SUBJECT: Requirements for removing contaminants from groundwater

COMMITTEE: Environmental Regulation — favorable, without amendment

VOTE: 4 ayes — Bonnen, Kuempel, Chisum, W. Smith

0 nays

3 absent — Crownover, Flores, West

WITNESSES: For — Chuck Epperson, Intera, Inc.; Jon Fisher, Texas Chemical Council; Jack Godfrey, Jack Godfrey and Sons; Mary Miksa, Texas Association of Business and Chambers of Commerce; Robert R. Raith, Kayco Composites

Against — Richard Lowerre, Community for Environmental Justice Action

BACKGROUND: Under Texas Commission on Environmental Quality (TCEQ) rules, people or businesses that contaminate groundwater must clean up the contaminated site and the surrounding area so that all the affected groundwater once again is clean enough to drink. The alternative to cleanup is to obtain a permanent deed restriction on all properties affected by the contamination that enjoins current and future landowners from using well water or drilling a new well. Such a deed restriction must be obtained with the landowners' consent to ensure that notice is given and all affected property owners are protected from human or animal exposure to contaminated water.

DIGEST: HB 3152 would amend the Solid Waste Disposal Act (Health and Safety Code, ch. 361) to allow TCEQ to grant a municipal setting designation (MSD) certificate that would waive certain requirements for removing contaminants.

Areas with the new MSD could be exempt from the requirement that an environmental impact study include the nature and extent of groundwater contamination and response actions to improve groundwater based on potential drinking-water use alone. These areas would be exempt only if no potable water wells were located or planned within one-half mile of the area's boundary, unless the impact study concluded that contamination of those wells was unlikely to occur. Also, if a response action were required to

protect humans from contaminants in water that was not drinking water or ecological resources, the property would not be exempt.

Properties that were not exempt because potable water wells were located within one-half mile of the area's boundary and the impact study concluded that contamination was possible still could be exempt if response action were completed that protected humans from exposure or offered the adjacent owner a sufficient and reliable alternate water supply and obtained the restrictive covenant for the adjacent property's groundwater.

A person, including a local government, could request a municipal setting designation for a property that:

- was within a municipality with at least 20,000 residents;
- had a public drinking-water system that could deliver drinking water to the property; and
- was subject to a local ordinance prohibiting the use of groundwater from the property as drinking water and restricting other uses, or to a restrictive covenant that did the same.

On or before the day the application for an MSD was submitted, the person seeking the designation would have to post notice to the municipality and any municipality within one-half mile. The notice would have to include the purpose of the MSD, eligibility criteria, a copy of the statute, the location and description of the property, information about the approval process, and a statement that the municipality could offer written comments relevant to the application to TCEQ.

The application would have to be on a TCEQ form and include the applicant's name and address, a legal description of the outer boundaries of the proposed MSD, and a statement as to whether the municipality and any within one-half mile supported the designation. The application also would have to include an affidavit affirming that the property met the MSD criteria and proof of all elements supporting the eligibility, the legal description of the property, and proof of notice by signed delivery receipts. A copy of the local ordinance or restrictive covenant required for the property to be eligible would have to be filed with the application or could be delivered before certification of the

MSD. If it was not available at that time, the TCEQ executive director could grant an MSD certificate contingent on receipt of the ordinance or covenant.

Within 90 days of receiving an application, the TCEQ executive director would have to issue or deny an MSD certificate or seek additional information related to the eligibility criteria. Within 45 days of receiving the additional information, the application would have to be approved or denied.

The executive director could deny an application if the property did not meet the eligibility criteria, if the information was incomplete, or if the MSD would affect negatively the current and future water resource needs of the municipality or one nearby. The executive director would have to notify the applicant of a denial and explain the reasons for denial.

If the application were approved, the TCEQ executive director would issue an MSD certificate to the applicant, the municipality, and a nearby municipality. The certificate would indicate the eligibility criteria that were met to obtain the MSD, the applicable investigation and response action requirements, and a legal description of the MSD's outer boundaries.

After a property received an MSD, the executive director still could require a response action if one were needed to address the property's environmental impact on groundwater more than one-half mile away, if it could cause that water to threaten human consumption or ecological resources.

The changes to response actions would not alter the private rights of legal action for personal injury or property damage caused by the release of contaminants. The bill would specify that municipalities may regulate the pumping, extraction, and use of groundwater for drinking purposes.

The bill would take effect September 1, 2003.

SUPPORTERS SAY:

HB 3152 would provide a common-sense, balanced approach for dealing with contaminated groundwater left behind by businesses such as dry cleaners, high-tech industries, service stations, and others. Standards in current law are so restrictive and expensive to comply with that businesses find it nearly impossible to do so. This bill would increase local control while maintaining

state oversight, reducing the amount of remediation required while ensuring minimum negative impact on regional groundwater.

Cleaning up contaminated groundwater can run many small businesses into bankruptcy. In some situations where a commercial property has been leased, the clean-up costs can be assessed to the property owner even though the owner was not necessarily the responsible party. It can cost hundreds of thousands of dollars to clean up a minor spill, but remediating shallow groundwater to the level of drinking water adds little practical value to the affected property, because rarely will the water be used for drinking anyway. As a result, a great deal of money and resources are spent assessing and remediating unusable groundwater. This bill would save businesses and communities hundreds of thousands of dollars in unnecessary remediation costs.

HB 3152 would not allow MSDs to be granted for contaminated aquifers or other sources of drinking water. A building situated over an aquifer would not qualify for an MSD, and any business or individual who contaminated city drinking water in an aquifer still would be held responsible for cleaning it up. Further, TCEQ would have the final review and discretion over the granting of MSDs, so in egregious cases such as Kelly Air Force Base, an exemption from clean-up most likely would not be granted.

HB 3152 would stimulate economic development, increase property values, and create jobs in urban areas that now have unusable property. Many cities have numerous abandoned properties with restrictions on their use that otherwise could have valuable commercial uses. By reducing the expense of remediating groundwater back to drinking-water levels, this bill would allow urban areas to market properties for redevelopment that otherwise would remain neglected. Three other states, Illinois, Pennsylvania, and Ohio have enacted such legislation. Cities in those states have used MSDs successfully to restore and revitalize the local property-tax base and to stimulate job creation in economically depressed areas.

The bill would allow state and local governments to work together to protect citizens from unsafe drinking water. By ensuring that a safe drinking-water alternative existed before granting or expanding the scope of an MSD certificate, the bill would eliminate groundwater ingestion as a pathway for

human exposure. By allowing TCEQ to grant final approval, it would ensure that the state continued to regulate and control water quality. City water supplies provide an ample, reliable, and safe source of drinking water. Thus, the bill would not deprive citizens of safe water.

HB 3152 would protect private landowners' property rights. It would not take away a landowner's water well. If a water well was located in an MSD, the well water still could be used for watering grass or for certain industrial uses, but not for drinking, showering, bathing, cooking, or irrigating crops intended for human consumption. Since an MSD could not be established unless a public water supply were available, no property owner would be deprived of safe water. Notice would be given to the affected municipality and to surrounding cities. Finally, the bill would preserve any private right of action that a property owner might have if his or her property were contaminated.

OPPONENTS SAY:

HB 3152 would provide a free pass for polluters. Under current law, when a business contaminates groundwater and then moves, the state holds it responsible for cleaning up its mess. If the state were to relieve responsible parties of the burden of cleanup, it essentially would say that Texas aquifers are not worth cleaning up. The bill would create a subsidy for polluters and would shift the burden to future generations of Texans who may need that water when alternative city water sources are tapped out.

The bill would remove landowners' rights to notice and consent before permanent deed restrictions were imposed on their property, thus infringing on private property rights. Under the bill, a person seeking to obtain an MSD would have to provide notice only to the municipality, not to neighboring landowners. Once the MSD was granted, polluters would have two options: file a restrictive covenant with landowners' permission or simply expand the MSD. Given a choice to notify landowners and obtain their buy-in or not, it seems clear what most polluters would choose to do.

HB 3152 would protect only property owners within one-half mile of the MSD. Groundwater contamination does not confine itself to a limited area. The contaminated plume spreads throughout the water table and can pollute the affected aquifer for miles around. For example, the groundwater contamination left behind by Kelly Air Force Base affects the aquifer for up to 10 miles outside the base. This bill would allow the federal government and

hundreds of other private companies in Texas to walk away from their messes without cleaning them up or paying for them. This would devalue private property for miles around to the sole benefit of polluters and future developers who no longer would have to meet certain hurdles for further commercial development.

NOTES:

The companion bill, SB 1761 by Jackson, has been referred to the Senate Natural Resources Committee.