

SUBJECT: Environmental in-stream flows in surface water permitting

COMMITTEE: Natural Resources — favorable, as amended

VOTE: 5 ayes — Puente, Callegari, R. Cook, Geren, Hardcastle

0 nays

4 absent — Hope, Campbell, Hamilton, Wolens

SENATE VOTE: On final passage, May 5 — 31-0

WITNESSES: For — Greg Rothe, San Antonio River Authority

Against — Jack Fairchild, Ilan Levin, and Dianne Wassenich, San Marcos River Foundation; Myron Hess, National Wildlife Federation; Ken Kramer, Sierra Club Lone Star Chapter; Charles C. Wemple, Galveston Bay Foundation

BACKGROUND: Surface water is the property of the state, and the state appropriates rights to divert or use surface water, such as that flowing in rivers, creeks, or streams. Water Code, sec. 11.023 specifies purposes for which surface water may be appropriated, stored, or diverted, including domestic and municipal use and agricultural and industrial use. In addition, the statute provides that surface water also may be appropriated, stored, or diverted for any other beneficial use. The Texas Commission on Environmental Quality (TCEQ) administers permits to divert surface water.

On March 20, 2003, TCEQ rejected an application by the San Marcos River Foundation for a new water right to appropriate 1.3 million acre-feet of water per year from the Guadalupe River to maintain streamflows for environmental in-stream use and to maintain inflows of freshwater to the river's estuary. "Environmental flows" or "in-stream flows dedicated to environmental needs" mean leaving a certain amount of water flowing in a river or stream that could not be diverted for consumption, but would remain in the river solely to meet the environmental needs of the river or the bays and estuaries at the river's mouth.

**DIGEST:** SB 1374, as amended, would specify that the Legislature expressly requires TCEQ to consider and provide for the amount of freshwater inflow necessary to maintain the viability of the state's bay and estuary system in granting permits to use state waters. It also would specify that the Legislature has not expressly authorized granting water rights for leaving water in-stream for environmental needs or bays and estuaries, or for other similar beneficial uses.

**Study commission.** The bill would create a Study Commission on Environmental Flows, composed of 17 members appointed by the governor, lieutenant governor, or House speaker and the presiding officers of TCEQ, the Texas Water Development Board, the Texas Parks and Wildlife Department, and the Texas Department of Agriculture. Of the three members appointed by the governor, one would have to be engaged in irrigated agriculture and one would have to represent a conservation and reclamation district. Of the five members appointed by the lieutenant governor: one would have to represent a river authority or municipal water supply agency; one would have to represent an entity engaged in resource protection; and three would have to be members of the Senate, including the chair of the Senate Natural Resources Committee. Of the five members appointed by the speaker: one would have to represent a river authority or municipal water supply agency; one would have to represent an entity engaged in resource protection; and three would have to be members of the House, including the chair of the House Natural Resources Committee. The House and Senate committee chairs would serve as joint-presiding officers of the study commission.

The study commission would conduct public hearings and study the policy implications of balancing the demands on water resources of a growing population with the requirements of river, bay, and estuary systems, including granting surface water permits for in-stream flows dedicated to environmental needs, use of the Texas Water Trust, or other relevant and important issues. The study commission would have to take notice of the state's strong public policy imperative recognizing that environmental flows are important to the biological health of parks, game preserves, and bay and estuary systems and are high priorities in the permitting process. The study commission would have to address specific ways that the ecological soundness of these systems would be ensured in the surface water allocation process.

The study commission would appoint an advisory scientific committee, could

appoint additional committees, and could draft proposed legislation to modify existing water-rights permitting statutes. By December 1, 2004, the study commission would have to issue a report summarizing hearings, studies, legislation, and any other findings or recommendations of the commission. The study commission would be abolished on September 1, 2005.

**Water rights for in-stream flows.** Until September 1, 2005, TCEQ could not issue a new surface water permit for in-stream flows dedicated to environmental needs or the bay and estuary system. TCEQ could amend an existing permit to change use or add a use for in-stream flows dedicated to environmental needs or bay and estuary inflows. The bill would not alter certain other statutory obligations of the agency in regard to water permitting.

In considering a water permit application, TCEQ would have to include in the permit, to the extent practical, conditions necessary to maintain existing in-stream uses, the water quality of the stream or river, or fish and wildlife habitat.

The bill would take immediate effect if finally passed by a two-thirds record vote of the membership of each house. Otherwise, it would take effect September 1, 2003.

**SUPPORTERS  
SAY:**

SB 1374 would affirm that state law does not allow permits to be granted solely for environmental uses. However, it would recognize the debate over how to best provide for the environmental needs of rivers, bays, and estuaries by establishing a study commission to examine the issue and make policy recommendations for the next legislature. In the meantime, the bill would specify that TCEQ could not grant permits solely for environmental in-stream flows, a continuation of the state's current policy. In its decision on the San Marcos River Foundation permit application, TCEQ determined that the agency does not have statutory authority to issue a permit solely for environmental in-stream flows and that the Legislature already has required the agency to consider in-stream flows and bay and estuary maintenance in granting state water rights.

The health of Texas' rivers and bays needs careful consideration in the water permitting process. However, using environmental reasons to justify requesting permits for all of the unappropriated water flowing in a river

jeopardizes the ability of cities and communities to meet future water needs. The state water plan projects that the state's population will nearly double by 2050 and that water demand will increase 18 percent. Reserving water for environmental flows without careful study and scientific investigation could hinder the state's ability to cope with population growth. The study commission would help to develop a balanced water policy, meeting both the needs of the environment and those of population growth.

The bill would not encourage a "gold rush" for water permits. In fact, the bill would strengthen current law provisions governing TCEQ's consideration of environmental factors in water permits by allowing the commission to impose conditions on a permit necessary to maintain water quality and fish or wildlife habitat.

**OPPONENTS  
SAY:**

This bill would deny citizens and public-interest groups the right to apply for permits for environmental in-stream flows. The bill would prevent TCEQ from granting permits for environmental flows while a commission studied the issue, but would impose no restrictions on permits for consumptive uses. Enacting this bill could create a "gold rush" of permit applications at TCEQ for the unappropriated water remaining in the state's river basins. By the time the study commission concluded its work, it could find that its options had been precluded by the rush for water permits during the interim.

Current law is far from clear that TCEQ does not have the authority to grant water rights for environmental in-stream flows. In fact, the agency's decision on the San Marcos River Foundation permit application already has been appealed in court. State law allows the agency to issue a permit for any beneficial use, but does not specify what constitutes a beneficial use. It is reasonable to assume that most people would consider protecting the health of rivers, bays, and estuaries a beneficial use of water. Moreover, although current law provides a mechanism for the agency to consider environmental needs in issuing water permits, the law does not suggest that this authority is exclusive of other means of providing for the environment through permitting.

**NOTES:**

The committee amendments to the Senate engrossed version would specify that the chairs of the House and Senate natural resources committees would be members of the study commission and serve as joint presiding officers.

Two members would be added to the study commission, including the agriculture commissioner. One appointee of the governor would have to be engaged in irrigated agriculture and one represent a conservation and reclamation district.