

**SUBJECT:** Water resources development and management

**COMMITTEE:** Natural Resources — committee substitute recommended

**VOTE:** 7 ayes — Counts, Walker, Cook, Culberson, R. Lewis, Moffat, Puente  
0 nays  
2 absent — Corte, King

**SENATE VOTE:** On final passage, April 3 — 31-0

**WITNESSES:** For — Mary Miksa, Texas Association of Business and Chambers of Commerce; Bill Powers, Texas Farm Bureau; Ed Small, Texas and Southwestern Cattleraisers Association; Wade Stansell, Association of Electric Companies of Texas; Ken Kramer, Sierra Club; Gary Bushell, Corpus Christi and Greater Corpus Christi Business Alliance; Michael Thuss, San Antonio Water System; Frederick Perrenot, Houston; Michael White, Greater Houston Partnership; Cathy Golden, Greater Dallas Chamber; C.E. Williams, Texas Alliance of Groundwater Districts; Tommy Duck, Texas Rural Water Association; Janet Hamilton, Champion International Corporation; Michael Booth, Tarrant Regional Water District; Stanford Lynch, Dallas County Utility and Reclamation District; Jim Oliver, Tarrant Regional Water District; Lee Arrington, South Plains Underground Water Conservation District; John Grant, Colorado River Municipal Water District; Richard Bowers, North Plains Ground Water Conservation District Number 2; Hector Gutierrez, El Paso Utilities Public Service Board; Ronald Kaiser

Against — Terrace Stewart, City of Dallas; Bill Clayton, Uvalde Underground Water Conservation District; Dennis Clark

On — Monte Akers, Texas Municipal League; Cyrus Reed, Texas Center for Policy Studies; Tom Goynes, Texas Rivers Protection Association; Ken Bull, McCulloch County Property Owners Association; Bennett Raley; Rodney Smith

**BACKGROUND** : During 1996, an update of the state water plan was prepared jointly by the Texas Water Development Board (TWDB), Texas Natural Resource Conservation Commission (TNRCC) and Texas Parks and Wildlife Department (TPWD). The report focused on water resource and management issues and made a number of policy recommendations.

For the current status of many issues on water resource management, including interbasin transfers, indirect re-use projects, and state regulation of ground and surface water law, see *Texas at a Watershed: Planning Now for Future Needs*, House Research Organization, Session Focus Report Number 75-13, April 15, 1997.

**DIGEST SUMMARY:** CSSB 1 would revise approaches to developing and managing water resources in Texas. Major changes would occur in the following areas:

- **Water resource and drought planning** — The bill would require the TWDB to adopt a state water plan that incorporated local and regional plans, provide for drought response planning, and create the Texas Geographic Information Council to direct statewide data collection.
- **Surface water management** — CSSB 1 would establish procedures for interbasin transfers, indirect reuse projects, emergency authorizations for water use, water rights cancellations, and increased penalties for water rights and dam and levee safety violations.
- **State water project financing** — The bill would consolidate existing TWDB bond authorizations into a single financial assistance fund called the Texas Water Development Fund II, pursuant to approval of a constitutional amendment (SJR 17 by Brown). It also would provide loans for investor-owned utilities and disadvantaged communities for water and wastewater systems in small communities from the Safe Drinking Water Act State Revolving Fund.
- **Groundwater management** — CSSB 1 would create priority groundwater management areas in groundwater districts, assist groundwater districts to develop management plans, and allow the TNRCC to dissolve districts.

- **Water use and conservation** — The bill would make regulatory changes concerning utility service provided small communities, grant tax exemptions for equipment used by manufacturers for water conservation and recycling, and allow local authorities to grant property tax exemptions for water conservation initiatives.
- **Funding mechanisms** — CSSB 1 would establish a Water Facilities Fund with revenues from fees imposed on authorized water rights, retail water customer fees, and bottled water plant operators. The funds would be used for state water projects. (See NOTES.)

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POINT-BY-  
POINT  
ANALYSIS:

**State water planning**

**Comprehensive state water plan.** CSSB 1 would require the TWDB to adopt a comprehensive state water plan every five years, beginning no later than September 1, 2001, as a guide to state water policy. The plan would provide for the development and conservation of water resources and preparation and response for drought conditions in order to ensure that sufficient water would be available at a reasonable cost to ensure public health, safety and welfare, further economic development and protect the agricultural and natural resources of the entire state. The plan would incorporate regional water plans approved by designated regional planning areas.

The TWDB would designate regional water planning areas by September 1, 1998. Within 60 days, it would have to designate representatives within each area to serve on regional planning groups. These, in turn, would designate additional representatives to ensure adequate representation of diverse interests in the region. Regional water plans would have to include water management strategies for use during droughts.

Each regional water planning group would prepare a plan based in part on local water plans submitted by such entities as holders of surface water rights to more than 1,000 acre-feet a year, retail or wholesale public water suppliers, irrigation districts, and groundwater districts.

The TWDB would be required to provide technical and financial assistance to regional water planning groups to help them develop their plans. CSSB 1 would specify notice and hearing requirements during the development of regional plans. The TWDB could enter into contracts with political subdivisions designated as representatives of regional water planning groups to fund all or part of the cost of developing or revising regional water plans.

**Drought management.** CSSB 1 also would create a Drought Response and Monitoring Committee charged with assessing, monitoring and reporting drought and water supply conditions, making recommendations for state responses to drought-related disasters, and advising regional water planning groups on drought-related issues. The committee would be composed of representatives of the Governor's Office Division of

Emergency Management, the TWDB, TNRCC, TPWD, Department of Agriculture's Texas Agricultural Extension Service, State Soil and Water Conservation Board, and a gubernatorial appointee. The Division of Emergency Management would be responsible for coordinating the drought response component of the state water plan.

The bill also would require the TNRCC to issue rules requiring that wholesale and retail public water suppliers and irrigation districts develop drought contingency plans for implementation during water shortages and drought. In addition, all holders of water rights appropriating more than 1,000 acre-feet a year would be required to submit water conservation plans.

**Water data collection and dissemination.** The TWDB, in cooperation with federal, state and local governments, institutions of higher learning, and interested parties, would be charged with developing a statewide water resource data collection and dissemination network, sufficient to support assessment of ambient water conditions statewide.

The board would make basin data and summary information accessible to state agencies and interested persons, and would cooperate with the Texas Agricultural Extension Service to facilitate development and delivery of educational programs for rural and urban water users.

The TNRCC would develop an updated water availability model for six river basins by the end of 1999 and for all river basins by 2001. Within 90 days of completing a water availability model, the agency would provide certain information concerning water availability in these basins to water rights holders and regional water planning groups.

Using water availability data, the TNRCC and TPWD would determine the potential impact of reuse on existing water rights, instream uses, and freshwater inflows to bays and estuaries and provide that information to regional planning groups within 30 days.

Effective September 1, 1997, the Texas Natural Resources Information System (TNRIS) and the Texas Geographic Information Systems Planning Council would be merged into a new Texas Geographic Information Council (TGIC). TGIC would provide strategic planning and coordinate the

acquisition and use of geo-spatial data, digital mapping, and related technologies. TGIC would also disseminate natural resource and related information describing the Texas-Mexico border region.

**Supporters say:** CSSB 1 would lay a foundation on which Texas could begin to build a statewide water management strategy, a move critical for its economic future. Without increased conservation and drought management, the increasing scarcity of water in some areas of Texas could reach crisis proportions in the next four decades.

Almost every area of Texas will be short of water in the next 50 years unless water infrastructure improvements are made by the state, according to the Texas Water Development Board (TWDB). The recent drought, scarcity of water supplies in some areas, and estimates that the state population will double in the next 50 years have combined to focus attention on water issues in the state.

With the planning mechanisms that would be initiated by CSSB 1, equitable reallocation of water in the state could be pursued through a number of different strategies, such as interbasin transfers and water marketing. These strategies would complement, not jeopardize, the rights of entities both downstream of water projects and in the basin of origin.

The state water plan proposed by CSSB 1 would be built from the local level up, incorporating local ideas and recommendations into overall regional and statewide policies. Without regional and statewide plans, water resources would be managed differently from county to county, becoming a hodgepodge of inefficient conflicting and duplicative plans.

**Opponents say:** CSSB 1 would give the TNRCC and TWDB too much power over local entities. Water planning would be structured in such a way as to come from the top down rather than the bottom up. Although the bill gives lip service to local plans being included in regional plans, essentially everyone would first have to comply with the state and then the regional plans. Only plans that truly percolate up from the local level will work; otherwise they will be resisted by those who are forced to comply with them.

**Other opponents say:** If Texas is serious about managing its water resources, it will eventually have to follow the lead of other Western states and eliminate the rule of capture that allows for unlimited pumping of groundwater. Texas needs to adopt a more appropriate strategy for groundwater regulation. The state should consider the “reasonable use” doctrine that allows landowners to pump as much as they wish so long as their pumping does not adversely affect their neighbors' wells. In addition, water marketing — which is more politically palatable than mandatory conservation, regulated use, or the forcible reallocation of water — would benefit from conjunctive management of ground and surface water. CSSB 1 should move more boldly in this direction.

### **Surface water management**

**Interbasin transfers.** Interbasin transfers of all or a portion of a water right would be junior in priority to water rights granted before an application for such transfer was approved by the TNRCC.

CSSB 1 would require the TNRCC to conduct a public meeting before taking action on an application for an interbasin transfer in order to receive comments from both the basin of origin and the receiving basin. If the application was formally contested, the commission would have to hold an evidentiary hearing. Notice of such hearing would be widely distributed to permit holders, county judges, mayors and groundwater districts in both basins.

The bill also would establish specific criteria for the TNRCC to use in deciding whether or not to authorize an interbasin transfer. These would include the:

- need for water in the basin of origin and in the receiving basin;
- availability of alternative supplies in the receiving basin;
- amount and purposes of use for the water to be transferred;
- proposed efforts by the receiving basin to avoid waste and implement water conservation and drought contingency measures;
- efforts by the receiving basin to put the water to beneficial use; and



- impacts on existing instream uses, water quality, riparian habitat, and bays and estuaries.

If the water sought for transfer was already authorized for use under an existing permit, impacts would only be considered for that portion of the permit involving the transfer and based on the historical uses of the permit.

The TNRCC could grant an application for an interbasin transfer only to the extent that the harm to the basin of origin would be less than the benefits to the receiving basin during the period of the proposed transfer. An interbasin transfer would not be granted if the applicant had not prepared a drought contingency plan and developed and implemented a water conservation plan that would result in the highest achievable levels of water conservation and efficiency.

The parties to a contract for an interbasin transfer could include provisions for compensation and mitigation. If the party from the basin of origin was a governmental entity, each county judge located in the basin could provide input on the appropriate compensation and mitigation. If the transfer was based on a contractual sale of water, the underlying water right or permit would have to be amended to specify the term of the contract.

The provisions of CSSB 1 would not apply to applications for interbasin transfer permits filed and pending before March 2, 1997, to emergency transfers, or to transfers involving less than 3,000 acre-feet of water per year from single permit or water right or from one basin to an adjoining coastal basin.

**Supporters say:** CSSB 1 would provide the TNRCC with specific criteria to review when deciding whether or not to approve an interbasin transfer and would require the agency to adequately weigh the impacts of the proposed transfer on the basin of origin with the benefits to the receiving basin. The bill would provide clear guidance to the TNRCC so litigation over proposed transfers could be avoided in the future.

The added notice and hearing requirements would provide a chance for more public input. Provisions providing for compensation to the basin of origin would help offset any impacts from the transfer. Limiting the term of

a transfer to the term of the underlying water supply contract would help avoid conflict and provide for equitable terms for both basins.

CSSB 1 also would grandfather the interbasin transfer of water from Lake Texana to Corpus Christi. Corpus Christi is in a water crisis and cannot afford to have the project delayed, even though the transfer would probably meet the standards proposed in the bill.

**Opponents say:** Making interbasin transfers junior to other water rights would essentially put a halt to transfers in the future and damage the future of water marketing in Texas. Few cities or other entities would be willing to pay the substantial infrastructure expenses to facilitate an interbasin transfer if they knew that their claim could be preempted by senior water rights holders just when they needed the water the most, such as in a time of drought.

It would be almost impossible to market water rights for interbasin transfers under this bill. Even the most senior of water rights would lose their priority just from being transferred to users in another basin. In effect, the bill would deprive those who hold valuable old water rights across the state of the value of their property.

CSSB 1 would place too many barriers to water transfers between willing parties. In the guise of protecting the basin of origin, the bill would discourage transfers from taking place at all. More than 80 interbasin transfers have been approved in the past by the TNRCC, and few problems have resulted under the current process. The hearing and review requirements in the bill would result in long delays before any interbasin transfer could be approved — delays that could prove injurious for a city in a desperate situation. Furthermore, if the receiving basin is required to implement strict conservation measures, the same standard should be applied to the basin of origin.

**Other opponents say:** Interbasin transfers should be approved in few if any circumstances. Transfers simply pose too great a threat to the basin of origin, adjoining basins, or downriver coastal basins that may count on using water that flows into their watershed.

CSSB 1 at least should require the TNRCC to weigh the projected impacts of a transfer on existing water rights in the basin of origin. Those rights should be considered as if they were being fully exercised, rather than by reference to historical use only. Some entities have made a point of purchasing additional water rights to meet future needs, and those rights need to be protected even if the water has not yet been used.

Interbasin transfers may adversely affect economic development in the basin of origin or adjoining basins in ways state regulators would never have foreseen. The receiving basin should be required not only to implement extensive conservation measures to avoid waste of water but also to plan for a new source of supply to replace the transferred water by the end of the transfer period.

**Water use and reuse.** CSSB 1 would establish procedures for the TNRCC to use in considering proposed uses of water.

- **Surplus water** — In granting an application for a water right, the commission could include conditions providing for that surplus water to be returned to a waterway and at a specific point on a watercourse. CSSB 1 would define “surplus water” as water in excess of the initial or continued beneficial use of the appropriator. Unless specifically provided otherwise, a water right holder could directly use and reuse water any number of times prior to releasing it. Once the water was returned to a water course or stream, however, it would be considered surplus water and be subject to reservation for instream uses, beneficial inflows, or appropriation by others unless the permit expressly provided otherwise.
- **Indirect groundwater reuse** — Entities using privately owned groundwater would have to obtain prior authorization before diverting and reusing existing return flows. TNRCC authorization could allow for carriage losses — loss of a certain amount of water during its transport down a stream — and could specify special conditions to protect existing water rights or maintain instream flows or freshwater inflows to bays and estuaries.

- **Indirect surface water reuse** — A bed and banks permit would be required to convey and subsequently divert water from a state watercourse. The TNRCC would take carriage losses into account, and the permit would be subject to any conditions that would address the effects that the diversion could have on existing permits, instream uses, and freshwater inflows to bays and estuaries. The agency also would have to ensure that water quality was not degraded to the point that it would have to reclassify that segment of the stream and disallow certain uses of the water. These bed and banks provisions would not affect an existing project with water rights and reuse permits granted prior to September 1, 1997.
- **Emergency authorizations** — The TNRCC would be authorized to grant an emergency permit for a retail or wholesale water supplier to use water if there was an imminent threat to the public health and safety and no practicable alternatives. An emergency authorization could be granted only for a temporary transfer of all or part of a permit, filing or certificate of adjudication for other than domestic and municipal use, and would be good for an initial period of not more than 120 days, up from the current 30 days. The action could be renewed once for not longer than 60 days. Emergency authorizations could be granted without prior notice or hearing, but TNRCC would have to hold a hearing within 20 days to affirm, modify, or set aside an emergency permit issued without notice or hearing. The entity granted an emergency authorization would be liable for the fair market value of the water transferred as well as any damages caused by the transfer. Disagreements about the amount due could be resolved through TNRCC dispute resolution or administrative procedures or through civil suit in district court.
- **Multi-use permits** — The TNRCC could authorize appropriation of a single amount of water for multiple purposes, so long as the permit contained a special condition limiting the total amount of water that could be diverted for all purposes to the amount of water appropriated.

**Supporters say:** CSSB 1 would establish clear guidance for the TNRCC in permitting decisions involving a variety of water uses. The recent drought highlighted inadequacies of current policy and law in these areas.

For example, although reuse has been around for many years and several reuse projects are in place or have been proposed in the state, only recently have cities begun to seriously consider indirect reuse as a way to increase their water supply. Downstream water rights holders are worried that water will not reach them if it is subject to reuse by upstream rights. CSSB 1 would provide protection for both downstream users and the environment while also permitting the TNRCC to authorize appropriate reuse projects. Establishing a statewide policy concerning reuse would allow cities and other entities to make their plans without fear that downstream users would litigate out of concern that their water rights would be affected.

Emergency transfer authorization is needed so the TNRCC can respond to water shortages threatening public health and safety. The need for these types of transfers became glaringly apparent during the recent drought.

Allowing TNRCC to authorize appropriation of a single amount of water for multiple uses would give major water suppliers flexibility to meet new and changing regional water needs without being subject to lengthy permit amendment proceedings.

**Opponents say:** CSSB 1 would improperly impinge on the privileges of water rights holders. These entities should have the first right to any water they have returned to a watercourse or stream — this water should not be considered “surplus” and subject to other appropriation. Many water rights holders have incurred large costs to develop water resources and should have priority to reuse their water. Those who have developed water supplies on their own through dams and reservoirs, for example, clearly have a vested interest in beneficially using or reusing their water.

Emergency authorizations should not be allowed before notice and hearing to allow water rights holders the opportunity to present information on how urgently needed that water may be in the future. The TNRCC should be required to forward an application for an emergency permit to the water right holder from whom water would be transferred to allow time for planning.

Major manufacturers that depend on large supplies of water could be damaged if emergency transfers were allowed without notice or hearing.

For these entities, a steady source of water may be critical to operations and continued viability of their facilities. Instead of allowing large amounts of water to be transferred from one non-municipal user, the bill should provide that emergency needs could be met by transferring smaller amounts from several users. The liability for damages due to a transfer described by the bill could also have the unhappy effect of pitting large non-municipal users against small municipal users.

Authorizing appropriation of a single amount of water for multiple uses could lead to abuses by water speculators. These parties could use the multiple-use permit to apply for water they did not really need and it would be hard for TNRCC to detect this under a multi-use permit. This could leave water unavailable to those who might have a genuine need for it. Pumping permits should keep specifying a single use for water and how much of that water is needed. State regulators would still be able to judge whether or not there was really a need for that water and whether it was being beneficially used.

**Other opponents say:** Indirect reuse projects should not be allowed at all, either from effluent derived from privately owned groundwater or from surface water returned to a state watercourse. There is simply too much potential harm from reuse projects to those who hold downstream rights. Furthermore, some water “reuse” projects actually may be water purification projects, since it is an established fact that running effluent through a watercourse helps remove impurities. State streambeds should not be used to clean water for entities that can — and should — pay for those cleanup costs themselves.

**Water rights.** CSSB 1 would amend various provisions dealing with water rights, including:

- **The Wagstaff Act** — The bill would repeal the Wagstaff Act, which specifies that any city or town can preempt without payment appropriations of state waters other than from the Rio Grande made after May 17, 1931, for any uses other than domestic and municipal use.

- **The “four corners” doctrine** — The TNRCC would be required to authorize an amendment to a water right if the change would not cause adverse impacts on other water rights holders or the environment any greater than if the original right was being fully exercised according to its conditions before the proposed change. (This “four corners” doctrine — so-called because the intention of the grantor of the permit is gathered from the permit as a whole — has been applied by TNRCC in the past.)
  
- **Domestic and livestock exemption** — The bill would amend the current exemption that allows landowners to construct reservoirs on their property to impound or contain not more than 200 acre-feet for domestic or livestock purposes. Under CSSB 1, these reservoirs would have to provide for a normal storage of not more than 200 acre-feet.
  
- **Water rights cancellations** — Before the TNRCC could cancel a permit for nonuse, it would have to consider whether the nonuse was justified. Factors in this determination would include whether sufficient water was available in the source of supply to meet all or part of the appropriation during the 10-year period of non-use and whether the permit was obtained to meet long-term public water supply or electric generation needs, as evidenced by a water management plan developed by the rights holder. The TNRCC would have to exempt a water right from cancellation if a portion of the water were used in accordance with an approved regional management plan. The bill would remove a current statutory provision prohibiting the TNRCC from cancelling an unused water right if the holder intended to use that right in the future and would allow a water right holder to waive a hearing on cancelling a permit.
  
- **State water bank** — The bill would expand the state water bank to encompass a new Texas water trust. The trust would hold water rights dedicated to environmental needs, including instream flows, water quality, fish and wildlife habitat, or bay and estuary inflows. Water rights could be held for a term specified by contractual agreement or forever. The TWDB would adopt rules governing the process for holding and transferring water rights; the board, along with the TNRCC and TPWD, would review the dedication of any rights held in trust.

**Supporters say:** CSSB 1 would make water rights provisions current and appropriate to the times. There is absolutely no need for the archaic Wagstaff Act to remain in statute. The new statutory provisions in CSSB 1 governing emergency authorizations would allow the state to appropriate water for human needs at any time if human health and safety were threatened. The act has only been used in several small uncontested cases and probably could be challenged as an unconstitutional taking without compensation under the Fifth Amendment to the U.S. Constitution and Art. 1, sec. 17 of the Texas Constitution.

CSSB 1 also would put the “four corners doctrine” into statute as a means of properly balancing the interests of the water rights holder with others who might be adversely affected by changes. TNRCC has used this doctrine in the past when making decisions concerning water rights, and recent court cases have upheld the principle behind it. Under the four corners doctrine, a farmer with a permit for 100,000 acre-feet of water who only uses 50,000 acre-feet of that water, for example, would be allowed to sell the rights to the additional 50,000 feet; prohibiting this would infringe on the farmer's property rights. CSSB 1 would ensure that the “rules of the road” are clearly laid out when water rights are being voluntarily transferred within the same basin.

Voluntary redistribution of water is the best method to solve water supply problems in Texas, and water marketing would be severely limited if the agency considered only historical use in amending water.

Allowing landowners to have reservoirs for domestic and livestock purposes would ensure that property owners could not be punished for having more than 200 acre-feet due to heavy rainfall or storms.

CSSB 1 also would ensure that water rights being held for genuine long-term water supply needs would be protected from cancellation. At the same time, it would remove a burdensome statutory provision requiring that the TNRCC know a water right holder's future intentions. This difficult evidentiary burden has made it essentially impossible for the agency to cancel unused water rights ever since its enactment in 1991.



The bill would only allow water rights to be cancelled if water rights holders had not used their rights in a long time and had no real plan to do so in the future. Possible cancellation would encourage these water rights holders to sell their rights so they could be reallocated to those in need and put to beneficial use. The bill would also avoid unnecessary hearings but only if they were waived by the water rights holder and would encourage water right holders to participate in regional water plans.

The bill would encourage the deposit of unused water rights into the state water bank where willing sellers could transfer water rights to buyers who wanted to meet alternative and future water needs. The state should promote water marketing since it is a much more palatable and efficient way to redistribute water in the state than the forcible re-allocation of water. Providing a voluntary mechanism for the donation of unused water rights to help maintain environmental water needs and the bays and estuaries of Texas would be an excellent way of protecting one of the state's most precious natural resources.

**Opponents say:** The Wagstaff Act should not be repealed even if it is little used. The act recognizes that the needs of people constitute the highest preference for water use and that children's health is more important than mining or catfish farming when water shortages occur. Repealing the act would reverse long-standing state policy concerning preferences of water use. At the most, the act should merely be amended to require payment for preempted water. Cities would be happy to pay for water taken in an emergency situation.

The Wagstaff Act does not permit unconstitutional taking of property because all water rights granted after it was enacted were subject to the conditions specified, i.e., the possibility that water could be taken.

On the other hand, the “four-corners doctrine” clearly should be kept out of statute. In the future, more and more agricultural water rights holders will want to sell their rights to cities; under this doctrine, they can sell rights to water they never used without regard to the consequences on other water rights holders. Converting unused water to beneficial use requires evaluating the impacts on other water rights and the environment. There is no vested right in the ability to amend a water permit when the water has

never been put to beneficial use; consequently, there is no infringement of a property right when the four corners doctrine is not taken into consideration.

There is no need to amend the statute to specify that reservoirs for domestic or livestock uses are allowed so long as normal storage is not more than 200 acre-feet. The current law specifying that a reservoir cannot impound or contain more than 200 acre-feet is clear; the change proposed by CSSB 1, however, would create an ambiguity as to what constitutes “normal storage.”

A water right is the property right of its holder, and TNRCC should not be able to cancel a water right against its holder's will. This is the worst kind of government interference. Under CSSB 1, farmers, small industries, and others who would like to keep their water rights even if they have no immediate plans for them could have them forcibly taken away by the state.

Proving what a holder intends to do in the future *is not* an impossible evidentiary burden — although TNRCC has chosen to see it as such. In a cancellation proceeding, evidence considered would be in the record and from that record a judge or examiner could fairly conclude whether or not intent was shown.

### **Funding for water projects**

**Consolidated bond authorizations.** CSSB 1 would allow the TWDB to consolidate existing bond authorizations for water supply, water quality, flood control and state participation in local water projects, pursuant to approval of SJR 17 by Brown, within a new Development Fund II (TDF II) separate from the existing TWDB Development Fund. The board could issue TDF II bonds for any of the existing constitutional purposes, in amounts that could not exceed existing outstanding constitutional authorizations.

The TDF II would encompass three separate accounts: the economically distressed areas program (EDAP) account, state participation account and financial assistance account. The bill would maintain the previously established bonding limit of \$250 million for the EDAP program. Financial assistance bonds could be used to fund local government projects for water and wastewater supply, water quality, and flood control projects.

Funds from the financial assistance account also could be transferred to the State Water Pollution Control Revolving Fund to administer the Safe Drinking Water State Revolving Fund and the State Revolving Fund. The bill would require the TWDB to develop procedures with the state comptroller governing payment of principal and interest on water financial assistance bonds.

CSSB 1 also would change procedures governing how the board requests general revenue from the comptroller for debt service on general obligation bonds, giving the board more time to accumulate payments from political subdivisions.

The TWDB would be authorized to enter into certain bond enhancement agreements, including interest and currency rate swap agreements, to further enhance the marketability, security or creditworthiness of water financial assistance bonds.

**Supporters say:** CSSB 1 would give the state more flexibility to finance a wide variety of critically needed water projects and aging water and sewer systems in many areas of the state. With the flexible financing proposed in the bill, the state could start on some of the \$65 billion in projects that the TWDB estimates will be needed in the next 50 years.

Existing constitutional authority limits the TWDB to a specific dollar amount of bonds for each of the various purposes of water supply, state participation, water quality enhancement, and flood control and require that the board issue separate series of bonds for each of these purposes. Once the TWDB has exhausted its authorization for any one of these specific purposes, it must request additional constitutional authority to issue bonds for that specific purpose, even though it may have ample authority to issue additional general obligation bonds for other purposes.

The TWDB is nearing the ceiling for its water supply bond authorization, although bond authorization remains for water quality, flood control and state participation. CSSB 1 and its accompanying constitutional amendment would allow the board more flexibility and would maximize the funds available to local governments for different kinds of projects. Voters would have to approve the consolidation of funds through a constitutional

amendment; the bill would not allow the TWDB to use funds originally dedicated for some other purpose or for projects that would not meet voter approval.

Consolidating existing bond authorizations would result in less outstanding general obligation authorization for the state and would allow bonds to be issued more efficiently. The TWDB estimates that the bill's bond provisions would expand the program capacity by approximately \$77 a year.

**Opponents say:** The TWDB should not be able to combine bonds that were approved by the voters for separate and specific purposes. Some special interests are pushing for the state to aggressively resume building reservoirs; consolidating separate bond authorizations would allow the TWDB to use money from bonds that were originally issued for water quality purposes to build reservoirs. Like any state agency, the TWDB is subject to political pressure. This pressure is easier to resist if bond money is specifically dedicated, making it impossible for powerful interests to sway the board into using a disproportionate amount of money for one project that would benefit only a few.

Many Texans support water quality programs but are opposed to dam building and would never have approved bonds if they thought those bonds could be used to build unneeded reservoirs. While the voters must approve the fund consolidation proposed by CSSB 1, since no new authorization of bonds is proposed, most voters would not really understand the consequences of fund consolidation. If the state wants more money to fund water supply and reservoir projects, for example, it should be required to ask the voters directly to approve money for those purposes.

**Conservation financing.** CSSB 1 would establish new mechanisms for financing infrastructure improvements designed to conserve water.

- **Tax exemptions** — The bill would amend the Tax Code to expand the current sales tax exemption for the purchase of pollution control equipment to include certain water conservation, water reuse, or wastewater treatment equipment used to reduce water use and waste of water from commercial manufacturing, processing, fabrication or repair operations. The bill also would allow for property tax exemptions for

part or all of the assessed value of property on which approved water conservation initiatives have been implemented. The governing body of a local taxing unit could allow such an exemption if the unit adopted an ordinance or other law designating water conservation initiatives. The property tax exemption would take effect if voters approved the constitutional amendment proposed in SJR 45 by Brown.

- **Agricultural loans** — CSSB 1 would allow the TWDB additional authority to use the principal in the Agricultural Trust Fund (ATF) to provide agricultural conservation loans to water conservation districts. Districts could use the money for agricultural water conservation purposes or could make direct loans to farmers to enhance agricultural water conservation. Repayment of principal and interest on these loans would be deposited in the agricultural trust fund. The bill also would raise from \$5 million to \$15 million the cap on deposits into the Linked Deposit Program that provides reduced interest rates for qualifying agricultural enterprises. The Texas Agricultural Finance Authority could use up to \$10 million of the funds to finance water conservation projects.

**Supporters say:** The tax exemptions proposed by CSSB 1 would promote water conservation by providing incentives to invest in technology designed to conserve or reduce the use of limited water supplies in the state. There have been great strides in developing equipment that allows manufacturing facilities to use treated wastewater for other sources in their operations, thereby allowing localities to divert freshwater supplies to municipal use. Much of this technology, however, is expensive; eliminating the sales tax on the equipment would bring the price more within the reach of Texas businesses. The payoffs for cities would be considerable, since demand for water on the municipal side is growing at a faster rate than in any other sector.

Allowing property tax exemptions for water conservation initiatives would provide a new water management option for local governments who judge that additional water supplies would more than offset lost revenues from property taxes. CSSB 1 would permit this purely local decision; it would not mandate property tax exemptions. Furthermore, it would give local authorities full discretion to approve which conservation projects, if any, would qualify for a tax credit and the amount of the credit. Several years

ago voters in Texas approved property tax exemptions for pollution control equipment as sound public policy. The voters may well agree that ensuring adequate supplies of water is another sound public policy that should be encouraged.

The bill also would provide the means for promoting water conservation within the agricultural sector, which accounts for about 65 percent of water use in Texas. The growing demand for water from the municipal and industrial sectors can only be met by converting agricultural waters to those uses, and this requires state of the art conservation technologies. The low profit margin in farming, however, puts this technology out of financial reach for most farmers. CSSB 1 would help remedy this problem by putting to better use existing financing mechanisms.

Under the bill, the TWDB could use invest the principal of the Agricultural Trust Fund in loans for agricultural projects. The interest on the loans would continue to provide revenue in the fund, and all principal on loan repayments would return to the fund. Currently law requires \$10 million, originally appropriated in 1985, and one-half the interest earned to be maintained as principal in the ATF and not spent for any purpose. The bill would allow this money to be used to develop an additional source of funds for agriculture conservation loans.

The present Texas Agricultural Finance Linked Deposit Program is underutilized. CSSB1 would invigorate the program with additional money to be used for water conservation projects and encourage agricultural water conservation across the state. Borrowers could refinance other agricultural-related debts that involve the production, processing and marketing of agricultural crops or other water conservation projects when borrowing money for new water conservation projects. The fiscal impact on the state would be a maximum of \$200,000 in lost interest revenue every year, a small price for an investment that could pay off big for Texas cities and industries.

**Opponents say:** In these times of fiscal austerity, the state cannot afford to give industries any more sales tax breaks. Equipment designed to reduce water use will pay for itself over the long-term because of lower water bills. This should be enough of an incentive. Furthermore, while water

conservation should be encouraged, the state should not allow for property tax exemptions that reduce the amount of money that goes to the public schools. This exemption would create a loophole by which locally powerful businesses could force local governments to give up vitally needed tax revenue.

The Legislature is now finalizing details on HB 4, the comprehensive tax reform bill, that would strip away many special tax exemptions in order to broaden the base for public school financing. Attempts to expand exemptions are ill-advised.

**Drinking water systems.** CSSB 1 would expand financial assistance for public water systems through the Safe Drinking Water Revolving Fund (SDWRF) administered by the TWDB. The bill would make a number of changes to comply with 1996 amendments to the federal Safe Drinking Water Act and would expand eligibility for SDWRF funds.

Currently, only political subdivisions may use the revolving fund for water projects; under CSSB 1, all community water systems — including investor-owned utilities and mobile home parks and nonprofit noncommunity systems such as youth camps — could be eligible for SDWRF funds. The bill would also authorize financial assistance to disadvantaged communities, which would include economically disadvantaged areas statewide not currently eligible for Economically Distressed Areas Program funding.

The bill would establish two separate accounts in the revolving fund: the Community/Noncommunity Water System Financial Assistance Account to provide financial assistance to entities other than political subdivisions and the Disadvantaged Community Account to provide funds to certain disadvantaged communities. The bill would also authorize the TWDB to forgive loans to disadvantaged communities.

**Supporters say:** Many private utilities have problems with both water quality and water quantity. However, most are not able to access state financing to improve operations. Currently, 50 percent of systems that the TNRCC determines to be noncompliant with state standards are not eligible for SDWRF funds. Expanding eligibility for SDWRF funds would allow operators to bring the systems into compliance and provide their users with

adequate service and a reasonable price. Customers of private utilities are taxpayers also and are entitled to the same reasonable rates provided urban ratepayers. Changes made in the bill would be consistent with requirements under the federal Safe Water Drinking Water Act.

Any loan forgiveness would be granted in very limited situations by the TWDB and could be used to encourage regionalization. In some cases, for example, a deficient system in a disadvantaged community could easily be taken over by a neighboring system, but without loan forgiveness the neighboring utility could not afford to run the lines to the other community. CSSB 1 would give that community with inadequate service a chance to tie into an adequate neighboring system. This solution would be much more cost-effective for the state than having to help finance an entirely new system.

**Opponents say:** Investor-owned utilities and other entities that are not political subdivisions should not benefit from state money. Furthermore, the state should not forgive loans to these entities.

**Miscellaneous water projects.** CSSB 1 would also allow financing for a range of other water quality and quantity projects. It would allow the TWDB to use the Water Loan Assistance Fund for additional purposes, including conveyance facilities, nonpoint source pollution control, repair and rehabilitation of unsafe dams, controlling brush and reestablishing grasslands, acquiring land for future water supply projects, and creating new water districts. The bill also would provide for:

- **Water management outside of Texas** — The TWDB could make both grants and loans for water projects, including wastewater treatment plants, outside Texas when such use would benefit the state or maintain and enhance the quality of water used in the state. The TWDB also could fund a channel storage reservoir located on the international boundary between Texas and Mexico to develop the water resources of Texas.
- **Precipitation enhancement** — CSSB 1 would establish a pilot weather modification program to provide money for research on its effectiveness in augmenting water supplies. The bill would create a pilot weather modification fund as a special account in general revenue from direct



appropriations and money transferred from the Water Facilities Fund. The fund could be used to provide grants for research on weather modification.

- **Conservation and restoration** — CSSB 1 would set up a conservation and restoration program to provide money to enhance conservation benefits of water projects, secure water rights for the benefit of fish and wildlife, and meet mitigation requirements. The bill would establish the conservation and restoration fund as a special account in the general revenue fund consisting of direct appropriations and transfers from the Water Facilities Fund. The new fund would be administered by the TPWD.

**Supporters say:** CSSB 1 would authorize the TWDB to pursue promising avenues for conserving and augmenting water supplies. Many of these projects have great promise and should be given some seed money to demonstrate their capabilities. For example, brush control efforts have shown potential for greatly increasing recharge to local aquifers. Cloud-seeding projects also have potential but have suffered for lack of state investment. These and other projects and techniques should be explored thoroughly to determine their value for Texas.

**Opponents say:** The state should focus on proven agricultural conservation efforts like non-evaporative irrigation systems and the efficient use of water for irrigation rather than fads like brush control and cloud seeding. One telling point about these types of projects are that people are usually interested if there are grants but unwilling to participate if it means using their own money. There are little hard data on how much brush clearing could benefit water supplies, and environmental objections have been raised to the practice in some areas because it can remove habitat for birds and other creatures. There is also debate over whether cloud seeding actually produces more rain or just shifts precipitation from one area to another. Texas should invest first in projects with proven returns before throwing money away on dubious “science.”

**Water Facilities Fund.** *(Rep. R. Lewis, House sponsor for CSSB 1, plans to offer a floor amendment removing these provisions from the bill.)*

CSSB 1 would institute fees on authorized water rights, retail water usage, and bottled water to fund various state programs for water resources and development. The fees would be collected in the Water Facilities Fund (WFF) established in the general revenue fund and administered by the TWDB.

TWDB loan programs would receive 70 percent of the WFF; 30 percent would go for grant programs. Grants could be made to political subdivisions (including nonprofit water supply corporations) but could not exceed 90 percent of the net cost, after deducting federal funds available for the project. Twenty-five percent of the fund would be set aside for financial assistance to political subdivisions that regularly served fewer than 15,000 people. Financial assistance for hardship projects also would be available from the fund. The WFF also would include fees for interbasin transfer mitigation, but these fees would be kept separate from other funds and used only for projects to mitigate the effects on the particular basin of origin.

The TWDB could transfer WFF monies to other specified funds, including the State Water Pollution Control Revolving Fund, to provide a match for federal funds and for payment of debt service on bonds issued for the State Participation Fund. The bill would set aside 2.5 percent of the fees deposited in the WFF for TNRCC expenses relating to water resource management and protection, and up to 2.5 percent of the amount available for grants and loans to the TWDB to administer the fund.

Money from the WFF fund could be used for:

- reservoir pipeline construction;
- acquisition of property necessary for water supply projects;
- water, wastewater, and re-use treatment facilities;
- flood control and drainage;
- salinity control;
- repair and rehabilitation of unsafe dams;
- nonpoint source pollution control;

- conservation including aquifer recharge;
- weather modification;
- brush control and reestablishment of grassland; and
- conservation and protection of fish and wildlife.

The board would give priority to all grant projects that would provide the greatest benefit when compared to cost, or projects found to be of imminent public necessity.

Political subdivisions required and eligible to pay into the fund would have to do so to qualify for WFF funding. Other entities not required or eligible to pay fees also would be eligible for grant money. Member-owned and controlled non-profit water and sewer service corporations could be eligible for WFF money under certain circumstances.

Public water supply systems would assess and collect fees monthly based on a customer's meter size and usage. For meter sizes of one inch or less, fees would range from \$1 per month for usage between 7,000 and 15,000 gallons to \$5 for usage over 90,000 gallons. Residential users consuming less than 7,000 gallons of water per month would be exempt from the fee.

For meter sizes greater than one inch, the bill would provide for a graduated scale ranging from \$6 for meters of one to three inches to a maximum of \$50 for a meter larger than 10 inches. Each public water supplier could retain five cents per retail customer per month to cover collection costs. The fees would be paid to the TNRCC.

The Texas Department of Health would also assess a fee on bottled water plant operators. The fee would be based on annual gross receipts and range from \$250 on receipts of less than \$10,000 to \$15,000 on receipts of more than \$10 million.

TNRCC would also assess annual fees on water rights holders based on type of water use and volume of water used. Holders of water rights for industrial and other non-municipal use would pay \$1 per acre-foot; for agricultural use, 10 cents per acre-foot; for hydro-electric purposes, 1.2 cents per acre-foot. Exemptions would be provided to holders of municipal water

rights, rights to brackish coastal water, and rights in a basin where fees are already being paid to support a watermaster operation. Political entities in an area under the jurisdiction of a watermaster would have to pay a certain specified amount into the fund in order to be eligible for WFF financial assistance. Groundwater districts in counties with populations of less than 40,000 could pay an annual fee in lieu of having water supply systems in the district pay retail water customer fees.

**Supporters say:** Creating the WFF would give the state a chance to start on some of the \$65 billion projects that the TWDB estimates will be needed in the next 50 years as population in Texas doubles. If the state does not start financing some of these critically needed projects, economic development in the state will grind to a halt. The population explosion means there is no time to wait for the next drought emergency. The fees that would go to the WFF are equitable; everyone would pay a little, but no one would carry a disproportionate share of the burden.

Approximately 80 percent of Texans would pay an extra dollar on their monthly water bill, except the many who use less than 7,000 gallons of water a month, a segment that includes most senior citizens and low-income households. This small fee would not be too much to ask to fund the water projects all of Texas and all Texans so critically need.

The large urban areas that complain about their fees going to small cities are being short-sighted. All regions of the state must work together to help each other or there will be water wars in Texas in the future. It is true that Houston or Dallas can finance the cost of a billion dollar project by spreading expenses among their sizeable populations, but smaller cities simply cannot raise the money needed to do this. The WFF funds would give those smaller cities a chance to borrow money to complete their projects. Furthermore, projects that help upstream communities also help downstream users. Houston users were some of the biggest complainers about unauthorized diversions from the Brazos River during last summer's drought, showing that they do feel the impact of what happens in the Waco area.

Bottled water plant operators are essentially tapping one of the state's most precious resources and paying almost nothing for the privilege because “the rule of capture” allows them to tap as much as they want for the price of buying or leasing the land. CSSB 1 would ensure that they would share a small amount of the profits being realized on state water.

The new Drinking Water State Revolving Fund that is just starting up is limited to \$260 million in capacity over the next five years unless additional cash is raised. Pending requests for the fund already total \$1.35 billion. WFF money could be used to match federal dollars and could generate \$1.1 billion over the next five years, representing an additional \$840 million in loan capacity. This would give many communities a chance to borrow money at low rates of interest, saving them millions of dollars. The WFF also would expand the ability of the State Water Pollution Control Revolving Fund to serve additional cities, saving them at least \$100,000 for every \$1 million borrowed.

The WFF also support the TWDB's existing State Participation Fund and its efforts to acquire water supplies, convert groundwater users to surface water systems, and develop regional water and wastewater projects. WFF funds could also be used for flood control, desalinization, and other desperately needed projects across the state.

**Opponents say:** The so-called “fees” to fund the WFF would actually constitute a water tax, and an unfair one at that. Those cities that have sacrificed and heavily taxed their residents to ensure that water would be available in the future would be assessed the same amount as citizens of profligate cities that are depleting their water supplies with no thought for the future, refusing to pay for reservoirs to develop their water supplies, and counting on the state to come to their rescue.

The cities more likely to get a TWDB loan would certainly not be the cities that have planned for the future and already taken care of their own water needs and those of smaller cities nearby that tap into the developed supplies. Those cities would be penalized by CSSB 1 and required to impose additional taxes on their citizens to help finance projects for cities that in the past have refused to pay for needed water projects. The bill would actually

create a disincentive for cities to develop their own water supplies since they would be able to count on future subsidies from the state.

These fees would be just the latest in a 10-year long series of water and environmental fees that have driven up costs to cities. Cities have been required to raise their fees for drinking water, solid waste, sludge management, air quality, stormwater, solid waste and other environmental purposes.

There are no real guarantees that the money collected would be spent wisely or returned to local governments. The money raised by the fees would not begin to cover costs for water improvements needed in the state. Most cities would prefer to raise funds for water projects through tax or utility increases or by issuing bonds. That is the essence of local control. Furthermore, cities should not be forced to serve as the tax collector for these fees — even when cities identify the source of the additional fee as a state fee, residents regard their local elected officials as the responsible parties. And should a city have to raise its own tax or utility rates to meet costs, the additional state-mandated fees become even more controversial.

If the state sincerely needs the fees proposed by the bill, it should impose a state sales tax on water. This would be much fairer than the fees proposed by the bill because a water tax would be directly proportional to the water used. A tax would not be capped at \$50 a month, as CSSB 1 proposes. A cap just means that large industrial users and utilities do not have to pay their fair share.

It would be premature to levy fees before assessing the real needs for water projects. CSSB 1 would establish the kind of data collection needed for the state to make an informed decision on what kind of fees, if any, would be needed to fund state water needs. There may be other, better ways to fund water projects than imposing water fees. California, for example, was able to sell bonds to finance a multibillion dollar project to move water from one end of the state to another, bonds that were paid back with water sales through contracts with water districts, cities and utilities.

## **Groundwater management**

**Groundwater district management plans and well permits.** CSSB 1 would specify that groundwater conservation districts were the preferred method of managing groundwater in Texas. Groundwater districts would be required within two years of creation to submit groundwater management plans to the TWDB, addressing groundwater use, waste subsidence, natural resource issues, and conjunctive — or coordinated — management of ground and surface water. The bill would establish procedures, requirements and deadlines for the plans, which would have to be consistent with approved regional plans.

The TWDB and TNRCC would be required to provide technical assistance in developing such plans. The TNRCC would have to review and comment on a development plan within 30 days after receiving a request. CSSB 1 would establish a process to be followed if the TWDB did not certify a plan. Enforcement action, including dissolution of the district, could not be taken until at least 180 days after the district received notice its plan had not been certified.

Districts created or confirmed before September 1, 1997, would be required to submit a management plan for certification to the TWDB no later than September 1, 1998.

Groundwater districts would require applications for drilling or modifying a well to be in writing, and certain wells for hydrocarbon production would have to meet spacing requirements. Wells supplying water for subdivisions for which plat approval was required would no longer be exempted from well permit requirements.

**Supporters say:** Groundwater supplies in many areas of the state are running low because of unregulated use. CSSB 1 would require that groundwater districts did the job they were set up to do. The bill would ensure that districts, working with surface and groundwater users, develop plans to address and resolve area water supply issues and problems. Technical assistance would be made available to districts in this effort. There could be no valid reason for not complying with requirements for promptly submitting plans to the TWDB.

**Opponents say:** There is no need to create more bureaucracy and regulation in groundwater districts. A better solution to groundwater problems would be to establish a “reasonable use doctrine,” allowing landowners to pump as much as they wished so long as their pumping did not adversely affect their neighbors' wells. Under this doctrine, groundwater districts could regulate local affairs without the need for extensive oversight from the TNRCC.

**Priority groundwater management areas.** CSSB 1 would change the definition of an area experiencing critical groundwater problems from critical area to priority groundwater management area (PGMA) and would revise the process for designating such an area.

The bill would provide that TNRCC would have to hold an evidentiary hearing, with written notice to affected parties. After the hearing, the agency could issue an order stating that it was necessary to create a PGMA.

The bill would delete a current statutory provision allowing landowners to wait to create a critical area until one year after the end of the legislative session following issuance of the TNRCC order. It also would delete a provision prohibiting the TWDB from providing assistance to political subdivisions in areas in which the voters failed to approve creation of a district.

When the TNRCC proposed to create a PGMA, the Texas Agricultural Extension Service (TAES) would have to begin an educational program within the affected area to inform residents of water resource and management options, including formation of a district.

An existing groundwater district that voted to add a PGMA to its area could request TAES to provide a program for educating district residents about water resources and management options, including possible annexation into the district. A temporary board of a PGMA could set fees to pay for the creation and initial operation of the district until a permanent board was elected. Fees on water used for crop or livestock production could not be more than 20 percent of the rate applied to municipal users.



Temporary directors for a new PGMA district could be appointed by the county commissioners court. The temporary directors would call an election to confirm district creation and elect permanent directors. If the Legislature required the TNRCC to manage a district, a new election could not be called for three years; in the interim, the TNRCC could levy taxes, collect fees, impose administrative penalties for violations, and adopt well spacing and per-acre pumping restrictions.

The TNRCC and the TWDB would have to submit a joint report on the status of all PGMAs to the governor, the lieutenant governor, and the speaker of the House every two years.

**Supporters say:** CSSB 1 would facilitate designating and creating priority groundwater areas. It also would speed up the process for forming districts in those areas, cutting the time from five years to only one and a half years. An efficient process is important to manage water resources in areas with critical problems but without a groundwater management authority.

The bill would expand notice requirements to ensure that the TNRCC report on the proposed PGMA was widely available, avoid unnecessary and duplicative hearings, eliminate a counterproductive waiting period, and establish educational efforts to inform residents in the proposed district of the status of groundwater resources in their area and their management options. Making political subdivisions eligible for financial assistance even where a district confirmation has failed would be a necessary step to help districts that may truly require funding in order to solve their problems.

Creation of districts in PGMA areas would go much more smoothly under CSSB 1 because local officials familiar with the issues in their areas would appoint the temporary board, rather than the TNRCC.

**Opponents say:** The process for creating PGMAs would still be too cumbersome for areas with critical problems that need to be addressed immediately. Existing groundwater districts are often blamed for problems in areas where there are no districts and over which they have no jurisdiction; the state should make the creation of PGMAs even easier.

**Other opponents say:** The rule of capture ensures that landowners may collect the groundwater from under their property as long as that water is put to beneficial use and not wasted. It is an infringement on private property rights when the state create entities to regulate groundwater in areas where voters do not want them.

**Dissolving groundwater districts.** CSSB 1 would establish the Texas Groundwater Management Council to oversee groundwater districts and determine whether they were operational. The five-member council would include two gubernatorial appointees chosen from a list provided by the Texas Alliance of Groundwater Districts, one TNRCC employee appointed by the TNRCC executive director, and one TWDB employee appointed by the executive administrator. The council would conduct reviews a year after the district's management plan was certified and every five years thereafter. These findings would be reported to the governor, the lieutenant governor, and the speaker of the House.

If the council determined that a district was not operational, it could issue an order requiring certain actions to implement the district's management plan, dissolve the board, remove the district's taxing authority, or dissolve the district altogether. The TNRCC could recommend to the Legislature actions it deemed necessary to implement a management plan in the district.

The bill would establish procedures to be followed in dissolving a board or district, specifying hearing and notice requirements, provisions for new board elections, appeals, and the sale of district assets.

**Supporters say:** The state cannot efficiently manage water resources on a local and regional basis without some type of peer review process to determine whether a district is actively working to protect area groundwater resources. The possibility of district dissolution would be a great incentive for districts currently unwilling to manage groundwater resources to assume the responsibilities of their jobs.

**Opponents say:** The TNRCC should not be empowered to dissolve groundwater districts. These districts work because local residents are able to make decisions about their own destiny. The TNRCC already has the ability to do away with shell districts. The bill would give the agency too

much control over districts, subordinating them to the central TNRCC bureaucracy in Austin.

**Other groundwater provisions.** CSSB 1 also would provide for:

- **Conjunctive management of ground and surface water** — The TNRCC could consider a proposed appropriation of a water right only if it provided for the effects of any hydrological connection between surface and groundwater. In considering a permit to store, take or divert surface water, TNRCC would be required to consider the effects, if any, on groundwater or groundwater recharge.
- **Aquifer storage and recovery** — The TNRCC could issue permits or permit amendments authorizing the storage of water in aquifers only where completed pilot projects or historically demonstrated projects have been shown to be feasible. The bill would remove a current provision providing that such projects cannot be authorized before June 1, 1999.
- **Groundwater district funding** — The TWDB could allocate funds to groundwater districts for data collection and the development of both management plans and regional plans. TNRCC, TPWD and the Texas Agricultural Extension service could also allocate funds to districts for various purposes.

**Supporters say:** Requiring the connection between ground and surface water to be considered in surface water appropriations would protect groundwater resources from being depleted by proposed upstream surface water diversions and promote conjunctive management of water resources in Texas. It is hard to clearly delineate where surface and groundwater part company. Precipitation replenishes both ground and surface water, and the hydrological cycle shows groundwater is related to surface water. Conjunctive management of these interconnected water resources would provide a better coordinated and more comprehensive approach to meeting the state's water needs. This connection currently lacks legal recognition, hindering effective water marketing and causing conflicting management schemes and unintended impacts on certain water rights holders.

**Opponents say:** Requiring TNRCC to consider the effects between groundwater and surface water when considering an application for unappropriated water could impede the permitting process.

### **Utility service**

CSSB 1 would provide new definitions for members of water supply corporations, service by a retail public utility, and member-owner, member-controlled water supply or sewer service corporations. Regulatory authorities, including both the TNRCC or cities, could use methodologies for water and sewer rates based on factors other than the rate of return, so long as rates, operations and service were just and reasonable to both consumers and utilities.

In determining whether to grant a certificate of public convenience and necessity (CCN), the TNRCC would be required to ensure that the applicant possessed the financial, managerial and technical ability to provide continuous and adequate service. The same criteria would be required of those wanting to purchase a water or sewer system or acquire a controlling interest in the stock of a utility.

Applicants for CCNs also would have to live up to certain criteria, including providing drinking water meeting Health and Safety Code standards and complying with TNRCC design criteria for sewer treatment plants. In granting a CCN, TNRCC would consider the efforts of the applicant to extend services to any economically distressed areas located within the service area, and could order improvements in service in these areas.

Before an applicant could be granted a CCN for construction of an individual facility, it would have to demonstrate that regionalization or consolidation with another public retail public utility was not economically feasible.

The TNRCC would have new authority to order improvements from any service provider, including cities and districts, not providing adequate service under its CCN to an economically distressed area. The TNRCC also could order specified improvements and repairs to retail public utilities with CCNs that were not providing continuous and adequate service in their

service area. Investor-owned utilities could be required to provide a bond or other financial assurance to ensure that continuous and adequate service would be provided.

CSSB 1 would specify what constituted abandonment by an investor-owned utility and the conditions under which TNRCC could seek a receiver to take over an investor-owned water or sewer utility.

In addition, the bill would delineate the criteria under which TNRCC could revoke or amend a CCN or decertify a utility provider for failure to meet CCN requirements. If the area had been decertified without the consent of the CCN holder, a utility service provider seeking to service the decertified area would be required to compensate the decertified utility service provider, if the TNRCC determined that compensation was necessary. The amount of compensation would be set by an independent appraiser selected by the decertified retail public utility.

CSSB 1 also would address other areas of utility service:

- **Water Utility Improvement Account** — CSSB 1 would establish this account outside of the state treasury with funding from civil and administrative penalties paid by investor-owned utilities. The fund would be managed by the state comptroller. Money in the fund could be used for improvements to water or sewer systems that had paid fines or penalties or for expenses for a utility placed in receivership. Fines collected from utilities other than investor-owned utilities would go to general revenue.
- **Drinking water system operations** — CSSB 1 would direct the TNRCC to encourage development of regional drinking water supply systems and consider compliance history when authorizing construction of new public drinking water systems. Investor-owned utilities and certain other entities that wished to build new drinking water supply systems would have to submit a business plan to the TNRCC for review and approval. The plan could require financial assurance. Business plans and financial assurance could also be required of owners or operators of public drinking water supply systems that were constructed without approval, had a history of noncompliance, or were subject to a TNRCC

enforcement order. A system could be required to stop operations if it were constructed illegally. The TNRCC executive director would be required to notify the utility's representative and initiate enforcement action if there was reason to believe that failure to properly operate a facility would present an imminent threat to human health or safety. Maximum civil and administrative penalties for violations of public drinking water regulations would be increased from \$500 to \$10,000 for each day of the violation.

**Supporters say:** The changes made in CSSB 1 concerning utility providers would help to ensure high quality service in the small communities often serviced by these utility providers. Clarifying the definition of “member” and “water supply corporation” would ensure that water supply corporations, which are exempted from certain state regulations, are actually operated by and for the benefit of their customer members and are not shell organizations created by developers and others to escape state requirements.

The TNRCC, or cities regulating a utility within their city limits, should be allowed greater flexibility in establishing rates in order to fund improvements in service and attract capital necessary for system upgrades. Increased funds could also attract more efficient utility service providers, a move that would ultimately hold down rates through better management and economies of scale. This would also allow utilities to more easily qualify for and repay loans by setting rates to match debt payments.

A decertified utility should be allowed to choose the independent appraiser who would determine the amount of compensation the utility is owed. The executive director of TNRCC in Austin should not be saddled with this unnecessary burden. Independent appraisers would not sacrifice their professional reputation by favoring the utility who hired them.

**Opponents say:** A decertified utility should not be able to choose the appraiser. A utility usually is decertified because it failed to live up to its agreement to provide appropriate services to its customers. Allowing it to select the appraiser would be like giving it a blank check to try and recoup its losses. The appraiser should be selected by a neutral party, such as the executive director of TNRCC.

**Other opponents say:** A utility that failed to provide adequate service to its customers should not necessarily be compensated at all. In these cases, the facilities often are so substandard to be unusable. The law should establish that if the city or other entity taking over the area was not going to use the facilities, it should not have to compensate the decertified utility.

### **Orders and penalties**

CSSB 1 would hike existing penalties for certain violations of water laws and establish new procedures for other violations.

- **Field citations** — Watermasters or their deputies could issue field citations upon witnessing water rights violations. The alleged violator could either agree to pay the fine or contest the citation and request an evidentiary hearing before the TNRCC. The agency could establish penalty amounts for these violations.
- **Administrative penalties** — The bill would set an administrative penalty not to exceed \$10,000 a day for illegal water diversions, violations of water rights, related rules and regulations, and levee safety rules. The TNRCC would have to consider a number of factors in determining the penalty amount, including the gravity or potential hazard created by the violation and the history and extent of previous violations. The bill would provide for notice, hearing and other requirements concerning administrative penalties. Final orders would have to be paid in full within 30 days and/or the person could file a petition for judicial review.
- **Emergency orders on levees** — If the TNRCC determined that the condition of a levee created or would cause extensive or severe property damage, economic loss, or posed a serious and immediate threat to human life or health, it could issue an emergency order directing the owner to repair, modify or remove the levee. Such an order could be issued with or without notice to the levee owner. If the order were issued without notice, a hearing would have to be held within 20 days after the emergency order was authorized.

- **Criminal penalties** — A person who constructed a levee or other project to control floodwater from state streams without first obtaining approval by TNRCC would be guilty of a Class C misdemeanor, punishable by a fine of not more than \$4,000 for each day the violation continued, an increase from the current maximum penalty of \$100. The penalty for taking or diverting water illegally would be increased from the current range of \$100 to \$500 to a maximum of \$10,000. The offense would remain a misdemeanor.
  
- **Civil penalties** — The maximum civil penalty for illegally taking or diverting state water or violating dam safety rules would be increased from \$1,000 to \$10,000 a day for each day of the violation. The bill also would provide that a district court could award the costs of litigation, including reasonable attorney's fees, to a water rights holder who prevailed in a suit for injunctive relief to stop illegal use of surface water.

**Supporters say:** CSSB 1 would give teeth to the water laws of Texas. Current penalties are so slight as to provide no deterrent effect. However, to ensure justice, the bill would provide that the size of a penalty in specific instances would be based on such factors as the potential hazard presented by the violation. A large fine could not be imposed for a small infraction of the rules.

Under current law, TNRCC lacks administrative penalty authority for water rights, dam and levee safety violations that it has for other regulatory programs. Currently, the agency must seek injunctive action from a district court through the attorney general with maximum civil penalties of only \$1,000, which makes surface water right enforcement largely ineffective. Penalties are so low they fail to provide a deterrent; violators can easily absorb the fines. Furthermore, the process of seeking compliance through the attorney general and the court system is very time consuming.

The bill also would expedite settlement of water rights disputes in basins served by a watermaster. Authorizing watermasters to issue field citations would avoid costly unnecessary court proceedings and hearings in Austin that are expensive both for the violator and the agency. If the citation were contested, the alleged violator would retain all existing rights to an evidentiary hearing before the commission.



The bill would allow prompt enforcement action in certain cases when immediate action is necessary to prevent significant injury and damages to downstream water rights. These field citations could only be issued in two areas in Texas since there are only two watermaster programs in Texas: The South Texas Watermaster Program, which serves the Nueces, San Antonio, and Guadalupe River Basins as well as the adjacent coastal river basins, and the Rio Grande Watermaster Program, which coordinates releases from the Amistad and Falcon reservoir system.

Watermaster deputies perform their jobs by “running the river,” going from one property to another checking meters to make sure that pumping has been authorized and is proceeding properly. Their work is done in the field, and most deputies have been on the job for years and know their territory well. Furthermore, not much training is required to recognize a pumping violation — deputies know who has rights to pump and when. Under the watermaster program, water rights holders must notify the agency in advance of any pumping. These entities know exactly what is required of them; what they are concerned about is not the citation powers of their watermaster but illegal diversions by unauthorized pumpers.

**Opponents say:** The TNRCC should not be able to levy a \$10,000 fine for violation of a rule or regulation. These kinds of harsh penalties should be restricted to violations of water rights and not broadly applied to violations of all rules and regulations concerning water rights.

CSSB 1 also would go too far in allowing watermaster deputies to issue field citations. Inadequately trained inspectors might not be able to distinguish a legal pumping from illegal pumping and could harass innocent property owners. Inspectors should not be able to witness a violation or come onto someone's property without a warrant. Texas is not a police state and should not give such broad powers to field inspectors.

Even if a citation were unfair, the alleged violator would probably pay it to avoid a costly trip to Austin. Citations issued to large companies or utilities would become part of their compliance history whether fairly or unfairly granted. It would be very expensive to fight unfair field citations in Austin, but all too easy to hand them out.

### **Effective dates**

Most provisions of CSSB 1 would take effect September 1, 1997, with the following exceptions:

- emergency authorizations, multi-use water permits and appropriations of unappropriated water — immediate effect.
- sales tax exemption for capital equipment used by manufacturers for water conservation — effective beginning the first calendar quarter after the effective date of CSSB 1.
- consolidation of existing bond authorizations — effective upon voter approval of SJR 17.
- property tax exemptions for water conservation initiatives — effective upon voter approval of SJR 45.

The requirement that business plans be submitted before construction of a public drinking water system would apply only to construction begun on or after September 1, 1997. Financial assurance requirements for public drinking water systems would apply to all owners and operators, regardless of when a system was constructed.

### **NOTES:**

**Floor amendment.** Rep. Ron Lewis, House sponsor of CSSB 1, plans to offer a floor amendment removing statewide water user fees. The fiscal note to the bill estimated that total revenue from the Water Facilities Fund would have amounted to \$54.7 million per year, of which \$3.4 million would have been retained by local units of government.

The floor amendment also would establish a 10-member Interim Committee on Water Resources Development and Management to study the state's water supply and wastewater infrastructure needs. Five members of the committee would be appointed by the speaker and five by the lieutenant governor. The committee would review the state's current inventory of water resources, state needs to the year 2050, the role of state and regional

entities in participation and investment in water-related projects, and implementation of SB 1. No later than 1999, the committee would report to the governor, lieutenant governor, the speaker and the 76th Legislature on its findings and recommendations for legislation.

**Fiscal note.** CSSB 1 would make no appropriation but would provide a basis by which funds could be appropriated. The fiscal note to the bill estimated that approximately \$50 million from general revenue would be needed to fund the bill through the biennium ending August 31, 1999. The bulk of that money — approximately \$40 million — would go to the TWDB for regional and drought planning, water conservation, financial and technical assistance for water plans, data collection, and financial assistance programs, including \$18 million expected to be passed on to develop 16 regional management plans. TNRCC would receive approximately \$6 million for drought planning, water conservation, enforcement, water rights management, water service regulation, interbasin transfers, and data collection.

About \$700,000 would go to TPWD for drought planning, assessments of plan impacts on fish and wildlife, administration of the conservation and restoration fund, technical assistance and data collection; \$1.5 million to the Comptroller's Office in compensation for tax exemptions for water conservation equipment; and \$1.5 million to the Texas Agricultural Extension Service for educational programs to inform district residents of water issues.

After the first biennium, approximately \$16 million annually would be needed to fund the provisions of CSSB 1.

**House and Senate versions.** The principal differences between the House committee substitute to SB 1 and the Senate-passed version are provisions added to:

- make interbasin transfers junior in priority to water rights granted prior to the application for the transfer;
- require applicants for interbasin transfers to prepare a drought contingency plan and implement a water conservation plan;

- allow bed and banks permits to be issued for privately owned groundwater;
- codify the “four corners” doctrine on permit amendments;
- allow a decertified utility to select an appraiser to decide the amount it would be compensated;
- establish the Texas Groundwater Management Council to review the performance of groundwater districts, rather than the state auditor;
- specify that regional planning groups would be required to consider any local plans submitted;
- require regional water plans to consider the amount of nonmunicipal water that could be transferred by emergency authorization without causing unreasonable damage to the property of the water rights holder;
- provide that reuse as a management strategy be considered during the development of regional water plans;
- require wholesale and retail public water suppliers and irrigation districts to provide for public input in preparing drought contingency plans;
- require copies of regional water plans to be made available for public inspection a month prior to hearings on the plan; and
- establish the Water Facilities Fund.

**Related legislation.** SJR 17 by Brown, the constitutional amendment authorizing consolidation of TWDB funds, was reported favorably by the House Natural Resources Committee on May 1. SJR 45 by Brown, the constitutional amendment allowing tax exemptions for properties with water conservation initiatives, was reported favorably from the House Ways and Means Committee on May 15.