THE FUTURE OF THE DFC APPEAL PROCESS

IS THE FUTURE APPEALING?

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CHALLENGING DFCS: THE PETITION PROCESS

Faced with a Sunset Advisory Commission recommendation that the Texas Water Development Board be removed from the DFC appeals process altogether, the TWDB actually agreed. What circumstances caused a state agency to wish away part of its responsibilities? The purpose of this paper is to look at the background of the DFC appeals process as it has evolved, and to explore the possible shape of future appeals.

I. CURRENT VEHICLES FOR CHALLENGING DFCS

The requirements and procedures for challenging desired future conditions are as murky and ill-conceived as the requirements for joint planning. Texas Water Code Section 36.108, which creates the concept of joint planning, also created a method for challenging the desired future conditions promulgated as a result of such joint planning. If a groundwater district fails to engage in joint planning, or fails to implement rules designed to ensure compliance with the DFCs, Section 36.108(f) establishes a mechanism for appeals to the Texas Commission on Environmental Quality. In addition, section 36.108(l) establishes a mechanism for appeals to the Texas Water Development Board.

TCEQ APPEALS

If a district has refused to engage in joint planning or the process failed to result in adequate planning, including the establishment of reasonable desired future conditions of the aquifers,[1] Section 36.108(f) provides that a district or person with a legally defined interest in groundwater[2] may file a petition with the Commission requesting an inquiry. The petitioner must assert one of several bases for the complaint to the Commission:

1. a district in the groundwater management area has failed to adopt rules;

2. the rules adopted by a district are not designed to achieve the desired future condition of the groundwater resources in the groundwater management area established during the joint planning process;

3. the groundwater in the management area is not adequately protected by the rules adopted by a district; or

4. the groundwater in the groundwater management area is not adequately protected due to the failure of a district to enforce substantial compliance with its rules.

Note that the first three potential challenges relate to the adoption of rules. The first ground challenges the district or districts that have not adopted any rules at all, which is unlikely to exist in today's districts. The second ground is a challenge based on the failure of each district in a GMA to adopt rules that are designed to achieve the DFCs of the groundwater resources in

[1] Emphasized here because even TCEQ fails to see this language in determining the scope of its authority. See, for example, Executive Director's Response to Mesa Request for Inquiry, TCEQ Docket Number 2010-1611-MIS.

[2] "Legally defined interest" is not a defined term under the Water Code. It probably refers to any type of ownership recognized under Texas law.

the GMA as a whole. Some districts appear to believe that their rules only need to be designed to achieve their individual DFC even though multiple DFCs exist in a GMA, but the language of this section does not support that narrow view. To be interpreted that narrowly, the language would have to read "the rules adopted by a district are not designed to achieve the desired future condition of the groundwater resources in the groundwater district established during the joint planning process." But the language used by the Legislature is "in the groundwater management area," expanding the scope of each district's responsibility for the DFCs selected across a much broader area. In GMAs where multiple districts exist over a single aquifer, and the districts have adopted different DFCs for each county or groundwater district, it will be interesting to watch each district try to fashion new rules that are designed to achieve each DFC in every area of the GMA. Because no district has extra-territorial jurisdiction, it is arguable that each district will have to do whatever is necessary to its own rules to assure that every DFC is achieved across the GMA.

The fourth basis for challenge addresses the situation where a district has adopted rules but failed to enforce compliance with those rules. Examples could be a district that passes a production limit on a per acre basis but fails to require metering to determine compliance, fails to require producers to report what required meters show, or fails to take action against those who violate the production limits.

If the Commission finds evidence adequate to show one of the alleged conditions exists, the Commission appoints a review panel. Section 36.108(h). The review panel submits a report and the Commission can ultimately take a number of actions. *See* Section 36.108(k), 36.3011, 36.303. These actions include ordering the district to take certain actions, dissolving the board of the district, or dissolving the district.

Specific provisions regarding TCEQ review of DFCs are found at 30 Tex. Admin. Code Sec. 293.23. Under the regulations of TCEQ, a person with a legally defined interest in groundwater may request a TCEQ "inquiry" if the GMA planning process does not establish reasonable desired future conditions for the aquifers in the GMA. The process is initiated by filing a petition with the executive director of TCEQ, including documentation that demonstrates that joint planning meetings were conducted. This documentation must also include:

> (A) a certified copy of the board resolutions calling for the joint planning between the districts in the GMA;
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> (B) evidence that joint planning meeting notice was received by the districts in the GMA such as a return receipt for certified mail service;
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> (C) publishers' affidavits of joint planning meeting notice; and
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> (D) copies of joint planning meeting minutes and accepted handouts certified by the districts that attended the meetings.

But the requirements for a petition don't stop there. A petitioner is additionally required to tender a "certified statement" from the petitioning district's board of directors or from the person with a legally defined interest in the groundwater within the GMA that describes why the

petitioner believes that adequate planning was not achieved in the GMA. Additionally, the petition must provide "evidence" that a district in the groundwater management area has failed to adopt rules; the rules adopted by a district are not designed to achieve the desired future condition of the groundwater resources in the GMA established during the joint planning process; the groundwater in the management area is not adequately protected by the rules adopted by a district; or the groundwater in the groundwater management area is not adequately protected due to the failure of a district to enforce substantial compliance with its rules. Once filed, the petitioner must provide a copy of the petition to all GCDs in the GMA within five (5) days of the date the petition was filed. Within 21 days of filing the petition, the petitioner must file an affidavit or other evidence (such as a return receipt card) that a copy of the petition was mailed to each GCD in the GMA.

A GCD that is the subject of a petition must file a response to the petition within 35 days of the date the petition is filed. The TCEQ is then directed to review the petition and any timely responses no sooner than 35 days or later than 90 days after the petition is filed. If the TCEQ finds that the evidence is not sufficient to show the requisite elements set forth above, the petition is dismissed. On the other hand, if TCEQ does not dismiss the petition, it must appoint a review panel and direct that panel to conduct public hearings to take evidence on the petition. No specific provision addresses the type of hearing that must take place or the availability of procedural due process safeguards for the parties to such a petition. Unlike the TWDB rules, no guidance is given in the Administrative Code as to the type of evidence that may be allowed at any hearing conducted by the review panel or whether objections to evidence will be heard. Also unlike the TWDB rules, there is no indication of whether this proceeding is regarded as a contested case hearing. Given that the TCEQ does have rules that contemplate contested case hearings in other contexts,[3] and given the apparent lack of procedural due process trappings, it appears that the review panel hearings are not contested case hearings.

No later than 120 days after the appointment of the review panel, it must tender a report to the executive director. The report must include a summary of the evidence on the petition and a list of findings and recommended actions under Tex. Water Code Sec. 36.303 and 30 Tex. Admin. Code Sec. 293.22(e). No later than 45 days after receiving the review panel's report, the executive director must recommend or take any action deemed necessary under Sec. 36.303 or Sec. 293.22(b)-(e).

Unlike the rules relating to TWDB appeals, there is no deadline within which a petition must be filed following adoption of DFCs. All actions of the TCEQ appear to be on a strict and fairly abbreviated time schedule, except that there is no deadline by which TCEQ must appoint a review panel if its review of the petition does not result in a dismissal. Otherwise, the longest a petition can languish in the system is 255 days (90 days + 120 days + 45 days). Because the procedure under Sec. 293.23 does not appear to be a contested case hearing, the substantial evidence rule should not be applicable in any further action.

[3] See, for example, 30 Tex. Admin. Code Sec. 80.1 *et seq*.

TWDB APPEALS

The second method for challenging DFCs—the one roundly criticized by the Sunset Advisory Commission--is set forth in Section 36.108(l), which provides that a person with a legally defined interest in groundwater in a GMA can bring a petition before the Board asserting that the districts in a GMA did not establish "a reasonable desired future condition" for the groundwater resources in the GMA.[4] Section 36.108(l) does not further suggest the scope of inquiry regarding the reasonableness of DFCs. However, Texas Administrative Code Section 356.45 sets forth several factors that the Board "shall" consider:

> The board shall consider the following criteria when determining whether a desired future condition is reasonable:
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> (1) the adopted desired future conditions are physically possible and the consideration given groundwater use;[5]
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> (2) the socio-economic impacts reasonably expected to occur;
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> (3) the environmental impacts including, but not limited to, impacts to spring flow or other interaction between groundwater and surface water;
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> (4) the state's policy and legislative directives;
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> (5) the impact on private property rights;
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> (6) the reasonable and prudent development of the state's groundwater resources; and
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> (7) any other information relevant to the specific desired future condition.

Once a petition is received, the Board determines if it is "reviewable" under the standards set forth in Texas Administrative Code Section 356.43(a). A petition is reviewable if:

> (1) the petition conforms to the requirements of this subchapter;
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> (2) the districts have adopted their desired future conditions;
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> (3) the petitioner has provided the districts, whose adopted desired future condition is being appealed, with a copy of the petition and supporting evidence that meets the requirements of subsection (b) of this section, at least thirty (30) days prior to filing an appeal with the board;
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> (4) the substantive issues raised in the petition have not been previously reviewed by the board; and

[4] Note that the Code refers to a single DFC for groundwater resources in a GMA; various districts assert that the language of Section 36.108(d) allows multiple DFCs for a homogenous aquifer within a GMA.

[5] The quoted language of subsection 1 is copied verbatim from the language found in the Code; its meaning remains obscure.

(5) no more than one year has passed since the districts' adoption of the desired future condition.

Note that the petitioner must provide a copy of the petition to the affected districts at least 30 days before filing it with the Board,[6] and the petition must be filed within one year of the adoption of the challenged DFC.[7] The Board staff has determined that the 30 day requirement does not extend the one year deadline for filing a petition.[8] Thus, prudence dictates that the petitioner send a copy of the proposed petition to the relevant districts well in advance of the one year deadline. The Board may, however waive any of these provisions upon a showing of good cause. Section 356.43(a)(6).

Once the petition is received, the Board has 10 business days to acknowledge receipt. Once that acknowledgement is received, the districts may, within 10 days of their receipt of Board acknowledgement, request postponement of the proceedings for 60 days to "encourage consultation and resolution of the petition." However, no provision is made to mandate any actual dispute resolution procedures.

Under Section 356.43(d), the petition must be presented to the Board within 120 days after the expiration of the 60 day postponement.[9] Section 36.108(l) requires a hearing be held by the executive administrator or his designee before the petition is presented to the Board, which means that the evidence gathering hearing must be held sometime after the expiration of the 60 day postponement and before the expiration of 120 days. As a practical matter, the hearing must take place early enough in the 120 day period to allow the staff to digest the evidence and make recommendations to the Board. Thus, the parties will almost necessarily have to begin preparation for the evidentiary hearing while engaged in "consultation and resolution."

While the Water Code requires an evidentiary hearing before the Board hears the petition, it is silent as to the nature of that hearing. The Administrative Code, however, sets forth certain parameters for this evidence gathering hearing. Section 356.44 reiterates that the executive administrator shall hold at least one hearing "to take testimony on the petition from the petitioner and respondents." The hearing must be at a central location in the GMA.

Of interest is the nature of the evidentiary hearing. Section 356.44(d) explicitly states that the hearing is not a "contested case" hearing. Further, the Board staff has made it clear that the evidentiary hearing will not in fact be a contested case hearing. This invokes a phrase with specific meaning and import: the hearing is not of the type required to invoke the substantial evidence rule upon any subsequent suit challenging the DFC. Note that nothing in the Water Code or the rules of the Board requires or even mentions an obligation to adhere to the Texas Administrative Procedure Act in terms of the joint planning required by §36.108. Similarly, the Board has stated that "it decided when it developed the petition process that the Rules of

[6] No explanation is given for the requirement that the petition be delivered to the districts at least 30 days before filing with the Board. There is no requirement that the districts review and respond to the petition.

[7] The TWDB Staff appears to believe that the one year deadline is a complete bar to filing a petition.

[8] Correspondence from Kenneth Peterson to Ronald Fieseler, dated September 11, 2009.

[9] No provision requires that the petition be presented within 120 days of the Board acknowledgement of receipt of the petition if the districts do not request postponement, apparently recognizing that the districts will always request postponement.

Evidence and Rules of Civil Procedure would not apply to these proceedings."[10] It can therefore be assumed that the appeal procedure outlined in § 36.108(l) is not intended to provide the type of hearing in which the legal rights, duties or privileges of a party will be determined.[11]

It is also noteworthy that § 356.44(f) provides for taking "written evidence in any form" from "other interested persons" after the close of the hearing, which becomes part of the record to be considered by the Board under § 346.44(g)(3). TEX. GOV'T CODE 2001 (the Administrative Procedures Act) "[d]oes not support the practice of allowing unsworn public comment that is not subject to cross-examination in an adjudicative proceeding…"[12]

Given the proclamation that the hearing is not a contested case hearing, it becomes important to understand just what type of proceeding this is. Clearly, the proceeding is not "litigation." It is likewise not an adjudicative hearing as that term is generally understood. This is true because the hearing does not contemplate cross examination and does not permit evidentiary objections. No provision is made to subpoena witnesses or compel discovery of any kind. Therefore, if the Board's action on DFCs is meant to affect the individual rights of the parties, the procedure would violate procedural due process.[13] In fact, even the GMA process itself cannot be characterized as adjudicative in nature because the districts in the GMAs are not statutorily required to hold contested case hearings before adopting DFCs. At most, the opportunity for meaningful input from any private party is limited to making "public comments" at GMA meetings. The districts, individually and acting collectively as GMAs, are loath to permit cross examination of their consultants or members. Because the proceeding is not a contested case, is not litigation and is not adjudicatory in nature, a party should be able to challenge DFCs through the judiciary, and should not face the substantial evidence rule. Again, any other result would result in a deprivation of procedural due process.

Once the hearing is concluded, the staff is charged with the responsibility of sorting through all the evidence and making findings. The mandatory findings and permissive summaries, analyses and recommendations are then presented the Board within 120 days of the expiration of the "consultation and resolution" period, if invoked by the districts. Presumably, the staff work product must be presented to the Board within 120 days of the staff's acknowledgment of the receipt of the petition if the districts do not invoke their right to a 60 day delay period. Pursuant to §356.45(c), the Board "shall" base any recommended revisions only on evidence in the hearing record, which consists of:

1. the petition and the respondent's rebuttal;

2. the testimony and evidence presented at the hearing;

3. the written comments submitted by other interested persons;

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[10] Correspondence from Joe Reynolds dated November 16, 2009.

[11] *See, generally,* Beal, *Texas Administrative Practice and Procedure,* Vol 1, §5.6 et seq.

[12] *City of Arlington*, 232 S.W.3d at 254; *see also Railroad Commission of Texas v. WBD Oil & Gas Co. and WBD Oil & Gas Co., Inc.*, 104 S.W.3d 69 (Tex. 2003).

[13] *Bi-Metallic Investment Co. v. State Bd of Equalization,* 239 U.S. 441 (1915).

4. the list of findings, the summary and analysis of the evidence, and any recommendations prepared by board staff;

5. the minutes of the board's public deliberation on the petition;

6. the board's report containing recommended revisions transmitted to the districts; and

7. any other information relevant to the particular hearing.

Following the hearing, the Board can either hold that the DFCs are reasonable or unreasonable. If the Board holds that the DFCs are reasonable, the administrative issue ends. If the Board finds the DFCs to be unreasonable, the process proceeds to an uncertain finish. Both the Water Code and the Administrative Code provide for the process that must be followed in the event the DFCs are held to be unreasonable. Some have suggested that the process is pointless because the districts have the power to simply go back and affirm their previously adopted DFCs, and that the Board does not have "the last word."[14] A fair reading of both the Water Code and the Administrative Code, however, contradicts that notion.

Section §36.108(n) of the Water Code states that if the Board finds DFCs to be unreasonable, it will make recommendations. That section goes on to state that the districts shall prepare revised plans in accordance with the Board's recommendations. The districts must then revise the DFCs and submit to Board for review. Therefore, the districts cannot ignore the recommendations but must revise the DFCs in accordance with the recommendations. Merely re-adopting the DFCs that the Board has said are unreasonable would not comport with the clear meaning of the word "revise."

Section 356.46 of the Administrative Code further defines the respective roles of the districts and the Board where the Board has determined the DFCs to be unreasonable. Under that section, the Board is then required to prepare a report with a list of findings and recommended revisions. At that point, the districts "shall" prepare revised plans and revised DFCs in accordance with the Board's recommendations. Note that the districts are not given discretion to adopt DFCs that are not in accordance with the Board's recommendations. Instead, the districts must revise (i.e., change) the DFCs and must do so in accordance with what the Board recommended.

After the districts have revised their management plans and the DFCs, they must submit the revised DFCs to the Board. If they want, they can request an opinion of the Board regarding the revisions. The districts then must hold public hearings on the revisions. Then, the districts "shall" consider public comments and Board comments, revise the DFCs and submit revised DFCs to the Board, along with their reasoning. After receiving the revised DFCs, the Board provides public notice of the revisions and "may" hold a public hearing.

[14] Included in that group is the TWDB itself, which says that it has no authority under Section 36.108 to require GCDs to do anything, even if TWDB finds a DFC to be unreasonable. In fact, TWDB successfully argued in a Travis County district court that whatever you may call its actions in the DFC petition process, it does not make "decisions, orders or rulings." See The TWDB's First Amended Plea to the Jurisdiction in Cause No. D-1-GN-10-000819 in the 201st District Court, Travis County, Texas. Sunset Advisory Commission agrees with TWDB, noting that the process had no finality. In other words, the Legislature failed to provide a meaningful appeal to TWDB.

Based on the above, it appears that the districts cannot merely re-adopt the "unreasonable" DFCs. To do so would not be a "revision" and would not be "in accordance with Board recommendations." Therefore, it is arguable that the Board's recommendations become the de facto DFCs and the Board gets the last word. To assume otherwise is to assume that the Legislature designed a process without a purpose.[15]

II. THE SUNSET ADVISORY COMMISSION REPORT

As luck or fate would have it, TWDB and TCEQ were both up for Sunset review for the 2011 legislative session. After reviewing the statutory provisions for DFC appeals and observing the few appeals attempted under those provisions, the Sunset Advisory Commission issued its report on TWDB. Given its strong background in administrative procedures, the Sunset Commission found the TWDB appeals process to be "fundamentally flawed,"[16] an assessment shared by at least one member of TWDB itself.[17]

The Sunset report addressed several key points:

1. *DFCs can have significant impacts that justify the need for an administrative remedy.*[18] Contrary to the assertions of GCDs that DFCs are just "ephemeral and aspirational" and therefore merely rule-making processes, the Sunset report recognizes that DFCs have quasi-regulatory aspects that justify a real administrative remedy—as contrasted to the process provided in Section 36.108. For one thing, DFCs are used to fix the managed available groundwater for districts, which in turn limits the amounts that may be permitted (and therefore produced).

2. *The Board's process does not lead to a clear administrative conclusion as is common in other regulatory approaches.*[19] "Without the ability to finally resolve petitions of the reasonableness of DFCs, the State cannot ensure the fundamental fairness of the process – especially for those harmed to seek redress."[20]

3. *The petition process at the Board lacks standard components of administrative processes.*[21] Specifically:

    - There is no clear definition of who may file a petition.
    - There is no statutory guidance for decisions.

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[15] If "shall" is not mandatory, the appeal process in the statute is effectively useless because the groundwater districts would not be required to revise the DFCs even after a successful appeal regarding the reasonableness of the DFCs by a person with a legally defined interest in the groundwater. Such a construction violates the rules of statutory construction. *See City of La Porte v. Barfield*, 898 S.W.2d 288, 291-92 (Tex. 1995) ("we will not read statutory language to be pointless. . .").

[16] Sunset Advisory Commission Report on TWDB, December 2010 at p. 29.

[17] See comments of Jack Hunt, February 17, 2010 at a hearing regarding the petitions of Mesa Water L.P. and Arrington regarding the DFCs adopted by GMA 1.

[18] Sunset Advisory Commission Report on TWDB, December 2010 at p. 30.

[19] Id.

[20] Id. at 30-31.

[21] Id. at 31.

- There is no contested case hearing.
- There is no final resolution.
- There is no clear judicial remedy.

With respect to contested case hearings, the Sunset report correctly notes that the TWDB process excludes standard components of due process such as cross examination. The report observes that the technical nature of the DFC process "requires the ability to evaluate the credibility of expert witnesses, to be able to question imprecise science, and to provide contrary arguments to the evidence and testimony."[22] Additionally, the report concludes that without a contested case hearing, only a limited record exists for further court review under substantial evidence, "which risks courts having to begin the case anew under a trial de novo standard."[23]

The Sunset report recommends that the appeals process be removed from TWDB and placed in TCEQ, with certain important changes being made to the TCEQ process to as to ensure fairness and due process. In that regard, the Sunset report first notes that TCEQ at least has certain administrative processes in place to handle appeals,[24] but Section 36.108 fails to give the TCEQ appeals process certain required components usually found in administrative processes across state government:[25]

- Like TWDB, there is no definition of who may file a petition.
- The petition process requires the petitioner to produce evidence unrelated to the DFC appeal.
- Like TWDB, there is no statutory guidance for decisions.
- No contested case hearing.
- No objective review.
- No formal transcript.
- No Travis County venue for appeals—regarded as desirable because courts in Travis County have the experience to handle substantial evidence reviews, if appeals from this process qualify.

Perhaps most significantly, the Sunset report concludes that the TCEQ appeals process under Section 36.108 lacks overall objectivity. Instead, the process appears to provide procedural advantages to the groundwater districts. This includes venue for appeals of the Commission's decisions in the county where the land lies, where the district may have a "hometown advantage."[26]

From reading the Sunset report concerning the DFC appeals process, it is clear that the legislature scores an "F" in its promulgation of Section 36.108. The process outlined in Section 36.108 reflects no knowledge of or experience with administrative processes or remedies, no understanding of procedural or substantive due process, and no concept of fundamental fairness.

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[22] Id. at 32.
[23] Id.
[24] Id. at 33.
[25] Id. at 34-35.
[26] Id. at 36.

It is clearly time for change.

III. POTENTIAL SOLUTIONS

A. TCEQ Only

The Sunset Staff Report on TWDB recommended that all appeal processes be removed from TWDB and given to TCEQ, with key modifications to TCEQ's procedures required to ensure due process and justify a later substantial evidence review.[27] The final report from Sunset contained a "modification" substantially altering the staff recommendations.[28] While still removing reasonableness appeals from TWDB, the modification did not place appeals of reasonableness anywhere. Instead, the modification contemplates a rule making style appeal in a district court in the county where a district lies, using a substantial evidence standard. The modification is silent as to the type of hearing at the district or GMA level that would support a substantial evidence review, but presumably some sort of evidentiary hearing would be required before a trial court could entertain a substantial evidence review. Other forms of DFC appeals (relating to implementation) remained in TCEQ. There would be no apparent administrative appeal path for challenging the reasonableness of DFCs under the modification.

Appendix A contains a proposed bill that reflects the Sunset staff recommendation—all TCEQ, all the time.

B. DISTRICT COURT PLUS TCEQ

Appendix B is a proposed bill that would implement the modification to the Sunset staff recommendations. This bill contemplates a rule making style appeal in a district court in any county where the district lies, providing for substantial evidence review. Consistent with that type of review, the bill also requires an evidentiary hearing at the GMA level so that a district court will have an evidentiary record to review. Other appeals are placed with TCEQ, with the details of those appeals following the staff recommendations.

[27] Id. at 36.
[28] Id. at 42d.

IV. CONCLUSION

Actual appeals to TWDB and TCEQ under present law served to illuminate the inadequacies of the present statute to provide for meaningful review of desired future conditions—even though the adoption of DFCs will have lasting and potentially harmful effects on the availability of groundwater for agriculture, manufacturing and municipal use across the state. Independently, the Sunset Advisory Commission reached conclusions that likewise highlighted the statutory deficiencies in the present system of appeals. A Travis County district judge, looking at Section 36.108, observed that the appeal process involving TWDB reflected a certain legislative will to reign in the unbridled power of water districts, but also reflected the ultimate failure of that will. The 2011 Legislative session provides an unusual confluence of factors militating toward significant change of the present system. Perhaps recent developments will give the legislature the will to make curative modifications.

APPENDIX A

SECTION 1: Section 36.001, Water Code, is amended to read as follows:

Sec. 36.001. DEFINITIONS. In this chapter:

(2) "Commission" means the Texas Environmental Quality Commission, and "board" means the Texas Water Development Board.

(3) "Executive director" means the executive director of the commission.

(4) "Executive administrator" means the executive administrator of the Texas Water Development Board.

(30) "Affected person" shall mean a regional water planning group for a region in the management area, a district in or adjacent to the groundwater management area, a permit holder or an applicant for a permit within the groundwater management area, or a holder of groundwater rights within the groundwater management area.

(31) "SOAH" shall mean the State Office of Administrative Hearings.

SECTION 2: Section 36.108, Water Code, is amended to read as follows:

Sec. 36.108. JOINT PLANNING IN MANAGEMENT AREA.

(f) An affected person may file a petition with the commission appealing the approval of the desired future condition of the groundwater resources established under this section. The petition must allege one or more of the following:

(1) a district in the groundwater management area has failed to adopt rules;

(2) the joint planning process failed to result in the establishment of a reasonable desired future condition or conditions of the aquifer(s) of the groundwater management area;

(3) a district has failed to revise its management plan or adopt rules to achieve the desired future condition(s) of the aquifer(s) in the groundwater management area within one year of the adoption of a desired future condition;

(4) the rules adopted by a district are not designed to achieve the desired future condition of the groundwater resources in the groundwater management area established during the joint planning process;

(5) the groundwater in the management area is not adequately protected by the rules adopted by a district; or

(6) the groundwater in the groundwater management area is not adequately protected due to the failure of a district to enforce substantial compliance with its rules.

(g) Not later than the 60th day after the date the petition is filed, the commission shall review the petition and either:

(1) dismiss the petition if the commission finds that the petition does not adequately allege any of the conditions set forth in subsection (f); or

(2) refer the petition to SOAH for a contested case hearing under the Administrative Procedures Act.

(h) If within the 60 day review of the petition as provided in subsection (g) the executive director finds that a technical analysis is needed related to the hydrogeology of the groundwater management area, the executive director may request a study from the Texas Water Development Board. In conducting the technical analysis, the board shall consider any relevant information provided in the petition, as well as any groundwater availability models or other published studies or information the board considers relevant. The study must be completed and delivered to the commission on or before the 120th day following the date of the request. If the

matter has been referred to SOAH, the study shall also be delivered to SOAH for admission into the evidentiary record for consideration at the hearing. The relevant board staff shall be available as an expert witness during the hearing if requested by any party or the administrative law judge.

(i) If the petition is referred to SOAH, the commission or executive director shall provide notice of the hearing to the petitioner and each district and regional water planning group in the groundwater management area. Evidentiary hearings shall be held at a central location in the groundwater management area. If the administrative law judge considers further information necessary, the judge may request such information from any source.

(j) The administrative law judge shall make findings of fact and conclusions of law, including any recommended changes to the desired future condition(s).

(k) Not later than the 45th day after receiving the administrative law judge's findings of fact and conclusions of law, including any required changes to the desired future condition(s), the commission shall issue an order stating its findings and conclusions, and may take other action against a district, as provided in law.

(l) Appeals of the commission decision shall be filed in a district court in Travis County under substantial evidence review.

(m) The districts shall submit the conditions established under this section to the executive administrator. Within six months after receiving the desired future conditions, the executive administrator shall provide each district and regional water planning group located wholly or partly in the management area with the managed available groundwater in the management area based upon the desired future condition of the groundwater resources established under this section.

Section 3: Section 36.3011, Water Code, is amended to read as follows:

Sec. 36.3011. FAILURE OF DISTRICT TO CONDUCT JOINT PLANNING. The commission may take any action against a district it considers necessary in accordance with Section 36.303 if the commission finds that:

(1) a district has failed to submit its plan to the executive administrator;

(2) a district has failed to adopt rules;

(3) the rules adopted by the district are not designed to achieve the desired future condition of the groundwater resources in the groundwater management area;

(4) the groundwater in the management area is not adequately protected by the rules adopted by the district, or the groundwater in the management area is not adequately protected because of the district's failure to enforce substantial compliance with its rules;

(5) a district has failed to revise its desired future conditions in accordance with an order of the commission pursuant to Section 36.108(k); or

(6) a district has failed to make necessary revisions, if any, to its management plan or rules within six months after receiving managed available groundwater information from the board pursuant to Section 36.108(m).

SECTION 4. This Act takes effect immediately if it receives a vote of two-thirds of all the members elected to each house, as provided by Section 39, Article III, Texas Constitution. If this Act does not receive the vote necessary for immediate effect, this Act takes effect September 1, 2011.

APPENDIX B

SECTION 1: Section 36.001, Water Code, is amended to read as follows:

Sec. 36.001. DEFINITIONS. In this chapter:

(2) "Commission" means the Texas Commission on Environmental Quality, and "board" means the Texas Water Development Board.

(3) "Executive director" means the executive director of the commission.

(4) "Executive administrator" means the executive administrator of the Texas Water Development Board.

(30) "Affected person" shall mean a regional water planning group for a region in the management area, a district in or adjacent to the groundwater management area, a permit holder or an applicant for a permit within the groundwater management area, or a holder of groundwater rights within the groundwater management area.

SECTION 2: Section 36.108, Water Code, is amended to read as follows:

Sec. 36.108. JOINT PLANNING IN MANAGEMENT AREA.

(a) If two or more districts are located in whole or in part within the boundaries of a groundwater management area, each district shall prepare a comprehensive management plan as required by Section 36.1071 covering that district's respective territory. On completion and approval of the plan as required by Section 36.1072, each district shall forward a copy of the new or revised management plan to the other districts in the management area. The boards of the districts shall consider the plans individually and shall compare them to other management plans then in force in the management area.

(b) The presiding officer, or the presiding officer's designee ("delegates"), of each district located in whole or in part in the groundwater management area shall meet at least

annually to conduct a DFC Joint Planning Conference. At the DFC Joint Planning Conference, the delegates of the districts shall conduct joint planning with the other districts in the management area and review the management plans and accomplishments for the management area. In reviewing the management plans, the delegates shall consider:

(1) the goals of each management plan and its impact on planning throughout the management area;

(2) the effectiveness of the measures established by each management plan for conserving and protecting groundwater and preventing waste, and the effectiveness of these measures in the management area generally;

(3) any other matters that the boards consider relevant to the protection and conservation of groundwater and the prevention of waste in the management area; and

(4) the degree to which each management plan achieves the desired future conditions established during the joint planning process.

(c) Not later than September 1, 2010, and every five years thereafter, the delegates shall consider groundwater availability models and other data or information for the management area and shall establish desired future conditions for the relevant aquifers within the management area. The delegates may appoint and convene non-voting advisory committees consisting of social, environmental, or economic segments within each groundwater management area to assist in the development of desired future conditions. The Board and the Commission shall make technical staff available to serve in a non-voting advisory capacity to the DFC Joint Planning Conference if requested. In establishing the desired future conditions of the aquifers under this section, the Delegates shall consider:

(1) Aquifer uses or conditions of an aquifer within the management area that

differ substantially from one geographic area to another

(2) The water supply needs and water management strategies included in the adopted state water plan;

(3) Whether the desired future conditions are physically possible;

(4) Socioeconomic impacts reasonably expected to occur;

(5) Environmental impacts, including spring flow and other interactions between groundwater and surface water;

(6) The impact on the interests and rights in private property, including ownership and rights of the owners of the land and their lessees and assigns in groundwater as recognized under Section 36.002;

(7) Hydrogeological conditions including, but not limited to, total estimated recoverable storage provided by the executive administrator, recharge, inflows, and discharge;

(8) Impact on subsidence; and

(9) Any other information relevant to the specific desired future condition.

(d) The desired future conditions proposed under this Section must be adopted by a two-thirds vote of the delegates present at a meeting:

(1) at which at least two-thirds of the districts located in whole or in part in the management area have a voting representative in attendance; and

(2) for which all districts located in whole or in part in the management area provide public notice in accordance with Chapter 551, Government Code.

(e) After adoption of the proposed desired future conditions under Subsection (d), each district shall convene a public hearing to consider the desired future conditions. Notice of

such hearings shall be posted in each district's office, the courthouse of each county wholly or partially in the GMA, the Texas Register, and each district's website, if they have a website, at least 10 days before the GMA meeting. Notice for any GMA meeting must include:

(1) the date, time, and location of the public meeting or hearing;

(2) a summary of the proposed action to be taken;

(3) names of each groundwater conservation district making up the GMA;

(4) the name, telephone number, and address of the person to whom questions or requests for additional information may be submitted; and

(5) information on how the public may submit comments.

Upon conclusion of such hearing, each district shall prepare a report for consideration at the DFC Joint Planning Conference describing public comment received and proposing revisions, if any, to the proposed desired future conditions.

(f) The delegates of the DFC Joint Planning Conference shall reconvene to consider the reports of the individual districts. The delegates shall hold one or more evidentiary hearings regarding the factors and criteria to be considered in establishing desired future conditions.

(1) Such evidentiary hearings shall be held at a location within the groundwater management area. Notice of such hearings shall be published in at least one newspaper with general circulation in the county or counties in which each district lies. Notice must be published not later than the 30th day before the date set for the hearing. Notice of such hearings shall also be given by electronic mail or facsimile transmission to any persons specifically requesting such notice.

(2) At such hearings, the presiding person of the DFC Joint Planning Conference or his designee shall hear testimony and receive evidence from affected persons. Cross-examination of witnesses shall be allowed within reasonable limits to be established by the presiding person or his designee. Each evidentiary hearing shall be recorded.

(3) The delegates shall prepare a report identifying for each desired future condition adopted the specific factors, criteria, policies, and technical justifications considered in determining each desired future condition established under this Section, including in such documentation references to the record evidence upon which the districts have relied. The report shall also identify other desired future conditions considered but not adopted, including in such report the reasons each proposed desired future condition was not adopted. Such report shall also include all recommendations made by advisory committees and all public comment received, and the reasons such recommendations and comments were not incorporated into the adopted desired future conditions. The districts shall submit such report to the executive administrator in the form of a resolution adopted by two-thirds (2/3) of the districts in the DFC Joint Planning Conference.

(g) (f) The districts voting to adopt the desired future conditions established under this Section shall individually adopt such desired future conditions by appropriate action of their respective boards of directors under the procedures described in Section 36.101.

(h) The districts may establish different desired future conditions for:

(1) each aquifer, subdivision of an aquifer, or geologic strata located in whole or in part within the boundaries of the management area; or

(2) each geographic area overlying an aquifer in whole or in part or subdivision of an aquifer within the boundaries of the management area.

(-1)(i) Each district in the management area shall ensure that its management plan contains goals and objectives consistent with achieving the desired future conditions of the relevant aquifers as adopted during the joint planning process.

(j) An affected person may file suit against one or more districts in a groundwater management area that voted to adopt the desired future conditions established under this Section, challenging the reasonableness of such desired future conditions.

(1) Suit may be filed in a district court of any county in which a district that voted to adopt the challenged desired future conditions lies.

(2) In any suit filed under this Subsection, review shall be according to the substantial evidence rule.

(k) An affected person may file a petition with the Commission appealing the approval of the desired future conditions of the groundwater resources established under this section. The petition must allege one or more of the following:

(1) a district or districts refused to join in the planning process;

(2) the process failed to result in adequate planning, including the establishment of reasonable future desired conditions of the aquifers;

(3) a district in the groundwater management area has failed to adopt rules;

(4) the rules adopted by a district are not designed to achieve the desired future condition of the groundwater resources in the groundwater management area

established during the joint planning process;

(5) the groundwater in the management area is not adequately protected by the rules adopted by a district; or

(6) the groundwater in the groundwater management area is not adequately protected due to the failure of a district to enforce substantial compliance with its rules.

(l) Not later than the 90th day after the date the petition is filed, the Commission shall review the petition and either:

(1) dismiss the petition if the Commission finds that the evidence is not adequate to show that any of the conditions alleged in the petition exist; or

(2) select a review panel as provided in Subsection (i).

(m) If the petition is not dismissed under Subsection (l), the Commission shall appoint a review panel consisting of a chairman and four other members. A director or general manager of a district located outside the groundwater management area that is the subject of the petition may be appointed to the review panel. The review panel may not include more than two members from groundwater conservation districts. The Commission may not appoint members of the review panel from the same district. The Commission also shall appoint a disinterested person to serve as a nonvoting recording secretary for the review panel. The recording secretary may be an employee of the Commission. The recording secretary shall record and document the proceedings of the panel.

(n) Not later than the 120th day after appointment, the review panel shall review the petition and any evidence relevant to the petition and, in a public meeting, consider and adopt a report to be submitted to the commission. The review panel shall conduct public hearings at a location in the groundwater management area to take evidence on the petition. Such hearings

shall be conducted as contested case hearings. The review panel may attempt to negotiate a settlement or resolve the dispute by any lawful means.

(o) In its report, the review panel shall include:

(1) a summary of all evidence taken in any hearing on the petition;

(2) a list of findings and recommended actions appropriate for the commission to take and the reasons it finds those actions appropriate; and

(3) any other information the panel considers appropriate.

(p) The review panel shall submit its report to the Commission. The Commission may take action under Section 36.3011.

SECTION 3. This Act takes effect immediately if it receives a vote of two-thirds of all the members elected to each house, as provided by Section 39, Article III, Texas Constitution. If this Act does not receive the vote necessary for immediate effect, this Act takes effect September 1, 2011.