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2011 CHANGES TO THE DFC APPEAL PROCESS

INTRODUCING THE NEW AND IMPROVED EDSEL

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APPEALING DFCS: CHANGES TO THE PETITION PROCESS

When the Texas Legislature introduced the concept of "desired future conditions" ("DFC" or "DFCs"), the apparent purpose was to move toward coordinated management of groundwater by requiring groundwater conservation districts ("GCDs") to meet together in common areas ("Groundwater Management Areas" or "GMA") and jointly agree on management objectives for shared aquifers. To the extent that the process has forced some GCDs to quantify the available groundwater within district borders and to engage in joint planning with neighboring districts, the DFC process as a whole produced fragmented, disparate and sometimes conflicting DFCs over single shared aquifers.

As a check on GMA activities, the Legislature provided an appeals procedure as part of the DFC process. That appeals procedure focused on the Texas Water Development Board ("TWDB"), with a somewhat parallel process at the Texas Commission on Environmental Quality ("TCEQ"). To date, several persons or entities have appealed DFC determinations to the TWDB. Only one such appeal has been "successful,"[1] while all others have been rejected. Only one appeal has been made to TCEQ, which was likewise unsuccessful.

Prior to the 2011 Texas Legislative session, the Sunset Advisory Commission ("Sunset") examined both TWDB and TCEQ, and issued a recommendation that TWDB be removed from the DFC appeals process altogether. The TWDB issued its own Legislative Priorities Report in which it agreed. Given these strong indications that something was amuck with the DFC appeals process, the Legislature acted boldly to fix the processes that Sunset referred to as "fundamentally flawed."

This paper will explore the recommendations of Sunset and the resulting changes that were made in the DFC appeals process. The discerning reader will find that this paper, like the process itself, is pretty much an unaltered version of a paper written two years ago, when hope sprang eternal that something would result from Sunset's insightful work.

I. 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, Sunset issued its report on TWDB (the "Sunset Report"). Given its strong background in administrative procedures, the Sunset Commission found the TWDB appeals process to be "fundamentally flawed,"[2] an assessment shared by at least one member of TWDB itself.[3]

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[1] Success was illusory. Although the TWDB found the DFCs in that appeal to be unreasonable, the affected districts determined that the same DFCs would be used anyway. TWDB regarded its jurisdiction to be so narrowly circumscribed that it could not compel modification of the "unreasonable" DFCs.

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

3 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.

The Sunset Report addressed several key points:

DFCs can have significant impacts that justify the need for an administrative remedy.[4] Contrary to the assertions of GCDs that DFCs are just "ephemeral and aspirational" and therefore merely rule-making processes, the Sunset Report recognized 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 set the modeled available groundwater for districts, which in turn limits the amounts that may be permitted (and therefore produced).

The Board's process does not lead to a clear administrative conclusion as is common in other regulatory approaches.[5] "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."[6]

1. *The petition process at the Board lacks standard components of administrative processes.*[7] Specifically:

    - There is no clear definition of who may file a petition.
    - There is no statutory guidance for decisions.
    - 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 noted that the TWDB process excludes standard components of due process such as cross examination. The report observed 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."[8] Additionally, the report concluded 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."[9]

The Sunset Report recommended that the appeals process be removed from TWDB and placed in TCEQ, with certain important changes being made to the TCEQ process so as to ensure fairness and due process. In that regard, the Sunset Report first noted that TCEQ at least has certain administrative processes in place to handle appeals,[10] but concluded that Section 36.108

4 Sunset Advisory Commission Report on TWDB, December 2010 at p. 30.
5 Id.
6 Id. at 30-31.
7 Id. at 31.
8 Id. at 32.
9 Id.
10 Id. at 33.

fails to give the TCEQ appeals process the required components usually found in administrative processes across state government:[11]

- 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 concluded 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."[12]

From reading the Sunset Report concerning the DFC appeals process, it is clear that the Legislature scored 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.

Given that strong indictment of the DFC appeals processes, the 2011 legislative session was dominated by…budget issues. Although changes were made to the DFC process, those changes were cosmetic and did not address the due process and fundamental fairness concerns raised by Sunset.

II. TWDB APPEALS

The predominate method for challenging DFCs—the one roundly criticized by Sunset--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.[13] Section 36.108(l) does not further suggest the scope of inquiry regarding the

[11] Id. at 34-35.
[12] Id. at 36.
[13] 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.

reasonableness of DFCs. However, Texas Administrative Code Section 356.45 currently 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:

(1) the adopted desired future conditions are physically possible and the consideration given groundwater use;[14]

(2) the socio-economic impacts reasonably expected to occur;

(3) the environmental impacts including, but not limited to, impacts to spring flow or other interaction between groundwater and surface water;

(4) the state's policy and legislative directives;

(5) the impact on private property rights;

(6) the reasonable and prudent development of the state's groundwater resources; and

(7) any other information relevant to the specific desired future condition.

As a result of the 2011 legislation, TWDB has proposed revisions to its rules on the DFC appeals process. One such revision is found at newly numbered Section 356.43(c), which states:

(c) The board shall consider the following criteria when determining whether a desired future condition is reasonable:

(1) whether the adopted desired future condition is physically possible (that is, whether there is any groundwater production scenario that would allow the desired future condition to be achieved);

(2) whether the desired future condition provides a balance between production from the aquifer and conservation of the aquifer as described in Texas Water Code § 36.108(d-2);

(3) whether the districts have stated a purpose for the desired future condition and whether the desired future condition is reasonably fit and appropriate for that particular purpose. For example, if the purpose is to protect spring flow, the desired future condition must have a reasonable correlation to spring

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

flow and provide an appropriate indication of whether spring flow is protected; and,

(4) whether the districts have given appropriate consideration to the factors set out in Texas Water Code § 36.108(d).

This revised Rule explicitly adopts and incorporates the changes made in Section 36.108, which now requires the districts to consider the following factors in setting DFCs:

(1) aquifer uses or conditions within the management area, including conditions that differ substantially from one geographic area to another;

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

(3) hydrological conditions, including for each aquifer in the management area the total estimated recoverable storage as provided by the executive administrator, and the average annual recharge, inflows, and discharge;

(4) other environmental impacts, including impacts on spring flow and other interactions between groundwater and surface water;

(5) the impact on subsidence;

(6) socioeconomic impacts reasonably expected to occur;

(7) the impact on the interests and rights in private property, including ownership and the rights of management area landowners and their lessees and assigns in groundwater as recognized under Section 36.002;

(8) the feasibility of achieving the desired future condition; and

(9) any other information relevant to the specific desired future conditions.

As any trial lawyer will recognize, the factors set forth in Section 36.108 are replete with words that give rise to "differences of opinion" (a.k.a. lawsuits), such as "geographic area," and "socioeconomic impacts reasonably expected to occur." And any student of the Water Code will recognize that little was changed from prior iterations of Section 36.108.

Under the current rules, 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;

(2) the districts have adopted their desired future conditions;

(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;

(4) the substantive issues raised in the petition have not been previously reviewed by the board; and

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

Note that the current rules require that petitioner must provide a copy of the petition to the affected districts at least 30 days before filing it with the Board,[15] and the petition must be filed within one year of the adoption of the challenged DFC.[16] The Board staff has determined that the 30 day requirement does not extend the one year deadline for filing a petition.[17] 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). [18]

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.[19] 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."

[15] 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.
[16] The TWDB Staff appears to believe that the one year deadline is a complete bar to filing a petition.
[17] Correspondence from Kenneth Peterson to Ronald Fieseler, dated September 11, 2009.
[18] The unofficial proposed changes to this procedure reduce the time period for DFC challenges from one year to 180 days. Proposed Section 356.41. Additionally, the proposed rules eliminate the requirement to send a copy of the petition to the affected groundwater districts 30 days before filing, instead allowing the petitioner to serve the petition on the districts at the same time as the TWDB.
[19] 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.

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 Section 36.108. Similarly, the Board has stated that "it decided when it developed the petition process that the Rules of Evidence and Rules of Civil Procedure would not apply to these proceedings."[20] It can therefore be assumed that the appeal procedure outlined in Section 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.[21]

It is also noteworthy that Section 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 Section 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.…"[22]

Given the proclamation that the hearing is not a contested case hearing, it becomes important to understand just what type of proceeding is being conducted. 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.[23] 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.

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

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

[22] *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).

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

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 to 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 Section 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;

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."[24] 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 the revised DFCs to Board for review. Therefore, the districts cannot ignore the recommendations but must revise the DFCs in accordance with the

[24] 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.

recommendations. Merely re-adopting the DFCs that the Board has said are unreasonable does not comport with the clear meaning of the word "revise."[25]

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.

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.[26]

III. 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,[27] Section 36.108(f) provides that a district or person with a legally defined interest in groundwater[28] 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;

[25] Merriam-Webster Dictionary defines "revise" as: to make a new, amended, improved or up-to-date version. Listed as synonyms are: alter, make over, modify, recast, redo, refashion, remake, remodel, change, rework or vary.

[26] 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. . .").

[27] 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.

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

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 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. § 36.108(h). The review panel submits a report and the Commission can ultimately take a number of actions. *See* §§ 36.108(k), 36.303 and 36.3011. 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 Texas Administrative Code Section 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;

(B) evidence that joint planning meeting notice was received by the districts in the GMA such as a return receipt for certified mail service;

(C) publishers' affidavits of joint planning meeting notice; and

(D) copies of joint planning meeting minutes and accepted handouts certified by the districts that attended the meetings.

But the requirements for a petition do not 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,[29] and given the apparent lack of procedural due process trappings, it appears that the review panel hearings are not contested case hearings.

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

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 § 36.303 and 30 Tex. Admin. Code § 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 Section 36.303 or Section 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 Section 293.23 does not appear to be a contested case hearing, the substantial evidence rule should not be applicable in any further action.

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, Sunset reached conclusions that likewise highlighted the statutory deficiencies in the present system of appeals. The 2011 Legislative session provided an unusual confluence of factors that militated toward significant change of the present system. Unfortunately for groundwater rights owners, that confluence of factors resulted in little change, with little hope of a similar alignment of factors in the near future. The unhappy groundwater rights owner should bypass these appeals processes in favor of seeking redress in other venues, whether that be the Legislature or, more appropriately, the courts.