

SUBJECT: TCEQ's authority to curtail or transfer water rights in emergency shortage

COMMITTEE: Natural Resources — committee substitute recommended

VOTE: 9 ayes — Ritter, Ashby, D. Bonnen, Callegari, T. King, Larson, Lucio, Martinez Fischer, D. Miller

0 nays

2 absent — Johnson, Keffer

WITNESSES: For — *(Registered, but did not testify:* Larry Casto, City of Dallas; Gary Gibbs, American Electric Power Co.; Stephen Minick, Texas Association of Business; Julie Moore, Occidental Petroleum Corp.; Stephanie Simpson, Texas Association of Manufacturers; CJ Tredway, Texas Oil & Gas Association; Julie Williams, Chevron USA, Inc.)

Against — None

On — Regan Beck, Texas Farm Bureau; Robert Martinez, Texas Commission on Environmental Quality

BACKGROUND: The State of Texas holds surface water in trust for the public good. The Texas Commission on Environmental Quality (TCEQ) is charged with issuing rights for the use of the surface water and the management of those rights.

The prior appropriations doctrine which states “first in time, first in right” is used to manage surface water rights in Texas and gives superior rights to first users of the water. The most senior water rights are served first during times of drought, but domestic and livestock uses are superior to any appropriated rights. Water rights are suspended or curtailed by priority date, with the most recently issued – or “junior” – priority users suspended before senior water rights in the area. A water right holder not receiving water to which the right holder is entitled may call on the TCEQ to enforce the prior appropriations doctrine. This is referred to as a “senior call.” Due to severe drought conditions, the TCEQ has received numerous senior calls. To protect public health and welfare, water rights with municipal uses or for power generation have not been suspended when

there was not an alternative source of water available.

Texas Water Code, sections 11.053 and 11.139 address the TCEQ's authority in drought or emergency conditions. The 82nd Legislature adopted sec. 11.053 as part of the TCEQ's sunset legislation, HB 2694 by W. Smith, in response to priority calls by senior water right holders. It was intended to confirm the TCEQ's authority to take emergency action in response to such senior calls. Sec. 11.053 allows the TCEQ executive director, by order and according to the priority of water rights, "first in time, first in right," to temporarily suspend surface water rights or adjust the diversions of water during a drought or emergency shortage. In ordering a suspension or reallocation, the TCEQ must ensure that the action taken maximizes the beneficial use of water, minimizes the impact on water rights holders, prevents the waste of water, and conforms to preference of use as much as possible, with the highest preference being for municipal purposes.

Under rule, the TCEQ requires water rights' holders to demonstrate water conservation measures as well as efforts to secure other sources of water. TCEQ rule also allows the executive director to consider public health and safety concerns when ordering curtailments.

Sec. 11.139 addresses the TCEQ's authority to deal with water emergencies in several ways, including a temporary transfer of water to meet emergency municipal or domestic water supply needs. If there are no feasible alternatives and an imminent threat to public health and safety exists, a retail or wholesale water supplier, regardless of their priority date, may request an emergency authorization from the TCEQ for the temporary transfer of water from a non-municipal water right holder. This may require that the TCEQ take water from another water right holder. A party granted an emergency authorization for a temporary transfer is liable to the owner of the water right for the fair market value of the water transferred as well as for damages caused by the transfer. If the parties do not agree on the amount due, or if full payment is not made within 60 days of the termination of the authorization either party can file a complaint with the TCEQ to determine the amount due. After exhausting all administrative remedies with the TCEQ, the owner of the water right can file suit in district court to recover or determine the amount due. The prevailing party in a suit is entitled to recover court costs and reasonable attorney fees.

DIGEST: CSHB 2720 would add language to the TCEQ's authority to adjust water

diversions to specify that such adjustments may be made to address an imminent hazard to the health, safety, or welfare of the public.

The bill also would provide that emergency water transfers could not be granted by the TCEQ until compensation had been agreed to by the petitioner for the emergency transfer and the water right holder from whom the use was to be transferred. This would not apply to a suspension or an adjustment ordered by executive director of the TCEQ.

The bill also would change the title of Water Code, sec. 11.053, to TCEQ's "authority to suspend or adjust water rights during periods of drought or water shortage." The bill also would change the title of Water Code, sec. 11.139 to "request to transfer water temporarily."

CSHB 2720 would take effect September 1, 2013.

**SUPPORTERS
SAY:**

It is the state's responsibility to honor the prior appropriations doctrine by administering water rights as they relate to each other — with the oldest rights given priority — while also reflecting the actual conditions in the field, including public health and safety. CSHB 2720 would clarify the TCEQ's authority when responding to senior calls as well as requests for water transfers as a solution to an emergency water shortage.

There are concerns that specifying that adjustments to water diversions may be made to address the health, safety, or welfare of the public would effectively exempt municipal rights from a senior call regardless of their priority date, resulting in a taking of a vested property right from a senior water right holder. CSHB 2720 would not challenge the property interest on an issued water right, its place in line in relation to others, or the ability of its owners to sell it. On the contrary, in responding to senior calls, a prior appropriation water right is actually protected. Surface water in Texas is state-owned water that is held in trust for the public good. A surface water right does not give ownership of the water, just the right to use it. The issued water right grants a water rights' holder a property interest in relation to other holders. This is known as "first in time, first in right." However, the issued rights do not guarantee water and are conditioned by water being available. Even the most senior water right is still second in line to permit-exempt domestic and livestock uses.

CSHB 2720 would appropriately clarify that compensation would not apply to a suspension or adjustment ordered by the TCEQ's executive

director. Sections 11.139 and 11.053 of the Water Code address two separate issues regarding the TCEQ's authority in drought and emergency conditions. Sec. 11.139 is about compensation in the transfer of water between users, whereas sec. 11.053 relates to the state's response to a call for the protection of a senior water right. Administration of a water right is based on the condition of water being available. When water is unavailable, the prior appropriation doctrine determines who gets cut off first. Compensation in that instance is not contemplated.

OPPONENTS
SAY:

CSHB 2720 could cause further confusion and conflict over the TCEQ's authority to manage the surface water rights' priority system in the event of a senior call. It would do this by codifying the TCEQ rule to consider public health and safety concerns when ordering curtailments and by ruling out compensation of senior water rights' holders for their loss of water rights.

Texas has long held a priority system of water allocation known as "first in time, first in right," where senior water rights' holders have a superior right to junior water rights' holders. However, TCEQ rule allows the executive director to consider public health and safety concerns when ordering curtailments. In a recent order, TCEQ cited the need to protect public health and safety for exempting municipalities and power generators from curtailment even though their rights were junior to many senior water rights' holders.

Water rights' holders rely on the surety of water rights as vested property rights to know how water is allocated during water shortages. Codifying the TCEQ rule to consider public health and safety concerns when ordering curtailments would effectively give preference to municipal use regardless of the prior appropriations doctrine. Further, allowing junior water rights' holders to divert water for public health and safety, while senior water rights' holders are curtailed, would be a regulatory taking of vested property rights. Unless senior water right holders were fairly compensated, the TCEQ could be taking a vested property right without compensation.

Water rights' permits, once issued by the TCEQ and put to beneficial use by the permit holder, are vested property rights. While a surface water right does not give ownership of the water, it does give the water right holder a vested right to use the water.

OTHER
OPPONENTS
SAY:

CASHB 2720 could limit the TCEQ's ability to respond to senior calls for water rights' holders in a flexible manner if adjustments can be made only if there is an imminent hazard to the health, safety, or welfare of the public.

NOTES:

CASHB 2720 would not have a significant fiscal implication to the state.

The committee substitute differs from the original bill by providing that an adjustment of diversions of water may be ordered to address an imminent hazard to the health, safety, or welfare of the public, rather than just the imminent threat to public health.