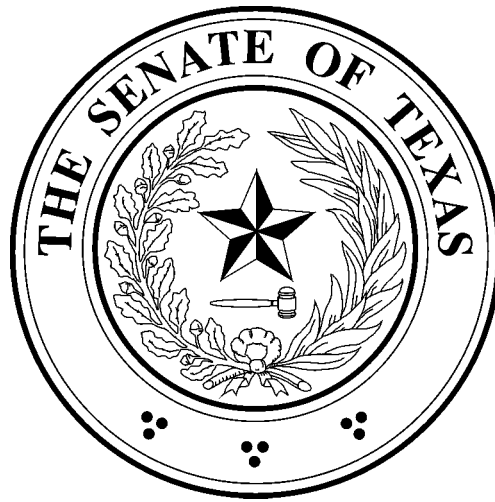


# Senate Committee on Agriculture, Water & Rural Affairs

Interim Report  
to the  
86th Legislature



December 2018

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# Senate Committee on Agriculture, Water, and Rural Affairs

Senator Charles Perry, *Chairman*

Members: Senator José Rodríguez, Vice-Chair; Senator Brandon Creighton; Senator Bob Hall;  
Senator Juan "Chuy" Hinojosa; Senator Lois Kolkhorst; Senator Borris Miles

November 30, 2018

Dear Members and Fellow Texans:

Enclosed is the interim report for the Senate Committee on Agriculture, Water, & Rural Affairs. Thanks to the direction of Lieutenant Governor Dan Patrick, the committee studied ways in which groundwater, surface water, and agriculture policy can be improved in the coming Legislative Session. I would like to extend my thanks to my staff for their dedication to these important issues: Matt Dowling, Katherine Thigpen, Lauren Murray, Robert Papierz, Shannon Harmon, Caitriana Corkill and Jillian Myles as well as the committee members. The report reflects committee hearings, meetings across the state, and individual meetings with Texans to discuss ideas and opportunities to more efficiently run the state.

Since the dawn of time, water has determined where civilizations develop and thrive. The most important natural resource in Texas is water. Water makes all other resource development possible to grow the economy, to the food we eat, to even the gas in our vehicles and cooling our power plants.

The 86th Legislative Session will no doubt spur conversations about how to adequately preserve the water available in Texas, while also developing new sources through aquifer storage and recovery, desalination, inter-basin transfers and flood control with a water development component. The balance between private property rights, conservation, agriculture, energy, and municipal users is a constant struggle that will continue to be a focus in the 86th Legislative Session.

Texas farmers and ranchers face hardships from the environment and a changing industry. The agriculture industry is a cornerstone of the Texas economy, playing a vital role in the state's growth.

In order to address the interim charges placed before the committee, I hosted hearings and conducted meetings to develop ways in which the state can create efficient and collaborative efforts to serve the state. It was encouraging to learn that Texans are working together to meet the water challenges of the future.

The state has created groundwater districts and permitting provisions over surface water. Court rulings on the subject matter have provided a constant environment of litigation over water takings at the peril of the private landowner. The legislature's role is to clarify any statute that is not in step



with these rulings. That said, as the realization that water is not optional for survival, these cases seem to be more and more the norm.

As Chairman, I am reminded to keep our eye on the ball. The lawsuits distract from the real issue of water supply development for the next generations of Texans. Texas must take up the development of water supply for all areas of the state. The time to develop water is now, not when we need it.

In the 86th Legislative Session, I plan to reintroduce legislation which clarifies the State Water Code to avoid costly litigation and keep the state moving forward.

Respectfully,

A handwritten signature in black ink that reads "Chad Perry". The signature is written in a cursive, slightly slanted style.

Chairman Perry

Senate Committee on Agriculture, Water and Rural Affairs



# Senate Committee on Agriculture, Water, and Rural Affairs

Senator Charles Perry, *Chairman*

Members: Senator José Rodríguez, Vice-Chair; Senator Brandon Creighton; Senator Bob Hall;  
Senator Juan "Chuy" Hinojosa; Senator Lois Kolkhorst; Senator Borris Miles

November 30, 2018

The Honorable Dan Patrick  
Lieutenant Governor of Texas  
Members of the Texas Senate  
Texas State Capitol  
Austin, Texas 78701

Dear Lieutenant Governor Dan Patrick and Fellow Members:

The Senate Committee on Agriculture, Water and Rural Affairs of the Eighty-Fifth Legislature hereby submits its interim report including findings and recommendations for consideration by the Eighty-Sixth Legislature.

Respectfully submitted,

Handwritten signature of Charles Perry in black ink.

Senator Charles Perry, Chair

Handwritten signature of José Rodríguez in black ink.

Senator Jose Rodriguez, Vice-Chair

Handwritten signature of Brandon Creighton in black ink.

Senator Brandon Creighton

Handwritten signature of Bob Hall in black ink.

Senator Bob Hall

Handwritten signature of Juan "Chuy" Hinojosa in black ink.

Senator Juan "Chuy" Hinojosa

Handwritten signature of Lois Kolkhorst in black ink.

Senator Lois Kolkhorst

Handwritten signature of Borris Miles in black ink.

Senator Borris Miles



COMMITTEES:  
ADMINISTRATION, CHAIR  
AGRICULTURE, WATER & RURAL AFFAIRS  
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TRANSPORTATION

## THE SENATE OF TEXAS



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### LOIS W. KOLKHORST

STATE SENATOR  
DISTRICT 18

November 27, 2018

Chairman Charles Perry  
Senate Committee on Agriculture, Water, and Rural Affairs

Chairman,

I would first like to thank you for you and your staff's work following the devastation of Hurricane Harvey. The hearings in New Caney and Wharton provided an invaluable forum for the members of the committee and the legislature to learn more about the devastating effects of the storm and the manner in which response and recovery operations were conducted. I look forward to working with you this session to ensure that Texas is prepared to face the next major disaster.

I am more than willing to add my signature to this interim report, however, I must express my reservations concerning your recommendations on Interim Charge #2, relating to the regulatory framework of Groundwater Conservation Districts. As we heard in testimony, there are certain situations where a district may require unique or special rules. A district may be situated over a distinct and delicate hydrological formation which might require separate management practices. Additionally, activities on the surface such as historic agricultural use or rapid real estate development might necessitate dissimilar rules. Finally, many districts' enabling legislation require them to adopt rules that differ from the majority of other districts. Your report indicates that you are working to address these concerns and I look forward to the results of that endeavor.

Please know that I share your commitment to science-based groundwater regulation. I also share your concerns over the confusion created when a piece of land is located in two districts. I will always appreciate your dedication to rural Texas. My own district consists of 21 largely rural counties surrounded by four of the fastest-growing metropolitan areas in the United States. It is imperative that the rural Texans we represent continue to have a say over the manner in which their groundwater is produced and distributed and I believe the model created under Chapter 36 of the Water Code best supports that goal.

Sincerely,

A handwritten signature in black ink that reads "Lois W. Kolkhorst". The signature is written in a cursive style with a horizontal line at the end.

Lois W. Kolkhorst  
State Senator, District 18

## Interim Charge #1

*Streamlining Water Permitting: Study and recommend changes that promote streamlining of water right permit issuance and the amendment process by the TCEQ for surface water, and that promote uniform and streamline permitting by groundwater conservation districts for groundwater. Evaluate more transparent process needs and proper valuation of water.*

### Committee Hearing Information

The Committee held a hearing on June 5, 2018 to hear testimony from invited stakeholders and the public on the permitting process for surface water.

The hearing included invited testimony from the following persons:

- Kim Wilson, Director, Water Availability Division, Texas Commission on Environmental Quality
- Stacey Steinbach, Assistant General Manager, Texas Water Conservation Association
- Mike Booth, Partner, Booth, Ahrens, and Werkenthin
- Jason Hill, Principal, Lloyd Gosselink Rochelle & Townsend, P.C.
- Carlos Rubinstein, RSAH20
- John Hoffman, Executive Vice President, Water, Lower Colorado River Authority
- Matt Phillips, Government and Customer Relations Manager, Brazos River Authority

### Background

Surface water in Texas is owned by the state, which grants the use of surface water through permitting for agricultural use, municipalities, industries, businesses, and for private or public use.<sup>1</sup>

The Texas Commission on Environmental Quality (TCEQ) is the agency responsible for managing and permitting of surface water in Texas.<sup>2</sup> When new surface water is available such as through a new reservoir or other water source, TCEQ surveys the availability of the new source and concludes if there is availability prior to granting permits. A permit is required to divert, use, or store state water in the state or to use the bed or banks of a water way to convey water.<sup>3</sup>

### Committee Testimony on Interim Charge #1

The TCEQ asserts their jurisdiction over surface water through rules adopted to outline the permitting process.<sup>4</sup> Generally, the permit process consists of an application, conservation information, environmental flows analysis, hydrological analysis, reporting requirements, and Watermaster Programs.<sup>5</sup>

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<sup>1</sup> Texas Commission on Environmental Quality, "Who Owns State Water?", [https://www.tceq.texas.gov/permitting/water\\_rights/wr-permitting/wr\\_amiregulated.html](https://www.tceq.texas.gov/permitting/water_rights/wr-permitting/wr_amiregulated.html) (last visited Sept. 7, 2018).

<sup>2</sup> Tex. Water Code § 11.023, <https://statutes.capitol.texas.gov/Docs/WA/htm/WA.11.htm#11.021> (last visited Sept. 7, 2018).

<sup>3</sup> *Id.*

<sup>4</sup> Senate Committee on Agriculture, Water, and Rural Affairs Hearing, June 5, 2018 (written testimony submitted by Texas Commission on Environmental Quality.)

<sup>5</sup> *Id.*

The TCEQ evaluates river basins for participation in a Watermaster Program. There are four Watermaster Programs as of October 1, 2018: the Brazos, Concho River, Rio Grande, and South Texas.<sup>6</sup> A Watermaster program can be appointed by TCEQ, the court, or by the Legislature. The programs operate from field offices in their designated basins and continually monitor streamflows, reservoir levels, and the water use in the basin.<sup>7</sup> The Watermaster Program creates an advisory committee which then makes recommendations to the Watermaster. The Watermaster makes decisions during water shortages to manage surface water and water rights.<sup>8</sup>

In property law, there is a general rule that a holder whose interest in a property is established first prevails over another party who subsequently acquires an interest in that property. This rule is known as the "first-in-time, first-in-right rule." The appropriation of water, or the amount of water permitted to a right holder, abides by the "first-in-time, first-in-right" doctrine which gives the right to the water to the permit holder who has held the permit longer.<sup>9</sup> The permits with earlier dates are entitled to water first before junior water right holders.

TCEQ focuses their efforts during times when there are major changes to state water policy, drought, or an influx of complex applications. The following chart explains the timeline since 2007 in which the TCEQ has worked to reduce the number of pending permits. The agency has worked to remove the back log of permits.<sup>10</sup>

<b>Texas Commission on Environmental Quality Timeline, 2007-2016</b>	
2007	SB 3 was enacted and required TCEQ to work with stakeholders in the state to develop environmental flow standards.
2009-2015	Widespread drought conditions developed and persisted throughout the state that refocused the Water Rights Permitting team to drought response which included: monitoring conditions, expedited processing of drought related water right applications, emergency orders related to water rights, and priority call response.
2011-2016	TCEQ expanded resources and time on large, complex, contested projects.
2013-2015	Through petition process, TCEQ established the Brazos Watermaster Program.

Table 1: Information provided by TCEQ.

Large projects that have diverted TCEQ resources from water permitting over the last several years include: the Brazos River Authority's System Operation Permit, an update to the naturalized flows in the Water Availability Model (WAM) for the Colorado River Basin, and permitting two major water supply reservoirs, the Lower Bois D'Arc Creek Reservoir and Lake Ralph Hall.<sup>11</sup>

<sup>6</sup> Texas Commission on Environmental Quality (oral testimony)

<sup>7</sup> Texas Commission on Environmental Quality, *Water Master Evaluation Sheet -2017*, [https://www.tceq.texas.gov/assets/public/compliance/field\\_ops/wmaster/2017\\_Eval/WM%20Fact%20Sheet%20-%202017.pdf](https://www.tceq.texas.gov/assets/public/compliance/field_ops/wmaster/2017_Eval/WM%20Fact%20Sheet%20-%202017.pdf) (last accessed October 25, 2018).

<sup>8</sup> Texas Commission on Environmental Quality (oral testimony)

<sup>9</sup> Tex. Water Code § 11.027, <https://statutes.capitol.texas.gov/Docs/WA/htm/WA.11.htm#11.021> (last visited Sept.7, 2018).

<sup>10</sup> Senate Committee on Agriculture, Water, and Rural Affairs Hearing, June 5, 2018 (written testimony Kim Wilson, Texas Commission on Environmental Quality.)

<sup>11</sup> *Id.*



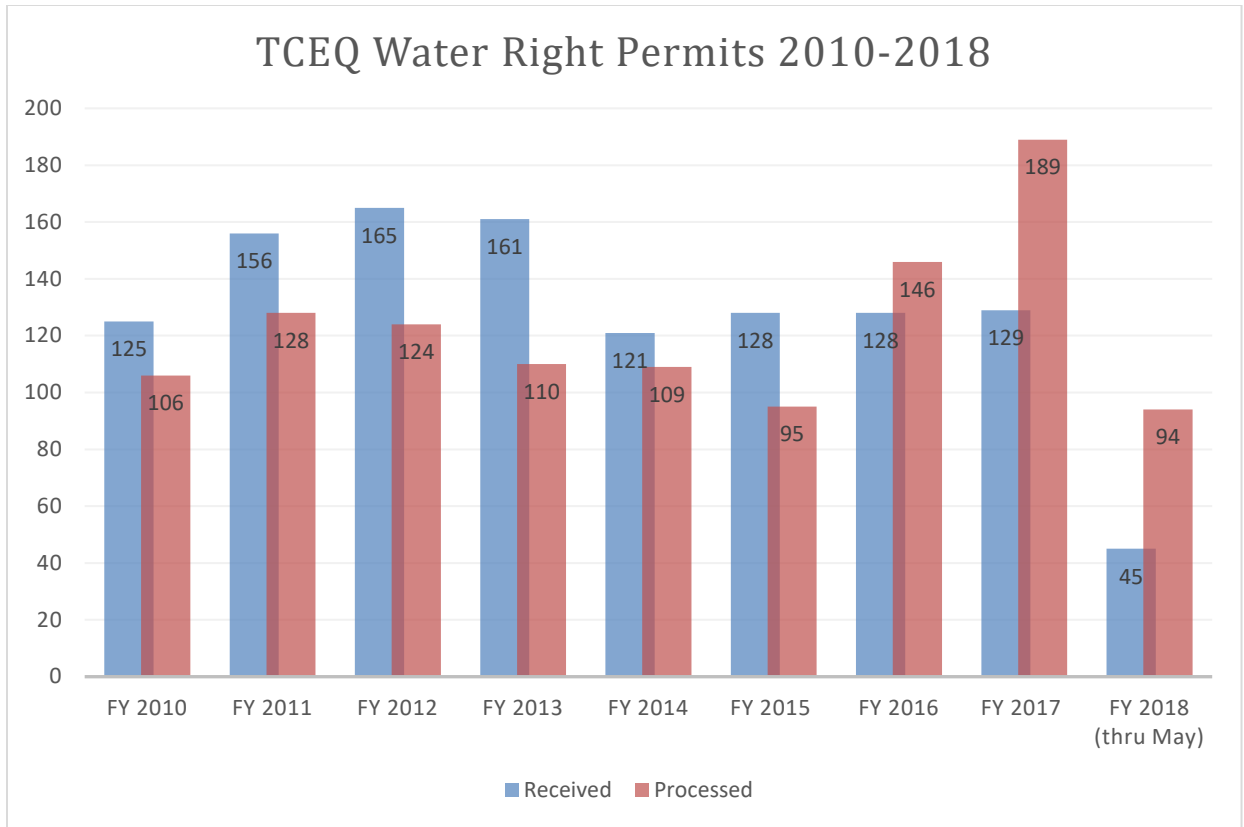


Table 2: Information provided by Texas Commission on Environmental Quality

Following the buildup of too many unfulfilled surface water permits with the agency, TCEQ has taken steps to reduce the number of pending permits in the form of pre-application meetings to make sure the applicant has all information ready; creating a new application form which was streamlined and better formatted for the public; and the fast track permitting option. These changes have improved processing times.<sup>12</sup>

The Fast Track Permitting Program began in July 2016 with a pilot program for applications which "did not seek a new appropriation of water, move a diversion point (outside the Rio Grande River), or reuse applications."<sup>13</sup> The applications are a separate track from the regular process for permitting and have an average processing time of 177 days.<sup>14</sup>

The Texas Water Conservation Association (TWCA) was created in 1944 and is made up of water districts and authorities, municipalities, consultants, and individuals interested in Texas water policy and development.<sup>15</sup> TWCA created a group of stakeholders to study and make recommendations for

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> Senate Committee on Agriculture, Water, and Rural Affairs Hearing, June 5, 2018 (written testimony Stacey Steinbach, Texas Water Conservation Association).

changes to groundwater and surface water policy. Their surface water committee was created in 2015 and has 120 members.<sup>16</sup>

TWCA supported several changes to state law in order to promote a more efficient permitting process. The changes included conforming the requirements of a water rights application with current TCEQ practice and modern technology, more clarity in the appeals process, and giving the executive director authority to act on permit applications that are uncontested after the initial filing of hearing requests. Additionally, TWCA supports a requirement for a notice when an application for a surface water right permit which proposes to use groundwater from a well located in a groundwater conservation district as an alternate water source.<sup>17</sup> TWCA supports the changes which TCEQ has made to their permitting process to make it more efficient for applicants.<sup>18</sup>

The Lower Colorado River Authority (LCRA) was established in 1934 and collects most of its revenue from the sale of electricity and a portion from the sale of water to municipalities, industries and agriculture.<sup>19</sup> The LCRA also manages a 600-mile section of the Lower Colorado River from San Saba to the Gulf Coast. Operations include six dams: Buchanan, Inks, Wirtz, Starcke, Mansfield and Tom Miller. Through the River Operations Center, LCRA manages flood control operations, water supply, and recreational activities such as boating.<sup>20</sup>

LCRA stated it has witnessed substantial improvement to the TCEQ water permitting process since the 85th Legislative Session. By revising the application forms and guidelines, LCRA believes TCEQ is able to process more permits in a shorter amount of time. The LCRA supports legislation that would streamline the process further including defining those who are directly impacted in a contested case and a requirement for filing timely hearing requests.<sup>21</sup> The LCRA supports legislation which would make the process of completing an administrative permit more efficient. Additionally, the river authority supports legislation that would allow attorney's fees to be awarded to the prevailing party in a dispute as opposed to only the groundwater conservation district.<sup>22</sup>

The Brazos River Authority (BRA) was created in 1929 as the "first government entity in the United States created specifically for the purpose of developing and managing the water resources of an entire river basin."<sup>23</sup> The BRA is not a tax revenue based system but operates using revenue from water users.<sup>24</sup>

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<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> Lower Colorado River Authority, "LCRA: Providing power, water and transmission infrastructure to a growing Texas," <https://www.lcra.org/about/overview/pages/default.aspx> (last visited Sept. 7, 2018).

<sup>21</sup> Senate Committee on Agriculture, Water, and Rural Affairs Hearing, June 5, 2018 (written testimony John Hofmann, Lower Colorado River Authority).

<sup>22</sup> *Id.*

<sup>23</sup> The Brazos River Authority, "About Us," <http://www.brazos.org/About-Us/About-the-BRA> (last visited Sept. 7, 2018).

<sup>24</sup> *Id.*

The BRA experienced a delay during the permitting process for a Systems Operation Permit. The permit would have allowed the authority to utilize water that flows in the basin, downstream of the reservoirs, which has been shown to be unused or permitted to another individual or entity. According to testimony from Matt Phillips with the BRA, the permit process was lengthy and while under review, the Brazos Basin Watermaster was created. According to the BRA, the permit was put on hold as the judges with authority over the process were overseeing the Watermaster. Since the System Operations permit was pending, all other permits filed after were delayed. The BRA is in favor of an increase in fees to their water users in order to assist TCEQ with better infrastructure to accelerate permitting.<sup>25</sup>

### **Recommendations**

The committee is encouraged by the TCEQ process and their commitment to reduction in the backlog of surface water permits. The Legislature should continue to monitor the process to ensure that it operates in the most efficient manner while preserving the rights of Texans. Timelines should be monitored to improve the length of time for which TCEQ must process surface water permits and monitor the process for transparency and accuracy.

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<sup>25</sup> Senate Committee on Agriculture, Water, and Rural Affairs Hearing, June 5, 2018 (written testimony Matt Phillips the Brazos River Authority.)

## Interim Charge #2

*Regulatory Framework of Groundwater Conservation Districts and River Authorities: Study and make recommendations on the regulatory framework for managing groundwater in Texas to ensure that private property rights are being sufficiently protected. Study the role of river authorities and groundwater conservation districts including the state's oversight role of their operations and fees imposed.*

### Committee Hearing Information

The committee held a public hearing on June 4, 2018 to hear testimony from invited stakeholders and heard public testimony on the changes proposed in the 85th Regular Legislative Session.

The hearing included invited testimony from the following persons:

- Ty Embrey, Principal, Lloyd Gosselink Rochelle & Townsend, P.C.
- CE Williams, General Manager, Panhandle Groundwater Conservation District
- Sarah Rountree Schlessinger, Executive Director, Texas Alliance of Groundwater Districts
- Victoria Messer, Governmental Affairs, High Plains Water District
- Russel Johnson, Partner, McGinnis Lochridge
- Ronnie Muennink, State Director, District 10 Chair, Natural Resources Committee Texas Farm Bureau

### Background

The Texas Legislature recognizes a landowner's right to groundwater as real property, including the right to drill and produce groundwater.<sup>26</sup> In 2012, the Texas Supreme Court affirmed that land owners ultimately have private property rights to groundwater that lies beneath their land.<sup>27</sup>

There are 16 Groundwater Management Areas (GMA) in Texas that were designated by the Texas Water Development Board (TWDB) 17 years ago. The GMAs were created to cover all major and minor aquifers in Texas and coordinate with Groundwater Conservation Districts (GCDs) for adoption of their Desired Future Conditions (DFCs). DFCs are defined in the Texas Administrative Code, as the "quantified condition of groundwater resources such as water levels, spring flows, or volumes."<sup>28</sup> The TWDB uses technical expertise in groundwater modeling to assist GCDs in developing and approving their DFC every five years. Both TWDB and the Texas Commission on Environmental Quality (TCEQ) have processes in place to challenge a DFC. To challenge a DFC, an affected person, someone who is directly impacted, would file a petition with the GCD which adopted it.<sup>29</sup>

Groundwater Conservation Districts are created through the Texas Legislature or by a process overseen by the TCEQ.<sup>30</sup> The primary responsibilities of a GCD are issuing permits for water wells,

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<sup>26</sup> Tex. Water Code § 36.002(a) (2015).

<sup>27</sup> Edwards Aquifer Authority v. Day 2012

<sup>28</sup> Tex. Admin Code, Title 31, Part 10 §356.10.

<sup>29</sup> Texas Water Development Board, "Appeal of Desired Future Conditions," [http://www.twdb.texas.gov/groundwater/management\\_areas/DFC.asp#title-03](http://www.twdb.texas.gov/groundwater/management_areas/DFC.asp#title-03) (Last visited Oct. 10, 2018).

<sup>30</sup> Texas Water Development Board, "Groundwater Conservation District Facts," [http://www.twdb.texas.gov/groundwater/conservation\\_districts/facts.asp](http://www.twdb.texas.gov/groundwater/conservation_districts/facts.asp) (last visited Aug. 30, 2018).

developing a management plan based on the water supply, and creating rules to follow the plan.<sup>31</sup> Currently there are 98 GCDs covering 70% of the state, in 173 counties, and 96 of which at least cover a portion of a major aquifer.<sup>32</sup>

TWDB approves groundwater management plans that all GCDs are required to create and implement. The agency provides technical and educational support to the GCDs during management plan development.

GCDs permit drilling based on their adopted DFCs and appropriate the amount which can be drilled based on acreage owned.<sup>33</sup>

Through Legislative action, the GCD framework includes the responsibilities of the district with the steps for setting up the leadership of the district. Through a landowner petition, a GCD is created when property owners file a petition with TCEQ. The agency considers the petition and if approved, temporary leadership will be established.<sup>34</sup>

During the 85th Legislative Session, the term “similar rules” was introduced. Clarification of what “similar” rules would mean and the intent of the term was needed during the interim. During the interim hearing process, the term was clarified as to what legislative intent is expected and what would be incorporated in the 86<sup>th</sup> Legislative Session. Specifically, the similar rules discussion means that the GCD’s permitting process should have predictability and be consistently applied through process when considering the science of the hydrology of the groundwater the GCD oversees.

As an example, two GCDs over the same aquifer with similar science-based hydrological formations should not have dissimilar DFC’s. The process in which this occurs would not meet the intent of the “similar rules” intent. The inconsistency of new well permitting based on user, historical use, and a loose interpretation of correlative rights across the state continues to create litigation over ground water permitting.

Since the conclusion of the 85th Regular Legislative Session, GCDs have met to discuss similar rules through their GMA meetings and at their GCD meetings. Over half of the GMAs have met to discuss a process for similar rules where applicable. Three concerns have been expressed which would impact the ability to set up similar rules in certain situations: requirements established in a GCD enabling act; distinct hydrological characteristics; and real estate development patterns such as new construction of

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<sup>31</sup> *Id.*

<sup>32</sup> Texas Water Development Board, "Groundwater Conservation District Facts," [http://www.twdb.texas.gov/groundwater/conservation\\_districts/facts.asp](http://www.twdb.texas.gov/groundwater/conservation_districts/facts.asp), Accessed August 30, 2018.

<sup>33</sup> Tex. Water Code § 36.002(d), 2015, <https://statutes.capitol.texas.gov/Docs/WA/htm/WA.36.htm>.

<sup>34</sup> TX. Admin. Code § 293.19 (2012), [http://texreg.sos.state.tx.us/public/readtac\\$ext.TacPage?sl=R&app=9&p\\_dir=&p\\_rloc=&p\\_tloc=&p\\_ploc=&pg=1&p\\_tac=&ti=30&pt=1&ch=293&rl=19](http://texreg.sos.state.tx.us/public/readtac$ext.TacPage?sl=R&app=9&p_dir=&p_rloc=&p_tloc=&p_ploc=&pg=1&p_tac=&ti=30&pt=1&ch=293&rl=19).

subdivisions or commercial buildings.<sup>35</sup> The 86<sup>th</sup> Legislative Session will address these concerns in order to meet the goal of consistency and predictability amongst districts.

### **Committee Testimony on Interim Charge #2**

High Plains Underground Water Conservation District No. 1 (HPWD) was the first GCD created in Texas and currently serves 11,850 square miles with complete or portions of 16 counties. They are headquartered in Lubbock, Texas.<sup>36</sup> HPWD employs a well spacing and production permitting framework to balance the needs of water users in the region. Each land owner is required to apply for a permit prior to drilling and production of any well expected to produce 17.5 gallons of water per minute or more.<sup>37</sup>

Victoria Whitehead with HPWD explained that the district issues a standard permit which is required for the construction of a new well, or increasing production of an existing well above the exempt amount.<sup>38</sup> The most recent change to production limits was in 2012, when the district added a 1.5 acre feet per contiguous acre per year which increased the amount of water available to well owners. Spacing requirements for GCDs are generally to protect the groundwater availability, promote water conservation, prevent interaction between neighboring wells, and keep water quality high. According to Victoria Whitehead, the well spacing rules were adopted in 1953 and changes were made to include property line spacing in 2004.<sup>39</sup> The following table depicts the well spacing rules for aquifers under HPWD.<sup>40</sup>

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<sup>35</sup> Senate Committee on Agriculture, Water and Rural Affairs Hearing, June 4, 2018 (written testimony submitted by Ty Embrey, Lloyd Gosselink).

<sup>36</sup> High Plains Underground Water Conservation District, "Who we Are," <http://www.hpwd.org/about/> (last visited Sept. 6, 2018).

<sup>37</sup> High Plains Underground Water Conservation District, " Why Does The High Plains Water District Require Well Permits And Well Spacing?," <http://www.hpwd.org/faqs/#district> (last visited Sept. 6, 2018).

<sup>38</sup> Senate Committee on Agriculture, Water and Rural Affairs Hearing, June 4, 2018 (written testimony submitted by Victoria Messer Whitehead, High Plains Underground Water Conservation District).

<sup>39</sup> Senate Committee on Agriculture, Water and Rural Affairs Hearing, June 4, 2018 (written testimony submitted by Victoria Messer Whitehead, High Plains Underground Water Conservation District).

<sup>40</sup> *Id.*

HPWD Well Spacing Rules for Ogalla/Edwards-Trinity (High Plains)		
Max Production (gpm)	Spacing from Nearest Well (yards)	Spacing from Property Line (yards)
70	100	25
165	200	50
265	300	75
390	350	87.5
560	400	100
1000	500	125
>1000	540	135
HPWD Well Spacing Rules for the Dockum		
70	100	25
165	200	50
265	300	75
500	880	100
>500	1760	135

Figure 1: Information provided by HPWD.

According to Victoria Whitehead, HPWD places a high emphasis on aquifer management, monitoring, and education including partnerships with United States Geological Survey and the State Board of Water Engineers. Additionally, the district utilizes an irrigation assessment program which looks at water quality analysis, rainfall, and estimated irrigation application.<sup>41</sup>

C.E. Williams with the Panhandle Groundwater Conservation District (PGCD) explained that the district was created in 1955 and consists of all or part of eight counties located entirely in the Panhandle. The oversight of the district is mainly through an elected board of directors, judicial review, open meetings, and state agency authority. The district has continually worked with neighboring GCDs to have similar procedures in place.<sup>42</sup>

The following table illustrates the spacing rules in PGCD.

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<sup>41</sup> *Id.*

<sup>42</sup> Senate Committee on Agriculture, Water, and Rural Affairs Hearing, June 4, 2018 (oral testimony given by C.E. Williams, Panhandle Groundwater Conservation District).

Panhandle Groundwater Conservation District Spacing Rules		
Size of Pump (Inside Diameter of Column Pipe in inches)	Minimum Distance from Nearest Well (yards)	Minimum Distance from Property Line (yards)
1	50	25
2	100	50
3	150	75
4	200	100
5	250	125
6	300	150
8	500	250
10	750	325
12	1000	500
14	1250	625

Figure 2: Information Provided by High Plains Groundwater Conservation District

The Texas Farm Bureau advocates on behalf of their membership on several issues which affect their membership from land use, taxes, and water. The organization has a membership of 500,000 families and provides an array of services such as advocacy and insurance assistance.<sup>43</sup> Specifically, the organization advocates to protect landowners and agricultural producers' property rights to ground and surface water.<sup>44</sup>

According to the Texas Farm Bureau, they believe that issues related to GCD regulation are not due to the framework which is in place, but is due to the Texas Supreme Court's ruling on landowner rights in 2012.<sup>45</sup> Most of the current law was adopted before the decision. Since the courts are a landowner's only recourse to challenge local groundwater regulations, they are at a disadvantage due to the high fees associated with a filing a law suit. In order to continue to protect landowner's rights, the Texas Farm Bureau supports reintroducing attorney's fee related legislation similar to Senate Bill (SB) 862 from the 85th Regular Legislative Session to support private property owners.<sup>46</sup> SB 862 put parties involved in a lawsuit involving a GCD on a level playing field by allowing the party that succeeds to recover attorney's fees.

Sarah Rountree Schlessinger explained that the Texas Alliance of Groundwater Districts (TAGD) was created in 1988 to serve as an educational resource to GCDs and the public on groundwater issues. TAGD collaborates with members' districts for demographics, regulatory frameworks, and various local current activities and issues.<sup>47</sup>

<sup>43</sup> Texas Farm Bureau, "About", <http://texasfarmbureau.org/voice-of-texas-agriculture/> (last visited Sept. 6, 2018).

<sup>44</sup> Texas Farm Bureau, "Priority Issues," <http://texasfarmbureau.org/advocacy/priority-issues/> (last visited Sept. 6, 2018).

<sup>45</sup> Edwards Aquifer Authority v. Day, 369 S.W.3d 814 (2012).

<sup>46</sup> Senate Committee on Agriculture, Water, and Rural Affairs Hearing, June 4, 2018 (written testimony submitted by Texas Farm Bureau).

<sup>47</sup> Senate Committee on Agriculture, Water, and Rural Affairs Hearing, June 4, 2018 (written testimony submitted by Sarah Rountree Schlessinger, Texas Alliance of Groundwater Districts).



Following the 85th Regular Legislative Session, TAGD has hosted six public panel discussions on similar rules in San Marcos, Conroe, Beeville, Ft. Stockton, Amarillo, and Salado. Members have worked to compare their rules for opportunities for similar regulations or reasons why they must differ. TAGD has also created a legislative committee to study the efforts of GMAs toward their efforts to compare rules. According to TAGD, at least nine GMAs have begun similar rules discussions which include permitting, exceptions, term lengths, administrative processes, fees, and metering structures.<sup>48</sup>

Through the discussions among GMAs, there have been opportunities for a similar regulatory framework such as consistent terminology and definitions; administrative (forms); and procedural rules language.<sup>49</sup>

### **Recommendations**

Texas landowners and producers would be better served to have a GCD regulatory process that was similar across neighboring GCDs. The committee received testimony from TAGD during the June 2018 hearing that GCDs have engaged in collaborative work to move towards a goal of similar rules and administrative processes, while still protecting the integrity of their conservation efforts. Private property owners with land spanning more than one GCD would benefit from processes which are similar.

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<sup>48</sup> Senate Committee on Agriculture, Water, and Rural Affairs Hearing, June 4, 2018 (written testimony submitted by Sarah Rountree Schlessinger, Texas Alliance of Groundwater Districts).

<sup>49</sup> *Id.*

## Interim Charge #3

*Agricultural Fees: Review licensing, permitting, or registration requirements and fees imposed on the agriculture industry by licensing agencies within the committee's jurisdiction. Make recommendations for state licenses and fees that should be reduced, repealed or transitioned to private-sector enforcement.*

### Committee Hearing Information

The committee held a public hearing on June 4, 2018. The committee received stakeholder and public testimony on issues related to fees imposed on the agriculture industry by licensing agencies.

The hearing included invited testimony from the following persons:

- Dr. T.R. Lansford, Texas Animal Health Commission Region 8 Director
- Clayton Wolf, Wildlife Division Director, Texas Parks and Wildlife Department
- John Helenberg, Executive Director, Texas Board of Veterinary Medical Examiners
- Tessa Mlynar, Senior Auditor, State Auditor's Office
- Audrey O'Neill, Audit Manager, State Auditor's Office
- Commissioner Sid Miller, Texas Department of Agriculture
- Ronnie Muennink, State Director, District 10 Chair, Natural Resources Committee, Texas Farm Bureau
- Elizabeth Choate, Director of GR & General Counsel, Texas Veterinary Medical Association
- Gary Holcomb, AG Coop
- Mary Hamilton, Texas Grain and Feed Association
- Chris Wimmer, Texas Seed and Trade Association
- Keith Walters, Texas Seed and Trade Association

### Background

Texas Agriculture Code, Section 12.0144, requires the Texas Department of Agriculture (TDA) to set fees in an amount to offset, when feasible, the direct and indirect costs of administering its regulatory activities.<sup>50</sup> The regulatory activities are grouped into the following categories: regulated pesticide uses, integrated pest management, seed certification, verify seed quality, agriculture commodity regulation, structural pest controls, and inspect measuring devices.<sup>51</sup> TDA agriculture and consumer protection cost-recovery programs are a group of programs designed to ensure the quality and quantity of various consumer products and services, provide value-added certification of agricultural products, and enforce statutory requirements.<sup>52</sup> In September 2015, TDA's cost-recovery rate analysis concluded that the estimated administrative costs for its agriculture and consumer protection cost-recovery

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<sup>50</sup> Texas Agriculture Code § 12.0144 (1995).

<sup>51</sup> Texas Department of Agriculture, Cost Recovery Analysis: September 2015 (pages 6-16 of the PDF version of the Department's rate analysis, located at <https://texasagriculture.gov/Portals/0/DigArticle/3078/TDA%20-%20ACP%20cost%20recovery%20rate%20analysis.pdf>, )

<sup>52</sup> Senate Committee on Agriculture, Water and Rural Affairs Hearing, June 4, 2018 (written testimony submitted by Tessa Mlynar, Senior Auditor's Office).

programs was \$27.5 million.<sup>53</sup> Based on that estimate, on January 1, 2016, TDA increased 110 fees and eliminated three.<sup>54</sup>

The State Auditor's Office (SAO) conducted an audit to determine if TDA's process for setting fees had resulted in fees that offset the costs of administering its regulatory activities.<sup>55</sup> According to SAO, the audit was conducted based on risks identified and legislative interest. The State Auditor concluded that the fees exceeded the amount necessary to recover its direct and indirect costs.<sup>56</sup> The agriculture and consumer protection cost-recovery program revenue exceeded its expenditures by \$6.5 million, or 31%, for 2016.<sup>57</sup>

The audit also found that TDA was not adequately tracking fees to determine if they were set appropriately to recover costs.<sup>58</sup> TDA lacked documentation supporting its methodology for estimating its operating and indirect costs.<sup>59</sup> Without such documentation, the auditors were not able to assess the reasonableness of specific operating and indirect cost estimates.<sup>60</sup>

The table below shows the audit findings.<sup>61</sup>

Summary of Chapters and Related Issue Ratings <sup>a</sup>		
Chapter	Title	Issue Rating
1	TDA's Revenues Exceeded Its Expenditures, and TDA Should Establish Processes for Monitoring Fee Levels for Its Cost-recovery Programs	Priority
2-A	TDA Did Not Clearly Define Its Methodology or Maintain Documentation for Estimating Costs	High
2-B	TDA Did Not Adequately Document Its Methodology for Setting Individual Fees in Each Strategy to Recover Estimated Costs	Medium
Auditors used professional judgment and rated the audit findings identified in this report. The issue ratings were determined based on the degree of risk or effect of the findings in relation to the audit objective(s). A description of the issue ratings and other factors considered are included in Appendix 2 of the audit report.		

Figure 3: Information provided by State Auditor's Office

The audit found that TDA did not complete regular monitoring and could not evaluate or update its fee structure in a timely manner when its actual direct and indirect costs changed.<sup>62</sup> TDA completed a rate analysis to determine its new fee levels.<sup>63</sup> In that analysis, TDA estimated its revised total costs

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

for administering its cost-recovery programs, and then proposed a revised fee structure to recover those estimated costs.<sup>64</sup> TDA determined its total costs by estimating three categories of costs: operating costs (\$8.6 million, or 31%), indirect costs (\$3.6 million, or 13%), and direct labor costs (\$15.4 million, or 56%).<sup>65</sup> Examples of operating costs include utilities, telecommunication, fuel, office space, vehicle maintenance and repair, and computer repair and replacement plan.<sup>66</sup> The replacement program refers to replacement and updating of computers, monitors, and other workstation equipment. TDA was unable to provide adequate support for the costs within its total estimated indirect costs.<sup>67</sup>

Once TDA finalized the estimate, the auditors reviewed the process for setting fees based on these estimates and determined that the agency included a \$4.6 million contingency estimate.<sup>68</sup> This estimate was not based on specific actual expenditures or projected costs, which is not a direct or indirect cost that is required for TDA to recover.<sup>69</sup> For 2016, this contingency estimate contributed to the difference between TDA's actual revenues and expenditures.<sup>70</sup> The auditors also established that the agency did not consistently maintain support for its other estimated operating costs.<sup>71</sup>

Additionally, there were 11 out of 15 other types of operating cost estimates TDA was not able to provide adequate support for regarding certain components of its estimates.<sup>72</sup> The agency was not able to provide vital information such as the quantity and unit prices it used to estimate costs, how it estimated total costs, or how it allocated costs to each strategy.<sup>73</sup> During the audit, it was discovered that factually incorrect information had been used.<sup>74</sup> For example, TDA purchased specialized equipment that would be paid off over several years.<sup>75</sup> Rather than reporting the annual payment, TDA documented the \$300,000 total cost of the equipment.<sup>76</sup> As a result, there was a \$254,256 overage of the annual cost.<sup>77</sup> The auditors were not able to determine whether the \$3.6 million that TDA allocated to its agriculture and consumer protection cost-recovery program included only indirect costs because the agency did not provide adequate support for the costs within its total estimated indirect costs.<sup>78</sup> An indirect-cost recovery plan was also not prepared, as required by Texas Government Code, Chapter 2016.<sup>79</sup> If TDA had prepared this document it would have been beneficial

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<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

in identifying and allocating indirect costs as part of its rate analysis.<sup>80</sup> In conclusion, the agency did not clearly define or document its methodology for setting fees.<sup>81</sup>

Operating Costs Considered by the Texas Department of Agriculture	
Base budget operating costs	Fleet management system
Utilities	Mobile Logistics software licenses
Telecommunication	Vehicle maintenance and repair
Fuel	Vehicle replacement plan
Uniforms for inspectors	Computer replacement plan
Rent - Office Space	Printed replacement plan
Operating Costs Considered by the Texas Department of Agriculture for its Inspection Measuring Devices Strategy	
Replacement schedule for 5-gallon test provers and weights	
Metrology loan repayment	
Weight truck replacement	

Table 3: Texas Department of Agriculture Rate Analysis

The Texas Animal Health Commission (TAHC) also utilizes a fee structure. During Fiscal Years 2014 and 2015, the agency assessed fees for numerous programs and inspections including certificates of veterinary inspection, chronic wasting disease inspections, fowl registration program, herd status, in-state laboratory fees and out-of-state laboratory fees.<sup>82</sup> For the 2016-2017 biennium, TAHC collected four percent of its appropriated General Revenue through authorized fees.<sup>83</sup> The livestock and poultry industry generates more than \$18 billion each year in sales.<sup>84</sup>

The agency's mission is to protect the health of the animal industry and marketability of Texas' livestock commodities on the state, national and international level.<sup>85</sup> TAHC is responsive to emergency situations to mitigate disease risk.<sup>86</sup> TAHC works closely with the state's livestock producers and private veterinarians when diseases are detected and reported, as the producers and veterinarians are considered the state's first line of defense.<sup>87</sup>

Texas requires a certificate of veterinary inspection to facilitate certain interstate movement and international export of Texas livestock and poultry.<sup>88</sup> Texas Agriculture Code 161.601 requires TAHC to charge a fee for each certificate of veterinary inspection, which is currently set by the commission at seven dollars.<sup>89</sup> The commission processes all livestock and poultry entering and exiting the state in

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> Texas Animal Health Commission home page, <http://www.tahc.state.tx.us/>.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> Senate Committee on Agriculture, Water and Rural Affairs Hearing, June 4, 2018 (written testimony Submitted by: Dr. T.R. Lansford, Texas Animal Health Commission)

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

order to facilitate disease prevention, surveillance and response. As of May 2018, there were 2,018 Texas veterinarians authorized to purchase a certificate of veterinary inspection. A certificate of veterinary inspection is an official document issued by a federal, state, or accredited veterinarian certifying that the animals identified on the document have been inspected and were found to satisfy the regulations pertaining to their intended movement – within the same state, between states, or internationally.<sup>90</sup>

TAHC registers domestic and exotic fowl sellers, distributors, or transporters who do not participate in disease surveillance programs recognized by the Commission.<sup>91</sup> The fowl registration are good for one year from the date of issuance.<sup>92</sup> The agency provides a voluntary herd status program for species that are susceptible to Chronic Wasting Disease (CWD).<sup>93</sup> Landowners that own exotic CWD susceptible species that participate in the program must have a herd inventory performed annually by the TAHC, United States Department of Agriculture, or an accredited veterinarian.<sup>94</sup> At the end of Fiscal Year 2015, Texas Animal Health Commission was no longer authorized to collect herd status in-state and out-of-state laboratory fees.<sup>95</sup> As a result, the Commission's fee revenue decreased in Fiscal Year 2016-2017.<sup>96</sup> The revenue collected through fee revenue is dedicated to fleet maintenance.<sup>97</sup>

The following chart illustrates Texas Animal Health Commission's fee revenue from Fiscal Years 2014 through May 22, 2018.<sup>98</sup>

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<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<b>TAHC Historical Fee Revenue</b>					
Revenue Type	2014	2015	2016	2017	2018*
CVI	\$ 465,287	\$ 481,336	\$ 480,613	\$ 497,436	\$ 369,005
FRP	\$ 53,395	\$ 53,615	\$ 60,094	\$ 59,055	\$ 37,405
CWD Inspection	\$ 6,450	\$ 5,950	\$ 12,725	\$ 9,450	\$ 7,750
Herd Status	\$ 26,900	\$ 19,450	\$ -	\$ -	\$ -
In-State Lab Fees	\$ 150,622	\$ 138,781	\$ -	\$ -	\$ -
Out-Of-State Lab Fees	\$ 730	\$ 999	\$ -	\$ -	\$ -
<b>Total</b>	<b>\$ 703,384</b>	<b>\$ 700,131</b>	<b>\$ 553,432</b>	<b>\$ 565,941</b>	<b>\$ 414,160</b>
	2014	2015	2016	2017	2018*
Appropriated to TAHC	\$ 438,129	\$ 434,876	\$ 453,269	\$ 469,053	\$ 414,160
Appropriated to TX GR	\$ 265,255	\$ 265,255	\$ 100,163	\$ 96,888	\$ -
<b>Total</b>	<b>\$ 703,384</b>	<b>\$ 700,131</b>	<b>\$ 553,432</b>	<b>\$ 565,941</b>	<b>\$ 414,160</b>
<i>*2018 Fees collected through 05/22/2018</i>					

Figure 4: Information provided by Texas Animal Health Commission.

The following table illustrates TAHC's fee revenue from fiscal years 2014 through May 22, 2018.<sup>99</sup>

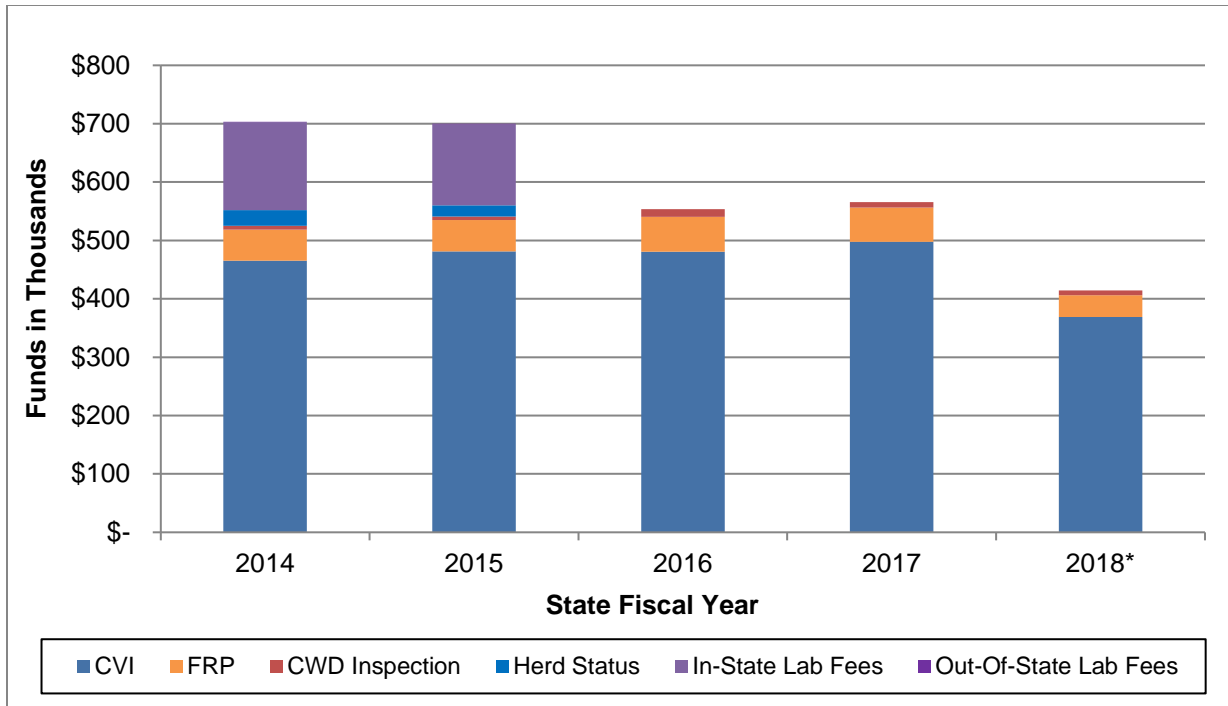


Figure 5: Information provided by Texas Animal Health Commission

In Fiscal Year 2016, the hours increased dramatically due to the reported findings and cases of Chronic Wasting Disease in Texas. The following table illustrates TAHC's fee revenue from fiscal years 2014 through May 22, 2018.<sup>100</sup>

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*



Chronic Wasting Disease Inspection Hours and Revenue			
Fiscal Year	Hours	Cost Per Hour	Revenue
2014	64.5	100	\$6,450
2015	59.5	100	\$5,950
2016	127.25	100	\$12,725
2017	94.5	100	\$9,450
2018*	77.5	100	\$7,750
*2018 data current through 05/22/2018			

Figure 6: Information provided by Texas Animal Health Commission.

The Texas Parks and Wildlife Department’s (TPWD) mission is to manage and conserve the state's natural and cultural resources.<sup>101</sup> TPWD's duty is to ensure that present and future generations will be able to enjoy hunting, fishing, and outdoor recreation.<sup>102</sup> The agency offers a wide range of licenses and permits to regulate the commercial harvesting of fish and wildlife.<sup>103</sup> Approximately 180 types of recreational, commercial and wildlife management licenses and permits have been issued to the public, and 32 of those are agricultural related.<sup>104</sup> Only \$2 million, or 1%, of the funds in the Game, Fish and Water Safety Account (Fund 9) was obtained from agricultural related permits/licenses.<sup>105</sup> Agricultural permits have not been increased since 2009.<sup>106</sup>

One of the most common agricultural-related permits acquired is the hunting lease license, which has been available since 1924. This license is issued to landowners who want to charge for selling hunting access to their property.<sup>107</sup> The income from the selling of hunting leases provides landowners with additional income and could assist in reducing crop depredation by wildlife species.<sup>108</sup> In Fiscal Year 2017, more than 7,000 properties were issued hunting lease licenses, and more than 1,500 landowners participated in hunting cooperatives and wildlife management associations.<sup>109</sup>

The depredation permit is the sole wildlife-related permit that is specifically agricultural in nature. In Fiscal Year 2017 more than 70 depredation permits were active.<sup>110</sup> These permits are issued to a landowner, occasionally a land manager, or resource manager who can clearly show that certain

<sup>101</sup> Senate Committee on Agriculture, Water and Rural Affairs Hearing, June 4, 2018 (written testimony submitted by Clayton Wolf, Texas Parks and Wildlife Department).

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

protected wildlife are causing serious damage to agricultural, horticultural or aqua cultural interests; or presents a threat to public safety as in the case of wildlife at airports.<sup>111</sup>

### Committee Testimony on Interim Charge #3

Clayton Wolf with the Texas Parks and Wildlife Department educated the committee on the Managed Land Deer Program which allows landowners enrolled in a formal wildlife management program with TPWD to have the state's most flexible deer seasons and bag limits.<sup>112</sup> The Managed Land Deer Program protects native wildlife and conserves wildlife habitats on private lands in Texas.<sup>113</sup> The program has experienced significant growth since its start.<sup>114</sup> Enrollment has increased from 813 properties spanning about 3.1 million acres in 1998 to about 10,250 properties covering nearly 25 million acres in 2016.<sup>115</sup>

There is no fee associated with Managed Land Deer Program.<sup>116</sup> However, the agency would like the ability to charge a fee to cover the expenses caused by the significant increase in the program's popularity and growth.<sup>117</sup> With considerable input from the public and various stakeholder groups staff proposed a simplified version of the program.<sup>118</sup> Stakeholders supported this proposal with the caveat that TPWD would pursue legislation to charge a fee for program participation.<sup>119</sup>

In the 85th Regular Legislative Session, Senate Bill 722 was authored by Senator Charles Perry to allow the Texas Parks and Wildlife Commission to impose a fee for voluntary landowner participation in both the harvest option and the conservation option within the Managed Land Deer Program. The legislation passed the Senate, was reported favorably without amendments by the House Culture, Recreation and Tourism Committee, but was still pending in the House Calendars Committee when the session ended. Senate Bill 722 did not have any registered opposition in either the senate or the house.

TPWD has implemented the two options for the program and, for now, will continue using funding from other sources.<sup>120</sup> The two options for the program are Harvest Option and Conservation Option.<sup>121</sup> The Harvest Option is a more self-regulated program than the Conservation Option.<sup>122</sup> If a participant voluntarily enrolls in the program they will receive a deer harvest recommendation, tag issuance, and general guidance about wildlife and wildlife habitat management.<sup>123</sup> This option does

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<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

not require habitat management practices, deer population data, or the participant to receive technical assistance from TPWD's wildlife biologist.<sup>124</sup>

The Conservation Option offers the participants to work with a Department's wildlife biologist to receive customized, ranch-specific habitat and deer harvest recommendations, as well as, Managed Land Deer Program tag issuance for white-tailed deer and/or mule deer.<sup>125</sup> To remain in the program the participants have to report certain types of deer data in addition to completion of specific habitat management practices each year in order to participate and remain in the program.<sup>126</sup>

The following pie chart illustrates TPWD's Funding Sources from 2018-2019 Biennium.<sup>127</sup>

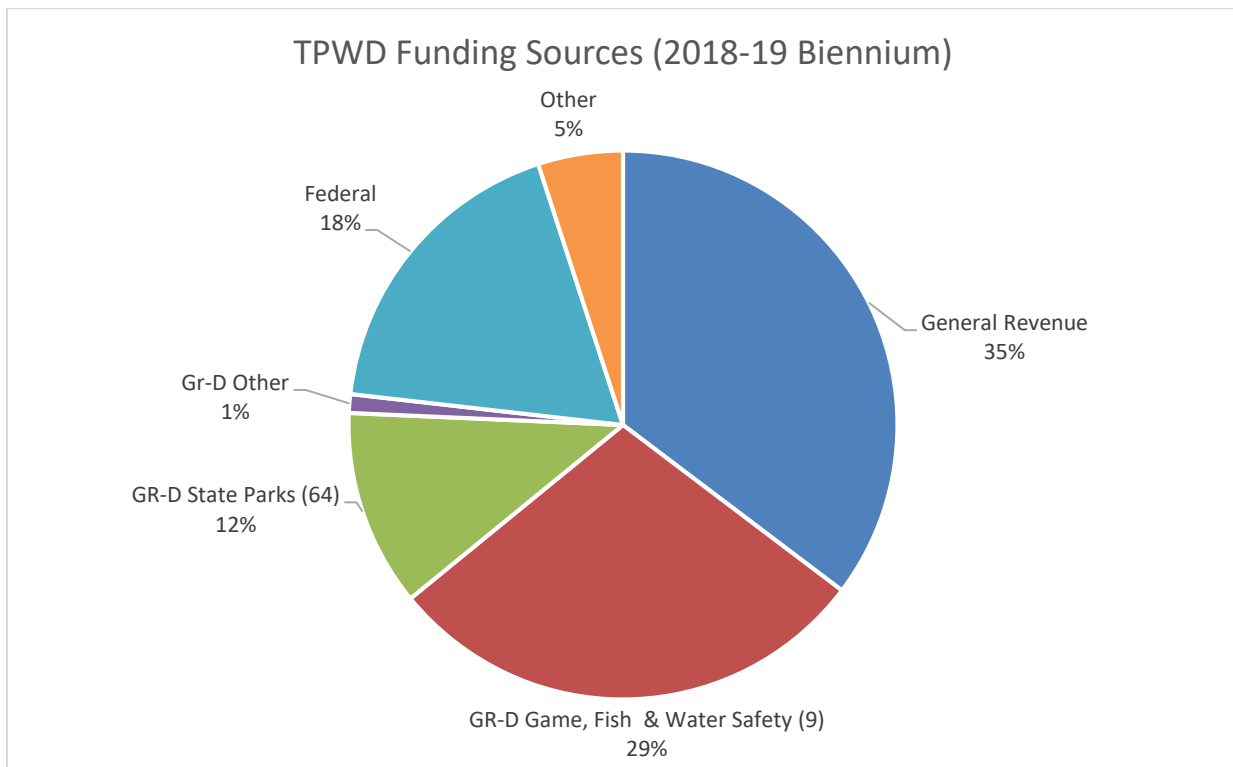


Figure 7: Information provided by Texas Parks and Wildlife Department.

TPWD evaluates agency fees periodically with the mission of maintaining hunting, fishing and other outdoor opportunities accessible and affordable to the public.<sup>128</sup> In May 2009, the Commission adopted the most recent comprehensive fee adjustment which went into effect Fiscal Year 2010.<sup>129</sup> According to the Department, the majority of recreational hunting and fishing licenses, commercial permits, and other permit types were increased 5% across the board.<sup>130</sup> Prior to this 5% increase, the

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<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

last significant fee adjustment was adopted by the Commission in May 2003 and became effective for Fiscal Year 2004.<sup>131</sup>

John Helenberg, Executive Director, testified on behalf of The Texas Board of Veterinary Medical Examiners. During the agency's testimony it was explained the Texas Board of Veterinary Medical Examiners is a licensing agency for doctors of veterinary medicine, equine dental providers, and licensed veterinary technicians. Combined, these three licenses total 10,175 individuals, with each person paying an annual licensing fee that generates approximately \$1,600,000 each fiscal year.<sup>132</sup> Section 801.155 of the Texas Occupations Code provides that administrative costs incurred by this agency, including the compensation and expenses of board members and employees, may be paid only from fees it collects.<sup>133</sup> In 2017, the Board increased its fees to cover cost in three areas: prescription monitoring program, professional recovery network, and a budget rider for a new investigator position.<sup>134</sup>

The following table illustrate the Texas Board of Veterinary Medical Examiners initial license fee with the annual renewal fee.<sup>135</sup>

<b>Initial License Fee</b>	<b>Annual Renewal Fee</b>
Doctor of Veterinary Medicine : \$515.00	\$195.00
Equine Dental Providers: \$100.00	\$83.00
Licensed Veterinary Technicians: \$50.00	\$50.00

*Figure 8: Information provided by Texas Board of Veterinary Medical Examiners.*

Commissioner Sid Miller testified on behalf of the TDA on its imposition of fees on the agricultural industry.

Commissioner Miller expressed deep frustration over the legislature's decision to require the TDA to base its fees solely on cost recovery and to eliminate the use of various tools the TDA has previously used to balance its budget.

With respect to the setting of fees, Commissioner Miller concluded that the empirical and historical data regarding program costs is currently insufficient to accurately estimate future costs of the programs and that at least three years, and preferably five years, of such data will need to be collected before the TDA can do so.<sup>136</sup>

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<sup>131</sup> *Id.*

<sup>132</sup> Senate Committee on Agriculture, Water and Rural Affairs Hearing, June 4, 2018 (written testimony submitted by John Helenberg, Texas Board of Veterinary Medical Examiners).

<sup>133</sup> Texas Occupations Code § 801.155.

<sup>134</sup> *Senate Committee on Agriculture, Water and Rural Affairs Hearing, June 4, 2018 (written testimony submitted by John Helenberg, Texas Board of Veterinary Medical Examiners).*

<sup>135</sup> *Id.*

<sup>136</sup> Senate Committee on Agriculture, Water and Rural Affairs Hearing, June 4, 2018 (written testimony submitted by Texas Department of Agriculture).

Among the financial tools eliminated by the legislature was the right to retain and use unexpended balances from year to year.<sup>137</sup> Also eliminated was the ability to transfer funds among the various programs, as well as the right to use fees, fines, penalties and taxpayer funded General Revenue.<sup>138</sup> According to Commissioner Miller, the loss of these four revenue streams, which were previously used to correct imbalances, will result in an inevitable escalation of fees to insure against under collection.<sup>139</sup> As an example, the Commissioner explained the potential effect on TDA's fuel budget due to volatility in the price of gasoline.<sup>140</sup> An overestimation of the future price of gasoline would result in an over collection of fees and thus an unnecessary surplus, but an underestimation would result in an under collection and a shortfall.<sup>141</sup> Commissioner Miller stated the ability to transfer funds between overfunded and underfunded programs would protect against this outcome.<sup>142</sup> Commissioner Miller also expressed in the case of an over collection, the legislature has prevented the TDA from offering rebates to fee payers thereby essentially "stealing" over collected funds by sweeping them into the treasury to pay for programs unrelated to those for which they were collected.<sup>143</sup>

Commissioner Miller concluded his remarks by outlining the various steps TDA has taken to evaluate, determine and monitor its costs for each program in order to objectively set fees to recover those costs.<sup>144</sup> However, Commissioner Miller believes the restoration of TDA's financial tools described above is important in ensuring the reduction of fees.<sup>145</sup>

The Ag Producers Co-op testified on the effect of the escalation of TDA fees on its 2,450 members in the Texas Panhandle.<sup>146</sup> Ag Producers is a farmer-owned cooperative whose primary businesses are grain storage and marketing, cotton ginning, crop production sales and service, and fuel sales.<sup>147</sup>

The Ag-Producers Co-op testified with regard to the disparity between the licensing fees charged by USDA and TDA. Given the choice of being licensed by either the USDA or the TDA, Ag Producers Co-op opted to be licensed by the USDA where the fee was \$22,250, as opposed to the \$262,300 it would have paid if licensed by the TDA.<sup>148</sup> The Co-op noted the decline in the number of TDA licensed co-ops, and expressed surprise that more had not switched to federal licensing.<sup>149</sup>

In addition to this disparity in licensing fees, there is a dramatic escalation in TDA fees in a number of areas. Specifically, a 132% increase in the last three years in the truck scale inspection fee and a

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<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Senate Committee on Agriculture, Water and Rural Affairs Hearing, June 4, 2018 (written testimony submitted by Ag-Producers Co-Op by Gary Holcombe)*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

115% increase in the fee for inspection of fuel dispensing devices.<sup>150</sup> Also, while Ag-Producers Co-op members face out-of-state competition, many of those competitors have no hard assets in Texas and thus pay no licensing fees to the agency.<sup>151</sup>

Finally, it was suggested that since consumers are benefitting from food and fiber produced by agricultural interests, and since they are the people being protected by TDA, perhaps they should shoulder some of the costs of the services performed by TDA.<sup>152</sup>

Flatlands Grain, a group of grain elevators located near Plainview, Texas, testified to general dissatisfaction with the operation of TDA relative to Texas Grain and Feed Association.<sup>153</sup> Additionally, Flatlands Grain pointed out the same disparity in licensing fees between USDA and TDA noted by Ag Producers Co-op above, and how that disparity drove Texas Grain and Feed Association from being a TDA licensee to a USDA licensee.<sup>154</sup>

Pogue Agri Partners, a seed company in Kenedy, Texas, testified regarding the seed certification program as administered by TDA. There was a dramatic increase in the fees being charged by TDA for seed inspection and certification, and its effect on certification of seed in Texas.<sup>155</sup> Due to the increased fees, voluntary certification has declined and Pogue Agri Partners believes that the decline will accelerate.<sup>156</sup> Their solution is to transfer seed certification from TDA to private non-profit companies.<sup>157</sup> This has already occurred in 36 other states, including every major agricultural state except Texas.<sup>158</sup> In addition, the testimony pointedly noted that they have had no complaint with the way in which the TDA certifies seeds, only its fees for doing so.<sup>159</sup>

The Texas Seed Trade Association testified on the recent and rapid escalation in TDA seed certification fees. While the Texas Seed Trade Association concedes that fees are recouping less than 60% of the program's cost, if the TDA budget numbers are accurate, those fees are higher than their members can pay, especially in light of the dramatic increases of the recent past.<sup>160</sup> The association noted that the fees charged by the states of Nebraska and Kansas are a fraction of those charged by TDA in Texas.<sup>161</sup> They suggest that cost could be contained and fees reduced by a redesign of the program to better align it with reasonable and available resources without harming the program's

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<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> Senate Committee on Agriculture, Water and Rural Affairs Hearing June 4, 2018 (written testimony submitted by Texas Grain and Feed Association members: Flatlands Grain, and Pogue Agri Partners).

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> Senate Committee on Agriculture, Water and Rural Affairs Hearing June 4, 2018 (written testimony submitted by Texas Seed and Trade Association).

<sup>161</sup> *Id.*

integrity.<sup>162</sup> Alternatively, the association offers the idea that contracting seed testing to commercial labs could result in reducing the cost to a fraction of that now being charged.<sup>163</sup>

Elizabeth Choate testified on behalf of Texas Veterinary Medical Association representing veterinarians. According to their testimony, when the Texas Animal Health Commission faced a devastating series of budget cuts during the 82nd Legislative Session the veterinarians agreed to support the fee-for-service model to generate new revenue streams in order to maintain essential commission services.<sup>164</sup> In addition to the veterinarians, other industry groups also pledged to support this new proposal. House Bill 1992 was passed with support of industry groups to provide the Texas Animal Health Commission with broader based fee assessment authority. The industry agreed the Texas Animal Health Commission would have the authority to set and collect a fee for most services.<sup>165</sup> These services include: inspecting animals or facilities, obtaining samples from animals for disease diagnostic tests, testing animals for disease, disease prevention, control/eradication and treatment efforts, services related to the transport of livestock, control and eradication of ticks and other pests, and any other services for which the Commission may incur a cost.<sup>166</sup> Texas Agricultural Code, Section 161.0601 authorizes the Texas Animal Health Commission through rulemaking to issue and set the fee for a certificate of veterinary inspection for the transport of domestic and exotic livestock and fowl<sup>167</sup>.

According to Texas Veterinary Medical Association testimony, once the legislation was passed, other industry groups did not hold up to their support level and the majority of fees incurred came from the Certificates of Veterinary Inspection.<sup>168</sup> The fee implemented by the Texas Animal Health Commission has gradually increased for the Certificate of Veterinary Inspection.<sup>169</sup> As of June 2018, the fee is \$7.00 per certificate.<sup>170</sup> The consensus of veterinarians do not object to paying a fee for the Certificate of Veterinary Inspection, although, the veterinarians believe their current fee of \$7.00 is too expensive.<sup>171</sup> Other states do not charge veterinarians for using electronic health certificates.<sup>172</sup> Veterinarians express concerns to the association when they must pass the fee on to their client because it falls heavily on young men and women participating in 4-H programs or livestock shows.<sup>173</sup> Prior to the cost increase, many veterinarians would provide this service to students at a heavily discounted cost or at no cost at all.<sup>174</sup>

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<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> Senate Committee on Agriculture, Water and Rural Affairs Hearing June 4, 2018 (oral testimony by Elizabeth Choate and written testimony submitted by Aaron Rainer, DVM, President)

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

The Texas Animal Health Commission is aware of this issue and is reviewing these fees.

The Texas Farm Bureau supports the privatization of Texas' seed and plant certification services through a non-profit crop improvement association.<sup>175</sup> This privatization would be required through a memorandum of understanding with the Association of Official Seed Certifying Agencies and the United States Department of Agriculture.<sup>176</sup> Texas Farm Bureau supports fee increases when the fee increase supports the cost-recovery program and provide more services for their consumers.<sup>177</sup> The organization is opposed to fee increases that are being cleared into General Revenue.<sup>178</sup>

## Recommendations

The committee recommends continuing to monitor the effects of the rules adopted by agencies related to licensing, permitting, or registration requirements and fees imposed on the agriculture industry.

As supported during the Regular 85th Legislative Session, the committee recommends refiling legislation to authorize the Texas Parks and Wildlife Commission, by rule, to establish and provide for the collection of a fee for each Managed Land Deer Program participation option.

The complexity of the timing of the collection of agricultural fees for the different fiscal periods including multi-period licensing creates unique accounting challenges. The state's fiscal year does not coincide with the licensing periods of many agricultural industry sectors. As a consequence, prepayments under the cash method of financing can result in "sweeps" of cash that are tied to future licensing periods. The elimination of the carryover of unexpended balances and the lack of confidence in the accounting supporting the fee increases have created an internal accounting problem that allows for fees to be collected in excess of costs.

The committee recommends a revisit with Texas Department of Agriculture to determine if the changes the State Auditor recommended have been made and the internal accounting policies and procedures modified to account for the fees. These changes will allow for LAR requests that can support the need for balance carryover or at least be considered in an LAR request. It is fair to say, that the decision to remove unexpended balance authority highlighted problems that existed long before its removal. Therefore, the tools are a legitimate point for discussion in the 86th legislative session. For cost recovery agencies to be effective, transparent and deserving of public trust, a higher level of accountability is necessary. Standards as to what is a recoverable cost and the ability to account for that recovery must be clear and those in charge knowledgeable in the implementation of these policies.

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<sup>175</sup> Senate Committee on Agriculture, Water and Rural Affairs Hearing June 4, 2018 (written testimony submitted by Texas Farm Bureau, Ronnie Muennink, State Director for Texas Farm Bureau).

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*



## Monitoring Charge

*Monitoring: Monitor the implementation of legislation addressed by the Senate Committee on Agriculture, Water & Rural Affairs during the 85th Legislature, Regular Session, including, but not limited to:*

- *SB 1511 (prioritization in the regional water plan);*
- *SB 1538 (Floodplain Management Account uses);*
- *SB 864 (GCD application of state water);*
- *HB 2004 (Texas economic development fund for TDA); and*
- *HB 3433 (adoption of rules affecting rural communities. Make recommendations for any legislative improvements needed to improve, enhance, or complete implementation including regional water planning, flood planning, and groundwater production).*

### Committee Hearing Information

The Committee held a hearing on June 5, 2018 to hear invited testimony from stakeholders and the public on implementation of legislation.

The hearing included invited testimony from the following persons:

- Kim Wilson, Director, Water Availability Division, Texas Commission on Environmental Quality
- Temple McKinnon, Director of Water Use, Projections and Planning, Texas Water Development Board
- Sam Marie Hermitte, Assistant Deputy Executive Administrator, Texas Water Development Board

### Background

SB 1511 allowed for several updates to the Regional Water Planning process, including the addition of rules by the Texas Water Development Board for prioritizing projects based on feasibility; the planning groups to host at least one meeting at a centralized location; and allows for a streamlined planning report submission for those planning groups with no substantial changes.<sup>179</sup>

SB 1538 allows the Texas Water Development Board to expand the use of funds in the floodplain management account. The allowable expansion included the cost of flood gages and the installation of warning systems.<sup>180</sup>

SB 864 expands the scope of notice for permitting by TCEQ when granting a surface water permit. When a new surface water permit uses groundwater as an alternative source, TCEQ must send a notice to the GCD of the permit application.<sup>181</sup>

In 2011, TDA was given a stimulus package through the Small Business Credit Initiative. In September of 2015, the contractual agreement between TDA and the U.S. Treasury expired. In the 85th

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<sup>179</sup> Tex. S.B. 1511, 85 Leg. R.S. (2017)

<sup>180</sup> Tex. S.B. 1538, 85 Leg. R.S., (2017)

<sup>181</sup> Tex. S.B. 864, 85 Leg. R.S. (2017)

Legislative Session, the legislature passed House Bill 2004 which limited the economic development programs to loan and matching grant structured activities.<sup>182</sup> House Bill 2004 places some restrictions on the program while also allowing it to be used for certain other rural economic development initiatives. TDA would be allowed to create funding programs designed to help rural economic development, and rural agricultural manufacturing. According to Commissioner Miller, TDA is continuing to implement the previous program and preparing guidelines for the loan program as money is received.<sup>183</sup>

House Bill (HB) 3433 required state agencies to identify if a new state agency proposed rule that would have a negative economic impact on a rural community and its small businesses. The legislation required agencies to reduce the impact to the community if possible. Agencies are required to submit an economic impact statement and regulatory flexibility analysis to each member of the legislature who represents a rural community impacted.<sup>184</sup>

### **Committee Hearing Testimony**

The Texas Water Development Board (TWDB) was charged with implementing SB 1511, which required the agency to adopt rules specifying the manner for prioritizing projects addressed by an agency rule revision. According to TWDB, in order to receive the most input on implementation, the agency held a work session, requested public comment, and received remarks from stakeholders. On March 21, 2018, the Board adopted the rules which became effective April 6, 2018.<sup>185</sup> TWDB explained that the new rules provide more transparency in the regional water planning process, confirm that projects which are included in the State Water Plan or prioritized by regional water planning groups are realistic and can be implemented, and allow planning groups to adopt the simplified planning cycle if it is more economical for the region.<sup>186</sup>

In implementing SB 1511, TWDB explained that they continue with the "bottom-up" approach to water planning. Regional water planning groups determine which projects best meet the needs of their population. With the new rules, the groups will still determine which projects are best, but will also encourage them to ensure that the projects are a possibility.<sup>187</sup>

There are circumstances when there are no significant changes to a regional water planning group's projects or plan. In order to address these situations and the burden of planning on some regions, the "simplified planning cycle" was created which can be used when there has been no significant change to the water supply, availability, and demand within the last planning cycle. The process requires the regional water planning groups to update their groundwater and surface water availability models and meet any changes in statute that were not required previously. The regional water planning groups

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<sup>182</sup> Senate Committee on Agriculture, Water and Rural Affairs Hearing, June 4, 2018 (written testimony Commissioner Sid Miller, Texas Department of Agriculture).

<sup>183</sup> *Id.*

<sup>184</sup> Tex. H.B. 3433, 85 Leg., R.S. (2017)

<sup>185</sup> Senate Committee on Agriculture, Water, and Rural Affairs Hearing, June 5, 2018 (written testimony Temple McKinnon, Texas Water Development Board).

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

would also have to submit a plan for approval as part of the regular process to meet TWDB requirements for inclusion in the State Water Plan.<sup>188</sup>

TWDB explained that they also made a rule change which required regional water planning groups to include information in the State Water Plan. New information related to implementation and impediments to the development of water plan projects which have been prioritized by the Board for financial assistance from the State Water Implementation Fund for Texas (SWIFT).<sup>189</sup>

Lastly, TWDB added the following changes to membership and operation for regional water planning groups: an ex-officio member from the State Soil and Water Conservation Board must serve on each planning group, public meetings and hearings must be held at a central location that is accessible to the public, and the revisions or changes be added to the online Regional Water Planning Public Notification Quick Reference Guide for use by all planning groups.<sup>190</sup>

Senate Bill 1538 expanded the permissible use of the floodplain management account to include data collection and analysis, outreach efforts, and planning. TWDB explained that they have partnered with the National Weather Service (NWS) and the United States Geological Survey (USGS) to identify and place flood gages throughout the state. From the previous biennium, the Disaster Contingency Fund No. 453 funded 29 gages to be installed and an additional 20 flood gages will be installed in the current biennium.<sup>191</sup>

The average cost of a flood gage is \$55,000 to install and \$17,000 per year to maintain and operate.<sup>192</sup> TWDB has funding available to support a network of 60 gages.<sup>193</sup>

TWDB is continuing to collaborate with the NWS for improvements to data received from gages through model calibration which allows the agency to manipulate data to create an accurate model representation and expanding technology. With the expanded use of the Disaster Contingency Fund, 23 locations were able to calibrate models. A contractor is being used to calibrate 24 points along the San Jacinto River and in the Houston area.<sup>194</sup> TexMesonet, a statewide earth observation data collection network, is expanding their first state-wide network of weather stations with 48 stations in areas of the state that require additional monitoring.<sup>195</sup>

TWDB has continued to build flood warning systems and data collection through the TexasFlood.org website. The website focuses on river stages with a halo surrounding the point on the map to indicate

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<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> Senate Committee on Agriculture, Water, and Rural Affairs Hearing, June 5, 2018 (written testimony Sam Marie Hermitte, Texas Water Development Board).

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

weather condition improvement or decline.<sup>196</sup> The agency has offered \$1.8 million in community assistance to be used for flood protection planning, early warning systems, and response plans.<sup>197</sup>

Following the 2015 flood disasters, TWDB was tasked with a statewide flood assessment to provide an overview of existing programs, risks, and needs for floodplain management and mitigation. The agency incorporated broad input from stakeholders with an intent for the report to standardize project evaluations or prioritize projects for funding.<sup>198</sup>

TCEQ has incorporated HB 3433, which requires state agencies to consider the economic impact of proposed rules on rural communities and include the findings in an Economic Impact Statement. The impact statement is included in the fiscal note prepared for the rule making.<sup>199</sup> Additionally, TCEQ has followed the Attorney General guidelines with directions for issuing the Small Business and Rural Communities Impact Statements.<sup>200</sup> Per the legislation, the agency uses the definition of rural which refers to a community of less than 25,000 population.<sup>201</sup>

The TCEQ has developed a process for including the rural communities' assessment. Based on the studies, TCEQ staff will decide if the rule adversely affects rural communities and to what extent. With this determination, the agency can: establish separate compliance or reporting specifics for the communities, replace design standards with performance standards; exempt the communities, and/or facilitate other actions which would reduce the impact to the communities. If TCEQ finds that there is an adverse economic effect on a community, the agency will prepare an Economic Impact Statement and a Regulatory Flexibility Analysis. Simultaneously, TCEQ will determine if the rule qualifies for an exemption based on health, safety, and welfare.<sup>202</sup>

If TCEQ determines that an agency does have an adverse effect on rural communities through the internal process, the information will be included in the Texas Register notice and a copy of the notice will be sent to each Legislator representing a rural community.<sup>203</sup>

## Recommendations

The committee recommends continuing to monitor legislation as enacted by the 85th Legislature and how it affects the state. Specifically, the committee will monitor legislation that adversely affects rural communities in the state.

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<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> Senate Committee on Agriculture, Water, and Rural Affairs Hearing, June 5, 2018 (written testimony Matt Phillips Texas Commission on Environmental Quality).

<sup>200</sup> *Id.*

<sup>201</sup> Texas Gov. Code § 2006.001 (1-a) 2017, <https://statutes.capitol.texas.gov/Docs/GV/htm/GV.2006.htm#2006.001> (last visited Sept. 7, 2018).

<sup>202</sup> Senate Committee on Agriculture, Water, and Rural Affairs Hearing, June 5, 2018 (written testimony Kim Wilson, Texas Commission on Environmental Quality).

<sup>203</sup> *Id.*