

SUBJECT: Developing, managing, and conserving water resources

COMMITTEE: Natural Resources — committee substitute recommended

VOTE: 6 ayes — Puente, Bonnen, Campbell, Geren, Hardcastle, Hilderbran

3 nays — Callegari, Hope, Laney

SENATE VOTE: On final passage, April 29 — 25-3 (Brimer, Harris, Nelson)

WITNESSES: For — A.W. Blair, Texas Irrigation Council; Myron Hess, National Wildlife Federation; Jerry James, City of Victoria; Mary Kelly, Environmental Defense; Ken Kramer, Lone Star Chapter, Sierra Club; David K. Langford, Texas Wildlife Association; Robert J. Potts, Edwards Aquifer Authority; Dean Robbins, Texas Water Conservation Association; Lynn Sherman, The City of Lubbock

Against — Pat Carlson, Tarrant County Republican Party; Dennis Clark, Emerald Underground Water Conservation District; Jim Conkwright, High Plains Underground Water Conservation District No. 1; Art Dohmann, Goliad County Groundwater Conservation District; Harvey Everheart, Mesa Underground Water Conservation District; Merry Lynn Gerstenschlager, Texas Eagle Forum; William Richter, Water Research Group; Caroline Runge, Menard County Underground Water District and West Texas Regional Groundwater Alliance; Wade Stansell, Association of Electrical Companies of Texas; Gary Westbrook, Post Oak Savannah Groundwater Conservation District

On — Jarrett Atkinson, City of Amarillo; Richard Bowers, North Plains Groundwater Conservation District; Carolyn Brittin, Kevin Ward, Texas Water Development Board; Doug Caroom, El Paso Water Utilities and Canadian River Municipal Water Authority; David Chardavoyne, Steve Kosub, San Antonio Water System; John Grant, Colorado River Municipal Water District; Kathy Jones, Lone Star Groundwater Conservation District; John T. Montford, San Antonio Greater Chamber of Commerce; Gregory Rothe, San Antonio River Authority; Ben Vaughan, Coastal Conservation Association; CE Williams, Panhandle Groundwater District; Christina Wisdom, Texas Chemical Council; Carol Patterson

BACKGROUND: Surface water belongs to the state, which grants rights to use it through permits from the Texas Commission on Environmental Quality (TCEQ). Cities, individuals, and river authorities may apply for water rights permits. TCEQ requires that surface water be used for a "beneficial purpose." In order to obtain a permit, an applicant must show that there is a source of unappropriated water available. Water permits do not guarantee that water will be available, only that the holder has a right to available water. The principle of "prior appropriation" gives priority to those whose water rights have greater seniority.

In 2001, the 77th Legislature enacted SB 2 by Brown. Among its provisions, the bill established an instream flow program under which state environmental agencies would collaborate to study river and stream flow conditions necessary to support a sound ecological environment.

In 1997, the 75th Legislature enacted SB 1 by Brown, which required the Texas Water Development Board to adopt a comprehensive state water plan every five years, incorporating local and regional water plans. The first water plan after enactment of SB 1 was released in 2002, and planning continues for the next state water plan in 2007.

The Edwards Aquifer is an underground water-bearing geologic formation that stretches from Kyle to Bracketville. The aquifer is the primary water source for over 1.5 million people, including the population of San Antonio. In 1993, the 73rd Legislature enacted SB 1477 by Armbrister, which established the Edwards Aquifer Authority to regulate groundwater use from the aquifer in order to comply with federal endangered species protections. The authority is governed by an elected board of directors.

DIGEST: CSSB 3 would make comprehensive changes in state water policies concerning environmental flows, water conservation and planning, and water project financing. It would modify the Edwards Aquifer Authority and create two new groundwater districts.

Environmental flows.

Environmental Flows Commission and Science Advisory Commission.
CSSB 3 would establish an Environmental Flows Commission (EFC). This commission would be charged with issuing a biennial report to the governor, the lieutenant governor, and the speaker of the House

summarizing the actions of the commission and legislative recommendations stemming from studies conducted by the commission. The EFC would replace the Study Commission on Water for Environmental Flows and would include:

- three members appointed by the governor;
- three senators appointed by the lieutenant governor; and
- three representatives appointed by the speaker of the House.

Members appointed by the governor would have to include one member of TCEQ, one member of TWDB, and one member of the Parks and Wildlife Commission.

The bill also would establish an environmental flows Science Advisory Committee (SAC) to provide the EFC with scientific expertise and make recommendations for environmental flow protection. TWDB, TCEQ, and TPWD would submit reports to the EFC explaining how SAC recommendations were implemented, and reasons if recommendations were not implemented.

Development of environmental flow recommendations. By November 1, 2005, the EFC would have to define geographically each river basin and bay system for the purpose of developing environmental flow recommendations. Priority would be given to the following river basin and bay systems, in descending order:

1. the system consisting of the Trinity and San Jacinto Rivers and Galveston Bay and the system consisting of the Sabine and Neches Rivers and Sabine Lake Bay;
2. the system consisting of the Colorado and Lavaca Rivers and Matagorda and Lavaca Bays, and the system consisting of the Guadalupe, San Antonio, and Aransas Rivers and Copano, Aransas, and San Antonio bays; and
3. the system consisting of the Nueces River and Corpus Christi and Baffin Bays and the system consisting of the Rio Grande, the Rio Grande estuary, and the Lower Laguna Madre, and the Brazos River and its associated bay and estuary system.

For the first group of priority river basin and bay systems, the EFC would appoint a stakeholders committee by November 1, 2005. The stakeholders committee would establish an expert science team by March 1, 2006. The

science team would submit environmental flow recommendations to the stakeholders committee, the EFC, and TCEQ by March 1, 2007. The stakeholders committee would submit comments on the recommendations to TCEQ by September 1, 2007. TCEQ would adopt environmental flow standards by September 1, 2008.

For the second group of priority river basin and bay systems, the EFC would appoint a stakeholders commission by September 1, 2006. For the third group of priority river basin and bay systems, the EFC would appoint a stakeholders commission by September 1, 2007. For these systems, the EFC would adopt a schedule for other tasks that would allow for adoption of environmental flow standards as soon as reasonably possible. For a river basin and bay system not included in the priority list, the EFC would establish a schedule for environmental flow recommendations and standards.

A river basin and bay system stakeholders committee appointed by the EFC would have to consist of at least 17 members and include representatives of:

- agricultural water users;
- recreational water users, including coastal anglers and businesses supporting water recreation;
- municipalities;
- soil and water conservation districts;
- industrial water users, including manufacturing and refining;
- commercial fishermen;
- public interest groups;
- regional water planning groups;
- groundwater conservation districts;
- river authorities and other special districts with jurisdiction over surface water; and
- environmental interests.

Stakeholders committee members would serve five-year terms.

Each stakeholders committee would establish an expert science team for the committee's river basin and bay system. In order to coordinate statewide environmental flow activities, the SAC would appoint a member to serve as liaison to each expert science team. Each system's expert science team would recommend an environmental flow regime based

solely on the best science available, without regard for other water use needs. These recommendations would be submitted to the relevant stakeholders committee, as well as the EFC and TCEQ. Each stakeholder committee would consider the recommendations in conjunction with other factors such as water needs by other users in the river basin and bay system. Each stakeholders committee would submit to the TCEQ environmental flow standards and strategies to meet those standards. The EFC would review and provide comments upon recommendations from stakeholders committees when appropriate. Each stakeholders committee would have to regularly review environmental flow regimes and refine those regimes.

The Rio Grande system expert science team could not make a recommendation that would violate an international treaty.

The bill would provide funds from the TWDB research and planning fund to support activities and expenses related to environmental flows research and planning.

Environmental flow standards and set-asides. The bill would direct TCEQ to:

- adopt environmental flow standards for each river and bay system that would support a sound ecological environment; and
- determine the amount of unappropriated water to be set aside for environmental flow standards.

In adopting environmental flow standards for a river basin and bay system, TCEQ would have to consider findings and recommendations from the EFC, the SAC, stakeholders committees, and expert science teams. TCEQ also would have to consider:

- the specific characteristics of the river basin and bay systems;
- economic factors; and
- competing water needs.

TCEQ could not issue a new water right that would impair an environmental flow set-aside. An environmental flow set-aside for a system other than the middle and lower Rio Grande would have to be assigned a priority date that corresponded with the date that TCEQ received environmental flow recommendations from the applicable expert

science team. A set-aside could be altered by TCEQ once every 10 years, more often if recommended by the EFC.

TPWD would be granted the right to file suit to prevent unlawful use of a right held in the Texas Water Trust, including use in violation of an environmental flow set-aside.

A set-aside temporarily could be made available for other beneficial uses in emergency situations.

Water rights permitting. Any permit to TCEQ for a new water right or an amendment increasing an existing water right would have to allow TCEQ to adjust the water right to protect instream flows or freshwater inflows. This would not affect any water right or amendment issued before September 1, 2005. An adjustment in combination with any previous adjustments for instream flows could not increase the amount of a release requirement for the protection of instream flows by more than 12.5 percent of the total annual release requirement contained in the water rights permit. The adjustment would have to be based on priority dates and diversion locations of any other water rights granted in the basin that were subject to instream flow protections under this section of the bill. Consideration would be given for voluntary contributions to the Texas Water Trust.

Watermaster advisory committee. For each river basin with a watermaster, the TCEQ executive director would appoint a watermaster advisory committee of between 9 and 15 holders of water rights in the basin. A committee would make recommendations to TCEQ on the administration of water in the basin, comment on the watermaster's annual budget, and perform other advisory duties.

Water Conservation and Planning.

Land stewardship. SB 3 would state that it was the policy of the state to encourage voluntary land stewardship to benefit the water of the state.

Water conservation plan. A retail public utility providing potable water service to a population of at least 3,300 would have to submit to the TWDB chief administrator a water conservation plan based on specific goals generated in accordance with best management practices developed by TCEQ and TWDB. Each entity required to submit a water conservation

plan to TCEQ would have to submit a copy of the plan and report on implementation to the TWDB executive administrator. The executive administrator would review the plan and report to determine compliance with rules adopted by TWDB and TCEQ. Those rules would identify the minimum requirements for the plan. TWDB could notify TCEQ if an entity had violated its requirements. The entity would be subject to enforcement actions by TCEQ if it committed a violation.

Water conservation awareness program. The bill would require the TWDB executive administrator to develop and implement a statewide public awareness program to educate Texas residents about water conservation.

Submetering. Before the TCEQ executive director could approve a request by an apartment owner, manufactured home rental community, or condominium manager to switch from submetered water billing to allocated water billing, the property owner or manager would have to submit a request with information on:

- equipment failures; or
- meter reading or billing problems.

The billing change could not be made unless extraordinary circumstances justified the change. Notice of the change would have to be made to tenants.

Regional water plan amendments. A regional water planning group could make a minor amendment to a regional water plan after TWDB had approved the plan. Existing laws governing preparation and approval of a plan would apply to such an amendment. A minor amendment would have to be certified as such by the TWDB executive administrator and could not result in the over-allocation of water sources, relate to a new reservoir, or significantly affect instream or freshwater inflows.

Water conservation systems for state buildings. The bill would require the TCEQ to contract with a private vendor, at no cost to the state, to install electronic water conservation systems on toilets, sinks, and showers in state buildings.

Private vendors would have to demonstrate that water conservation systems would result in an annual cost savings of at least 50 percent of

current costs. The vendors also would have to have a minimum of five years' experience with retrofitting public buildings and use equipment that had been used for at least five years in public buildings. The contractor also would have to have at least five years experience with the use of gray water and rainwater harvesting.

A contract would include a provision to ensure a budget-neutral or positive fiscal impact to the state. Private vendors would be prohibited from receiving any remuneration until cost savings to the state had been verified.

When deciding which buildings would have the system installed, TCEQ would consider the buildings where the greatest savings could be achieved, the age of the building, and potential operational and security concerns.

TCEQ would have to submit a progress report on the system to the lieutenant governor, the speaker of the House, and the Legislative Budget Board by December 31, 2006. The report would have to include an evaluation of the initial installation of the system, its effectiveness, and the amount of savings to the state.

Irrigation systems. A municipality of 5,000 or more would require an irrigation system installer to hold a license and obtain a permit prior to installing a system in the municipality or the municipality's extraterritorial jurisdiction. A municipality also would have to establish minimum standards for irrigation systems in accordance with state law and TCEQ rules.

Historic use. A change in the purpose and place of use under an historic or existing use permit could not be made without a permit amendment.

Nondiscrimination against conservation reserve program lands. The bill would prevent a groundwater district from discriminating between owners of land that was irrigated for production and owners of land whose land was participating in a federal conservation program.

In issuing a permit for an existing or historic use, a district could not discriminate between land that was irrigated for production and land that was enrolled in a federal conservation program. A permitting decision would be void if:

- the decision discriminated between irrigated land and land in a conservation program; and
- the district would have reached a different decision had there been no discrimination between the two categories of land.

The district would have to reconsider a decision voided under the bill upon receiving an application of an affected owner or lessee of land. The district would have to base its decision on the equal treatment of irrigated land and land in a conservation reserve program and would have to render its decision and notify the applicant within 90 days of receiving an application.

Groundwater under state-owned lands. The bill would establish a 14-member stakeholder committee to study management of groundwater underneath state-owned lands. The committee would report recommendations to the Legislature by December 1, 2006, regarding appropriate management techniques and availability of groundwater under state-owned lands.

Other provisions. For applications for funds to implement water supply projects in the state water plan, TWDB would give priority to entities that had demonstrated significant water supply savings or that would achieve savings by implementing the project for which funding was sought.

Annexation by a municipality of a municipal utility district or water supply corporation would not authorize the municipality to regulate fireworks in the annexed area. This provision would not apply to an area annexed under a limited purpose annexation or an area regulated under public nuisance statutes if that area was regulated before January 1, 2005.

Financing of water projects

Study on water infrastructure funding. CSSB 3 would establish a Legislative Oversight Committee on Water Financing. The committee would consist of five senators appointed by the lieutenant governor and five representatives appointed by the speaker of the House. The presiding officer position would rotate between the chairs of the Senate and House Natural Resources committees. TWDB would provide staff support to the committee. The committee would study the implications of a water conservation and development fee as a source for funding water

infrastructure. The committee would provide recommendations to the Legislature and the governor by August 31, 2006.

Economically Distressed Areas Program. The bill would allow TWDB to use the Economically Distressed Areas Program (EDAP) account to assist political subdivisions in the improvement of water supply and sewer services. Money from bonds could not be used under this provision.

A political subdivision with average household incomes of not more than 75 percent of the state average would be able to apply to TWDB for financial assistance. A water conservation program would have to be included in the application.

The bill would authorize transfers from the TWDB water assistance fund to the state participation account, the Economically Distressed Areas Program (EDAP) account, or the agricultural water conservation fund, provided that the funds were not used for debt service on obligations from before September 1, 2005. Transfers also could be made to the water system financial assistance account under the safe drinking water revolving fund or to the water assistance fund.

Edwards Aquifer Authority.

Allowable withdrawals. Under CSSB 3, for the period beginning January 1, 2005, the amount of permitted withdrawals from the Edwards Aquifer could not exceed the sum of all regular permits issued or for which an application had been filed and issuance was pending as of January 1, 2005. If annexation occurred, the amount of permitted withdrawals could be adjusted to include permits for wells in the annexed areas as of January 1, 2005.

Critical period withdrawal reduction stages. By January 1, 2006, the EAA would have to adopt a critical period management plan with withdrawal reduction percentages at no less than the following amounts, as applicable either to well levels or spring flows :

TABLE 1 - Withdrawal Reduction Stages for the San Antonio Pool

Well Level (MSL)	Comal Springs Flow (CFS)	Critical Period Stage	Withdrawal Reduction Percentage
<665	N/A	I	10%
<650	N/A	II	10%
<640	<150	III	10%
<630	<100	IV	10%

TABLE 2 - Withdrawal Reduction Stages for the Uvalde Pool

Well Level (MSL)	Critical Period Stage	Withdrawal Reduction Percentage
N/A	N/A	N/A
N/A	II	N/A
<845	III	15%
<842	IV	15%

These provisions would result in a maximum of reduction in withdrawals under a Stage IV critical period of 40 percent under Table 1 or 30 percent under Table 2.

"MSL" would mean the elevation in feet above sea level of water in a well. "CFS" would mean cubic feet per second.

After September 1, 2005, the EAA could not allow permitted withdrawals to exceed an annualized rate of 340,000 under critical period Stage IV. After January 1, 2012 the EAA could not allow permitted withdrawals to exceed an annualized rate of 340,000 under critical period Stage IV unless the EAA determined that a different volume of withdrawals was consistent with maintaining protection for endangered species as required by federal law.

The bill would establish provisions by which the Environmental Flows Commission (EFC) would appoint an Edwards Aquifer stakeholders committee, which would appoint an expert science team. These bodies would aid in developing recommendations for withdrawal reduction levels and stages for critical period management.

Recharge facilities. The EAA would be authorized to build or maintain recharge facilities or contract with a person for those facilities.

Creation of groundwater districts

The bill would create two local groundwater conservation districts, the Victoria County Groundwater Conservation District and the Val Verde County Groundwater Conservation District. The bill would specify provisions governing the boundaries, board of directors, and powers and duties for the two districts.

Effective date. The bill would take effect September 1, 2005.

SUPPORTERS SAY:

Environmental flows. CSSB 3 would mark an historic step toward protecting the environment by dedicating instream flows for rivers and freshwater inflows for bays and estuaries. Currently, no state law provides designated protection to ensure a minimum of flow in rivers and into bays and estuaries. Instead, priority is given to other uses such as agricultural, commercial, and residential uses. Water rights in several river basins have been over-permitted, and other basins likely will follow suit. CSSB 3 would provide a means to balance agricultural, commercial, and residential needs with important environmental considerations.

While important for the environment, instream flows do more than support fish, aquatic organisms, and wildlife. River flows provide recreation, dilute and disperse treated wastewater, and support commercial activity. Aquatic species need sufficient flows of water to facilitate their life cycles. Coastal wetlands rely upon freshwater flows from rivers to sustain their unique habitats. These bays and estuaries support the economy of the Texas Gulf Coast through the tourism industry and commercial fishing and shrimping. For these reasons and many more, environmental flows are crucial to the economy and the quality of life of Texas.

In order to determine standards and set-asides for environmental flows, the bill would establish a consensus-based process relying upon the best available science to determine the amount of flows needed for environmental considerations. The bill would include stakeholders from every group with a substantial interest in water rights and flows and would allow that stakeholder group to review scientific data on necessary flows for that basin and bay system. In this manner, the process would resemble the successful regional water planning process established under SB 1, 75th Legislature. Because water is a vital resource for so many diverse interests, it is important that the environmental flow planning process be as inclusive as practicable.

The planning process established under CSSB 3 would establish set asides in rivers where unappropriated water still existed. The bill would not infringe on the water rights of existing water holders. The bill would include protections for other beneficial uses in case a drought or emergency situation required diversion of environmental flows for other uses. The bill would strengthen the Texas Water Trust, an important program that serves to retire unused water rights for environmental purposes.

Water conservation. The bill would establish and expand several important programs to encourage conservation of water resources in the state. Many of these recommendations were agreed upon by the Water Conservation Implementation Task Force, a diverse group of governmental, commercial, and public interest entities that met during the interim of the 78th Legislature. The bill would recognize the importance of such strategies as private land stewardship and residential conservation measures, while moving cities toward more efficient use of the state's limited water resources.

The bill would direct TCEQ to establish a statewide water conservation public awareness program to educate Texans about the importance of conserving water resources. This program would be similar to the Department of Transportation's "Don't Mess With Texas" campaign, which so effectively has encouraged Texans not to litter.

The bill would prevent discriminatory treatment in the groundwater permitting process against land owners who placed their property in the federal conservation reserve program, an important conservation program that helps prevent overuse and improves the ecological balance of pastureland in the state. Landowners who voluntarily have removed their property from production for environmental purposes should not be punished with the possibility of losing their water rights when their participation in the conservation reserve program had expired.

A stakeholder committee to study management of groundwater under state-owned lands could help solve a complicated issue that has resisted easy regulatory resolution.

Water infrastructure funding. By establishing a legislative oversight committee on water infrastructure financing, the bill would help future Legislatures address pressing needs for funding water development. With

competing education, health care, and other obligations in the state budget, Texas risks falling behind schedule in the implementation of the state water plan. Texas has a rapidly growing population, and this committee could provide recommendations as to how best to fund water infrastructure demands.

Edwards Aquifer Authority. The bill appropriately would balance environmental, residential, and other concerns with respect to the EAA. By allowing withdrawals from the aquifer up to the currently permitted amount, the bill would prevent ratepayers from having to support a costly buy-down of water rights above the current withdrawal level. To protect environmental considerations, the bill would establish reduction requirements during critical periods of drought when springs were impacted most severely.

OPPONENTS
SAY:

Environmental flows. CSSB 3 would establish an unnecessarily complicated tangle of bureaucracy. The bill would create two new statewide committees, as well as stakeholder and science boards in every river basin and bay system in the state. Recommendations made by these four groups would have to work their way up to TCEQ, which would make the final determination on environmental flow standards and set-asides. The majority of those on these policymaking bodies would not be accountable to the voters in the way that elected officials are. These bodies would be granted excessive power to seize water rights for what could be marginally important purposes.

Water conservation. CSSB 3 would place several unfunded mandates on local governments that would have to comply with the bill's extensive water conservation requirements. For example, water utilities would have to develop and abide by water conservation plans, and municipalities would have to regulate more extensively residential irrigation facilities and installers. It would be inappropriate for the state to mandate these requirements without providing the funds through which they would be implemented.

The provision on nondiscrimination against conservation reserve program lands is unnecessary because current law sufficiently protects the water rights of landowners enrolled in a government program. Districts must consider idle land in a government program as agricultural land, preventing disparate treatment of these types of land.

Water infrastructure funding. Establishing a legislative oversight committee on water infrastructure financing could lay the groundwork for new taxes and fees for costly water projects. A water infrastructure fee is an idea that the Legislature repeatedly has rejected, yet this committee could serve as a vehicle to resurrect this discredited option.

Edwards Aquifer Authority. By allowing pumping of the Edwards Aquifer up to the currently permitted amount, CSSB 3 effectively would eliminate the pumping cap for all practical purposes. This level of pumping on a regular basis likely would be unsustainable over the long term. Although the bill would incorporate important reductions in pumpage during drought periods, it would be better for the aquifer ecologically and hydrologically if a lower level of regular pumping were allowed.

OTHER
OPPONENTS
SAY:

Environmental flows. CSSB 3 would not go far enough in protecting environmental flows. The bill would provide no remedy for the many basins in which all available water has been permitted. In addition, when a drought strikes – precisely the time that instream flows are so crucial to river and bay ecosystems – environmental flow set-asides would be available for diversion to other uses. The only reasonable method for reliably protecting environmental flows would be to buy back more senior water rights from private interests and keep those flows in the river.

Water conservation. Establishment of a statewide water conservation public awareness program likely would be costly, and CSSB 3 would provide no means to support this important endeavor. The Legislature should establish a water infrastructure fee to fund this program. Such a fee also could fund the numerous water infrastructure projects needed throughout the state and could provide grants to colonias and other areas lacking in basic water and wastewater services.

Groundwater regulation. CSSB 3 would do nothing to address the many pressing issues surrounding the regulation of groundwater in Texas, such as the rule of capture. With water marketers eyeing water contained in the aquifers across the state, the bill should include a provision to protect groundwater owners whose wells are affected by neighbors who over-pump.

NOTES:

According to the LBB, CSSB 3 would result in a cost of \$3.7 million in general revenue in fiscal 2006-07. These costs primarily would be related to administering the environmental flows study and recommendation process.

The committee substitute differs from the Senate passed version of SB 3 in several substantial respects. As passed by the Senate, the bill would have included several provisions relating to conjunctive management of groundwater resources, including:

- providing remedies for interference with a domestic or agricultural well;
- requiring registration and reporting of water transactions;
- establishing training requirements for groundwater conservation districts; and
- establishing a groundwater management area council to coordinate the activities of groundwater conservation districts.

The House committee substitute added several provisions, including creating a Val Verde County Groundwater District. In addition, the substitute would require the EAA to determine that a change in withdrawal limits was consistent with protecting endangered species to the extent required under federal law.