

TexasBarCLE

Legislative Update 2015: Water Law

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Groundwater Legislation:

HB 200 (Keffer / Perry) – Appeals of Desired Future Conditions of Aquifers:

- Adds new provisions to Chapter 36 of the Texas Water Code for appealing a GCD's adopted desired future conditions (DFCs).
- An affected person may file a petition with a GCD for a contested case hearing (CCH) on the reasonableness of an adopted DFC. The GCD will then contract with the State Office of Administrative Hearings (SOAH) to conduct a hearing on the petition and issue findings of fact and conclusions of law in its proposal for decision (PFD) to the GCD.
- GCD must also forward a copy of the petition to TWDB, who will conduct an administrative review of the petition and a technical analysis of the DFCs.
- GCD will then issue a final order in light of SOAH's PFD.
- Allows a judicial appeal of the GCD's final order on the adopted DFCs to be filed in a district court with jurisdiction over any part of the GCD's territory.
- In a judicial appeal of DFCs, the court is required to award attorney's fees and costs for those issues in which the GCD prevails.
- If the reviewing court in a judicial appeal determines that an adopted DFC is unreasonable, the GCDs in the Groundwater Management Area must reconvene to revise the DFC within 60 days following the court's order. This bill only applies to DFCs adopted on or after September 1, 2015.

Groundwater Legislation:

SB 854 (Zaffirini/Lucio III) – Renewal of amendment of GCD permits:

- Amends Chapter 36 of Water Code as it relates to permit renewals and permit amendments by GCDs.
- New Section 36.1145 mandates that a GCD must renew an operating permit without a hearing provided that the application is timely and the permit holder is not requesting a change to the permit that would normally require a permit amendment under GCD rules.
- A GCD would not be required to renew a permit if the applicant is delinquent in paying any fees, if the applicant is subject to an unsettled or pending enforcement action initiated by the GCD, or if the applicant has not complied with any final order issued in relation to a violation of GCD rules.
- New section 36.1146 requires that if a permit holder seeks a change to a permit requiring an amendment under GCD rules, the original permit remains in effect until the later of either the conclusion of the permit amendment or renewal process, or until final settlement or adjudication on the matter of whether or not the requested change requires a permit amendment.

Groundwater Legislation:

HB 2179 (Lucio/Perry) – Hearings Process for GCDs:

- Amends Chapter 36 of the Water Code, particularly Subchapter "M," as it relates to the hearing process involved with groundwater permit applications.
- Clarifies and establish differences between the different hearings that may occur before a GCD such as public, preliminary, evidentiary, or final hearings.
- Section 36.4051 is added to address requests for contested case hearings, and specifically mandating that the board of directors of a GCD hold a "preliminary" hearing on a request for a contested case hearing to determine if the requestor has the requisite standing and justiciable interest to file for a contested case hearing on the permit application.
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- Provision is added in Section 36.406(d) that would allow the presiding officer of a hearing to determine how costs related to a contested case hearing will be apportioned between the parties involved.
- The bill adds language that for a GCD to modify or vacate and order, or to alter a finding of fact or conclusion of law, criteria is established for a GCD board to vacate, modify, alter, etc. an order, finding of fact, or conclusion of law issued by an ALJ.

Groundwater Legislation:

HB 4112 (Burns/Perry) – Groundwater rights consistency between Chapter 36 of Texas Water Code and common law:

- Amends Chapter 36 of Water Code to make it clear that a property owner has any rights to the groundwater located below the surface of the real property they own that are recognized under common law.
- Legislature wanted to make certain that the rights of a property owner were consistent between Chapter 36 of the Water Code and common law.

Groundwater Legislation:

HB 1232 (Lucio/Estes) – TWDB study to map aquifers in Texas:

- Requires TWDB to conduct a study to define the quality and quantity of groundwater in confined and unconfined aquifers.
- TWDB would be required to produce a map showing the area and water quality of confined and unconfined groundwater aquifers, and report the results of the study to the Legislature by December 31, 2016.
- TWDB study would also determine:
 - Salinity of aquifers;
 - Whether aquifers are tributary or non-tributary; and
 - Contribution of aquifers to any surface flow of water or any other aquifer.

GCD Creations and Boundary Expansions:

- HB 2407 – Created the Comal Trinity GCD in Comal County.
- HB 4207 – Created the Aransas County GCD.
- HB 3405 – Boundary Expansion for Barton Springs / Edwards Aquifer Conservation District (BSEACD)

Desalination Legislation:

HB 30 (Larson / Perry) – Development of Brackish Groundwater:

- Addresses the development and production of brackish groundwater resources in Texas.
- Imposes requirements on Regional Water Planning Groups (RWPGs) and the Texas Water Development Board (TWDB) to investigate and report on opportunities for the development of brackish groundwater (including desalination projects).
- Requires TWDB to identify and designate local or regional brackish groundwater production zones in its biennial report to the legislature.
- Lists criteria for and exceptions to areas that may be designated as brackish groundwater production zones.
- Requires TWDB to include in its biennial report to Texas Legislature that is due by December 1, 2016 an identification and designation of brackish groundwater production zones for: (1) the portion of the Carrizo-Wilcox Aquifer located between the Colorado and Rio Grande Rivers; (2) the Gulf Coast Aquifer and sediments bordering it; (3) the Blaine Aquifer; and (4) the Rustler Aquifer.

Hearing Procedure:

SB 709 (by Fraser) – relating to procedures for certain environmental permits.

- First major overhaul of the TCEQ hearings process since 1999.
- Does not apply to water rights cases, but does apply to water quality, air, and waste cases.
- Amends Texas Gov't Code § 2003.047, Texas Water Code §§ 5.115 and 5.228(c), and adds Texas Water Code § 5.5553.
- Designed to limit who is affected and to have additional certainty about the case's outcome.

Hearing Procedure:

SB 709:

- Changes what the TCEQ may consider when determining who is an “affected person”.
- Definition of “affected person” is the same.
- Added a list of factors the Commission may consider:
 - Merits of the application
 - Likely impact on health, safety, welfare, property use
 - Administrative record
 - Opinions and analysis of the ED
 - Other expert reports, affidavits, opinion, or data submitted
- The hearing requestor must submit timely comments on the application.
- A group must timely identify by name and physical address the affected member.

Hearing Procedure:

SB 709:

- Changes the contested case hearing:
 - The application, ED's draft permit, the preliminary decision, and other supporting information in the administrative record establishes a prima facie demonstration that:
 - The draft permit meets all legal and technical requirements
 - The permit would be protective of human health and safety, environment, and physical property
 - Protesting parties may rebut this demonstration with evidence:
 - Relating to a matter referred to SOAH
 - Demonstrating one or more provisions in the permit violate a “specifically applicable” state or federal requirement
 - If the presumption is rebutted, the ED and Applicant can present additional information to support the permit.

Hearing Procedure:

SB 709:

- Requires the proposal for decision be provided to the commission no later than the earlier:
 - The 180th day after the date of the preliminary hearing
 - The date specified by the commission
- The deadline may be extended by agreement of the parties or by the ALJ if the ALJ determines failure to extend the deadline will deprive a party of due process or another constitutional right.

Hearing Procedure:

SB 709:

- New law is effective 9-1-2015
- Only applies to:
 - Applications filed with TCEQ after the effective; or
 - A judicial proceeding initiated on or after the effective date of the Act that challenges a TCEQ decision.
- The law will not apply to an application that is substantially similar to an application that is filed and withdrawn before the effective date of the Act.

Hearing Procedure:

SB 1267 (by Estes/Watson) – relating to contested cases conducted under the Administrative Procedures Act.

- Amends Texas Gov't Code §§ 2001.052, 2001.054, 2001.141, 2001.142, 2001.143, 2001.144, 2001.145, 2001.146, and 2001.176.
- Applies to all contested case hearings, including water rights cases.
- Effective 9-1-2015

Hearing Procedure:

SB 1267:

- Changes related to notifications of agency decisions or orders:
 - Notification shall be either:
 - Personally
 - If agreed, by electronic means sent to a current email address or telecopier number of the attorney of record or the party, if unrepresented
 - By first class, certified, or registered mail sent to the last known address of the party's attorney or of the party, if unrepresented
 - If the adversely affected party or his or her attorney does not receive the notice, or acquire actual knowledge of the decision before the 15th day after the date the decision or order is signed, the deadline to file motions and replies to motions for rehearing and petition for review, the time period for the motion, reply, or petition will begin when the person receives the notice or has actual knowledge:
 - Requires sworn proof in the form of a motion
 - The agency must grant or deny the motion at its next meeting, or it is deemed granted

Hearing Procedure:

SB 1267:

- Extends deadlines for motions for rehearing and replies:
 - Motions for rehearing must be filed not later than the 25th day after the date of the agency decision
 - Changed from 20 days
 - Replies to motions for rehearing must be filed not later than the 40th day after the date of the agency decision
 - Changed from 30 days
 - The state agency must act on the motion for rehearing not later than the 55th day after the date of the decision
 - Changed from 45 days
 - The agency can extend the time to take action to 100 days after the decision.

Hearing Procedure:

SB 1267:

- Clarifies what must be in motions for rehearing:
 - Must identify with particularity findings of fact and conclusions of law that are the subject of the complaint.
 - Must identify any evidentiary or legal rulings claimed to be erroneous.
 - Must state the legal and factual basis for the claimed error.

Hearing Procedure:

SB 1267:

- Clarifies that a new motion for rehearing is required if the agency modifies or vacates the decision:
 - Subsequent motions are due not later than the 20th day after the original motion is considered.
- A prematurely filed petition for judicial review is effective and considered filed on the date the last motion for rehearing is overruled.

Surface Water Rights Permitting:

SB 109 (by Taylor of Collin), HB 201 (by Leach), and HB 3821 (by Ashby) relating to the procedure for action by the TCEQ on a water rights application.

- These bills attempted to establish a more definitive procedure by which water rights applications would be processed.
- The bills would have established specific deadlines by which administrative completeness review and technical review would have had to occur.

Surface Water Rights Permitting:

- HB 3821 would have allowed the applicant to request that the TCEQ use a 3rd party contractor to complete the technical review.
- The bills would have established guidelines for referrals of contested applications to SOAH and durations for those hearings.
- HB 3821 went further to limit the participation of the TCEQ's Office of Public Interest Counsel.

Surface Water Rights Permitting:

- SB 109 and HB 201 were companion bills:
 - SB 109 was referred to the Senate Agriculture, Water, and Rural Affairs Committee. It received a hearing, but was left pending.
 - HB 201 was referred to the House Natural Resources Committee, but went nowhere.
 - HB 3821 was also referred to the House Natural Resources Committee, but went nowhere.

Real Estate Notification Legislation:

HB 1221 (Lucio III / Estes) – Disclosure to Purchasers of Property of Existence of GCD:

- Requires the seller of a one-dwelling-unit residential property to disclose whether any portion of the property is located in a groundwater conservation district, subsidence district, or other special purpose district with the authority to regulate the withdrawal of groundwater.

Real Estate Notification Legislation:

HB 1665 (Bonnen, Dennis / Kolkhorst) – Disclosure to Purchasers of Fluctuating Water Levels in Water Impoundments:

- Requires sellers of residential or commercial property to give purchasers written notice of water level fluctuations for any adjoining impoundment of water.
- "Impoundments of water" would include a reservoir or lake constructed and maintained under Chapter 11 of the Water Code that has a storage capacity of at least 5,000 acre-feet at normal operating levels.
- Includes language that after the date of conveyance, the purchaser may bring an action for misrepresentation against the seller, if the seller had actual knowledge that the water level fluctuated and failed to provide notice before the date of conveyance.

Miscellaneous Legislation – PUC and Utility Bills:

SB 1148 (Watson / Geren) – PUC Water / Wastewater Utility Clean-Up:

- Amends several sections of Chapters 5 and 13 of the Water Code to address several issues that have arisen due to the transfer of the rate and CCN programs from the TCEQ to the PUC.
- Provides that TCEQ and PUC shall coordinate, as needed, to authorize an emergency rate increase under Water Code Section 13.4133.
- Adds language to establish procedures and rule-making authority for the PUC for the issuance of emergency orders.

Interbasin Transfer Bills:

- Texas Water Code § 11.085(s) provides that any transfer of water out of a river basin is junior in priority to water rights granted before the time the application was accepted for filing.
- There were six bills that interbasin transfers in some fashion.

Miscellaneous Legislation - Interbasin Transfer Bills:

- HB 1153 (by Turner of Collin) would have repealed the junior priority provision all together:
 - The bill was referred to committee, but never received a hearing.
- HB 2805 (by Frank) as amended would have excluded an interbasin transfer from the Trinity River basin to the City of Wichita Falls, TX:
 - The bill made it through the committee and was placed on the General State Calendar, but never made it to a vote on the floor.

Miscellaneous Legislation - Interbasin Transfer Bills:

- HB 3324 (by Larson) did not propose to repeal the junior priority provision, but instead sought to ease some of the requirements:
 - The bill also specifically sought to except interbasin transfers of recycled or desalinated water or treated water from the interbasin transfer requirements.
 - The bill was amended in committee to only focus on the exemptions.
 - The bill was voted out of committee, but never made it to the floor for a vote.

Miscellaneous Legislation - Interbasin Transfer Bills:

- SB 1411 and SB 1588 (by Estes) both sought to add an exception to the interbasin transfer requirements that would allow transfers between adjoining basins:
 - Neither bill received a committee hearing.
- HB 3298 (by Larson, Frank, Lucio III, Kacal, Keffer, et al.) proposed that the TWDB conduct a study regarding the development of a market and conveyance network for water in Texas:
 - The bill made it out of the House and was referred to the Senate Agriculture, Water, and Rural Affairs committee where no action was taken.

Miscellaneous Legislation - Interbasin Transfer Bills:

- HB 2308 (by Keffer) would have required an economic impact study that evaluated the economic impact of granting or denying a water right and would have allowed the TCEQ to require applicants to take reasonable actions to mitigate adverse economic impacts:
 - The bill received a committee hearing, but was left pending in committee.

Miscellaneous Legislation - Interregional Conflicts:

- HB 3803 (by Keffer) related to defining the occurrence of an interregional conflict between two regional water plans and how TWDB addresses the conflict:
 - This bill arises out of the conflict between Regions C and D over the inclusion of a reservoir in Region D as a supply source for Region C.
 - In 2013, the Texas Court of Appeals found there was a conflict. *Texas Water Development Bd. v. Ward Timber, Ltd.*, 411 S.W.3d 554 (Tex. App. – Eastland 2013).

Miscellaneous Legislation - Interregional Conflicts:

- HB 3803 would have more specifically defined what an interregional conflict is.
- The bill had a committee hearing, but was left pending in committee.
- The TWDB is moving forward, however. On July 3, 2015, new rules regarding interregional conflicts were proposed. Comments are due August 4, 2015.

Legislative Interim and Preview of Regular Session of 85th Texas Legislature:

- Legislative leadership gathering ideas for legislative interim committee study topics / charges in preparation for 2017 Regular Session.
- Legislative committees will receive study topics this fall and begin holding public hearings to receive testimony on topics.
- Legislators may begin to file legislation in November 2016.
- Regular Session of 85th Texas Legislature begins on January 10, 2017.
- Possible topics = multiple surface water issues including inter-basin transfers and GMA planning process for DFC determination.