**Center for Global Energy, International Arbitration, and
Environmental Law
The University of Texas-School of Law**

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PAYING FOR WATER:
THE 83RD LEGISLATIVE SESSION AND THE \$2 BILLION WATER INFRASTRUCTURE BANK

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Introduction

The current drought¹ has been hanging over Texas for three years.² Meteorologists have predicted that it could last for another five years³ and could become worse⁴ than the infamous 1950s drought of record, which “reshaped Texas, ruining thousands of farmers and ranchers and pushing rural residents to migrate out of the country and into the cities.”⁵

Among Texas leaders, there is a general consensus⁶ that the state must act now to ensure its long-term water security,⁷ and as the legislature convened for its 2013 session, many observers predicted water would emerge as a marquee issue.⁸ And it did, with lawmakers introducing numerous water-related bills.

Three of these bills are aimed at financing enough water infrastructure projects to assure long-term water supplies for the state: H.B. 4, H.B. 1025 and S.J.R. 1.⁹ These bills could have a profound and long-lasting impact on Texas water law and water resources.¹⁰ H.B. 4 revamps the agency that provides state financing for water infrastructure, the Texas Water Development Board (TWDB). Together with H.B. 1025 and S.J.R. 1, it creates two new funds to be used by TWDB, contingent upon voters Texas approving Proposition 6 (as authorized by S.J.R. 1) in the November 5 special election.¹¹

The new funds are the State Water Implementation Fund for Texas (SWIFT) and the State Water Implementation Revenue Fund for Texas (SWIRFT). If Proposition 6 passes, SWIFT will receive a \$2 billion appropriation from the Economic Stabilization Fund (“Rainy Day Fund”).¹² TWDB may disburse money from SWIFT through a “bond enhancement agreement”¹³ to certain other TWDB funds, which may then provide approved forms of financial assistance to applicants for state aid. Sister fund SWIRFT provides TWDB with new revenue bonding authority and provides an additional mechanism for distributing SWIFT money.

While H.B. 4 sets broad parameters for SWIFT and SWIRFT, it delegates significant responsibility for creating, designing and operating those funds to TWDB. Many of the questions that a politically high-profile and financially high-dollar bill such as H.B. 4 raises – which projects will benefit, how exactly will the money be used, and how long will the money last – will remain unanswered until TWDB promulgates regulations to implement its statutory commands.

In anticipation of the November 5 special election, and of the extensive rulemaking processes that will follow if Proposition 6 succeeds, the Center for Global Energy, International Arbitration and Environmental Law has prepared this white paper. It explains the key provisions in H.B. 4 and Proposition 6. It explores the contours and inflection points in complex legislation that – aside from a salient few details – remains relatively unfamiliar to the general public and even to those who work regularly on water policy issues.

HB 4 TIMELINE	
Action	Deadline
Governor must appoint new TWDB board members. ¹⁴ (<i>See</i> Part II below.)	September 1, 2013 ¹⁵
TWDB board members must appoint new executive administrator. ¹⁶ (<i>See</i> Part II below.)	October 1, 2013 ¹⁷
Proposition 6 put before voters in special election. (<i>See</i> Part VI below.)	November 5, 2013 ¹⁸
The comptroller, the lieutenant governor, and the speaker of the house of representatives must appoint their chosen representatives to the SWIFT Advisory Committee. ¹⁹ (<i>See</i> Part IV.C below.)	As soon as practicable after November 5, 2013, if voters approve Proposition 6 ²⁰
TWDB creates a Stakeholder Committee, consisting of regional water planning group presiding officers or their appointees. ²¹ (<i>See</i> Part III.A below.)	As soon as practicable after November 5, 2013, if voters approve Proposition 6 ²²
The Stakeholder Committee must submit to the TWDB its proposed prioritization standards to be used by the regional water planning groups in prioritizing projects. ²³ (<i>See</i> Part III.A below.)	December 1, 2013 ²⁴
Regional water planning groups must submit draft prioritizations for projects included in the regional water plans to the TWDB. ²⁵ (<i>See</i> Part III.A below.)	June 1, 2014 ²⁶
Regional water planning groups must submit final prioritizations for projects included in the regional water plans to the TWDB. ²⁷ (<i>See</i> Part III.A below.)	September 1, 2014 ²⁸
SWIFT Advisory Committee must submit recommendations to the TWDB on the proposed rules regarding implementation of statutorily mandated allocations for rural projects and for conservation or reuse projects. ²⁹ (<i>See</i> Part IV.C Below.)	September 1, 2014 ³⁰
TWDB must provide SWIFT implementation report to governor lieutenant governor, speaker of the house of representatives, and members of the legislature regarding the use of the fund.	December 1, 2014 ³¹
TWDB must adopt rules about providing for the use of money in SWIFT. ³² (<i>See</i> Part IV.C Below.)	The latter of March 1, 2015 or 90 days after the TWDB receives the Advisory Committee's recommendations ³³

I. State Water Plan

The legislature has embraced the State Water Plan (SWP)³⁴ as a blueprint for ensuring water security.³⁵ Under H.B. 4 and Proposition 6, the state can use SWIFT and SWIRFT only to provide financial assistance to projects included in the SWP.

The SWP is adopted by the TWDB every five years and, according to the Texas Water Code, must “provide for the orderly development, management, and conservation of water resources and preparation for and response to drought conditions, in order that sufficient water will be available at a reasonable cost to ensure public health, safety, and welfare; further economic development; and protect the agricultural and natural resources of the entire state.”³⁶

The legislature created the TWDB and the SWP in 1957, in response to the 1950s drought of record. In 1997, through the passage of S.B. 1,³⁷ the legislature changed the water planning process from top-down to bottom-up.³⁸ The bottom-up process divides the state into sixteen regional planning groups and requires each to prepare a regional water plan, which the TWDB then incorporates into the single statewide SWP. Among other things, the regional water plans project future water needs and identify projects that could meet those needs.³⁹

In May 2013, the Eleventh Court of Appeals found that two of the regional plans included in the current SWP conflicted with each other, in violation of a Water Code provision requiring the SWP to be internally consistent.⁴⁰ The decision has raised doubts about the reliability of the planning process and the vulnerability of the SWP to legal challenges.⁴¹

For now, however, the SWP remains the official “guide to state water policy.”⁴² The TWDB adopted the current SWP⁴³ in January 2012, at a time when the state was mired in drought. The SWP included alarming and widely reported warnings that, if Texas does not develop additional water supplies, it will fall catastrophically short of meeting water needs by 2060.⁴⁴ “Annual economic losses from not meeting water supply needs could result in a reduction in income of approximately \$11.9 billion annually if current drought conditions approach the drought of record, and as much as \$115.7 billion annually by 2060, with over a million lost jobs.”⁴⁵

The SWP has been criticized for overestimating future demand and for failing to account for conservation gains and technological improvements.⁴⁶ Still, the doomsday estimates have served as a rallying cry for lawmakers, and funding the SWP has become “[i]n the legislative imagination...Texas’ version of the creation of Dutch dikes.”⁴⁷

II. Restructuring the Board

The TWDB was created in 1957 and has existed in its current form since 1985, when sunset legislation separated it from what is now the Texas Commission on Environmental Quality (TCEQ).⁴⁸ At that time, the legislature put the TWDB under the control of six volunteer, part-time board members – in contrast to the three paid, full-time commissioners handed the reins at sister agency TCEQ.

H.B. 4 reconfigures the TWDB's governing structure so that it resembles that of TCEQ and the similarly organized Texas Public Utilities Commission.⁴⁹ The table below summarizes the changes.

In addition to restructuring the TWDB's governing board, H.B. 4 requires the governor to appoint new board members by September 1, 2013,⁵⁰ and makes all current and former board members ineligible.⁵¹ On August 16, 2013, Governor Rick Perry announced his three picks for the restructured board: Carlos Rubenstein, Mary Ann Williamson and Bech Bruun.⁵² The new board members were, in turn, required to name a new executive administrator by October 1, 2013.⁵³ On September 19, 2013, the board members announced that they had selected Kevin Patteson for the position.⁵⁴

The administrative overhaul to the TWDB is somewhat unusual, in that such efforts are typically undertaken as part of the sunset review process.⁵⁵ The Sunset Advisory Commission did not recommend any changes in governance during its most recent review of the TWDB, in 2011,⁵⁶ or in its previous review, in 2000.⁵⁷

News accounts identified State Sen. Troy Fraser as the driving force behind the governance provisions.⁵⁸ Fraser has contended that the changes would make the Board more accountable and would avoid the sort of controversy that has recently attended the Cancer Prevention and Research Institute of Texas.⁵⁹

Critics of the change have warned that the new governance structure will reduce the diversity of perspectives at the helm of the board⁶⁰ and politicize the agency.⁶¹ In a June 2013 *San Antonio Express-News* op-ed, five former TWDB board members said that many of their counterparts, “who represented areas throughout Texas and who have served and governed the TWDB since its founding in 1957, do not think this reorganization is necessary, or wise.”⁶²

Structural Feature	Old TWDB	New TWDB
Number of board members	Six	Three ⁶³
Full-Time/Part-Time	Part-Time	Full-Time ⁶⁴
Required Expertise	None	(1) engineering; (2) finance; (3) law or business ⁶⁵
Lengths	Six years	Six years ⁶⁶
Term Cycles	Staggered so that, every other year, two members' terms expire.	Staggered so that one member's term expires February 1 of each odd-numbered year. ⁶⁷
Term Limits	None ⁶⁸	No one may serve more than two six-year terms. ⁶⁹
Selection Process	Governor appoints with advice and consent of senate	Governor appoints with advice and consent of senate
Board Member Eligibility	Cannot have conflict of interest.	Cannot have conflict of interest or have served as board members on or before January 1, 2013.
Geographic Representation	Each member must be from "a different section of the state."	The members must "reflect the diverse geographic regions and population groups of this state."
Chairman	The governor designates one board member as chairman.	The governor designates one board member as chairman. ⁷⁰
Vice-Chairman	Board members select a vice-chairman every two years. ⁷¹	None.
Compensation	Compensation as provided the General Appropriations Act for each day he serves, plus expenses ⁷²	Aggregate agency salaries set by appropriations legislation.
Removal	None	The governor may remove a board member with "the advice and consent of the senate." ⁷³
Regular Meetings	Board members required to meet at least once every other month.	Board members required to meet "at times specified by a board order and entered in its minutes." ⁷⁴
Special Meetings	Board members may call a special meeting "at any time."	Board may "hold special meetings at the times and places in this state that the board decides are appropriate for the performance of its duties." ⁷⁵
Executive Administrator	The TWDB board members must appoint an executive administrator.	The TWDB board members must appoint a new executive administrator by October 1, 2013. ⁷⁶

III. Prioritization

H.B. 1025 and Proposition 6 would appropriate \$2 billion to SWIFT – a significant sum, but well below the \$53 billion price tag for all projects included in the 2012 SWP.⁷⁷ Thus, the TWDB must be selective in allocating assistance from SWIFT. H.B. 4 establishes a prioritization process and sets forth factors that the TWDB and regional planning groups must consider during that process.

A. Regional Prioritization

H.B. 4 requires each regional planning group to prioritize projects for financial assistance from SWIFT⁷⁸ and to provide this prioritization with its regional water plan.⁷⁹ The prioritization must include projects aimed at addressing both “short-term” and “long-term” water needs.⁸⁰ (The legislation does not define “short-term” or “long-term.”) When determining its statewide prioritization (*see* Part III.B below), the TWDB must give consideration to regional prioritizations, though not as much as to other factors; the legislation lists regional prioritization as one of seven secondary factors that the TWDB must take into account.⁸¹

The TWDB must form a stakeholders committee, consisting of regional planning group chairs or their appointees. The purpose of the committee is “to establish uniform standards” to guide the regional planning groups in their prioritization.⁸² The standards cannot take effect until the TWDB board has approved them.⁸³ H.B. 4 requires that, “at a minimum,”⁸⁴ regional planning groups “consider:”

1. “the decade in which the project will be needed;”⁸⁵
2. “the feasibility of the project, including the availability of water rights for purposes of the project and the hydrological and scientific practicability of the project;”⁸⁶
3. “the viability of the project, including whether the project is a comprehensive solution with a measurable outcome;”⁸⁷
4. “the sustainability of the project, taking into consideration the life of the project;”⁸⁸ and
5. “the cost-effectiveness of the project, taking into consideration the expected unit cost of the water to be supplied by the project.”⁸⁹

The bill does not elaborate upon these factors – it does not, for example, explain what a project must do to offer “a comprehensive solution with a measureable outcome” or to be considered “sustainab[le].”⁹⁰ Nor does it specify the precise manner in which a regional planning group must consider these factors. A planning group, looking at the statute alone, could conceivably “consider” but still give no weight to one factor; or it could “consider” all the listed factors but subordinate them to other unlisted factors.

Much, then, will hinge on the standards the stakeholder committee develops. Given the importance of the standards, the stakeholder committee is likely to attract significant attention from affected interest groups. Although H.B. 4 does not direct the TWDB to adopt the standards through rulemaking – as it does for the board’s own prioritization methodology⁹¹ (see Part III.B below) – it does require the SWIFT Advisory Committee (see Part IV.C below) to provide comments and recommendations on any rulemakings related to the standards.⁹²

This implicit distinction in H.B. 4 – between rules that require a formal rulemaking and standards that do not – exists in some degree of tension with the Texas Administrative Procedures Act, which under current case law could require formal rulemakings even for the standards. The act requires agencies to adopt “rules” through a formal notice-and-comment process.⁹³ It defines a “rule” as a “state agency statement of general applicability that: (i) implements, interprets or prescribes law or policy; or (ii) describes the procedure or practice requirements of a state agency.”⁹⁴

The line between a rule and internal agency guidance is fine and has been the subject of increasing litigation in recent years.⁹⁵ Statements are “generally applicable” if they “affect[] the interest of the public at large such that they cannot be given the effect of law without public input.”⁹⁶ While the prioritization standards are intended to guide the decision-making of the regional planning groups – and ultimately the TWDB – they arguably affect the public at large by influencing which projects move forward in planning and funding processes that are structured to be collaborative and to engage public stakeholders.

B. Statewide Prioritization

The TWDB must prioritize the projects in the SWP (which incorporates the regional water plans and the projects that the regional water planning groups have already prioritized for their jurisdictions).⁹⁷ H.B. 4 directs the TWDB to establish a “point system” for “projects for which SWIFT financial assistance is sought from the board.”⁹⁸ The point system will not apply to projects for which financial assistance *has not* been sought. (Such projects could include those being undertaken by water utilities with strong credit ratings and capital markets access that prefer to finance themselves.)

The point system must “include a standard for the board to apply in determining whether a project qualifies for financial assistance at the time the application for financial assistance is filed with the board.”⁹⁹ This language likewise calls for the TWDB to rank all projects seeking financial assistance but not all projects in the SWP. The cumulative ranking will thus reflect TWDB’s SWIFT funding priorities but not, to the extent that certain projects bypass the SWIFT process, its broader water planning priorities.

H.B. 4 requires that, in awarding points, the TWDB consider four primary and seven secondary factors.¹⁰⁰ For the primary factors, the TWDB “shall give the highest consideration ... to projects that will have a substantial effect, including projects that will:

1. “serve a large population”
2. “provide assistance to a diverse urban and rural population”
3. “provide regionalization”
4. “meet a high percentage of the water supply needs of the water users to be served by the project.”¹⁰¹

The bill does not interpret these factors or explain whether a project that does not satisfy any of them could still be shown for other reasons to have a “substantial effect.” Similarly, it does not discuss potential interactions among the factors. A project might be most likely to serve a “large population” if it supplied only a “diverse urban” (but not rural) population; and yet such a large urban population would be unlikely to rely for a “high percentage of [its] water supply” on a single project, let alone one that does not already exist. The secondary factors provide further guidance but also raise further questions:

1. the applicant’s contribution to the project’s financing;
2. the applicant’s financial capacity to repay;
3. the ability of the Board and the applicant to leverage state financing with local and federal financing;
4. whether there is an emergency need for the project;
5. whether the applicant is shovel-ready to proceed at the time of application;
6. the demonstrated or projected effect of the project on water conservation; and
7. the priority given the project by the applicable regional water-planning group.¹⁰²

Any number of interest groups could find fault with these factors. They do not incorporate environmental impacts, aside from the factor looking at conservation. Nor do they take into account economic impacts – an interesting omission, given that H.B. 4 was sold largely on the basis of the economic misfortune that the TWDB predicted would befall Texas if the SWP were not funded.

The meaning of the factors and the proper method for navigating among them will have to be developed more fully during the rulemaking process. The language of H.B. 4 is so broad,

however, that the rule the TWDB proposes and ultimately adopts could take many different shapes.

IV. SWIFT

H.B. 4 launches two new and related funds – SWIFT and SWIRFT. In a general sense, SWIFT holds money and routes it through other funds (in the form of a statutorily permitted financial assistance) to applicants (like cities or utilities) pursuing infrastructure projects. But the exact manner in which SWIFT money will be disbursed – and repaid – could vary considerably. Much depends on the regulations that emerge from H.B. 4-driven rulemaking processes and, perhaps, on the specific terms and conditions of the financing arrangements negotiated for individual infrastructure projects.

The sections below review the mechanics of SWIFT in greater detail. They consider: (A) the trust management of SWIFT; (B) the funding of SWIFT; (C) the SWIFT advisory committee; and (D) bond enhancement agreements.

A. Trust

SWIFT will be managed by the state Comptroller through the Texas Treasury Safekeeping Trust Company (Trust),¹⁰³ which will hold SWIFT in the name of the Board.¹⁰⁴ The Trust has broad authority to manage money in the funds but must invest prudently¹⁰⁵ and may disburse no more than twice a year, as directed by TWDB.¹⁰⁶ For oversight, the trust must contract with a certified public accountant to conduct an annual independent review of the fund; the accountant must then provide the findings to TWDB and the Advisory Committee.¹⁰⁷

B. Funding Sources

H.B. 1025 capitalizes SWIFT with \$2 billion from the Rainy Day Fund, contingent upon the passage of Proposition 6. At this point, the legislature has provided no indications of intent to further fund SWIFT.¹⁰⁸ Still, H.B. 4 provides the flexibility for SWIFT to receive cash inflows from five different sources:¹⁰⁹

1. Money transferred to the fund by law;
2. Proceeds of fees or taxes dedicated for the fund;
3. Statutorily dedicated revenues;
4. Investment earnings and interest on fund corpus; and
5. Money transferred from another fund or account that received SWIFT money under a bond enhancement agreement.

C. Advisory Committee

HB 4 creates a seven-member advisory committee for SWIFT (the SWIFT Advisory Committee). It is comprised of: (1) the comptroller, or a person designated by the comptroller; (2) three members of the Senate appointed by the lieutenant governor, including a member of the Finance Committee and a member of the Natural Resources Committee; (3) and three members of the House appointed by the speaker of the House, including a member of the Appropriations Committee and a member of the Natural Resources Committee.¹¹⁰

The Advisory Committee is charged with submitting comments and recommendations regarding the use of SWIFT funds. It is discussed at greater length in Part VII.A below.

D. Bond Enhancement Agreements

TWDB may direct the Trust to disburse money from SWIFT only under a “bond enhancement agreement” – a term already found in the Water Code but defined more narrowly for the purposes of SWIFT.¹¹¹ (As discussed in Part V.C below, H.B. 4 uses a less constrained definition of “bond enhancement agreement” in regards to SWIRFT.)

For SWIFT, a “bond enhancement agreement” is a “professional services agreement” that could encompass any number of financial instruments, so long as it complies with the following requirements:

- **Eligible Project:** TWDB cannot provide financial assistance directly to applicants through SWIFT. Rather, it can only provide money from SWIFT to one of five other TWDB programs, to support projects approved under those programs:¹¹² (1) SWIRFT; (2) the Water Infrastructure Fund;¹¹³ (3) the Rural Water Assistance Fund;¹¹⁴ (4) State Participation Program accounts in the Texas Water Development Fund II; and (5) the Agricultural Water Conservation Fund.¹¹⁵ SWIRFT, as discussed in Part V below, can also provide financing to projects in the other four above-listed programs (Water Infrastructure Fund, et al). In other words, TWDB can provide financial assistance from SWIFT directly to the other programs, or indirectly by routing the assistance through SWIRFT. Proposition 6 includes a provision¹¹⁶ that empowers the legislature to authorize the TWDB to make loans directly from SWIFT; conceivably, future legislation could modify SWIFT to that effect.

Eligible TWDB Program	Statutory Basis	Purpose of Program
Water Infrastructure Fund	Texas Water Code Chapter 15, Subchapter Q	Subsidized and deferred loans for state political subdivisions and water supply corporations, for projects in SWP or approved regional water plans

Rural Water Assistance Fund	Texas Water Code Chapter 15, Subchapter R	Loans for political subdivisions and nonprofit water supply corporations, for infrastructure or for consolidation or regionalization
Agricultural Water Conservation Fund	Texas Water Code Chapter 17, Subchapter J	Loans for political subdivisions, colleges, interstate compact commissions and nonprofit water supply corporations, for conservation projects
State Participation Program accounts, Texas Water Development Fund II	Texas Water Code Chapter 16, Subchapters E and F	Deferred interest obligations to repurchase TWDB's temporary ownership interest in facilities, for political subdivisions and water supply corporations

Additionally, H.B. 4 directs the SWIFT Advisory Committee (*see* Part IV.C below) to submit to TWDB an evaluation of the need for “premium financing programs” under SWIFT for rural political subdivisions, agricultural conservation, and conservation or reuse.¹¹⁷

- **Financial Benefits:** Through a bond enhancement agreement, the TWDB may disburse money from the SWIFT to one of the five eligible programs listed above. The programs, in turn, may only use the money to provide four types of financial benefits: (1) low-interest loans (though the interest rate cannot be less than 50 percent of the then-current market rate of interest available to the board);¹¹⁸ (2) long-term loans (with repayment periods no longer than the lesser of 30 years or the expected useful life of the facility)¹¹⁹; (3) loan deferrals;¹²⁰ and (4) incremental repurchase terms for certain facilities from the state (e.g., funding through the State Participation Program).¹²¹ Grants are not permitted.¹²²
- **Retroactivity:** The TWDB may enter into bond enhancement agreements for bonds issued prior to September 1, 2013 only if: (1) the bonds were issued as part of an eligible program; (2) the bonds are being used to provide authorized financial benefits; and (3) the bond proceeds were or are required to be used only for projects recommended through the state and regional water planning processes.¹²³
- **Repayment to SWIFT:** Bond enhancement agreements must include terms providing for TWDB funds that receive financial assistance to repay SWIFT.¹²⁴ But two preconditions must be satisfied before SWIFT can receive such repayments: (1) the TWDB fund making the repayment must have a “surplus balance”¹²⁵ for that purpose; and (2) the

repayment cannot cause general obligation bonds issued by the fund making the repayment to be no longer be considered self-supporting.¹²⁶

The latter condition is intended to protect the state from violating the constitutional debt and spending prohibitions discussed in Part VI.A below. The former condition prevents TWDB from cannibalizing its other funds to maintain SWIFT. “Surplus balance” refers to “the amount of money on deposit in the fund or account, as determined by [TWDB], that is attributable to the general obligation bonds or revenue bonds that are the subject of the bond enhancement agreement ... that exceeds the amount required to pay annual debt service on the bonds and any other amounts specified in the resolution or other proceedings authorizing the bonds and any related obligations.”¹²⁷

- Eligible Applicants: To be eligible for financial assistance with bond proceeds benefitting from a SWIFT bond enhancement agreement, an entity must “submit or implement” a water conservation plan and must “satisfactorily complete a request by the executive administrator or a regional water planning group for information relevant to the project.”¹²⁸ H.B. 4 cites a water infrastructure financing survey as an example of information that could be sought but provides no additional guidance. Existing statutes – including Texas Water Code §§ 11.1271 and 16.053(g) – provide additional direction regarding conservation plans.

The requirement that applicants “submit or implement” a water conservation plan (WCP) encourages greater adoption of WCPs.¹²⁹ This requirement parallels other Water Code sections that direct entities seeking water-related benefits from the state to have WCPs.¹³⁰ By allowing applicants to “submit” rather than to “implement,” however, H.B. 4 permits applicants to satisfy the requirement through the paper exercise of preparing and submitting a WCP rather than by implementing the WCP and achieving concrete water savings. (By way of comparison, another bill passed in the 2013 legislative session – H.B. 3604 – mandates that, when the governor declares a drought-related disaster area, water suppliers in that area must implement WCPs).¹³¹

- Set-Asides: When determining how to allocate SWIFT funds under bond enhancement agreements, the TWDB must “undertake” to apply: (1) at least 10 percent of disbursed SWIFT money to rural political subdivisions¹³² or agricultural water conservation; and (2) at least 20 percent to projects that are “designed for water conservation or reuse ... including agricultural irrigation projects.”¹³³ The TWDB must adopt a formal regulation for determining whether projects satisfy these criteria.¹³⁴ It is unclear how these set-asides will interact with the regional and statewide prioritization factors discussed in Part III above.

V. SWIRFT

H.B. 4 creates a sister fund for SWIFT – SWIRFT.¹³⁵ Like SWIFT, SWIRFT exists in the State Treasury, outside the General Revenue Fund. As explained in Part IV above, TWDB may only disburse money from SWIFT to four agency programs or to SWIRFT. In effect, under a SWIFT bond enhancement agreement, SWIRFT would function as a middleman that TWDB may choose to use or to bypass, much like the other funds or accounts to which SWIFT bond enhancement agreements may provide benefits.

TWDB might opt to use SWIRFT as a way-station because it offers the agency greater control and day-to-day flexibility than SWIFT does. That maneuverability – combined with new revenue bonding authority H.B. 4 confers upon SWIRFT – could make the fund an attractive vehicle for leveraging and disbursing money from SWIFT.

Apart from its connection to SWIFT, SWIRFT has revenue bonding authority that TWDB may broadly use to support other agency programs.

A. Management

Where SWIFT functions more as a holding account, under the purview of the Trust and accessible only through twice-a-year disbursements, SWIRFT is an actively used fund that the TWDB directly controls.¹³⁶

B. Funding Sources

TWDB may capitalize SWIRFT with: (1) money the TWDB credits to it; (2) the proceeds of dedicated fees or taxes; (3) any revenue the legislature by statute dedicates to the fund; (4) investment earnings and interest earned on amounts in SWIRFT; (5) bond proceeds, including SWIRFT revenue bonds; (6) repayment of loans made from SWIRFT; (7) money from the sale, transfer or lease of a project that used SWIRFT financing; and (8) money from a SWIFT bond enhancement agreement.¹³⁷

C. SWIRFT Revenue Bonds

H.B. 4 gives TWDB new revenue bonding authority through SWIRFT.¹³⁸ TWDB already has revenue bonding authority under Texas Water Code Chapter 17, Subchapter I, which empowers the agency to issue revenue bonds to capitalize the Texas Water Resources Fund (TWRP).¹³⁹ Indeed, H.B. 4 amends Subchapter I to allow TWDB to use TWRP revenue bonds to provide money to SWIRFT.¹⁴⁰

In many ways, the SWIRFT revenue bonding authority duplicates the TWRP revenue bonding authority.¹⁴¹ Through both funds, TWDB may issue revenue bonds that impose no indebtedness

on the state and that mature no later than 50 years from their dates of issuance. Notably, though, TWDB may use TWRF revenue bond proceeds only “to acquire obligations of political subdivisions”¹⁴² for certain itemized (albeit relatively broad) purposes. When acquiring subdivision debt, TWDB may devise a range of financial mechanisms that provide different sorts of assistance to the subdivision – but any such mechanisms must still be built around the debt acquisition.

Through SWIRFT, TWDB does not have to limit itself to subdivision debt acquisition. It may “purchase bonds or other obligations of eligible political subdivisions *or* make loans”¹⁴³ to support projects approved under the: (1) State Water Implementation Fund; (2) Water Infrastructure Fund; (3) Rural Water Assistance Fund; and (4) State Participation Program accounts under the Texas Water Development Fund II.¹⁴⁴

TWDB may further use SWIRFT to provide a source of revenue or security on a bond enhancement agreement¹⁴⁵ or “to acquire loans or other assets from another fund or account administered by the TWDB.”¹⁴⁶ While the provisions governing SWIFT define the term “bond enhancement agreement” in detail, those provisions pertain only to SWIFT.¹⁴⁷ The SWIRFT provisions include no comparable definition of the term, suggesting that TWDB may use SWIRFT revenue bonds as a source of revenue or security for SWIFT-style bond enhancement agreements or for other arrangements such as credit enhancements.

All in all, it is more likely that the TWDB will use SWIRFT to issue revenue bonds to purchase or guarantee subdivision bonds rather than to fund loans to political subdivisions. Rating agencies may view SWIRFT revenue bonds payable from subdivision promissory notes less favorably than revenue bonds payable from political subdivision securities that the state attorney general has approved under state law.¹⁴⁸

VI. Capitalizing the Funds

SWIFT and SWIRFT were structured to account for both constitutional and political concerns. The requirement that voters approve the establishment of the funds and the \$2 billion appropriation to SWIFT reflects these concerns.

A. Constitutional Concerns

The Texas Constitution imposes limits on state debt and spending. The debt limits prohibit the state from incurring debt and from exceeding a debt ceiling. The spending limit restricts increases in appropriations from one legislative session to the next. H.B. 4 and S.J.R. 1 are designed to avoid violating these limits.

Prohibition against State Debts

Article III, § 49 provides that “[n]o debt shall be created by or on behalf of the state” unless under limited circumstances (such as to repel an invasion) or unless the constitution otherwise allows.¹⁴⁹ Under Article III, § 49-d-11, for instance, TWDB has evergreen authority¹⁵⁰ to issue up to \$6 billion worth of debt for the Texas Water Development Fund II.

General obligation bonds that are issued by the state or its agencies, backed by the faith and credit of the state, and reasonably expected to be paid from general revenues are considered state debt under Section 49.¹⁵¹ So are bonds that are identified as revenue bonds but that are nonetheless payable (or guaranteed) by the state.¹⁵²

H.B. 4 accommodates the prohibition against state debt in four ways: (1) it establishes SWIFT and SWIRFT outside the General Revenue Fund; (2) the only bonding authority it grants is for self-supporting revenue bonds; (3) in multiple sections, it expressly states that the operations of SWIFT and SWIRFT will not give rise to any general obligations, creating a statutory firewall between those funds and the rest of the treasury;¹⁵³ and (4) it seeks to add an amendment to the constitution through Proposition 6.

Constitutional Debt Limit

Article III, Section 49-j(a) augments the prohibition against debt under Article III, Section 49 by adding a limit on the amount of debt the state can carry. It provides: “The legislature may not authorize additional state debt if the resulting annual debt service exceeds the limitation imposed by this section. The maximum annual debt service in any fiscal year on state debt payable from the general revenue fund may not exceed five percent of an amount equal to the average of the amount of general fund revenues, excluding revenues constitutionally dedicated for purposes other than payment of state debt, for the three preceding fiscal years.” The term “state debt” includes issued debt and authorized but unissued debt.¹⁵⁴

H.B. 4 and Proposition 6 avoid the constitutional debt limit much the same way they avoid the constitutional prohibition against debts: (1) they capitalize SWIFT through an appropriation from the Rainy Day Fund rather than through state debt; (2) they give SWIRFT authority to issue self-supporting revenue bonds but not general obligations bonds; and (3) they seek to cure any constitutional shortfalls through Proposition 6.

Constitutional Prohibition against Lending Credit

Art. III, Section 50 of the Texas Constitution provides that the legislature has “no power to give or to lend, or to authorize the giving or lending, of the credit of the State in aid of, or to any person, association or corporation, whether municipal or other, or to pledge the credit of the State in any manner whatsoever, for the payment of the liabilities, present or prospective, of any individual, association of individuals, municipal or other corporation whatsoever.”

TWDB – as an arm of the state – has a better credit rating than many of the applicants that come to it for support. Through its general obligation bonds, the agency can assist applicants by passing down its lower borrowing costs. It routinely makes its loans by purchasing debt that applicants have issued, for instance. (If interest rates are low, as they have been in recent years, the financial assistance that the TWDB offers may not be as attractive, and political subdivisions may prefer to obtain market financing by accessing the public debt markets.)

The TWDB cannot, the attorney general has opined, share its credit rating with applicants by guaranteeing their debt.¹⁵⁵ Thus, of the types of financial assistance H.B. 4 authorizes TWDB to provide through SWIFT, guarantees are not one. Similarly, the bill allows SWIRFT to enter into credit enhancement agreements – but for the benefit of other TWDB funds and accounts, not for applicants.¹⁵⁶

Constitutional Spending Limit

Article VIII, Section 22(a) restricts the amount of money the state can spend. It provides: “In no biennium shall the rate of growth of appropriations from state tax revenues not dedicated by this constitution exceed the estimated rate of growth of the state’s economy. The legislature shall provide by general law procedures to implement this subsection.”

In response to a request from state Rep. Jim Pitts, Attorney General Greg Abbott sent an advisory letter in May 2013 finding that the legislature would have to count any money appropriated from the Rainy Day Fund toward this constitutional spending limit.¹⁵⁷ The attorney general reasoned that the Rainy Day Fund consists of “state tax revenues not dedicated by this constitution.”

The Rainy Day Fund is replenished with tax revenues, and the constitutional provision controlling the fund – Article III, § 49-g(m) – empowers the legislature to appropriate money

from the fund “at any time and for any purpose.” The use toward which the legislature may put the money is unrestricted, not dedicated.

In his support, the attorney general quoted a Third Court of Appeals decision distinguishing undedicated state tax revenue from other types of state money that would not count toward the spending limit: “‘State tax revenues not dedicated by this constitution’ refers to one source of funds that the legislature could appropriate; others include non-tax revenues and tax revenues whose use is dedicated by the constitution.”¹⁵⁸ For instance, the state constitution dedicates the revenues from motor vehicle registration fees toward road construction and maintenance,¹⁵⁹ and it dedicates 25 percent of oil and gas production taxes to education.

As a matter of practice, the attorney general observed, the Legislative Budget Board (LBB) has counted Rainy Day Fund appropriations toward the constitutional spending limit for more than twenty years, because the LBB, like the attorney general’s office, views the appropriations as falling within the scope of Article VIII, Section 22. The attorney general’s letter is not binding authority and carries less weight than a formal opinion;¹⁶⁰ still, it is legally persuasive¹⁶¹ and could have political influence.¹⁶²

Assuming the attorney general’s letter is correct, the legislature could comply with the constitutional spending limit when appropriating money from the Rainy Day Fund to SWIFT only by: (1) ensuring that the sum of that appropriation and all other appropriations of undedicated tax revenues does not exceed the constitutional threshold; or (2) amending the constitution to authorize the appropriation.

The Texas Government Code charges the LBB with estimating: (1) the economic growth rate between each legislative session; (2) the level of appropriations of tax revenues from the previous legislative session that is not constitutionally dedicated; and (3) the amount of state tax revenues not constitutionally dedicated that could be appropriated in the upcoming legislative session within the limit established by the economic growth rate.¹⁶³

These estimates set parameters for compliance with the constitutional spending limit. And of course, they may be influenced by various accounting tactics¹⁶⁴ and are subject to competing political interpretations.¹⁶⁵ In the past, the legislature has sometimes found that the estimates permit it to appropriate significant sums from the Rainy Day Fund without having to call a special election to amend the constitution.¹⁶⁶ In 2011, for instance, the legislature passed H.B. 275, which appropriated \$3.2 billion from the Rainy Day Fund to General Revenue Fund. While the bill needed approval of three-fifths of each house of the legislature, as constitutionally required of all appropriations from the Rainy Day Fund,¹⁶⁷ it did not call for voter approval. The same was true of H.B. 10 (2005), which moved \$1.93 billion from the Rainy Day Fund, and H.B. 7 (2003), which moved \$1.26 billion.

The \$2 billion H.B. 1025 appropriation is thus not automatically unconstitutional; but when added on top of other appropriations it could either become unconstitutional or cause them to

become unconstitutional. Consequently, the appropriation of that sum through Proposition 6 left the legislature with more room under its spending cap to make appropriations for other purposes.¹⁶⁸

B. Political Concerns

Lump-Sum Appropriation

The legislature could have financed water infrastructure projects statutorily, either through a lump-sum or through ongoing appropriations.¹⁶⁹ By all accounts, it decided against the piecemeal approach because: (1) it wished to avoid the recurring political contentiousness that surrounds the appropriations process (as with education and health care)¹⁷⁰; and (2) it recognized that deferring appropriations to subsequent sessions could inject greater uncertainty into the planning process by making those appropriations dependent upon unpredictable political and economic situations.¹⁷¹

Still, the lump-sum approach had critics, who warned that moving a large lump-sum from the Rainy Day Fund could jeopardize the state's credit rating.¹⁷²

Voter Referendum

In addition to the legal reasons to put the Rainy Day Fund appropriation to voters as Proposition 6, there were political reasons. For years, certain Texas lawmakers have recognized a need to invest in water infrastructure¹⁷³ but, because of a desire to avoid increasing taxes, have been reluctant to make those investments.¹⁷⁴ By putting funding before voters, the legislature could avoid appearing to break anti-tax pledges while still providing a large chunk of funding to implement the SWP.¹⁷⁵

C. Maintaining the Funds

In a statement of legislative intent, H.B. 4 explains that SWIFT is intended to serve as a “water infrastructure bank” – that is, a “cash flow mechanism” under which money “flows back into the fund to provide protection for the fund’s corpus.”¹⁷⁶ The prohibition against grants¹⁷⁷ reaffirms the expectation that SWIFT must be self-sustaining, as does the requirement that bond enhancement agreements include repayment provisions and offer interest rates no less than fifty percent below prevailing market rates

Nonetheless, in the same statement, H.B. 4 declares that SWIFT and SWIRFT are meant to “ensure” the availability of “proper funding” to provide for the “state’s future water needs.” The funding is to take the form of “financial assistance” that is “meaningful and adequate” to provide “an adequate water supply for the future.”¹⁷⁸ Achieving this goal could require significant subsidies that rapidly deplete the funds.

How long will the \$2 billion¹⁷⁹ appropriation last if the TWDB must use it according to these two conflicting policy goals? As with much else in H.B. 4, the answer will turn on the rules TWDB promulgates and the financial arrangements the agency enters under those rules. The bill only establishes a general and somewhat loose framework that TWDB may operationalize in many different ways.

For example, if TWDB uses SWIFT to enhance the credit of bonds it has issued under other programs and passes on its interest rate savings to the participants in those programs, the agency could maintain the fund's corpus while leveraging it for financial benefit. If, on the other hand, the TWDB steers SWIFT money primarily toward State Participation Program accounts within the Texas Water Development Fund II, it may have to make large financial outlays (by paying the upfront capital costs of projects) that drain the corpus more quickly. At this point, given the credit strength of the TWDB's outstanding bonds and the low interest rates being offered on new debt, modest credit enhancements would offer relatively little benefit. Under State Participation Program arrangements, meanwhile, TWDB could manage the upfront costs of infrastructure that subdivisions would only need in the long-term.

VII. Oversight and Accountability

The statutory parameters of H.B. 4 are broad enough that TWDB will have great influence over the manner and velocity with which SWIFT funds are used. To better the odds that TWDB will implement H.B. 4 as legislatively intended, the bill creates a powerful new advisory committee and imposes certain reporting requirements.

A. SWIFT Advisory Committee

The SWIFT Advisory Committee (the Advisory Committee) consists of seven members, all high-ranking elected officials:

- The comptroller, or a person designated by the comptroller;
- Three members of the Senate appointed by the lieutenant governor, including a member of the Finance Committee and a member of the Natural Resources Committee; and
- Three members of the House appointed by the speaker of the House, including a member of the Appropriations Committee and a member of the Natural Resources Committee.¹⁸⁰

The committee has broad powers and responsibilities. It may “hold public hearings, formal meetings, or work sessions”¹⁸¹ and “adopt rules, procedures, and policies.”¹⁸² It has only two mandates that it *must* follow. One is to semiannually “review the overall operation, function, and structure of the SWIFT.”¹⁸³ The other is to provide comments and recommendations on TWDB rulemakings related to any of the following

- Criteria for determining whether, of the money disbursed from SWIFT during the five-year SWP planning cycle, the TWDB has undertaken to apply: (1) at least 10 percent to projects for rural political subdivisions or for agricultural water conservation; and (2) at least 20 percent to conservation and reuse;
- Prioritization of projects in regional water plans;
- Prioritization of projects in the SWP;
- Maintaining the tax-exempt status of municipal bonds related to SWIFT financings;

These comments and recommendations, in turn, must include evaluations that assess, among other things:

- Financing programs through which the TWDB may provide SWIFT financial assistance;
- TWDB’s lending practices;

- TWDB’s use of SWIFT funds through bond enhancement agreements;
- TWDB’s lending practices;
- Need for “premium financing” programs for rural political subdivisions, agricultural conservation, and conservation or reuse;
- Methods for encouragement participation in the procurement process by Texas companies; and
- Overall operation, function, and structure of the TWDB.

The TWDB is statutorily obligated to give “full consideration” to the committee’s submittals, but not to act on them.¹⁸⁴ H.B. 4 does not explain what the TWDB must do to ensure that its “consideration” is “full.” Presumably, the agency must accord the submittals more weight than it would comments on rulemaking that it is already required to “consider fully” under the Texas Administrative Procedure Act.¹⁸⁵ Given its makeup, the committee may become “advisory” in name only, with its recommendations evolving into the functional equivalent of directives that the agency must heed.¹⁸⁶

The Advisory Committee members receive no compensation¹⁸⁷ and may use certain TWDB personnel as support staff.¹⁸⁸ The committee is subject to Texas Sunset Act and is scheduled for its first sunset review in 2023. H.B. 4 expressly declares that “[s]ervice on the advisory committee by a member of the senate or house of representatives is considered legislative service for which the member is entitled to reimbursement and other benefits in the same manner and to the same extent as for other legislative service.” If the committee begins to effectively direct – rather than merely advise – on the operation of SWIFT, however, positions on the committee could come to be seen less as extensions of legislative service than as separate and distinct offices.¹⁸⁹ Such a view could expose the committee to arguments that it violates the state constitutional prohibition on dual office holding by legislators.¹⁹⁰

B. Reporting Requirements

To assist the committees and others, the TWDB (either its board members or executive director) must prepare four reports. These reports and their intended audiences and purposes are shown in the table below.

Prepares	Receives	Subject Matter	Frequency
Executive Director	Advisory Committee	Participation of historically under-utilized businesses.	Annually
Board	Governor, lieutenant governor, speaker of the house and members of the legislature	Use of the fund, including the use of the fund to support projects that are for rural political subdivisions or agricultural water conservation or that are for water conservation or reuse. ¹⁹¹	Even-numbered years (by December 1)
Board	General public (internet disclosure)	Progress made in developing water supply statewide and for each planning area; and for each planning area, a description of each project funded through bonds supported by a SWIFT bond enhancement agreement ¹⁹²	Evergreen
Board	Legislative Budget Board	The board must provide written notice of each bond enhancement agreement or loan agreement, with copies of the proposed agreement. ¹⁹³	Evergreen

Conclusion

Texas political leaders and a cross-section of influential interest groups supported H.B. 4/Proposition 6. The legislature presented the laws as the most effective means of addressing the water supply concerns the drought and SWP projections raised. If Proposition 6 fails in the November 5, 2013 special election, select H.B. 4 provisions will survive – notably, those overhauling TWDB governance – but SWIFT, SWIRFT and the \$2 billion appropriation will not take effect.

Although the Tea Party opposes Proposition 6,¹⁹⁴ much of the state’s business and political leadership has rallied behind it.¹⁹⁵ The greatest threat to the proposition could be that its fate will depend in large part on voters in Houston. It is the only large city with municipal elections scheduled for this November and, with the mayor’s race and the funding of a Superdome makeover on the ballot, could account for more than 30 percent of total statewide voters.¹⁹⁶ The irony is that Houston has escaped the worst of the drought and the water scarcity it has brought upon much of the state.

Assuming that Proposition 6 succeeds, it and H.B. 4 will be implemented according to the timetable shown above in the Introduction. TWDB will undertake rulemakings that hammer the generalities and flexibilities of H.B. 4 into practical processes. A dynamic between the agency and the Advisory Committee will emerge. The committee could be relatively hands-off or it could exercise its powers to the full extent and influence activities at TWDB even beyond the management of SWIFT.

On average, after Texas voters or the legislature approved new bonding authority, almost 4 years pass before any debt is actually issued pursuant to that authority.¹⁹⁷ It could be that long or even longer before SWIFT and SWIRFT money funnels toward specific infrastructure projects. The drought could be over by then, and the policy spotlight could have moved on. But another drought will inevitably come and test whether the H.B. 4 funds were used for reliable and cost-effective projects that truly improve water security.

¹ Office of the Governor, State of Texas, Proclamation dated April 18, 2013, <http://www.txdps.state.tx.us/dem/documents/droughtProc032213.pdf> (renewing the Certification that Exceptional Drought Conditions Pose a Threat of Imminent Disaster).

² Holly Heinrich, *Where We Stand: The Texas Drought*, STATE IMPACT TEX. (Jul. 12, 2013), <http://stateimpact.npr.org/texas/2013/07/12/where-we-stand-the-texas-drought>.

³ Jim Watts, *Texas GOP Leaders Form Water Bond Political Action Committee*, THE BOND BUYER, Aug. 2, 2013, http://www.bondbuyer.com/issues/122_149/texas-gop-leaders-form-water-bond-political-action-committee-1054361-1.html.

⁴ Holly Heinrich, *Texas Drought Forecast to Continue, Perhaps For Years*, STATE IMPACT TEX., (July 19, 2013), <http://stateimpact.npr.org/texas/2013/07/19/texas-drought-forecast-to-continue-perhaps-for-years>.

⁵ *Hearts Bluff Game Ranch v. State*, 381 S.W.3d 468, 472-473 (Tex. 2012) (noting that, “[b]y the end of the drought, 244 of Texas’ 254 counties were classified as disaster areas, and losses from the drought were estimated at \$22 billion in 2011 dollars.”).

⁶ E.g., David Barer, *Leaders Push for Water Funding while other Financing Available*, DALL. MORNING NEWS (Oct. 13, 2013), <http://www.dallasnews.com/news/politics/headlines/20131013-leaders-push-for-water-funding-while-other-financing-available.ece>; Terence Henry, *Major Funding Bill Moves One Step Forward, Prioritizes Conservation*, STATE IMPACT TEX., (March 14, 2013), <http://stateimpact.npr.org/texas/2013/03/14/major-water-funding-bill-moves-one-step-forward-prioritizes-conservation/>.

⁷ State House Speaker Joe Straus, for instance, has expressed concerns that inadequate water supplies could drive companies to relocate to other states. Nick Swartsell, *Texas House Speaker Promises Water Focus*, TEX. TRIBUNE (Sept. 25, 2012), <http://www.texastribune.org/texas-environmental-news/water-supply/strauss-speaks-cattle-raisers-water/>. Comptroller Susan Combs has said that “[p]lanning for and managing our water use is perhaps the most important task facing Texas policymakers in the 21st century.” SUSAN COMBS, COMPTROLLER OF PUBLIC ACCOUNTS, THE IMPACT OF THE 2011 DROUGHT AND BEYOND, i (2012), available at <http://www.window.state.tx.us/specialrpt/drought/pdf/96-1704-Drought.pdf>. And in his 2013 state-of-the-state speech, Governor Rick Perry said that “[w]henever we’re recruiting a business seeking to relocate or expand, a chief concern of theirs is ensuring there are adequate water, power and transportation systems for their needs.” Richard Williamson, *\$2 Billion Water Fund Gets Texas Panel’s OK*, THE BOND BUYER, Mar. 19, 2013, http://www.bondbuyer.com/issues/122_53/2-billion-dollar-water-bond-fund-gets-texas-panel-s-ok-1049763-1.html.

⁸ See, e.g., Enrique Rangel, *Straus: Public Education, Water Top Priorities*, AMARILLO GLOBE-NEWS, Dec. 12, 2012, <http://amarillo.com/news/local-news/2012-12-12/straus-public-education-water-top-priorities>.

⁹ *HB 4 Bill History*, TEXAS LEGISLATURE ONLINE, <http://www.legis.state.tx.us/BillLookup/History.aspx?LegSess=83R&Bill=HB4> (last modified May 28, 2013); *HB 1025 Bill History*, TEXAS LEGISLATURE ONLINE, <http://www.legis.state.tx.us/BillLookup/History.aspx?LegSess=83R&Bill=HB1025> (last modified June 14, 2013); *SJR 1 Bill History*, TEXAS LEGISLATURE ONLINE,

<http://www.legis.state.tx.us/BillLookup/History.aspx?LegSess=83R&Bill=SJR1> (last modified May 30, 2013).

¹⁰ “This is making history,” Governor Rick Perry said when signing H.B. 4. “We’re securing the future of our great by making sure that Texas has the water it needs for decades to come.” Ben Philpott, *Agenda Texas: Water Plan Goes to Voters*, TEX. TRIBUNE (May, 29, 2013), <http://www.texastribune.org/2013/05/29/agenda-texas-can-water-pass/>. See also Jim Watts, *Texas GOP Leaders Form Water Bond Political Action Committee*, THE BOND BUYER, Aug. 5, 2013, http://www.bondbuyer.com/issues/122_149/texas-gop-leaders-form-water-bond-political-action-committee-1054361-1.html (quoting House Speaker Joe Straus as calling H.B. 4 a “historic action”).

¹¹ Office of the Governor, State of Texas, Proclamation dated August 21, 2013, <http://governor.state.tx.us/news/proclamation/18830> (calling for a special election on nine constitutional amendments).

¹² Tex. Const. art. III, § 49-g.

¹³ The TWDB already uses bond enhancement agreements for certain other programs, though existing statutes define the term more broadly than H.B. 4 does. Compare Tex. Water Code §§ 17.894 and 17.954 with § 15.435; Tex. Const. Art. III, § 49-d-8.

¹⁴ Tex. H.B. 4, 83rd Leg., R.S. (2013), § 1.09 [hereinafter H.B. 4]. On August 16, 2013, Governor Perry announced the three new members of the TWDB’s board. Neena Satija, *Perry Appoints New Water Development Board*, TEX. TRIBUNE, (Aug. 16, 2013), <http://www.texastribune.org/2013/08/16/perry-appoints-new-water-development-board/>.

¹⁵ H.B. 4 § 1.09. Note that this white paper follows the convention of citing H.B. 4 provisions that will be not codified as sections of that bill; it cites H.B. 4 provisions that will be codified by the Tex. Water Code sections that they will create or amend.

¹⁶ *Id.* at § 1.10.

¹⁷ *Id.*

¹⁸ Tex. S.J. Res. 1, 83rd Leg., R.S. (2013), § 2.

¹⁹ H.B. 4 § 2.21.

²⁰ *Id.*

²¹ *Id.* at § 2.23.

²² *Id.*

²³ *Id.* at § 2.24.

²⁴ *Id.*

²⁵ *Id.* at § 2.25(a).

²⁶ *Id.* at § 2.25.

²⁷ *Id.* § 2.25(a).

²⁸ *Id.* at § 2.25.

²⁹ *Id.* at § 2.22(a).

³⁰ *Id.* at § 2.22.

³¹ H.B. 4; Tex. Water Code § 15.440.

³² H.B. 4 § 2.22(b).

³³ *Id.*

³⁴ Tex. Water Code § 16.051.

³⁵ E.g., Dave Montgomery, *Opposition Forming to Massive Texas Water Plan*, FORT WORTH STAR-TELEGRAM (June 3, 2013), <http://www.star-telegram.com/2013/06/03/4906347/opposition-forming-to-massive.html>; Mose Buchele, *Lawmakers Approve Funding for Texas Water Plan, Setting up Statewide Vote*, STATE IMPACT TEX., (May 22, 2013), <http://stateimpact.npr.org/texas/2013/05/22/lawmakers-approve-funding-for-texas-water-plan-setting-up-statewide-vote-in-november/>.

³⁶ Tex. Water Code § 16.051(a).

³⁷ The Texas Supreme Court has called the legislation “likely the most comprehensive water bill in the State’s history.” *Hearts Bluff Game Ranch, Inc. v. Texas*, 381 S.W.3d 468, 473 (Tex. 2012).

³⁸ For an overview of the current planning process, see ANDREW SANSOM, *WATER IN TEXAS: AN INTRODUCTION* 203-226 (Univ. of Tex. Press, 2008).

³⁹ Tex. Water Code § 16.053.

⁴⁰ *Tex. Water Dev. Bd. v. Ward Timber, Ltd.*, 2013 Tex. App. LEXIS 6384 (Tex. App.—Eastland May 23, 2013, no pet. h.).

⁴¹ Kate Galbraith, *Texas Water Plan Being Questioned by Court*, TEXAS TRIBUNE (May 29, 2013), <http://www.texastribune.org/2013/05/29/texas-water-plan-being-questioned-court/>. See also *Region C Reality Check Would Reduce the Price of the SWP, A Sustainable Water Plan for Texas*, TEX. CTR. FOR POLICY STUDIES (July 21, 2013), <http://www.texascenterforpolicystudies.blogspot.com/2013/07/region-c-reality-check-would-reduce.html>.

⁴² Tex. Water Code § 16.051(b).

⁴³ *2012 State Water Plan, 2012: Water for Texas*, TEX. WATER DEV. BD. (Jan. 2012), http://www.twdb.state.tx.us/publications/state_water_plan/2012/2012_SWP.pdf.

⁴⁴ *Id.* at XII.

⁴⁵ *Id.* See also Richard Williamson, *Parched Texas Looks Way Ahead*, THE BOND BUYER, Oct. 24, 2011, http://www.bondbuyer.com/issues/120_205/texas-population-water-shortage-1032399-1.html; Jim Watts, *Relentless Drought is Stressing Texas Water Utilities to the Max*, THE BOND BUYER, Oct. 11, 2011, http://www.bondbuyer.com/issues/120_196/texas-drought-1031966-1.html.

⁴⁶ See, e.g., *State and Regional Water Plan*, TEX. LIVING WATERS PROJECT, <http://texaslivingwaters.org/state-and-regional-water-plan/the-state-water-plan/> (last visited Oct. 9, 2013); Mary E. Kelly, *Behind the Scary Water Headlines*, AUSTIN AM.-STATESMAN, (Dec. 15, 2012), <http://www.statesman.com/news/news/opinion/behind-the-scary-water-headlines/nTSRX/>; Mose Buchele, *Will Texas Lawmakers Fund the State Water Plan*, STATE IMPACT TEX., (Oct. 31, 2012), <http://stateimpact.npr.org/texas/2012/10/31/will-texas-lawmakers-fund-the-state-water-plan/>.

⁴⁷ Asher Price, *As Water Plan Moves Toward Reality, Who Benefits?*, AUSTIN AM.-STATESMAN, (Feb. 18, 2013), <http://www.statesman.com/news/news/as-water-plan-moves-toward-reality-who-benefits/nWR7x/>.

⁴⁸ *About the Texas Water Development Board*, TEX. WATER DEV. BD., <http://www.twdb.state.tx.us/about/> (last visited Oct. 9, 2013).

⁴⁹ The Texas Transportation Commission also has paid, full-time members, though it has more – at five – than the TCEQ or Public Utilities Commission. Tex. Transp. Code § 201.051(a).

⁵⁰ H.B. 4 § 1.09.

⁵¹ *Id.* at § 1.02(d).

⁵² Neena Satija, *Perry Appoints New Water Development Board*, TEX. TRIBUNE (Aug. 16, 2013), <http://www.texastribune.org/2013/08/16/perry-appoints-new-water-development-board/>.

⁵³ Tex. Water Code § 6.103; H.B. 4 §1.10.

⁵⁴ *Texas Water Development Board names Kevin Patteson Executive Administrator*, TEX. WATER DEV. BD., (Sept. 19, 2013), http://www.twdb.texas.gov/newsmedia/press_releases/2013/09/NewEA.asp.

⁵⁵ The Texas Sunset Act requires state agencies to undergo regular review or be abolished. Tex. Gov't Code Ann. §§ 325.001 to 325.024. *See also Sunset in Texas*, SUNSET ADVISORY COMM'N (Jan. 2012), <http://www.sunset.state.tx.us/suntx.pdf>.

⁵⁶ *Final Report: Texas Water Development Board*, SUNSET ADVISORY COMM'N (July 2011), http://www.sunset.state.tx.us/82ndreports/wdb/wdb_fr.pdf.

⁵⁷ *Staff Report: Texas Water Development Board*, SUNSET ADVISORY COMM'N (2000), <http://www.sunset.state.tx.us/77threports/twdb/twdb.pdf>.

⁵⁸ *See, e.g.*, Matthew Tresaugue, *Lawmakers Float Changes to Water Board*, HOUS. CHRON. (Apr. 8, 2013), <http://www.houstonchronicle.com/news/houston-texas/houston/article/Lawmakers-float-changes-to-water-board-4416551.php>; Bill McKenzie, *Water funding is Gaining Big Mo, but Let's Wait on Changing the Texas Water Development Board*, DALL. MORNING NEWS (Mar. 18, 2013), <http://dallasmorningviewsblog.dallasnews.com/2013/03/water-funding-is-gaining-big-mo-but-lets-wait-on-changing-the-texas-water-development-board.html>; Kate Galbraith, *Texas Lawmaker Seeks Overhaul of Water Board*, TEX. TRIBUNE (Feb. 14, 2013), <http://stateimpact.npr.org/texas/2013/02/14/texas-lawmaker-seeks-overhaul-of-water-board>.

⁵⁹ Tresaugue, *supra* note 60 (“His position reflects an uneasiness in Austin after the mismanagement of hundreds of millions of dollars by the taxpayer-funded Cancer Prevention and Research Institute of Texas. Last week, the Senate passed a bill that would restructure the four-year-old agency and establish new safeguards.”); *See also* Galbraith, *supra* note 60.

⁶⁰ Tresaugue, *supra* note 60 (“Ronald Kaiser, a professor of water law and policy at Texas A&M University, said while additional oversight is important, the bill would reduce the number of interests represented by cutting the number of board members.”).

⁶¹ McKenzie, *supra* note 60 (“there is a nervousness among some in Austin that Gov. Perry would use Fraser’s idea to politicize the water development board and the projects it selects to fund. The way Perry has used his university regents to push his higher education ideas stands as a precedent that some want to avoid.”).

⁶² Weir Labatt and Jack Hunt (on behalf of Wales Madden Jr., Noe Fernandez, and D.V. Guerra), *TWDB Revamp Unnecessary, Unwise*, SAN ANTONIO EXPRESS-NEWS (June 28, 2013),

<http://www.mysanantonio.com/opinion/commentary/article/TWDB-revamp-unnecessary-unwise-4636646.php>.

⁶³ Tex. Water Code § 6.052(a).

⁶⁴ *Id.* at § 6.061.

⁶⁵ *Id.* at § 6.052(a).

⁶⁶ *Id.*

⁶⁷ *Id.* at § 6.056(a).

⁶⁸ *See* Tex. Const. art. III, § 49-c (allowing the legislature to set term limits for TWDB board members).

⁶⁹ *Id.* at § 6.056(b).

⁷⁰ *Id.* at § 6.059.

⁷¹ Formerly Tex. Water Code § 6.059(b).

⁷² Formerly Tex. Water Code § 6.061.

⁷³ Tex. Water Code § 6.052(d).

⁷⁴ *Id.* at § 6.06(a).

⁷⁵ *Id.* at § 6.060(a).

⁷⁶ *Id.* at § 6.103; H.B. 4 § 1.10.

⁷⁷ *2012 State Water Plan, 2012: Water for Texas*, TEX. WATER DEV. BD., xii (Jan. 2012),

⁷⁸ Tex. Water Code § 15.436(a).

⁷⁹ *Id.* at § 15.436(d).

⁸⁰ *Id.* at § 15.436(b).

⁸¹ *Id.* at § 15.437(d)(7).

⁸² *Id.* at § 15.436(c).

⁸³ *Id.*

⁸⁴ *Id.* at § 15.436(a).

⁸⁵ *Id.* at § 15.436(a)(1).

⁸⁶ *Id.* at § 15.436(a)(2).

⁸⁷ *Id.* at § 15.436(a)(3).

⁸⁸ *Id.* at § 15.436(a)(4).

⁸⁹ *Id.* at § 15.436(a)(5).

⁹⁰ In popular speech, “sustainability” has increasingly come to refer to environmental impacts, but H.B. 4 does not indicate whether a project must be sustainable from an environmental, financial or other perspective.

⁹¹ Tex. Water Code § 15.439(a).

⁹² *Id.* at § 15.438(g) (directing the committee to submit comments and recommendations for rulemakings related to Section 15.436).

⁹³ Tex. Gov’t Code Ann. §§ 2001.023, 2001.024, 2001.029.

⁹⁴ Tex. Gov’t Code Ann. § 2001.003(6)(A).

⁹⁵ The Texas Supreme Court’s decision in *El Paso Hosp. Dist. v. Health and Human Servs. Comm’n*, 247 S.W.3d 709 (Tex. 2008), precipitated this trend. It held that an agency had made rules ad hoc, rather than according to the Administrative Procedure Act, when it used a cutoff date for claims calculations that was at odds with the cutoff date in its regulations. *See also, e.g., Tex. Dep’t of Transp. v. Sunset Transp., Inc.*, 357 S.W.3d 691 (Tex. App.—Austin 2011, no pet.); *Combs v. Entertainment Publications*, 292 S.W.3d 712 (Tex. App.—Austin 2009, no pet.); *Tex Dep’t of Pub. Safety v. Salazar*, 304 S.W.3d 896 (Tex. App.—Austin 2009, pet. dism’d).

⁹⁶ *R.R. Comm’n v. WBD Oil & Gas Co.*, 104 S.W.3d 69, 31-32 (Tex. 2003).

⁹⁷ Tex. Water Code § 15.437(a).

⁹⁸ *Id.* at § 15.437(b).

⁹⁹ *Id.*

¹⁰⁰ The bill does not use the terms “primary” or “secondary” factors. Instead, it states that the board must give “highest consideration” to four factors and must “also consider” seven other factors. *Id.* at §15.437(c).

¹⁰¹ *Id.*

¹⁰² *Id.* at §15.437(d)

¹⁰³ Tex. Gov't Code Ann. § 404.102.

¹⁰⁴ Tex. Water Code § 15.432(a).

¹⁰⁵ *Id.* at § 15.433(a). The Trust must invest to “maintain sufficient liquidity to meet the needs of the fund while striving to preserve the purchasing power of the fund.” *Id.* at § 15.433(b). *See also* Tex. Water Code § 15.433(c) (requiring the Trust to follow a prudent investor standard). The Trust must submit a written investment policy to the investment advisory board established under Government Code Section 4.4028. *Id.* at § 15.433(f).

¹⁰⁶ *Id.* at § 15.433(h). (expressly prohibiting the Board from disbursing more than twice in a fiscal year).

¹⁰⁷ *Id.* at § 15.433(e).

¹⁰⁸ *See id.* at § 15.432(a) (specifying that SWIFT “is to be used by the board, without further legislative appropriation”) and § 15.472(a) (specifying the same for SWIRFT) and S.J.R. 1, Article III, Section 49-d-12(a) (specifying the same for SWIFT) and 49-d-13(a) (specifying the same for SWIRFT).

¹⁰⁹ Tex. Water Code § 15.432(c).

¹¹⁰ Chapter 2110 of the Texas Government Code (§§ 2110.001 to 2110.008) does not apply to the Advisory Committee. *Id.* at § 15.438(j). The Advisory Committee is, however, subject to the Texas Sunset Act. *Id.* at § 15.438(k).

¹¹¹ Existing statutes define the term more broadly than H.B 4 does. *Compare* Tex. Water Code §§ 17.894 and 17.954 with § 15.435. *See also* Tex. Const. art. III, § 49-d-8.

¹¹² The TWDB has a description of financing programs available at: <http://www.twdb.state.tx.us/financial/programs/>

¹¹³ Tex. Water Code §§ 15.971 to 15.981.

¹¹⁴ *Id.* at §§ 15.991 to 15.995.

¹¹⁵ *Id.* at § 15.435(b)(5).

¹¹⁶ Tex. S.J. Res. 1, 83rd Leg., R.S. (2013), §I (amending Article III, § 49-d-12 of the Texas Constitution).

¹¹⁷ Tex. Water Code § 15.438(g)(6).

¹¹⁸ *Id.* at § 15.435(c)(1).

¹¹⁹ *Id.* at § 15.435(c)(2).

¹²⁰ *Id.* at § 15.435(c)(3).

¹²¹ *Id.* at § 15.435(c)(4).

¹²² H.B. 4 § 2.01(b). *See also* Tex. Water Code § 15.435(f) (“The board may not direct the trust company to enter into a bond enhancement agreement with respect to bonds issued by the board the proceeds of which have been or are to be used to make grants.”)

¹²³ Tex. Water Code § 15.435(c).

¹²⁴ *Id.* at § 15.435(i).

¹²⁵ *Id.* at § 15.435(i)(1).

¹²⁶ Tex. Water Code § 15.435(i)(2). The Municipal Securities Rulemaking Board (MSRB) defines “self-supporting debt” as “[d]ebt that is to be repaid exclusively from specified pledged revenues.” *Glossary of Municipal Securities Terms*, MSRB, <http://www.msrb.org/glossary/definition/self-supporting-debt-or-self-liquidating-debt.aspx> (last visited October 15, 2013).

¹²⁷ Tex. Water Code § 15.435(j).

¹²⁸ *Id.* at § 15.435(g).

¹²⁹ A water conservation plan represents a blueprint that entities may use to save water and includes “those practices, techniques, and technologies that will reduce the consumption of water, reduce the loss or waste of water, improve the efficiency in the use of water, or increase the recycling and reuse of water so that a water supply is made available for future or alternative uses.” *Id.* at §§ 11.1271, 11.002(8)(B).

¹³⁰ *Id.* at § 11.1271.

¹³¹ Tex. H.B. 3604, 83rd Leg., R.S. (2013).

¹³² “Rural political subdivision” means: “(A) a nonprofit water supply or sewer service corporation, district, or municipality with a service area of 10,000 or less in population or that otherwise qualifies for financing from a federal agency; or (B) a county in which no urban area exceeds 50,000 in population.” *Id.* at § 15.992(4)(A).

¹³³ *Id.* at § 15.434(b).

¹³⁴ *Id.* at § 15.439(a).

¹³⁵ H.B. 4 § 2.02 (creating Tex. Water Code Chapter 15, Subchapter H).

¹³⁶ The board has the authority to invest monies in the SWIRFT. As with the SWIFT, the Board may invest SWIFT monies with the state treasury pool. At its discretion, the Board put the SWIRFT under the management of the state comptroller or a trustee. Tex. Water Code § 15.473.

¹³⁷ *Id.* at § 15.472(b).

¹³⁸ H.B. 4, Tex. Water Code § 15.475.

¹³⁹ Tex. Water Code § 15.859(a).

¹⁴⁰ H.B. 4 § 2.13 (amending Tex. Water Code § 17.853(c)(7)).

¹⁴¹ *Compare* Tex. Water Code §§ 17.474(g) and 17.859(g).

¹⁴² Tex. Water Code § 17.854. “Acquired obligations” is defined broadly, as “obligations of participants acquired under this subchapter.” *Id.* at § 17.852(1).

¹⁴³ Tex. Water Code § 15.474(b).

¹⁴⁴ *Id.* at 15.474(a)-(b).

¹⁴⁵ *Id.* at 15.474(c)(1)(B).

¹⁴⁶ *Id.* at 15.474(c)(2).

¹⁴⁷ Section 15.435(a) begins: “A bond enhancement agreement entered into under *this section* is an agreement for professional services.” *Id.* at § 15.435(a). The phrase “this section” presumably refers to Section 15.435. SWIRFT is established under Sections 15.471 to 15.476. Arguably, in the alternative, “this section” is supposed to refer to H.B. 4 Section 2.02, which includes the SWIFT and SWIRFT provisions. But the sectional organization of the bill will not be codified to statute; and if legislators had intended for “bond enhancement agreement” to have the same meaning for both SWIFT and SWIRFT, they could have defined the term for the purposes of Water Code Chapter 15, Subchapters G and H (governing SWIFT and SWIRFT, respectively), rather than “this section.”

¹⁴⁸ Tex. Gov't Code § 1202.003. For several reasons, loan debt would be less secure than bond debt. While the bond debt would be secured by either the revenues of a particular project or the subdivision's full faith and credit, the loan debt would be secured by lien that is subordinate to the liens of existing creditors and that, because the subdivision could likely claim sovereign immunity, may not be fully enforceable. *See Tooke v. City of Mexia*, 197 S.W.3d 325 (Tex. 2006) (finding that a political entity could contract away its immunity from liability but not its immunity from suit). *See also* Omer Kimhi, *Reviving Cities: Legal Remedies to Municipal Financial Crises*, 88 B.U. L. REV. 633, 647-50 (2008). While for political reasons a subdivision

would be disinclined to default on a loan held by the state, that political check would be removed if the state transferred the loan in the secondary market. *Id.*

¹⁴⁹ Tex. Const. art. III, § 49-b.

¹⁵⁰ In contrast, constitutional debt authorizations in Texas are typically once-offs; with each issuance, the authority is reduced by the principal of the bonds issued. Under Article III, Section 49-d-11, the authority is replenished as the TWDB pays off its bond debt. Tex. Const. art. III, § 49(d).

¹⁵¹ *Tex. Pub. Bldg. Auth. v. Mattox*, 686 S.W.2d 924, 928-930 (Tex. 1985); *Texas Bond Review Primer*, TEXAS BOND REVIEW BOARD, at 4 (undated), available at <http://www.brb.state.tx.us/agency/publications.aspx>.

¹⁵² *Tex. Pub. Bldg. Auth.*, 686 S.W.2d at 928-30. See also Tex. Atty. Gen. Opinion No. JC-0039, 1999 Tex AG Lexis 44 (1999) and Tex. Atty. Gen. Opinion No. GA-1012, 38 Tex. Reg. 4451 (2013). (finding that the Texas Windstorm Insurance Association's program of backstopping losses under a state insurance program complied with Art. III, Section 49, because it relied upon revenue bonds rather than the state's credit for funding).

¹⁵³ See, e.g., Tex. Water Code § 15.435(a): "An obligation to disburse money from the fund, or from a special account established by the board, in accordance with a bond enhancement agreement does not constitute indebtedness of the state."

¹⁵⁴ Tex. Const. art III, § 49-j(b). See also Robert C. Kline, Texas Bond Review Board, *Debt Primer*, available at <http://www.brb.state.tx.us/agency/publications.aspx> (last visited Oct. 13, 2013). See also Legislative Budget Board Staff, *Constitutional Debt Limit: An Issue Brief*, ID: 470, (April 2013), http://www.lbb.state.tx.us/Issue_Briefs/470_GG_ConstitutionalDebtLimit.pdf.

¹⁵⁵ Tex. Atty. Gen. Opinion No. C-363, 1964 Tex. AG LEXIS 162 (1964). While the TWDB enjoys a strong credit rating, as do the revenue bonds currently issued under the State Revolving Fund, the revenue bonds that TWDB issues through SWIRFT may not receive equally high ratings, particularly since they – unlike the State Revolving Fund – will not benefit from federal participation.

¹⁵⁶ See H.B. 4 § 2.02 (creating Tex. Water Code Chapter 15, Subchapter H) and Tex. Leg. J. Rules 2013 TX S.J.R. 1 (NS) [hereinafter S.J.R. 1] (adding Tex. Const. art. III, § 49-d-12(b): "The legislature by general law may authorize the [TWDB] or that board's successor in function to enter into bond enhancement agreements to provide additional security for general obligation bonds or revenue bonds of the [TWDB] or that board's successor in function.")

¹⁵⁷ Tex. Atty. Gen. Letter Opinion to Rep. Jim Pitts (May 8, 2013).

¹⁵⁸ *Hendee v. Dewhurst*, 228 S.W.3d 354, 360 (Tex. App.—Austin 2007)

¹⁵⁹ *Id.*

¹⁶⁰ Tex. Gov't Code § 402.042.

¹⁶¹ *See Weaver v. Head*, 984 S.W.2d 744 (Tex. App.—Texarkana 1999) and *State v. Keeton Packing Co.*, 487 S.W.2d 775 (Tex. App.—Amarillo 1972).

¹⁶² Matthew Waller, *AG Opinion Adds Hurdle to Creation of Water Bank*, SAN ANGELO STANDARD-TIMES (May 9, 2013), available at <http://www.gosanangelo.com/news/2013/may/09/ag-says-rainy-day-fund-withdrawals-count-toward/?print=1>.

¹⁶³ Tex Gov't Code § 316.002. For the estimates the LBB calculated prior to the 83rd legislative session, *see* 37 Tex. Reg. 9031.

¹⁶⁴ *See, e.g., Texas Goes Sacramento*, W.S.J., at A14 (June 7, 2013), available at; <http://online.wsj.com/article/SB10001424127887324299104578527193464764384.html>; James Quintero, *LBB Adopts Spending Limit Above Pop. & Inflation...Again*, TEXAS PUBLIC POLICY FOUNDATION (Nov. 16, 2012), <http://www.texaspolicy.com/center/fiscal-policy/blog/lbb-adopts-spending-limit-above-pop-inflation%E2%80%A6again>.

¹⁶⁵ Patti Hart, *Report: State Spending Down 11.5 Percent Since 2002*, HOUS. CHRON. Aug. 12, 2013), <http://blog.chron.com/texaspolitics/2013/08/report-state-spending-down-11-5-percent-since-2002/>.

¹⁶⁶ House Research Organization, *State Finance Report*, No. 83-1, Jan. 31, 2013, available at <http://www.hro.house.state.tx.us/pdf/focus/Restrict83-1.pdf>.

¹⁶⁷ Tex. Const. art. III, § 49-g(k).

¹⁶⁸ Charles Perry, *Texas Doesn't Need Rainy Day Money Yet*, TEX. TRIBUNE (Apr. 16, 2013), <http://www.texastribune.org/2013/04/16/guest-column-texas-doesnt-need-rainy-day-money-yet/>.

¹⁶⁹ Kate Galbraith, *Legislature Prepares to Take on Water Projects*, N.Y. TIMES (Dec. 21, 2012), available at: http://www.nytimes.com/2012/12/21/us/texas-legislature-prepares-to-take-on-water-projects.html?_r=0.

¹⁷⁰ *Id.*

¹⁷¹ *See id.*; *Ritter Legislation Directs \$2 billion from ESF to New Water Fund*, H2O4TEXAS (Jan. 11, 2012), <http://www.h2o4texas.org/latest-news-from-h2o4texas/>.

¹⁷² Dave Montgomery, *Opposition Forming to Massive Texas Water Plan*, FORT WORTH STAR-TELEGRAM (June 3, 2013), <http://www.star-telegram.com/2013/06/03/4906347/opposition-forming-to-massive.html>. See also Richard Williamson, *\$2 Billion Texas Water Bill Wins Easy Passage*, BOND BUYER (Apr. 1, 2013), available at http://www.bondbuyer.com/issues/122_62/2-billion-texas-water-bill-wins-easy-passage-in-the-house-of-representative-1050209-1.html; Tim Eaton, *House Passes Legislation Aiming to Improve State's Water Supply*, AUSTIN AMERICAN-STATESMAN (Mar. 27, 2013), available at <http://www.mystatesman.com/news/news/house-passes-first-water-bill/nW54F/>.

¹⁷³ See Chris Tomlinson, *Voters to Decide Tapping Texas' Rainy Day Fund*, MIAMI HERALD (July 21, 2013), <http://www.miamiherald.com/2013/07/21/3512299/lawmakers-approve-funding-measures.html>.

¹⁷⁴ See *Id.*; Leslie Lee, *Worth It: Weighing the Costs of Implementing the State Water Plan and the Consequences of Doing Nothing*, TEX. WATER RESOURCES INST. (Winter 2013), <http://twri.tamu.edu/publications/txh2o/winter-2013/worth-it/>. See also Richard Williamson, *Parched Texas Looks Way Ahead*, BOND BUYER (Oct. 25, 2011), available at http://www.bondbuyer.com/issues/120_205/texas-population-water-shortage-1032399-1.html (describing the failure of a bill introduced in the 2011 legislative session that would have imposed charges to finance water infrastructure).

¹⁷⁵ Tomlinson, *supra* note 177.

¹⁷⁶ H.B. 4, § 2.01(b).

¹⁷⁷ *Id.*

¹⁷⁸ H.B. 4, § 2.01(a).

¹⁷⁹ Presumably, the legislature has no plans to provide additional near-term capital for the funds. See Tex. Water Code §§ 15.432(a) (specifying that SWIFT “is to be used by the board, without further legislative appropriation”) and 15.472(a) (specifying the same for SWIRFT); S.J.R. 1, art. III, §§ 49-d-12(a) (specifying the same for SWIFT) and 49-d-13(a) (specifying the same for SWIRFT).

¹⁸⁰ Chapter 2110 of the Texas Government Code (§§ 2110.001 to 2110.008) does not apply to the Advisory Committee). Tex. Water Code § 15.438(j). The Advisory Committee is, however, subject to the Texas Sunset Act. *Id.* at § 15.438(k).

¹⁸¹ Tex. Water Code § 15.438(e).

¹⁸² *Id.* at § 15.438(i).

¹⁸³ *Id.* at § 15.438(h).

¹⁸⁴ *Id.* at § 15.439(b).

¹⁸⁵ Tex. Gov't Code § 2001.029.

¹⁸⁶ Jeremy Brown, *New Water Infrastructure Advisory Committee Could Violate State Constitution*, UT LAW GRID, Sept. 26, 2013, <http://www.utexas.edu/law/academics/centers/energy/2013/09/new-water-infrastructure-advisory-committee-could-violate-state-constitution>.

¹⁸⁷ Tex. Water Code § 15.438(f).

¹⁸⁸ TWDB support staff consists of: (1) the deputy executive administrator of the Board who is responsible for water science and conservation, or someone who holds an equivalent position or is designated by that person; (2) the deputy executive administrator of the Board who is responsible for water resources planning, or someone who holds an equivalent position or is designated by that person; and (3) the chief financial officer of the Board or the equivalent. Tex. Water Code § 15.438(b).

¹⁸⁹ Tex. Att'y Gen. Opinion No. JC-464 (2002) (concluding that an unpaid member of the Texas Department of Economic Development governing board could not concurrently serve in the legislature).

¹⁹⁰ Tex. Const. art. XVI, § 40(d) ("No member of the Legislature of this State may hold any other office or position of profit under this State, or the United States, except as a notary public if qualified by law.")

¹⁹¹ Tex. Water Code § 15.440(a).

¹⁹² *Id.* at § 15.440(b).

¹⁹³ S.J.R. 1 (amending Tex Const. art. III, § 49-d-12(d)).

¹⁹⁴ Montgomery, *supra* note 176.

¹⁹⁵ *Id.* See also Straus, *Ritter form Water PAC*, HOUS. CHRON. (Aug. 1, 2013), <http://blog.chron.com/texaspolitics/2013/08/straus-ritter-form-water-pac/>.

¹⁹⁶ Ross Ramsey, *Harris County May Control Water Plans*, TEX. TRIBUNE (Sept. 14, 2013), http://www.nytimes.com/2013/09/15/us/harris-county-may-control-water-plans.html?_r=0.

¹⁹⁷ Legislative Budget Board Staff, *Texas State Government Effectiveness and Efficiency*, at 19 (January 2011) <http://www.lbb.state.tx.us/GEER/GEER01012011.pdf>.