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Update: TCEQ and the Texas Water Development Board

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The 82nd Legislature passed a number of bills with implications for the Texas Commission on Environmental Quality (TCEQ) and the Texas Water Development Board (TWDB). Most notably, the legislature passed the two agencies' sunset bills (HB 2694 and SB 660, respectively), which renew the agencies until 2023. This paper discusses significant changes made by the sunset bills to TCEQ's and TWDB's authority.

TCEQ

Highlights of the TCEQ Sunset Bill (HB 2694)

TCEQ is primarily responsible for generating environmental regulations and overseeing Texas's environmental programs related to air, surface water, and waste. While maintaining most of TCEQ's previous authority, HB 2694 also makes certain significant changes.

Nearly all of the modifications contained in HB 2694 are consistent with the Sunset Advisory Commission's recommendations. The Sunset Commission identified ten broad issues and provided the legislature with key recommendations to address these issues.

The detailed list, below, includes the Sunset Commission's identified issues, its key recommendations to the legislature, the outcome of those recommendations in HB 2694, and the implications these changes may have for TCEQ.

Issue 1: Continuing TCEQ

Recommendation: Continue TCEQ for 12 years.

- By modifying § 5.014 of the Water Code, HB 2694 continues TCEQ until September 1, 2023. On that date, TCEQ expires unless extended via the sunset review process. HB 2694 also modifies Chapter 5 of the Water Code to reflect the agency's name change from the "Texas Natural Resource Conservation Commission" to the "Texas Commission on Environmental Quality."

Recommendation: Transfer authority for making groundwater protection recommendations regarding oil and gas activities from TCEQ to the Texas Railroad Commission.

- By modifying § 91.011, § 91.0115, § 91.1015 of the Texas Natural Resources Code as well as § 27.033 and § 27.046 of the Water Code, HB 2964 gives the Railroad Commission authority to adopt rules regarding oil and gas well casing depths so as to be protective of groundwater resources. The legislation also transfers authority from TCEQ's Executive Director to the Railroad Commission to issue letters of determination to well permit applicants, stating what depth of well casing is required in order to protect groundwater in the area. The Railroad Commission must adopt rules to evaluate the necessary casing depths. The evaluation must include a review of 1) the area of review and corrective action plans; 2) subsurface monitoring plans required during or post injection; 3) post-

injection site care plans; and 4) any other relevant application materials necessary for the Railroad Commission to make its determination. The Commission may charge the applicant a fee, of an amount to be set by rule, for the letter of declaration. In addition to this fee, the Commission may also charge a fee not to exceed \$75 for an expedited letter of determination.

- Furthermore, HB 2964 (§ 2.03) amends Natural Resources Code § 91.020 to require TCEQ to work cooperatively with other agencies in order to study and evaluate electronic geologic data and surface casing depths necessary to protect groundwater resources.

Issue 2: Providing focus and coordination for TCEQ's public assistance efforts

Recommendation: Charge TCEQ's Executive Director with providing assistance and education to the public on environmental matters under TCEQ's jurisdiction.

- HB 2694 modifies Texas Water Code § 5.239 to require the Executive Director to develop a program to ensure that the agency is responsive to environmental and citizens' concerns, including environmental quality and consumer protection. This program must include centralized public access to information about TCEQ and matters regulated by the commission. In addition, the program must identify, assess and respond to public concerns regarding matters regulated by the commission.

Recommendation: Focus the Office of Public Interest Counsel (OPIC) efforts on representing the public interest in matters before TCEQ.

- Water Code § 5.271 is modified to transfer the requirement of responsiveness to environmental and citizens' concerns regarding environmental quality and consumer protection from OPIC to the Executive Director (codified in the new § 5.239). In place of the requirement to respond to environmental and citizens' concerns, § 5.271 only requires OPIC to represent the public interest as a party in matters before the commission.

Recommendation: Require TCEQ to define, by rule, factors OPIC will consider in representing the public interest and to establish OPIC's priorities in case development.

- HB 2684 adopts this recommendation by modifying Water Code § 5.276. Under the modified § 5.276, TCEQ must establish factors OPIC must consider before deciding to represent the public interest as a party to a commission proceeding. In accordance with § 5.276(b), the rules developed by TCEQ must include 1) factors to determine the nature and extent of the public interest; and 2) factors that should be used to prioritize OPIC's caseload.
- HB 2694 (§ 3.03) adds Water Code § 5.2725, which requires that OPIC give TCEQ a report on its performance at an annual public meeting. TCEQ must then

include OPIC's performance information in its reports and biennial appropriations request to the legislature. As part of the presentation to TCEQ, OPIC must include an evaluation of its performance representing the public interest in the preceding year, an assessment of OPIC's budgetary needs, including funds to cover contracts with outside experts, and any legislative or regulatory changes recommended under Water Code § 5.273. The legislation requires TCEQ and OPIC to work cooperatively in order to identify performance measures for OPIC.

Taken together, the changes made by HB 2694 to address Issue 2 are designed to allow TCEQ to respond more effectively to the public's concerns and questions. The changes are also designed to permit OPIC to focus on representing a defined "public interest" in TCEQ proceedings.

Issue 3: Modifying TCEQ's approach to compliance history to accurately measure entities' performance

Recommendations: Remove uniform standards and require TCEQ to develop a compliance history method that can be applied consistently—though not identically—to regulated entities. Also, expand statutory requirements to allow TCEQ to consider additional factors when assessing compliance history.

- HB 2694 adopts these recommendations in Water Code § 5.753. The legislation requires TCEQ to evaluate and use compliance history in a manner that ensures consistency but that accounts for differences among regulated entities. The bill also modifies the components that may be considered when TCEQ evaluates compliance history. Specifically, TCEQ must consider enforcement orders, court judgments, and criminal convictions in Texas relating to compliance with TCEQ requirements. In addition, to the extent that information is available, TCEQ may consider consent decrees and criminal convictions relating to violations of the USEPA's rules. Prior to HB 2964, these factors were mandatory components of a compliance evaluation. In accordance with HB 2964, TCEQ is no longer required to consider criminal convictions relating to violations of environmental rules from other states when evaluating compliance history, even if the information is readily available.
- Whereas, previously, TCEQ was required to consider notices of violations (NOVs) in its assessment of compliance history, after the enactment of HB 2964, TCEQ must include NOVs in an entity's compliance history only for the year following issuance of the NOV. Furthermore, NOVs that are listed in compliance histories must be accompanied by the statement: "A notice of violation represents a written allegation of a violation of a specific regulatory requirement from the commission to a regulated entity. A notice of violation is not a final enforcement action or proof that a violation has actually occurred." TCEQ is also granted permission (previously mandatory) to remove NOVs that are administratively determined to be without merit from an entity's compliance history.

- Additionally, for the purposes of compliance history, HB 2964 forbids TCEQ from listing as a NOV information received as part of the Title V program in the federal Clean Air Act unless TCEQ also issues the entity a written NOV. However, final enforcement orders or judgments related to Title V deviations may be included in the entity's compliance history.
- Under the new Water Code § 5.754(b) and (c), compliance history classifications must be evaluated in terms of positive and negative factors present at a site, including the nature of the site's operation, its size, complexity and whether it is subject to Title V of the Clear Air Act. When classifying an entity's compliance history, TCEQ may only consider an entity a repeat violator after considering the site's size, complexity, and whether the site is subject to Title V. In addition, to be considered "repeat violations," violations must be of the same nature, in the same environmental medium, and within the five years preceding the compliance classification. TCEQ must also consider whether the potential for violations is attributable to the site's nature and complexity.
- HB 2694 (§ 4.01) modifies Water Code § 5.751 to apply the compliance and enforcement standards of Water Code Chapter 5, Subchapter Q (Performance-Based Regulation), including changes made by HB 2694, to programs under the jurisdiction of Water Code chapters 26, 27, and 32 as well as Health & Safety Code chapters 361, 375, 382, and 401 only. Water Code chapter 32 and Health & Safety Code chapter 375 were not previously subject to the provisions of Water Code § 5.751.
- HB 2694 adds Water Code § 5.754(e-1), which limits the amount of penalty enhancement attributed to compliance history to 100% of the base penalty for an individual violation. Although previously, § 5.754(h) prohibited TCEQ from conducting unannounced inspections at sites classified as "unsatisfactory" by compliance history standards, HB 2694 deletes this provision. Thus, unsatisfactory performers may now receive unannounced inspections.
- Although Water Code § 5.756 requires TCEQ to collect certain compliance information on regulated entities and post this information online, HB 2694 adds Subsection (e), which requires a QA/QC procedure, including a 30-day period in which the site owner or operator may review and comment on the information, before an entity's compliance information may be placed online.

Recommendation: Remove the statutory requirement for TCEQ to address entities for which it does not have adequate compliance information.

- The legislation accomplishes this by amending Water Code §§ 5.754 (b)-(d) to allow TCEQ to establish an "unclassified" category of regulated entities for which the commission has insufficient information to evaluate compliance. HB 2694 also removes the portion of § 5.754(d) that required the agency to establish a method of evaluating sites for which there was inadequate compliance

information. The commission may now require a compliance inspection to determine an entity's eligibility for participation in programs that are restricted to highly compliant entities.

These changes allow TCEQ more flexibility in determining compliance history and in using compliance history classifications to target regulations toward non-compliant entities.

Issue 4: Increasing the public visibility and statutory authority behind TCEQ's enforcement process

Recommendation: Require TCEQ to develop rules stating the Commission's general enforcement policy, and require TCEQ to publicly adopt enforcement policies.

- HB 2694 adopts this recommendation in Water Code § 7.006 by requiring TCEQ to adopt a general enforcement policy that describes the commission's approach to enforcement. This policy must be updated regularly, and any changes to the policy—including changes related to the calculation of penalties and deterrence—must be adopted publically. TCEQ must make a copy of the policy available online.

Recommendation: Increase TCEQ's administrative penalty caps.

- HB 2694 (§ 4.10) modifies Water Code § 7.052 to increase penalty cap for violations of Water Code chapter 37, Health & Safety Code chapters 366, 371, or 372 or Occupations Code chapter 1903 increased from \$2,500 to \$5,000 per day for each violation. The cap for all other violations within TCEQ's jurisdiction is also increased from \$10,000 to \$25,000 per day for each violation.
- HB 2694 (§ 4.12) also modifies Water Code § 13.4151 to increase the penalty cap for violating Water Code chapter 13 from no more than \$500 to no more than \$5,000 per day.

Recommendation: Authorize TCEQ to assess administrative penalties for dam safety violations.

- HB 2694 (§ 1.07) amends Water Code § 12.052 to clarify TCEQ's duty to regulate dams, specifically focusing on the most hazardous dams in the state. The legislation also allows TCEQ to form agreements with dam owners who are required to evaluate the adequacy of a dam or spillway. The agreement may include timelines for compliance or deferral of compliance. Additionally, TCEQ must exempt from meeting dam safety requirements those dams that 1) impound less than 500 acre-feet; 2) are located on private property; 3) are considered to be low or significant hazards; 4) are located in a county with a population less than 215,000; and 5) are not located within the corporate limits of a municipality.

However, even those dams that are exempt from meeting dam safety requirements must comply with operation and maintenance rules promulgated by TCEQ.

Recommendation: Authorize TCEQ to consider Supplemental Environmental Projects for local governments that would improve the environment.

- HB 2694 (§ 4.11) adds § 7.067(a-1) to the Water Code. This section allows TCEQ to approve supplemental environmental projects necessary to bring a local government into compliance or to remediate environmental harm caused by the local government's alleged violation. However, the bill also adds Water Code § 7.067(a-2), which requires TCEQ to develop a policy to prevent an entity from using the supplemental environmental project system so as to avoid compliance. The policy must include an assessment of the entity's financial ability to pay administrative penalties, to remediate the harm or come into compliance, and an assessment of the need for corrective action. "Local government," as defined by this section, includes a school district, county, municipality, junior college district, river authority, water district or other special district, or other political subdivision created under the constitution or a statute of Texas.

The changes HB 2694 incorporates to address Issue 4 will clarify TCEQ's enforcement power and increase its public visibility. This will greatly increase the Commission's transparency.

Issue 5: Providing TCEQ with additional tools to address surface water availability during drought or emergency water shortage

Recommendation: Clarify the Executive Director's authority to reduce or suspend water use during drought.

- HB 2694 (§ 5.03) addresses this recommendation by adding § 11.053 to the Water Code. This section authorizes the Executive Director, in accordance with the priority system of water rights established by Water Code § 11.027, to order a temporary suspension or adjustment of a water right to use or divert water during a drought. In ordering a suspension of water rights, the Executive Director must ensure that the action 1) maximizes the beneficial use of water; 2) minimizes the impact on water rights holders; 3) prevents waste; 4) considers the efforts of affected water rights holders to develop and implement water conservation and drought contingency plans as required by Chapter 11 of the Water Code; 5) conforms to the greatest extent possible with the order of preferences enumerated in Water Code § 11.024; and 6) does not require the release of water lawfully stored in a reservoir at the time of the suspension, in accordance with a water right associated with the reservoir.
- TCEQ is required to make rules to enforce this section, including rules to define "drought" or "emergency shortage of water," and rules that specify the conditions under which TCEQ may issue an order to suspend or adjust rights under this

section, the terms of an order issued under this section (including maximum duration of a temporary suspension of a water right), and the procedures for notice, hearing, and appeal of an order issued under this section.

Recommendation: Require water rights holders to maintain monthly water use information to be provided to TCEQ upon request during a drought.

- HB 2694 (§ 5.02) adds subsections (d)(e) and (f) to Water Code § 11.031. Subsections (d) and (e) require water rights holders to keep monthly water use information and make these records available to TCEQ, upon request, during a drought or emergency water shortage. Subsection (f) establishes that the previous subsections do not affect the authority of a watermaster to obtain water use information under any other law (i.e., a watermaster may be allowed to request water use information when an area is not experiencing drought or emergency water shortage).

Recommendation: Authorize TCEQ to require implementation of drought contingency plans during time of potential water shortage.

- This provision was not adopted into HB 2694, but see § 5.03.

Recommendation: Require TCEQ to evaluate the need for additional watermaster programs.

- HB 2694 adds subsections (g) and (h) to Water Code § 11.326. These new provisions authorize the Executive Director to evaluate basins without watermasters at least once every five years in order to determine the need for additional watermaster programs. The new provisions also require the Executive Director to report the findings and make recommendations to the Commission, which will establish factors that should be evaluated to determine whether a watermaster is needed. The Commission must then report its findings and recommendations in its biennial report to the legislature.

Issue 6: Addressing gaps in regulation and cleanup of petroleum storage tanks (PSTs)

Recommendation: Require previous PST owners to share responsibility for contamination from leaking PSTs.

Recommendation: Prohibit delivery of certain petroleum products to uncertified tanks and allow administrative penalties for violations.

- HB 2694 (§ 4.16) adds Water Code § 26.3467(d) to prohibit any person from delivering a regulated substance into an underground storage tank unless the tank has been issued a valid, current registration and certificate of compliance in accordance with Water Code § 26.346. TCEQ must pass rules in order to implement this section.

- This section also allows TCEQ to assess an administrative penalty on anyone who violates this subsection; however, Water Code § 26.3467(e) allows an affirmative defense against the administrative penalty, namely, that the person delivering the regulated substance into the storage tank relied on 1) a valid paper deliver certificate from the owner or operator of the storage tank or displayed at the facility associated with the tank; 2) a temporary delivery authorization presented by the owner/operator or displayed at the facility associated with the tank; or 3) registration and self-certification information for the tank, as listed on the Commission's website not more than 30 days before delivery.

Recommendation: Reauthorize PST remediation fee, change fee levels to caps, and authorize TCEQ to determine fees by rule.

- HB 2694 (§ 4.19) amends Water Code § 26.3574(b) and adds subsection (b-1) to address this recommendation.

Recommendation: Expand the use of the remediation fee to allow TCEQ to remove non-compliant PSTs that pose contamination risks.

- HB 2694 (§ 4.18) adds § 26.3573(d)(5) to the Water Code, which allows money in the petroleum storage tank remediation account to pay for expenses associated with investigations, cleanup or corrective action measures performed in accordance with Water Code § 26.351 (as amended by HB 2694 § 4.17).

Issue 7: Providing TCEQ with guidance on how to fund the Texas Low-Level Radioactive Waste Disposal Compact Commission

Recommendation: Clarify the Compact Commission's funding mechanism.

- HB 2694 (§ 6.01) expands Health & Safety Code § 401.246 to include the Texas Low-Level Radioactive Waste Disposal Compact Commission among the organizations for which TCEQ must secure funding through the compact waste disposal fees adopted by the commission.
- HB 2694 (§ 6.02) also adds Health & Safety Code § 401.251, which establishes that the Low-Level Radioactive Water Disposal Compact Commission account is an account in the general revenue fund. Furthermore, TCEQ must deposit the portion of the compact waste disposal fees (collected under Health & Safety Code § 401.245) calculated to support the Texas Low-level Radioactive Waste Disposal Compact Commission as required by Section 4.04(4) of the Compact (§ 403.006 of the Health & Safety Code). Finally, money in this account may be appropriated only to fund the operations of the Texas Low-Level Radioactive Waste Disposal Compact Commission.

Issue 8: Changing statutory caps on emissions would allow TCEQ to fund the Title V Air Permit program

Recommendation: Authorize TCEQ to administratively adjust annual emissions tonnage cap for Air Emissions Fee when necessary to provide sufficient funds for the Title V Operating Permit program.

- This provision was not adopted by HB 2694.

Water and Wastewater Utility Regulation Transfer

Recommendations: Transfer responsibility for regulating water and wastewater rates and services from TCEQ to PUC; eliminate existing water and wastewater utility application fees, adjust the Water Utility Regulatory Assessment Fee to pay for utility regulation at PUC; require OPIC to represent residential and small commercial interests relating to water and wastewater utilities, contingent upon transfer of these interests to PUC oversight.

None of the Sunset Commission's recommendations regarding transfers of TCEQ authority to the PUC were adopted because the PUC sunset bill failed to pass the legislature. Therefore, TCEQ will continue to handle matters related to water and wastewater rates and services.

Abolish the independent On-Site Wastewater Treatment Research Council that funds on-site sewage research

Recommendation: Abolish the On-Site Wastewater Treatment Research Council and transfer its authority to TCEQ.

- HB 2694 (§ 8.01 - § 8.08) modifies Health & Safety Code §§ 367.001-367.008 to abolish the On-Site Wastewater Treatment Research Council and transfer all of the Council's previous authority, grants and contracts to TCEQ.

In addition to the changes, listed above, that directly address the Sunset Commission's recommendations as laid out in the TCEQ Sunset Report, HB 2694 also includes modifications that do not specifically address recommendations from the Sunset Report:

- HB 2694 (§ 1.03) adds Water Code § 5.061, which prohibits commission members from accepting contributions to their campaigns for elected office. A commissioner who accepts such contributions is considered to have resigned from his/her position as commissioner, and the vacant position must be filled in the manner required by law.
- HB 2694 (§ 1.04) adds § 5.1031 to the Water Code. This section requires TCEQ to develop and implement policies to encourage negotiation and ADR. These policies must conform, to the extent possible, with any model guidelines issued by

the State Office of Administrative Hearings. TCEQ is also required to coordinate the implementation of the negotiation and ADR policies, conduct training, and collect data on the effectiveness of the procedures.

- HB 2694 (§ 4.08) amends Water Code § 5.758 and reduces the standards a regulated entity must meet in order to be exempt from statutorily-specified pollution control and abatement. Whereas previously, an applicant had to propose an alternative method of achieving pollution control or abatement that was more protective of the environment and public health than TCEQ’s standard, under the modified statute, an applicant may propose a method and provide evidence to TCEQ that the proposed alternative is “as” protective as TCEQ’s standard.
- HB 2694 (§ 4.17) adds to Water Code § 26.351 to allow TCEQ to take corrective action to remove an underground storage tank if the tank 1) is not in compliance with the requirements of Water Code Chapter 26; 2) is out of service; 3) poses a contamination risk; and 4) is owned or operated by someone who is financially unable to remove the tank. In addition, TCEQ may make rules to enforce this section, including rules regarding 1) how to determine the ability of the tank owner or operator to finance tank removal and 2) how to assess the potential contamination risk posed by the tank.
- HB 2694 (§ 4.27) adds Health & Safety Code § 382.059, which relates to permit amendment applications by electric generating facilities submitted solely to allow the facility to reduce emissions in order to comply with § 112 of federal Clean Air Act, which requires facilities to use applicable maximum achievable control technology.
 - The permit amendment application must include a condition that the applicant is required to meet all requirements for compliance according to the timeline set forth in § 112 of the federal Clean Air Act.
 - In addition, TCEQ is required to provide opportunity for public hearing and comment on the proposed permit amendments, in accordance with Health & Safety Code § 382.0561. Once the application is submitted, however, the Executive Director must issue a draft permit within 45 days. Then, within 30 days of TCEQ’s issuance of the draft permit, parties may submit to TCEQ any “legitimate issues of material fact” regarding whether the technology approved in the draft permit meets the maximum available control technology requirement under § 112 of the Clean Air Act. At this time, parties may also request a contested case hearing, which must be conducted and a final order issued by TCEQ within 120 days of TCEQ’s issuance of the draft permit. Once a final permit is issued, anyone affected by the commission’s decision may move for rehearing and is entitled to judicial review.

- These provisions expire on the sixth anniversary of the date the US EPA adopts standards for existing electric generating facilities under Clean Air Act § 112, unless a stay is granted. TCEQ is required to adopt rules to implement these requirements.
- HB 2694 (§ 5.01) modifies the definition of “agriculture” in Water Code § 1.002(12) to include aquaculture, as defined in § 134.001 of the Agriculture Code.
- HB 2694 (§ 5.04) amends Water Code § 11.1273 to require the Executive Director to review any water management plan that includes a reservoir operation plan for two water supply reservoirs that was originally required by a court during the water rights adjudication process. The amended section requires the Executive Director to conduct a technical review of the water management plan within a year from the time a permit to amend the application is complete. Consistent with the application process for other water rights, TCEQ must provide an opportunity for public comment and hearing on the application. If someone requests a hearing within the appropriate period, the commission must act on the request. If TCEQ denies the request, the commission must act on the application within 60 days after the hearing period expires. If there is no request for a hearing within the open period, the Executive Director may act on the application.
- HB 2694 (§ 6.03) modifies Water Code § 5.701(n) to allow regulatory assessments collected by potable water or sewer utilities from retail customers to be appropriated by a rider to the General Appropriations Act to any agency—not only TCEQ—with duties related to water or sewer utility regulation or representation of residential or small commercial consumers or water or sewer services in order to pay costs and expenses incurred through its regulation of districts, water supply or service corporations, and public utilities under Chapter 13. Fees collected may be used to protect state water resources.
- HB 2694 (§ 6.04) repeals Subchapter L, Chapter 13, Water Code (“Commission Financing.”)
- HB 2694 (§ 7.01) adds § 13.1325 to the Water Code and requires the state agency with jurisdiction over water and sewer utility rates to provide public electronic copies of all information given to the agency under § 13.016, 13.043 and 13.187 at a reasonable cost. The information must be provided only if available and non-confidential. The information is also required to be provided to the Office of Public Utility Council upon request, free of charge.

Rate Notification

- HB 2694 (§ 9.01) amends § 13.043(i) of the Water Code. In particular, the legislation extends the amount of time (from 30 to 60 days) after a final decision on a rate change in which the governing body of a municipally owned utility or

political subdivision must provide written notification to each ratepayer who lives outside the boundaries of the municipality or political subdivision. In this section, as in § 13.187(b), the notification or statement of intent may be sent by e-mail if the governing body has access to the ratepayers' email addresses.

Contested Case Hearings

- HB 2694 modifies Water Code § 5.115(b). Under the amended section, when TCEQ notifies a state agency of a complete permit application, the state agency may submit comments but may not contest the issuance of the permit or license. However, for the purpose of this section, a river authority is not considered a “state agency.”
- HB 2694 (§ 10.02) also amends Water Code § 5.228(c) and (d) to make mandatory the Executive Director’s participation in contested case hearings at the State Office of Administrative Hearings. As part of the contested case hearing, the Executive Director is required only to provide information in order to complete the administrative record and to support TCEQ’s position on the permit application. HB 2694 removes all other guidelines previously contained in Water Code § 5.228(c). Furthermore, under the modified § 5.228(d), the Executive Director may not rehabilitate a witness’s testimony unless the witness is a commission employee. It is no longer required that the employee be testifying for the sole purpose of completing the administrative record.
- HB 2694 (§ 10.03) adds Water Code § 5.315, which changes the rules relating to discovery in cases using prefiled written testimony. In those cases, all discovery must be completed before the deadline for the submission of that testimony. The only exception to this provision is for water and sewer rate-making proceedings.
- HB 2694 (§ 10.04) repeals Water Code § 5.228(e), which previously prohibited the Executive Director from assisting a permit applicant in meeting its burden of proof in a contested case hearing unless the applicant fell within a category of applicant that TCEQ had designated as eligible, by rule, to receive assistance.

In addition to HB 2694, several bills passed by the 82nd Legislative Session impact TCEQ. Below is summary of the relevant portions of those bills and their implications:

- SB 660 (§ 5) amends § 11.1271(f) of the Water Code to require TCEQ to generate rules that require the methodology and guidance used for calculating water use and conservation under Water Code § 16.403 to be used in water conservation plans. In addition, TCEQ’s rules must require an entity to report the most detailed municipal water use data available to the entity. The rules may not require an entity to provide data that is more detailed than the entity’s billing system can produce.

- SB 660 (§ 18) amends Water Code § 36.3011 to require the Executive Director to take action within 45 days of receiving the review panel’s report, generated in response to a petition for inquiry under Water Code § 36.1082. If necessary, and in accordance with Water Code § 36.303, TCEQ may take action against a district if it finds that 1) the district failed to submit its management plan to TWDB’s executive administrator; 2) the district failed to participate in the joint planning process detailed in Water Code § 36.108; 3) the district failed to adopt rules; 4) the district failed to adopt the DFCs adopted by the management area at a joint meeting; 5) the district failed to update its management plan within two years of the management area adopting DFCs; 6) the district failed to update its rules to implement the DFCs; 7) the rules adopted by the district are not designed to achieve the DFCs; 8) the groundwater in the management area is not adequately protected by a district’s rules; or 9) the groundwater is not adequately protected due to a district’s failure to enforce compliance with district rules.
- Under SB 660 (§ 21), by January 1, 2013, TCEQ is required to adopt rules under the amended Water Code § 11.1271(f); TWDB and TCEQ must adopt rules under the amended Water Code § 16.402(e); and TWDB and TCEQ, in consultation with the Water Conservation Advisory Council, must develop water use and conservation calculation methods and guidance, as well as the data collection and reporting program required by § 16.403(a) and (c), Water Code.
- HB 610 (§ 1) amends Water Code § 5.128 to allow TCEQ to adjust fees as necessary to encourage electronic reporting and the use of TCEQ’s electronic document receiving system. This section also allows TCEQ to use electronic means of transmission for notices, orders, and commission decisions. In addition, if the notice is related to a facility permit, TCEQ must include a hyperlink to an electronic map indicating the location of the facility.
- SB 1179 (§ 25(164)) repeals Water Code § 5.178(d), which previously required TCEQ to file annual reports with the governor and presiding officer of each house of the legislature, detailing all funds received and disbursed the previous year.
- SB 430 (§ 1) amends Water Code § 5.236 to include groundwater conservation districts among the entities who must be notified if the Executive Director learns of a potential public health hazard due to contaminated usable groundwater.
- SB 1003 (§ 2) changes the language in Water Code § 5.5145 (“Emergency Orders Concerning Operation of Rock Crusher or Concrete Plant without Permit) from mandatory to permissive. Under the new statute, TCEQ is allowed to issue an emergency order to suspend the operations of an unpermitted rock crusher but is not required to do so.

Sale, Recovery and Recycling of Television Equipment

- SB 329 (§ 1) adds Subchapter Z to Chapter 361 of the Health & Safety Code. This section requires a manufacturer of covered television equipment to register with TCEQ and comply with certain collection, reuse, recycling, and reporting requirements established by TCEQ. Under this program, TCEQ must maintain an online list of TV manufacturers who are in compliance with the requirements of Subchapter Z. TCEQ must also establish a state recycling rate, and provide to each manufacturer its market share allocation for collection, reuse and recycling.
- SB 329 (§ 2) expands Water Code § 7.052(b-1) to subject a manufacturer of “covered television equipment” to a maximum penalty of \$10,000 (second violation) or \$25,000 (subsequent violations) for failure to label equipment or implement a recovery plan under Health and Safety Code § 361.955, 361.975, or 361.978.

Certificates of Convenience and Necessity: Municipal Boundaries or Extraterritorial Jurisdiction of Certain Municipalities

- SB 573 (§ 1) modifies Water Code § 13.245(b) and adds §§ (c-1) through (c-5). The legislation amends § 13.245, which applies to municipalities with a population of 500,000 or more, to allow TCEQ to grant the certificate to a retail public utility if: 1) the municipality has not consented within 180 days of a request by a retail public utility to obtain a CCN in the boundaries of ETJ of a city; 2) the commission makes the findings required in (c) (specifically, that the municipality does not have the ability to provide service or has failed to make a good faith effort to provide service on reasonable terms and conditions); 3) the municipality has not entered a binding commitment to serve the applicant’s targeted area before 180 days after the formal request; or 4) the landowner or retail public utility that submitted the request has not unreasonably refused to comply with the municipality’s service extension and development process or enter into a contract for water or sewer services with the municipality.
 - However, under (c-3), all certificates of public convenience and necessity granted under (c-1) or (c-2) must be conditioned upon all water and sewer facilities being designed and constructed according to the municipality’s standards for water and sewer facilities. Furthermore, these revisions in (c-1) through (c-3) do not apply to: 1) a county that borders the United Mexican States and the Gulf of Mexico or a county that is adjacent to such a county; 2) a county with a population of more than 30,000 and less than 35,000 that borders the Red River; or 3) a county with a population of more than 100,000 and less than 200,000 that borders a county described in (2), above.
 - Finally, (c-1) through (c-3) do not apply to: 1) a county with a population of 130,000 or more that is adjacent to a county with a population of 1.5

million or more and that is within 200 miles of an international border; or
2) a county with a population of more than 40,000 but less than 50,000
that contains a portion of the San Antonio River.

- SB 573 (§ 2) amends Water Code § 13.2451 to prohibit TCEQ from extending a municipality's certificate of public convenience and necessity beyond its extraterritorial jurisdiction if a landowner located wholly or partly outside the jurisdiction elects to exclude some or all of his property within a proposed service area, in accordance with Water Code § 13.246(h). However, this prohibition does not apply to a transfer of a certificate, as approved by TCEQ or to an extension of extraterritorial jurisdiction for municipalities located in the counties exempted from the requirement.
- SB 573 (§ 3) modifies Water Code § 13.246(h). According to the amended section, if a certificate of public convenience and necessity applicant has land removed from the proposed service area because of a landowner's election, the applicant cannot be required to provide service to the removed land for any reason, including the violation of law or TCEQ rules by another person's water or sewer system.
- SB 573 (§ 4) also amends Water Code § 13.254, addressing the procedures and circumstances of decertification. The modified subsection (a-1) establishes that a certificate holder's status as a borrower under a federal loan program is not a bar to a request for the release of the petitioner's land from the CCN and receipt of services from an alternative provider.
 - In addition to the previously enumerated factors in subsection (a-1)(1)(A) through (C), the petitioner for expedited release from a CCN must also demonstrate that: D) the alternative service provider will provide service at approximately the same level and cost as the service requested from the certificate holder; E) the flow, pressure, and infrastructure requirements and needs; and F) any additional, relevant information requested by the certificate holder related to the determination of capacity or cost of providing service.
 - The legislation also modifies Subsection (a-3) to require TCEQ to take action on a petition for expedited release within 60 days (previously 90 days) of the date TCEQ determines the petition to be administratively complete.
 - Additionally, as an alternative to decertification under Subsection (a), Subsection (a-5) allows an owner of 25 acres or more that is not receiving water or sewer service to petition for expedited release of the area of a certificate of public convenience and necessity. The landowner is entitled to release if the property is located 1) in a county with a population of at least 1 million; 2) in a county adjacent to such a county; or 3) in a county

with more than 200,000 and less than 220,000 that does not contain a public or private university with an enrollment of 40,000 or more. The property may not be located in a county with population of more than 45,500 and less than 47,500.

- Under Subsection (a-6), once the landowner files the petition, TCEQ must grant the petition within 60 days. TCEQ may not deny a petition based on the fact that a certificate holder is a borrower under a federal loan program; however, TCEQ may require the petitioner to compensate the subject decertified retail public utility under (a-5) or as otherwise provided in this section.
- Under (a-8), if a certificate holder has never made service available to the area a petitioner seeks to have released under (a-1), TCEQ is not required to find that the proposed alternative provider is capable of providing better service than the certificate holder, only that the alternative provider is capable of providing service.
- Section (a-8) does not apply to a county bordering Mexico or the Gulf of Mexico, a county adjacent to either such county, or a county 1) with population of more than 30,000 and less than 35,000 bordering the Red River; 2) with a population of more than 100,000 and less than 200,000 that borders a county described in 1); 3) with a population of 130,000 or more that is adjacent to a county with population of 1.5 million or more, located within 200 miles of an international border; or 4) with a population of more than 40,000 but less than 50,000 that contains a portion of the San Antonio River.

Don't Mess With Texas Water Program

- HB 451 (§ 1) adds § 26.053 to the Water Code. This section requires TCEQ to establish a program to prevent illegal dumping in surface waters.

Inspection of the John Graves Scenic Riverway

- SB 408 amends §26.555 and §26.563, Water Code to address the John Graves Scenic Riverway. The legislation requires TCEQ, the Brazos River Authority, and Texas Parks and Wildlife to collaborate on efforts to inspect and detect violations on the John Graves Scenic Riverway.
- It also requires TCEQ to make rules prohibiting the commercial or recreational use of airboats, fanboats, shallow draft watercraft with aircraft-type propellers for propulsion, and hovercraft on the John Graves Scenic Riverway and making a violation of such rule a Class C misdemeanor.

Applications for Injection Wells for Disposal of Municipal and Industrial Waste within a GCD

- HB 444 (§ 1) modifies Water Code § 27.017 to require the Executive Director to submit a copy of an application for a proposed injection well for the disposal of industrial and municipal to the groundwater conservation district (if any) in which the proposed well is located.
- HB 444 (§ 2) adds § 27.017(e), requiring that, before testimony is heard in a contested case hearing regarding a proposed injection disposal well located within a GDC, the evidence show that TCEQ's Executive Director provided a copy of the application to the governing body of the GCD and mailed that body notice of the contested case hearing.

Regulation of Certain Aggregate Production Operations

- HB 571 (§ 1) adds Water Code Chapter 28A, relating to the registration and inspection of certain aggregate production operations. Subchapter A defines "aggregate production operations" to include those sites from which aggregates are removed from the earth.
- The legislation also adds Subchapter B to Water Code Chapter 28A. This subchapter requires the responsible party of an aggregate production operation to register with the TCEQ not later than 10 days before beginning extraction activities and requires inspection of such facilities by TCEQ.
- Under § 28A.101, TCEQ may collect a registration fee those authorized to operate an aggregate production operation and may assess penalties for failure to register.
- HB 571 (§ 2) requires an aggregate production operation to register with TCEQ by September 1, 2012.

Priority Groundwater Management Areas (PGMAs)

- SB 313 (§ 1) amends § 35.007, Water Code, to require TCEQ's Executive Director and TWDB's Executive Administrator to identify areas of the state that will experience critical water shortages within the following 50-year (previously 25-year) period.
- SB 313 (§ 2) adds Water Code § 35.008 to allow TCEQ to adopt rules regarding the creation of a district over all or part of a PGMA that was designated as a critical area under Chapter 35, Water Code (as it existed before September 1, 1997) or other prior law. TCEQ may also adopt rules regarding the addition of all of part of the land within a PGMA to an existing district.
- SB 313 (§ 3) amends § 35.012, Water Code, to allow TCEQ to consider territory in two different PGMAs to be in the same designated PGMA if the areas share a

common boundary and one or more common aquifers and if TCEQ determines that a district composed of territory in the two areas will manage groundwater more effectively and efficiently than other options available to TCEQ.

- SB 313 (§ 4) amends § 35.013, Water Code, addressing the procedures for adding a PGMA or portion of a PGMA to an existing district. The amendment requires TCEQ to submit a copy of its order to the board of the affected district, and, not later than 120th day after receiving the order, the board must vote on the addition of the PGMA to their district and advise TCEQ of the outcome. If the board approves the addition and has an ad valorem tax, the board must obtain voter approval to add the territory to the district and the order must comply with the requirements of the legislation. No later than the first anniversary of the proposition's defeat or the district's vote not to accept the PGMA into the district, TCEQ shall 1) create under § 36.0151 one or more districts covering the PGMA; or 2) recommend the area be added to another existing district.
- SB 313 (§ 5) adds § 35.0151(c) to allow TCEQ to amend the territory in an order under § 35.008 or 35.0151 to adjust for areas that, since the time of the order, have or have not been added to an existing district or created a separate district. When amending the order, TCEQ may recommend the creation of a new district in the area or that the area be added to a different district. Except as provided in § 35.013(h), changing the order will not affect deadlines under § 35.012 or 35.013.
- SB 313 (§ 7) requires TCEQ, by September 1, 2012, to create a district or add territory to an existing district for any territory for which TCEQ has issued an order recommending creation of a district or adding territory to a district before the effective date of SB 313 unless TCEQ determines that the territory is not suitable under § 35.013(i).
- SB 313 (§ 9) specifies that the new § 35.007(a), Water Code, applies only to PGMA's that are designated by TCEQ after SB 313 becomes effective.

Continuing Education Requirements for TCEQ Licensees

- HB 965 modifies Water Code § 37.008. Specifically, the legislation authorizes TCEQ to recognize, prepare or administer continuing education programs for license holders, including online continuing education programs and to provide a method to certify compliance.

Texas Low-Level Radioactive Waste Compact Waste Disposal Facility

- SB 1504 (§ 1) adds Health & Safety Code § 401.2005(1-a), which defines "Curie capacity" as the radioactivity of the waste that may be accepted by the compact waste disposal facility, as determined by TCEQ in the facility's license.

- SB 1503 (§ 2) modifies Health & Safety Code § 401.207 to allow compact waste disposal facility license holders to accept approved nonparty compact waste that is classified as Class A, B, or C low-level radioactive waste according to the compact waste disposal facility license as long as the acceptance of such material does not diminish the disposal volume or curie capacity available to party states and meets certain other criteria.
- SB 1504 (§ 3) adds Health & Safety Code § 401.208, requiring TCEQ to conduct a study of the available volume and curie capacity at the compact waste disposal facility for the disposal of party state and nonparty compact waste.
- SB 1504 (§ 3) also adds Health & Safety Code § 401.2085, which requires TCEQ to review the adequacy of the license holders' financial assurance mechanisms approved by TCEQ before January 1, 2011.
- SB 1504 (§ 5) amends § 401.245 Health & Safety Code. Under Subsection (g), for the purposes of a contested case hearing involving the adoption of fees under § 401.245, only a party state generator of low-level radioactive waste is a person affected. Furthermore, under (h), the administrative law judge assigned to the case involving the adoption of fees must issue a proposal for decision on the fees proposed by TCEQ by the first anniversary of SOAH's jurisdiction of the case.
- SB 1504 (§ 6) adds § 401.2455 to the Health & Safety Code. Under § 401.2455, TCEQ's Executive Director may establish interim party state compact waste disposal fees only for the time between license holder approval and the effective date of rules establishing the fees under § 401.245. A generator may not receive a refund or be charged a surcharge for the differences between interim and final adopted fees. TCEQ may not extend the interim rate period. If the interim period under § 401.245(h) expires without a proposal for decision from SOAH, all disposal at the compact waste disposal facility must cease until rates are adopted.
- SB 1504 (§ 6) also adds § 401.2456 to the Health & Safety Code. This section allows a compact facility license holder, at any time after TCEQ has granted approval to begin operating the compact waste disposal facility, to contract with nonparty compact waste generators for disposal in accordance with the facility's license. Rates and contract terms must be set both by price per curie and price per cubic foot and are subject to TCEQ's review and approval.
- SB 1504 (§ 7) requires that party state compact waste disposal fees adopted by TCEQ under § 401.245 be sufficient to 1) allow the license holder to recover operation and maintenance costs and a reasonable profit on operation of the facility; 2) provide an amount necessary to meet future costs of decommissioning, closing, and post-closure maintenance and surveillance of the facility and the compact waste disposal facility portion of the disposal facility site; 3) provide money to fund local public projects under § 401.244; 4) provide a reasonable rate of return on capital investment in facilities used for management or disposal of

compact waste; and 5) provide an amount necessary to pay licensing fees, facility fees, provide security for the facility, as required by TCEQ. In determining compact waste disposal fees, TCEQ may consider only capital investment in property by the license holder that is used and useful to the facility, as authorized under this chapter. TCEQ may not consider capital investment costs or related costs prior to September 1, 2003.

- SB 1504 (§ 10) adds Health & Safety Code § 401.271(c). This section provides that a holder of a license or permit issued by TCEQ under Chapter 361 or 401 that authorizes the storage (not disposal) of radioactive waste or elemental mercury must remit to TCEQ each quarter 20% of the license holder's gross receipts received from the storage of the substance for more than one year. These funds must be deposited into the general revenue fund. It should be noted that this requirement is only relevant to the storage of radioactive waste or elemental mercury at or adjacent to the compact waste disposal facility.

Disposal of Demolition Waste from Abandoned or Nuisance Buildings

- SB 1258 (§ 1) adds § 361.126 to the Health & Safety Code. Under this section, TCEQ may issue a permit to authorize the governing body of a county or municipality with population of 10,000 or less to dispose of demolition waste from an abandoned or nuisance building, as defined in § 361.126(a), if the disposal occurs on land that 1) the county or municipality owns or controls; and 2) would qualify for an arid exemption under TCEQ rules.

Issuing a Certificate for a Municipal Setting Designation

- HB 2826 (§ 3) amends § 361.8065 of the Health & Safety Code. The amended Subsection (a) exempts situations under Subsection (c) from the requirement that an applicant provide certain documentation before TCEQ's Executive Director may issue a municipal setting designation. The addition of Subsection (c) to § 361.8065 allows an applicant who seeks a municipal setting designation for property within a municipality with population of two million or more and who has complied with the requirements of § 361.805(b)(8) to be considered to have complied with § 361.8065(a). The applicant is then considered eligible for a municipal setting designation upon providing documentation 1) that no resolution opposing the application has been adopted within 120 days of receipt of the notice under § 361.805 by a municipality's city council (§ 361.805(a)(1)(B) or (C)) or the governing body of a retail public utility (361.805(a)(3)); and 2) that the property for which the designation is sought is or was under the oversight of TCEQ or the US EPA and is subject to either an ordinance that prohibits the use of and contact with groundwater beneath the property as potable water or a restrictive covenant enforceable by the relevant municipality that prohibits the use of and contact with groundwater beneath the property as potable water. The applicant or the applicant's representative may provide an affidavit as documentation under Subsection (c).

Low-Income Vehicle Repair Assistance, Retrofit, and Accelerated Vehicle Retirement Program

- HB 3272 (§ 3) amends § 392.210 of the Health & Safety Code to require TCEQ to adopt guidelines to assist counties in implementing the low-income vehicle repair assistance, retrofit, and accelerated vehicle retirement program.

Measuring, Monitoring, and Reporting Emissions

- HB 1981 (§ 1) adds § 382.0161 to the Health & Safety Code. The section requires TCEQ to establish and maintain an air pollutant watch list, which must identify: 1) each air contaminant TCEQ determines should be included on the watch list (on the basis of federal or state air quality standards); and 2) each area of the state for which air quality monitoring data indicates that one or more contaminants may cause short- or long-term adverse health effects or odors. TCEQ must publish notice and allow public comment on the addition or removal of a contaminant or area on the watch list.

Idling Motor Vehicles and Greenhouse Gas Emissions

- SB 439 (§ 1) adds Health & Safety Code § 382.0191 to prohibit TCEQ from limiting the idling of any motor vehicle weighing over 8,500 pounds (gross) that is equipped with a 2008 or later heavy-duty diesel engine or a liquefied or compressed natural gas engine that has been certified by US EPA or another state environmental agency to emit no more than 30 grams of nitrogen oxides (NOX) per hour when idling.
- HB 1906 (§ 1) adds Water Code § 7.1831 to make it a Class C misdemeanor to violate one of TCEQ's rules concerning locally enforced motor vehicle idling limitations.
- SB 875 (§ 1) adds Water Code § 7.257, which allows an affirmative defense to nuisance or trespass arising from greenhouse gas emissions. Specifically, a person charged with nuisance or trespass for such emissions (and not for nuisance actions based solely on a noxious order) has a defense to the allegations if the person's actions that resulted in the alleged nuisance or trespass were authorized by TCEQ, the federal government, or an agency of the federal government and 1) the person was in substantial compliance with the rule, permit, order, license, certificate, registration, approval or other authorization while the alleged nuisance or trespass was occurring; or 2) TCEQ, the federal government, or an agency of the federal government exercised agency discretion related to the actions that resulted in the alleged nuisance or trespass.

Emissions from Stationary Natural Gas Engines in Combined Heating & Power Systems

- HB 3268 (§ 1) adds Health & Safety Code § 382.051865 and requires TCEQ to issue a standard permit or permit by rule for stationary natural gas engines used in a combined heating and power system that establishes emissions limits for air contaminants released by the engines. In adopting the permits, TCEQ may consider 1) the geographic location of the stationary natural gas engine, including proximity to a nonattainment area; 2) total annual operating hours; 3) technology used by the engine; 4) types of fuel used; and 5) other emission control policies of Texas.

Facility Permitting

- SB 1134 (§ 1) adds Health & Safety Code § 382.051961, which prohibits TCEQ from adopting a new permit by rule, a new standard permit, or an amendment to an existing permits by rule or by standard permit for a facility with SIC codes 1311, 4612, 4922, or 4923 unless the TCEQ takes certain steps outlined in this section. The air quality data used under this section must be relevant as well as technologically and scientifically credible, as determined by TCEQ.
- SB 1134 (§ 1) also adds Health & Safety Code § 382.051962. Under that section, TCEQ may adopt a new permit by rule, a new standard permit, or an amendment to an existing permit by rule or by standard permit to authorize planned maintenance, start-up, or shut-down of facilities described in § 382.051961(a). Section 382.051963 allows permits to be amended to require 1) the permit holder to provide TCEQ with information about a facility authorized by the permit, including facility location; and 2) any facility handling sour gas to be a minimum distance from a recreational area, residence, or other structure not occupied or used solely by the facility operator or property owner. Under § 382.051964, TCEQ is prohibited from aggregating two facilities within the previously identified SIC codes in order to consider the facility an oil and gas site, a stationary source, or another single source, unless certain exceptions apply.

Concrete Crushing Facilities

- SB 1250 (§ 1) modifies Health & Safety Code § 382.065(b) and exempts concrete crushing facilities from TCEQ regulation if the facility is 1) at a location for which TCEQ authorization for a concrete crushing facility was in effect on September 1, 2001; 2) at a location that meets the distance requirements of subsection (a) at the time of the initial authorization application, regardless of whether a residence, school, or place of worship is subsequently built within 440 yards of the facility; or 3) one that uses a concrete crusher to manufacture products that contain recycled materials and is located in an enclosed building within 25 miles of an international border in a municipality with population between 6,100 and 20,000.

Projects Funded through the Texas Emissions Reduction Plan Fund

- SB 527 allows TCEQ and the comptroller to provide grants and funding for several air quality research and monitoring programs, infrastructure projects, and other clear air initiatives.
- SB 20 (§ 2) adds Health & Safety Code §§ 386.252(e), (f), and (g). The new section (e) allows TCEQ to allocate extra funds originally designated for the Texas alternative fueling facilities program to other programs under § 386.252(a). Furthermore, (f) allows TCEQ to allocate money in the fund if 1) TCEQ, in consultation with the governor and advisory board, determines that using the fund for programs under Chapter 393 will result in noncompliance with the state implementation plan to such an extent that federal action is likely; and 2) TCEQ finds that reallocating some or all of the funding for the Chapter 393 program would resolve the noncompliance. However, TCEQ may not reallocate more than the minimum amount of money necessary to address the noncompliance.

Texas Natural Gas Vehicle Grant Program

- SB 20(§ 3) adds Chapter 393 to the Health & Safety Code. Under this program, an entity operating a heavy- or medium-duty motor vehicle in Texas may apply to TCEQ for a grant under this chapter.
- SB 20 (§ 4) adds Chapter 394 to the Health & Safety Code, which authorizes TCEQ to establish and administer a program to provide fueling facilities for alternative fuel in nonattainment areas. TCEQ must issue grants to each eligible facility to offset the facility's costs.

Texas Emissions Reduction Plan Grants

HB 3399 (§ 1) amends § 368.104 of the Health & Safety Code to specify how heavy-duty motor vehicles and engines must be decommissioned.

TWDB

Highlights of the TWDB Review Bill (SB 660)

The TWDB provides financial assistance to political subdivisions in order to fund water and wastewater projects and conducts statewide and regional planning for the future of water resources in Texas.

Issue 1: Expanding TWDB's authority to issue bonds to support its water and wastewater financing programs

Recommendation: Authorize TWDB to issue Development Fund general obligation bonds on a continuing basis but such that the aggregate principal amount outstanding does not exceed \$6 billion at any time.

- This recommendation was adopted by SJR 4 and proposes to amend the Texas constitution to allow TWDB to issue general obligation bonds such that the aggregate principal amount outstanding never exceeds \$6 billion. SJR 4 requires voter approval and will be on the November 2011 ballot as Proposition 2.

Recommendation: Clarify that TWDB's general obligation bonds are not considered state debt payable from general revenue fund for purposes of calculating constitutional debt limit until Legislature appropriates debt service to TWDB and TWDB issues the debt.

- SB 660 (§ 12) adopts this recommendation by amending Water Code § 17.003. That section specifies that TWDB's general obligation bonds do not become state debt payable from the general revenue fund for the purposes of calculating constitutional debt limits until the legislature approves the debt service and TWDB issues the debt. Furthermore, the bill requires that, when requesting approval for its bonds, TWDB designate whether the bonds are reasonably expected to be paid from general state revenue or from another source. The bond review board must then verify whether debt service on bonds issued by TWDB is considered state debt. Even if the bonds are initially designated as state debt, payable from general state revenue, however, their designation may change if they become backed by insurance or a guarantee that ensures payment from a non-state source, or if TWDB demonstrates that payment from state general revenues is no longer necessary. The bond review board must then certify to the Legislative Budget Board that payment from the state general revenues is no longer required. The changes made by SB 660 in this section of the water code were also independently adopted in HB 1732, which was signed by the governor in June 2011.

Issue 2: Coordinating among planning processes to facilitate statewide water planning

Recommendation: Require TWDB to certify that each groundwater management area includes a voting representative from each regional water planning group whose boundaries overlap the area.

- SB 660 incorporates this recommendation in part. Water Code § 16.053(c) requires GCDs to participate in the regional water planning group for their management area; however, TWDB does not have to certify the participation of groundwater conservation districts in the groundwater management area planning group.

Recommendation: Require regional water planning groups to use the desired future conditions (DFCs) in place at the time of adoption of the State Water Plan in the next water planning cycle.

- This recommendation was addressed by adding Water Code § 16.053(e)(2-a).

Recommendation: Strengthen the public notice requirements for groundwater management area meetings and adoption of DFCs; require proof of notice be included in submission of conditions to TWDB.

- This recommendation was incorporated into Water Code §§ 36.108(d-2) through (e-3)

Issue 3: Changing the processes to petition an aquifer's desired future conditions

Recommendation: Transfer the process to petition the reasonableness of a DFC from TWDB to TCEQ and modify TCEQ's existing petition process to unify elements relating to reasonableness and implementation of DFCs.

- SB 660 made multiple changes to the DFC process. See "Desired Future Conditions" section, below.

Issue 4: Change the statewide approach to GIS to allow TWDB to provide effective GIS leadership

Recommendations: Exempt the Texas Natural Resources Information System (TNRIS) from the data center services contract at the Department of Information Resources.

- This recommendation was not adopted in SB 660.

Recommendation: Clarify TNRIS's duties, require TWDB to report TRNIS's progress and GIS initiatives to the legislature; abolish the Texas Geographic Information Council.

- SB 660 (§ 6) abolishes the Texas Geographic Information Council and transfers its authority to TWDB.

Issue 5: Provide TWDB with data to determine whether water management strategies are meeting future water needs

Recommendations: Require TWDB to evaluate the state’s progress in meeting its water needs as part of the State Water Plan.

- SB 660 (§ 8) provides additional detail to Water Code § 16.051, regarding the components of the state water plan. Specifically, the plan must an evaluation of the state’s progress in meeting future water needs, an assessment of the effect of recent strategies, and an analysis of the number of projects that received TWDB funding as part of the previous water plan. As part of TWDB’s evaluation of the state’s progress toward meeting future water needs, TWDB may obtain implementation data from the various regional water planning groups.

Require TWDB and TCEQ, in consultation with the Water Conservation Advisory Council, to develop uniform, detailed gallons per capita daily reporting requirements.

- SB 660 (§ 10) modifies Water Code § 16.402 to require TCEQ and TWDB to adopt joint rules requiring a methodology and providing guidance for calculating water use and conservation under Water Code § 16.403. These calculations must then be used in water conservation plans. The rules adopted by TCEQ and TWDB must require an entity to report at the most detailed level of municipal water use data currently available but cannot require more detail than an entity’s billing system is capable of producing.

Issue 6: Changing the language in TWDB statutes to reflect standard language applied to agencies undergoing Sunset Review

Recommendation: Apply standard Sunset across-the-board requirements to TWDB.

- SB 660 (§ 2) adds §§ 6.113-6.115 in order to implement standard Sunset across-the-board requirements on TWDB.
- The new § 6.114 defines the term “default” to mean 1) default in payment of principal or interest on bonds, securities or other obligations purchased or acquired by TWDB; 2) failure to perform a covenant related to a bond, security, or other obligation purchased or acquired by the board; 3) a failure to perform any of the terms of a loan, grant or other financing agreement; 4) any other failure to perform an obligation, breach of an agreement term, or default on any proceeding agreement evidencing an agreement or obligation of a recipient, beneficiary, or guarantor of financial assistance provided by TWDB. Additionally, § 6.114 provides that, in the event of a default on a request by the board, the attorney general must seek a writ of mandamus to compel a financial assistance program

recipient or its officers, agents or employees to cure the default or any other legal or equitable remedy that is determined by the AG and TWDB to be necessary and appropriate. The venue for such a proceeding is a Travis County district court. From the proceeding, the AG may recover reasonable attorney's fees, investigative costs, and court costs incurred on behalf of the state in the same manner as a provided by general law for a private litigant.

- Finally, § 6.115 allows the attorney general to bring suit in a Travis County district court in order to appoint a receiver to collect the assets and carry on the business of a financial assistance program recipient if 1) the action is necessary to cure the recipient's default; 2) the recipient is not a municipality, county, or district or authority created under Article III, Section 52 or Article XVI, Section 59 of the Texas Constitution. The receiver is to be vested by the court with any power or duty necessary to cure the default, including the ability to perform audits; raise wholesale or retail water or sewer rates or other fees; fund reserve accounts, make payments on the principal or interest on bonds, security, or other obligations purchased or financed by TWDB; and take any other action necessary.

Additional Modifications made by SB 660

- SB 660 (§ 3) condenses many of the requirements of Water Code § 6.154. Under the amended section, TWDB must maintain a system to promptly and efficiently act on complaints that are filed with the board.
- SB 660 (§ 4) modifies Water Code § 6.155 and requires the board to periodically (rather than quarterly) notify complaint parties of the status of their complaint until final disposition.
- SB 660 (§ 9) amends Water Code § 16.053 to require groundwater conservation districts to participate in the regional water planning group for their management area. This section also requires that the regional water plan submitted to TWDB be consistent with the established desired future conditions adopted under Water Code § 36.108. The regional water planning group may choose to use the DFCs that were contained within the most recent state water plan or DFCs that were established after the state water plan was issued. Consistent with other legislation passed by the 82nd Session, the section also changes the term "managed available groundwater" to "modeled available groundwater."
- SB 660 (§ 11) adds Water Code § 16.403 and § 16.404, requiring TCEQ and TWDB to develop consistent and uniform methods that a municipality or water utility can use in developing water use and conservation plans and generating required reports.
 - The methodology and guidance must include, at a minimum, 1) a way to calculate water use by sector served by a municipality or water utility; 2) a way to classify water users within sectors; 3) a way to calculate single-

and multi-family residential use in gallons per person per day; 4) a way to calculate industrial, agricultural, commercial and institutional water use independent of the municipality's population or the number of water utility customers served; and 5) guidance on developing per-capita calculations of water use. TWDB and/or TCEQ must then use these methods to evaluate water conservation plans, programs, surveys, and reports related to water conservation generated under Water Code chapters 11, 13, 15, 16, or 17.

- In addition, TWDB (in consultation with TCEQ and the Water Conservation Advisory Council) must also develop data collection and reporting programs for municipalities and utilities with more than 3,000 connections; however the data must be interpreted in the context of local use and may not be the sole factor used to determine water conservation and efficiency goals. The board must provide this data to the legislature by January 1 of each odd-numbered year and must also include statewide water usage by sector (e.g., residential, industrial, etc).
- Finally, the legislation adds Water Code § 16.404, which grants TWDB the authority to make rules to effectuate the goals set forth in § 16.403.
- SB 660 (§ 13) eliminates Water Code § 17.0922(b), which previously authorized the attorney general to seek a writ of mandamus or other legal remedy to cure a political subdivision's defaults on a loan or grant from TWDB.

Desired Future Conditions

- SB 660 (§ 14) adds the definition of "desired future condition" to Water Code § 36.001(30). Specifically, a desired future condition (DFC) is defined as "a quantitative description, adopted in accordance with Section 36.108, of the desired condition of the groundwater resources in a management area at one or more specified future times." As discussed in detail below, the legislation amended § 36.108, which governs joint planning within a management area.
- Although, generally, groundwater district meetings are governed by the Open Meetings Act (Chapter 551, Government Code), SB 660 (§ 15) amends Water Code § 36.063 to require groundwater districts to post special notice of hearings under § 36.108(d-2) and meetings at which a district plans to adopt a DFC under § 36.108(d-4). The notice must list 1) the proposed DFCs and other agenda items; 2) the date, time, and location of the meeting or hearing; 3) the contact information (name, phone number, address) of the person designated to handle questions or requests for additional information; 4) the names of the districts within the relevant management area; and 5) information on how the public may submit comments. With these exceptions, notice must be provided as prescribed for a rulemaking hearing under § 36.101(d).

- SB 660 (§ 17) amends Water Code § 36.108, which governs joint planning in a management area. Specifically, the legislation adds the term “district representative,” which means “the presiding officer or the presiding officer’s designee for any district located wholly or partly in the management area.” In addition, the section requires that the district representatives meet at least annually to review proposals to adopt or amend DFCs.
 - Whereas, previously, districts were permitted to “establish” desired future conditions for their management areas, SB 660 requires the districts to “propose [DFCs] for adoption” and vote on the proposals for new or amended DFCs according to the new § 36.108(d-2).
 - When voting on proposed DFCs, the districts must consider: 1) the aquifer conditions and uses within the management area, including substantial differences by location; 2) the water supply needs and strategies laid out in the state water plan; 3) hydrologic conditions, including total estimated recoverable storage (as provided the TWDB’s executive administrator), average annual recharge, inflows, and discharge; 4) other environmental impacts and interactions between surface and groundwater, including impacts on stream flow; 5) subsidence; 6) reasonably expected socioeconomic impacts; 7) impacts on private property rights and interests, including ownership rights in groundwater (recognized under Water Code § 36.002); 8) the feasibility of achieving the DFC; and 8) any other information relevant to the specific DFC.
- According to § 36.108(d-2), any proposed DFCs must balance the highest practicable level of groundwater production with the goals of conservation, preservation, protection, recharge, and prevention of waste. However, the section does not prohibit districts from establishing DFCs that provide for the reasonable long-term management of groundwater, consistent with the management goals of § 36.1071(a).
 - Once a DFC is proposed, it must be approved by a two-thirds vote of all the district representatives (not only those in attendance). After approval, the DFC must be distributed to all the districts in the management area for 90 day period of public comment. During the public comment period, each district that will be impacted by the DFC must hold a public hearing and make available in the district office a copy of the proposed DFC and supporting evidence (e.g., factors considered during approval of the DFC, groundwater availability modeling results). After the hearing, the district must compile relevant comments and present a summary at the next joint planning meeting.
 - Once every district has conducted a hearing and compiled the public responses, the district representatives must reconvene to review the reports, consider suggested revisions to the DFC, and adopt the DFC with

a two-thirds resolution of all district representatives in the management area. They must then submit a DFC explanatory report to each district in the management area and submit a copy of the explanatory report, DFC resolution, and proof that notice was posted for the joint planning meeting to TWDB. As soon as possible after receiving the district representatives' explanatory report, each district should adopt the DFCs in the resolution.

Joint planning meetings

- Except as provided in other parts of § 36.108, the district representatives may elect one member to be responsible for providing public notice of a joint meeting in the management area. Such notice may be given by notifying the secretary of state, notifying the county clerk of each county wholly or partly within a district that is within the management area, and posting notice at a publicly accessible place in each district office within the management area. Notice of a joint planning session must be provided at least 10 days before the meeting.
- Under § 36.108(e-1), the secretary of state and county clerk must post notice of the joint planning meeting in accordance with § 551.053 of the Government Code.
- Notice of a joint planning session must include: 1) the date, time and location of the meeting; 2) a summary of the proposed action to be taken; 3) the name of each district in the management area; and 4) the contact information of the person designated to receive questions, comments, and requests for information. Failure or refusal of a district to post notice for a joint meeting does not invalidate actions taken at the meeting.
- SB 660 adds § 36.1081 to the Water Code, which allows TCEQ and TWDB, upon request, to serve as technical staff advisors and non-voting members of the joint planning process for developing DFCs. Nonvoting advisory members may also include individuals who represent social, governmental, environmental, or economic interests.

Petitions for Inquiry and Appeals of DFCs

- SB 660 (§ 14) adds Water Code § 36.1082, which defines an “affected person” as: 1) a land owner within the management area; 2) a district in or adjacent to the management area; 3) a regional water planning group with a water management strategy within the management area; 4) a person who holds or is applying for a permit from a district within the management area; 5) a person with groundwater rights in the management area; or 6) any other person who is defined as “affected” by TCEQ rule.
 - An affected person may file a petition with TCEQ requesting inquiry if 1) a district does not submit its management plan to the TWDB executive administrator; 2) a district fails to participate in joint planning under §

36.108; 3) a district fails to adopt rules; 4) a district fails to adopt the DFCs adopted at a joint meeting; 5) a district fails to update its management plan within two years of the adoption of DFCs in the management area; 6) within a year after updating its management plan, a district fails to update rules to implement the DFCs; 7) the rules adopted by the district are not designed to achieve the DFCs; 8) the groundwater in the management area is not adequately protected by a district's rules; or 9) the groundwater is not adequately protected due to a district's failure to enforce compliance with district rules.

- The remainder of the section makes only minor adjustments to wording and numbering of statutes governing the review process.
- The amended § 36.1083 allows a person with a legal interest in groundwater within the management area, an adjacent district or the regional planning group area encompassing the management area to petition TWDB to appeal the approval of the DFCs. SB 660 does not make other significant changes to this section.

Modeled Available Groundwater

- SB 660's new Water Code § 36.1084 establishes a timeline for a district to act on adopted DFCs. Specifically, within 60 days of adopting DFCs, districts within a management area must submit to TWDB's executive administrator 1) a copy of the adopted DFCs; 2) proof that notice was posted for the joint planning meeting; and 3) the explanatory report. Once TWDB receives that information from the districts, the board must provide each district with the management area's modeled available groundwater (previously "managed" available groundwater), based upon the adopted DFCs.
- Water Code § 36.1085 requires that each district ensure that its management plan is consistent with achieving the DFCs adopted through the joint planning process. This requirement was previously located in § 36.108(d-2), which was eliminated by SB 660.

Additional Modifications

- SB 660 (§ 19) repeals Water Code § 15.908 ("Enforcement by Mandamus") and § 17.180 ("Default"). These issues are addressed elsewhere in SB 660 (§ 2 and § 12).
- SB 660 (§ 20) requires groundwater conservation districts to appoint initial representatives to regional water groups, as required by the amended Water Code § 16.053(c), as soon as possible after the effective date of the legislation (September 1, 2011).

- Under SB 660 (§ 21), by January 1, 2013, TWDB and TCEQ must adopt rules under the amended Water Code § 16.402(e), and TWDB and TCEQ, in consultation with the Water Conservation Advisory Council, must develop water use and conservation calculation methods and guidance, as well as the data collection and reporting program required by the new § 16.403(a) and (c), Water Code.
- SB 660 (§ 22) requires TWDB to submit its first report under Water Code § 16.403(d) to the legislature by January 1, 2015.

In addition to SB 660, several bills passed by the 82nd Legislative Session impact TWDB. Below is summary of the relevant portions of those bills and their implications:

- HB 1732 (§ 1) modifies Water Code § 15.975 and prohibits TWDB from approving an application for funds from the Water Infrastructure Fund if the applicant has failed to satisfactorily meet a request for relevant project information (including a water infrastructure financing survey under Water Code § 16.053(q)) by TWDB's executive administrator or a regional water planning group. This prohibition is reiterated in HB 1732 (§ 2) which, by modifying Water Code § 15.912, prohibits TWDB from considering an application for financial assistance if the applicant has failed to satisfactorily meet a request for relevant project information (including a water infrastructure financing survey under Water Code § 16.053(q)) by TWDB's executive administrator or a regional water planning group. An identical provision, modifying § 15.912, is also included in SB 370 (§ 2).

Rural Water Assistance Fund

- SB 360 (§ 2) amends Water Code § 15.993, which governs the rural water assistance fund. In addition to money directly appropriated by the board for a purpose of the fund, the fund also consists of money transferred from the water assistance fund in accordance with § 15.011(b).
- SB 360 (§ 3) modifies Water Code § 15.994, which allows TWDB to use the fund to support water or water-related projects, including: A) the construction of infrastructure facilities for wholesale or retail water or sewer services; B) desalination projects; C) the lease or purchase of water well fields; D) property necessary for water well fields; E) the purchase or lease of rights to produce groundwater; F) onsite or wetland wastewater treatment facilities; and G) the interim financing of construction projects.
 - Furthermore, under § 15.994(a), funds can be used for water projects included in the state water plan; the development of groundwater sources and the acquisition of groundwater rights; the acquisition of retail public utilities (§ 13.002); construction acquisition or improvement of water or wastewater projects to provide service to an economically distressed area;

planning, design and permitting costs and costs associated with state or federal regulation of the project; and obtaining water or wastewater service or financing from other political subdivisions.

- The legislation also modifies Water Code § 15.994(b) to allow money from the Water Assistance Fund to be used for zero or negative interest loans, loan forgiveness, or grants for any of the above-mentioned projects, according to criteria developed by TWDB.
- SB 360 (§ 5) adds Water Code § 15.996. This section allows TWDB to make loans to nonprofit water supply or sewer service corporations. To be eligible for financial assistance, the applicant must 1) execute a promissory note for the full amount of the loan and 2) provide an attorney's note stating that the applicant has the authority to incur debt. However, the applicant is not required to appoint or employ a bond counsel or a financial advisor.

Water Audits by Retail Public Utilities

- HB 3090 (§ 1) adds Water Code § 16.0121(b-1) and modifies § 16.0121(b), (c) and (f). Section 16.0121(b-1) requires a retail public utility that does not receive financial assistance from TWDB to file a water audit report with TWDB every five years. The audit must compute the utility's most recent annual system water loss. Furthermore, § 16.0121(b) requires a retail public utility that receives TWDB financial assistance to file annual audits with TWDB, computing the utility's system water loss for the previous year. TWDB must develop methodologies for audits and submission dates for each category of retail public water utility: 1) those serving populations of 100,000 or more; 2) those serving more than 50,000 but fewer than 100,000; 3) those serving more than 10,000 but fewer than 50,000; 4) those serving 10,000 or fewer.
- HB 3090 (§ 2) requires a retail public utility receiving TWDB assistance or a retail public utility serving 10,000 or more to file its first audit with TWDB no later than May 1, 2013. The audit should compute the utility's more recent annual system water loss.

Reporting Requirements for State Water Plan

SB 181 (§ 1) modifies Water Code § 16.053 to require a regional water plan to include information on projected water use and conservation in the regional water planning area. The water plan must also include information on the implementation of state and regional water plan strategies, including conservation measures, necessary to meet the state's projected water needs.

- SB 181 (§ 2) adds §§ 16.403-16.404 to the Water Code. These sections are also contained within SB 660 and are discussed elsewhere in this paper.

GCD Management Plans

- SB 727 (§ 2) adds Water Code § 36.1072(a-1), requiring a newly created or reconfigured district, not later than 3 years after the election in which the district was created, to submit its management plan as required under § 36.1071 to TWDB's executive administrator for review and approval.

Management of Groundwater by GCDs

- SB 737 (§ 1) amends Water Code § 36.001(25). Under the new section, "modeled available groundwater" (previously "managed available groundwater") means that amount of water that TWDB's executive administrator determines may be produced on an average annual basis to achieve the DFC established under § 36.108.
- SB 737 (§ 4) requires TWDB's executive administrator to solicit information regarding exempt water use (i.e., under exemptions granted by district rules and Water Code § 36.117) from each applicable district.