HOUSE RESEARCH ORGANIZATION bill analysis 5/17/95

SB 1017
Wentworth (R. Lewis)
(CSSB 1017 by R. Lewis)

SUBJECT: Creation of water quality protection zones

COMMITTEE: Natural Resources — committee substitute recommended

VOTE: 8 ayes — Counts, Yost, Combs, Corte, King, R. Lewis, Puente, Walker

0 nays

1 absent — Stiles

SENATE VOTE: On final passage, April 19 — 26-3 (Barrientos, Truan, Zaffirini)

WITNESSES: (*On House companion bill, HB 2471 by R. Lewis*):

For — Richard Suttle, David Ruehlman, and Ernest Howard, F.M. Properties.

Against — Brigid Shea, Austan Librach and Jackie Goodman, City of Austin; Mike Dunn, Greenpeace; Nina Yager, Texas Citizens Action; Alfredo Reza, Students for Earth Awareness; Pam Thompson, Citizens Organized to Defend Austin; Al St. Louis, Barton Springs Polar Club; Karen Hadden, Austin Peace and Justice Coalition, Stephen K. Beers, Daniel Strub, Dimitrius Pulido, Shudde Bess Bryson Fath, Louis T. Adams, D. Lauren Ross, Marjorie Adams, Alicia Serapiglia, Christina McCain, Ariel Nash, Linda Gleis, Caren Canfield Floyd, Tim Jones, Robert Singleton, Tom Cuddy, Mary Arnold

DIGEST: CSSB 1017 would authorize owners of continuous tracts of land in the extraterritorial jurisdiction (ETJ) of certain cities (Austin) to designate "water quality protection zones." The designation would include a description of the proposed land use within the zone, a water quality plan for the zone and a description of water quality facilities and infrastructure in the zone. The water quality plan would be signed by an engineer acknowledging that the plan would either maintain background levels of water quality in waterways or capture the first 1.5 inches of rainfall in developed areas.

The plan would be submitted to the Texas Natural Resource Conservation Commission (TNRCC) for approval. TNRCC would be required to accept and approve the plan within 120 days from when the plan was filed unless the commission found that the plan would not attain the water quality protection standards described by CSSB 1017. TNRCC would have the burden of proof for the denial of a plan or any plan amendments. A denial would be appealable to a court of competent jurisdiction. A public hearing on the plan would not be required.

A plan implemented in a water quality zone would be presumed to meet all state and local requirements for the protection of water quality. Development in the zone would comply with state regulations relating to water quality as well as water quality regulations adopted by a conservation and reclamation district in the zone. TNRCC could require and enforce additional water quality protection measures to comply with federal mandates.

In a water quality protection zone, a city could not enforce any land-use ordinances, rules or requirements including but not limited to the abatement of nuisances, pollution control and abatement programs, water quality ordinances, most subdivision requirements or any environmental regulations that would limit the ability to operate a water quality plan or land use plan in a water quality zone. A city could not collect fees or exercise eminent domain inside a zone until the zone was annexed by the city.

A city could not annex a zone until 20 years after the zone was designated or after the completion of 90 percent of all facilities and infrastructure described in the water quality plan for the entire zone.

Subdivision plats would be required to be approved by a city and commissioner's court of a county if the plat complied with the county's subdivision design regulations and if an engineer verified that the plat complied with the water quality plan currently in effect in the protection zone.

The bill would require that water quality be monitored in the designated water quality zones and would provide how and when that monitoring should be done. Results of the monitoring and a description of the

management practices used throughout the zone would be summarized in a technical report and submitted annually to TNRCC, which would be required to review the report. If the commission found that background levels were not maintained, the landowner or developer would be required to modify water quality plans.

The bill would specify that an owner of a contiguous tract of land of over 1,000 acres (or an owner of land between 500 and 1,000 acres with TNRCC approval) could designate a water quality protection zone.

The zone would have to be designated in the ETJ of a city that has a population greater than 5,000, which has extended a water pollution control and abatement program to its ETJ and that has enacted, or attempted to enact, three or more ordinances or amendments to regulate water quality within the last five years or in any five year period. (Currently, this description applies only to the city of Austin.) The bill would specifically exempts the city of San Antonio from its provisions.

The bill would take immediate effect upon approval by two-thirds of the membership of each house.

SUPPORTERS SAY:

CSSB 1017 would allow communities in the ETJ of certain cities to voluntarily create water quality zones and develop their own non-degradation water quality protection programs that would be regulated by TNRCC. Water quality protection zones would provide a means to develop land in a city's ETJ while at the same time ensuring non-degradation of water quality within the area.

TNRCC has absolute authority to set water quality standards in the state, although the agency has in the past delegated that authority to cities for certain pollution abatement programs. Cities with a population of 5,000 or more can extend their water quality regulations to their ETJ to prevent the pollution of their water supply.

A city has every right to regulate water quality within its jurisdiction, but it should not be allowed to use its water quality authority as an excuse to harass residents in the city's ETJ. Cities like Austin abuse water quality

authority — using it almost as if it were land-use authority — to prevent development in the city's ETJ.

Abuse of water quality regulatory authority can practically halt land development outside of certain cities. Lack of development can lead to stagnant growth, restricted economic development, loss of jobs and falling county and school district tax rolls. Stalling projects by passing illegal or impossibly stringent water quality ordinances is unfair and poor public policy.

Water quality inside the city is the city's business; outside the city it should be the business of the state. CSSB 1017 would merely allow TNRCC, rather than certain cities, to regulate water quality in certain areas. This could actually be the first step towards a coherent regional water policy.

ETJ residents are not allowed to vote on city water quality ordinances that directly affect their lives. It would be far better for TNRCC, the state's environmental regulatory agency, to regulate water quality in the ETJs of cities that abuse their regulatory powers. The bill would only refer to cities that have enacted or attempted to enact three or more ordinances or amendments to regulate water quality in a five-year period. This kind of chaotic and inconsistent over-regulation makes it very difficult for developers to plan for the future.

Water quality in water protection zones would be strictly protected. In fact, the water quality standards required in CSSB 1017 would assure non-degradation of the water in the area. The constituents that would be measured to determine water quality in the bill (like phosphorus) are so sensitive that if any change was made in water quality, it would be registered by measuring those constituents.

There is no need for public hearings on the sort of technical water quality issues that would be raised in an application for approval of a water quality plan because the issues raised would be scientific, not political. Too often, public hearings become political sideshows which do not add anything to the debate over real water quality issues. Engineers, rather than local

activists, should make informed decision about the details of a proposed water plan.

It is false to say that water from water quality protection zones in west Austin would pollute the waters for those downstream in east Austin. In fact, city water quality standards for east Austin are less stringent that the standards proposed in CSSB 1017.

It is misleading to allege how onerous it would be for TNRCC to have the burden of proof in the denial of a report and not mention that the real burden of proof is still on the applicant, who would have to submit the plan to a registered professional engineer. The engineer would have to sign and seal the water quality plan and acknowledge that it would meet the water quality standards delineated in the bill. Once that initial burden of proof has been met, the TNRCC should have to justify a denial of a plan.

OPPONENTS SAY:

This bill is designed to allow Freeport McMoRan's Barton Creek Development and the Circle C development to completely escape Austin's regulatory jurisdiction in the area of a so-called "water quality protection zone." There is no precedent for such a move to allow a special area to remove itself from a specific city's authority. Austin should not be singled out for punitive regulations. The Legislature should not give certain land developers exemptions from local laws — if local control means anything, local citizens should have the right to protect their quality of life.

TNRCC oversight of the area would be minimal, and there would be no mechanisms for enforcement if the development is found to pollute. The citizens of Austin voted for strong water quality protections over the watersheds that feed the Edwards Aquifer, and residents of the Barton Creek land development should not be able to escape city regulations because of special legislation that would benefit only one or two developers.

Maintaining background levels of water quality in waterways or retaining the first 1.5 inches of rainfall are not standards that would assure non-degradation of water and would be insufficient to ensure that water quality would be maintained. Constituents listed in the bill to be monitored to determine whether background levels of water quality are being maintained

would not include a number of important and dangerous constituents, like pesticides, fertilizer and fecal coliform.
The bill lacks clearly defined inspection, enforcement and compliance standards and would place an unreasonable burden of proof on TNRCC regarding a denial of a plan. Traditionally the burden of proof lies with the party asserting a particular matter or requesting an agency action.

The public would be completely removed from the process of water quality policies in the zone. Currently, both the city and the state provide a means for public comment or a contested hearing when a dispute arises between an applicant and agency staff. Without a hearing, there would be no opportunity for comment from potentially affected adjoining or downstream landowners.

CSSB 1017 would create an "island of exclusivity" in the area west of Austin where residents could create their own rules and discharge water that would not meet city standards downstream for the other (mostly less wealthy) residents of Austin to deal with. If Barton Creek and Barton Springs are polluted, then the residents of the entire Austin area will have to deal with the consequences, yet they would have no say in regulating how neighboring developments, within the ETJ of the city, are meeting environmental standards that would likely prove too lax to preserve these unique resources.

It is unwise to create a patchwork of regulations across a watershed. Water, which flows freely throughout watersheds, can only be efficiently managed on a regional basis, encompassing the entire watershed.

NOTES:

The committee substitute amended the Senate-passed version of the bill to add provisions applying the bill to the ETJs of cities that have changed their ordinances three times in the last five years, allowing designation of water quality zones of less than 1,000 but not less than 500 acres with TNRCC approval, allowing for annexation of the zone in certain circumstances and exempting San Antonio from the bill.