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## **Impacts of Regional Planning Decisions on Permitting and Financing (Whom Do You Sue?)**

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# Impacts of Regional Planning Decisions on Permitting and Financing (Whom Do You Sue?)

## Overview

We want to accomplish four things with this paper and presentation, all from the perspective of an entity developing a water supply project –

1. Provide background and a primer on the water planning processes in Texas with a focus on the supply side
2. Describe how the planning processes interact with processes for permitting and financing of water supply projects
3. Provide lessons for entities planning or developing water supply projects
4. Explore some policy questions at the intersection of water planning and water permitting

Our overarching theme is this: Water planning processes in Texas are interwoven with the permitting and financing processes for water supply projects. Because of this, entities that wish to develop water supply projects that require state or groundwater district permits or state financial assistance must actively participate in water planning processes well in advance of constructing facilities and delivering water. Moreover, the remedies for inappropriate planning decisions vary and may dictate the need for active participation in the processes of making planning decisions.

## 1. Background and Primer on Water Planning Processes in Texas

“Planning is an unnatural process; it is much more fun to do something.  
The nicest thing about not planning is that failure comes as a complete surprise,  
rather than being preceded by a period of worry and depression.” - Sir John Harvey-Jones

### A. The State Water Plan and Regional Water Plans: Projecting Supply Needs and Evaluating Supply Strategies

Most of us are familiar with the process under which the Texas Water Development Board (TWDB) formulates the state water plan by compiling plans developed by regional water planning groups (RWPGs) in sixteen distinct areas of the state.<sup>1</sup> The regional plans and state plan are updated on a five-year cycle, and use a fifty-year planning period.<sup>2</sup> Each RWPG is composed of stakeholders representing a broad base of interests, including cities, counties,

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<sup>1</sup> See TEX. WATER CODE § 16.051(a). In addition to compiling the regional plans, the state plan must include TWDB legislative recommendations to facilitate “voluntary water transfers,” must identify “river and stream segments of unique ecological value,” and must identify “sites of unique value for the construction of reservoirs”. See TEX. WATER CODE § 16.051(e). If the legislature designates a river or stream segment to be of “unique ecological value,” the designation “solely means that a state agency or political subdivision of the state may not finance the actual construction of a reservoir” in the designated area. See TEX. WATER CODE § 16.051(f).

<sup>2</sup> See 31 Tex. Admin. Code § 358.3(a).

industries, agriculture, environmental groups, river authorities, and groundwater conservation districts (GCDs).

Each planning cycle, the sixteen RWPGs update their parts of the state plan by defining current population, water demands and supplies, projecting population and water needs over the planning period, and evaluating water management strategies (WMSs), including water supply projects, for meeting projected demands.<sup>3</sup> In general, water needs are defined by water user groups (WUGs) or wholesale water providers (WWPs)<sup>4</sup>. Surface water availability for meeting projected needs is determined according to Texas Commission on Environmental Quality (TCEQ)-approved water availability models (WAMs), and groundwater availability is based on modeled available groundwater (MAG) amounts that result from the regional groundwater planning process described below.<sup>5</sup> WMSs undergo technical evaluation based on quantity, reliability, cost, impacts to the environment, agriculture, and water quality, and time to implement.<sup>6</sup> The regional plan update process must provide for significant public participation, including the preparation of a draft “initially prepared plan” (IPP) that is open to public comments for a prescribed period of time before final plan adoption.<sup>7</sup> With limited exceptions, each RWPG must include in its plan “recommended” WMSs for meeting all identified water needs in the region.<sup>8</sup> Mechanisms are provided to resolve “interregional conflicts” between the plans for different regions.<sup>9</sup> Once approved by TWDB, a regional plan can be amended, either by following the same lengthy process used to update the plan, or an abbreviated process for amendments confirmed by TWDB to be “minor”.<sup>10</sup>

## B. Groundwater Planning

### 1. Groundwater Availability Determination - General

RWPGs are required to use groundwater availability estimates adopted by GCDs during the so-called joint planning process described in Section 36.108 of the Texas Water Code. The operative statutory provisions state:

(e) Each regional water planning group shall submit to the development board a regional water plan that: . . . ;

(2-a) is consistent with the **desired future conditions** adopted under Section 36.108 for the relevant aquifers located in the regional water planning area as of the date the board most recently adopted a state water plan under Section 16.051 or, at the option of the regional water planning group, established subsequent to the adoption of the most recent plan; [and]

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<sup>3</sup> See TEX. WATER CODE § 16.053(e); 31 Tex. Admin. Code §§ 357.30 – 357.35.

<sup>4</sup> See 31 Tex. Admin. Code § 357.33(a).

<sup>5</sup> An anomaly with respect to available groundwater has been Region D, which currently does not include any GCDs. The legislature this year enacted Senate Bill 1101, which provides in this circumstance for the RWPG to determine the supply of groundwater for regional planning purposes, with review and approval by the TWDB. See Act of May 26, 2015, 84<sup>th</sup> Leg., R.S., ch. 1180.

<sup>6</sup> See TEX. WATER CODE § 16.053(h); see also the guidelines for regional planning in 31 Tex. Admin. Code Ch. 357.

<sup>7</sup> See TEX. WATER CODE § 16.053(e). The TWDB has adopted extensive requirements for notice and opportunity for comment that apply to the regional planning process. See 31 Tex. Admin. Code § 357.21.

<sup>8</sup> See 31 Tex. Admin. Code § 357.35(d).

<sup>9</sup> See TEX. WATER CODE § 16.053(h)(5), (6). Final authority to resolve interregional conflicts rests with the TWDB.

<sup>10</sup> See TEX. WATER CODE § 16.053(h)(10), (11).

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