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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.

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## **Commentary: 85<sup>th</sup> Texas State Legislature: summaries of water-related legislative action**

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**Editor-in-Chief's Note:** September 1 of every odd-numbered year is the date when new legislation from the most recent session of the Texas Legislature typically goes into effect. With this in mind, the Texas Water Journal invited four 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 2017 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
  - Sierra Club, Lone Star Chapter
  - Texas Water Infrastructure Network
  - Texas Alliance of Groundwater Districts
-

## Terms used in paper

Short name or acronym	Descriptive name
ASR	aquifer storage and recovery
DFC(s)	desired future condition(s)
GCD(s)	groundwater conservation district(s)
GMA(s)	groundwater management area(s)
HB	House Bill
HNRC	House Natural Resources Committee
RFQ	request for qualifications
RFP	request for proposals
SWIFT	State Water Implementation Fund for Texas
SWIRFT	State Water Implementation Revenue Fund for Texas
SB	Senate Bill
SAWRAC	Senate Committee on Agriculture, Water and Rural Affairs
TAGD	Texas Alliance of Groundwater Districts
TCEQ	Texas Commission on Environmental Quality
TWCA	Texas Water Conservation Association
TWDB	Texas Water Development Board
TxWIN	Texas Water Infrastructure Network
WAMs	water availability models
TERS	total estimated recoverable storage

## TEXAS WATER CONSERVATION ASSOCIATION 85<sup>TH</sup> LEGISLATIVE SESSION WRAP-UP

*By Stacey Allison Steinbach, Texas Water Conservation Association*

Ask any legislator, staffer, or lobbyist, and they will tell you the 85<sup>th</sup> Legislative session was one like no other. And though most in the political sphere say that at the end of every session, this year it is true. In 2017, legislators filed 6,631 bills, second only to the 2009 session. And just 1,211 of those bills passed both chambers by sine die. Governor Greg Abbott then vetoed 51 bills, the most vetoes by a governor in more than a decade. The 17.5% bill passage rate is also the lowest seen in more than a decade, attributable in large part to political disagreements between the chambers and delays in processing legislation.

The 85<sup>th</sup> was also unusual in that water legislation did not draw a great deal of attention among legislators and the media. It may be that the state's wet years since the 2011 drought have caused policymakers to focus on other issues. This year, the spotlight was on tax reform, social issues, and school matters. And it still is—the Governor called a special session to continue legislative efforts on these fronts.

As in past sessions, the Texas Water Conservation Association (TWCA) closely tracked bills of possible interest to its members. TWCA staff followed nearly 450 bills in 2017, designating more than a third of those bills as high-priority. Fewer than 20% of those bills will become law. Summaries for the most significant bills are provided below.

### **TWCA Groundwater Committee**

TWCA's longstanding Groundwater Committee, chaired by Hope Wells of the San Antonio Water System and Brian Sledge, an attorney in private practice, reached consensus on 11 groundwater-related legislative proposals in advance of the 85<sup>th</sup> Legislature. Ten of those bills were filed, five were sent to the Governor, and four are now law or will be effective on September 1. It is interesting to note that these four bills are the only bills to amend Chapter 36 of the Texas Water Code (relating to groundwater conservation districts) this session:

#### ***House Bill (HB) 2215: Desired Future Condition (DFC) Adoption Dates (Price/Miles)***

This bill amends the deadlines for proposing and adopting DFCs by groundwater conservation districts (GCDs) to best align the process with the state water planning process. Groundwater management areas must now propose DFCs for adoption by May 1, 2021, adopt them by January 5, 2022, and repeat the process every five years thereafter.

#### ***Senate Bill (SB) 864: Use of Groundwater in Conjunction with a Water Right (Perry/King)***

This bill amends Chapter 11 of the Water Code to require special notice when an applicant for a surface water right at the Texas Commission on Environmental Quality (TCEQ) proposes to use groundwater from a well located within a GCD as an alternative source of water. This bill also came through TWCA's Surface Water Committee.

#### ***SB 865: GCDs and Direct Deposit (Perry/Burns)***

One of the least controversial bills we tracked this session, SB 865 authorizes GCDs to use online banking tools, such as direct deposit, online bill pay, and other electronic banking applications that increase efficiency in financial transactions.

#### ***SB 1009: Administratively Complete Permit Applications (Perry/Larson)***

This bill limits the list of items a GCD can require in a permit application to what is already listed in statute as well as other relevant information included in a GCD's rules. A GCD is prohibited from requiring any additional information for a determination of administrative completeness.

### **TWCA Surface Water Committee**

The 85<sup>th</sup> is the first session where the TWCA convened a formal "Surface Water Committee" during the interim to address matters related to the state's permitting of surface water. The committee, chaired by Lyn Clancy, Lower Colorado River Authority, and Bob Brandes, a water resources consultant, included more than 130 TWCA members and approved four consensus bills (including one groundwater committee bill) and one legislative concept, all of which were filed during session. Three of those bills are now law. In addition to SB 864, described above, the Surface Water Committee bills that passed this session include:

#### ***HB 3735: Chapter 11 Clean Up (Frank/Rodriguez)***

The TWCA-initiated version of this bill aimed to conform the requirements of a water rights application with current TCEQ practice and modern technology. It was amended on the House floor to remove language related to whether a water right application or amendment is consistent with the state water plan, and again in the Senate Committee on Agriculture, Water and Rural Affairs to add SB 1430.

***HB 3177: Actions by the Executive Director (Lucio III/Estes)***

This bill defines when a matter becomes uncontested before parties are named at the TCEQ and clarifies the process for challenging an action of TCEQ's Executive Director with the agency's commission first and then by filing a district court appeal.

**Other bills of interest**

Though only a handful of other water-specific bills made it to the finish line this session, we also saw some non-water bills that will impact Texas water provider operations. The list below includes the session's most significant water and local government bills.

***SB 1511: State Water Planning (Perry/Price)***

This bill requires that the state water plan include implementation information on projects previously deemed high priority by the Texas Water Development Board (TWDB). It also adds representatives of the Texas State Soil and Water Conservation Board as ex officio members of each regional water planning group, requires regional water planning groups to amend plans to exclude "infeasible" water management strategies or projects, and authorizes a simplified, every-other-five-year planning cycle if there have been no significant changes to a planning group's water availability, supply or demand.

***SB 1430: Water Rights and Desalinated Seawater (Perry/Lucio III)***

This bill requires the TCEQ to expedite processing of applications to amend existing water rights when the applicant is using desalinated seawater after acquiring the water right that is being amended. The bill also limits a contested case hearing on such an application to 270 days. This bill was also added to HB 3735 (see section II, above).

***SB 1289: U.S. Steel Bill (Creighton/Paddie)***

This bill drew a great deal of attention during the session, especially with respect to provisions related to TWDB funding under the State Water Implementation Fund for Texas (SWIFT) and State Water Implementation Revenue Fund for Texas (SWIRFT). As relevant to this article, the bill requires that projects financed with SWIFT or SWIRFT funding must use iron and steel products that are produced in the United States. The bill provides for an exemption when the iron or steel is not available or of satisfactory quality or when the use of U.S. steel or iron will increase the cost of the project by more than 20%. The requirement does not apply to a project "formally approved" by the TWDB before May 1, 2019 or

in cases where complying with the requirements would be "inconsistent with the public interest." As required by the bill, the TWDB is currently in the process of developing a report for the state auditor that includes information on recently funded construction projects and potential impacts of the new requirements.

***SB 347: Regional Water Planning Groups and Open Government (Watson/Phelan)***

This bill makes regional water planning groups and their committees subject to the Open Meetings Act and the Public Information Act.

***SB 1172: Local Government Regulation of Seed (Perry/Geren)***

This bill prohibits a political subdivision from adopting an order, ordinance, or other measure that regulates agricultural seed, vegetable seed, weed seed, or any other seed in any manner, including planting seed or cultivating plants grown from seed. Though this bill was not intended to address any water-related matters, some water providers became concerned during the session that the broad language could unintentionally pull in certain water regulations, including stormwater, drought contingency plans, and water conservation plans. The enrolled version expressly excludes these regulations to avoid any confusion.

***SB 625: Special Purpose District Public Information Database (Kolkhorst/Stephenson)***

This bill requires the Comptroller to create a Special Purpose District Public Information Database that includes information related to each district's board, staff, revenue, bonds, taxing authority, and budget. Districts that do not cooperate with information requests from the Comptroller may be charged \$1,000.

***HB 544: Rural Water Assistance Fund (Anderson/Hinojosa)***

This bill amends Chapter 15, Water Code, to include "planning" as an eligible use of TWDB's rural water assistance fund.

***HB 1257: Criminal Mischief (Kacal/Birdwell)***

This bill adds "property used for flood control purposes or a dam" to the criminal mischief provision of the Penal Code, making violations punishable as a state jail felony.

***HB 1573: Training for Water Loss Auditors (Price/Creighton)***

This bill requires the TWDB to establish training standards for certified water loss auditors and make the required training available on its website free of charge.

***HB 1648: Water Conservation Coordinator (Price/Seliger)***

This bill requires that water conservation plans filed under section 13.146, Water Code, include a designated water conservation coordinator responsible for implementing the plan.

***SB 622: Public Notice Expenses (Burton/Lozano)***

This bill requires political subdivisions located in counties with a population of 50,000 or more to include a line item indicating expenditures for a state-required published notice that allows a clear comparison between those expenditures in the proposed budget and actual expenditures for the same purpose in the preceding year.

**Bills that did not make the cut**

In sessions like the 85<sup>th</sup>, sometimes it is just as important to track the bills that didn't pass as it is to track those that did. These high-priority bills made it far enough in the process or commanded enough attention to suggest that we will see similar versions in 2019, and in fact, some were refiled this summer during the special session, as identified below.

***HB 2378: Export Permit Renewals (Larson/Perry)***

In 2015, the 84<sup>th</sup> Texas Legislature passed SB 854, allowing for automatic renewals of certain groundwater operating permits. However, many GCDs also require "export permits" when groundwater will be exported out of the GCD. This TWCA-initiated bill would have clarified that export permits must be renewed consistent with the corresponding operating permit. The Governor vetoed this bill on June 15, but Representative Ashby filed the bill as HB 275 and Chairman Larson included the language HB 26 during the special session.

***HB 2377: Brackish Groundwater (Larson/Perry)***

This bill would have expanded upon Chairman Larson's 2015 brackish groundwater study bill by authorizing a GCD, upon petition or its own motion, to designate a brackish groundwater production zone where brackish groundwater can be produced without unreasonable negative impacts on groundwater, existing users, and DFCs. Designations would not be allowed in formations that serve as a primary source of water supply for municipal or agricultural purposes. After the designation of a zone, a production permit would be issued in the same manner as an uncontested application, with permit terms equal to the expected project financing term but no

longer than 30 years.

Versions of this bill have been considered by the Legislature as far back as 2013, and this broad-based consensus effort was one of the last bills to pass the Senate. It was amended on the Senate floor to include HBs 180 and 3417, but those bills were stripped in conference committee. The Governor vetoed the bill on June 15, citing its complexity, and Chairman Larson refiled it as HB 27 during the special session.

***HB 3742/ SB 225: Contested Case Hearings for Water Rights (Phelan/Taylor)***

These bills were not companions, but they both would have significantly amended the contested case hearings process for water rights applications and amendments. HB 3742 came out of TWCA's Surface Water Committee, and it eventually merged with SB 225 via committee substitutes in both chambers. Legislators and stakeholders have been working on some form of this bill for at least three sessions, so we expect to see it reworked yet again in 2019.

***SB 696: Water Availability Model Updates (Perry/Larson)***

This bill would have required updating certain water availability models (WAMs) at the TCEQ. Though the bill passed the Senate and was voted out of the House Natural Resources Committee, it stalled when the funding component did not survive budget negotiations. Chairman Larson refiled this bill as HB 282 during the special session.

***HB 31/ SB 1392: Groundwater Management (Larson/Perry)***

Though these bills were not companions, both were omnibus groundwater bills that addressed numerous provisions of Chapter 36, Water Code. Groundwater stakeholders worked with the Chairmen and their staff on multiple drafts throughout session, reaching consensus on some major issues. Ultimately, the bills ran out of time, but we expect the work on these bills to continue in advance of the 86<sup>th</sup> session. Elements of HB 31 are included in the special session's HB 26.

***SB 226: Notice of Amendments to Water Rights (Taylor/Frank)***

This bill would have amended the Water Code to exempt certain types of water right amendments from any requirements of a statute or commission rule regarding notice and hearing or technical review, consistent with the Texas Supreme Court's decision in *Marshall v. Uncertain*. It did not get enough votes in the House Natural Resources Committee to move to the House floor.

***HB 3417: Consideration of Registered Wells in Permitting (King)***

This bill, initiated by TWCA's Groundwater Committee, would have required a GCD to consider whether a proposed use of water unreasonably affects registered wells exempt from permit requirements in addition to existing groundwater and surface water resources and existing permit holders when issuing permits or permit amendments. It passed the House but did not receive a hearing in the Senate. It was later added to HB 2377 on the Senate floor, only to be removed in conference committee.

***HB 3166: Modeled Sustainable Groundwater (Lucio III)***

This bill, initiated by TWCA's Groundwater Committee, would have added a definition of "modeled sustainable groundwater pumping" to Chapter 36 of the Water Code as the maximum amount of groundwater that the executive administrator of the TWDB determines may be produced from an aquifer on an annual basis in perpetuity using the best available science. It would also have included "modeled sustainable groundwater pumping" in the list of hydrological conditions considered by groundwater management areas in developing DFCs. The bill passed the House but did not receive a hearing in the Senate.

***HB 180: State Audit Review of GCDs (Lucio III)***

This bill, initiated by TWCA's Groundwater Committee in 2015 and 2017, would have limited the powers of the State Auditor's Office to review a GCD's financial records only, consistent with Chapter 49 water district audits. The bill passed the House in both sessions but did not make it through the Senate Committee on Agriculture, Water and Rural Affairs. This session, the bill was added to HB 2377 on the Senate floor, only to be removed in conference committee.

**Looking ahead**

Though the 85<sup>th</sup> Legislature has adjourned sine die, their work continued in a special session convened by the Governor on July 18. The priority was to pass legislation for a handful of state agencies subject to sunset this year, but the call included 21 topics, ranging from political subdivision powers to abortion to education. The TWCA actively tracked more than 50 bills, mostly addressing taxing and other authorities of political subdivisions, but we also followed nine high priority, water-specific bills. In addition to the bills referenced in the previous section, legislators filed two TWDB funding bills, two bills related to aquifer storage and recovery, and one bill creating an "interregional planning council" of regional water planning group representatives to improve state water

plan coordination. None of those bills were approved by the Legislature during the special session. Now that the special session has ended, the TWCA will continue its efforts to find common ground among stakeholders and legislators on water-related priorities at the capitol and look forward to beginning again in 2019.



**SIERRA CLUB**  
**WATER IN THE 85<sup>TH</sup> TEXAS LEGISLATURE:**  
**PERSONALITIES, POLITICS, AND POLICY**

*By Ken Kramer and Christopher Mullins, Lone Star Chapter of the Sierra Club*

The outcome of water issues in the 85<sup>th</sup> Texas Legislature was a good reminder that personalities and politics are often more important than policy considerations in determining the fate of legislation. Perhaps this situation is more likely when the legislation involves an issue that is not seen as a priority during the legislative session.

Certainly, the management of the state's water resources was not the topic that garnered the attention of most legislators or the Texas news media in the 2017 regular session. Instead of addressing the issue of how we should sustainably manage our water resources for people and the environment, the 85<sup>th</sup> Legislature focused on such issues as who gets to use which bathroom.

Attention to water resources has fared better in previous legislative sessions. Water—or at least funding for projects in the state water plan—was a priority for the Legislature in 2013 and led to the creation of the State Water Implementation Fund for Texas (SWIFT) and a related fund, as well as the revamping of the Texas Water Development Board (TWDB). True to form, the Texas Legislature tends to put a subject on the backburner for a while after passing major legislation to address that issue. Therefore, no one was surprised that water did not make any one's "top ten" list for the 85<sup>th</sup> Legislature.

Nevertheless, there was no lack of bills relating to water introduced in the 2017 regular session, in part, because there are many significant water questions left unanswered for Texas and no shortage of viewpoints about the best answers to those questions. Among those questions are the following:

- Should groundwater be managed primarily for production or for conservation or for some balance between those two goals?
- Are the procedures for allocating groundwater and surface water unduly hampering the use of certain water supplies, or are they necessary to assure that all "affected parties" have a say in those decisions?
- Is our current state and regional water planning process working well to advance realistic water projects to meet the state's growing demands for water?
- How accurate are those demand forecasts, and to what extent might additional actions for water conservation and efficiency reduce those demands?
- Are we "behind the curve" in pursuing "innovative water projects" (insert your definition of "innovative" here), or are many of these "innovative" projects simply new versions of grandiose water projects that have been rejected before due to cost, lack of need, environmental

impacts, or other factors?

- Are existing environmental flow standards sufficient to maintain our rivers and streams and the ecology and productivity of our coastal bays and estuaries, especially in light of new proposals to divert surface water for various projects?

All of these questions are deserving of consideration and, indeed, bills were introduced in 2017 that attempted to answer most of these policy questions, whether correctly or incorrectly.

### **Groundwater management**

By far, the largest number of water-related bills filed focused on groundwater. The deluge of groundwater bills was not unexpected. Groundwater was a 2016 interim study topic of the Texas House and Senate committees with jurisdiction over water. Legislative leaders had also asked the Texas Water Conservation Association (TWCA)—the trade association for major water suppliers and the related "water industry"—to develop "consensus" recommendations on groundwater management.

Groundwater was also the focus of a 2015-2016 policy research project by graduate students at the Texas A&M University Bush School of Government and Public Service, which caught the attention of state legislators. Moreover, groundwater marketing and transport projects such as the San Antonio Water System Vista Ridge project and numerous private groundwater marketing ventures have been stirring controversy for years as private landowners, rural communities, and environmental groups express concerns for the future of springs and aquifers while many cities search for new water supplies.

These factors led to approximately 40 groundwater bills introduced in this "non-water" session. The most notable bills fell into three broad categories. First, two omnibus bills were introduced that sought to make numerous additions and changes to laws governing planning and permitting by groundwater conservation districts (GCDs). Second, several more targeted bills were aimed at curbing specific regulatory powers of GCDs in order to favor groundwater production. Finally, some legislation was introduced to address the risks associated with abandoned water wells.

The two omnibus bills were House Bill (HB) 31 and Senate Bill (SB) 1392. HB 31 (House sponsor: Representative Lyle Larson, Chairman of the House Natural Resources Commit-

tee) would have combined groundwater production and groundwater transport permits, prescribed certain procedures for GCDs, repealed portions of Chapter 36 of the Water Code, and made extensions of groundwater permits automatic. All of these changes generally favored the transport and marketing of groundwater by large water utilities and others. However, by working with some stakeholders, Chairman Larson was able to craft a somewhat more balanced bill that gained the support of many GCDs. However, the bill did not see floor action in the Senate after passing in the House and being reported out of the Senate committee.

The second omnibus bill, SB 1392 (sponsor: Senator Charles Perry, Chairman of the Senate Committee on Agriculture, Water and Rural Affairs) would have modified the joint groundwater planning process, weakened protections for conservation of groundwater resources, limited groundwater export fees, and constrained the ability of GCDs to place special conditions on permits. These changes would have limited the regulatory powers and flexibility of GCDs. The bill ran into a firestorm of opposition, especially to its initial (later deleted) provision to prohibit GCDs from employing “historic use” by the permit applicant as the basis for allocating volumes of groundwater permitted. A version of SB 1392 was eventually reported favorably out of committee after Chairman Perry agreed to continue working with members of his committee on changes to the bill, but the legislation was never brought to the floor of the Senate. In part that was because HB 31, which had a broad caption, was passed by the House and sent to the Senate and was then seen as the vehicle for incorporating aspects of SB 1392. Ultimately that strategy failed, and neither bill was enacted.

Several more targeted bills attempted to weaken the regulatory power of GCDs and tip the scales in favor of production rather than conservation. In some respects, these bills were similar to the omnibus bills in that they were seen as legislation to curb what water marketers and some others characterized, rightly or wrong, as arbitrary and unfair decisions by GCDs in permitting and rulemaking.

In this category of groundwater legislation, HB 3028 (sponsor: Representative DeWayne Burns) would have had the greatest potential impact on the current groundwater regulatory system. In the wake of the Texas Supreme Court’s decision in the *Day* case, one major question for many legislators has been “do we legislate more concepts from oil and gas law into groundwater regulation?” HB 3028 answered this question with a resounding “yes” from those who wish to maximize groundwater pumping. Specifically, the bill would have introduced controversial, unclear, and ambiguous “fair share” language from oil and gas law, under the concept of correlative rights, into Chapter 36 of the Water Code. As filed, HB 3028 would have also required that the desired future conditions

(DFCs) for different aquifers or portions of aquifers allow the highest practicable level of groundwater production based on total estimated recoverable storage (TERS) of water from the aquifer (as contrasted, for example, to limiting production to levels that would sustain the aquifers over the long term).

A reasonable question regarding HB 3028 that stumped many of its proponents was “fair share of what?” The concept of “fair share” has never been applied to groundwater, so it is unclear how it would be determined or defined. In addition, TERS does not recognize all of the relevant practical and scientific information. For example, the TERS concept ignores that groundwater production in excess of aquifer recharge might negatively affect spring flows and water quality. In the final analysis, it appears HB 3028 was thrown into the hopper by its author to see how correlative rights would be received by other state legislators. At best, it seems that correlative rights applied to groundwater is an idea whose time has not yet come. Nevertheless, this issue will likely arise again next session.

Another targeted bill, SB 862 (sponsor: Chairman Perry) was focused on a specific legal area regarding the powers given by the Legislature to GCDs. Because GCDs are not defended in lawsuits by the Attorney General and often have extremely limited funding, they are currently awarded automatic attorney’s fees on any issues they prevail on in a lawsuit. This allows them to make rules and enforce them without worrying about the specter of bankruptcy due to court costs. However, many parties who have brought lawsuits challenging district rules believe this is unfair, as in, for example, a case where the challenger prevails in a lawsuit but loses as some of its claims.

SB 862 would have automatically awarded attorney’s fees to the prevailing party on any issue in a case involving regulation by a GCD. However, this ignores the importance of the policy decision that was made in setting the current procedure regarding fees. GCDs are the only regulatory entities that have both a limited budget and are tasked with managing a vast resource claimed as a property right by every landowner. This kind of responsibility invites lawsuits, and those who see the value of pro-active groundwater management feel that the risk of litigation should not be a barrier to reasonable and necessary regulatory actions by districts. Due to pressure from stakeholders, the bill did not make it out of the House Natural Resources Committee after passing the Senate.

Another targeted groundwater management bill was HB 4122 (House sponsor: Representative Kyle Kacal). As filed, HB 4122 would have allowed the owner of a piece of land greater than 1,000 acres, and within the jurisdiction of two or more GCDs, to request that the entire property be transferred to the territory of a single district of the landowner’s choice. A later amendment gave the relevant GCD veto power over such a change. However, this kind of exception would set a dangerous precedent by encouraging “district shopping” (similar to

“forum shopping” in litigation). It appears that this bill was initiated by powerful and resourceful landowners seeking to come under the jurisdiction of GCDs with fewer financial resources and more limited authority. A version of HB 4122 passed the House and was voted favorably from the Senate Committee on Agriculture, Water and Rural Affairs but was never brought up on the Senate floor.

In addition to bills to manage groundwater quantity, legislation was introduced this session to address groundwater quality. Abandoned water wells may pollute groundwater by serving as a conduit for pollutants on the surface to enter underground water supplies. Both HB 3025 (Sponsor: Representative Tracy King) and SB 2068 (Sponsor: Senator Dawn Buckingham) sought to remedy this problem, albeit in different ways. HB 3025 would have required a landowner or other person who has a deteriorated well to repair or plug the well within 180 days of discovering its condition. GCDs would have been able to enforce this requirement 10 days after notice was given to the landowner and to go onto his or her land to repair or plug a well. The landowner would then be liable to the district for the associated costs. HB 3025 would have been a way to make sure landowners were held accountable for their wells. However, Governor Abbott vetoed the bill with the stated objection that he found it too intrusive on a landowner’s private property rights, despite the propensity of abandoned wells to harm neighboring landowners’ groundwater property interests.

In contrast, SB 2068 took a more localized approach, applying provisions to a specific area and regulatory entity. SB 2068 authorizes the Bandera County River Authority and Groundwater District to use revenue gained from fees and other sources to cap abandoned, deteriorated, open, or uncovered water wells. Reasonable expenses could then be charged to the property on which the well is located by attaching a lien. This bill passed and was signed by Governor Abbott.

Overall, the flurry of groundwater bills introduced produced much sound and fury but few results in the form of enacted legislation. In part that was due to the complexity of groundwater issues and the lack of consensus on how to address all of those issues. However, the outcomes were also based, in part, on factors other than groundwater policy considerations.

### Gubernatorial vetoes

The demise of HB 31, for example, illustrates the impact that personalities and politics have in the state legislative process. While there were significant concerns about HB 31 and SB 1392 as they were originally filed, the last version of HB 31, as it was expected to be brought to the Senate floor, was a legitimate compromise that most stakeholders could accept even though it might not have addressed all concerns. The compromise was the outcome of deliberations among many (but not

all) of those stakeholders, more so on the Senate side than on the House side. But it also apparently became embroiled in a personal political dispute that probably had little to do with the substance of the legislation.

By the end of the legislative session, it was very clear that there was friction between the House sponsor of HB 31 – Chairman Larson – and Governor Abbott. In part, the strained relationship resulted from Chairman Larson’s lead sponsorship of a bill that would have prevented a Governor of Texas from appointing persons who had donated \$2,500 or more to a Governor’s most recent campaign for that office to various state government boards and commissions. This legislation was rather clearly aimed at Governor Abbott and may have arisen not only from ethics concerns but also from dissatisfaction with one or more of Governor Abbott’s appointees on the Texas Parks and Wildlife Commission. Those appointees have taken strong positions on issues such as how to respond to incidences of chronic wasting disease in Texas deer, positions that are not popular with deer-breeding interests who have been supportive of Chairman Larson’s political races.

Although HB 31 never made it to the Governor’s desk, there is speculation that the abrupt halt to final movement on that legislation in the Senate may have stemmed from behind-the-scenes signals from the Governor that the bill, a signature one for Chairman Larson, would be dead on arrival on his desk. That speculation is lent credence by the fact that numerous other Larson-sponsored bills were vetoed by the Governor after the conclusion of the session. In addition to two relatively minor Larson groundwater bills, HB 2377 (relating to production of brackish groundwater in designated zones) and HB 2378 (relating to groundwater production and transport permits), that list included the following House bills authored by Chairman Larson and Senate bills sponsored by Chairman Larson in the House:

- **HB 2943** – a bill to clarify that the state water pollution control revolving fund could be used to finance the acquisition of conservation easements for water quality protection
- **HB 3987** – a bill to authorize the TWDB to finance and own all or part of an aquifer storage and recovery (ASR) project or desalination facility
- **SB 1525** – a Senate bill authored by Chairman Perry in the Senate and sponsored by Chairman Larson in the House that would have required the TWDB to assess and report on the water supplies and needs of the state and specific types of projects to meet identified needs.

Some other bills sponsored by Chairman Larson apparently failed due to House-Senate tensions over other legislative issues that had nothing to do with water or the environment. There was obvious disagreement between the House and Senate leadership over a number of contentious issues, such

as the transgender bathroom legislation, and the Lt. Governor was clearly not happy with the reticence of the House to deal with certain issues that were a priority for him. Whether the result of retribution or not, approximately 50 bills that passed the House and were sent to the Senate never were referred to a Senate committee, essentially killing the bills. These included some of Chairman Larson's bills—HB 2005 (requiring studies and reports on possible areas for ASR), HB 2802 (taking river authorities out of the sunset review process), and HB 3991 (capturing “excess” surface water flows for ASR projects)—although the Chairman was only one of many House members whose bills fell victim to this fate. Once again, however, water bills were caught in what appears to have been a political trap.

There were areas of water legislation in the 2017 session whose outcomes appear, however, to reflect policy considerations rather than the effect of personalities or politics: water conservation legislation, bills dealing with surface water rights, and the “excess flows” issue, for examples. In all three areas, the results were generally positive in the view of environmental and conservation organizations and allies.

### Water conservation legislation

Several bills were introduced to advance water conservation. Although not all were able to make it through the legislative gauntlet, the bills that passed are considered by conservation advocates as positive, if modest, steps forward.

An important impetus to these bills was the December 2016 report to the Legislature by the state's Water Conservation Advisory Council. For the first time, due to legislation passed in 2015, the Council's biennial report included recommendations on statutory changes and funding for water conservation. Members of the Council, acting as individuals or as representatives of their respective advocacy groups, were successful in getting the recommended statutory changes introduced as bills or included in other bills.

The Legislature enacted three of those recommendations in the following bills:

- **HB 1573** (sponsors: Representative Four Price/Senator Brandon Creighton) – requires the person who conducts a water loss audit for a water utility to be trained in water loss auditing and requires the TWDB to make that training available without charge from the agency's website; advocates view this as a step forward in improving the accuracy of water audits and thus helping utilities pinpoint ways of curbing water loss in their distribution systems
- **HB 1648** (sponsors: Representative Price/Senator Kel Seliger) – requires a retail public water utility serving 3,300 or more connections to designate a water conservation coordinator responsible for implementation of that utility's water conservation plan; this new require-

ment is seen as a way to help ensure that conservation plans are actually implemented, leading to more efficient use of existing water supplies

- **SB 1511** (sponsors: Senator Perry/Representative Price) – includes a new requirement, as part of a broader bill on state and regional water planning, that a representative of the Texas State Soil and Water Conservation Board serve as an ex officio member of each of the state's 16 regional water planning groups; this change is considered important for better integration of that agency's water conservation and management activities with water supply planning

One of the Water Conservation Advisory Council's recommended statutory changes, which was embodied in HB 2240 (sponsor: Representative Eddie Lucio III), was not enacted. HB 2240 would have required certain recipients of state financial assistance for water projects to have enforceable “time-of-day” limits on outdoor watering (to prevent waste of water from evaporation during hot summer afternoons, for example). The bill was heard in the House Natural Resources Committee and was favorably reported from the Committee. However, the bill was not set on the House Calendar for floor debate before the legislative session ended. The bill did set the issue of outdoor landscape watering on the legislative agenda, however, and future action to address that issue is expected.

### Surface water rights legislation

Surface water, unlike groundwater, is owned by the State and held in trust for the benefit of all Texans. As both a resource and a part of our State's heritage, the Texas Constitution and regulatory structure recognizes that it must be used in a manner that carefully balances production and conservation. This is especially important when it comes to surface water rights permitting. Surface water rights are perpetual permits that allow holders to produce a certain amount of state water based on Texas Commission on Environmental Quality (TCEQ) guidelines. Occasionally, the road to attaining a permit can be long because our state is facing growing water demands coupled with a limited supply of unpermitted surface water. Moreover, the TCEQ has insufficient funding and resources to process expeditiously the complex and technical applications associated with attaining permits. In response to complaints regarding the few instances where the permitting process has been especially lengthy, several legislators introduced bills this session that sought to fast track the surface water rights permitting process. On paper, this goal might seem commendable; however, these bills would have accomplished it in ways that would have grossly favored production over conservation, without actually addressing the underlying issues mentioned above. The most notable bills are below.

- **HB 3742** (sponsor: Representative Dade Phelan) and

SB 225 (sponsor: Senator Van Taylor) would have arbitrarily restricted contested case hearings by limiting the scope and number of issues that could be addressed, restricting affected party status (a doctrine akin to standing in court cases), and providing for a narrow 270-day deadline for the completion of hearings. These changes were problematic for several reasons. Contested case hearings are a critical check on the power of the TCEQ to make decisions affecting the landowners, hunters and anglers; recreational river users; and environmental interests. Just as decisions on the initial surface water rights applications are complex so are contested case hearings. Thus, these hearings on perpetual permits warrant an approach that ensures the state gets its decision right the first time. The state needs to ensure that all relevant issues that arise during a hearing are considered, and proceedings are limited only in a reasonable manner, on a case-by-case basis. Ultimately, the arguments that killed these bills involved affected party status. The potential danger regarding a landowner not being able to protect his or her property rights was simply too great. There were seven revised versions of SB 225; however, none made it out of committee. HB 3742 was favorably reported from the House Natural Resources Committee but stalled in the House Calendars Committee. The persistence of proponents of the legislation indicates that this issue is likely to reappear in the next regular session.

- **HB 3314** (sponsor: Representative James Frank) and SB 226 (sponsor: Senator Van Taylor) would have directed the TCEQ to exempt applications for certain identified types of amendments to surface water rights from technical review, public notification, and contested case hearings. SB 226 had to be revised a few times before it could pass the Senate. Most egregiously, the first committee substitute would have granted the exemption even to those amendments not listed in the bill, meaning potentially any amendment could qualify. In addition, the final bill did not include any sort of public notification provision or limits on the exemption to amendments that move a diversion point downstream. Moving a diversion point downstream is a critical change because it affects landowners and ecosystems over sometimes large stretches of land by potentially reducing the streamflow between the original point of diversion and the new diversion point. Some Senators voted for the bill on the basis that it appeared to be a very limited streamlining of part of the water rights permitting process. This was an erroneous assumption, however, because of the lack of public notice and collaborative input in the process and the potential effects

and unintended effects on streamflow. The bill passed the Senate anyway but failed in the House Natural Resources Committee.

- **HB 2894** (sponsor: Representative Lucio) and SB 1430 (sponsor: Chairman Perry) sought to fast-track applications for certain surface water rights related to seawater desalination in a way similar to SB 225 and HB 3742. Concerns about the bill's restrictions on length of permit hearings were brought to the attention of the House author. However, these were rejected, in part, because the proposed restrictions on hearings were limited to seawater desalination projects. Ideally, the bill would have allowed administrative law judges to extend hearings past the proposed 270-day deadline based on the individual facts of a case. However, this compromise did not end up in the final bill, and SB 1430 was passed by both houses and signed by Governor Abbott.
- **HB 3735** (sponsor: Representative Frank) sought several reasonable and practical updates to provisions in the Water Code governing surface water rights applications. The introduced version would have also required, however, that an application be "not inconsistent" with the state and applicable regional water plan. Currently, the Water Code states that an application must be "consistent" with these plans. This change made the bill problematic because it would have weakened the directive to the TCEQ to give meaningful consideration in its permitting decisions to the water management strategies recommended in state and regional water plans. It appeared to many that the change in language from "consistent" to "not inconsistent" was initiated by people or groups connected with the Brazos River Authority Systems Operation permit—a controversial permit that has been appealed to state court and where "consistency" with water plans is an issue. Fortunately, the "not inconsistent" language was removed by an amendment on the House floor by Chairman Larson, with pressure from Representative Larry Phillips. This resulted in a clean bill that was passed and signed into law by Governor Abbott.

### The "excess flows" issue

Another controversial issue revolved around a piece of legislation—HB 3991—that Chairman Larson considered a priority for his legislative agenda. Chairman Larson is a strong advocate for ASR projects, especially as an alternative to surface water reservoirs with their high rates of water loss through evaporation (among other problems with reservoirs). Generally speaking, groups such as the Sierra Club also view ASR in a positive light, at least where aquifer characteristics, groundwater conditions, and other factors are compatible

with this water supply approach. However, the Sierra Club and National Wildlife Federation opposed HB 3991 because of concerns about specific provisions to facilitate or promote ASR projects and because the legislation was based on a misunderstanding of how it might affect surface water flows necessary to sustain the environment.

The bill would have established new provisions governing TCEQ approvals for the appropriation of surface water for storage in ASR projects. HB 3991 would also have established a system whereby the developers of new surface water projects permitted by the TCEQ but not yet constructed could convert their appropriation to storage in an aquifer rather than a surface reservoir. As an enhancement to do so, the TCEQ would grant an “evaporation credit” to the project developer allowing the developer to divert an additional amount of surface water than originally allowed by their water right. The evaporation credit was supposed to reflect the volume of water that would have been lost to evaporation if stored in a surface water reservoir rather than stored in an aquifer. Although considered innovative by some observers, this process was seen as impractical and unworkable by others, including the Sierra Club.

The most contentious aspect of HB 3991, however, was the concept promoted in the bill that the surface water that would be stored in ASR projects would be “excess flows...that would otherwise flow into the Gulf of Mexico,” implying that this water is now wasted. The bill essentially, although not explicitly, defined “excess flows” as those flows over and above what was needed to meet existing water rights in the same river basin and applicable environmental flow standards adopted by the TCEQ. However, the false assumption in that concept was that TCEQ environmental flow standards were sufficient to meet freshwater inflows for the state’s coastal bays and estuaries, which reflects a misunderstanding of what those standards mean. In reality, those environmental flow standards in river basins and their associated bays and estuaries were established within the last several years after the vast majority of the volume of available surface water in our state’s streams was already allocated to water rights holders for consumptive use. The standards merely provide a benchmark for putting conditions on new surface water rights to maintain some flows for environmental purposes and do not reflect what flows may be necessary to assure the health and productivity of our state’s bays and estuaries.

Despite the fundamental flaw in the basis for HB 3991, the bill was voted favorably from the House Natural Resources Committee and eventually passed the House. HB 3991 was one of the Larson bills not referred to committee in the Senate, however. The language from HB 3991 was resurrected near the end of the session as a House amendment to SB 1511, the water planning bill. A concerted effort by environ-

mental, hunting and angling organizations was successful in convincing the conference committee on SB 1511, appointed to reconcile the differences between the House and Senate versions of that bill, to delete the HB 3991 language from the final version of SB 1511. Senators Lois Kolkhorst and Chuy Hinojosa, conference committee members representing coastal districts, were particularly instrumental in making sure that freshwater inflows to bays and estuaries were protected.

Promotion of ASR and interest in using surface water for storage in ASR projects remain priorities for Chairman Larson, however, who has already reached out to opponents of HB 3991 such as the Galveston Bay Foundation to find ways to continue this effort. The interim before the next legislative session will see considerable discussion on this issue but hopefully one based on attention to facts and science and a better understanding of “environmental flows.”

### Looking ahead

Although predicting the actions of future Texas Legislatures is an inherently risky business, the death of so many pieces of water legislation this session and the unresolved issues left in their wake suggest that we are likely to see most of these issues, and perhaps some identical bills, resurface in the 2019 session. Whether water is likely to be a priority in the 86<sup>th</sup> Texas Legislature remains to be seen, of course. A lot depends upon the vagaries of the weather. Drought has a way of increasing our thirst for water legislation. Rain has a way of dampening our interest.

Whether water is a 2019 legislative priority or not, however, water continues to be a major challenge in Texas, one that will only grow more challenging in light of climate change. Meeting that challenge will require a more inclusive and balanced approach than evidenced by the way most water legislation was handled in the 2017 regular session. More openness on the part of legislative water leaders to other ideas and to constructive criticism may help avoid situations in future legislative sessions where personalities and politics trump policy considerations. That in turn would provide a better likelihood for successful outcomes on water legislation—something that will be increasingly important to Texas as the state moves forward in the 21<sup>st</sup> century.

## TEXAS WATER INFRASTRUCTURE NETWORK THE 85<sup>TH</sup> REGULAR SESSION OF THE TEXAS LEGISLATURE

*By Perry L. Fowler, Executive Director, Texas Water Infrastructure Network*

By all measures the 85<sup>th</sup> Regular Session of the Texas State Legislature was one of the most complicated, least productive and conflict-laden Texas Legislative sessions in recent history with the distinction of also having one of the highest numbers of bills filed, and the least bills passed in the last 20 years. The politics of the 85<sup>th</sup> Texas Legislative Session were a reflection of the broader political environment. As a result of the antagonistic environment, this was a session for bills to die. Those that lived were heavily negotiated, shielded by leadership, or non-controversial in nature.

Of the 4,333 House bills and 2,298 Senate bills filed this session, Texas Water Infrastructure Network (TxWIN) tracked 500 bills that were deemed relevant or directly related to our member interests; approximately 330 bills in our track did not pass. Fourteen bills on the TxWIN track were subsequently vetoed by Governor Greg Abbott.

To gain an even greater understanding of how difficult this session was in a broader context, almost 3,000 (45%) bills did not even receive hearings in their body of origin, of those 139 were bills on the TxWIN track. Construction legislation in particular did not do well this session. This session was also characterized by massive bill kill-offs and fighting (literally on the floor of the House on the last day or sine die). Of 6,631 bills filed this session, only 700 in the House bills and 511 Senate bills were sent to the Governor for his signature (approximately 18%).

The following is a summary of the most important bills that TxWIN worked on and tracked, directly and indirectly related to water infrastructure markets in Texas.

### **Contracting-related law that passed with implications for Texas water projects**

***Senate Bill (SB) 1289 Creighton, Brandon (R) Padie, Chris (R) Signed by Governor on 6/9/17 effective 9/1/17***

Relating to the purchase of iron and steel products made in the United States for certain governmental entity projects.

SB 1289 and the House companion House Bill (HB) 2780 represented one of the most controversial topics of the 85<sup>th</sup>. TxWIN was heavily engaged in successfully advocating for changes in this legislation expanding “Buy American” requirements for state-funded construction projects. Since passage of HB 4 in 2013, which created the State Water Implementation Fund for Texas (SWIFT) and the funding mechanism known as SWIRFT, projects receiving state-funded financial

assistance such as the D-Fund were subject to “U.S. Iron and Steel” requirements, which were comprehensive and covered not only iron and steel products but manufactured goods and systems incorporated into water and wastewater treatment plants, which is very problematic for a number of reasons.

Through TxWIN efforts, manufactured goods and systems incorporated into water and other projects were exempted from current Texas Water Development Board (TWDB) requirements, and the application of the law was limited to “Iron and Steel products” such as structural, steel, pipe and other such items. TxWIN also secured broad “public interest” waiver authority that will allow for further project, categorical and other waivers as necessary. TxWIN also secured rulemaking language in this legislation to ensure a clear process for implementation and compliance.

Effectively TxWIN accomplished the policy goals of our “Buy American” repeal legislation (HB 2204/SB 1416) through this bill because of lengthy negotiations and persistent advocacy.

Other key aspects of SB 1289 include grandfather provisions for certain projects in the Harris County area, a delay for implementation for SWIFT projects until May 2019, and a study on costs associated with the requirement. The next step in the process to implement SB 1289 will be the rulemaking process that was scheduled to begin in August 2017. TxWIN will continue working to ensure that there is a clear process and flexibility to ensure compliance is achievable.

For those dealing with these issues, it is important to note that there is a distinct difference between rules associated with federally assisted construction financial assistance from the U.S. Environmental Protection Agency “American Iron and Steel” SRF requirements administered by the TWDB and financial assistance without federal funds, which has been referred to as “U.S. Iron and Steel.” We strongly encourage all participants in projects to exercise caution in all phases of design and to create project specifications to ensure clarity in bid documents and that available waiver processes available under state and federal law are utilized as necessary.

***SB 533 Nelson, Jane (R) Geren, Charlie (R) Signed by Governor on 6/9/17 effective 9/1/17***

Relating to state agency contracting.

Most of the subject matter in this bill applies only to direct state contracting, but there were 10 amendments adopted on the floor of the House on a broad range of subject matter. Only two amendments adopted in the House survived the

conference committee and both are relevant to Government Code 2269 procurements.

One such amendment by Representative Jeff Leach (R-Plano) was a third reading floor amendment that instructs government entities under the jurisdiction of Gov. Code 2269 to provide a detailed methodology for scoring request for qualifications (RFQ) and request for proposals (RFP) criteria. It is unclear how broadly this change will apply, but it should assist public owners and contractors proposing on procurements with qualifications components to ensure that bid documents are precise, which should improve the quality of submissions and any potential ambiguities.

The second amendment adopted in the House was by Representative Carol Alvarado (D-Houston), which changes language for civil works design-build relative to RFQ/RFP response times, “clarifying” that 180 days is not a mandatory minimum to respond to design-build RFQs. The Alvarado amendment did not impact project or population limits currently in place for design-build procurements.

***SB 807 Creighton, Brandon (R) Workman, Paul (R) Signed by Governor on 6/9/17 effective 9/1/17***

Relating to choice of law and venue for certain construction contracts.

SB 807 amends the Business and Commerce Code to change the type of construction-related contract to which the statutory provision making voidable a contract provision that subjects the contract or any conflict arising under the contract to another state’s law, litigation in the courts of another state, or arbitration in another state applies from a contract principally for the construction or repair of an improvement to real property located in Texas to a construction contract, as defined by the bill, concerning real property located in Texas or an agreement collateral to or affecting the construction contract. The bill changes the party that may void the provision from the party obligated by the contract to perform the construction or repair to the party obligated by the contract or agreement to perform the work that is the subject of the construction contract.

**Contracting, ethics and disclosure**

***HB 501 Capriglione, Giovanni (R) Taylor, Van (R) Signed by Governor on 6/6/17 effective 1/8/19***

Relating to the disclosure of certain contracts, services, and compensation in personal financial statements filed by public officers and candidates.

HB 501 expands this reporting requirement to require that elected officials disclose contracts for goods or services that they or their spouse or dependent child have with governmen-

tal entities. Specifically, HB 501 expands the personal financial statement reporting requirements for each state officer, elected official, or candidate to include the disclosure of written contracts for goods or services with governmental entities if the aggregate value of those contracts exceeds \$10,000 per reporting year. HB 501 also requires that Legislature members who provide bond counsel services to a public issuer disclose specific information regarding each issuance, including the amount of the bond issuance, the name of the issuer, and the fees paid to the member or their firm. HB 501 further requires that state officers disclose referrals and associated fees.

**Water financial assistance**

***HB 544 Anderson, Doc (R) Hinojosa, Chuy (D) Signed by Governor on 5/26/17 effective immediately***

Relating to the use of the rural water assistance fund.

HB 544 would allow the TWDB to use money in the Rural Water Assistance Fund to contract for certain services to assist rural local governments in obtaining financing from any source for eligible water and wastewater projects. The bill also would add planning to the list of contracted services.

**Water utility management**

***HB 294 Walle, Armando (D) Garcia, Sylvia (D) Signed by Governor on 5/26/17 effective 9/1/17***

Relating to the revocation of certain water utilities’ certificate of public convenience and necessity for major rules violations.

Primarily introduced to address issues in certain unincorporated areas of Harris County with poor water utility management, HB 294 would require the Attorney General, at the request of the Public Utility Commission or the Texas Commission on Environmental Quality (TCEQ), to bring suit to appoint a receiver to collect the assets and carry on the business of a water or sewer utility that violated a final judgment issued by a district court in a suit brought by the Attorney General under Water Code, ch. 13 or ch. 7, or Health and Safety Code, ch. 341.

***SB 814 Hinojosa, Chuy (D) Canales, Terry (D) Signed by Governor on 6/9/17 effective 9/1/17***

Relating to the board of directors of the Agua Special Utility District.

SB 814 amends the Special District Local Laws Code to replace one of the directors of the Agua Special Utility District elected at-large to represent the part of the district that is not included in specified municipalities with a director elected by



the voters of the part of the City of La Joya within the district to represent that part of the city. The bill includes temporary provisions set to expire September 1, 2020, providing for the transition for such replacement.

SB 814 prohibits the district's board of directors from employing as an employee, as a consultant, or on a contract basis, an elected official of the largest public employer in the service area of the district or a person related to such an elected official within the third degree by consanguinity or affinity. The bill does not subject a person employed by the district on the bill's effective date who is such an elected official to the prohibition until the date the person's term as an elected official expires and authorizes the board to continue to employ the person until that date.

### Water planning

#### ***SB 1511 Perry, Charles (R) Price, Four (R) Signed by Governor on 6/15/17 effective 9/1/17***

Relating to the state and regional water planning process and the funding of projects included in the state water plan.

Omnibus water planning bill to evaluate effectiveness, streamline processes and reduce interregional conflicts.

#### ***HB 2215 Price, Four (R) Miles, Borris (F)(D) Signed by Governor on 6/9/17 effective immediately***

Relating to the adoption of desired future conditions (DFCs) for aquifers in groundwater management areas and the consideration of those conditions in the regional water planning process.

HB 2215 amends the Water Code to change the DFCs with which a regional water planning group's regional water plan is required to be consistent from the DFCs adopted as of the date of the TWDB's most recently adopted a state water plan or, at the option of the regional water planning group, established subsequent to the adoption of the most recent plan to the DFCs adopted as of the most recent deadline for the TWDB to adopt the state water plan or, at the option of the regional water planning group, established subsequent to the adoption of the most recent plan.

### Desalination

#### ***SB 1430 Perry, Charles (R) Lucio III, Eddie (D) Signed by Governor on 6/1/17 effective 9/1/17***

Relating to desalinated seawater and a requirement that the TCEQ provide expedited consideration of certain applications to amend water rights.

SB 1430 should encourage development of desalination projects. SB 1430 amends the Water Code doing the following:

- Establishes that a holder of a water right who begins using desalinated seawater after acquiring the water right has a right to expedited consideration of an application for an amendment to the water right if the amendment authorizes the applicant to divert water from a diversion point that is different from or in addition to the point or points from which the applicant was authorized to divert water before the requested amendment.
- Authorizes the applicant to divert from the different or additional diversion point an amount of water that is equal to or less than the amount of desalinated seawater used by the applicant.
- Authorizes the applicant to divert from all of the diversion points authorized by the water right an amount of water that is equal to or less than the amount of water the applicant was authorized to divert under the water right before the requested amendment.
- Authorizes the applicant to divert water from all of the diversion points authorized by the water right at a combined rate that is equal to or less than the combined rate at which the applicant was authorized to divert water under the water right before the requested amendment and does not authorize the water diverted from the different or additional diversion point to be transferred to another river basin.

### Water conservation

#### ***HB 1573 Price, Four (R) Creighton, Brandon (R) Signed by Governor on 6/1/17 effective 9/1/17***

Relating to personnel requirements for water loss auditors.

HB 1573 requires that water loss audits be completed by a person trained to conduct the auditing. The TWDB shall make training on water loss auditing available without charge from TWDB's website. The TWDB may provide training in person or by video or a functionally similar and widely available medium. Training must include comprehensive knowledge of water utility systems and terminology and any tools available for analyzing audit results.

#### ***HB 1648 Price, Four (R) Seliger, Kel (R) Signed by Governor on 5/26/17 effective 9/1/17***

Relating to the designation of a water conservation coordinator by a retail public water utility to implement a water conservation plan.

HB 1648 amends current law relating to the designation

of a water conservation coordinator by a retail public water utility to implement a water conservation plan.

### Groundwater

***SB 1009 Perry, Charles (R) Larson, Lyle (R) Signed by Governor on 6/15/17 effective 9/1/17***

Relating to administrative completeness requirements for permit and permit amendment applications for groundwater conservation districts.

SB 1009 would limit the information a groundwater conservation district could require for an operating permit or permit amendment application to information required by current law, other information included in a district rule in effect on the date the application was submitted, and information reasonably related to an issue the district was authorized to consider. A district could not require additional information to be included in an application for a determination of “administrative completeness.”

### Open meetings and public notice

***SB 347 Watson, Kirk (D) Phelan, Dade (R) Signed by Governor on 5/16/17 effective 9/1/17***

Relating to the applicability of open meetings and public information laws to regional water planning groups and their committees.

SB 347 provides statutory clarity that the business of the regional water planning groups, including their committees and/or subcommittees, shall be conducted in accordance with the Texas Open Meetings and Public Information Acts. With the establishment of the SWIFT, the importance of the regional water planning groups has grown immensely, and SB 347 ensures the planning process is open and transparent for the sake of efficient and effective future planning and for public participation in how the state’s resources and finances are used.

***SB 554 Kolkhorst, Lois (R) Metcalf, Will (R) Signed by Governor on 6/15/17 effective 9/1/17***

Relating to notice requirements for certain special districts that hold board meetings outside the district.

SB 554 amends the Water Code to require certain water districts that do not have a meeting place within the district, respectively, to include in the required notice for a district’s first meeting of each calendar year a description of the petition process for the TCEQ to designate a meeting place.

### Insurance/workers compensation

***HB 1989 Shine, Hugh (R) Zaffirini, Judith (D) Signed by Governor on 6/15/17 effective 9/1/17***

Relating to the requirements for withdrawal by a certified self-insurer from workers’ compensation self-insurance.

Current law allows a certified self-insurer to withdraw from self-insurance with the approval of the commissioner of workers’ compensation (commissioner) if it shows to the satisfaction of the commissioner that it has established an adequate program to pay all incurred losses, including unreported losses, that arise out of accidents or occupational diseases first distinctly manifested during the period of operation as a certified self-insurer. To add clarity to current law and to reduce compliance burdens on self-insurers choosing to withdraw, HB 1989 would provide that, for purposes of withdrawal, an “adequate program” includes one in which the self-insurer has insured or reinsured all of its incurred workers’ compensation obligations with an authorized insurer under an agreement that is filed with and approved in writing by the commissioner.

***HB 2111 Romero, Ramon (D) Zaffirini, Judith (D) Signed by Governor on 6/15/17 effective 9/1/17***

Relating to changing statutory references to hearing officer and hearings officer to administrative law judge under the workers’ compensation system.

Under current law, when a dispute arises regarding a workers’ compensation claim, the dispute may be resolved through a quasi-judicial process involving a hearing. The Division of Workers’ Compensation personnel who preside at these hearings are referred to in current law as “hearing officers.” HB 2111 amends current law relating to changing statutory references to hearing officer and hearings officer to administrative law judge under the workers’ compensation system.

***HB 2112 Romero, Ramon (D) Zaffirini, Judith (D) Signed by Governor on 6/15/17 effective 9/1/17***

Relating to certain workers’ compensation reporting requirements.

HB 2112 amends current law relating to certain workers’ compensation reporting requirements by requiring an employer who terminates workers’ compensation insurance coverage obtained under this subtitle to file a written notice with the division of workers’ compensation of the Texas Department of Insurance (division), rather than with the division by certified mail, not later than a certain date.

***HB 2443 Gonzalez, Mary (D) Zaffirini, Judith (D)***  
***Signed by Governor on 6/9/17 effective 9/1/17***

Relating to the electronic submission of a wage claim to the Texas Workforce Commission.

HB 2443 amends current law allowing the electronic submission of a wage claim to the Texas Workforce Commission.

**Additional thoughts and noteworthy issues for consideration**

The majority of water infrastructure-related bills that passed this session were actually related to the establishment of municipal utility districts and other similar types of special districts, approximately 70, which is indicative of the amount of growth currently occurring in Texas. The growth that we are experiencing will continue to stress our water resources and will necessitate additional investments in developing water supplies and water infrastructure. In order to meet that demand, we depend on sound public policy.

A number of very substantive water bills were vetoed by Governor Abbott, many of which were re-introduced during the special session. Included in the group of water bills vetoed was legislation relating to transfer of groundwater permits (HB 2377), water reuse (HB 2798), development of brackish groundwater (HB 2378), use of funds in the state water pollution control revolving fund (HB 2943), use of the TWDB participation fund for desalination projects and aquifer storage and recovery projects (HB 3987), and a bill related to a study by the TWDB of water needs and potential alternative water sources (SB 1525). These are important water issues for the State of Texas, and it is unfortunate that they were vetoed. These bills were all re-filed in the special session and include HBs 26, 27, 226, 228, 229, 230, 275, and 277. Unfortunately, these re-filed bills did not move in the Senate since they had already been vetoed and were not part of the Governor's "call."

Another significant bill vetoed by the Governor was SB 1215 relating to responsibility for the consequences of defects in the plans, specifications, or other documents for the construction or repair of an improvement to real property. SB 1215 was one of the most controversial bills for the construction industry this session. The legislation originally clarified that contractors should not be liable for defective plans and specifications. This legislation was met with great animosity from the architects, engineers, oil and gas industry, and numerous other public and private owners groups. House sponsors amended the bill on the floor to mandate a study on the topic in the interim. Despite that this legislation was significantly amended to instruct further research and stakeholder input, it was subsequently vetoed. The owner and designer (architecture and engineering) communities should strive to work with the construction industry to reach consensus on the issues of fair risk

allocation and appropriate assignment of liability. For non-negotiated public works contracts, this is especially important. We anticipate a robust discussion on this and related topics in the interim, which has already begun with a hearing called by House Business and Industry Chairman Rene Oliveira on July 25, 2017.

TxWIN also supported introduction of additional legislation related to public works contracting and retainage on construction contracts; the legislation was heavily negotiated with owner group representatives. Consensus was reached on a compromise bill that established a fair process with reasonable limits on retainage withholding that died due to the clock. Retainage policies vary greatly across the state, and TxWIN strongly believes that a change in law is necessary to provide for fairness in withholding and payment of retainage on construction contracts. Additionally, TxWIN supported legislation related to pre-qualification of public works contractors on competitive bidding projects that also addressed competitive sealed proposals and some related public contracting law issues. Both of these bills would have benefited construction contractors and public owners. TxWIN intends to seek their re-introduction in the next session.

In terms of other legislation introduced in the "Special Session" call by the Governor, two items constitute the biggest threat to local water projects, including funding programs established to fund the Texas state water plan. HB 18 by Estes et al. and HB 206 by Villalba seek to artificially cap spending by political subdivisions based on previous budget years, population growth, and inflation factors. Both bills constitute an egregious overreach by the state government under the banner of promoting fiscal responsibility. TxWIN has respectfully requested that the authors exempt water projects that are necessary for public health and safety. There are too many potential unintended consequences that could occur as a result of both pieces of legislation, and it is TxWIN's assertion that projects that involve years to plan, permit, design and construct should not be subjected to potential delays due to arbitrary and artificial spending caps.

TxWIN and the TxWIN membership is committed to working with representatives of the water infrastructure owner and design community in the interim to promote fair and reasonable policy that promotes competition, fair risk allocation, sound construction contract law, value for public owners, and the public whom they serve. We appreciate our relationships with all parties with an interest in the legislative process relative to Texas water. We are committed to sound policy based on consensus and fairness.

## TEXAS ALLIANCE OF GROUNDWATER DISTRICTS LEGISLATIVE WRAP-UP

*By Sarah Rountree Schlessinger, Executive Director, Texas Alliance of Groundwater Districts*

The 85<sup>th</sup> Texas Legislative Session, Regular Session, saw the introduction of 6,631 bills. Of these, the Texas Alliance of Groundwater Districts (TAGD) identified 41 bills as statewide priority groundwater bills and an additional 40 bills as proposed local groundwater conservation district (GCD) legislation. Of the 41 statewide priority groundwater bills, nine bills made it across the May 29 finish line, and only five bills survived the Governor's veto pen.

Of the 6,631 bills that were filed, 1,211 bills passed, and 50 bills were vetoed. In what could be described as a particularly tense legislative session, several pieces of groundwater legislation were significantly impacted by political factors beyond the groundwater debate. As such, the groundwater policy dialogue is as affected by what did not pass, as it is by what did.

Following a busy legislative interim for groundwater issues, the 85<sup>th</sup> Texas Legislature picked up several of the interim's emerging themes. Those topics, as expressed in both interim hearings and reports, predominately included discussion on regulatory certainty, uniformity, permitting approaches/procedures, regional planning, and GCD performance. While it would be difficult to cover the full expanse of filed legislation in this summary, the groundwater legislation filed this session can largely be allocated into those five themes.

### **Omnibus bills: regulatory certainty and uniformity**

Creating a symmetrical effect and holding the bulk of this session's groundwater focus, the chairmen of both the Senate Committee on Agriculture, Water and Rural Affairs (SAWRAC) and the House Natural Resources Committee (HNRC) each filed one omnibus groundwater bill and one issue-specific bill. Each of the four ranked as high priority groundwater bills, with significant committee and stakeholder time dedicated to them. While two of the four bills passed, both were ultimately vetoed.

Responding to interim concerns on a groundwater permit applicant's regulatory certainty and incorporating concepts discussed by groundwater consensus groups, Chairman Larson's omnibus House Bill (HB) 31 was comprised of five sections that addressed subjects such as export permits, moratoriums, and administrative completeness for permit applications. TAGD members voted in support of this bill and the issues it addressed. While there was little opposition to it, HB 31 was passed by the full House but did not make it out of the SAWRAC.

Chairman Perry's omnibus SB 1392 met more concern, with the originally filed version consisting of 27 pages and addressing tough subjects such as the adoption of common rules in a

groundwater reservoir and restrictions on a district's ability to issue special permit conditions. While subsequent committee substitutes made significant efforts to meet concerns while still addressing the issue of uniformity, TAGD did not support SB 1392 and it did not pass.

### **Issue-specific bills: brackish groundwater and attorney's fees**

Following the previous legislative session's efforts in HB 30, Chairman Larson's HB 2377 sought to establish the permitting procedures for brackish groundwater production permits within the Texas Water Development Board (TWDB) identified brackish groundwater production zones. While the originally filed version of HB 2377 caused some concern within TAGD, a strong stakeholder process ultimately produced a bill that was agreeable to all parties and gained TAGD's support. HB 2377 was ultimately vetoed by Governor Greg Abbott.

If you heard Chairman Perry speak during the legislative interim, you know that he was consistent in his concern regarding a landowner's ability to pursue his or her groundwater rights in a courtroom. As such, the filing of SB 862 on the award of attorney's fees in a suit involving a GCD was not a surprise. With subsequent committee substitutes seeking to balance concerns, testimony against the bill focused on historical context for current provisions and a regulatory body's ability to take enforcement decisions without fear of its ability to finance it. Amid significant tension, TAGD members did not support SB 862.

### **Permitting approaches/procedures**

Beyond the wide array of subjects addressed by the omnibus and issue-specific bills, there were a number of additional pieces of legislation filed that addressed GCD permitting approaches and procedures. Many of these bills were a result of either Texas Water Conservation Association (TWCA)'s groundwater committee's consensus efforts or a response to those GCD critiques raised during the legislative interim. Of the nine total permit-related bills, four bills passed and two were vetoed.

Larger conceptual efforts to reformat GCD permitting structures included Chairman Perry's omnibus SB 1392, HB 1318, and HB 3028, all three of which were related to a correlative rights GCD permitting structure in some way. Representative Lucio's HB 1318, relating to the regulation of production wells for a retail public utility by a GCD, sought to put legislation in place to protect a water utility's ability to be allocated a permit in a correlative rights model based on their

service area, rather than land ownership. Representative Burn's HB 3028 related specifically to groundwater ownership and rights, attempting to put into legislation the concept of fair share allocation based on property ownership. While neither bill was passed, the discussion of fair share allocation, correlative rights permitting, and the ability to protect those activities and industries that depend on groundwater was front and center in the groundwater policy debate.

Less controversial legislation on permitting approaches and procedures included SB 1009, SB 864, HB 2378, and HB 3417. Chairman Larson's HB 2378, relating to extensions of an expired permit for the transfer of groundwater from a GCD, was a TWCA consensus bill that applied to transfer permits the same automatic renewal provision passed in the previous session for production permits. This bill was supported by TAGD but was unfortunately, along with several other bills by Chairman Larson, vetoed. Representative King's HB 3417 was also a TAGD-supported consensus bill that addressed what a district considers when issuing a permit, specifically the ability to look at exempt and registered wells for potential impact.

Chairman Perry's SB 1009 and SB 864 were the only permitting bills that passed this session. SB 864 is a consensus piece of legislation that promotes increased coordination between the Texas Commission on Environmental Quality (TCEQ) and GCDs when issuing a right to use state water if the applicant intends to use groundwater as an alternative supply. TAGD supported this effort. SB 1009 is also a piece of consensus legislation that addresses those requirements that may be requested by a GCD for a permit or permit amendment to be considered administratively complete. As a response to one of the frequent GCD critiques during the interim, TAGD strongly supported SB 1009.

### **Regional planning and joint groundwater management**

Like the GCD permitting legislation, there were a number of pieces of legislation that address regional planning and joint groundwater management procedures. Most notably, these included SB 1053, SB 1392, SB 1511, HB 2215, HB 3043, and HB 3166.

Of those listed above, only SB 1511 and HB 2215 ultimately passed. Representative Price's HB 2215 addresses the timeline of desired future condition adoption as it relates to both the groundwater management areas (GMAs) and state water plan, and is a direct result of interim discussions and recommendations made in interim reports. It is a piece of TWCA consensus groundwater legislation and had full TAGD support. Similarly, Chairman Perry's SB 1511 gained TAGD's full support as an attempt to better address which projects receive funding in the state water plan.

### **GCD performance, annexation and administration**

While a principal topic of discussion during the legislative interim hearings and reports, the subject of GCD performance only surfaced in the form of HB 180 and GCD-specific sunset legislation. Filed again from the previous session, HB 180 addressed the role the State Auditor's Office plays in GCD performance review and sought to improve the oversight function. While this bill received no testimony in opposition, had full TAGD support, and was voted out of the full House, the bill was not voted out of SAWRAC.

The subject of GCD territory and annexation received a substantial amount of attention during this session, with numerous testimonies on the merits of HB 4122 discussed. Following significant stakeholder discussion, Representative Kacal's HB 4122 committee substitute, which provided a landowner with a certain amount of property the ability to seek annexation into another GCD, landed in the neutral zone for TAGD. HB 4122 was passed out of the full House but was not passed out of the full Senate.

On an administrative front, two significant bills were passed this session, but only one will become law. Representative King's HB 3025 related to open, uncovered, abandoned or deteriorated wells, and would have provided GCDs with the ability to plug deteriorated wells before they cause significant harm to groundwater quality. Due to political factors, this bill was unfortunately vetoed. Chairman Perry's SB 865, however, relating to a GCDs ability to use electronic funds transfers, was signed with an immediate effective date.

### **Summary**

TAGD's positions on the 41 statewide priority groundwater-filed bills ultimately resulted in support for 22 bills, neutral on 12, and opposed to six. Broadly speaking, these numbers appear to indicate a willingness from the GCD industry to respond to concerns and work through those topics of regulatory certainty, uniformity, permitting, regional planning, and GCD performance.

While several pieces of significant groundwater legislation were not ultimately signed into law, the outcome in groundwater legislation during the 85<sup>th</sup> appeared much more positive than the initial outlook at the bill filing deadline. With TAGD strongly supporting all five of the groundwater bills that have or will become law, it seems reasonable to conclude that it was a good session for GCDs.

Looking ahead, it is clear there will be more discussion both inside and outside the Texas Legislature on those topics that did not pass into law during the 85<sup>th</sup> Legislative Session, particularly on the topic of attorney's fees and uniformity.

**What passed*****HB 2377 Vetoed***

Relating to the development of brackish groundwater.

***HB 2378 Vetoed***

Relating to extensions of an expired permit for the transfer of groundwater from a GCD.

***HB 3025 Vetoed***

Relating to open, uncovered, abandoned, or deteriorated wells.

***SB 1525 Vetoed***

Relating to a study by the TWDB of water needs and availability in this state.

***SB 865 6/09/17 Effective Date***

Relating to a GCD's use of electronic fund transfers.

***HB 2215 6/09/17 Effective Date***

Relating to the adoption of desired future conditions (DFCs) for aquifers in GMAs and the consideration of those conditions in the regional water planning process.

***SB 1009 9/01/17 Effective Date***

Relating to administrative completeness requirements for permit and permit amendment applications for GCDs.

***SB 864 6/09/17 Effective Date***

Relating to the procedure for obtaining a right to use state water if the applicant proposes an alternative source of water that is not state water.

***SB 1511 9/01/17 Effective Date***

Relating to the state and regional water planning process and the funding of projects included in the state water plan.

**What did not*****SB 1392***

Relating to GCDs.

***SB 862***

Relating to the award of attorney's fees and other costs in certain proceedings involving a GCD.

***HB 31***

Relating to the regulation of groundwater.

***HB 4122***

Relating to the transference of certain territory from one GCD to another.

***HB 3166***

Relating to the consideration of modeled sustainable groundwater pumping in the adoption of DFCs in GCDs.

***HB 180***

Relating to the review of GCDs by the state auditor.

***HB 1318***

Relating to regulation of production of wells for retail public utilities by a GCD.

***HB 3028***

Relating to groundwater ownership and rights.

***HB 3043***

Relating to the joint planning process for groundwater management.

***HB 3417***

Relating to the criteria considered by GCDs before granting or denying a permit.

***SB 189***

Relating to notice of an application for a permit to drill certain injection wells within a certain distance of a GCD.

***SB 1053***

Relating to an appeal of a desired future condition in a GMA.