

From the Capitol:  
the 80<sup>th</sup> Texas Legislature

by

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Over the last ten years the Texas Legislature has passed three significant omnibus water bills that have, literally, changed the landscape of water law in Texas. These laws have profoundly adjusted the very foundation for water rights permitting and water project funding in Texas, created significant new regulation of groundwater resources in the state, implemented a planning process that has grown into the planning template for other states and nations, and instituted a mechanism for identifying and protecting precious water resources for the environment as well as reservoir sites for the state's growing population, which is predicted to double in the next 50 years.

This paper identifies the major water legislation passed by the Legislature this past spring, beginning with a detailed description of Senate Bill 3, the 80<sup>th</sup> Legislature's omnibus water bill, and ending with a brief description of several other bills of significance. To lend some perspective, pursuant to the Texas Constitution, legislative sessions in Texas occur every two years, for 140 days, beginning in mid-January and lasting until about the end of May. Pursuant to Texas House of Representatives and Texas Senate rules, the legislative calendar is filled with deadlines by which a committee and both bodies of the Legislature must act on a measure, or it is effectively killed. These procedural rules often mean life or death to a proposed measure, and they are strictly adhered to. In many instances, however, such procedural deadlines may be waived by a two-thirds vote of the body seeking the waiver. These deadlines are integral to the path followed in the Legislature's consideration of SB 3 this past session.

### Senate Bill 3

SB 3 was one of several hotly contested bills heard by the Texas Legislature last spring. It passed on the 140<sup>th</sup> day of the 80<sup>th</sup> Legislative Session after several lengthy hearings in the House committee that heard it, running well past midnight and early into the morning, but also surprisingly smooth sailing in the Senate. It faced long, arduous floor debates in the House, as well as a number of parliamentary challenges, and several iterations that saw the bill go from 4 articles to 13, with the addition of a number of "local" measures that were attached to it late in the legislative process. Final action on the bill occurred on the 140<sup>th</sup> day when House members, on a two-thirds vote, voted to concur with the SB 3 Conference Committee report.

While it was contested, SB 3's path was well-lit by prior legislation of equal importance that was passed by the 75<sup>th</sup> Texas Legislature in 1997 (Senate Bill 1) and the 77<sup>th</sup> Texas Legislature in 2001 (Senate Bill 2). These measures have been instrumental in Texas' ability to institute a number of significant changes to its water laws, including the implementation of a revised water planning process across the state that starts at the regional level and moves to the formulation of a state water plan, to more meaningfully regulate groundwater resources in the state in light of the state's "rule of capture" for groundwater resources, and to changing the mechanism by which Texas funds public water supply projects. Practically all of the provisions of SB 1 and SB 2 have been put to considerable use by water interests in Texas in the years since

their passage, and while this legislation was carefully scrutinized and scrubbed as it went through the legislative process, neither was the subject of such bitter debate as was SB 3.

As noted, the fate of SB 3 was not certain until more than two-thirds of the House voted to suspend its procedural rules to take up the bill (as required on the 140<sup>th</sup> day of a legislative session pursuant to House rules), and then only after two points of order challenging the Conference Committee's report were overruled. And, this followed a failed initial vote by House members to take up the bill, when slightly less than the necessary two-thirds of the members failed to agree to suspend the rules, and then only after a motion to reconsider the initial vote was subsequently granted. On the other hand, the Senate agreed to concur with the SB 3 Conference Committee's report on a 29-1 vote. This important legislation was pronounced dead on several occasions, only to be resurrected through the vigorous efforts of the bill's author, Senate Natural Resource Committee Chairman Kip Averitt (R-Waco), and the bill's House sponsor, House Natural Resource Committee Chairman Robert Puente (D-San Antonio).

SB 3 includes several important provisions to water interests around the state, and as noted it also served as a late-session vehicle for a number of "local" bills, which are noted below but are not detailed herein. This legislation includes the following provisions:

- Article I of the bill provides for a significant adjustment to the state's environmental flows protection and implementation policies. Similar to the "bottom-up" approach to state water planning included in Senate Bill 1 through the formation of regional water planning groups to identify future water needs of the state and the submission of such plans to the Texas Water Development Board (TWDB) for consideration and possible inclusion in a state water plan, Article I creates the "Environmental Flows Advisory Group" (EFAG), made up of three appointees (each) of the Speaker of the Texas House of Representatives, the Lt. Governor (the chair of the Texas Senate pursuant to the Constitution), and the Governor. The EFAG is charged with holding public meetings and studying public policies concerning the implications of balancing the needs of the environment for water with the needs of people for water, and is to report its findings to the Legislature every two years, beginning December 1, 2008. The EFAG is authorized to appoint the Texas Environmental Flows Science Advisory Committee (SAC), made up of from 5-9 members having expertise in hydrology, water resources, aquatic and terrestrial biology, and other areas pertinent to the evaluation of environmental flows. The SAC is to serve as an objective scientific body to assist the EFAG in its policy recommendations.

The EFAG also i) designates the geographic territory within each bay and basin system and ii) appoints members of the various bay and basin stakeholder committees, intended to represent 17 different interest groups in each of the different bay and basin areas of the state. In turn, the bay and basin stakeholder committees appoint expert science teams that will support the committees. Each expert science team is charged with identifying environmental flow regime recommendations for their bay and basin areas and forwarding same to their bay and basin stakeholders committee, the EFAG, and the Texas Commission on Environmental Quality (the state's environmental air, waste and water permitting and enforcement agency) for analysis, comment, and adoption of regulations. Such regulations will set environmental flow standards for bays, estuaries, and streams in Texas. The Rio Grande is included in the third tier of bay and basin systems to be studied, with flow recommendations due no later than September 1, 2009.

Until such recommendations are reduced to rules, Article I provides that the TCEQ may continue to issue permits for surface water rights, but such permits will include re-opener clauses so as to enable the agency to subsequently re-open and amend such permits to take into account environmental flow standards that may be established through the post-permitting rulemaking process. The re-opener provision will be subject to a 12.5 percent adjustment cap, which is only applicable to any environmental flow limitation in the permit.

Article I also creates a "Watermaster Advisory Committee" in each river basin and stream segment where the TCEQ appoints a watermaster, for the purpose of making recommendations regarding the administration of water within the basin or stream segment, reviewing and commenting on a watermaster's budget, and performing other advisory functions as requested by either the agency or water rights holders in the basin or stream segment.

- Article II of SB 3 includes substantive changes to a variety of water conservation policies and procedures. This article creates the "Water Conservation Advisory Council," made up of the 23 different stakeholder interests appointed by the TWDB, including representatives of state and federal agencies, cities, districts, river authorities, and environmental, agricultural and industry groups. The Council is to serve the state with expertise in water conservation matters, and to report annually to the Governor, the Lieutenant Governor and the Speaker on progress it has made in a variety of measures related to water conservation. It is charged with monitoring trends and technologies related to water conservation, and with developing resources to be made available to the public related to water conservation. This article also directs the TWDB to develop and implement a state-wide water conservation program to educate the public about conservation.
- Article III of the bill provides a number of landowner protection measures associated with the potential permitting and construction of new reservoirs in the state. This article identifies measures that political subdivisions may take that do not violate the provisions of Water Code § 16.051(g), which prohibits political subdivisions and state agencies from accepting ownership interests in real property that may "significantly prevent" the construction of reservoirs whose sites have been designated as "unique" by the Legislature. It also ensures that landowners may continue to lease land acquired by reservoir sponsors for the siting of reservoirs until construction is commenced on the projects, and that reservoir sponsors will offer to use easements in lieu of fee title for environmental mitigation, if such easements are acceptable to federal permitting agencies that determine the adequacy of environmental mitigation.
- Article IV of SB 3, easily the most controversial article in the bill, designates the sites of all reservoirs recommended in the most recent (2007) State Water Plan as "unique" for the construction of a reservoir, thereby precluding political subdivisions and state agencies from accepting ownership interests in real property which would "significantly prevent" the construction of such reservoirs. Such designations are sunsetted September 1, 2015, unless the governing body of a reservoir sponsor takes action to expend monies necessary to construct or permit the project by that date.

With specific regard to the proposed Marvin Nichols Reservoir and Lake Fastrill projects, this article also creates a study commission, made up of representatives of the Region C Planning Group (the Metroplex-area planning region that has included these two reservoir projects in its regional water plan as water management strategies designed to meet the region's long-term water demands) and the Region D Planning Group (the Northeast Texas water planning region, where the Marvin Nichols Reservoir project is located), to assess these projects, and alternatives that may be available to the sponsors of these projects. Finally, this article designates sites of "unique ecological value," which effectively precludes the construction of reservoirs on such sites.

- Article V of the bill creates an interim committee, the "Joint Interim Committee on State Water Funding," to assess the possible funding alternatives available for State Water Plan implementation. This committee is made up of 8 members of the House and Senate, including the Chair of the House and Senate Natural Resources Committees. The Committee is to report its findings related to water project funding to the Legislature no later than December 1, 2008.
- Article VI amends Water Code § 16.344 to allow TWDB funding to any political subdivision located in an economically distressed area if the agency makes certain findings related to the entity, and if certain express conditions are met.
- Article VII amends Water Code Chapter 49 to establish various customer classes that a conservation and reclamation district may distinguish amongst, and statutory factors it may consider, in setting rates.
- Article VIII directs the Brazos River Authority and the Lower Colorado River Authority to conduct a study of the role of Lake Somerville in the economic development of the surrounding vicinity, and to report their findings to the Legislature by January 2009.
- Article IX creates the Agua Special Utility District in the Rio Grande Valley.
- Article X creates the True Ranch Municipal Utility District No. 1 in Hays County.
- Article XI creates the Tablerock Groundwater Conservation District in Coryell County.
- Article XII amends the Edwards Authority Act to address a number of significant concerns related to the rights and powers of the EAA. This measure raises the cap on permitted withdrawals the EAA is allowed to recognize from 400,000 acre-feet per annum to 572,000 acre-feet per annum. This article also addresses changes to the EAA's adoption of a critical period management plan and reductions in withdrawals that the EAA is to require during critical periods, when reductions in elevations of the Edwards Aquifer result in diminished springflows.
- Article XIII amends the boundaries of the Culberson County Groundwater Conservation District.

Senate Bill 3 accomplished what its supporters intended and what the state needed. The bill included meaningful and important measures related to environmental flows and water conservation, it provided important if limited protection for sites that are unique for the

construction of reservoirs and sites of unique ecological value, and it served to initiate work during the interim period before the next legislative session to identify the various financial protocols the state will develop and implement in order to pay for the \$30 billion of water infrastructure the TWDB has identified as necessary to address the state's future water supply needs. These measures, together with those included in Senate Bill 1 and Senate Bill 2, demonstrate the state's long-term interest in protecting, conserving and further developing its ground and surface water resources.

In addition to SB 3, a handful of other bills passed last session, as described below.

#### House Bill 147

HB 147 amends Water Code Chapter 7, related to the TCEQ's enforcement of the permits it issues. HB 147 affirmatively authorizes the TCEQ to defer administrative penalties, in whole or in part, against municipally-owned utilities, water supply corporations and water districts, with due consideration of the following factors: the financial position of the entity and its ability to pay penalties and complete necessary corrective actions; risks to human health or the environment if corrective actions are delayed due to limited financial resources; alternatives reasonably available to the entity to both pay a penalty and complete corrective actions; and, the potential effects of penalty payment on other essential public health and safety services.

#### House Bill 149

HB 149 authorizes TCEQ to establish procedures to allow retail public utilities that take over a non-functioning retail utility to immediately charge rates to new customers in light of the costs necessary to bring the non-functioning utility into compliance. The bill allows TCEQ to establish a streamlined process for establishing new rates, with due consideration of the costs necessarily incurred to bring the non-functioning utility system into compliance. Finally, HB 149 expressly grants the TCEQ the right to authorize these utilities a reasonable time to bring non-functioning utilities into compliance without fear of penalties or fines.

#### Senate Bill 714

SB 714 expands the rights of groundwater conservation districts to require groundwater production reporting from otherwise exempt groundwater wells. This bill is squarely directed at wells serving oil and gas exploration and production facilities, and it specifically exempts from its applicability exempt wells used for domestic and livestock purposes.

#### Senate Bill 1762

SB 1762 directs the Texas Water Development Board and the Far West Regional Water Planning Group to study the impacts of climate change on surface water supplies from the Rio Grande. This study is to consider any similar analyses conducted by other western states related to the impact of climate change on water supplies in those states, and to develop recommendations of potential impacts, including impacts to the Rio Grande and identification of reasonable alternative management strategies to offset such impacts. SB 1762 requires the TWDB to complete its report to the Legislature no later than December 31, 2008.