

TEXAS ALLIANCE OF GROUNDWATER DISTRICTS
Legislative Wrap-Up
Groundwater-Related Bills

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 a handful of other bills of possible interest to GCDs, 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 (for more information related to these subjects, see presentations by Dean Robbins and Ty Embrey at the June 2011 TAGD meeting).

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**, will be 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

¹ Other 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).

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 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 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 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;
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”.

² GMA members are required to appoint a representative as soon as possible after the act’s effective date of September 1, 2011.

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 TCEQ and 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 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 TWDB within 60 days of adoption.

Petitions for Inquiry

The provisions of Chapter 36 related to petitions for inquiry at 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 TCEQ rule. Affected persons are authorized to file a petition with 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 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 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

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.

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)(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), TCEQ and 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 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 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 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 encouraging cities and counties to provide rainwater harvesting incentives. 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 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 TCEQ and 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 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 a-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 (indeed, the Legislature is still working on the Governor's first-called special 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. TAGD members should use the interim to fully review various proposals and work to reach a consensus that will allow TAGD to participate in the process by providing insight based on the experience of its members. It is also probable that water conservation will once again be at the forefront of legislative issues, particularly if the drought continues.