-19 pandemic would result in a decrease in the total number of bills filed as compared to prior legislative sessions. That was not the case however, with over 7,300 bills filed—slightly fewer than the 86th legislative session but more than either the 84th and 85th legislative sessions. Although, it likely did impact the overall passage, with only 1,175 bills (~16%) passing both chambers.

### Big picture priorities and leadership

In the months leading up to the legislative session, many had anticipated that the budget, redistricting, and COVID-19 response would dominate the session. That did not play out quite as planned for several reasons. Winter Storm Uri and the near failure of the state's energy grid caused a swift shift in priorities and quickly became a primary focus of the legislative session. While the state's budget outlook looked grim last spring, it had improved in the months leading up to the legislative session. Also, the Legislature is charged with redrawing the Texas electoral maps every 10 years, which falls this year, but delays in census data meant that this redistricting was not completed. This was not a surprise, and Governor Abbott will call a special session later this fall to complete redistricting.

On the first day of the legislative session, the Texas House of Representatives elected Representative Dade Phelan (R-Beaumont) as Speaker of the House. This meant new committees,

new committee chairmen, and a new power structure in the House. Of particular significance to TAGD and the groundwater stakeholders, Representative Tracy King (D-Uvalde) was newly appointed as chair of the House Natural Resources Committee. A long-serving House member with an extended tenure on the House Natural Resources Committee, Representative Tracy King brings a deep understanding of groundwater to this role. On the Senate side, Lieutenant Governor Dan Patrick (R-Houston) opted to merge the Agriculture Committee with the Water and Rural Affairs Committee and appointed the experienced Senator Charles Perry (R-Lubbock) to chair that committee for the third time.

### Groundwater bills

No one really expected the 87th legislative session to have a significant focus on groundwater, which was demonstrated by the relatively few groundwater bills that were filed. A number of those bills were refiled bills, reflecting unsettled issues from prior legislative sessions. COVID-19 prevented committee hearings on interim charges, with only a single Senate Water and Rural Affairs committee hearing in January 2020 where groundwater management was discussed. This convergence of factors made for a legislative session that—for the first time since the Texas Water Code underwent major revisions during the 75th legislative session in 1997—there were no changes to Chapter 36 enacted. However, just as many of these bills were continuations of discussions from prior legislative sessions, it is likely that many of the groundwater bills from the 87th will return.

Throughout the 87th legislative session, TAGD tracked legislation that could impact GCDs and groundwater management. TAGD has a legislative committee that tracks pending legislation and determines if a bill warrants action by TAGD. This committee will then vote on relevant bills and will only take a position if a 75% consensus standard is achieved. This is subject to confirmation by TAGD's Executive Committee.

There were six bills filed that sought to make substantive changes to the provisions of Chapter 36 of the Texas Water Code. While one of these bills was an omnibus bill with four distinct sections, this nevertheless represented fewer Chapter 36-related bills than in prior legislative sessions (15 bills in the 86th, 25 in the 85th, and 23 in the 84th). There were also several other bills filed that implicated groundwater policy and GCD operations. In total, TAGD identified 10 statewide priority groundwater bills for tracking during the legislative session. Of those 10 bills, none crossed the finish line.

In addition to priority groundwater bills, TAGD tracked selected bills affecting individual GCDs, general water, and administrative law/governance of political subdivisions for its membership. In total, TAGD tracked over 120 bills of interest to GCDs.

### ***SB 152/HB 668***

The omnibus SB 152/HB 668 (Perry/Harris) was the main focus of groundwater-related discussions leading up to and during the legislative session. The bill included four distinct parts. First, it would have changed the mandatory award of attorney's fees to groundwater conservation districts when a district prevails under Section 36.066(g) to be discretionary. Second, it would have clarified which DFC should be used in a GCD's management plan if the adopted DFC is petitioned to be unreasonable under the provisions of Chapter 36. This provision came out of the consensus process conducted by TWCA's groundwater committee in which TAGD and many TAGD members participated. Third, the bill would have added a new section to Chapter 36 allowing a person with groundwater ownership to petition their GCD to adopt or modify a district rule. This provision also achieved consensus at the TWCA groundwater committee. Lastly, SB 152 would have added a new section to Chapter 36 to require an applicant for a well permit application or amendment to provide notice to each person with a real property interest in groundwater beneath the land within the space prescribed by the district's spacing rules for the proposed or existing well, with certain exceptions.

TAGD voted to support three of the four components of SB 152—all except the proposed change to the attorney's fees provision contained in Section 36.066(g). Bills to modify the attorney's fees provisions of Chapter 36 have been filed for at least the past three legislative sessions and have consistently reflected a point of disagreement, with TAGD opposed to such a change. After SB 152 passed the Senate with the provision to change attorney's fees intact, a committee substitute was offered in the House Natural Resources Committee that removed that change. That committee substitute garnered support from TAGD, was voted favorably from committee, and subsequently passed the full House. Ultimately, however, the Senate did not vote to concur or appoint a conference committee on the version of the bill returned to the Senate. As a result, the entire bill died. While it is still too early to make predictions, it does appear likely that the provisions of this bill will again be part of interim discussions and portions of the bill may be refiled in the 88th legislative session.

### ***Other groundwater bills***

Because groundwater bills that are not successful one session have a habit of returning in future sessions, it is worth briefly

mentioning the other bills from the 87th legislative session that would have modified Chapter 36. These included:

- **HB 2851 (Lucio)** would have required TWDB to calculate the managed sustained groundwater pumping of the state's aquifers as a way to provide greater context to the total estimated recoverable storage number. This bill was a refile from earlier legislative sessions, and the concept originated in the TWCA consensus process. TAGD supported this bill. This bill was approved by the House but did not receive a hearing in the Senate Water, Agriculture, and Rural Affairs Committee.
- **HB 3619/SB 946 (Bowers/Eckhardt)** would have added registered exempt wells to those to be considered in permitting decisions. Similar versions of this bill have been filed in prior legislative sessions and first emerged through the TWCA consensus process. TAGD supported this bill. Like HB 2851, this bill was approved by the House but did not receive a hearing in the Senate Water, Agriculture, and Rural Affairs Committee.
- **HB 966 (Burns)** sought to eliminate the mandatory award of attorney's fees under Section 36.066(g) and 36.102(d). TAGD opposed this bill. This bill did not receive a hearing in the House Natural Resources Committee.
- **HB 3972 (T. King)** sought to add a bonding requirement for petitioners other than the applicant in a contested case hearing to cover both the district's and applicant's costs (SB 1314 [Lucio] included a similar but not identical concept). TAGD was neutral on this bill. This bill was voted favorably from the House Natural Resources Committee but did not receive a vote in the House.
- **HB 3801/SB 2157 (Metcalf/Creighton)** contained the same provision regarding unreasonable DFCs as was included in SB 152. TAGD supported this bill. This bill was approved by the House but did not receive a hearing in the Senate Water, Agriculture, and Rural Affairs Committee.
- **HB 2103 (Bowers)** would have clarified that meetings of GCDs within groundwater management areas are subject to provisions regarding video and telephonic meetings contained in the Texas Government Code Section 551.125 and 127. This bill was approved by the House but was not referred to a committee in the Senate.

### ***Groundwater-adjacent bills***

While not directly affecting Chapter 36 of the Texas Water Code, another bill that was filed this legislative session and received attention was HB 2095 (Wilson). This bill would have directed the Bureau of Economic Geology at the University of

Texas at Austin to conduct studies of surface water and groundwater to improve on data gaps, integrate models to characterize water resources, and make determinations on water availability. In a lengthy Senate Water, Agriculture, and Rural Affairs Committee hearing, questions were raised regarding potential confusion and overlap with other legislatively funded models relied on for the regional and state water planning process, and the bill was left pending in committee. However, the dialogue on this topic suggests that how to best fill and fund data and modeling gaps, including interactions between groundwater and surface water, could be a subject for interim study.

Finally, a bill with potential future implications for groundwater management that did pass this legislative session was SB 601 (Perry/Burrows). This bill creates the Texas Produced Water Consortium at Texas Tech University, which will study the economic, environmental, and public health aspects of beneficially using water produced during oil and gas operations and will recommend a pilot project. The potential to reuse produced water could provide a viable alternative to disposal through underground injection and may offer future opportunities for beneficial use outside the industry to meet water demands, if the produced water is treated to meet all water quality and groundwater protection standards.

### Government bills

After over a year of countless meetings and hearings held virtually, pursuant to Governor Abbott's temporary suspension of certain provisions of TOMA, it was anticipated that the 87th legislative session would bring changes to TOMA that would provide additional opportunities for governmental entities to utilize virtual meetings. Several bills were filed that would have granted governmental entities this increased flexibility, and there was early movement of those bills at the committee level. However, as the legislative session progressed, these efforts met resistance in the Senate. As a result—and pursuant to Governor Abbott's recent declaration—the suspension of certain provisions of TOMA will expire on September 1 and governmental entities will be required to fully comply with the unchanged TOMA.

There were, however, several bills affecting government operations and transparency that did become law and were of interest to TAGD members:

- **HB 1118 (Capriglione/Paxton)** expands the cybersecurity training requirement to include appointed officials while limiting the requirement only to those employees and officials that have access to the government's computer system and who use a computer to perform at least 25% of their required duties.

- **HB 1154 (Jetton/Kolkhorst)** requires certain special purpose districts to post specified information on a website. It also amends requirements regarding public meeting locations for districts in rural areas.
- **HB 1082 (P. King/Zaffirini)** exempts certain personal information of elected public officials from public disclosure.
- **SB 1225 (Huffman/Paddie)** provides that a governmental entity may only suspend responses to open records requests once for each declared catastrophe. It also requires that a governmental entity make a good faith effort to continue to respond to open records requests even when it closes its administrative offices but requires remote work.
- **HB 2723 (Meyer/Bettencourt)** requires DIR to develop and maintain a property tax database on the internet and requires that tax notices from taxing entities reference how to access that local property tax database.

### Looking forward

As of August, there is a special session underway that was called by Governor Abbott to address election integrity, bail reform, and a few other key topics. Next up for the Legislature will be another special session later this fall to complete redistricting. It is unclear if redistricting will impact the timing for issuance of interim charges by Speaker of the House Dade Phelan and Lieutenant Governor Dan Patrick, which typically occurs late in the fall. Almost certainly, the upcoming interim will see the return of in-person interim hearings on those charges.

To further TAGD's mission to promote and support sound groundwater management based on local conditions and good science, TAGD will continue to engage in groundwater-related interim charges and associated policy discussions. TAGD will also be monitoring the upcoming sunset review process for TWDB and TCEQ. Given the fate of groundwater legislation during the 87th legislative session and continuing pressure caused by population growth on the water resources of the state, it would be unsurprising to see a strong focus on groundwater in the 88th legislative session.

## WATER, RESILIENCE, AND EQUITY IN THE 87TH TEXAS LEGISLATURE

By Sarah Rountree Schlessinger, Texas Water Foundation, Chief Executive Officer

*Texas Water Foundation (TWF) is a nonpartisan 501(c)(3) nonprofit that equips decision makers with tools to lead Texas into a sustainable water future.*

In a typical legislative season, a certain distribution of subjects can be expected. Some are anticipated and developed over months of interim hearings, some focus on advancing a special interest, some are designed to retain voting segments, and a handful can be best described as left fielders. The 87th Texas Legislature was not typical, and the probability of a successful water agenda was murky at best. The Legislature convened following a tense change in administration, at the height of the COVID-19 pandemic, and had barely named its new Speaker of the House when a catastrophic winter storm brought the state to a grinding halt. Interim hearings were not held, party politics were loud, and where consensus efforts presented legislation, the urgency of disaster took priority.

Of the 7,327 bills filed during the 87th Texas legislative session, almost 200 related to or impacted water in Texas. Atypical in every way, it was surprising to see the volume of water-related legislation filed this season, but unsurprising to see few cross the finish line.

Beyond the water bills that were filed or passed, three unusual observations can be made of this legislative session that might inform where water policy goes during special sessions and beyond:

1. “Resilience” and “climate variability” made appearances in several pieces of legislation;
2. Texas almost made permanent virtual participation in public meetings; and
3. The significance of Winter Storm Uri’s water security crisis was largely absent.

### The emergence of resilience

A word of particular resonance this year found its way into the Legislature again. Resilience, a term used across disciplines from engineering to psychology, was cited in 32 different pieces of legislation. Of those, 25 were infrastructure-, energy-, or water-related. The 86th Texas Legislature saw similar uses of the term, whereas the 85th Texas Legislature saw almost none. Whether referencing Winter Storm Uri, past disasters, or the recognition of the need to plan, it is evident that the ability to recover and the role of critical infrastructure has made an inroad into public debate.

Related to the emergence of resilience is the slow introduction of bills that reference climate change — but only a handful of the bills called it so. Instead, about 20 bills reference

planning for “climate variability,” “danger of climatic activity,” “projected changes in weather,” “weather extremes,” and “abnormal weather conditions.” The 86th Texas Legislature, on the other hand, saw a greater number of bills that reference climate change specifically. Whatever the term, planning for the impact of climate change and references to water security have established a small but significant momentum.

### Transparency, equity, and access

In response to the COVID-19 pandemic, Governor Abbott issued a temporary disaster exception to TOMA allowing governmental bodies to conduct meetings by telephone or video conference. In a surprising attempt, several bills were filed that would make permanent the ability to hold public meetings by videoconference. While none of those efforts passed, and the relaxed provisions of the Open Meeting Act are expected to end on September 1, the discussion on best practices for public participation poses interesting questions for Texas water.

With the passage of the 1997 SB 1, Texas fundamentally shifted its water planning from a top-down to a bottom-up approach. Texas’ decentralized, stakeholder-driven planning is a celebrated model and plays well with the concept of local control. It is also, however, premised in opportunity for public input. With increasingly urgent calls for diversity, equity, and inclusion, to what extent could the permanent expansion of TOMA support diverse and equitable participation in important public meetings? Despite the financial and technical concerns held by public entities, pandemic learning might suggest that virtual opportunities for public input increase and improve participation.

### Winter Storm Uri and funding

Despite the emergence of the terms “resilience” and “climate variability,” the 87th Texas Legislature was audibly silent on the significance of the water security disaster that ensued after Winter Storm Uri. Committee and floor discussions focused on accountability for the energy grid failures and addressed water outages in terms of emergency response, calling for weatherization and emergency operation requirements. But almost 15 million Texans were without potable water for over a week, and many thousands remained without water long after the pipes had thawed. There was no discussion on why the water outages were as significant as they were, why certain communities were more impacted than others, and where investment in public infrastructure is needed to make us more resilient for future disasters.

Winter Storm Uri exposed more than the need to plan for disasters. It exposed a fragile and aging infrastructure that impacts every aspect of Texas' economy, health, and security. As utilities and state agencies perform after-action reviews, TWF expects that discussion to emerge. Looking forward, Texas can only hope that the Legislature will consider allocating American Rescue Plan Act of 2021 funds to invest in a resilient water future.

## WADING THROUGH A NON-WATER SESSION

By Ken Kramer, Water Resources Chair, and Alex Ortiz, Water Resources Specialist

*The Lone Star Chapter of the [Sierra Club](#) is the state-level arm of the national grassroots environmental organization. Organized in 1965, the Lone Star Chapter represents over 29,000 Texans committed to the protection and enjoyment of the state's natural resources. The Lone Star Chapter has been actively lobbying the Texas Legislature on water and other issues for over 50 years.*

Conventional wisdom would say that the regular session of the 87th Texas Legislature was not a “water session.” Indeed, compared to some previous legislative sessions (such as in 1997 and 2019), water issues were not the dominant topics of this year’s regular session, nor were they among the priorities identified by the presiding officers of the House and Senate or the governor.

However, virtually every regular session of the Legislature sees numerous significant water-related bills introduced and discussed, and this session was not an exception. The reason for the biennial outpouring of water bills is simple: water is a critical issue in a state that endures endless cycles of drought and flood, continuing assaults on water quality, and the need to provide water for an ever-growing population.

In addition to the appropriations bill, which funds state water agencies and the entirety of state government, approximately 200 water-related pieces of legislation were filed in this “non-water session.” This total does not include the large number of bills filed during the session—and indeed every session—creating municipal utility districts or similar districts to facilitate water and wastewater service for real estate development in unincorporated areas of Texas counties.

The topics those 200 bills covered ranged widely, including: groundwater management; transparency of water information; preservation of flowing rivers; surface water management; maintenance of water service during extreme events such as winter storms; disposition and use of produced water from oil and gas operations; state financial assistance for water and wastewater services in economically distressed areas; water quality protection; soil and water conservation; water and wastewater rates; and others, including some specific to geographic areas or watersheds.

Of course, not all of the 200 bills were acted on. Only about 35 of these bills actually passed and were sent to the governor. None of those were vetoed.

### Groundwater legislation

In general, there was no pattern as to which water bills passed and which did not, and no one category of water issues dominated the bills that were successful. An exception was

groundwater management legislation. Only one stand-alone groundwater bill passed: SB 1441 (Campbell/Lopez), which dealt with water withdrawals from the Edwards Aquifer to supply a military installation.

Although the reasons for the outcomes of specific groundwater bills varied, one factor was a clear message from Senator Charles Perry, Chairman of the Senate Committee on Water, Agriculture, and Rural Affairs, that the fate of some groundwater bills would be affected by whether he would be successful in getting changes in the law governing the awarding of attorney’s fees and other costs incurred in cases where the decisions of GCDs were challenged in court. Senator Perry has tried for three legislative sessions to prevent GCDs from automatically being awarded those fees and expenses in court cases where they prevail, and he was not successful in achieving that goal this session. Consequently, groundwater bills supported by GCDs or other groups that had passed the House did not get Senate hearings or otherwise achieve final Senate passage.

Conversely, the fall from power of a former legislative chairman in the House resulted in the demise of legislation attempting to study connections between groundwater and surface water. This legislative session, Representative Lyle Larson lost the chairmanship of the House Natural Resources Committee, a position he held in the previous two sessions. Although HB 2652 (Larson) was reported out of the Natural Resources Committee, it was stymied in the House Calendars Committee and never reached the floor. HB 2652 would have established an advisory board to study surface water and groundwater interaction. Apparently, Representative Larson’s failure to back the right horse in the race for Speaker of the House knocked him and his bill off the saddle. That was unfortunate. The bill had widespread support, including the backing of environmental organizations.

### Transparency and accessibility to water information

Groundwater management was not the only water issue left largely unaddressed this legislative session. As Texas began ramping up its COVID-19 vaccination program, the Legislature began to think of the state’s transition to being open again. This prompted a new interest in environmental agency transparency. While Governor Abbott’s executive orders on the pandemic were in effect, TCEQ and other agencies were posting permit applications online. In the wake of the pandemic, there has been a greater focus on information access for transparency purposes. However, two bills that aimed to provide greater transparency for water quality data—HB 2990 and HB 1143—ultimately did not pass.

HB 2990 (Morales Shaw) would have required TCEQ to make water rights and other environmental permit applications available to the public online. Online availability would have brought public access to permit applications in line with what the governor had required of state agencies while his COVID-19 orders were in effect and would have brought permitting transparency into the 21st Century. This would have benefitted community stakeholders by not requiring them to physically go somewhere (typically a public library) to see an application.

HB 1143 (Ramos) would have required TCEQ to create and maintain a public-facing website providing updates on waterborne pathogen data for waterbodies where recreation occurs. This bill likely came as a response to the rare instances of infections from deadly waterborne pathogens (specifically *Naegleria fowleri*) in Texas waters. Such pathogens were linked to the death of one six-year-old boy near Lake Jackson in 2020 ([Associated Press 2020](#); [Kessler and Associated Press 2020](#)). While these specific infections are rare, they also carry a fatality rate of 97% ([CDC 2020](#)). The bill may also have been used to provide state-level data on cyanobacteria (commonly called blue-green algae) in the Highland Lakes. Cyanotoxins from these bacteria have already resulted in the illness and death of several dogs in addition to posing threats to human health ([LCRA 2021](#)). Although HB 1143 and HB 2990 did not pass this legislative session, no doubt the issues raised by these legislative proposals will be discussed again in future sessions.

One piece of water-related legislation that did have a transparency aspect did pass: HB 531 (Walle/Huffman). HB 531 sets requirements for a landlord to give notice to a tenant regarding property being rented that may be located within what is defined as the 100-year floodplain.

### Texas Parks and Wildlife water-related legislation

Environmental groups, hunting and angling organizations, and other conservation and public interest groups strongly pushed two pieces of legislation related to the role of TPWD on water issues. Indeed, these bills were priorities for the Sierra Club. One bill passed; the other did not.

HB 2225 (T. King/Zaffirini) was successful. This legislation directs TPWD to “encourage and facilitate the dedication of water rights in the Texas Water Trust through lease, donation, purchase, or other means of voluntary transfer for environmental needs, including for the purpose of maintaining or improving (1) instream flows; (2) water quality; (3) fish and wildlife habitat; and (4) bay and estuary inflows” ([HB 2225 2021](#)). HB 2225 also authorizes TPWD to manage rights in the Texas Water Trust, just as a private holder of a water right would be able to do to protect that right from infringement by others and to operate that water right to serve its intended purpose (in this case, environmental flows). The management of those

rights must be consistent with the dedication of those rights to the Texas Water Trust and agreed to by the holder of the water right. The purpose of this legislation is to make the existing Texas Water Trust, a mechanism for protecting instream river flows and freshwater inflows to coastal bays and estuaries, more robust and effective in achieving its purpose.

On the other side of the ledger, HB 2716 (T. King) passed the House but received no consideration in the Senate. HB 2716 was legislation to restore the authority of TPWD to request and be a party in a contested case hearing on proposed surface water rights and other TCEQ permits such as wastewater discharge permits. TPWD had this authority for over 25 years prior to 2011, when one obscure sentence in an amendment to the TCEQ “sunset bill” (HB 2694, 82nd Texas Legislature) was added on the House floor to prohibit any state agency from contesting a TCEQ permit. The effort to restore the right of TPWD to protect its properties (such as state parks and wildlife management areas) as well as fish and wildlife resources from negative impacts of water diversions and pollution discharges was thwarted by organizations such as the Texas Chemical Council, the Texas Association of Manufacturers, and Texas Independent Producers & Royalty Owners. However, this issue will come back.

### Water legislation addressing oil and gas activities

Three pieces of legislation on water issues related to oil and gas operations were enacted and signed by the governor, the most significant being SB 601 (Perry/Burrows). This bill created the Texas Produced Water Consortium. The purpose of the consortium is “to bring together information resources to study the economics of and technology related to, and the environmental and public health considerations for, beneficial uses of fluid oil and gas waste”<sup>1</sup> ([SB 601 2021](#)). These wastes, sometimes referred to as produced water, are a byproduct of the extraction of oil and natural gas through fracking and traditional oil and gas production. Produced water typically includes brackish or saline water and other constituents, and in the case of fracking operations, even hazardous chemicals.

SB 601 passed with overwhelming bipartisan support in both the Senate and the House. There was substantial engagement by Sierra Club and other environmental groups on SB 601, especially concerning the initial exclusion of environmental interests and TPWD in the work of the consortium. As filed, the consortium would have focused entirely on the economic and technological feasibility of using produced water for beneficial purposes. As enacted, however, SB 601 includes environmental considerations and more robust stakeholder engagement.

<sup>1</sup> The bill uses the phrase “fluid oil and gas waste” to refer to produced water, as that term is defined in Section 122.001, Natural Resources Code.

The consortium will be composed of the host university (Texas Tech University), members that pay a membership fee, an agency advisory council made up of state agency-appointed representatives, a stakeholder advisory council, and a technical and economic steering committee. Each part of the consortium will be responsible for overseeing a different body of the consortium's work, with Texas Tech bearing the primary management responsibility. Additionally, the Texas Produced Water Consortium is obligated by law to consult with the existing New Mexico Produced Water Research Consortium on research, data, and any other matter related to the consortium.

The consortium membership costs will be developed by Texas Tech along with the agency advisory council, and members will have access to the consortium's research data proportional to their membership level. While some data will be made available to the public, other data will be protected by these membership agreements. Texas Tech will appoint paying members to the stakeholder advisory council, including members from oil and gas industry, agricultural interests, water utilities, landowners and water right holders, and environmental interests. If no selected member of the consortium matches a given interest, then the consortium may appoint someone from outside its membership to represent that interest.

The consortium must produce a report by September 1, 2022 that includes: "suggested changes to laws and administrative rules to better enable beneficial uses" of produced water ("including specific changes designed to find and define additional beneficial uses"), "guidance for establishing [produced water] waste permitting and testing standards," "a technologically and economically feasible pilot project for state participation in a facility designed and operated to recycle" produced water, and "an economic model for using [produced water] in a way that is economical and efficient and that protects public health and the environment." ([SB 601 2021](#))

Whether this report will provide all the information necessary to evaluate possible beneficial uses of produced water is a concern, especially given that there are several constituent chemicals in produced water that lack US Environmental Protection Agency (EPA) approved analytical methods, toxicity, and/or radioactivity data. Suggesting changes to law or rules, especially in a way that could encourage additional untreated "beneficial use" discharges enabled by 40 CFR § 435 Subpart E, would be incredibly risky for the health of Texas waters, wildlife, and communities. However, the guidance establishing testing and permitting standards that are sufficiently protective of human health and the environment will be key to a safe regulatory scheme. What remains unclear is how, if at all, EPA will be engaged with the consortium.

In addition to SB 601, HB 3516 (T. King/Perry) was enacted this legislative session to give additional direction to TCEQ in adopting rules to govern the treatment and recycling of fluid

oil and gas waste, including requiring minimum siting standards for recycling pits. Also, HB 2201 (Ashby/Nichols), as enacted, requires the Railroad Commission of Texas to establish standards for permissible locations for commercial oil and gas waste disposal facilities, and these standards must take into account whether the location proposed for a disposal pit has a history of flooding.

### Responding to the winter storm: SB 3

An unexpected issue that became a priority in this legislative session was the need to respond to the failure of the state's electric grid and the subsequent failure of many water systems in the state as power was shut off or was intermittent during the winter storm that hit Texas in February. One of the bills filed and ultimately passed in response was SB 3 (Paddie/Schwertner). Although most of that bill dealt with weatherization of electric generating and natural gas facilities and other issues regarding operation of the grid and gas facilities, SB 3 also addressed the topic of emergency operations of retail public water utilities and wholesale water utilities.

The basic provisions of SB 3 in regard to retail and wholesale public water utilities set a standard for emergency operation of those water utilities; require each utility to adopt an emergency preparedness plan that must be submitted to and approved by TCEQ; enumerate possible components of such a plan; require TCEQ to create an emergency preparedness plan template; and require TCEQ to adopt rules to implement this part of the legislation. SB 3 as it passed the House included a provision authorizing TWDB to provide financial assistance to political subdivisions for projects to weatherize water and wastewater facilities, but that provision was not included in the bill as it finally passed. Thus, the onus is still on each water utility to make and finance its own emergency preparations, and the Legislature did not pass any blanket state law requiring that water utilities be granted critical load status during emergencies affecting the electrical service providers.

### Funding the economically distressed areas program

A notable legislative action this session was the appropriation of additional debt service to TWDB for the Economically Distressed Areas Program (EDAP) via SB 1 (Nelson/Bonnen). EDAP is a program to provide state financial assistance for colonias along the Texas border with Mexico and other low-income communities elsewhere without adequate economic resources to provide basic water and wastewater services. The Legislature and the voters of Texas approved an additional \$200 million in bond authorization for EDAP in 2019 because the program had committed all previously authorized bond money to qualified applicants. However, the debt service for those bonds

comes out of general revenue, so additional funds needed to be appropriated for that purpose to allow TWDB to issue any new bonds.

The 87th Legislature responded by granting TWDB's exceptional item request for almost \$2.6 million in new debt service for EDAP and further sweetened the pot with another \$3.6 million, for a total of roughly \$6.2 million in additional debt service. That should allow TWDB to issue over \$70 million of the authorized \$200 million in EDAP bonds. The new appropriation for EDAP was a priority for the Sierra Club during the legislative session. This additional money will be a significant boost to a program that is important in achieving greater equity in the use of state funds for the provision of water and wastewater.

### Other water-related legislation of note

Some other water-related bills of interest to environmental and other organizations were enacted this legislative session. One of those was SB 905 (Perry/Frank), which requires TCEQ to develop a guidance document for those water utilities who wish to pursue direct potable reuse of wastewater, potentially an important part of meeting future water supply demands. Another bill, SB 1118 (Johnson/Wilson), authorizes TSSWCB to create an On-the-Ground Conservation Program to facilitate landowners in implementing soil conservation measures that—among other benefits—conserve and manage water resources and prevent and manage flooding.

Unfortunately, another environmentally important bill, Representative Tracy King's HB 4146—known unofficially as the “pristine waters bill”—passed the House but was never considered in the Senate. That bill would have prevented direct wastewater discharges, with some exceptions, into certain streams with extremely low or no levels of phosphorous in order to maintain high water quality in those streams.

### CONCLUSION

The Lone Star Chapter of the Sierra Club's review of water legislation in the regular session of the 87th Texas Legislature, though not comprehensive, reinforces the point that even when water is not considered a priority issue in a legislative session, the range of water legislation introduced and water issues debated is extensive. Water remains a fundamental concern of Texas lawmakers. Although water may not be a dominant issue in any one legislative session, water bills are something that legislators have to wade through each session.

### REFERENCES

- Associated Press. 2020 Sept 26. Deadly microbe water warning lifted for all but 1 Texas city. CBS Austin. Available from: <https://cbsaustin.com/news/local/deadly-microbe-water-warning-lifted-for-all-but-1-texas-city-09-26-2020>.
- [CDC] Parasites — Naegleria fowleri — Primary Amebic Meningoencephalitis (PAM) — Amebic Encephalitis. 2020. Atlanta (Georgia): Centers for Disease Control and Prevention. Available from: <https://www.cdc.gov/parasites/naegleria/general.html>.
- H.B. 2225, 87th Legislature, Regular Session (Texas 2021). Available from: <https://capitol.texas.gov/BillLookup/History.aspx?LegSess=87R&Bill=HB2225>.
- Kesslen B, Associated Press. 2020 Sept 29. Texas city where boy, 6, died of brain-eating amoeba to purge water system for 60 days. NBC News. Available from: <https://www.nbcnews.com/news/us-news/texas-city-where-boy-6-died-brain-eating-amoeba-will-n1241328>.
- [LCRA] Algae in the Highland Lakes. 2021. Austin (Texas): Lower Colorado River Authority. Available from: <https://www.lcra.org/water/quality/algae-in-the-highland-lakes/>.
- S.B. 601, 87th Legislature, Regular Session (Texas 2021). Available from: <https://capitol.texas.gov/BillLookup/History.aspx?LegSess=87R&Bill=SB601>.

## TEXAS WATER INFRASTRUCTURE SUMMARY OF KEY CONSTRUCTION-RELATED LAW FROM 87TH LEGISLATIVE SESSION

*By Perry L. Fowler, Executive Director, Texas Water Infrastructure Network, and Jeff Chapman, The Chapman Firm PLLC*

*The [Texas Water Infrastructure Network](#) (TXWIN) is a 501 C6 nonprofit trade association founded in 2013 representing construction companies and related interests involved in the construction of water infrastructure in the state of Texas. The primary focus of TXWIN is the promotion of competition, accountability, and consistent application of sound public contracting and procurement law in addition to supporting funding policy to ensure adequate and consistent investment in Texas water infrastructure.*

TXWIN tracked approximately 500 of the 6,927 bills filed in the 87th regular legislative session. Approximately 100 of the bills tracked by TXWIN passed, 41 of which related to the creation or governance of special districts such as municipal utility districts and water control and improvement districts. That passage rate was consistent with the overall bill passage rate of approximately 15%. Ultimately Governor Abbott exercised his veto power on 21 bills. TXWIN does not anticipate any significant legislation impacting the water or infrastructure sector in any special sessions of the 87th Legislature called by Governor Abbott. The following report will attempt to focus on infrastructure-related bills relevant to the water infrastructure construction sector and public owner community.

Very few bills that impact the public works construction industry made it to Governor Abbott's desk to become law. However, three new key pieces of legislation do have an immediate and impending impact on the construction industry. The bills change the law in a way that generally impacts and promotes competition for public work and increases fairness in public contract awards. These new changes will make a meaningful impact on retainage, the procedures by which public works contracts are awarded, and eliminate abuses to the competitive marketplace by clarifying the purposes of particular contracts awarded to promote energy efficiency. TXWIN is willing and available to assist interested parties especially regarding implementation of new and existing contracting law from this legislative session.

### **HB 692 (Shine/Creighton)**

Relating to retainage requirements for certain public works construction projects.

The first piece of legislation was championed by its sponsors and supporters as one of the most significant retainage laws ever passed in Texas. Contractors have long complained about retainage on bonded public projects. The burden of statuto-

ry retainage is generally passed from the general contractors through subcontractor agreements that contain contractual retainage provisions, which similarly allows the general contractor to ensure the subcontractor's work is performed in accordance with the contract and completion of such work. Essentially retainage provides the contractor with an incentive to complete the project while also providing the owner with some protection against delays, contractual default, payment claims, and the like.

HB 692 addends Texas Government Code 2252 in several significant respects. First, it requires owners to include a provision within the public works contract that provides conditions for release of a portion of retainage and establishing circumstances under which the project is considered substantially complete or finally complete. The new bill also caps maximum retainage withheld for contracts over \$5 million dollars at 5%, including materials and equipment delivered on site to be installed. For contracts under \$5 million dollars, the maximum retainage is capped at 10%. Owners of competitively awarded contracts with a value of \$10 million dollars or more and contracts awarded using a method other than competitive bidding may also agree with the contractor to deposit the retainage in an interest-bearing account. The key change here from the prior version of the law is that an owner was free from paying interest on retainage as long as the amount withheld did not exceed 5%. Now, all large contracts will be eligible for interest to the contractor even at 5%.

Regarding subcontractor withholding, HB 692 prohibits subcontractor withholding at a greater percentage of retainage than the percentage withheld from the prime contractor. This prohibition also applies to sub-subcontractors. The bill further prohibits withholding of retainage during the warranty period after the completion and acceptance of work, and prohibits the withholding of retainage to compel the contractor to perform work on manufactured systems or goods that were properly installed. Finally, HB 692 contains the right to cure provisions for the parties to agree on reasonable compensation for any noncompliant labor services or materials that cannot properly be cured and preserves the owner's ability to withhold retainage in the event of a bona fide dispute, default, or no performance. One key component of the legislation that allowed it to pass both the House and Senate without opposition from key interest groups is the fact that much of the bill's provisions are permissive and not mandatory. This important distinction must be understood and utilized by contractors and owners

while negotiating contract terms on any procurement method that permits post-submission negotiations, such as competitive sealed proposals.

HB 692 was signed by Governor Abbott on June 15, 2021 and took effect immediately. TXWIN strongly encourages all public owners to carefully examine internal procedures and boiler plate documents to ensure compliance. Contractors should also carefully review specifications in bid and solicitation documents for compliance with HB 692. Key features and summary of HB 692 are:

- Sets the maximum amount for retainage at 10% for jobs under \$5 million and 5% for jobs over \$5 million on all schedules of work and materials delivered on site.
- Requires public works contracts to contain a provision stating when the contract is considered substantially completed and when the governmental entity may release all or a portion of retainage.
- Allows for retainage to be placed in an interest-bearing account for projects that are negotiated and for competitively bid projects for \$10 million or more.
- Prohibits subcontractor withholding in excess of the rate of retainage withheld on the general or prime contractor.
- Prohibits withholding of retainage during the warranty period, or to perform work on systems properly installed and accepted by the owner.
- Prohibits withholding of retainage after the completion of work performed under the contract to require the contractor to perform work on manufactured goods or systems that were specified by the designer and properly installed.
- Contains right to cure provisions to secure release of retainage or offer compensation for items with consent of the owner.
- Contains special provisions allowing 10% retainage on dams, certain SWIFT funded projects under contract as of 2019, and wholesale water supplier that supplies water to customers in 10 or more counties and is governed by Chapter 49, Texas Water Code. However, all other provisions of the bill apply, and this provision requires retainage over 5% to be placed in an interest-bearing account.

### HB 2581 (Kacal/Hancock)

Relating to civil works projects and other construction projects of governmental entities.

The next piece of legislation passed, HB 2581, reforms the procurement laws contained in the Texas Government Code, Chapter 2269. The bill applies to all procurements conducted pursuant to Chapter 2269. Two of the most significant changes to the existing law involve the disclosure of information in

relation to the evaluation of all bidders and offerors, and the weighting of price in requests for proposals for a competitive sealed proposal project.

To improve openness of government and competition for public work, Chapter 2269 enables a contractor who submits a response to a bid or request for proposal for any project issued under Chapter 2269 to request, from the owner, documents related to the evaluation of the offeror's submission. The law requires that the owner supply the documents to the requesting party no later than 30 days after the request.

Specifically, on competitive sealed proposal procurements for civil works projects, HB 2581 requires the weighted value assigned to price be at least 50% of the total weighted value of all selection criteria. An exception to the 50% mandate exists where the governing body of a governmental entity determines that assigning a lower weighted value is in the public interest. In that scenario, a governmental entity may dip below the 50% bottom and assign a weight to price of no less than 36.9%.

The reform further requires CSP scores and evaluations to be made public to all offerors no later than seven business days after the contract is awarded. The language in HB 2581 also modified the older version of the law by adding evaluations to the information required to be made public. Finally, the bill increases the amount of time for a contractor to seek injunctive relief to 15 calendar days (up from 10) after the contract has been awarded.

HB 2581 was signed by Governor Abbott on June 15, 2021 and takes effect on September 1, 2021. All solicitations and contract documents for projects advertised and scheduled for award as of September 1, 2021 should be compliant with changes in HB 2581. Specifically, the owner community should familiarize themselves with provisions applicable to explaining scoring methodologies in requests for qualifications and requests for proposals. Finally, contractors and public owners should ensure that provisions related to price weighing on competitive sealed proposal solicitations are taken into account and contemplate procedures regarding release of scoring on CSP projects to ensure that they are compliant with changes in the law. Key features and summary of HB 2581 are:

- Requires disclosure of scoring methodologies and bid evaluations.
- Requires governmental entities to provide documents related to how an unsuccessful offeror was ranked or scored upon request without requiring open records or public information requests 30 days after request from the contractor.
- Requires that competitive sealed proposals for civil works projects assign a 50% weight to price in scoring proposals and allows for an entity to assign a lower price weighting with the formal approval of its governing body to 36.9%.

- Requires that CSP scores and evaluations be made public and provided to all offerors within 7 days of award.
- Increases the time that a contractor may seek injunctive relief from 10 calendar days to 15 calendar days after the contract has been awarded.

### HB 3583 (Paddie/Hinojosa)

Relating to energy savings performance contracts.

The final major piece of legislation to address is HB 3583. This bill reforms the manner in which an energy savings performance contract, commonly referred to as “ESPC,” may be awarded and modified. This bill addresses a trend of abuses and misuse of the energy savings ESPC statute by ensuring that energy savings performance contracts are utilized in a transparent manner for the purpose originally intended, and not as a means to bypass statutes relating to the procurement of public works projects to add unrelated scope. The prior version of this law, which is codified in Texas Local Government Code Chapter 302, allowed a provider of services for energy efficiency to be awarded a contract based on the professional services contracting rules. In allowing this type of award, the legislature exempted these contracts from competitive bidding. To promote transparency and competition, this bill now specifically defines what types of water infrastructure projects may be awarded in that manner. The bill also places limits on the amount of change orders allowed on a project. Finally, it provides a means and timeframe for enforcement of the chapter through declaratory or injunctive relief. Both latter changes closely resemble the language that is found in Chapter 2269.

HB 3583 was signed by Governor Abbott on June 14, 2021 and takes effect immediately. Key features and summary of HB 3583 are:

- The bill prohibits the use of ESPC for public works and civil works projects, including “design or new construction of a water supply project, water plant, wastewater plant, water and wastewater distribution or conveyance facility, or drainage project,” which are subject to well-established contracting and procurement statutes ([HB 3583 2021](#)).
- While the bill specifically prohibits the use of ESPC for the design or construction of major water civil works projects, it does allow the use of ESPC to perform water and energy savings projects, upgrades, system replacements, and water conservation measures such as the installation of advanced metering or smart water metering infrastructure.
- The bill prohibits change orders adding scope unrelated to or ancillary to the original contract and caps change orders at 25% of original project budget. The bill also contains provisions for injunctive relief.

### REFERENCES

H.B. 3583, 87th Legislature, Regular Session (Texas 2021). Available from: <https://capitol.texas.gov/BillLookup/History.aspx?LegSess=87R&Bill=HB3583>.

## TEXAS RURAL WATER ASSOCIATION SUMMARY OF THE 87TH LEGISLATIVE SESSION

*By Trent Hightower, Assistant General Counsel, Texas Rural Water Association*

The [Texas Rural Water Association](#) (TRWA) is a nonprofit trade association that provides training, technical and legal support, and legislative services for more than 760 water utilities collectively serving more than three million customers across the state. TRWA's members include nonprofit water supply corporations, special utility districts, other types of water districts, small cities, and investor-owned utilities.

Water issues are always a hot topic at the capitol when the Texas Legislature convenes every other year, and the 87th legislative session was no exception. As a statewide trade association serving the interests of more than 750 rural water and wastewater utilities, TRWA tracked more than 450 bills this legislative session that could affect the quality and affordability of water for more than three million Texans. TRWA's membership consists of nonprofit water supply corporations (WSCs), special utility districts (SUDs), other types of districts, small cities, and investor-owned utilities, each with their own unique challenges and regulatory frameworks. While other organizations in this journal will be covering bills with broader impacts on water law and policy in Texas, TRWA has identified the following bills as having the most impact on the rural water industry in Texas.

### Response to Winter Storm Uri

#### **SB 3 (Schwertner)**

While the bulk of this bill addressed issues with the state's electrical grid that were brought to light during February's freezing weather event, the bill also contains several provisions pertaining to water utilities:

- Water utilities must provide service during an extended power outage as soon as it is safe and practicable to do so following the occurrence of a natural disaster.
- Utilities must also adopt and submit to the TCEQ a plan demonstrating the utility's ability to provide emergency operations. Participation in a statewide mutual aid program counts toward meeting this requirement. The bill also requires TCEQ to develop a template plan for systems to utilize and mandates that the agency provide systems with access to financial, managerial, and technical staff for assistance. TRWA currently provides these services to systems through a contract with TCEQ.
- SB 3 prohibits systems from disconnecting customers for nonpayment and from imposing late fees during an "extreme weather emergency," which is defined as a period when the previous day's high temperature did not

exceed 28 degrees Fahrenheit and is predicted to remain at that level for the next 24 hours.

- Utilities are required to work with customers that request a payment schedule for unpaid bills during extreme weather emergencies. Based on the experience this February, most systems were already voluntarily doing this.
- Violations of SB 3's billing provisions could result in fines up to \$50,000, though the bill mandates that only extreme cases qualify for fines of more than \$5,000.
- Utilities have until November 1, 2021, to submit critical infrastructure and emergency contact information to the PUC, their electric provider(s), their local office of emergency management, and the Texas Division of Emergency Management. They have until March 1, 2022, to submit their emergency preparedness plan to TCEQ and until July 1, 2022 (or later if approved by TCEQ) to implement that plan.

### Cybersecurity training for district employees and directors

#### **HB 1118 (Capriglione)**

Last legislative session, the Legislature mandated that all district employees and directors must complete an annual cybersecurity training approved by DIR. HB 1118 narrows the scope of the cybersecurity requirement and became effective immediately upon Governor Abbott signing it on May 18, 2021. Under the new law, only employees and board members who use a system computer to perform at least 25% of their required duties must complete the annual cybersecurity training. This should eliminate most board members and some field staff from the requirement.

Water supply corporations were never subject to the cybersecurity training requirement and HB 1118 did impose this obligation upon them, but TRWA recommends that staff of those entities who utilize system computers voluntarily complete the training anyway, as water systems continue to be a target for this type of breach.

### Retail rates

#### **SB 387 (Schwertner)**

This bill authorizes rate appeals for customers within a city's extraterritorial jurisdiction (ETJ) when their service is taken over by another municipal utility and their rates increase as a result.

***HB 3689 (Cortez)***

Chapter 13 of the Texas Water Code gives municipal utility customers located outside a city's limits to appeal their rates to the PUC because they are not able to vote in city elections. However, in a recent appeal on the reasonableness of a city's rates outside its limits, the PUC assumed jurisdiction to review not only those rates but also the rates charged to customers within the city limits. HB 3689 clarifies that the PUC's jurisdiction extends only to the rates charged to out-of-city customers, and that the agency may not compare those rates to the rates charged within the city.

***HB 1484 (Metcalfe)***

This bill relates to the rates charged by a utility after it purchases or otherwise acquires another utility. Under the new law, the acquiring utility may charge its newly acquired customers the rates specified in its tariff that are in effect for its current customers without having to go through a new rate proceeding at the PUC.

**Certificates of Convenience and Necessity (CCN) issues*****HB 837 (Lucio)***

Last legislative session, the Legislature changed the manner in which the PUC compensates utilities when their service area is decertified by a landowner or developer. Since then, several utilities have been able to work out compensation with developers who decertify land from their service area. HB 837 simply adds to last session's legislation by requiring the landowner or developer to notify the PUC once the compensation is paid.

***HB 3476 (Schofield)***

The Texas Water Code requires cities with a population of 500,000 or more to give their consent when a new CCN is requested within the city's boundaries or ETJ. As a condition of giving consent, the city may require that all water and sewer facilities be designed and constructed in accordance with its standards. In general, cities have less authority in their ETJ than they do within their boundaries, and HB 3476 makes a similar distinction in this area. Under the new law, affected cities may no longer require facilities within their ETJ to comply with the city's standards. Instead, those facilities are subject to standards set forth by TCEQ. The bill does not affect cities' ability to require that facilities within their city boundaries be designed and constructed in accordance with their standards.

**Direct potable reuse guidance*****SB 905 (Perry)***

This bill requires TCEQ to develop and make available to the public a regulatory guidance manual to explain its rules applying to direct potable reuse, which is defined as the introduction of treated or reclaimed municipal wastewater directly into a public water system or into a raw water supply immediately before it enters a water treatment plant.

**Public Information Act*****HB 872 (Bernal)***

Section 182.052 of the Utilities Code currently requires utilities to keep confidential the address, phone number, social security number, and usage information of their customers, but only if the customer requests that they do so. HB 872 flips this opt-in confidentiality process to an opt-out structure. Beginning September 1, utilities can automatically withhold this information from Public Information Act requests without express permission from their customers. Instead, customers may request that the information be made available on request. This should make responding to this type of request much easier because systems will no longer need to redact the information of some customers while providing the information of others.

## TEXAS DESALINATION ASSOCIATION POST 87TH LEGISLATIVE SESSION REPORT

*By Kyle Frazier, Executive Director*

*Since 2011, the [Texas Desalination Association](#) (TXD) and its members have been advocating for the development of brackish, marine, and produced water. The TXD focuses on educating state and local decisionmakers, the public, and industry leaders on the effectiveness and cost benefits of desalination.*

The 2021 legislative session has come to a close (87th for those counting). While all legislative sessions are unique, this version may eventually prove to be more unusual than normal. It's necessary to say "prove to be" because the process has probably not quite finished despite the May 31 deadline having come and gone.

There are several unanswered questions (depending on to whom one listens) that might be considered unfinished business for the Texas Legislature. Without question, the Legislature will need to return in a special session early this fall to pass redistricting legislation. The necessary information is still being developed by the federal government, and the Texas Legislature must wait for receipt of that data to complete their work.

In addition, a number of high-profile partisan issues were left unresolved that Governor Abbott could include as issues to be addressed during some future special session. As a reminder, the governor calls a special session and determines the issue(s) to be discussed. A special session lasts no more than 30 days and the governor may call as many as desired. With the June 20 deadline for signing, vetoing, or allowing to become law without signature now passed, there is a more complete picture of this past legislative session and what the future may hold.

On July 8, Governor Abbott called a special session of the Legislature. The second called special session is now under way, with no end in sight due to the inability of the House to make quorum.

### TXD

While TXD tracked a number of bills during the legislative session, the main interest was in the passage of SB 601 (Perry/Burrows). SB 601 passed the Senate by a vote of 31-0 and the House by 143-0. It is unusual for water-centric legislation to pass unopposed, but having a great author and sponsor always helps. The bill was amended in the House, but the bill went to conference and the amendment was removed. For the most part the bill passed as originally drafted. Governor Abbott signed SB 601 on June 18, and because of the language and

overwhelming support in both House and Senate, the bill went into immediate effect.

Although this was not really a water-centric legislative session—for good or ill—a number of infrastructure bills were filed. While most of these bills did not pass, and many did not even get a hearing, several were possible vehicles for desalination-related legislation. HB 2905 (Morrison), which expanded the use of public-private partnerships, is certainly worthy of consideration in a future legislative session. Another bill, also by Representative Morrison, HB 3040 continued and expanded the use of the Chapter 313 economic development program. Adding desalination projects (among other projects) to this particular part of the tax code has been of interest to various segments of the desalination industry for the past several years. The failure of this bill was not because of the addition of the desalination project language; this particular segment of the tax code has been under fire for the past several legislative sessions. The bill failed because of the ongoing concern about the expansion of these types of "incentives."

Besides SB 601, the only other water-related bills that TXD tracked that were passed and signed were:

- **HB 1322**, requiring agencies to publish brief summary of proposed rules on website.
- **HB 1904**, ensuring that equity that can no longer be used under the water infrastructure fund can be used for other programs in the Texas Water Development Fund II.
- **HB 1905**, relating to relieving regional water planning groups of certain duties.
- **HB 2361**, amending the Texas Health and Safety Code to include projects that reduce flaring emissions and other site emissions among the projects for which TCEQ is required to give preference in awarding grants under the new technology implementation grant program.
- **SB 669**, relating to certain reports created by TWDB.
- **SB 905**, directing TCEQ to create a direct potable reuse document so that entities will understand the process for having such a project. It does not create new rules or permitting.

Unless something dramatic changes, there do not appear to be any possible water issues that would be included in the special sessions. Regardless of the bills that failed this legislative session, the future of desalination looks extremely bright.