

**SUBJECT:** Prohibiting TCEQ from amending wholesale water supply contracts

**COMMITTEE:** Natural Resources — committee substitute recommended

**VOTE:** 7 ayes — Puente, Hope, Campbell, R. Cook, Geren, Hamilton, Hardcastle  
0 nays  
2 absent — Callegari, Wolens

**WITNESSES:** For — Ken Ramirez, Poseidon Resources  
Against — Doug Caroom, City of El Paso Water Utilities; Ilan Levin  
On — Margaret Hoffman, Texas Commission on Environmental Quality

**BACKGROUND:** The Texas Commission on Environmental Quality (TCEQ) has the authority to amend contracts to provide wholesale water or wastewater service. A person may request a review of the rates in a contract. If the agency finds that the rates adversely affect the public interest, it may set a new rate (30 TAC 291).

**DIGEST:** CSHB 2184 would prohibit TCEQ from amending, interpreting, impairing, or modifying a written contract for the wholesale provision of water.  
  
A petition from a person complaining that they had been denied surface water to which they were entitled would have to show also that the petitioner had not entered into a contract with the party owning or controlling the water supply.  
  
The bill would take immediate effect if finally passed by a two-thirds record vote of the membership of each house. Otherwise, it would take effect September 1, 2003, and would apply only to a contract executed on or after the bill's effective date.

**SUPPORTERS SAY:** CSHB 2184 would prohibit TCEQ from amending wholesale water supply contracts. The agency's authority under current law discourages investment in

new water supply projects. TCEQ can amend rates agreed upon by willing parties to a contract if it makes a determination that the rates adversely affect the public interest. While protecting the public interest is important, the agency's power to set new water rates in a long-term contract is viewed as a risk by potential lenders for a new water supply project.

For example, if a small company sought to build a water desalination plant to provide water to nearby municipalities, before building the project it would negotiate long-term contracts — such as 30 years or longer — to supply the water. The company then would submit the plans for the project, along with the contracts, to investment banks in Chicago or New York that could finance the project. Before lending \$200 million to finance a new desalination plant, however, the lender would scrutinize the company's plans and contracts. Unfortunately, TCEQ's power to change the rates midway through the contract could cause a potential lender to increase the loan interest rate or deny the loan altogether.

By removing TCEQ's authority to amend contracts, the bill would discourage people from entering into contracts with no intention of delivering. It would encourage honest negotiation of contract terms. TCEQ currently processes five or fewer wholesale rate cases per year because most are settled before reaching the commission level. The high proportion of settlements may be an indication that entities mainly use the agency's authority as a bargaining tool and a means to achieve an end. Moreover, the agency's authority to amend contracts between willing parties puts the agency in a difficult position as arbiter of the contract.

The bill would eliminate only TCEQ's authority to amend wholesale water supply contracts. It would not affect the agency's ability to amend other contracts and guard against unscrupulous retail providers. Wholesale water contracts are necessary to procure financing for expensive water projects. The purpose of the bill is to encourage investment in water supply projects, not remove agency authority. The bill would not affect retail contracts because these usually are not involved in financing for water supply projects.

**OPPONENTS  
SAY:**

This bill would remove an important regulatory tool. The state long has regulated basic services, such as water, gas, or electricity, to protect the public interest, ensuring that customers are not at the mercy of profiteers. Currently,

large water companies around the world are envisioning water service as the next market to be deregulated, similar to the frenzied effort to deregulate the electricity market in the 1990s. Eliminating the agency's authority to review wholesale water supply contracts would be a short-sighted policy, especially now.

Investment bankers have little reason to be concerned about TCEQ's authority to review rates. The agency has been generous to water wholesalers in the past and processes only a few wholesale rate cases per year. To change a rate the agency must find, according to specific criteria, that the protested rate adversely affects the public interest. Meeting this high standard is a burden for a party seeking a new rate.

The agency's authority protects purchasers or sellers from being exploited in a wholesale water contract. Not all contracts are created equal; many contain onerous provisions that are not fully understood by one party until much later. The agency needs the power to ensure that the public is not harmed or disadvantaged by a contract entered into by someone else. Moreover, as the guardian of Texas' natural resources for the public, the state should have the right to review contracts for the wholesale provision of our most important natural resource.

**OTHER  
OPPONENTS  
SAY:**

The bill would be too broad in its scope and could have unintended consequences. By eliminating TCEQ's authority to amend, interpret, impair, or modify a wholesale water supply contract notwithstanding any other law, the bill could create a means to circumvent other TCEQ authority. For instance, unscrupulous people could enter into a sham contract in order to avoid certain other TCEQ regulations.

**NOTES:**

The committee substitute modified the bill as introduced to specify that TCEQ could not amend a wholesale water supply contract and that the bill would apply only to a contract executed on or after the bill's effective date.

The companion bill, SB 1656 by Madla, was considered in a public hearings on April 8 and April 15 by the Senate Natural Resources Committee and has been reported favorably.