



## Texas Alliance of Groundwater Districts 86<sup>th</sup> Legislative Session Wrap-Up

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The overarching themes of property tax and school finance reform dominated the 86<sup>th</sup> Texas Legislature, while the legislative response to Hurricane Harvey in the form of flood and disaster planning was the primary focus of discussions on water. Ultimately, significant legislation was passed in these areas. This resulted in a somewhat decreased focus on groundwater management during the 86<sup>th</sup> Legislative Session.

There were 15 bills filed that sought to make substantive changes to the provisions of Chapter 36 of the Texas Water Code. This represented fewer bills than in prior sessions. Nevertheless, the changes sought by many of the bills would have been significant. There were also a number of other bills filed that implicated groundwater policy and groundwater management districts (GCDs). In total, the Texas Alliance of Groundwater Districts (TAGD) identified 20 statewide priority groundwater bills for tracking during the session. Of those 20 bills, only five crossed the finish line.

Throughout the 86<sup>th</sup> Legislative Session, TAGD tracked over 130 bills of interest to groundwater conservation districts. In addition to the 20 statewide priority groundwater bills, TAGD tracked selected bills affecting individual GCDs, general water, study/planning, and administrative law/governance of political subdivisions for its membership. Those that passed and have or will become law are listed at the end of this article.

The substance of many of the 86<sup>th</sup> Legislative Session's groundwater bills reflected various themes that emerged during a busy legislative interim. And as is frequently the case, the session's groundwater policy dialogue was as affected by what didn't pass as by what did. This article briefly describes key groundwater bills that passed by topic area. It then discusses selected pieces of ultimately unsuccessful groundwater-related legislation that were the subject of significant attention this session.

### **GROUNDWATER BILLS THAT PASSED**

#### ***Brackish Groundwater***

Two of the groundwater bills that passed during the 86<sup>th</sup> Legislative Session address development of brackish groundwater resources. **SB 1041** extends the time by which TWDB must identify and designate brackish groundwater production zones (BGPZs)

until December 1, 2032. This was necessary because TWDB may otherwise have not been able to meet the prior 2022 deadline to identify and designate those BGPZs due to inadequate funding and limited availability of qualified contractors. In addition to this extension, the Legislature approved \$2.0 million dollars and two FTEs for the TWDB Brackish Resources Aquifer Characterization System, aimed at accelerating the mapping and characterization of brackish aquifers.

Once such BGPZs are identified, the passage of Chairman Larson's **HB 722** creates a separate GCD permitting system for the production of brackish groundwater in BGPZs. This may be the most notable change to Chapter 36 and GCD permitting as a result of the 86<sup>th</sup> Legislative Session and reflects a continuation of Chairman Larson's prior efforts to encourage further development and utilization of brackish groundwater.

Specifically, HB 722 provides that a GCD located over any part of a TWDB-designated BGPZ may adopt separate rules to govern the issuance of permits for wells to produce brackish groundwater from that BGPZ. If such GCD receives a petition from a person with a legally defined interest in groundwater in the district, that GCD must adopt such rules governing the issuance of permits for the withdrawal of brackish groundwater within 180 days.

HB 722 details certain requirements for applications for BGPZ operating permits. This includes a requirement that the TWDB investigate each such application and issue a report on potential adverse impacts from operation under the proposed BGPZ permit. Permits shall be for 30-year permit terms and shall include requirements for monitoring of water levels and water quality on the permit as may be recommended by TWDB.

These BGPZ rules must provide for production in addition to the amount of managed available groundwater under Section 36.108 of the Water Code. HB 722 further provides that permits shall be issued, to the extent possible, up to the point that the total exempt and permitted brackish production equals the amount that may be produced annually under TWDB's BGPZ designation. While providing for separate BGPZ rules, HB 722 also requires that GDCs provide greater access to brackish groundwater by simplifying procedure, avoiding delay, and providing greater flexibility in permitting.

### ***Export Permits***

Another noteworthy change to Chapter 36 resulted from the passage of Representative Ashby's **HB 1066**. This bill was initiated by the TWCA groundwater committee and was a re-file of the 85<sup>th</sup> Legislative Session's HB 2378, which was vetoed by the Governor. This bill was described as essentially cleaning up a piece that had been overlooked in the passage of SB 854 by the 84<sup>th</sup> Legislature in order to align the timing of renewals of transfer permits and operating permits in those districts where both are issued separately.

## ***Aquifer Storage and Recovery***

The 86<sup>th</sup> Legislative Session saw passage of a handful of bills to encourage further development and use of aquifer storage and recovery (ASR) and managed aquifer recharge projects.

**HB 720** amends portions of Chapters 11 and 27 of the Water Code to allow appropriations of state water for recharge into aquifers through ASR or an aquifer recharge project if certain conditions are met and TCEQ determines that the water is not needed to meet instream flow needs. HB 720 also allows for amendments to convert certain qualifying appropriations for storage in a reservoir to storage in an ASR project. The bill also contains provisions for TCEQ to adopt rules to protect groundwater quality through requirements for recharge injection wells and injection water quality.

Also intended to encourage the development of ASR projects, **HB 721** directs the TWDB to conduct studies on ASR projects in the State Water Plan and to conduct a survey to identify the relative suitability to various aquifers for use in ASR projects by December 15, 2020. The Legislature appropriated \$500,000 in funding and three FTEs for the TWDB to complete this work.

Rounding out the bills designed to encourage further development of ASR projects, **HB 1052** authorizes the TWDB's State Participation Fund account to be used for interregional projects and for desalination and ASR projects that are not in the State Water Plan.

## ***State and Regional Water Planning***

**HB 807** makes changes to the regional water planning process aimed at encouraging greater cooperation between regional water planning groups (RWPGs), which include representation from groundwater management areas. HB 807 directs TWDB to appoint an interregional planning council of representatives from every RWPG. The purposes of the council include improving coordination among the state's 16 RWPGs and the TWDB, as well as help facilitate dialogue on water management strategies and best practices that could affect multiple planning areas. The bill also expands the requirements for information that RWPGs are required to provide in their regional water plans. This includes a requirement that regional water plans include opportunities for large-scale desalination projects for brackish groundwater and for regional water plans to include any legislative recommendations to facilitate voluntary water transfers.

Also, of significant interest in the groundwater community was the Legislature's approval of \$1.0 million in funding and four FTEs for the TWDB to update the Groundwater Availability Models (GAMs) from outdated, unsupported software and code to current best practice standards. This allows TWDB to develop and refine

essential tools and information to address evolving water planning needs and to provide critical inputs for the state water planning process and groundwater management.

## **GROUNDWATER BILLS THAT DID NOT PASS**

Many of the bills that would have most affected GCD powers and duties under Chapter 36 and attracted the most attention during the 86<sup>th</sup> Legislative Session ultimately failed to make it to *Sine Die*. The topics of many of these bills were the subject to interim charges and hearings over the interim.

### ***GCD Rules & Uniformity***

Increasing uniformity between GCDs was a topic that received attention over the interim and had grown out of the dialogue that started with the failed SB 1392 from the 85<sup>th</sup> Legislative Session. Over the interim, a number of groundwater management areas (GMAs) undertook efforts to look at the rules of the GCDs within that GMA to compare their rules for similarities and differences. The TWCA groundwater committee proposed an amended SB 1392 for the 86<sup>th</sup> Legislative Session, which included language aimed at increasing GCD coordination of their rules through the GMA planning process. In filing **SB 1010**, however, Chairman Perry proposed a different approach.

SB 1010 sought to prohibit GCDs overlying a “common aquifer” and located within the same GMA from making or enforcing rules that are not similar to another GCD “that... regulate levels of groundwater production similar to the level the district regulates,” with certain exceptions. A GCD could have rules that are not similar if it was specifically authorized to do so by its enabling legislation or if it provides an explanation of the district’s reasoning to support its rule in its management plan. While SB 1010 passed the Senate, it was not voted out of the House Natural Resources Committee in the face of significant concerns.

Another bill, **HB 2123** authored by Representative Harris, sought to codify a petition process whereby a person with groundwater ownership and rights could petition a GCD to adopt a rule or modify a rule. HB 2123 included notice and hearing requirements that would need to be followed by the petitioner and the GCD, and would have required the GCD to issue an explanation of its reasoning if it did not grant the petition. While it was voted favorably from the House Natural Resources Committee, this bill did not receive a vote on the floor of the House.

### ***Retail Public Utility Service Area***

Two bills both sought to modify Section 36.116(c) of the Texas Water Code. This section grants GCDs the permissive authority to consider the service needs or service area of a retail public utility when regulating groundwater production by tract size or acreage. While nearly identical in their captions, **HB 2122** and **HB 2249** sought to

replace a GCD's discretion with opposing mandates. HB 2122 (Rep. Harris), along with its companion **SB 800**, would have prohibited consideration of service needs or service area unless the retail public utility had obtained rights through purchase or lease to groundwater, or otherwise obtained permission from the landowner. Conversely, HB 2249 (Rep. Lucio III) would have required GCDs to consider the service area in granting permits to retail public utilities, subject to reductions for operating permits within the service area. While SB 800 was favorably voted on in the Senate, none of these bills were voted out of the House Natural Resources Committee.

### ***Attorney's Fees***

The subject of attorney's fees awards to GCDs was again at issue during the 86<sup>th</sup> Legislative Session. There were two bills filed that would have altered the provisions that award attorney's fees to a prevailing GCD when lawsuits are filed against a GCD. Representative Burns' **HB 2125** sought to modify the mandatory nature of the award of attorney's fees to prevailing GCDs and instead make that award of attorney's fees permissive.

Chairman Perry filed a more aggressive bill on the same subject, SB 851, which would have made the award of attorney's fees permissively available to the prevailing party in lawsuits. It went one step further and would have also removed the mandatory award of attorney's fees to GCDs in enforcement actions and allowed for recovery in those enforcement actions to the prevailing party.

There was no appetite in the House for any changes to the attorney's fees provisions of Chapter 36, however. While SB 851 was voted favorably by the Senate, neither bill went further than the House Natural Resources Committee.

### ***Surface Water and Groundwater Interaction***

The interaction between groundwater and surface water has been, and will likely continue to be, the subject of conversations in the water community. Chairman Larson's **HB 4570** sought to create a nine-person advisory board charged with studying the extent of surface water and groundwater interaction, challenges arising therefrom, and potential approaches to mitigating those challenges and delivering a report prior to the 87<sup>th</sup> Legislative Session. While ultimately this bill suffered at the hands of the clock and did not come up for a vote in the House, one can reasonably expect to see this subject discussed in the interim and beyond.

### ***De Novo Review***

While not the subject of any interim discussion, Chairman Perry's **SB 2027** proposed to make a dramatic change to the standard of review applied by reviewing courts to GCD decisions. SB 2027 would have changed the deferential "substantial evidence" standard

of review that is applied by reviewing courts to GCD – and essentially all administrative agency – decisions to a “de novo” standard of review. Amid significant concerns, Senator Perry did not call for a vote on SB 2027 in the Senate Water and Rural Affairs Committee. Instead, he promised to hold a hearing on this issue during the interim.

### ***Omnibus***

Chairman Larson filed **HB 726** with an omnibus caption to address a number of proposed changes to Chapter 36. HB 726 had four primary elements: (1) clarifying GCD considerations in granting or denying permits, including consideration of registered exempt wells; (2) clarifying that the rules in place at the time of a permit application govern consideration of the permit; (3) authorizing GCDs to issue 90-day moratoriums under certain circumstances only after a notice and hearing process has occurred; and (4) prohibiting a district from issuing a separate export permit from an operating permit.

A number of these proposed changes to Chapter 36 were re-files of bills that were met with the Governor’s veto pen in the 85<sup>th</sup> Legislative Session. It would be unsurprising if one or more bills are filed again next session to make some, if not all, of these proposed changes.

### **SUMMARY**

TAGD’s positions on the 20 statewide priority groundwater bills ultimately resulted in its support for nine bills, a neutral position on four bills, and opposition to seven bills. Broadly speaking, these numbers are representative of the GCD community’s willingness to engage in productive dialogue and work toward solutions to identified concerns.

Looking ahead, one can anticipate more discussion both inside and outside the Texas Legislature on the topics of bills that did not pass into law during the 86<sup>th</sup> Legislative Session, particularly on the areas of surface water and groundwater interaction, GCD uniformity, attorney’s fees, and judicial review.

### **LIST OF TAGD-TRACKED BILLS PASSED INTO LAW**

The following is a summary list of those bills of possible interest to GCDs that were tracked by TAGD for its members and ultimately have been or will become effective. It is not intended to represent an exhaustive list and should not be relied upon as such.

**HB 720** Relating to appropriations of water for use in aquifer storage and recovery projects. *Effective 6-10-19*

**HB 721** Relating to the duty of the Texas Water Development Board to conduct studies of and prepare and submit reports on aquifer storage and recovery. *Effective 6-14-19*

**HB 722** Relating to the development of brackish groundwater. *Effective 9- 1-19*

**HB 723** Relating to a requirement that the Texas Commission on Environmental Quality obtain or develop updated water availability models for certain river basins. *Effective 9-1-19*

**HB 807** Relating to the state and regional water planning process. *Effective 6-10-19*

**HB 1052** Relating to the authority of the Texas Water Development Board to use the state participation account of the water development fund to provide financial assistance for the development of certain facilities. *Effective 9-1-19*

**HB 1066** Relating to extensions of an expired permit for the transfer of groundwater from a groundwater conservation district. *Effective 9-1-19*

**HB 1311** Relating to the continuation and functions of the Texas Board of Professional Geoscientists. *Effective 9-1-19*

**HB 1495** Relating to authorization for the creation of a county ethics commission in certain counties. *Effective 6-14-19*

**HB 2018** Relating to required notice for municipal management districts that annex or exclude territory. *Effective 9-1-19*

**HB 2729** Relating to the administration, duties, and operation of the Edwards Aquifer Authority. *Effective 9-1-19*

**HB 2771** Relating to the authority of the Texas Commission on Environmental Quality to issue permits for the discharge into water of this state of produced water, hydrostatic test water. *Effective 9-1-19*

**HB 2840** Relating to the right of a member of the public to address the governing body of a political subdivision at an open meeting of the body. *Effective 9-1-19*

**HB 3001** Relating to the fiscal transparency of special purpose districts and other political subdivisions. *Effective 9-1-19*

**HB 3339** Relating to requirements for programs of water conservation and water conservation plans. *Effective 9-1-19*

**HB 3656** Relating to the transfer of certain permitted irrigation water rights related to a certain portion of the Edwards Aquifer. *Effective 9-1-19*

**HB 4172** Relating to the nonsubstantive revision of certain local laws concerning water and wastewater special districts, including conforming amendments. *Effective 4-1-21*

**HB 4705** Relating to the territory of the Sutton County Groundwater Conservation District. *Effective 9-1-19*

**SB 2** Relating to ad valorem taxation. *Effective 1-1-2020 (certain sections with separate effective dates)*

**SB 27** Relating to recovery of damages, attorney's fees, and costs related to frivolous claims and regulatory actions by state agencies. *Effective 9-1-19*

**SB 65** Relating to state contracting and procurement. *Effective 9-1-19*

**SB 239** Relating to the requirements for meetings of certain special districts. *Effective 9-1-19*

**SB 241** Relating to certain required reports received or prepared by state agencies and other governmental entities. *Effective 9-1-19*

**SB 483** Relating to permits for certain injection wells that transect a portion of the Edwards Aquifer. *Effective 6-10-19*

- SB 520** Relating to the storage and recovery of water in a portion of the Edwards Aquifer. *Effective 9-1-19*
- SB 669** Relating to the date for the confirmation election for the Southwestern Travis County Groundwater Conservation District. *Effective 5-20-19*
- SB 872** Relating to the composition of the board of directors of the Gateway Groundwater Conservation District. *Effective 5-7-19*
- SB 911** Relating to the supervision of water districts by the Texas Commission on Environmental Quality. *Effective 9-1-19*
- SB 943** Relating to the disclosure of certain contracting information under the public information law. *Effective 1-1-20*
- SB 944** Relating to the public information law. *Effective 9-1-19*
- SB 1041** Relating to the deadline by which the Texas Water Development Board is required to identify and designate brackish groundwater production zones for certain areas of the state. *Effective 9-1-19*
- SB 1574** Relating to the duties of the Texas Water Development Board. *Effective 9-1-19*