

# TEXAS WATER JOURNAL

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THE TEXAS WATER JOURNAL is an online, peer-reviewed journal devoted to the timely consideration of Texas water resources management 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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*Cover photo: As Texas continues to face water challenges and drought, many communities are seeking to conserve water in various sectors, including lawn and landscape water use. ©Jose Manuel Gelpi Diaz, Crestock*

## **Commentary:** **83<sup>rd</sup> Texas State Legislature:** **Summaries of Water-related Legislative Action**

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**Editor’s Note:** September 1 of every odd-numbered year is the date that new legislation from the Texas Legislature session that ended the previous spring typically goes into effect. With this in mind, the Texas Water Journal invited 4 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 2013 session. The opinions expressed in these summaries are the opinions of the individual organizations and not the opinion of the Texas Water Journal or the Texas Water Resources Institute.

Organizations:

- Texas Water Conservation Association
- Water Environment Association of Texas
- Sierra Club, Lone Star Chapter
- Texas Alliance of Groundwater Districts

**Keywords:** Texas water law, Texas Legislature

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## Terms used in paper

Short name or acronym	Descriptive name
ASR	aquifer storage and recovery
BPAT	backflow prevention assembly testers
DFC	desired future conditions
FY	fiscal year
GCD	groundwater conservation district
HCR	House Concurrent Resolution
HB	House Bill
HOA	homeowners' association
LBB	Legislative Budget Board
POA	property owners' association
PUC	Public Utility Commission of Texas
SB	Senate Bill
SECO	State Energy Conservation Office
SJR	Senate Joint Resolution
SSOs	sanitary sewer overflows
SWIFT	State Water Implementation Fund for Texas
SWIRFT	State Water Implementation Revenue Fund for Texas
TAGD	Texas Alliance of Groundwater Districts
TCEQ	Texas Commission on Environmental Quality
TWCA	Texas Water Conservation Association
TWDB	Texas Water Development Board
TDS	total dissolved solids

## ON THE THRESHOLD OF SECURING THE STATE'S WATER FUTURE

*By Dean Robbins, Texas Water Conservation Association*

As the 83<sup>rd</sup> Texas Legislature edged closer to adjournment, the prospect of obtaining critical funding, once and for all, to secure the state's water future, was still uncertain. Questions about the appropriate balance of funding between water and education, and whether and how water-funding issues should be presented to the voters, still were unresolved.

Ultimately, those questions were addressed through the passage of House Bill (HB) 4, HB 1025, and Senate Joint Resolution (SJR) 1, and a special session on water funding was avoided.

HB 4, authored by State Representative Allan Ritter and sponsored by Senator Troy Fraser, creates a water implementation fund to be administered by a restructured Texas Water Development Board (TWDB) to provide low interest loans for projects in the state water plan.

HB 1025, by Representative Jim Pitts and Senator Tommy Williams, is a supplemental appropriations bill that transfers \$2 billion out of the Economic Stabilization Fund (the Rainy Day Fund) to the water implementation fund contingent upon voter approval of SJR 1.

SJR 1 is a joint resolution by Senator Williams and Representative Pitts that, if approved by the voters in November, will amend the Texas Constitution to create funding mechanisms in the state treasury but outside the general revenue fund that will allow the TWDB to provide the financial assistance prescribed in HB 4.

"Chairmen Ritter and Fraser deserve special recognition for their visionary efforts," commented Leroy Goodson, TWCA's general manager. "Chairman Ritter was correct when he observed that it is absolutely critical to secure viable, long-term funding for water infrastructure, which is undeniably the lifeblood of the sustained economic growth and development of our state," Goodson continued. "We must not squander this exceptional opportunity to leave such a critical legacy for future Texans. Our economy depends on it, our municipalities depend on it, and when you get right down to it, our quality of life depends on it."

Governor Rick Perry, Lieutenant Governor David Dewhurst, and House Speaker Joe Straus also worked diligently to find solutions to the issues that might have otherwise derailed the water-funding plan. The 2012 state water plan, prepared by the TWDB, recommends 562 unique water supply projects to meet the state's projected needs for additional water supplies over the next 50 years. If implemented, these projects would result in an additional 9 million acre-feet per year by 2060 to meet the anticipated 8.3 million acre-feet shortfall. Although the TWDB has provided financial assistance for water projects for decades, Texas previously has not had a comprehensive strategy for funding the state water plan.

### It's Our Turn Now

Just ahead is the critical juncture where policy and people converge — where voters must take ownership of future water supply issues by confirming this landmark legislation at the ballot box in November. What citizens do with this unique opportunity will depend in large measure upon what water leaders do to promote understanding that: 1) The long-term stability and growth of the Texas economy depend on the provision of ample water for household, commercial, industrial, and agricultural use; and 2) State funding can significantly reduce the total cost of financing regional and local projects.

What very well could provide a viable template for this upcoming election is the process through which a proposed constitutional amendment (Proposition 2) gained voter approval during the November 8, 2011 general election. This amendment allows the TWDB to authorize bonds on an ongoing basis so long as the dollar amount of bonds outstanding at any one time does not exceed \$6 billion.

As with Proposition 2, there are many and varied stakeholders who are committed to assuring that SJR 1 is passed. Without voter approval, the new funding mechanisms will not exist and the \$2 billion from the Rainy Day Fund will not be available for use. Much can and should be done to educate the voters on this critical election. TWCA will be working with its members and others to ensure success.

For additional and ongoing information about this crucial effort, please visit [www.twca.org](http://www.twca.org). More details about the water-funding legislation and a comprehensive summary of other water legislation passed by the 83<sup>rd</sup> Texas Legislature can be obtained on our website.

### Priority Bills Passed by 83<sup>rd</sup> (R)

#### House Bills (HB)

#### ***HB 4: Ritter, Allan (R); Fraser, Troy (R)***

Relating to the creation and funding of the state water implementation fund for Texas to assist the Texas Water Development Board (TWDB) in the funding of certain water-related projects.

**General Remarks:** Chapter 6, Water Code, is amended to change the governance of the TWDB to a full-time 3 member board with expertise in engineering, finance, and the field of law. Geographic diversity is also required. Chapter 15, Water

Code, is amended to establish a State Water Implementation Fund for Texas to be administered by the TWDB. The fund consists of any money transferred, deposited, or dedicated to the fund by law. A trust company shall hold and invest the fund. The TWDB may use the fund to establish a revolving loan program to implement the state water plan. The TWDB is given guidance on the percentage of money to be applied to rural, conservation, and reuse projects. The TWDB may make loans for up to 30 years at an interest rate not less than 50% of the rate of interest available to the board. Regional water planning groups are directed to prioritize projects using criteria in the legislation. The board shall establish a system for prioritizing projects pursuant to legislative criteria. The board may transfer money to various other accounts authorized by law. An advisory committee to the TWDB is created. Conforming amendments are made to Chapter 15 and 17, Water Code. See also Senate Joint Resolution (SJR) 1, HB 1025.

**Last Action:** 9-1-13 G Earliest effective date

**HB 252: Larson, Lyle (R); Hegar, Glenn (R)**

Relating to water shortage reporting by water utilities.

**General Remarks:** Chapter 13, Water Code, is amended to require a retail public utility and each entity from which the utility is obtaining wholesale water service for the utility's retail system to notify the Texas Commission on Environmental Quality (TCEQ) when the utility or entity is reasonably certain that the water supply will be available for less than 180 days. The TCEQ is required to adopt rules to implement the legislation.

**Last Action:** 9-1-13 G Earliest effective date

**HB 597: Guillen, Ryan (D); Eltife, Kevin (R)**

Relating to boater education and examinations on preventing the spread of exotic harmful or potentially harmful aquatic plants, fish, and shellfish.

**General Remarks:** Chapter 31, Parks and Wildlife Code, is amended to require that a boater education course or equivalency examination under this section include information on how to prevent the spread of exotic harmful or potentially harmful aquatic plants, fish, and shellfish, including methods for cleaning boating equipment.

**Last Action:** 5-24-13 G Earliest effective date

**HB 677: Geren, Charlie (R); Eltife, Kevin (R)**

Relating to the regulation and enforcement of dam safety by the TCEQ.

**General Remarks:** Section 12.052, Water Code, is amended to exempt from state dam safety requirements

dams located on private property if the dam impounds less than 500 acre-feet at maximum capacity, has a hazard classification of low or significant, is located in a county with a population of less than 350,000, and is not located in a city.

**Last Action:** 9-1-13 G Earliest effective date

**HB 738: Crownover, Myra (R); Nelson, Jane (R)**

Relating to the review of the creation of certain proposed municipal utility districts by county commissioners courts.

**General Remarks:** Section 54.0161, Water Code, is amended to modify procedures for the TCEQ to receive input from a commissioners court on the proposed creation of a municipal utility district in the county but outside the corporate limits of a municipality.

**Last Action:** 9-1-13 G Earliest effective date

**HB 788: Smith, Wayne (R); Hinojosa, Chuy (D)**

Relating to regulation of greenhouse gas emissions by the TCEQ.

**General Remarks:** Chapter 382, Health and Safety Code, is amended allow the TCEQ to issue permits for greenhouse gas emission to the extent required by federal law. Permit processes are not subject to a contested case hearing. The TCEQ may impose fees only to the extent necessary to cover costs of implementation.

**Last Action:** 6-14-13 G Earliest effective date

**HB 857: Lucio III, Eddie (D); Ellis, Rodney (D)**

Relating to the frequency of water audits by certain retail public utilities.

**General Remarks:** Chapter 16, Water Code, currently requires all utilities providing potable water service to perform and file with the TWDB every 5 years an audit computing the utility's water loss. Water utilities that receive financial assistance from the board are required to do this annually. The board is required to develop appropriate methodologies and submission dates based on population served. This legislation requires all retail public utilities providing potable water service to a population of more than 3,300 connections or receiving financial assistance from the TWDB to perform and file the audit annually. All other retail public utilities would still be required to perform and file the report every 5 years.

**Last Action:** 9-1-13 G Earliest effective date

**HB 1025: Pitts, Jim (R); Williams, Tommy (R)**

Relating to making supplemental appropriations and

reductions in appropriations and giving direction and adjustment authority regarding appropriations.

**General Remarks:** Section 33 of the bill appropriates \$2 billion out of the economic stabilization fund to the state water implementation fund of Texas contingent upon voter approval of SJR 1 and passage of HB 4.

**Last Action:** 6-14-13 G Earliest effective date

**HB 1079: Smith, Wayne (R); Hancock, Kelly (R)**

Relating to the procedural requirements for action by the TCEQ on applications for production area authorizations.

**General Remarks:** Chapter 27, Water Code, is amended to exempt certain applications related to uranium from the contested case hearing process. A uranium mining application must incorporate certain information relating to groundwater quality.

**Last Action:** 6-14-13 G Earliest effective date

**HB 1106: Larson, Lyle (R); Estes, Craig (R)**

Relating to the identification and operation of vessels in the waters of this state.

**General Remarks:** Procedures and information required for boater registration are modified. Certain vessels operated on coastal waters must be equipped with visual distress signals.

**Last Action:** 9-1-13 G Earliest effective date

**HB 1241: Guillen, Ryan (D); Deuell, Bob (R)**

Relating to the adoption of rules by the Parks and Wildlife Commission to protect the public water of this state.

**General Remarks:** Chapter 66, Parks and Wildlife Code, is amended to allow the TPWD to adopt and enforce rules to require a person leaving public water to drain from a vessel or portable container on board the vessel any water that has been collected from or come in contact with public water. These rules do not apply to salt water.

**Last Action:** 6-14-13 G Earliest effective date

**HB 1461: Aycok, Jimmie Don (R); Fraser, Troy (R)**

Relating to customer notification of significant water loss by a retail public utility.

**General Remarks:** Chapter 13, Water Code, is amended to require a retail public utility that files a water audit required by Water Code Section 16.021, to notify each of its customers of the water loss reported. The utility may do so either on its annual consumer confidence report or on the next water bill a customer receives after the water audit is filed.

**Last Action:** 9-1-13 G Earliest effective date

**HB 1554: Rodriguez, Justin (D); Campbell, Donna (R)**

Relating to the authority of a municipality to file a lien for the costs of abatement of a floodplain ordinance violation.

**General Remarks:** Chapter 54, Local Government Code, is amended to establish a procedure for a municipality to abate a violation of a floodplain ordinance by causing the work necessary to bring the real property into compliance and placing a lien on the property to recover the costs incurred.

**Last Action:** 9-1-13 G Earliest effective date

**HB 1563: King, Tracy (D); Hegar, Glenn (R)**

Relating to fees of office for directors of groundwater conservation districts.

**General Remarks:** Chapter 36, Water Code, is amended to increase the fees for a director of a groundwater district from \$150 per day to \$250 per day. The annual cap would remain \$9,000.

**Last Action:** 9-1-13 G Earliest effective date

**HB 1600: Cook, Byron (R); Nichols, Robert (R)**

Relating to the continuation and functions of the Public Utility Commission of Texas (PUC), to the transfer of certain functions from the TCEQ to the PUC.

**General Remarks:** This is the PUC Sunset bill. It includes the transfer to the PUC of the TCEQ's water and wastewater rate jurisdiction under Chapters 12 and 13 Water Code. See also SB567.

**Last Action:** 9-1-13 G Earliest effective date

**HB 1675: Bonnen, Dennis (R); Nichols, Robert (R)**

Relating to governmental entities subject to the sunset review process.

**General Remarks:** Section 2.03 of the bill places the Sulphur River Basin Authority under the Texas Sunset Act as if it were a state agency. Unless the authority is continued in existence, it is abolished on Sept. 1, 2017.

**Last Action:** 6-14-13 G Earliest effective date

**HB 1685: Price, Four (R); Whitmire, John (D)**

Relating to the continuation of the self-directed and semi-independent status of the Texas State Board of Public Accountancy, the Texas Board of Professional Engineers, and the Texas Board of Architectural Examiners.

**General Remarks:** The Self-Directed Semi-Independent Agency Project Act describing the responsibilities and powers of The Texas Board of Professional Engineers, the Texas State

Board of Public Accountancy, and the Texas Board of Architectural Examiners, is redesignated as Chapter 472, Government Code. Numerous changes are made.

**Last Action:** 9-1-13 G Earliest effective date

**HB 1973: Lucio III, Eddie (D); Hegar, Glenn (R)**

Relating to the provision of water by a public utility or water supply or sewer service corporation for use in fire suppression.

**General Remarks:** Chapter 341, Health and Safety Code, is amended to authorize a municipality to adopt fire flow standards established by the TCEQ for an investor-owned utility or water supply corporation providing service to certain residential areas within the city or its extraterritorial jurisdiction. The applicability to certain residential areas and minimum standards are prescribed in the bill.

**Last Action:** 9-1-13 G Earliest effective date

**HB 2105: Lucio III, Eddie (D); Lucio, Eddie (D)**

Relating to municipally owned utility systems.

**General Remarks:** Section 1502, Government Code, relating to public securities for municipal utilities, is amended to authorize a municipality to acquire and maintain channels or bodies of water known as resacas. A utility system located in a county contiguous to the Gulf and bordering the United States may collect service charges authorized under this section.

**Last Action:** 6-14-13 G Earliest effective date

**HB 2362: Keffer, Jim (R); Birdwell, Brian (R)**

Relating to the audit and review of river authorities.

**General Remarks:** Chapter 49, Water Code, and Chapter 322, Government Code, are amended to authorize the Legislative Budget Board (LBB) to periodically review the effectiveness and efficiency of the policies, management, fiscal affairs, and operations of a river authority. The LBB must conduct a review of the Lower Colorado River Authority and the Brazos River Authority before conducting a review of other river authorities.

**Last Action:** 9-1-13 G Earliest effective date

**HB 2615: Johnson, Eric (D); Fraser, Troy (R)**

Relating to reporting and information availability requirements for persons impounding, diverting, or otherwise using state water.

**General Remarks:** Chapter 11, Water Code, is amended to increase the penalty for failure to timely file a water use report and to establish a penalty for failure to make monthly

water use information available to the TCEQ upon request. The penalty for either violation is established as \$100 per day for a surface water right authorizing the appropriation of 5,000 acre-feet or less per year and \$500 per day for a water right authorizing the appropriation of more than 5,000 acre-feet per year. A surface water right is exempt from cancellation for non-use to the extent the non-use results from drought or curtailment of water by the TCEQ.

**Last Action:** 9-1-13 G Earliest effective date

**HB 2704: Callegari, Bill (R); Hegar, Glenn (R)**

Relating to the electronic submission of bids for construction contracts for certain conservation and reclamation districts.

**General Remarks:** Chapter 49, Water Code, is amended to authorize a district to receive bids by electronic transmission. The aggregate of change orders allowed is increased from 10% to 25% of the original contract price.

**Last Action:** 6-14-13 G Earliest effective date

**HB 2781: Fletcher, Allen (R); Campbell, Donna (R)**

Relating to rainwater harvesting and other water conservation initiatives.

**General Remarks:** Chapter 447, Government Code, is amended so that requirements for rainwater harvesting systems for state buildings apply to both indoor and outdoor water use. Chapter 341, Health and Safety Code, is amended to require that a privately owned rainwater harvesting systems with a capacity of more than 500 gallons that has an auxiliary water supply have a backflow prevention assembly or air gap. Chapter 580, Local Government Code, is amended to expand the applicability of training requirements for cities and counties related to rainwater harvesting standards.

**Last Action:** 9-1-13 G Earliest effective date

**HB 3233: Ritter, Allan (R); Fraser, Troy (R)**

Relating to interbasin transfers of state water.

**General Remarks:** Section 11.085, Water Code, relating to interbasin transfers of water, is amended to eliminate a provision requiring an assessment of the projected effect on user rates and fees for each class of ratepayers; to ensure that an evidentiary hearing be limited to issues related to requirements in this section; to make the notice requirement more manageable; to clarify the factors to be considered to assess whether detriments to the basin of origin are less than the benefits to the receiving basin; to allow for an extension or renewal of a contract that is the basis of the transfer; and to exempt from the requirements a transfer to serve a retail

water utility located partly within and partly outside the basin of origin.

**Last Action:** 9-1-13 G Earliest effective date

**HB 3511: Ritter, Allan (R); Eltife, Kevin (R)**

Relating to adjudication of claims under water contracts with local government entities.

**General Remarks:** Chapter 271, Local Government Code, is amended to waive sovereign immunity to suit for a local government for adjudicating a claim for a breach of contract regarding the sale or delivery by a local government of not less than 1,000 acre-feet of reclaimed water intended for industrial use. Damages for breach of such a contract may include actual damages, specific performance, or injunctive relief. The bill also contains the provisions of SB 958.

**Last Action:** 6-14-13 G Earliest effective date

**HB 3604: Burnam, Lon (D); Hegar, Glenn (R)**

Relating to the implementation of a drought contingency plan by wholesale and retail public water suppliers and irrigation districts.

**General Remarks:** Section 16.055, Water Code, currently requires implementation of water conservation and drought plans in areas of the state where an emergency due to drought has been declared by the Governor or a political subdivision. This bill would provide for penalties for failure to implement the conservation or drought plan.

**Last Action:** 9-1-13 G Earliest effective date

**HB 3605: Burnam, Lon (D); Hegar, Glenn (R)**

Relating to the evaluation by the TWDB of applications for financial assistance for certain retail public utilities.

**General Remarks:** Chapter 17, Water Code, is amended to require the TWDB, for a retail public utility serving 3,300 or more connections that applies for financial assistance, to review the utility's water conservation plan for compliance with the board's best management practices and issue a report to the utility and the Legislature.

**Last Action:** 9-1-13 G Earliest effective date

**Senate Bills (SB)**

**SB 198: Watson, Kirk (D); Dukes, Dawnna (D)**

Relating to restrictive covenants regulating drought-resistant landscaping or water-conserving turf.

**General Remarks:** Chapter 202, Property Code, is amended to prohibit a property owners' association (POA) from restricting a property owner from using drought-resis-

tant landscaping or water-conserving natural turf. The POA may require the submission of a landscape plan for review and approval to ensure aesthetic compatibility with other landscaping in the subdivision.

**Last Action:** 9-1-13 G Earliest effective date

**SB 204: Nichols, Robert (R); Price, Four (R)**

Relating to the continuation and functions of the Texas Board of Professional Engineers.

**General Remarks:** Chapter 1001, Occupations Code, is amended to continue in existence the Texas Board of Professional Engineers to 2025. Various changes are made to the agency's authority.

**Last Action:** 9-1-13 G Earliest effective date

**SB 293: Williams, Tommy (R); Ritter, Allan (R)**

Relating to the authority of certain water districts to hold meetings by teleconference or videoconference.

**General Remarks:** Chapter 551, Government Code, is amended to allow a water district or authority whose territory includes land in 3 or more counties to hold certain special called meetings by conference call.

**Last Action:** 5-10-13 G Earliest effective date

**SB 567: Watson, Kirk (D); Geren, Charlie (R)**

Relating to rates for water service, to the transfer of functions relating to the economic regulation of water and sewer service from the TCEQ to the PUC.

**General Remarks:** The rate jurisdiction of the TCEQ under Chapters 12 and 13, Water Code, are transferred to the PUC. Comprehensive procedural changes are made to the rate-making process for investor-owned utilities. These procedures vary depending on the number of taps or connections served. Conforming changes are made to other chapters of the Water Code and the Special District Local Laws Code. The changes generally take effect September 1, 2014, except the Office of Public Utility Counsel may begin intervening in cases at the TCEQ effective September 1, 2013.

**Last Action:** 9-1-13 G Earliest effective date

**SB 611: Lucio, Eddie (D); Lucio III, Eddie (D)**

Relating to the irrigation powers and functions of certain water districts.

**General Remarks:** Numerous changes are made to Chapters 51, 55, and 58, Water Code, to change the manner in which water control and improvement districts, water improvement districts, and irrigation districts engaged

in the delivery of irrigation water determine assessments and charges against irrigable land. These changes arise from the urbanization of districts that originally delivered primarily irrigation water. A provision in Chapter 58, Water Code, requiring a district engineer to study and investigate certain construction plans is repealed. Chapter 51 is also amended to address the authority of a preservation district as related to a particular water supply project.

**Last Action:** 9-1-13 G Earliest effective date

**SB 634: Davis, Wendy (D); Collier, Nicole (D)**

Relating to regulating faulty on-site sewage disposal systems in the unincorporated areas of a county as a public nuisance.

**General Remarks:** Chapter 343, Health and Safety Code, is amended to include in the definition of public nuisance a surface discharge from an on-site sewage disposal system. The county may use any reasonable means of abatement necessary to bring the system into compliance if the owner fails to abate the nuisance as ordered by the court.

**Last Action:** 6-14-13 G Earliest effective date

**SB 654: West, Royce (D); Anchia, Rafael (D)**

Relating to the enforcement of water conservation and animal care and control ordinances of a municipality by civil action or quasi-judicial enforcement.

**General Remarks:** Chapter 54, Local Government Code, is amended to authorize a municipality to bring a civil action or a quasi-judicial action for the enforcement of an ordinance relating to water conservation measures, including watering restrictions, and relating to animal care and control.

**Last Action:** 9-1-13 G Earliest effective date

**SB 655: Birdwell, Brian (R); King, Phil (R)**

Relating to the exercise of the power of eminent domain by certain authorized entities.

**General Remarks:** Chapter 1, Special District Local Laws Code, and Chapter 1, Water Code, are amended to authorize an entity governed by either code to exercise the power of eminent domain only for a public use in accordance with Section 17, Article I, Texas Constitution.

**Last Action:** 5-18-13 G Earliest effective date

**SB 656: Paxton, Ken (R); Button, Angie (R)**

Relating to providing transparency in the taxing and budgeting process of certain local governments.

**General Remarks:** Various provisions of Chapters 102 and 111, Local Government Code, are amended to estab-

lish additional procedural requirements for a municipality or county to adopt a budget. The procedures require a record vote and details about revenues to be collected.

**Last Action:** 9-1-13 G Earliest effective date

**SB 902: Fraser, Troy (R); Callegari, Bill (R)**

Relating to the operation, powers, and duties of certain water districts.

**General Remarks:** This approximately 30-page bill generally supported by water districts makes numerous changes to the authority of water districts contained in Chapters 49, 51, and 54, Water Code. Related provisions of Chapter 388, Health and Safety Code, and Chapters 375 and 552, Local Government Code, are also amended. Districts operating under the applicable chapters of the Water Code should review these changes carefully. Groundwater districts and water supply corporations may also be impacted by certain provisions.

**Last Action:** 9-1-13 G Earliest effective date

**SB 958: Fraser, Troy (R); Keffer, Jim (R)**

Relating to the liability of certain special-purpose districts or authorities providing water to a purchaser for the generation of electricity.

**General Remarks:** Chapter 113, Civil Practices and Remedies Code, is amended to waive sovereign immunity for any water district or authority for breach of a written water supply contract under which water is to be provided to a purchaser for use in connection with the generation of electricity. Remedies may include any remedy available for breach of contract that is not inconsistent with the terms of the contract, but may not include consequential or exemplary damages. Sovereign immunity is not waived in federal court or for a cause of action for a negligent or intentional tort.

**Last Action:** 6-14-13 G Earliest effective date

**SB 1212: Estes, Craig (R); Phillips, Larry (R)**

Relating to the applicability of certain provisions concerning the transfer of exotic species to certain transfers of water that supply populous areas.

**General Remarks:** Chapter 66, Parks and Wildlife Code, is amended so that certain water transfers (appears to be bracketed for the North Texas Municipal Water District situation) do not create violations of statutes prohibiting the import of harmful species and do not require a permit under this section.

**Last Action:** 5-24-13 G Earliest effective date

***SB 1282: Duncan, Robert (R); Price, Four (R)***

Relating to deadlines for proposals for adoption by certain districts or authorities of desired future conditions of relevant aquifers.

**General Remarks:** Chapter 36, Water Code, is amended to ensure that a proposal for the adoption of desired future conditions is not required before May 1, 2016. Districts in a management area are not prevented from voting on a proposal before that date.

**Last Action:** 9-1-13 G Earliest effective date

***SB 1297: Watson, Kirk (D); Branch, Dan (R)***

Relating to written electronic communications between members of a governmental body.

**General Remarks:** Chapter 551, Government Code, is amended to provide that written communications between members of a governmental body about public business do not constitute a meeting or deliberation so long as they are posted to an on-line message board meeting specified requirements.

**Last Action:** 9-1-13 G Earliest effective date

**Senate Joint Resolution (SJR)*****SJR 1: Williams, Tommy (R); Pitts, Jim (R)***

Proposing a constitutional amendment providing for the creation and use of funds in the state treasury to provide financial assistance for certain projects related to economic development and water infrastructure.

**General Remarks:** A constitutional amendment is proposed to create 2 new accounts outside of the general revenue fund, the State Water Implementation Fund of Texas (SWIFT) and the State Water Implementation Revenue Fund of Texas (SWIRFT), to be administered by the TWDB to finance projects included in the state water plan. Also see HB 4 and HB 1025.

**Last Action:** 11-5-13 G Election date

## WATER ENVIRONMENT ASSOCIATION OF TEXAS: LEGISLATIVE WRAP-UP OF BILLS RELATED TO WATER QUALITY

*By Carol Batterton, Executive Director, Water Environment Association of Texas, and  
Brad Castleberry, Lloyd Gosselink Rochelle & Townsend, P.C.<sup>1</sup>*

The 83<sup>rd</sup> regular session of the Texas Legislature adjourned May 27, 2013. According to Texas Legislature Online, 5,868 House and Senate bills were introduced, and 1,413 bills passed. This session addressed water, transportation, education, and tax reductions, although in some cases not to the extent that everyone wished. This article highlights those bills that passed, as well as those that did not pass, that relate to water quality. A table is included that summarizes an expanded list of highlighted bills passed by the Legislature this session.

### State Water Plan Funding

The most notable accomplishment of this session was the funding of the state water plan. In the end, all 3 pieces of legislation addressing funding of the state water plan passed and received the requisite signature of the Governor (albeit with a line item veto for House Bill (HB) 1025). **Voters will still need to approve a constitutional amendment in November to actually fund the water plan**, and so public education efforts must continue to keep the focus on water until that time. The following are the key pieces of legislation related to water plan funding:

- HB 4 (Ritter) defines the State Water Implementation Fund for Texas (SWIFT), the State Water Implementation Revenue Fund for Texas (SWIRFT), and how these funds will be managed by the Texas Water Development Board (TWDB).
- HB 1025 (Pitts) is the supplemental appropriations bill that will allocate the \$2 billion for use by the SWIFT if voters approve the constitutional amendment in SJR 1.
- Senate Joint Resolution 1 (Williams) is the joint resolution that will amend the constitution to create the SWIFT and SWIRFT, allowing the \$2 billion to be dedicated for water infrastructure needs. This resolution will need voter approval in November.

### Other bills that passed:

- **Desalination:** The Legislature passed House Concurrent Resolution (HCR) 59, which creates a joint interim committee to study seawater desalination on the Texas coast.
- **Drought:** HB 252 (Larson) requires retail public utilities and wholesale water and sewer service suppliers to

notify the Texas Commission on Environmental Quality (TCEQ) when the certainty of the utility's water supply is less than 180 days from being compromised.

- **Conservation:** HB 857 (Lucio III) requires annual water loss audits for utilities over 3,300 connections, and HB 1461 (Aycock) requires a retail public utility that is required to file a water audit with the TWDB to notify each of the utility's customers as well.
- **Water rates:** HB 1600 (Cook), the Public Utility Commission of Texas (PUC) Sunset bill, among other things, transfers the TCEQ's water and wastewater rate jurisdiction to the PUC.
- **Interbasin transfers:** HB 3233 (Ritter) streamlines the interbasin transfer permitting process for surface water rights at the TCEQ.
- **Professional engineers:** Senate Bill (SB) 204 (Nichols) requires professional engineers to be fingerprinted in order to apply for an initial or renewal license.

### Bills that did not pass:

- **SSO reporting:** Unfortunately, HB 824 (Calle-gari), which would have exempted sanitary sewer overflows (SSOs) less than 1,000 gallons from being reported to the TCEQ within 24 hours, did not pass. The good news is that as a result of hearing testimony, the TCEQ and members of the Legislature are now aware of the issues with reporting of minor spills on a 24-hour basis.
- **Biosolids:** None of the bills proposing to change the definition of Class B sludge passed. These were HBs 2996, 2997, 2998, and 3678. In addition, HB 3255 (Kacal), which would have prohibited sale of composted biosolids by a political subdivision outside its boundaries, did not pass.
- **Compliance history:** HB 1714 (Smith) would have discontinued TCEQ's compliance history program.
- **BPAT licensing:** HB 2179 (Davis) would have transferred the backflow prevention assembly testers (BPAT) licensing program from the TCEQ to the Texas State Board of Plumbing Examiners.
- **Stormwater professionals:** HB 3289 (Martinez) would have required licensing of stormwater professionals.

<sup>1</sup>Assistance also provided by Sarah Wells, 3<sup>rd</sup>-year law student, University of Texas School of Law

**Other key issues:*****TCEQ procedure***

The much-discussed and controversial SB 957, by Troy Fraser, which proposed a change from the current TCEQ permitting process to an Environmental Protection Agency-type notice and comment process, failed to come to fruition following intensive and thorough negotiations. As part of the negotiations, the proposal for the bill was changed to maintain the basic structure of the current contested case hearing process, but the proposal included tighter timelines and other restrictions to shorten the time the process takes from start to finish. However, the measure still failed to move forward. We anticipate that the Legislature and stakeholders will work together in the interim to find a balanced approach to this problem that will be able to move forward next session.

***Open government***

The Legislature also made a concerted effort this session to improve government transparency on many fronts. High-profile transparency measures initiated by the Texas Comptroller of Public Accounts, including HB 14 and SB 14, were the subject of intense negotiations with political subdivisions due largely to additional compliance costs and rumored potential impacts to public bond ratings. However, these 2 bills ultimately failed to become law because of a successful parliamentary procedure challenge. The measures that did succeed in becoming law included these amendments to the Open Meetings Act:

- HB 2414 (Button) amends current legal requirements to open meetings of governmental bodies held by video-conference.
- SB 293 (Williams) sets forth new procedures by which certain large water districts are permitted to hold a meeting by videoconference or telephone conference call.
- SB 1368 (Davis) and SB 1297 (Watson) both allow public officials to make certain communications outside of a proper public meeting via message boards that are visible to the public.

See Water Environment Association of Texas' summary of bill highlights in Table 1 and also at [www.weat.org](http://www.weat.org).

**Table 1.** 83<sup>rd</sup> Session Water Environment Association of Texas bill highlights

Bill	Author	Summary
<b>HB 4</b>	Ritter	Relating to the creation and funding of the state water implementation fund for Texas to assist the TWDB in the funding of certain water-related projects.
<b>HB 45/ SB 162</b>	Flynn/Van de Putte	Relating to the occupational licensing of members of the military and spouses of members of the military. HB 45 and SB162 were companion bills. SB 162 passed.
<b>HB 168/ SB 902</b>	Callegari/ Fraser	Relating to the operation, powers, and duties of certain water districts. HB 168 and SB 902 were companion bills. SB 902 passed.
<b>HB 252</b>	Larson	Requires that all retail public utilities report how long they have available water supplies to TCEQ. The bill includes additional notification requirements for utilities with supplies of less than 180 days.
<b>HB 340/ SB 1532</b>	Rodriguez, Eddie/ Zaffirini	Relating to the power of TCEQ to authorize certain injection wells that transect or terminate in the Edwards Aquifer. HB 340 and SB 1532 were companion bills. SB 1532 passed.
<b>HB 597</b>	Guillen	Relating to boater education and examinations on preventing the spread of exotic harmful or potentially harmful aquatic plants, fish, and shellfish.
<b>HB 857</b>	Lucio III	Relating to the frequency of water audits by certain retail public utilities.
<b>HB 970</b>	Rodriguez, Eddie	Relating to regulation of cottage food products and cottage food production operations.
<b>HB 1025</b>	Pitts	Relating to making supplemental appropriations and reductions in appropriations and giving direction and adjustment authority regarding appropriations.
<b>HB 1241</b>	Guillen	Relating to the adoption of rules by the Parks and Wildlife Commission to protect the public water of this state from the spread of aquatic invasive species.
<b>HB 1307/SB 567</b>	Geren/ Watson	Relating to rates for water service, to the transfer of functions relating to the economic regulation of water and sewer service from the TCEQ to other PUC, and to the duties of the Office of Public Utility Counsel regarding the economic regulation of water service. HB 1307 and SB 567 were companion bills. SB 567 passed.
<b>HB 1461</b>	Aycock	Relating to customer notification of significant water loss by a retail public utility.
<b>HB 1509/SB 654</b>	Anchia/ West	Relating to the enforcement of water conservation and animal care and control ordinances of a municipality by civil action or quasi-judicial enforcement; providing civil penalties. HB 1509 and SB 654 were companion bills. SB 654 passed.
<b>HB 1600/SB 206</b>	Cook/ Nichols	Relating to the continuation and functions of the PUC, to the transfer of certain functions from the TCEQ to the PUC, to the rates for water service, and to the functions of the Office of Public Utility Counsel; authorizing a fee. HB 1600 and SB 206 were companion bills. HB 1600 passed.
<b>HB 2105/SB 1817</b>	Lucio III/ Lucio	Relating to municipally owned utility systems; authorizing the imposition of fees by a utility board of trustees. HB 2105 and SB 1817 were companion bills. HB 2105 passed.
<b>SJR 1</b>	Williams	Proposing a constitutional amendment providing for the creation of the SWIFT and the SWIRFT for Texas to assist in the financing of priority projects in the state water plan. <b>Constitutional Amendment must be passed by voters in November.</b>
<b>SB 204/ HB 1676</b>	Nichols/ Price	Relating to the continuation and functions of the Texas Board of Professional Engineers; changing a fee. SB 204 and HB 1676 were companion bills. SB 204 passed.
<b>HB 3233</b>	Ritter	Relating to interbasin transfers of state water.
<b>SB 634/ HB 1932</b>	Davis/ Strickland	Relating to regulating faulty on-site sewage disposal systems in the unincorporated areas of a county as a public nuisance; providing a criminal penalty. SB 634 and HB 1932 were companion bills. SB 634 passed.

## SIERRA CLUB: ADVANCING WATER CONSERVATION AND MANAGEMENT

*By Ken Kramer, Water Resources Chair, Lone Star Chapter, Sierra Club*

Without a doubt the most publicly visible water issue in the regular session of the 83<sup>rd</sup> Texas Legislature was the debate over “funding the state water plan.” The proposal of a state constitutional amendment to create new funding mechanisms for projects in the state water plan, the passage of House Bill (HB) 4, and the transfer of \$2 billion out of the so-called Rainy Day Fund for the new State Water Implementation Fund for Texas (SWIFT) — taken together — constitute historic water legislation. Of course, history will only be made if Texas voters in November 2013 approve the constitutional amendment. The funding structure and process outlined in HB 4 and the actual transfer of money out of the Rainy Day Fund (in HB 1025) will take effect only if the constitutional amendment passes muster with the voters.

The public and media attention to the fight at the Capitol over “funding the state water plan,” however, obscured other important water decisions made by state legislators in the regular session. The Texas Legislature took action to advance water conservation, curb water loss, respond more effectively to drought situations, and enhance water management in certain other ways. Those actions included seminal appropriations for water conservation and environmental flow studies and the enactment of a variety of new water management laws, including several key provisions of HB 4 that have garnered only limited attention. Also important is that the Legislature turned away many other pieces of legislation that would have undermined management and protection of our state’s water resources.

### Spending State Money for Water Management

As is usually the case, the Texas Legislature in its biennial state appropriations bill allocated tens of millions of dollars to the Texas Water Development Board (TWDB), the state’s primary water planning and financing agency. Other water programs and activities, of course, were funded at the Texas Commission on Environmental Quality (TCEQ), Texas State Soil and Water Conservation Board, Texas Parks and Wildlife Department, and other state agencies. Thanks to a relatively healthy state revenue forecast for the 2014–2015 biennium, these programs were funded at decent, although hardly spectacular, levels.

Buried in the appropriations for the TWDB, however, were some interesting earmarks. These earmarks, which reflected a growing interest in water management activities (and the willingness of key legislators to get money appropriated for those activities), included

- \$1 million for Fiscal Year (FY) 2014 for competitive grants to water conservation education groups (may

require matching funds);

- \$1.8 million in each year of the biennium for the Texas Alliance for Water Conservation Demonstration Project, a partnership project in the Texas Panhandle to enhance agricultural water efficiency to extend the life of the Ogallala Aquifer;
- \$1.5 million in each year of the biennium for grants to groundwater districts for agricultural water conservation (grants will only go to districts that require metering of water use and may only be used to offset half the cost of each meter);
- \$407,000+ in FY 2014 and \$326,000+ in FY 2015 to develop an online tool to consolidate water use, annual water loss, and annual water conservation reports and make them publicly viewable online; and
- \$2 million in FY 2014 for the continued study of environmental flows and instream flows for river basins, of which at least \$750,000 shall be used in the bay/basin area that covers the Guadalupe River Basin and San Antonio Bay.

Two disappointments were the failure of the Legislature once again to appropriate requested funds for the state’s water education program, known as Water IQ, and the Governor’s veto of a line item appropriating funds to the Houston Advanced Research Center for aquifer research. Some lawmakers dismiss Water IQ as just an “advertising campaign.” Exactly — just as legislators use “advertising campaigns” to get voters to vote for their re-election, Water IQ uses “advertising” to get the public’s attention and to educate people about the sources of their water and the need to conserve it. Several entities, such as North Texas Municipal Water District, have spent their own money to implement Water IQ and have experienced positive results in water savings. Supporters of Water IQ think those results could be replicated statewide. Indeed the Legislative Budget Board (LBB) staff in its *Texas State Government Efficiency and Effectiveness Report* released early in the session recommended a \$6 million appropriation for Water IQ for the biennium, but to no avail.

The Governor’s veto of the \$1.5 million per year appropriation for aquifer research was publicly explained on the basis that the appropriation was duplicative of an appropriation to the TWDB for *demonstration projects related to water reuse, aquifer storage and recovery, and other innovative water storage approaches*. While the Legislature did appropriate \$3 million to the TWDB for FY 2014 for such demonstration projects, the money that would have gone to the Houston Advanced Research Center, however, was money for basic research about aquifers, not funding for water supply demonstration projects.

Overall, though, the legislative appropriations for water

management activities for the 2014–2015 biennium represent incremental steps forward. If these expenditures become part of the base budgets of the agencies and are increased over time, they will represent a very positive development. At the least they show that legislative appropriators are interested in water management and not just water infrastructure.

### Using State Financial Assistance Wisely

Legislative leaders also demonstrated a serious concern that decisions about state financial assistance for water projects and programs reflect commitments to advancing water conservation, curbing water loss, and prioritizing projects based on rational criteria. For example, among its extensive provisions for funding the state water plan for restructuring the TWDB, HB 4

- requires the TWDB to undertake to apply not less than 20% of the money disbursed in each 5-year period to support projects, including agricultural irrigation projects, that are designed for water conservation or reuse;
- requires the TWDB to undertake to apply not less than 10% of the money disbursed in each 5-year period to support projects for rural political subdivisions or agricultural water conservation;
- prohibits the use of state financial assistance for a water project if the applicant has failed to submit or implement a water conservation plan;
- requires regional water planning groups in their prioritization of projects for state financial assistance to consider at a minimum such factors as the feasibility, viability, sustainability, and cost-effectiveness of a project — factors which should work in favor of conservation projects; and
- requires the TWDB in its process for prioritization of projects to receive state financial assistance to consider (among other criteria) the demonstrated or projected effect of the project on water conservation, including preventing the loss of water (taking into consideration whether the applicant has filed a water audit that demonstrates the applicant is accountable with regard to reducing water loss and increasing efficiency in the distribution of water).

In addition, another significant but unheralded piece of legislation enacted by the 83<sup>rd</sup> Legislature, HB 3605 by State Representatives Burnam, Callegari, and Lucio III (Senate sponsor: Senator Hegar)

- requires a retail public water utility that receives financial assistance from the TWDB to use a portion of that assistance or any additional assistance provided by the TWDB to mitigate the utility's system water loss if, based on its water audit, the water loss meets or exceeds

a threshold to be established by TWDB rule;

- requires the TWDB in passing on an application for financial assistance from a retail public water utility serving 3,300 or more connections to evaluate the utility's water conservation plan for compliance with TWDB's best management practices for water conservation and issue a report to the utility detailing the results of that evaluation; and
- requires the TWDB not later than January 1 of each odd-numbered year to submit to the Legislature a written summary of the results of the evaluations noted above.

Thus, not only does HB 3605 have the potential to address water loss directly and to promote the use of best management practices for water conservation by utilities, it also has the potential for providing important data to legislators and the public about how well utilities are progressing in achieving water conservation. If utilities are not seen as making strides in that regard, the stage could be set for new water conservation requirements imposed by the Legislature.

### Avoiding Water Waste and Advancing Water Efficiency

In addition to the use of state financial assistance to guide the actions of water suppliers seeking that assistance, the Legislature also took steps through direct legislation to encourage water utilities to avoid water waste and advance water efficiency. Among the myriad of new laws enacted by the Legislature in that regard were the following:

HB 857 (Lucio III/Hegar) requires each retail public water utility with more than 3,300 connections to conduct a water audit annually to determine its water loss and to submit that audit to the TWDB (a retail public water utility with 3,300 or less connections will continue to be required to conduct and submit a water audit once every 5 years computing the utility's system water loss during the preceding year) — the initial annual water audit must be submitted by May 1, 2014.

HB 1461 (Aycocck/Fraser) requires each retail public water utility required to file a water audit with the TWDB to notify each of the utility's customers of the water loss reported in the water audit (The TCEQ will adopt rules to implement this requirement, but the notice may be done through the utility's annual consumer confidence report or on the next bill the customer receives after the water audit is filed).

Senate Bill (SB) 198 (Watson/Dukes) prevents a homeowners' association (HOA) from prohibiting or restricting a property owner from using drought-resistant landscaping or water-conserving natural turf but allows a HOA to require the property owner to submit a detailed description of a plan for the installation of such landscaping or turf for review and approval by the HOA to ensure to the extent practica-

ble maximum aesthetic compatibility with other landscaping in the subdivision. The legislation also states that the HOA may not unreasonably deny or withhold approval of the plan or unreasonably determine that the proposed installation is aesthetically incompatible.

SB 385 (Carona/Keffer) authorizes a municipality or a county or a combination thereof to establish and implement a program to provide directly or through a third party financing for a permanent improvement to real property that is intended to decrease water or energy consumption or demand, with the repayment of the financing of a qualified project to be done through an assessment collected with property taxes on the assessed property; sets out the procedures, requirements, and options by which such a program may be established, implemented, and operated by the local government through contracts and other mechanisms.

SB 654 (West/Anchia) specifically grants to municipalities the authority to enforce through a civil action ordinances related to water conservation measures, including watering restrictions (although some municipalities have taken the position that they already had this authority, this legislation makes it clear that they do and gives municipalities more flexibility in enforcing water conservation ordinances since there may be a reluctance to use criminal law in this regard).

SB 700 (Hegar/Kacal, Raney) requires

- the State Energy Conservation Office (SECO) to develop a template for state agencies and higher education institutions to use in preparing their respective comprehensive energy and water management plan (such a plan is already required);
- each agency and higher education institution to set percentage goals for reducing its use of water, electricity, gasoline, and natural gas and include those goals in its energy and water management plan;
- the plan to be updated annually (currently updates are required biennially);
- SECO biennially to report to the Governor and the LBB the state and effectiveness of management and conservation activities of the agencies and higher education institutions; and
- SECO to post that report on its website.

### Getting Serious about Water Data and Management

The Legislature also proved receptive in its 83<sup>rd</sup> Regular Session to other initiatives to make sure that water utilities and others were getting serious about such important responsibilities as reporting water use, overseeing rainwater harvesting systems, and implementing drought contingency plans. Examples of such efforts that were enacted into law include the following:

HB 2615 (Johnson/Fraser) increases the penalty for failure

of a water rights holder to submit an annual water use report to the TCEQ (in part because the penalties previously were so low, only about 60% of water rights holders outside watermaster areas reported their annual water use by the deadline) and requires the TCEQ to establish a process for submitting these reports electronically through the Internet.

HB 2781 (Fletcher/Campbell) makes a number of changes in current law governing the use and oversight of rainwater harvesting systems. For example HB 2781

- requires a privately owned rainwater harvesting system with a capacity of more than 500 gallons that has an auxiliary water supply to have a specified mechanism for ensuring physical separation between the rainwater system and the auxiliary supply (to prevent any possible contamination) and
- requires the permitting staff of each county and municipality with a population of 10,000 or more whose work relates directly to permits involving rainwater harvesting to receive appropriate training (provided by the TWDB) regarding rainwater harvesting standards.

HB 3604 (Burnam, Lucio III/Hegar) requires an entity to implement its water conservation plan and its drought contingency plan, as applicable, when it is notified that the Governor has declared its respective county or counties as a disaster area based on drought conditions; clarifies the authority of the TCEQ to enforce this requirement. (previously the law only required the entity to implement either plan, despite the fact that water conservation should be an ongoing activity as contrasted to short-term responses to drought conditions; during the 2011 drought a number of entities in drought disaster areas reportedly did not implement mandatory water use restrictions).

### Holding the Line on Some Questionable Legislation

The story of the legislative process, of course, is not just a story of the bills that passed into law. More often it is the story of the bills that did not become law. There were many positive pieces of legislation that failed to run the gauntlet of the legislative process, including, for example, all of the bills that would have clarified the authority of the state Water Conservation Advisory Council to make statutory and appropriations recommendations.

By and large, however, the majority of water bills that died were ones that were opposed by the environmental community and/or by other interests concerned about proper management and protection of water resources.

Following are some examples of these bills of concern that died:

HB 824 (Callegari) would have eliminated the requirement that all sewer overflows be reported to the TCEQ within 24 hours (the threshold for reporting would have been more

than 1,000 gallons; overflows below that level would have been exempted from reporting). HB 824 passed the House in amended form but never made it out of the Senate Natural Resources Committee.

HB 3234 (Ritter/Fraser) would have set what many water attorneys considered unrealistic deadlines for the processing of water rights permits that could have led to inadequate review of permit applications and might have interfered with the public's opportunity to impact permitting decisions. HB 3234 passed the House but was voted down in Senate Natural Resources Committee.

SB 1894 (Fraser) would have prevented the revision and possible strengthening of adopted state standards for instream flows and freshwater inflows to bays and estuaries until at least 2022, far beyond the time specified for review by most of the bay/basin area stakeholder committees that were set up under the environmental flows standards setting process created by SB 3 in 2007. SB 1894 was withdrawn from the Senate Natural Resources Committee hearing agenda and never seen again after a number of Senators raised concerns about delaying the review and revision process.

In addition, several pieces of legislation that had been introduced to "streamline" the process for developing and implementing marine water desalination or brackish groundwater desalination projects and/or aquifer storage and recovery (ASR) projects did not make it through the process. Although many environmental groups believe that desalination and ASR projects increasingly are going to be part of our water supply and indeed have positive appeal compared to other infrastructure projects (for example, surface water reservoirs), they are concerned about taking away important authority from state agencies and/or groundwater management districts to oversee and permit these projects in a responsible manner. These proposed bills were characterized by many as "not ready for prime time." But desalination is still on the front burner for discussion. Due to the passage of House Concurrent Resolution 59 (Hunter/Lucio), a joint interim study of "water desalination" should get underway in the fall of 2013.

## Conclusion

The general session of the 83<sup>rd</sup> Texas Legislature was a "water session" in many respects. Although it may be remembered most for the establishment of funding for state water plan projects (assuming the voters ratify the proposed constitutional amendment), there were many other significant legislative actions on water, and those actions indicate that our state officials are looking at water much more seriously than perhaps ever before. The drought conditions of recent years — continuing and intensifying in a large portion of Texas in the summer of 2013 — have driven home the point that our state cannot afford to waste our precious water resources. Moreover,

the shrinking surface water reservoirs in many parts of Texas and indeed the number of bone-dry reservoirs in West Texas are stark reminders that water infrastructure alone will not address our water problems. The 83<sup>rd</sup> Texas Legislature is to be commended for tackling the infrastructure funding issue and taking important steps forward on water conservation and management. But there are many river miles ahead of us in reaching a comprehensive solution to our state's water issues.

83<sup>RD</sup> TEXAS LEGISLATIVE WRAP-UP

By Stacey A. Steinbach Texas Alliance of Groundwater Districts

Unlike in previous sessions, it was no surprise when the 83<sup>rd</sup> Legislative Regular Session was inundated with water bills, particularly when it came to water infrastructure financing. Certainly, the largest water issue during 2013 — and one of the biggest overall this session — was providing a mechanism for adequately funding the state water plan. Through the passage of 2 bills and 1 resolution, Texas Legislators took an important, even revolutionary step, toward meeting the long-term water needs of the state. As my colleagues in this collaboration for Texas Water Journal have adeptly explained the substance of that legislation in their own columns, I will focus on other bills from the 83<sup>rd</sup> session that may affect groundwater use and management.

From the groundwater management perspective, the “beginning” (the bill filing deadline) and end of session painted very different pictures. Of the 150-plus bills tracked by the Texas Alliance of Groundwater Districts (TAGD), nearly 2 dozen would have significantly impacted groundwater conservation district (GCD) operations and authorities in this state. In prospect, those bills loomed as large as bills filed during the 82<sup>nd</sup> Legislative Session, when groundwater ownership, the Texas Water Development Board (TWDB) sunset review, and an overhaul of the desired future conditions (DFC) process was on the agenda. Even still, and despite efforts of legislators, staffers, and stakeholders to reach consensus, almost all of the groundwater bills filed this session failed to make it to *Sine Die*. In fact, just 2 housekeeping-type groundwater bills made it to the Governor: Senate Bill (SB) 1282, extending the deadline for proposing the next round of DFCs to May 1, 2016, and House Bill (HB) 1563, increasing the maximum fees of office for a GCD board member from \$150/day to \$250/day (with the annual cap remaining at \$9,000).

### What Didn't Pass

With so few groundwater bills that passed and so many that garnered attention, it is likely that what didn't pass this session is just as important — if not more so — than what did pass. These bills covered a myriad of notable issues, including brackish groundwater utilization, aquifer storage, groundwater use reporting requirements, long-term permitting, well construction standards and enforcement, DFC appeals, and hydraulic fracturing. Of these, bills related to brackish groundwater, long-term permitting, and hydraulic fracturing received a great deal of stakeholder attention and gained momentum at some point in one or both chambers. Perhaps more than in previous sessions, there also seemed to be multiple, competing bills filed on these 3 subjects, each with a different approach or philosophy.

### Groundwater and Hydraulic Fracturing

Like many states, gas exploration and development in Texas has increased dramatically over the past 10 years. Of TAGD-member GCDs with hydraulic fracturing in their jurisdictions, half are experiencing significant activity and nearly three-fourths are observing impacts to groundwater as a result of fracturing activities. But recently, a debate has emerged over a GCD's ability to require a permit for groundwater withdrawals related to hydraulic fracturing. Though some GCDs require permits without difficulty, others waive permit requirements out of concerns related to varying interpretations of the exemption described in Texas Water Code § 36.117(b)(2).

A look at the plain language and legislative history of this section supports the notion that the exemption language was not intended to encompass continuing oil and gas operations, of which hydraulic fracturing is a non-conventional example. But because the exemption language was adopted before the hydraulic fracturing boom in this state, these operations are not specifically addressed, and the exemption's applicability is being inferred in various ways. Ultimately, an interpretation that withdrawals related to fracturing activities are exempt from permit requirements creates a situation where these significant users of groundwater are exempted from regulatory requirements that all other significant users of groundwater must follow. This interpretation results in a greater regulatory burden for some users — agriculture, municipal, industry — and not others.

Three bills aimed to resolve the confusion this session, and 1 bill, SB 873, passed the Senate after being amended on the floor to include language to address oil and gas industry concerns. That bill would have expressly authorized a GCD to require a permit for oil- and gas-related groundwater withdrawals, while at the same time incorporating an “interim permit” concept to ensure that operations would not be delayed during the permitting process. Though the bill failed to move in the House, it likely presents a positive starting point for resolution of this issue during the next session.

### Long-Term Permitting

Questions related to long-term groundwater permitting continue to garner attention at the Legislature. With the recent drought, water-supply certainty is more important than ever, and a few large water providers have been pushing for a statewide requirement for long-term or automatically renewed permits (though some GCDs already incorporate such concepts in their rules). Proposed solutions during the

83<sup>rd</sup> session ranged from 30-year operational permits for transporters to automatic permit renewals with proportional cutbacks when “conditions” change. Though stakeholders could generally agree with the latter approach, they could not reach consensus in fully defining the changed “conditions” and other details related to implementing cutbacks.

A GCD’s mandate to balance private property rights, the highest practicable level of groundwater production, and conservation of the aquifer necessitates some flexibility for GCDs in managing this subsurface resource, especially in light of the court opinion in *Edwards Aquifer Authority v. Day*. All parties agree that no GCD can guarantee a certain level of groundwater availability for 30 years into the future and that arbitrary cutbacks should be (and already are) prohibited. Finding specific language that satisfies the needs of long-term groundwater investors and adequately addresses a GCD’s local needs in accordance with statutory requirements has been challenging.

### **“Brackish” Groundwater**

The groundwater issue that received the most attention during this session was brackish groundwater utilization, including desalination and aquifer storage and recovery. Early versions of filed bills would have essentially deregulated groundwater with a total dissolved solids (TDS) level of 1,000 parts per million (ppm) or more in order to promote its treatment and use.

Many GCDs had concerns with such a management strategy for numerous reasons; the most significant being that “brackish” groundwater is often hydrologically connected to other sources of groundwater. Production of such water may cause freshwater levels to drop or actually affect the quality of freshwater as the hydraulic pressure regimes change. Another important concern was that in some areas of the state, groundwater now being used without advanced desalination treatment and being managed by GCDs would be considered “brackish” under such a definition and therefore could no longer be managed by the GCD. Additionally, because a TDS concentration cannot be determined until after a well is drilled, and even then the concentration can fluctuate over the life of the well, a bright-line numerical definition creates a “chicken and egg” scenario that actually inhibits the certainty that most parties are seeking.

Legislators, staffers, and stakeholders worked hard on this issue during the session and though no legislation passed, all came to agree that hydrological connection to currently used sources of groundwater is a more important demarcation than an arbitrary TDS level that has different significance in different parts of the state. One bill, HB 2578, as amended, would have incorporated concepts of “brackish groundwater production zones” to be identified by the Texas Water Devel-

opment Board (TWDB), with the assistance of GCDs and other stakeholders. In those areas, GCDs would be required to issue permits with 30-year permit terms and unlimited production, unless the GCD could show that cutbacks were necessary to respond to a significant change in aquifer levels or adverse effects to water quality. Though the bill didn’t address all stakeholder concerns, the concept of identifiable, “distinct” brackish groundwater zones based on scientific research likely makes for a good launching point for stakeholder discussions during the interim. The upside to this issue is that there is a consensus among all stakeholders that use of brackish groundwater needs to be incorporated as a new water supply strategy wherever feasible.

### **What Did Pass**

In addition to the bills/resolution related to funding the state water plan and the bills that amended the DFC proposal deadline and increased maximum fees of office for a GCD board member, the following bills passed during the 83<sup>rd</sup> Legislature may impact groundwater management. This list is not intended to be exhaustive and merely provides a starting point for legislative research by interested individuals.

### **New GCDs**

- SB 1835 extends the deadline for the confirmation election for the Calhoun County GCD to December 31, 2016 and authorizes a tax if approved by voters.
- SB 980 creates the Reeves County GCD and authorizes a tax, subject to voter approval before December 31, 2018.
- SB 1840 creates the Deep East Texas GCD (consisting of Shelby, San Augustine, and Sabine Counties) and authorizes a tax, subject to voter approval before September 1, 2015.

### **Water Conservation/Drought**

- HB 252 requires a retail public utility and any of its wholesalers to notify the Texas Commission on Environmental Quality (TCEQ) when they reasonably believe that less than 180 days of water is available.
- HB 857 requires retail public utilities serving more than 3,300 connections *or* receiving financial assistance from the TWDB to conduct an annual water loss audit (other retail public utilities are still on a 5-year schedule).
- HB 1461 requires retail public utilities to provide notification of water loss to customers after each water loss audit.
- HB 3604 requires utilities to implement water conservation plans *and* drought contingency plans when a

disaster emergency is declared due to drought.

- HB 3605 requires the TWDB to review a utility's compliance with its water conservation plan when considering financial assistance applications from retail public utilities serving more than 3,300 customers.
- SB 1 provides appropriations for water conservation grants, including \$1.5 million per year for 2 years to the Agricultural Water Conservation Grant Program to be used for grants to GCDs that require meters in order to offset half the costs to well owners of installing those meters.
- SB 198 prohibits a homeowners' association from prohibiting xeriscaping, though the association can require plans to be pre-approved.
- SB 654 clarifies that a municipality may bring a civil action for enforcement of an ordinance relating to water conservation.
- SB 662 adds representatives of the Public Utility Commission of Texas and Electric Reliability Council of Texas to the Drought Preparedness Council.

the Capitol with some consensus language for consideration during the 84<sup>th</sup> Legislative session.

### *Open Meetings/Open Records*

- HB 2414 provides specifications for general videoconferencing meetings.
- SB 293 authorizes a "water district" covering 3 or more counties to hold a meeting via telephone or videoconference if it is a special called meeting, immediate action is required, and a quorum at 1 location would be difficult to obtain.
- SB 471 authorizes the use of electronic recorders for the official recording of open meetings.
- SB 984 provides specifications for videoconference meetings when the government entity is statewide or covers 3 or more counties.
- SB 1297 allows public officials to communicate between meetings on Internet message boards maintained by the governmental body and visible to the public.
- SB 983 provides for an "in camera" review of information at issue in a public information lawsuit.
- SB 1368 defines public information as it relates to contracts between non-government entities and government entities.

### **Looking Ahead**

If the number and scope of unsuccessful bills during the 83<sup>rd</sup> Texas Legislative session are any indication, 2015 will be a busy year for those interested in groundwater management. During the interim, stakeholders should continue the work they started on many of these issues with the goal of coming to