WATER SUPPLY OPTIONS AND CHALLENGES

Association of Water Board Directors

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presented by

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"State Water"

The water of the ordinary flow, underflow, and tides of every flowing river, natural stream, and lake, and of every bay or arm of the Gulf of Mexico, and the storm water, floodwater, and rainwater of every river, natural stream, canyon, ravine, depression, and watershed in the state is the property of the state

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- History of Texas Water Rights Laws
  - Irrigation Acts
  - Water Rights Adjudications -- Established vehicle to quantify and reconcile the water rights across the state
  - Senate Bill 1 (1997)
    - State and Regional plans
    - Water planning, water management, marketing, transfers, surface and groundwater supplies, and financial assistance
  - Senate Bill 2 (2001)
    - Implementation and Financing
  - Senate Bill 3 (2007)
    - Environmental Flows
    - Water Conservation

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- Obtaining a Water Right

  (Water Code § 11.134)

  - Unappropriated Water Available
  - Beneficial Use Requirement
  - Non-Impairment of Existing Water Rights
  - Not Detrimental to the Public Welfare (social, economic, environmental)
  - Environmental Impacts Considered
  - Consistency with Regional and State Plans
  - Conservation and Drought Contingency Plans

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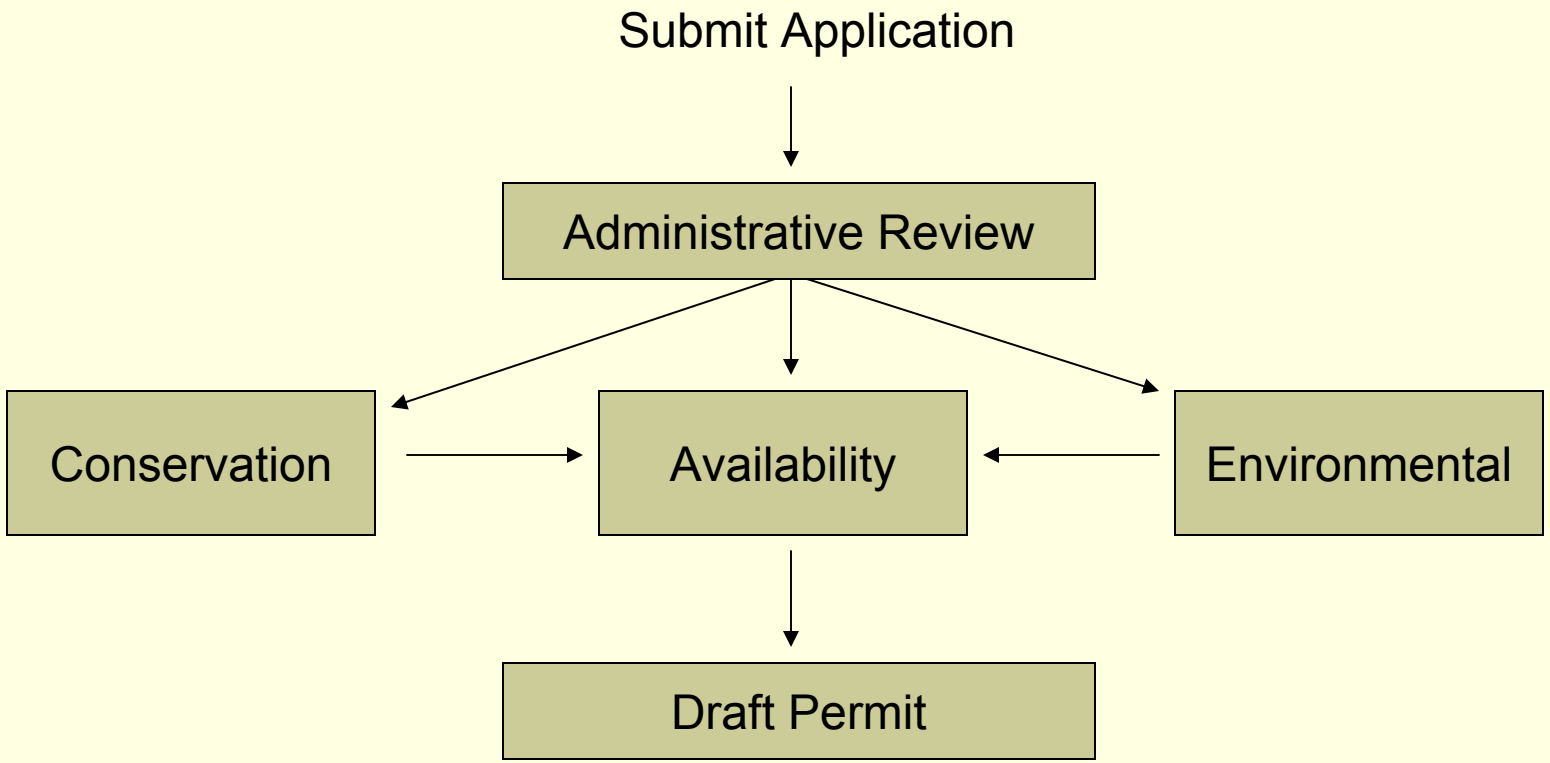
Water Rights Processing



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- Administrative Review
  - General provisions for reviewing all administrative actions
    - Provisions of 30 TAC Chapter 281
  - Application must include information necessary for staff to review and fully consider request
    - Provisions of 30 TAC §295.1 - §295.16
  - Applicant must remit appropriate fees
    - Provisions of 30 TAC §295.131 - §295.140
  - Commission must be able to prepare notice of application

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- Notice
  - Only one notice for water rights applications
  - Notice requirements for new appropriations
  - Notice requirements for amendments
  - Notice requirements for IBT applications
  - Notice exemptions

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- Technical Review
  - Resource Conservation Review
    - Water conservation standards
    - Consistency with State Water Plan
  - Environmental Review
    - Water quality impacts of project
    - Protection for aquatic and riparian habitat
  - Water Availability Review

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- Developing a Draft Permit
  - All technical disciplines prepare memoranda regarding their review of the application
  - Permit writer prepares a draft permit that includes recommendations and grants the permit if water is available
  - Special conditions included to impose restrictions on use of water

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- SOAH
  - Texas Government Code
    - Administrative Procedure Act
    - State Office of Administrative Hearings (SOAH)
  - SOAH Rules (Title 1, Chapter 155)
  - TCEQ Rules (Title 30, Chapters 39, 55, 80)
  - Rules of Evidence and Civil Procedure
  - Statutes and regulations related to type of application

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- Texas Water Code sections:
  - 11.121 – Permit requirement
  - 11.122 – Permit amendment requirement
  - 11.147 – Effect of permit on bays, estuaries, and instream flows
  - 11.148 – Emergency suspension of permit conditions
  - 11.1491–Evaluation of bays and estuaries data
  - 11.150 – Effects of permit on water quality
  - 11.152 – Effects of permit on fish and wildlife

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- Surface Water Permitting – The "storage, taking or diversion" of water
  - TWC § 11.022 – "When the right to use state water is lawfully acquired, it may be taken or diverted from its natural channel."
  - TWC § 11.023 – Identifies the uses for which "state water may be appropriated, stored, or diverted."
  - TWC § 11.121 – "No person may appropriate any state water or begin construction of any work designed for the storage, taking or diversion of water without first obtaining a permit..."
  - TWC § 11.002 – Defines a "water right" as a right to "impound, divert, or use state water."

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- Protecting Water for the Environment
  - 1917 Conservation Amendment to the Texas Constitution
    - Directed the Legislature to pass "all laws" for the "preservation and conservation" of water resources
  - 1985 Legislation – Mandates that TCEQ, in its "consideration of an application for a permit to store, take, or divert water," assess the effects on:
    - TWC § 11.147(b) – Bays and Estuaries
    - TWC § 11.147(d) – Existing Instream Uses
    - TWC § 11.150 – Water Quality
    - TWC § 11.152 – Fish and Wildlife Habitats
    - TWC § 11.151 – Groundwater or Groundwater Recharge
  - Senate Bill 3 (2007)

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- Applications Subject to an Environmental Assessment:
  - Increase the total appropriative amount
  - Significant change in point of diversion
  - Change in diversion rate
  - Significant change in place of use

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- The Environmental Assessment Process
  - 30 TAC 297.53 – 297.56
  - Commission staff consider the "effects" of a proposed appropriation or amendment on the instream uses of water
    - Analysis of representative stream gauges near the appropriation site
    - Review of site specific information, if available
    - Quantifies the base median flows necessary to maintain aquatic life
    - Imposition of restrictions within a water right permit if the base median flow patterns are impacted by the proposed application

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- Regional Water Planning
  - Senate Bill 1 (1997) – Divided State into 16 Regions
  - 50-Year Plans; Revised Every 5 Years
  - Texas Water Development Board Review
  - Regional Plans Comprise State Water Plan
  - Why is Regional Water Planning Important?
    - Consistency provision in Water Code Section 11.134

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- Water Law 101
  - Rule of Capture for Groundwater
    - Limited exceptions
    - Questionable reliability

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- Water Law 101
  - Groundwater Conservation Districts
    - Regulate spacing
    - Regulate production
    - Exemption for domestic and livestock
    - Define desired future conditions

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Topics for Discussion

- WAM Permitting Requirements
  - Application requirements
  - Subordination Agreements
- Return Flows, Surplus Water and Reuse
  - Direct vs. Indirect Reuse
  - Current trends in reuse permitting
- Environmental Flows & Texas Water Trust
  - Environmental assessments in the permitting process
  - Instream uses of water
- Watermaster Programs

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WAM Permitting

Water Code Section11.134(b)

The commission shall grant the application only if:

(1) the application conforms to the requirements prescribed by this chapter and is accompanied by the prescribed fee;

(2) unappropriated water is available in the source of supply;

(3) the proposed appropriation:

(A) is intended for a beneficial use;

(B) does not impair existing water rights or vested riparian rights;

(C) is not detrimental to the public welfare;

(D) considers the assessments performed under Sections 11.147(d) and (e) and Sections 11.150, 11.151, and 11.152; and

(E) addresses a water supply need in a manner that is consistent with the state water plan and the relevant approved regional water plan for any area in which the proposed appropriation is located, unless the commission determines that conditions warrant waiver of this requirement; and

(4) the applicant has provided evidence that reasonable diligence will be used to avoid waste and achieve water conservation as defined by Subdivision (8)(B), Section 11.002.

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Availability Rule

Base rule – 30 TAC Section 297.42

Except as provided by Texas Water Code (TWC), §11.1381, and §297.19 of this title (relating to Term Permit Under Texas Water Code §§11.1381 and 11.153, 11.155), ***an application for a new or increased appropriation will be denied unless there is a sufficient amount of unappropriated water available for a sufficient amount of the time to make the proposed project viable and ensure the beneficial use of water without waste.***

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Municipal Supplies

Firm Yield Requirement – 30 TAC 297.42(e)

For an application for an on-channel storage facility to be authorized for domestic or municipal water use, the proposed diversion right of the reservoir must be equal to its firm yield. The purpose of this limitation is to ensure a secure and dependable source of water supply for uses necessary to protect the public health, safety, and welfare (see also 30 TAC §290.41(b) requiring public water systems to have a "safe" yield capable of supplying the maximum daily demands during extended periods of peak usage and "critical hydrologic conditions"). Such reservoir may be authorized in excess of its firm yield when the implementation of a drought management plan or alternative sources of water supply such as groundwater, other reservoir systems, or other means are available to satisfy water needs during drought periods when the reservoir's normal supply capabilities would be exceeded.

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Subordination

- What is a subordination agreement?
  - Agreement between parties to alter the priority of respective water rights.
  - Contract independent of permit issuance. Breach of agreement governed by contract law.
  - Honored as between the parties to the agreement and sometimes included in Commission WAMs.
  - Can subordination provisions be written into water rights as a special condition?

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Subordination Considerations

- What conditions should be in a subordination agreement?
- Will the Commission enforce a subordination agreement? If so, what provisions are enforceable? Is this an administrative action as well as a contract right?
- What about interjacent third party water right holders not privy to the subordination agreement?
- Can a subordination agreement exist in perpetuity as tied to the underlying water rights?

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Environmental Flows

- Recent Legislative Action
  - Senate Bill 1639 (78th Session – 2003)
    - Created the Environmental Flows Study Commission
    - Moratorium on Issuing Environmental Permits
  - Legislative Interim (2004)
    - NAS Evaluation Regarding Environmental Flows
    - Senate Select Committee on Water Policy
  - Senate Bill 3 (80th Session – 2005)
    - Stakeholders Process for Environmental Flows
    - Re-opener Clause for Pending Applications

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Permitting Water Rights

- Obtaining a Water Right (Water Code § 11.134)
  - Unappropriated Water
    - Computer Models
    - 75/75 Rule
    - Municipal Supply: Generally, 100% of water available 100% of the time
    - Other
  - Beneficial Use Requirement
  - Impairment of Existing Water Rights

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Permitting Water Rights

- Obtaining a Water Right (cont.)
  - Public Welfare
    - Social, economic, and environmental effects
  - Consistency with Regional Plans
    - Specific identified projects
  - Conservation and Drought Contingency Plans
    - All new and amended water rights
    - Must include 5 year and 10 year targets

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Summary

- History of Texas water law runs deep and can bring out the best (or worst) in society
  - “Whiskey is for drinkin’ and water is for fightin”
- Process of planning for and securing a surface water right is timely and costly – a mine field full of things to consider
- Current trends expected to impacts water rights
  - Outcome of reuse debate
  - Direction of environmental flows policy in Texas
  - Further debate on water quality impacts associated with the Clean Water Act and Endangered Species Act

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Groundwater

- Rule of Capture – absent malice or willful waste, landowners have right to take all the water they can capture under their land and can use it in any possible manner.
- Water Code § 36.002 – rights of landowners in groundwater subject to rules promulgated by groundwater conservation districts.

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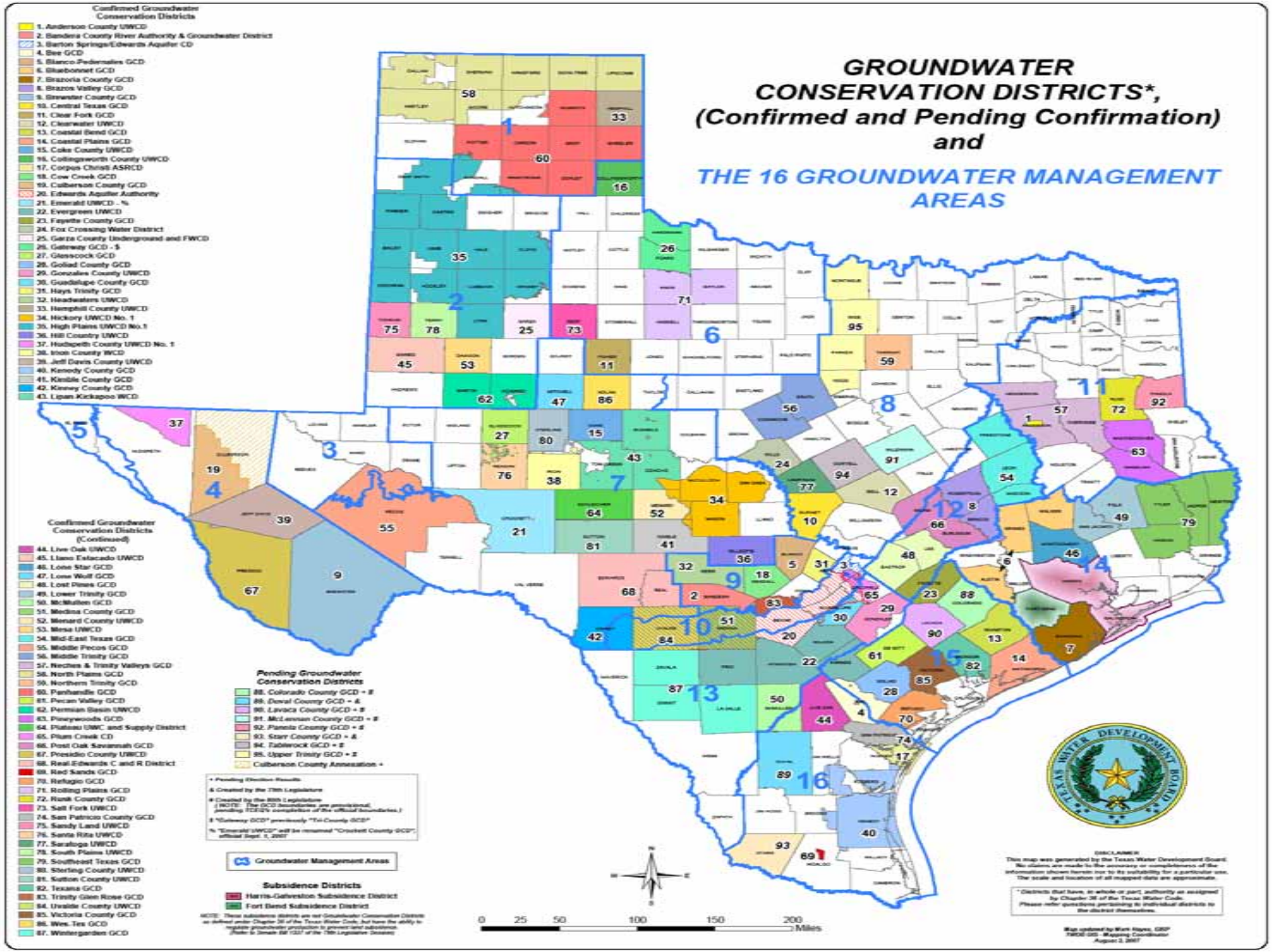
Legislative Background of Groundwater Conservation Districts

- SB 1 – 1997
  - -- §36.0015 – GCDs are the state's preferred method of groundwater management
- SB 2 – 2001
  - -- Consensus Groundwater Stakeholders group
  - -- 15 GCDs created or ratified in SB 2 and an additional 20 GCDs created during 77th Legislature


GROUNDWATER CONSERVATION DISTRICTS*, (Confirmed and Pending Confirmation) and
THE 16 GROUNDWATER MANAGEMENT AREAS
Confirmed Groundwater Conservation Districts
1. Anderson County UWCD
2. Bandera County River Authority & Groundwater District
3. Barton Springs/Edwards Aquifer CD
4. Bee GCD
5. Blanco Pedernales GCD
6. Bluebonnet GCD
7. Brazoria County GCD
8. Brazos Valley GCD
9. Brewster County GCD
10. Central Texas GCD
11. Clear Fork GCD
12. Clearwater UWCD
13. Coastal Bend GCD
14. Coastal Plains GCD
15. Coke County UWCD
16. Collingsworth County UWCD
17. Corpus Christi ASRCD
18. Cow Creek GCD
19. Culberson County GCD
20. Edwards Aquifer Authority
21. Emerald UWCD - %
22. Evergreen UWCD
23. Fayette County GCD
24. Fox Crossing Water District
25. Garza County Underground and FWCD
26. Gateway GCD - $
27. Glasscock GCD
28. Goliad County GCD
29. Gonzales County UWCD
30. Guadalupe County GCD
31. Hays Trinity GCD
32. Headwaters UWCD
33. Hemphill County UWCD
34. Hickory UWCD No. 1
35. High Plains UWCD No.1
36. Hill Country UWCD
37. Hudspeth County UWCD No. 1
38. Irion County WCD
39. Jeff Davis County UWCD
40. Kenedy County GCD
41. Kimble County GCD
42. Kinney County GCD
43. Lipan-Kickapoo WCD
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44. Live Oak UWCD
45. Llano Estacado UWCD
46. Lone Star GCD
47. Lone Wolf GCD
48. Lost Pines GCD
49. Lower Trinity GCD
50. McMullen GCD
51. Medina County GCD
52. Menard County UWCD
53. Mesa UWCD
54. Mid-East Texas GCD
55. Middle Pecos GCD
56. Middle Trinity GCD
57. Neches & Trinity Valleys GCD
58. North Plains GCD
59. Northern Trinity GCD
60. Panhandle GCD
61. Pecan Valley GCD
62. Permian Basin UWCD
63. Pineywoods GCD
64. Plateau UWC and Supply District
65. Plum Creek CD
66. Post Oak Savannah GCD
67. Presidio County UWCD
68. Real-Edwards C and R District
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83. Trinity Glen Rose GCD
84. Uvalde County UWCD
85. Victoria County GCD
86. Wes. Tex GCD
87. Wintergarden GCD
Pending Groundwater Conservation Districts
88. Colorado County GCD + #
89. Duval County GCD + &
90. Lavaca County GCD + #
91. McLennan County GCD + #
92. Panola County GCD + #
93. Starr County GCD + &
94. Tablerock GCD + $
95. Upper Trinity GCD + #
Culberson County Annexation +
+ Pending Election Results
& Created by the 79th Legislature
# Created by the 80th Legislature
$ "Gateway GCD" previously "Tri-County GCD"
% "Emerald UWCD" will be renamed "Crockett County GCD", effective Sept. 1, 2007
Groundwater Management Areas
Subsidence Districts
Harris-Galveston Subsidence District
Fort Bend Subsidence District
NOTE: These subsidence districts are not Groundwater Conservation Districts as defined under Chapter 36 of the Texas Water Code, but have the ability to regulate groundwater production to prevent land subsidence. (Refer to Senate Bill 1127 of the 75th Legislative Session)
0 25 50 100 150 200 Miles
TEXAS WATER DEVELOPMENT BOARD
DISCLAIMER:
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* Districts that have, in whole or part, authority as assigned by Chapter 36 of the Texas Water Code. Please refer questions pertaining to individual districts to the district themselves.
Map updated by Mark Hayes, GISP
TWDB GIS - Mapping Coordinator
August 3, 2007

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Texas Law Governing Groundwater

- Rule of Capture – absent malice or willful waste, landowners have right to take all the water they can capture under their land and can use it for a beneficial use. This is a common law doctrine, first adopted in 1904 (*East*) and most recently recognized in the 1999 "Ozarka" case.
- Water Code §36.002 – rights of landowners in groundwater are recognized, subject to rules promulgated by groundwater conservation districts.

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GROUNDWATER DISTRICTS

- Water Code § 36.0015 - groundwater districts are state's "preferred method of groundwater management."

  -- added by Senate Bill 2 in 2001

- Districts are conservation and reclamation districts created pursuant to Texas Constitution's Conservation Amendment

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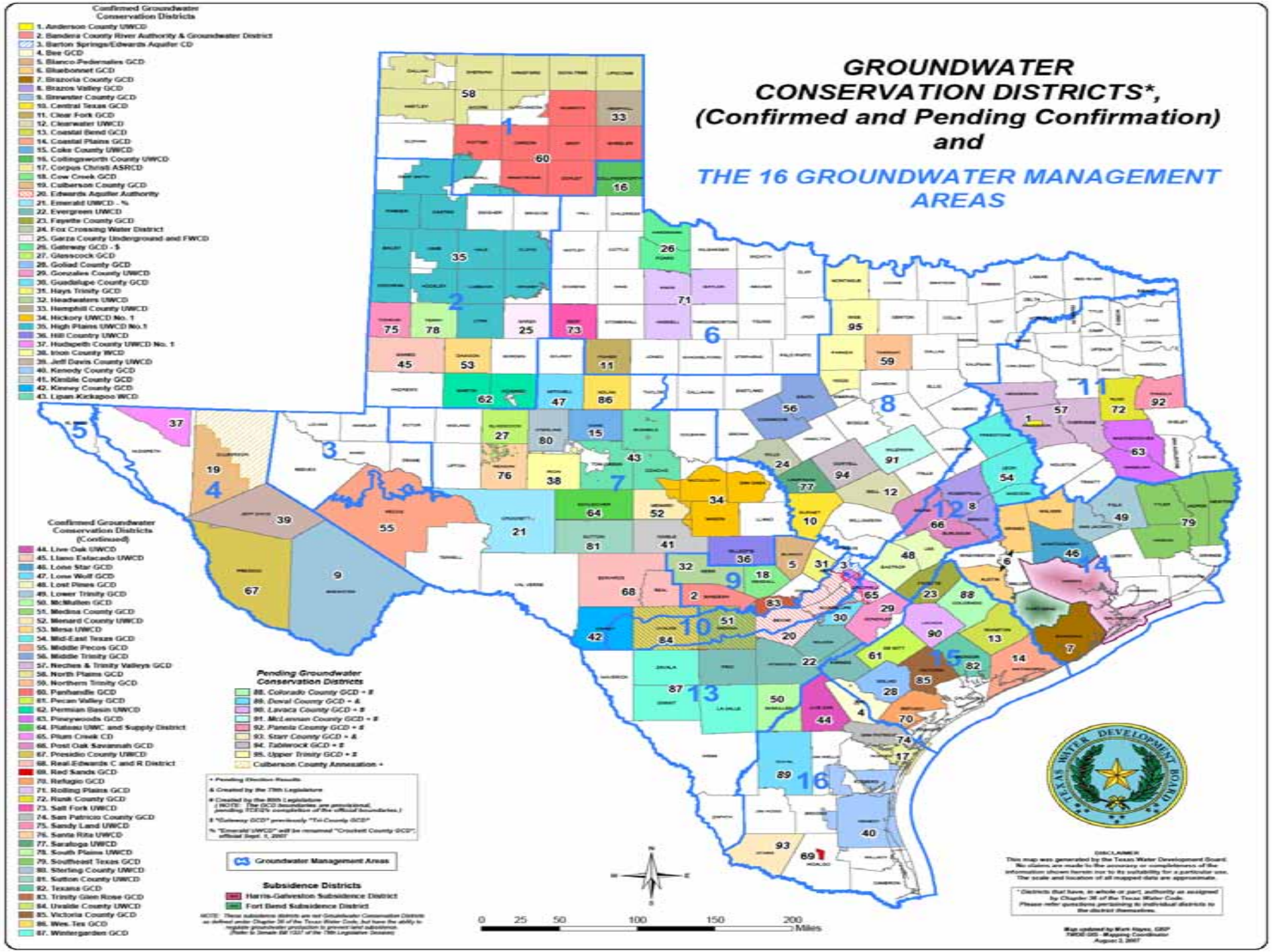
GROUNDWATER DISTRICTS

- 87 districts, with 8 additional districts pending confirmation.
- Of 254 counties in Texas, 144 are at least partially within a district.
- Approximately 90% of groundwater usage is captured within the boundaries of a District (TWDB 2006 report).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GROUNDWATER DISTRICT'S REGULATORY TOOLS:

- A district must first develop a Management Plan – which establishes general regulatory framework and sets district's objectives and priorities and recognizes water availability

- A district then adopts rules after notice and hearing – which govern all activities affecting use of groundwater located within district

- A district must participate in setting Desired Future Conditions of its aquifers

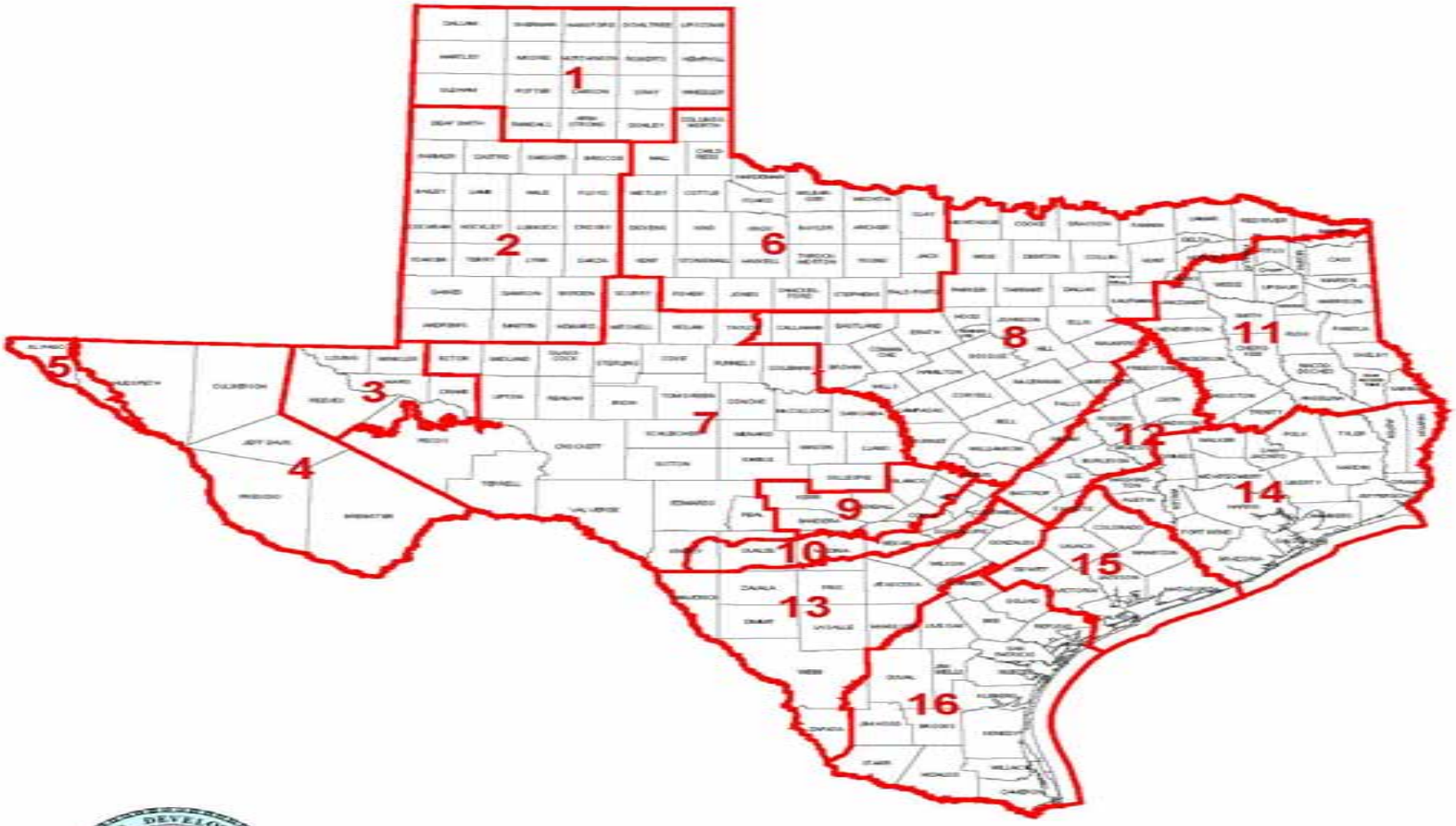
GROUNDWATER AVAILABILITY

New procedure set by Legislature in 2005 for determining statewide groundwater availability:

- Groundwater districts within each of 16 “Groundwater Management Areas” required to conduct joint planning and submit to TWDB “Desired Future Conditions” (DFCs) of state’s major aquifers by September 2010; there is an appellate process

- TWDB to run its groundwater availability models (GAMs) to apply DFC assumptions to generate “Managed Available Groundwater” (MAG) numbers

Groundwater Management Areas in Texas



Evaluating the Sufficiency of Your Utility's Current Water Supply

Is it time to seek alternative supplies?

- Assess your utility's demand and supplies
- Plan early (lead times to bring new water sources on-line are often lengthy)

DEMAND ASSESSMENT

- Conduct independent assessment of demand and population projections.
- Review Regional Plan and TWDB data.
- Assess other users' demands where they are in competition for the same resource.
- TCEQ Rule 290.41(b)("Water Quantity") requires:

  Sources of supply, both ground and surface, shall have a safe yield capable of supplying the maximum daily demands of the distribution system during extended periods of peak usage and critical hydrologic conditions.

ASSESSMENT OF SUPPLY

- Assess groundwater availability by investigating your GMA/DFC planning effort (DFCs due NLT September 2010)
- Review other users' current and future water supply plans (see Regional Plan and local plans)
- Consider other factors limiting groundwater supplies:
  - Is there subsidence?
  - Are there endangered species?
  - Are there springflow concerns?

If conversion from groundwater to surface water is imminent, factor in:

- Costs and lead time required for financing
- Consider rate increases to cover costs of developing alternative supplies
- Lead time for and requirements for permitting
- Contract negotiation for new source of supply

If conversion from groundwater to surface water is imminent, factor in:

- Whether your local groundwater district provides incentives for your utility to convert
- Plan for logistical challenges:
  - treatment plant modifications to handle blended or different source of water
  - system design, engineering

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Be creative in developing new sources of supplies:

- Consider regional partnerships
- Consider regional entity that can provide wholesale service and unique financing options (public utility agency, special district, existing river authority)

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Water Rate Regulations

- Retail Rates

  -- Who has authority over retail rates?

  - Municipality/District has exclusive original jurisdiction over all water and sewer utility rates, operations, and services provided by water and sewer utility within corporate limits.
  - TCEQ has exclusive appellate jurisdiction to review orders of municipalities/districts.
  - TCEQ has exclusive original jurisdiction over all water and sewer utility rates, operations, and services outside boundaries (and within boundaries if original jurisdiction surrendered to TCEQ).

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Water Rate Regulations

- Retail Rates
  -- What are standards for retail rates?
  - Retail rates must be just and reasonable.
  - Retail rates cannot be unreasonably preferential, prejudicial, or discriminatory.
  - Retail rates shall be sufficient, equitable, and consistent in application to each class of customers.
  - Retail rates must preserve the financial integrity of the retail public utility [§§13.043, 13.182, Water Code]
  - Retail rates must permit the utility a reasonable opportunity to earn a reasonable return on invested capital that is used and useful in rendering service to the public, over and above its reasonable and necessary operating expenses.
  - Components of invested capital and net income are set by statute and TCEQ regulations.

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Water Rate Regulations

- Wholesale Rates

  -- Who has authority over wholesale rates?

  - Rates are set by contract between wholesale provider and retail purchaser.
  - TCEQ has appellate jurisdiction over rate decision of retail public utility affecting the amounts charged to another retail public utility.

    §13.043(f).
  - TCEQ has jurisdiction over complaints for prices of conserved or stored water. §11.036(b).
  - TCEQ has jurisdiction over complaints for prices charged for water from dams, reservoirs, and lakes. §11.041.
  - TCEQ can review and fix rates for raw or treated water for any purpose included in Chapters 11 and 12 of Water Code.

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Water Rate Regulations

- Wholesale Rates
  -- What are standards for wholesale rates?
  - If disputed rates are charged pursuant to a contract, there must be a preliminary evidentiary hearing to determine whether protested rate adversely affects the public interest.
  - Specific public interest criteria are in TCEQ rules. Include inquiries affecting the seller's ability to provide service, the purchaser's ability to provide service, any abuse of monopoly power, disparate bargaining power, and the like.
  - Only after disputed rates are found to adversely affect the public interest is an evidentiary hearing held on the rates.
  - Wholesale rates are held to same standards as retail rates.

WATER SUPPLY OPTIONS AND CHALLENGES

Association of Water Board Directors

January 12, 2008

presented by

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