

**Legislative Wrap-Up**  
**83rd Legislative Session**  
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Unlike in previous sessions, it was no surprise when the 83rd Legislative 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 two bills and one resolution, Texas Legislators took an important, even revolutionary step toward meeting the long-term water needs of the state.

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 TAGD, nearly two 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 82nd Legislative Session, when groundwater ownership, 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 two housekeeping-type groundwater bills made it to the Governor: SB 1282, extending the deadline for proposing the next round of DFCs to May 1, 2016, and 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 three 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 one 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 83rd Session ranged from thirty-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. But 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 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 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 general consensus among all stakeholders that utilization 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 that may impact groundwater management passed during the 83rd Legislature. 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 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 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 TWDB to review a utilities' 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 two 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 homeowner's 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.

### *Open Meetings/Open Records*

- HB 2414: Provides specifications for general videoconference 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 one 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 three or more counties.
- SB 1297: Allows public officials to communicate between meetings on Internet message boards maintained by the governmental body and visible to 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 83rd 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 the Capitol with some consensus language for consideration during the 84th Legislative Session.