

BILL ANALYSIS

Senate Research Center
76R3732 MI-D

C.S.S.B. 1311
By: Brown
Natural Resources
4/1/1999
Committee Report (Substituted)

DIGEST

The 75th Texas Legislature established a comprehensive framework for planning the development and management of the state's water resources in Senate Bill 1. The consolidation of such authority relating to water rights and water utilities was intentionally avoided so as not to interfere with changes to those provisions in S.B. 1. The Interim Committee on Water Resource Development and Management, through its monitoring of the implementation of S.B. 1 also developed recommendations pertaining to the related activities of the Texas Natural Resource Conservation Commission (commission) under S.B.1, including the process for creating priority groundwater management areas and groundwater conservation districts. C.S.S.B. 1311 consolidates the emergency order and enforcement authorities of the commission related to water rights and water utilities.

PURPOSE

As proposed, C.S.S.B. 1311 regulates development and management of water resources.

RULEMAKING AUTHORITY

Rulemaking authority is granted to the Texas Natural Resource Conservation Commission in SECTION 2 (Sections 5.517(d) and Section 5.518(d), Water Code), SECTION 17 (Section 11.138(a), Water Code), and SECTION 31 (Section 36.1074(a), Water Code) of this bill.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends Section 5.504(a), Water Code, to require an emergency order to set a time for the hearing not later than the 20th day after the date the emergency order is issued, if the emergency order is issued under Section 5.517 or 5.518.

SECTION 2. Amends Chapter 5L, Water Code, by adding Sections 5.517, 5.518, 5.519, and 5.520, as follows:

Sec. 5.517. EMERGENCY PERMIT TO DIVERT AND USE WATER; AMENDMENT TO WATER RIGHT. Authorizes the Texas Natural Resource Conservation Commission (commission) by emergency order to issue a permit to divert and use water or amend an existing permit, certified filing, or certificate of adjudication for an initial period not to exceed 120 days if the commission finds that certain actions have taken place, except as provided by Section 5.506 and after notification to the governor. Authorizes the executive director to issue an emergency order if an imminent threat to the public health, safety, and welfare or the environment exists that requires emergency action before the commission can take action under Subsection (a) and there is no feasible alternative. Requires the commission to hold hearing as provided for in Section 5.504 as soon as practicable but not later than 20, rather than 10, days after issuance of the order to affirm, modify, or set aside the order, the executive director issues an emergency order under this subsection. Provides that the notice requirements of Section 11.132 relating to the time for notice, newspaper notice and method of giving a person notice do not apply to a hearing held on an application for an emergency order under this section. Requires the commission to give the general notice of the hearing that the commission considers practicable under the circumstances. Authorizes the commission to adopt rules and impose fees necessary to carry out the provisions of this section. Provides that an emergency order under this section does not vest in the grantee of any right to the diversion, impoundment, or use of water and expires by its terms.

Sec. 5.518. EMERGENCY ORDER FOR TEMPORARY TRANSFER OF USE OF WATER

RIGHT. Authorizes the commission by emergency order to grant the temporary transfer and use of all or part of a surface water right for other than domestic or municipal use to a retail or wholesale water supplier for public health and safety purposes. Authorizes the commission to direct the applicant to timely pay the amounts for which the applicant may be potentially liable under this section and to fully indemnify and hold harmless the state, executive director, and the commission from any and all liability for the order sought. Authorizes the commission to order bond or other surety in a form acceptable to the commission as a condition for an emergency order under this section. Prohibits the commission from granting an emergency authorization under this section that would cause a violation of a federal regulation. Requires the executive director or the commission to allocate the requested amount among two or more permits, certified filings, or certificates of adjudication for other than domestic or municipal use. Provides that a person granted an emergency authorization under this section is liable to the owner from whom use is transferred and for any damages proximately caused by the transfer of use. Authorizes either party to file a complaint with the commission to determine the amount due, if, within 60 days of the termination of the order, the parties do not agree on the amount due, or if full payment is not made. Requires the commission, by rule, to establish a dispute resolution procedure for a complaint filed under this section. Authorizes an owner from whom the use is transferred to file suit to recover or determine the amount due in a district court in the county where the owner resides or has its headquarters. Provides that the prevailing party in a suit filed under this subsection is entitled to recover court cost and reasonable attorney's fees.

Sec. 5.519. EMERGENCY WORKS SAFETY ORDER. Authorizes the commission to issue a mandatory or prohibitory emergency order directing the owner of a dam, levee, or other water-storage or flood control work to repair, modify, maintain, dewater, or remove a work if the commission finds certain conditions exist.

Sec. 5.520. EMERGENCY ORDER FOR OPERATION OF UTILITY THAT DISCONTINUES OPERATION OR IS REFERRED FOR APPOINTMENT OF RECEIVER. Authorizes the commission to issue an emergency order appointing a willing person to temporarily manage and operate a utility under Section 7.403. Provides that notice of the action is adequate if the notice is mailed or hand delivered to the last known address of the utility's headquarters.

SECTION 3. Amends Section 7.004, Water Code, to provide that nothing in this chapter affects the right of a private corporation, individual, or political subdivision that has a justiciable interest to pursue any available common law remedy to enforce a right, to abate a condition of pollution or other nuisance, to recover damages to enforce a right, or to prevent or seek redress or compensation for violation of a right or otherwise redress an injury.

SECTION 4. Amends Chapter 7B, Water Code, by adding Section 7.034, as follows:

Sec. 7.034. ATTORNEY'S FEES; COSTS. Authorizes a district court to award the cost of litigation, including reasonable attorney's fees and expert costs, to any political subdivision of the state, private corporation, or individual that is a water right holder and that prevails in a suit for injunctive relief to redress an unauthorized diversion, impoundment, or use of surface water in violation of Chapter 11 or a rule adopted under Chapter 11.

SECTION 5. Amends Section 7.051(b), Water Code, to provide that except as provided by this subsection, this subchapter does not apply to violations of Chapter 12, 13, 16, or 36. Provides that this chapter does apply to Section 16.236. Deletes text regarding Chapter 11 and Chapter 341, Health and Safety Code. Makes a conforming change.

SECTION 6. Amends Section 7.052, Water Code, to set forth certain penalties for violations including prohibiting the amount of the penalty for a violation of a rule or order adopted or permit, certified filing, or certificate of adjudication issued under Chapter 11 from exceeding a certain amount. Makes conforming changes.

SECTION 7. Amend Section 7.054, Water Code, to require a report regarding a possible violation under Chapter 11 to state the facts on which the conclusion was based and recommend the amount of any penalty. Requires the executive director to base the recommended amount of the proposed penalty on the factors provided by Section 7.053 and to analyze each factor for the benefit of the commission.

SECTION 8. Amends Section 7.069, Water Code, to require a penalty collected under this subchapter to be deposited to the credit of the general revenue fund, except as provided by Subsection (b). Requires a penalty collected under this subchapter from a public utility to be paid to the commission and deposited in the water utility improvement account as provided by Section 341.0485, Health and Safety Code.

SECTION 9. Amends Section 7.102, Water Code, to prohibit the amount of a penalty for a violation of a rule under Section 12.052 from exceeding \$5000. Requires a person who causes, suffers, allows, or permits a violation of a statute, rule, order, or permit relating to Chapter 11, to be assessed for each violation a civil penalty not less than \$100 nor greater than \$5,000 for each day of each violation as the court or jury considers proper. Make conforming changes.

SECTION 10. Amends Sections 7.105(a) and (c), Water Code, to authorize the attorney general to initiate a suit for recovery of a penalty under this section for a violation under Section 13.414. Authorizes the suit to be brought in Travis County, in the county in which the defendant resides, or in the county in which the violation or threat of violation occurs, except as provided by this subsection. Authorizes a suit to recover a penalty for a violation of a rule or order issued by the commission under Section 12.052 to be brought in Travis County.

SECTION 11. Amends Chapter 7D, Water Code, by adding Section 7.1075, as follows:

Sec. 7.1075. DISPOSITION OF PENALTY COLLECTED FROM PUBLIC UTILITY. Requires a penalty collected under this subchapter from a public utility to be paid to the commission and deposited in the water utility improvement account as provided by Section 341.0485, Health and Safety Code.

SECTION 12. Amends Chapter 7D, Water Code, by adding Section 7.112, as follows:

Sec. 7.112. LIMITATION ON SUIT FOR VIOLATION OF SECTION 11.081. Requires an action to collect the penalty provided by Section 7.102 for a violation of Section 11.081 to be brought within two years from the date of the alleged violation.

SECTION 13. Amends Section 7.351, Water Code, to make a conforming change.

SECTION 14. Amends Section 11.0843, Water Code, to delete text requiring a penalty collected under this section to be deposited in the state treasury to the credit of the general revenue fund. Makes conforming changes,

SECTION 15. Amends Section 11.085, Water Code, by adding Subsection (w), to provide that the requirements of this section apply to the transfer of water from one river basin to another regardless of whether all or any part of the water right, permit, certified filing, or certificate of adjudication under which the water is authorized to be used is also transferred.

SECTION 16. Amends Section 11.138(a), Water Code, to authorize the commission, by rule, to authorize the beneficial use, without a permit, of not more than 25 acre-feet of water, for a term not to exceed one year, if the diversion of water will not affect existing water right holders and the user of the water registers the use with the commission in the manner required by the commission.

SECTION 17. Amends Section 11.139, Water Code, to authorize the commission to grant an emergency permit, order, or amendment to an existing permit, certified filing, or certificate of adjudication under Subchapter L, Chapter 5. Deletes text regarding emergency authorizations.

SECTION 18. Amends Section 11.142(a), Water Code, to provide that normal storage may involve the temporary storage of greater than 200 acre-feet if the owner of the structure maintains records which can demonstrate that throughout a 12 month period an average of not more than 200 acre-feet of water is impounded in such a structure.

SECTION 19. Amends Section 11.173(b), Water Code, to provide that a permit, certified filing, or certificate of adjudication or a portion of a permit, certified filing, or certificate of adjudication is exempt from cancellation under Subsection (a) if it was obtained to meet demonstrated long-term public water supply or electric generation needs as evidenced by a water management plan developed by the holder and consistent with projections of future water needs contained in the state water plan or if it was obtained as

the result of the construction of a reservoir funded, in whole or in part, by the holder of the permit, certified filing, or certificate of adjudication as part of the holder's long-term planning.

SECTION 20. Amends Section 11.177(b), Water Code, to make conforming changes.

SECTION 21. Amends Sections 12.052(c), (d), (e) and (f), Water Code, to prohibit the owner of a dam that is required to be constructed, reconstructed, repaired, or removed in order to comply with the rules and orders promulgated under Subsection (a) of this section from wilfully failing or refusing to comply within the 30-day period following the date of the commission's final, nonappealable order to do so and from wilfully failing to comply with any rule or other order issued by the commission under this section within the 30-day period following the effective date of the order. Authorizes the commission to issue an emergency works safety order under Section 5.519. Deletes text regarding existing conditions of a dam. Makes conforming changes.

SECTION 22. Amends Chapter 7, Water Code, by adding Subchapter I, and Sections 13.412, 13.4131, and 13.4132, Water Code, transferred to Chapter 7I, Water Code, redesignated as Section 7.401, 7.402, 7.403, and 7.404 as follows:

SUBCHAPTER I. RECEIVERSHIP; SUPERVISION OF CERTAIN UTILITIES

Sec. 7.401. DEFINITIONS. Defines "affiliated interests" and "affiliate."

Sec. 7.402. RECEIVERSHIP. Makes a conforming change.

Sec. 7.403. SUPERVISION OF CERTAIN UTILITIES. Authorizes the commission to require the utility to meet, rather than abide by, conditions and requirements prescribed by the commission and to obtain commission approval before taking an action under Subdivision (1), rather than Subsection (b), of this section. Authorizes an action or transaction for which commission approval is required by this section that occurs without commission approval to be void by the commission. Deletes text regarding the commission's supervision of a utility. Makes conforming and nonsubstantive changes.

Sec. 7.404. OPERATION OF UTILITY THAT DISCONTINUES OPERATION OR IS REFERRED FOR APPOINTMENT OF RECEIVER. Authorizes the commission to appoint a person under this section by emergency order under Section 5.507 and to authorize an emergency rate increase by emergency order under Section 5.508, rather than notice of the action is adequate if the notice is mailed or hand delivered to the last known address of the utility's headquarters.

SECTION 23. Amends Section 13.414, Water Code, as follows:

Sec. 13.414. New heading: VIOLATION BY RETAIL PUBLIC UTILITY OR AFFILIATE INTEREST. Prohibits a retail public utility or affiliated interest from violating this chapter, failing to perform a duty imposed on it, or failing, neglect, or refusing to obey an order, rule, direction, or requirement of the commission or decree or judgment of a court. Deletes text regarding civil penalty. Makes conforming changes.

SECTION 24. Amends Sections 35.008(b), (c), and (d), Water Code, to require the commission to call a public comment, rather than evidentiary hearing, to consider certain actions. Provides that any testimony, evidence, report, comment, or other information received by the commission at a public comment hearing becomes part of the record of the contested case hearing on designation of the priority groundwater management area, creation of a district over all or part of the priority groundwater management area, or addition of any part of the land in the priority groundwater management area to an existing district.

SECTION 25. Amends Section 35.009, Water Code, as follows:

Sec. 35.009. New heading: NOTICE AND PUBLIC COMMENT HEARING. Makes conforming changes.

SECTION 26. Amends Section 35.012(a), Water Code, to make a conforming change.

SECTION 27. Amends Chapter 35, Water Code, by adding Section 35.010, as follows:

Sec. 35.010. CREATION OF DISTRICTS ON PETITION AFTER DESIGNATION OF PRIORITY GROUNDWATER MANAGEMENT AREA. Prohibits the commission from considering the creation of a groundwater conservation district in a designated priority groundwater management area before the conclusion of the next regular session of the Texas Legislature following the designation unless the local landowners have initiated a petition process under Chapter 36 for the creation of a groundwater conservation district with a priority groundwater management area.

SECTION 28. Amends Section 35.012, Water Code, by adding new Subsections (c) and (d), relettering existing Subsections (c)-(f) as Subsections (e)-(h), and amending existing Subsection (d), to require the commission not later than a certain date on which the commission order designating a priority groundwater management area is issued, to send a written notice of the commission's actions to each landowner in the designation priority groundwater management area at the landowner's most recent known address as shown in the tax rolls of the county in which the land is located. Requires the notice to include the commission's findings and conclusions from the data and information considered in designating the priority groundwater management area and the commission's recommendation regarding the need for a groundwater conservation district in the priority groundwater management area. Requires the Texas Agricultural Extension Service to begin an educational program within the area with the assistance and cooperation of the Texas Water Development Board, the commission, other state agencies, and existing districts to inform the residents of the status of the area's water resources and management options including possible formation of a district. Makes conforming changes.

SECTION 29. Amends Section 36.014, Water Code, to require the commission to give notice of the application or proposal as required by Section 49.011(a) and may conduct a hearing on the application or proposal if the commission determines that a hearing is necessary under Section 49.011. Deletes text regarding management areas.

SECTION 30. Amends Section 36.015, Water Code, to require the commission to issue an order containing findings granting the petition or adopting the proposal, as appropriate, if the commission finds that a district requested by petition or proposed by the commission is feasible and practicable, a benefit to the land in the district, and would be a public benefit or utility. Requires the commission by order to deny the petition or reject the proposal, as appropriate. Requires the commission to direct in its orders creating the district that an election be called by the temporary directors to confirm the creation of the district and to elect permanent directors, if the commission grants the petition or adopts the proposal. Requires the commission to act on the petition or its proposal within a reasonable amount of time. Deletes text regarding the refusal to grant a petition.

SECTION 31. Amends Chapter 36D, Water Code, by adding Section 36.1074, as follows:

Sec. 36.1074. EXTENSION OF DISTRICT AUTHORITY TO ADDITIONAL AQUIFERS WITHIN DISTRICT'S GEOGRAPHIC BOUNDARIES. Requires the commission, by rule, to establish a procedure by which a district created by special law may petition to extend the district's authority to include management of any aquifer within the geographic boundaries of the district the management of which is not provided for by the special law creating any district. Requires the rules adopted by the commission under this section to establish grounds for a petition described by Subsection (a) including certain conditions. Authorizes a petition under this section to be granted only by order of the commission.

SECTION 32. Amends Section 36.0151, Water Code, as follows:

Sec. 36.0151. New heading: NOTICE OF CREATION BY COMMISSION OF DISTRICT FOR PRIORITY GROUNDWATER MANAGEMENT AREA. Requires the commission to notify the county commissioners court of each county with territory in the district of the district's creation as soon as practicable after issuing the order under Section 36.015(a) creating a district proposed by the commission under Section 35.012(b).

SECTION 33. Amends Section 36.108, Water Code, as follows:

Sec. 36.108. New heading: JOINT PLANNING IN MANAGEMENT AREA OR PRIORITY GROUNDWATER MANAGEMENT AREA. Requires each district to prepare a comprehensive management plan as required by Section 36.1071 covering that district's respective territory, if two

or more districts are located within the boundaries of the same management area or priority groundwater management area. Making conforming changes.

SECTION 34. Amends Section 341.047, Health and Safety Code, by transferring it to Chapter 7E, Water Code, redesignating it as Section 7.1605, Water Code, as follows:

Sec. 7.1605. New heading: VIOLATIONS RELATING TO PUBLIC DRINKING WATER. Makes conforming changes.

SECTION 35. Amends Section 341.048, Health and Safety Code, as follows:

Sec. 341.048. New heading: VIOLATION. Deletes text regarding certain violations.

SECTION 36. Amends Section 5.07, Water Code, to make a conforming change.

SECTION 37. Amends Section 5.08(a), Water Code, to make a conforming change.

SECTION 38. Amends Section 341.0485, Water Code, to make conforming change

SECTION 39. Repealer: (1) Section 11.082, Water Code (Unlawful Use: Civil Penalty).

(2) Section 11.0841, Water Code (Civil Remedy) and Section 11.0842, Water Code (Administrative Penalty).

(3) Section 11.148, Water Code, (Emergency Suspension of Permit Conditions).

(4) Section 13.411, Water Code, (Action to Enjoin or Require Compliance).

(5) Section 13.4133, Water Code, (Emergency Rate Increase in Certain Circumstances).

(6) Section 13.4151, Water Code, (Administrative Penalty) and Section 13.416, Water Code (Penalties Cumulative).

(7) Section 13.417, Water Code, (Contemp Proceedings) and Section 13.418, Water Code, (Disposition of Fines and Penalties; Water Utility Improvement Account).

(8) Section 35.004, Water Code, (Designation of Management Areas), Section 35.005, Water Code, (Petition to Designate a Groundwater Management Area), and Section 35.006, Water Code (Notice for Designation of Management Area).

(b) Repealer: Section 341.049 Health and Safety Code (Administrative Penalty) and Section 341.050, Health and Safety Code (Penalties Cumulative).

SECTION 40. Effective date: September 1, 1999.

SECTION 41. Makes application of this Act prospective.

SECTION 42. Emergency clause.

SUMMARY OF COMMITTEE CHANGES

SECTION 2.

Amends Section 5.17(b), Water Code, to require the commission to hold a hearing as provided for in Section 5.504 as soon as practicable but, not later than 20, rather than 10, days after issuance of the a certain order. Deletes text regarding emergency action.

Amends Section 5.518, Water Code, to require the executive director or the commission to allocate certain requested amounts of water.

SECTION 6.

Amends Section 7.052, Water Code, sets forth certain penalties for violations including the amount of the penalty for a violation of a rule or order adopted under a certain permit.

SECTION 9.

Deletes proposed SECTION 9 and redesignates SECTIONS 10-17.

SECTION 18.

Amends Section 11.142(a), Water Code, to provide that normal storage may involve the temporary storage of certain amounts of water.

SECTION 22.

Amends Chapter 7, Water Code, to define “affiliated interests,” and “affiliate.” Deletes proposed Section 7.325, Water Code, regarding action to enjoin or require compliance: retail public utilities. Makes conforming changes.

SECTION 24.

Deletes proposed Section 13.417, Water Code, regarding contempt proceedings in utility actions.

SECTION 25.

Amends Section, 35.009 Water Code, to add a new heading and makes conforming changes.

SECTION 26.

Amends Section 35.012(a), Water Code, to make a conforming change.

SECTION 36.

Amends Section 5.07, Water Code, to make a conforming change.

SECTION 37.

Amends Section 5.08(a), Water Code, to make a conforming change.

SECTION 38.

Amends Section 341.0485, Water Code, to make conforming change

SECTION 39.

Deletes certain sections of the Water Code.