

CONFLUENCE



News from the leading water industry association in Texas.

1st Quarter 2011

Sunset Advisory Commission recommends changes to the Texas Commission on Environmental Quality and Texas Water Development Board

By LYN CLANCY
*Managing Associate General Counsel
Lower Colorado River Authority*

A review of recent Sunset Advisory Commission recommendations on the Texas Commission on Environmental Quality and Texas Water Development Board includes several potential changes of interest to TWCA members. As readers of Confluence know, state agencies are subject to an extensive review at least once every 12 years. The Sunset Advisory Commission recommends actions to the full Legislature which must act to continue the agencies; otherwise, they are automatically abolished. This article discusses its water-related recommendations.

Texas Commission on Environmental Quality

The Sunset Advisory Commission made its preliminary recommendationsⁱ on Jan. 12 and voted 10-to-1 to continue TCEQ for another 12 yearsⁱⁱ. It recommended TCEQ's mission statement emphasize "public" rather than "human" health: "The Texas Commission on Environmental Quality strives to protect our state's public health and natural resources consistent with sustainable economic development. Our goal is clean air, clean water, and the safe management of waste."ⁱⁱⁱ

The Commission recommended reducing some overlap between TCEQ and three other agencies: Texas Public Utility Commission (water and wastewater utility regulation), Railroad Commission of Texas (oil and gas extraction) and the Texas Water Development Board.

ⁱ See footnotes on pp. 10-11

Please see Water Law, page 4



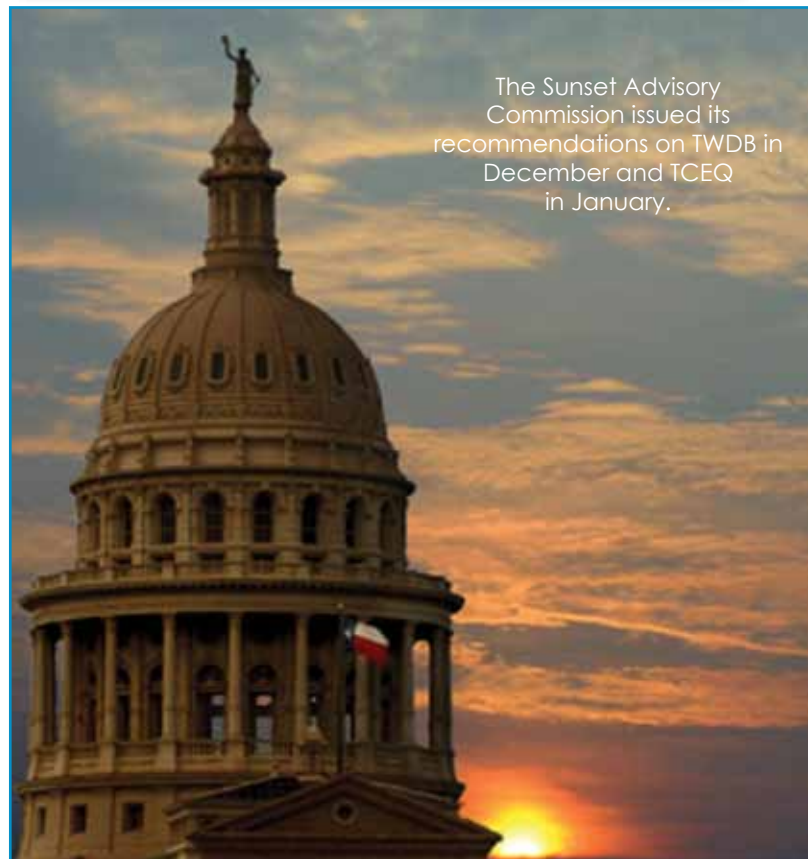
STATE OF TEXAS
OFFICE OF THE GOVERNOR

Greetings:
As Governor of Texas, it is my pleasure to welcome everyone to the Texas Water Conservation Association's 67th Annual Convention.

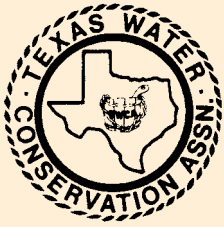
You stand at the focal point of one of the greatest challenges facing Texas and many other states in the coming years: the need to supply life-giving water to a population that continues to grow by leaps and bounds.

In Texas, this is an issue we must face head-on. The Lone Star State is a destination for people from across the country and around the world in search of better jobs and better lives. Combine that influx with the continuing

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The Sunset Advisory Commission issued its recommendations on TWDB in December and TCEQ in January.



PRESIDENT'S LETTER

Texas Water Conservation Association

221 E. 9th Street, Ste. 206
Austin, Texas 78701-2510
512-472-7216
Fax: 512-472-0537

<http://www.twca.org>
e-mail: goodson@twca.org
robbins@twca.org

Officers

Sonia Lambert, President
James M. Parks, President-Elect
M. Jeff Taylor, Immediate Past President

Association Staff

Leroy Goodson
General Manager
Dean Robbins
Assistant General Manager

Editorial Services



512.583.0929
www.raunpr.com

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By Sonia Lambert
TWCA President



Tracking water issues in Austin and Washington

The 82nd Legislative Session kicked off with bills on eminent domain, groundwater ownership, regulation of groundwater wells and tire disposal. Fortunately for us, TWCA's Dean Robbins and staff are keeping us abreast of the bills of interest to our members. If you haven't already done so, I encourage you to sign up for TWCA's legislative news service. It provides two tracking reports, one for bills of general interest and the other for higher priority bills, and updates as the bills move through the legislative process.

Legislative sessions bring not only changes in policy, but also in representation. Senator Kay Bailey Hutchison announced she would not seek re-election in 2012. We thank Senator Hutchison for her nearly 20 years of service to the citizens of Texas, and for being a friend of TWCA. We also welcome Speaker Joe Straus to his second term as speaker of the Texas House of Representatives.

Hopefully, you had an opportunity to attend the TWCA/TRWA Water Law Seminar, which addressed some of the issues in front of us. Speakers debated topics that included federal water policies, Desired Future Conditions, eminent domain, and implementing the state water plan. You can see photographs from the event on page 5 in this issue of Confluence.

I want to thank everyone who was involved in the planning, scheduling and implementation of Texas Water Day that ran from Feb. 8-11 in Washington D.C. (pages 3, 6-7) Working together, we must continue to be strong advocates for Texas water by engaging our delegation's support and stressing the importance of much-needed funding for water projects on both the state and federal levels.

Looking forward to seeing everyone in Austin at the Annual Convention March 2 to 4!



Texas Water Day 2011 focuses on funding for water infrastructure

By TOM RAY
Chair, TWCA Federal Affairs Committee

The seventh annual Texas Water Day carried one clear focus: federal money for Texas water infrastructure projects. Enthusiastic teams of some 90 TWCA members, thoroughly prepared and ready to discuss the future of Texas water, worked the halls, walking and talking this priority issue, answering questions and clarifying how members of the Texas delegation could be supportive. By the end of the Feb. 8-11 event, TWCA teams had met with members or staff of the Texas Congressional Delegation, staffing some 16 face-to-face meetings.

Realistic Expectations for 2011

Outlook for project funding in the 112th Congress is dim. Across-the-board cuts are likely, including the Environmental Protection Agency, Bureau of Reclamation, and Corps of Engineers. During our visit alone, some 70 funding cuts were included in the House Appropriation Committee's upcoming Continuing Resolution bill (to keep the government running). Spending cuts will exceed \$74 billion, "...the largest reduction in discretionary spending in the history of the nation," according to Chairman Hal Rogers.

We asked the support of our Texas Delegation in addressing unfair federal requirements

that hamper, delay and increase the cost of implementation.

To support our argument, we reviewed with each member a table listing projects recommended for their district from 2011 Water for Texas.

To cap off the three-day session, we met with the Council on Environmental Quality and the U.S. Army Corps of Engineers to address four federal constraints to Texas water project implementation:

- Federal implementation of the Endangered Species Act
- A broad definition of 'earmarks' that includes projects defined in the Texas Water Plan
- Recent expansion of regulation without clear legislative validation
- Loss of balance in the ongoing revisions to the Principles & Guidelines and to the Executive Order 11988, which discourages development and occupancy of flood plains.

We met with agency decision makers Robyn Colosimo, Deputy Director for Natural Resources with the Council on Environmental Quality and Gary Loew, chief of the Civil Works Programs at the U.S. Army Corps of Engineers. Colosimo is responsible for re-drafting the Principles and Guidelines, the guidance document that sets the standards for project and program reviews by agencies including the US Army Corps of Engineers to EPA, US Fish and Wildlife, Bureau of Reclamation,

and the USDA. Loew is the key headquarters staff overseeing the Civil Works budgeting process. With cuts pending in the federal budget, Loew outlined the impacts on Civil Works programs and the need to amend the budgeting process.

We, Texas Water Day 2011, put a face on our statewide water issues. But real influence over Federal water policy can only be secured if our water resources community remains informed and active throughout the year: helping shape Congressional legislation, responding to proposed Executive Branch rules and regulations, articulating the water community's mission the future of Texas.

It is essential that we participate in the process and get our positions on the record, and there are many opportunities to do just that. One resource is The Texas Washington D.C. Water Report, a useful and convenient resource that provides regular updates on these issues including timelines and deadlines for involvement established by Congressional committees and federal agencies. You can find out more at www.hicks-ray.com.

Other Texas Water Issues

The TWCA has identified several other federal issues that will be the focus of future Congressional briefings:

Overlap with the Texas Public Utility Commission

Sunset Advisory Commission staff concluded that water and wastewater utility regulation “is simply not within [TCEQ’s] wheelhouse.”^{iv} The Commission adopted a staff recommendation to move this function to PUC by March 1, 2012.^v The move would transfer TCEQ’s authority to regulate retail, wholesale, and sub-metering rates; Certificates of Convenience and Necessity; reporting requirements; and consumer assistance and complaints to PUC.^{vi} TCEQ would continue to be responsible for drinking water standards, sewage treatment requirements, and review of Drought Contingency Plans for investor-owned utilities. The agencies would be required to develop memoranda of understanding to implement the transition by Feb. 1, 2012, and address overlap and coordination especially regarding:

- Federal drinking water standards and maintaining adequate supplies of water; meeting established design criteria for wastewater treatment plants
- Economic feasibility of regionalization
- Service standards, utility data and serving the needs of economically distressed areas.^{vii}

PUC would assume responsibility for ensuring the accuracy of meters, instruments, and equipment for measuring a utility service. But TCEQ would continue to monitor the quantity, quality, pressure and other conditions relating to its supply of the service. The recommendation

also contemplates TCEQ’s retaining the authority to appoint temporary managers for abandoned water and wastewater utilities, while recognizing that PUC would be responsible for the financial aspects of these appointments^{viii}. The agencies would share emergency operations. The Commission unanimously adopted a recommendation to require the agency overseeing water rates to provide electronic copies of the utility’s water rate cases and make them available at a reasonable cost to the rate payer.

Overlap with the Railroad Commission

In light of recent activities associated with the Barnett Shale development in the Fort Worth area, the Sunset Advisory Commission staff reviewed opportunities for realigning the environmental regulation of oil and gas activities.^x

The Commission recommended that TCEQ transfer its authority for making groundwater protection recommendations related to surface casings for oil and gas activities and certain mapping responsibilities to the RRC.^{xi} Currently, the RRC regulates drilling-related oil and gas activities to protect water quality and ensure proper waste disposal, site remediation, and well plugging. It also regulates pipeline safety, surface mining, and exploratory drilling associated with in situ uranium mining. TCEQ makes recommendations to RRC about protecting groundwater for drilling and disposal wells. It is also responsible for air quality

issues associated with oil and gas activities. Staff declined to recommend any shift of these responsibilities.^{xiii}

TCEQ Enforcement

1. Dam Safety

Of the 7,190 Texas dams TCEQ currently monitors, inspects and regulates, the Commission unanimously recommended the agency focus on the most hazardous, and exempt low-hazard dams from TCEQ’s hydrologic and hydraulic criteria. The Commission considered but rejected the staff recommendation to provide administrative penalty authority for TCEQ to enforce dam safety standards.^{xiv}

2. Other Enforcement Concerns

The Commission adopted recommendations to improve TCEQ enforcement practices, including that the agency:

- Structure its general enforcement policy in rule and publicly adopt its resulting enforcement policies
- Increase some 20 administrative penalty caps to match civil penalty levels for individual programs. This recommendation would not affect administrative caps for water rights, levees and public water supply violations that are already the same as authorized civil penalty caps.^{xv}
- Authorize TCEQ to consider Supplemental Environmental Projects for local governments.^{xvi}

3. Water Rights and Drought

The Commission adopted a couple of staff recommendations related to curtailment of surface water diversions during drought.

TRWA/TWCA Water Law Seminar

January 27 - 28, 2011 • Hyatt Hotel • Austin



State Rep. Allan Ritter, chair,
House Natural Resources Committee



Larry Prather of the U.S. Army Corps of Engineers addressed the group as part of a panel on federal policies.

The Association staff thanks the sponsors and participants of the TRWA/TWCA Water Law Seminar.



Les Trobman, general counsel, Texas Commission on Environmental Quality



Carolyn Brittin, deputy executive administrator, Texas Water Development Board, moderated a discussion of federal policies.



Robert Mace, deputy executive administrator, the Texas Water Development Board (TWDB).

TWCA 67th Annual Convention

March 2-4, 2011
Sheraton Austin Hotel
Austin

Featured speakers include:



State Senator Glenn Hegar, chairman, Texas Sunset Advisory Commission



State Senator Kel Seliger, chairman, Senate Select Committee on Redistricting (invited)



Bryan Shaw, chairman, Texas Commission on Environmental Quality



Ed Vaughan, chairman, Texas Water Development Board

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TEXAS WATER DAY



Fort Worth-based U.S. Rep. Kay Granger (R-TX12) met with members of the TWCA Texas Water Day team.



First-term U.S. Rep. Francisco Canseco (R-TX23) met with members of the Texas Water Day team.



First-term U.S. Rep. Blake Farenthold (D-TX27) listens to the Texas Water Day team's message.



Texas Water Day Chairman Tom Ray briefs the group on the day's meetings.

2011

Texas Water Day • Feb. 8-11 • Washington D.C Focus on funding for Texas water infrastructure projects



U.S. Rep. Ralph Hall (R-TX04)



(L to R) Legislative Correspondent Michael Stwarka from the office of U.S. Rep. Kevin Brady(R-TX08) met with Phil Kelly, general manager of the Jefferson County Drainage District #7; Richard Beaumont, commissioner of the Jefferson County Drainage District #7, and Robert Mace from the Texas Water Development Board.



Robert Joseph from the U.S. Geological Survey's Texas Water Science Center prepares for meetings.



(L to R) John Aguilar, staff assistant to U.S. Rep. Silvestre Reyes (D-TX16), confers with Wes Birdwell of Half Associates.

(L to R) Jerry Clark, general manager of the Sabine River Authority, and U.S. Rep. Louie Gohmert (R-TX01)



2011 TWCA Water Day issues and proposed solutions

1. United States Geological Survey Cooperative Program— Finding ways to re-establish the 50/50 cost-share for the program and continued support for the National Streamflow Information Program, which has seen cuts in federal contributions.

2. Invasive Species— Invasive aquatic species squander large amounts of water and upset the ecosystem. The unchecked growth of salt cedar, giant salvinia, water hyacinth, hydrilla, Eurasian watermilfoil, and most recently, zebra mussels, impacts water supply and quality, hydropower production, flood control, navigation, recreation, fish and wildlife, property values and human health.

3. Levee Certification and National Flood Insurance Program Concerns—The Federal Emergency Management Agency certification requirements must be flexible enough to account for important hydraulic differences between the flood protection from riverine and coastal hurricane levees.

4. Water Conservation, Reuse, and Desal—Traditional supply strategies such as reservoirs and pipelines must be bolstered by the emerging sustainable water supply approach that supports federal “Green Initiative” and “sustainability” policies.

ENDANGERED SPECIES ACT	EARMARKS	REGULATORY EXPANSION	REVISION to Principles & Guidelines Executive Order 11988
The unfair burden of citizen lawsuits under the Endangered Species Act threatens existing Texas water primacy in its water resources management and future projects.	Water projects developed and documented in the Texas Water Plan are not anyone's “pet projects” but have emerged from a grassroots, comprehensive, multi-year planning process, to define needed projects.	Recent efforts by federal agencies to carry out agendas not clearly supported by Legislative mandate are and will continue to be a major concern to the Texas water community (ex: EPA efforts to broaden Clean Water Act jurisdiction).	Current draft revisions would give preference to 'non-structural' solutions, even without the net positive benefits. Draft does not promote balance.
PROPOSED SOLUTION: Require the U.S.Fish and Wildlife Dept. to be pro-active by preparing comprehensive action plans that address all major factors stressing a species, and to call for coordination with state and local stakeholders, including the general public.	PROPOSED SOLUTION: Support keeping Texas Water Plan projects from being broadly classified as 'earmarks' in the federal authorization and appropriation process.	PROPOSED SOLUTION: Support juridical Committees' oversight of federal agency regulatory actions.	PROPOSED SOLUTION: Hold hearings to ensure that P&G revisions are in accord with intent of legislation and insist that Council on Environmental Quality stop the current draft and acknowledge and address National Research Council concerns.

The Association appreciates the sponsors and participants of Texas Water Day.

About the author



Tom Ray, of Lockwood, Andrews & Newnam, has followed national water issues for more than 20 years. He can be reached at j-tray@lan-inc.com.

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growth of our Texas-born population and the extent of the challenge before us becomes clear.

I commend all of you for your part in helping us rise to this occasion. Your pursuit of innovative solutions to water conservation issues will help ensure a bright, well-hydrated future for us all.

First Lady Anita Perry joins me in wishing you all an enjoyable and informative event.

Sincerely,

Rick Perry

Rick Perry
Governor

It recommended clarification of the executive director's authority to curtail water during shortages and drought to enable TCEQ to act more quickly to protect water rights and maximize beneficial use, even where no watermaster or water diversion is in place.^{xvii} It agreed that TCEQ should evaluate the need for additional watermaster programs once every five years and report its findings to the Legislature in its biennial report.^{xviii}

However, the Sunset Advisory Commission modified a staff recommendation to require water rights holders to maintain monthly water use information and make it available to TCEQ on request,^{xix} opting instead to restrict the requirement to the months the water the holder actually uses water under the permit.^{xx} TCEQ would be able to request this information as needed in drought or other emergencies, but the water rights holder would only be required to submit annual water use reports.^{xxi}

The Commission also declined to adopt a recommendation to give TCEQ clearer authority to require implementation of drought contingency plans during times of a potential water shortage^{xxii}. TWCA objected to this recommendation out of concern that such authority might allow TCEQ to circumvent the prior appropriations system of water rights.^{xxiii}

Texas Water Development Board

Preliminary staff recommendations^{xxiv} of particular interest relate to the

agency's bonding authority and its role in groundwater and state water planning.

Bonding Authority

The Commission recommended the Board be authorized to issue Development Fund general obligation bonds on a continuing basis in amounts such that the aggregate principal amount outstanding at any time does not exceed \$6 billion.^{xxv} This recommendation would allow the Board to issue additional general obligation bonds and simplify the bond authorization process by avoiding repeated and costly constitutional amendments. It would require the Legislature to pass a joint resolution containing this evergreen authority, which would need to be approved by Texas voters as an amendment to the State Constitution.

Otherwise, the Board may not be able to meet the state's needs through the next biennium and might lose federal funds.^{xxvi}

The Commission also recommended that the Board's Development Fund bonds be treated as self supporting, and only be considered state debt repayable with state general revenues if the Legislature appropriates debt service to the Board. If the Legislature appropriates general revenue for debt service, the bond resolution must state that the bonds will be repaid with state general revenues.^{xxvii} When requesting the Bond Review Board's approval of bond issues, the Board would need to certify whether debt service on the bonds is expected to be paid from the state's general revenues or another revenue

source. The Bond Review Board would also need to confirm that the Legislature appropriated debt service which supports the issuance of any non- self-supporting debt.^{xxviii}

Enforcement of Financial Assistance Obligations

The Commission adopted the staff recommendation to enhance the Board's statutory authority to take legal action to compel any recipient of TWDB funding to cure or prevent a payment default or other required legal duties specified in documents such as bond ordinances and loan and grant agreements.^{xxix}

Groundwater Planning

To improve groundwater management area and regional planning group coordination, the Commission recommended that overlapping regional planning groups include a voting member from each GMA.^{xxx} A GMA representative would represent a GCD that overlaps with the regional water planning group.

Regional water planning groups would be required to use the desired future conditions included in the State Water Plan that is in place at the time of adoption in the next water planning cycle.^{xxxi} GMAs would be able to change their DFC by a certain date (e.g. Jan. 5, 2012 of the next planning cycle), with the assurance that the new MAG number be used in the next regional – and state – water plan adopted by the Board.^{xxxii} The Commission also adopted a number of recommendations to strengthen public notice requirements for GMA meetings

and adoption of DFCs.^{xxxiii}

Desired Future Conditions

The Commission recommended revising the to:

- Repeal the process for petitioning the reasonableness of a DFC with the TWDB^{xxxiv}
- Strengthen the process GCDs use to adopt a DFC^{xxxv}
- Provide for clear authority for judicial review for these decisions^{xxxvi}

Under these recommendations, a proposed DFC would require support from two-thirds of all GMA delegates who are eligible to vote prior to its being submitted to individual GCDs for consideration. Each district would be required to consider all proposed DFCs relevant to the district. At the conclusion of a public hearing, districts would report any public comment received and propose revisions made to the DFC and the basis of those revisions. The DFC report must identify and justify each DFC, describe other options that were considered, the reasons why they were or were not adopted, and discuss why advisory committee recommendations and public comment were or were not incorporated. These reports would be considered at the DFC Joint Planning Conference.

The GMA would be required to document the criteria used to determine a reasonable DFC and submit it to the Board.^{xxxvii} The DFC report would also need to document specific criteria used to establish reasonable DFCs, such as aquifer uses and conditions, water supply needs and strategies in the adopted state water plan, physical

feasibility, socio-economic and environmental impacts, impact on private property interests and rights and hydrogeological conditions and impacts on subsidence.^{xxxviii}

Appeals would be made to district court in the same manner used to challenge any other district rule under Texas Water Code, Chapter 36, Subchapter H, under substantial evidence review in any county in which the district is located. A person affected by the DFC could also file an inquiry with the TCEQ under TEXAS WATER CODE § 36.108(f); for example, an affected person may file an inquiry alleging the district failed to engage in joint planning (including failure to formally adopt a DFC) or that the rules adopted by a district are either not designed to achieve the DFC or adequately designed or enforced to protect the groundwater within the GMA.^{xxxix}

State Water Planning and Conservation

As part of the State Water Plan, the Commission adopted a recommendation that the Board be required to evaluate the state's water needs and strategies to meet them, as well as its progress in meeting those needs.^{xi} The Board would work with regional water planning groups to obtain data on plan implementation.

The Commission recognized the need for agencies to work together to develop water conservation as a means to meeting future water needs and recommended the Board and TCEQ work with the Water Conservation Advisory Council to develop uniform, detailed gallons per capita daily reporting

requirements.^{xii}

It concluded that the Board and TCEQ should not require water use information beyond that produced by an entity's billing system. Water use reporting requirements are intended to apply only to entities required to submit municipal water use data and are not intended to require metering of individual water wells.^{xlii}

Finally, the Commission recommended the Board explore ways to develop metrics for additional water use sectors beyond municipal use and to incentivize water conservation efforts.^{xliii} It identified restructuring TWDB's financial assistance as a possible incentive to further encourage conservation.^{xliv}

Footnotes

i. See Decision Material, Texas Commission on Environmental Quality & On-Site Wastewater Treatment Council, Jan. 2011 (TCEQ Sunset Decision Material) (available at http://www.sunset.state.tx.us/82ndreports/tceq/tceq_dm.pdf). Audio recording available at <http://www.sunset.state.tx.us/audioarchives.htm>.

ii. TCEQ Sunset Decision Material, Recommendation 1.1 at 27, 28c.
 iii. Id. New Issue No. 53 at 96
 iv. Id. at 3
 v. See id. at 27, 28c, 84, 86j
 vi. Id. at 82-83
 vii. Id.
 viii. Id.
 ix. Id. at 120
 x. Id. at 21-22, 27
 xi. Id. at 27, 28b-28c
 xii. Id. at 21-22, 27
 xiii. See id. New Issues Nos. 273-274 at 118, 120.
 xiv. Sunset Report Recommendations 4.3 at 50, 52d
 xv. Id. at 45-47, 49
 xvi. See id. at 50-51, 52d
 xvii. Id. Recommendation 5.1 at 57, 58c
 xviii. Id. Recommendation 5.4 at 57, 58c
 xix. Issue 5.2
 xx. Id. at 57, 58b, 58c
 xxi. Id. at 58b
 xxii. See Id. Recommendation 5.3 at 56-57, 58c
 xxiii. Id. at 58b
 xxiv. Decision Material, Texas Water Development Board, Dec. 2010 available at http://www.sunset.state.tx.us/82ndreports/wdb/wdb_

Welcome New Members!

dec.pdf. Audio recording available at <http://www.sunset.state.tx.us/audioarchives.htm>.

- xxv. Id. Recommendation 1.1. at 16, 18b
- xxvi. TWDB Sunset Decision Material
- xxvii. Id. at 18b
- xxviii. Id. at 16, 18b
- xxix. Id. at 18b
- xxx. Recommendation 2.1, as modified, at 28d
- xxxi. Id. Recommendation 2.2 at 27, 28d
- xxxii. Id. Recommendation 2.2 at 27
- xxxiii. Id. Recommendation 2.3 with Modification 9 at 28c, 28d
- xxxiv. TEX. WATER CODE § 36.108(l)-(n)
- xxxv. Id. Recommendation 3.2, as modified, at 36, 42d-42g
- xxxvi. Id.
- xxxvii. Id. Recommendation 3.1 at 36, 42g.
- xxxviii. Id.
- xxxix. Id. at 42d-42g.
- xl. Id. Recommendation 5.1 at 54, 56b
- xli. Id. Recommendation 5.2 at 55, 56b
- xlii. Adopted Recommendation 5.2, regarding uniform reporting of gallons per capita daily water use, with the following modifications. Id. at 56b
- xliii. Id. at 55, 56b
- xliv. Id. at 55

Associated General Contractors of Texas (AGC)
Austin, Texas
Contact:
Perry L. Fowler

Bell Engineering & Consulting
Abilene, Texas
Contact:
David Bell

City of Amarillo
Amarillo, Texas
Contacts:
Emmett A. Autrey
Sysarath Sysombath

End Op, LP
Elgin, Texas
Contact:
Frankie Limmer

Kip Averitt
Austin, Texas

Enprotec/Hibbs & Todd, Inc.
Abilene, TX
Contact:
Scott F. Hibbs

Prairielands
Groundwater
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
Texas Chemical Council
Austin, Texas
Contact:
Christina T. Wisdom

Thompson
Marketing
San Antonio, TX
Contact:
John Boggess


About the author



Lyn Clancy is managing associate general counsel at the Lower Colorado River Authority. She can be reached at lyn.clancy@LCRA.org.



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