

PRESENTATION

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**WATER ISSUES IN THE 84TH
TEXAS LEGISLATURE**

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The 84th Texas Legislature and Water Related Issues

I. Introduction

During the 83rd Legislative Session, the Texas Legislature adopted legislation that previews significant changes the Texas water landscape. This upward trajectory of water's importance can be traced to the confluence of several factors. The most pressing was that a majority of the state was experiencing some stage of drought. Several Texas cities were within days of completely running out of water. The state had just experienced the hottest year to date, setting a record of the number of continuous days above one hundred degrees. These factors combined with a robust economy and a very rapidly growing population required examination of existing policies and needed improvements.

Legislation passed during 83rd Legislature, with the largest water policy impact, was HB 4, HB 1025 and Senate Joint Resolution 1 (collectively known as Proposition 6). This bundle of legislation constitutionally created the State Water Implementation Fund for Texas ("SWIFT") and authorized the state Comptroller to transfer \$2 billion from the "Rainy Day Fund" to the SWIFT account so that a revolving loan program, administered by the Texas Water Development Board ("TWDB"), could be created to fund the state water plan. This legislation also re-structured the TWDB by implicitly unseating the sitting six board members, establishing a full-time compensated, three-member board, and explicitly prohibiting the continued employment of the then executive director of the TWDB. The 83rd Legislature also transferred the economic regulation of water and wastewater rates and services from the Texas Commission on Environmental Quality to the Public Utility Commission.

On January 13, 2015, the Texas Legislature convened for the 84th Legislative Session. While many parts of the state are not nearly as dry or severely drought stricken as they were prior to last session, the public's recognition of the state's booming population growth and the stagnate water supply, resulted in several policy changes and a more direct focus on the conservation of water.

II. The 84th Legislature

The Texas political landscape underwent a major change prior to the 2015 Legislative Session. For the first time in twenty-four (24) years, all statewide offices were on the ballot for election without an incumbent running.¹ As predicted, Republicans won each statewide office, establishing a "longest-in-the-nation winning streak that dates back to 1994."² Governor Rick Perry, who is the state's longest serving governor, was replaced by Governor Greg Abbott, who was previously the Texas Attorney General. Other statewide offices that underwent a change were: Lt. Governor Dan Patrick was elected to replace Lt. Governor David Dewhurst, Attorney General Ken Paxton was elected to fill the position vacated by Governor Greg Abbott,

¹ *Tripedia: 2014 Statewide Elections*, THE TEXAS TRIBUNE, <http://www.texastribune.org/tribpedia/2014-statewide-elections/> (last visited March 3, 2015).

² *Statewide sweep: Texas GOP hasn't lost since 1994*, THE ASSOCIATED PRESS (Nov. 4, 2014), <http://www.kvue.com/story/news/politics/elections/2014/11/04/statewide-sweep-texas-gop-hasnt-lost-since-1994/18500791/>.

Comptroller Glenn Hegar was elected to fill the office vacated by Comptroller Susan Combs, Agriculture Commissioner Sid Miller was elected to replace Commissioner Todd Staples, and Texas Land Commissioner George P. Bush was elected to replace Commissioner Jerry Paterson. Speaker Joe Straus remained as Speaker of the Texas House, sparing the House the inevitable issues related to new leadership.

Lt. Governor Dan Patrick, who is in charge of appointing Senate Committee chairs and vice-chairs, shook up the committee assignments this year by not only changing committee chairs but also changing the scope of historic committees. Previously, all water-related legislation was referred to the Senate Natural Resources Committee, which had been chaired by Sen. Troy Fraser of Horseshoe Bay since the 80th Legislature. The Lt. Governor divided the committee and created the Senate Committee on Agriculture, Water and Rural Affairs and the Committee on Natural Resources and Economic Development.

Lt. Governor Patrick named Sen. Charles Perry as Chairman of the Ag., Water and Rural Affairs Committee and chose Sen. Fraser as chair of Natural Resources and Economic Development. Sen. Perry is a freshman from Lubbock, who was elected to Sen. Robert Duncan's seat when he retired to become Chancellor of Texas Tech University. Over the course of the legislative session, Sen. Perry's committee received legislation related to surface water rights, the Texas Water Development Board, issues involving the state water plan, river authorities, and groundwater conservation districts. The effect of the committee "split" and the change in leadership was visible during committee discussions and the importance given to specific legislation.

During previous sessions, water related legislation that had some nexus to the Colorado River received extensive consideration and debate in the Senate Committee on Natural Resources due to Comptroller Glenn Hegar's (who served on the committee) constituency downstream on the Colorado River and bay area and Sen. Fraser's constituency in the Highland Lakes area. With Sen. Perry's West Texas background, and the committee's jurisdiction, the majority of the legislation considered dealt with groundwater policy rather than surface. This change in direction, I assume, is due mainly to the fact that a majority of the Sen. Perry's constituency live in drought stricken areas of Texas and rely heavily on groundwater.

Members of the Senate Committee on Agriculture, Water and Rural Affairs are Sen. Judith Zaffirini (Laredo) as Vice-Chair, Sen. Brandon Creighton (Conroe), Sen. Bob Hall (Canton), Sen. Juan "Chuy" Hinojosa (McAllen), Sen. Lois Kolkhorst (Brenham), and Sen. Jose Rodriguez (El Paso). All but Senator's Zaffirini, Creighton, and Hinojosa were new to water issues.

Senator Fraser's Committee received legislation related to oil and gas matters, coastal issues, electricity regulation, employment matters, environmental issues, and water utilities. The other members of the committee are Sen. Craig Estes (Wichita Falls) as Vice-Chair, Sen. Brian Birdwell (Granbury), Sen. Bob Hall (Canton), Sen. Kelly Hancock (North Richland Hills), Sen. Juan "Chuy" Hinojosa (McAllen), Sen. Eduardo "Eddie" Lucio (Brownsville), Sen. Robert Nichols (Jacksonville), Sen. Carlos Uresti (San Antonio), and Sen. Judith Zaffirini (Laredo).

This was Sen. Birdwell, Hall, and Hancock's first time to serve on the Senate Natural Resources Committee.

There were leadership changes on the House Natural Resources Committee as well, but due to retirement issues rather than statewide elections. Rep. Allen Ritter (Chairman - Nederland) and Bill Callegari (Vice-Chairman - Katy) chose to retire after the 83rd Legislative Session. Both Rep. Ritter and Callegari brought real interest and knowledge of the states' water resources and each took with them an enormous amount of institutional knowledge. Rep. Ritter was chair of the Committee during the 81st, 82nd, and 83rd Legislative Sessions, and was instrumental in passing SB 332 during the 81st session and HB 4 last session (which lead to the Constitutional Amendment, Proposition 6).

Speaker Joe Straus chose Rep. Jim Keffer (Eastland) to Chair the House Natural Resources Committee. Rep. Keffer has been a member of the committee since 2011. Bills referred to this committee covered groundwater, surface water, desalination, aquifer storage and recovery, utilities and districts, and groundwater conservation districts. The other members of the committee include Rep. Trent Ashby (Lufkin) as Vice-Chair, Rep. Dennis Bonnen (Friendswood), Rep. DeWayne Burns (Cleburne), Rep. James Frank (Wichita Falls), Rep. Kyle Kacal (College Station), Rep. Tracy O. King (Batesville), Rep. Lyle Larson (San Antonio), Rep. Eddie Lucio, III (Brownsville), Rep. Poncho Nevarez (Eagle Pass), Rep. Paul Workman (Austin). This will be Rep. Burns, Frank, Kacal, Nevarez, and Workman's first time to serve on this committee.

Once the 84th Legislature adjourned sine die, several members began announcing their retirement, taking with them more institutional knowledge and leaving a rather "green" group of legislators to deal with the difficult tasks debated each session. House Members that have announced their official retirement are Jimmie Don Aycock, Myra Crownover, Joe Farias, Allen Fletcher, Patricia Harless, Bryan Hughes, Jim Keffer, Susan King, Marisa Marquez, Ruth Jones McClendon, John Otto, David Simpson, Scott Turner, and Sylvester Turner. Senators who have accounted their retirements are Kevin Eltife and Troy Fraser.

III. Legislation

During the interim prior to the 84th Legislature, several topics received a great amount of attention: (i) aquifer storage and recovery, (ii) desalination (iii) consistency within groundwater conservation districts ("GCDs"), (iv) GCDs permitting renewal, and (v) the Texas Commission on Environmental Quality's impediments to permitting. Other topics that were consistently discussed with regard to water policy and always likely to become draft legislation are (i) issues related to certificates of convenience and necessity for water and sewer utility service and (ii) the use and safety of water as it relates to the oil and gas industry.

As predicted, each of the topics heavily discussed during the interim received a variable amount of attention, with some policy issues, such as aquifer storage and recovery, becoming clarified. However, unlike the 83rd Legislature, no major policy changes were adopted. For example, Rep. Larson filed, but failed to pass, legislation that would create a statewide water grid, that he stated would "transform the regulatory framework for water in Texas." The idea

behind the legislation was that the Texas Water Development Board would study and examine the creation of a grid that would allow entities throughout the state to market and trade water.

a. Notable Non-Water Legislation

The 84th Legislative Session was filled with many political highs and lows. Of these instances, several received media attention. One event that garnered headlines, and resulted in the biggest change to occur within the legislative process was the Senate's adoption of the three-fifths rule. At the beginning of every legislative session the Senate adopts rules to govern its operations and procedures. Prior to this legislative session, and for a period of 64 years, the Senate has adopted a two-thirds rule, meaning that it takes an affirmative vote of at least 21 Senators for a bill to receive a vote from the Senate floor. However, in the beginning of the 2015 Legislative Session, the Senate, voting along party lines, approved of a three-fifths rule, resulting in a necessary affirmative vote of 19 rather than 21. This change in Senate decorum provided the 20 Republican Senators the upper hand.

Other legislation that garnered statewide attention was SB 339, authored by Sen. Kevin Eltife and Rep. Stephanie Klick. Dubbed the "medical marijuana bill," SB 339 provides a physician the authority to prescribe the use of low-THC cannabis for individuals with intractable epilepsy. The bill requires the patient to be a permanent Texas resident, requires a second physician to concur with the original physician's determination, and requires the Texas Department of Public Safety to license dispensers of the low-THC cannabis. Other medically related legislation approved was SB 1697, authored by Sen. Huffman and Rep. Smithee. SB 1697 exempts from public information requests the identifying information of an entity that participates in an execution procedure. Sen. Huffman's bill was filed and passed to provide protection to those entities who participate in the lethal injection process.

The state's budget is always a hotly contested topic every legislative session. During the most recent session, many political analysts believed that the Governor would be forced to call a special session due to the conflicts related to the 2016-2017 budget. However, during the final hours, the state budget Conference Committee was able to agree on a final version. Noteworthy facts regarding the next biennium's budget are that the spending in the budget is increased by 3.6% over the current biennium's budget, it includes property tax cuts, there is an additional \$1.5 billion allotted to public education, and it boosts research funding for higher education institutions.

Issues related to handguns were also heavily debated in the media and in the legislature. On June 13, 2015, Governor Greg Abbott signed into law HB 910 and SB 11. HB 910 authorizes Texans who either have or obtain a concealed handgun license ("CHL") to openly carry their handgun in a shoulder or belt holster in all places that a CHL holder is currently authorized to carry. Police officers will have the implicit authority to stop and ask a person if they are licensed to openly carry simply because the person is openly carrying a handgun. SB 11 allows licensed gun owners to carry concealed weapons on college campuses. This law takes effect August 1, 2016. The law requires higher education institutions to establish reasonable rules, regulations, or other provisions regarding the carrying of concealed handguns by license holders on the campus or premises. Further, Sen. Brandon Creighton also authored and passed

legislation that will be voted on in November, which will constitutionally recognize the right of people to hunt, fish, and harvest wild game.

Several criminal justice-related bills also received media attention. SB 158, authored by Sen. West and Rep. Fletcher, and HB 1036, authored by Rep. Johnson and Sen. Whitmire, both pertain to law enforcement related matters. SB 158 requires law enforcement agencies that operate body worn camera programs to adopt a policy for such cameras. The legislation outlines several provisions the policy must include and requires law enforcement agencies operating such program to provide training to its peace officers or other personnel who will encounter the video and audio of the camera. HB 1036 requires the Attorney General to create a form that must be used by law enforcement when there is an officer-involved injury or death. The legislation requires the Attorney General to post a copy of a report submitted on the Attorney General's website. The legislation also requires the Attorney General to submit a report annually to the Governor and the applicable legislative committees that details all of the officer-involved injuries or deaths that occurred during the preceding year.

HB 2150, authored by Rep. Alvarado and Sen. Whitmire, revised the Texas criminal justice procedure by which a grand jury is selected. Rep. Alvarado's bill amends the Code of Criminal Procedure and allows a grand jury to be selected from a "fair cross section of the population of the area served by the court" rather than a judge appointing jury commissioners who select and draw grand and petit jurors.

In Governor Abbott's State of the State speech, he announced that this session should be dedicated to ethics reform and transparency in state government.³ To accomplish his goal, Governor Abbott added ethics reform and transparency to his list of emergency items.⁴ One piece of "transparency" legislation that affects local governmental entities is HB 3357, authored by Rep. Lucio, III and Sen. Eltife. HB 3357 amends the Government Code, Section 551.054(2) and provides political subdivisions, who extend into fewer than four counties, the convenience of posting notice of each meeting on the district's website or provide notice of each meeting to the county clerk in which the district or political subdivision is located.

Media outlets also heavily covered legislation aimed at limiting a local government's authority to impose more stringent regulatory measures than the state, consistent with Governor Abbott's statement that "Texas cities [are] contributing to the 'California-zation' of Texas."⁵ Governor Abbott claims that municipal regulations such as Denton's fracking ban or Austin's bag ban are "creating a patchwork quilt of bans and rules and regulations that is eroding the Texas model."⁶ HB 40, filed by Rep. Drew Darby, was a direct result of the City of Denton's fracking ban. HB 40 provides that an oil and gas operation is within the exclusive jurisdiction of the state and prohibits a municipality or other political subdivision from adopting or amending ordinances

³ Bob Price, *Abbott: Texas Must Double The Budget for Border Security*, BREITBART, <http://www.breitbart.com/texas/2015/02/17/abbotts-state-of-the-state-address-texas-must-double-the-budget-for-border-security/> (Feb. 17, 2015).

⁴ *Id.*

⁵ Wade Goodwyn, *New Texas Governor Adds to Tension Between State, City Governments*, NATIONAL PUBLIC RADIO, <http://www.npr.org/2015/01/15/377526831/new-texas-governor-adds-to-tension-between-state-city-governments> (Jan. 15, 2015).

⁶ *Id.*

that regulate oil and gas operations within the boundaries or extraterritorial jurisdiction of the municipality or political subdivision. However, HB 60 does provide that such operations within these specified areas may be regulated if the regulations are commercially reasonable, the regulations pertain to surface activity, the regulations do not effectively prohibit the operation, and the regulation is not otherwise preempted.

b. Water Legislation

i. Aquifer Storage and Recovery

The use of aquifer storage and recovery (“ASR”), as a method to store water, was authorized by the 74th Legislature. However, the permitting and operation of ASR projects has been without regulatory clarity and, in some cases, difficult to implement because of the overlay of groundwater regulation by groundwater conservation districts. Rep. Lyle Larson (San Antonio), Sen. Brandon Creighton (Conroe), and Sen. Charles Perry (Lubbock) filed legislation this past session that was developed by the Texas Water Conservation Association (“TWCA”) which would clarify this situation: HB 655, SB 1724, and SB 1903. Of this legislation, Rep. Larson’s HB 655 was able to receive the necessary approval.

HB 655 provides Texas Commission on Environmental Quality (“TCEQ”) the exclusive jurisdiction over the permitting and regulation of ASR injection wells. The bill requires each ASR project operator to install a meter on each injection and recovery well, and submit a report to TCEQ monthly that details the volume of water injected and the recovered. The operator shall also annually submit to TCEQ the water quality testing performed on the water injected into the aquifer and the water recovered. Furthermore, an operator is not required to amend a surface water right permit if the operator wishes to store permitted surface water within an injection well.

Operators of ASR projects must register each ASR well (injection and recovery) with any groundwater conservation districts (“GCD”) the wells are located and provide the GCD the same reports the operator must provide TCEQ. HB 655 prohibits a GCD from permitting an ASR injection or recovery well, unless the operator recovers an amount of water larger than the volume authorized by TCEQ. Furthermore, a GCD is prohibited from assessing a production, transportation, or export fee unless the operator withdraws a larger amount of water than authorized.

The TWCA is one of the largest trade associations in the state. TWCA has, for several sessions, convened representatives from a broad range of stakeholders, who meet regularly during the interim to debate, discuss and propose draft legislation. TWCA’s efforts are considered a good starting point for discussion and consideration of policy issues. Bills with the endorsement of the TWCA stakeholder’s process often are, with modifications, likely to become law. Because HB 655 began as TWCA consensus legislation, and was implicitly TWCA supported, it had a high chance of becoming law.

ii. Desalination and Regulation of the Production of Brackish Groundwater

The regulatory restrictions, market impediments and financial investment associated with the production and transportation of groundwater have increased the interest in production and treatment of brackish groundwater and the use of desalination to produce potable water. Rep. Lyle Larson (San Antonio) filed a group of bills (HB 30, 835, 836) aimed at encouraging the research and use of brackish groundwater and simplifying the overlying regulation of producing brackish groundwater. Of those bills filed, HB 30 received the necessary approval from both chambers of the Legislature.

HB 30 amends Chapter 16 of the Water Code and requires regional water planning groups to consider the benefits of developing a large-scale desalination facility for seawater or brackish water. The bill also requires the TWDB to study the implementation of brackish groundwater desalination activities. Within the TWDB's study, it must identify and designate local or regional brackish groundwater production zones that will provide moderate to high availability and productivity. Furthermore, the legislation requires the TWDB to determine the availability of brackish water in the identified zones for periods of 30 and 50 years. The identification of the brackish groundwater zones must be complete by December 1, 2016.

Legislation was also passed that encouraged the desalination of seawater. HB 4097, authored by Rep. Todd Hunter and Sen. Lois Kolkhorst, requires the Public Utility Commission ("PUC") to work with the ERCOT independent system operator and the transmission and distribution utilities to review existing transmission and distribution lines to determine if the lines provide sufficient infrastructure for seawater desalination projects. The bill also provides a procedure that allows a person to divert state water from the Gulf of Mexico for desalination and industrial purposes without a permit. Thus, the diversion is authorized without notice requirements or a potential contested case hearing. However, if certain conditions are met, then the entity must obtain a permit from TCEQ. The TCEQ must consider environmental flow standards in either situation (permit or no permit). The bill also provides that the brine from a seawater desalination plant, used for industrial purposes, may be discharged into the Gulf of Mexico, if a permit is obtained. Seawater desalination plants may also use disposal wells to discharge residual waste.

HB 2031 was also adopted this legislative session and it requires regional water planning groups to consider the benefits of developing a large-scale desalination facility for seawater. Rep. Lucio's bill also creates a new chapter within the Water Code that includes provisions very similar to those within HB 4907. For example, HB 2031 allows a person to divert state marine seawater without a permit. However, if some factors are sufficed then a permit is necessary. Unlike HB 20312, this legislation prohibits a diversion of marine seawater from a bay or estuary. The bill allows specific individuals to use the bed and banks of rivers to convey treated marine seawater, and if a permit is obtained, it allows a person to discharge treated marine seawater into a flowing stream and allows brine to be discharged into the Gulf, if a permit is obtained. The bill also requires the Texas Parks and Wildlife and General Land Office to study and identify zones in the Gulf of Mexico that are appropriate to divert seawater.

HB 2230 (Rep. Lyle Larson) requires the TCEQ and the Railroad Commission of Texas to amend or enter into a Memorandum of Understanding that will allow the injection of

nonhazardous brine resulting from desalination into Class V injection wells and the nonhazardous drinking water treatment residuals into Class II injection wells.

It remains to be clarified the exact regulatory landscape for the production and desalination of brackish groundwater while the desalination of marine seawater begins to become streamlined. The murky regulatory landscape and the expense of brackish desalination pose barriers to a clear policy decision being reached. The complexity of this area of water policy is evidenced by the number of bills filed each session that relate to this topic and, that during the interim, TWCA groundwater stakeholders were unable to agree on recommended legislation.

iii. Groundwater Conservation Districts

Groundwater conservation districts (“GCDs”) and Water Code Chapter 36 are consistently debated each legislative session. Prior to this session, several topics involving GCDs were discussed and resulted in the filing of a wide variety of bills. Legislation was also filed to create several new GCDs. The creation of GCDs can be accomplished by petitions, by the TCEQ or through the legislature. At the conclusion of the legislative session, two new GCDs were created: (1) Comal Groundwater Conservation District and (2) Aransas County Groundwater Conservation District. The creation of the Comal GCD was important to the constituents of Rep. Miller and Sen. Campbell because the Texas Commission on Environmental Quality (“TCEQ”) had identified this area as a Priority Groundwater Management Area (“PIGMA”). A PIGMA is an area of Texas that TCEQ determines to have critical groundwater management problems and recommends the creation of a GCD. If the area does not create a PIGMA on its own accord, TCEQ will create one for the area.

Several other GCD issues arose this session due to a groundwater battle in Hays County, Texas that attracted significant media attention and resulted in several proposed pieces of legislation intended to resolve the conflict. Electro Purification was in the process of completing a groundwater production and transportation project to produce water from the Trinity Aquifer in Hays County, Texas and transport it to the City of Buda, Texas, the Goforth Water Special Utility District (“SUD”), and a new subdivision near the City of Kyle, Texas. The area of the proposed wells was within the boundary of the Edwards Aquifer Authority -- which has no authority to regulate use of the Trinity Aquifer. Nearby GCDs (Hayes Trinity and Barton Springs) also appeared to lack jurisdiction to regulate these wells.

Residents overlying the Trinity Aquifer claimed that Electro Purification would drain the Trinity Aquifer, and damage their wells. In response to the residents’ concerns, Rep. Jason Isaac (Dripping Springs) and Sen. Donna Campbell (New Braunfels) filed and passed legislation intended to provide for regulation of the Trinity Aquifer and protect the residents of Hays County. HB 3405 expands the territory of the Barton Springs-Edwards Aquifer Conservation District (“BSEACD”) and explicitly brings the unregulated portion of the Trinity Aquifer into the BSEACD. As a result, Electro Purification must comply with the District’s regulations and obtain an operating permit from the BSEACD through a process unique to this area. The legislation requires the BSEACD to grant temporary permits to Electro Purification based upon the production capacity of their existing wells. However, Electro Purification must then obtain permanent operating permits after demonstrating that their proposed production will not

unreasonably affect existing well owners and the aquifer, with no assurance that the permit will equal either Electro Purification's production capacity or their contractual commitments.

Another bill filed by Rep. Isaac and Sen. Campbell that related to this issue attempted to prevent the Goforth Water SUD from exercising eminent domain power outside of its geographic boundaries. Goforth SUD has contracted with Electro Purification to purchase water and use its eminent domain authority to construct the pipeline Electro will use to transport the water. This legislation did not pass.

iv. Chapter 36 Amendments

Several of the bills filed this session, and some that were subsequently passed, were recommended by the TWCA groundwater stakeholders group. For example, SB 854 was authored by Sen. Zaffirini and Rep. Lucio III, and relates to the renewal or amendment of a permit issued by a groundwater conservation district. Specifically, the bill requires a GCD to renew or approve a renewal of a permit, issued for the operation of or production from a well, without a hearing, if the permit applicant has complied with fee requirements and is not requesting an amendment. The bill also clarifies that if an applicant seeks a permit amendment that is subsequently denied, the underlying permit remains in effect as it did prior to the amendment process. In short, permit renewals cannot generate a contested case hearing.

HB 2179, filed by Rep. Eddie Lucio III, amends GCDs' procedures regarding uncontested and contested hearing requests. The bill requires that (i) a GCD conduct an open hearing when considering a permit or permit amendment, (ii) the GCD's board schedule a preliminary hearing to hear a request for a contested case hearing, and allows the hearing to be conducted by the GCD's Board, the State Office of Administrative Hearings, or a person delegated by the Board, and (iii) requires the GCD to consider a proposal for decision at a final hearing, where evidence may not be presented. Furthermore, the GCD's presiding officer has thirty days from the date of the evidentiary hearing to submit to the board the proposal for decision. The bill also provides that a GCD board may only amend an administrative law judge's ("ALJ") order if the GCD determines the ALJ did not apply/interpret the law properly, that a prior decision relied on by the ALJ is incorrect or should be changed, or if there is a technical error in the findings of fact that must be changed.

Perhaps the most significant change in GCD policy and regulation was accomplished in HB 200, authored by Chairman Keffer. This legislation establishes an entirely new and significantly more meaningful process by which a landowner/groundwater interest may appeal decisions by GCDs in setting desired future conditions ("DFC") for the aquifers within their jurisdiction. Recognizing that a DFC has potentially profound impacts on landowner's rights, the bill authorizes an examination of these decisions through a contested process before the State Office of Administrative Hearings ("SOAH").

The bill provides that an affected person may appeal the reasonableness of an adopted DFC to the SOAH rather than appealing the "approval" to the TWDB. Once a petition is filed with SOAH, a copy of the petition must be submitted to the TWDB by the GCD, and the TWDB shall conduct a review of the DFC and the information relied on by the GCD in passing the DFC.

The TWDB report must then be submitted to SOAH. The bill requires the appealing party to pay the costs associated with the SOAH hearing and bear the burden of proof. The legislation also directs SOAH to make findings and prepare a proposal for decision. If SOAH determines the GCD's DFC is unreasonable, then in SOAH's proposal for decision, it must state the reasons for such conclusion. The GCD has the authority to reject a SOAH proposal; however, the GCD's decision may be appealed to a district court. HB 200 also amends Section 36.066(g) by providing that a GCD may only receive reimbursement for attorneys' fees on issues the GCD prevailed and if the GCD did not voluntarily intervene.

HB 1221, filed by Rep. Lucio III and Sen. Estes, require the seller of residential real property to disclose in writing to the purchaser that the property is subject to groundwater regulation by a groundwater conservation district.

v. Water and Sewer Utility Matters

Water and wastewater utility industry regulation endured substantial changes prior to the 84th Legislative Session. Beginning September 1, 2014, the PUC became responsible for all water and wastewater rate, extension, and service area regulation. Due to the transition's proximity to the 84th Legislature, many thought that reform legislation might be filed to address issues arising from the transition. Additionally, each session typically includes bills that attempt to alleviate the conflicts surrounding certificates of convenience and necessity ("CCN"). However, the amount of legislation filed this session relating to utilities is minimal. Despite these expectations, no general, statewide changes were made in the 84th Legislative Session. Local issues did receive attention.

HB 1378, authored by Rep. Flynn and Sen. Bettencourt, requires political subdivisions to publish online annual financial reports related to debt. The bill defines "political subdivision" to include a special district or political subdivision of the state government. If a district chooses not to maintain its own website, it could post the annual financial report on a third-party website, including a social media site, on which the subdivision controlled the content posted. The district may also post its annual financial reports on the comptroller's website.

SB 789, filed by Sen. Kevin Eltife and Rep. Schaefer, is a bracketed bill that allows a municipality to provide sewer service to customers within the municipality's geographic boundaries without having to obtain a CCN, regardless if the area is within an existing CCN. The bill requires the municipality to provide the other utility at least thirty days notice prior to beginning service in the certificated area. HB 1149, filed by Rep. Kacal, provides that a licensed operator of a public water supply system may be a volunteer; however, the system must maintain a record of each volunteer operator that includes the volunteer's name, contact information, and period of time the volunteer was responsible for the operation.

Sen. Water and Rep. Geren filed and passed SB 1148, which amends the Water Code to set out provisions relating to the functions of the PUC in relation to the economic regulation of water and sewer service. Among other things, the bill (i) authorizes the PUC to issue an emergency rate increase order with or without notice or opportunity for a hearing, (ii) generally requires a municipally owned utility, on request, to disclose to a person the number of ratepayers

who reside outside the corporate limits of the municipality and provide a list of the names and addresses of such ratepayers, and (iii) increases the maximum number of days the PUC may suspend the effective date of a rate change of a Class B utility. HB 1919, filed by Rep. Phillips and Sen. Estes, exempts political subdivisions from the prohibitions related to the transfer of water concerning invasive species.

HB 949, filed by Rep. Lucio III and Sen. Perry, amends the Water Code to authorize the TWDB, on the request of a retail public utility providing potable water that receives financial assistance from the TWDB, to waive the requirement that the utility use the financial assistance to mitigate system water loss if the TWDB finds that the utility is satisfactorily addressing the water loss.

Current law requires individuals who operate, are in charge of, or are responsible for the activity or facility from which an accidental discharge or spill occurs that causes or may cause pollution, to notify the appropriate authorities of the discharge or spill. SB 912, filed by Sen. Eltife and Rep. Crownover, amends the Water Code to exempt such an individual from this requirement for discharges or spills that occur at a wastewater treatment or collection facility owned or operated by a local government, if the spill is 1,000 gallons or less. However, the individual must submit a monthly summary of such discharges and spills to the TCEQ.

vi. Oil & Gas Matters Related to Water

Even though oil prices had dropped significantly, bills related to the use of water in energy production were filed and received attention. During the 83rd Legislature, part of the water discussion involved the amount of fresh water fracking operators require and the disposal/use of flowback. The concern is that the exploration and production of oil and gas consume large quantities of fresh water that is subsequently rendered forever unusable when disposed of by injection into disposal wells. The Texas Railroad Commission has amended its regulations in an attempt to encourage operators to recycle their flowback so that it may take the place of fresh water, thereby reducing the amount of fresh water consumed. The legislature followed suit with the approval of HB 1331.

HB 1331, filed by Rep. Phil King, encourages the recycling of oil and gas waste by providing protection to producers who generate drill cuttings during the production process, and subsequently enter into a contract to transfer the cuttings, with the understanding that the cuttings will be treated and used in connection with a beneficial use. The bill provides that the producer of such cuttings is not liable in tort for a consequence of subsequent use of such drill cuttings.

A remaining problem that the legislature was unable to clarify during the 84th Legislative Session was if the exemption provided to groundwater wells drilled for oil and gas exploration and production applies to groundwater wells drilled for hydraulic fracturing. Rep. King filed a bill that would have made it clear that producers of groundwater for hydraulic fracking are exempt from obtaining a GCD permit if the groundwater is supplied for drilling, exploring, or completion of oil and gas operations. However, because this legislation was not approved, the issue remains unresolved.

vii. Texas Commission on Environmental Quality

Each session, legislation is filed with the stated intent of improving the Texas Commission on Environmental Quality's ("TCEQ") permitting process; this session was no different. Sen. Troy Fraser and Rep. Geanie Morrison filed SB 709, which specifies what TCEQ must include in the referral to SOAH for a contested case hearing, which is that the referral must be detailed and complete and include only factual questions or mixed questions of law and fact. The bill also limits the amount of time an administrative law judge may consider an issue before issuing a proposal for decision. The bill also clarifies what documentation is necessary to establish a prima facie demonstration that the permit issued is legal and would protect human health and safety. Furthermore, the bill provides what evidence the TCEQ must consider when determining if a person is affected. Sen. Fraser and Rep. Morrison both claim that the bill will encourage more business in Texas because it provides for a more efficient permitting process. However, opponents argue that the legislation further restricts participation in contested case hearings.

HB 1794 provides that a civil penalty pursuant to Chapter 7 of the Water Code that results in a recovery must be divided equally between the state and the local government that brought the lawsuit, until the amount of the award exceeds \$4.3 million. If a recovery exceeds \$4.3 million, then the excess is awarded to the state. The bill also places a five-year statute of limitations. HB 930, authored by Rep. Miller, was the result of the TWCA stakeholders committee. The bill requires the TCEQ to create an apprentice water well driller and an apprentice pump installer program and offer examinations related to such licenses.

viii. Miscellaneous Legislation

Not all water related legislation could be categorized, or grouped with similar bills, particularly because the bill may either amends/requires an obscure rule of law, or may address an unpopular area of the law. HB 1665, authored by Rep. D. Bonnen and Sen. Kolkhorst, require the seller of residential/commercial real property that adjoins an impoundment of water, to submit to the purchaser of the property a written notice conveying that the water level in the impoundment fluctuates.

HB 1902, filed by Rep. Howard and Sen. Zaffirini, requires the TCEQ to adopt rules that provide for indoor and outdoor uses of treated graywater and alternative onsite water. The bill defines alternative onsite water as "rainwater, air-conditioner condensate, foundation drain water, storm water, cooling tower blowdown, swimming pool backwash and drain water, reverse osmosis reject water, or any other source of water considered appropriate by the commission." The legislation specifically requires that the TCEQ provide that graywater and alternative onsite water may be use for toilet and urinal flushing.

Rep. Lucio III filed, and Sen. Estes sponsored, HB 1232, which requires the Texas Water Development Board to conduct a study of the state's aquifers to define the quality and quantity of the groundwater in the confined and unconfined aquifers. SB 523, filed by Sen. Birdwell, requires the following river authorities to undergo a limited sunset review:

- Angelina and Neches River Authority

- Bandera County River Authority and Groundwater District
- Brazos River Authority
- (Central Colorado River Authority
- Guadalupe-Blanco River Authority
- Lavaca-Navidad River Authority
- Lower Colorado River Authority
- Lower Neches Valley Authority
- Nueces River Authority
- Palo Duro River Authority of Texas
- Red River Authority of Texas
- Sabine River Authority of Texas
- San Antonio River Authority
- San Jacinto River Authority
- Sulphur River Basin Authority
- Trinity River Authority of Texas
- Upper Colorado River Authority
- Upper Guadalupe River Authority

The Sunset Review of each river authority will include an assessment of each authority's governance, management, operating structure and compliance with legislative requirements. The bill also requires that each authority shall pay for the expenses incurred in the review. In addition, SB 1812, authored and filed by Sen. Kolkhorst and Rep. Geren, require the comptroller to create an internet website that includes a database that lists each public and private entity with eminent domain authority.

IV. Conclusion

Unlike the 83rd Legislative Session, this Legislature did not have an over-arching goal to accomplish related to water law. With the funding of the state water plan temporarily addressed, the Legislature was left to resolve water issues that create divisions among friends and political parties. As Rep. Lyle Larson has said, water politics in Texas is much like Friday night football.

With so many interests represented in the Legislature, and no cohesive purpose, it is always a gamble as to which water policy initiative will survive. This divisiveness is evidenced in the fact that the state's biggest water interest group, TWCA, was able to propose only five recommended pieces of legislation.