

- SUBJECT:** Establishing standards for surface water environmental flows
- COMMITTEE:** Natural Resources — committee substitute recommended
- VOTE:** 7 ayes — Puente, Hamilton, Gattis, Creighton, Gallego, Hilderbran, Laubenberg
- 0 nays
- 2 absent — Guillen, O’Day
- WITNESSES:** For — Henry Garrett, City of Corpus Christi; Myron Hess, National Wildlife Federation; Mary E. Kelly, Environmental Defense; Ken Kramer, Sierra Club; Ed McCarthy, City of Houston; Mary Miksa, Texas Association of Business; Dean Robbins, Texas Water Conservation Association; Gregory Rothe, San Antonio River Authority, Texas Water Conservation Association; W.E. “Bill” West, Guadalupe Blanco River Authority; Christina Wisdom, Texas Chemical Council; (*Registered, but did not testify*: Fred Aus, Lower Colorado River Authority; Valarie Bristol, The Nature Conservancy; Gary Gibbs, Association of Electric Companies of Texas; Debbie Hastings, Texas Oil & Gas Association; David K. Langford, Texas Wildlife Association; Andrew Smith, City of San Antonio)
- Against — Pat Carlson, Texas Eagle Forum
- On — Todd Chenoweth, Texas Commission on Environmental Quality; E.G. “Rod” Pittman, Environmental Flows Advisory Committee; (*Registered, but did not testify*: Barney Austin and Carolyn Brittin, Texas Water Development Board; Colette Barron and Cindy Loeffler, Texas Parks and Wildlife Department)
- BACKGROUND:** Surface water belongs to the state, which grants rights to use it through permits from the Texas Commission on Environmental Quality (TCEQ). Cities, individuals, and river authorities may apply for water rights permits. TCEQ requires that surface water be used for a “beneficial purpose.” In order to obtain a permit, an applicant must show that there is a source of unappropriated water available. Water permits do not guarantee that water will be available, only that the holder has a right to

available water. The principle of “prior appropriation” gives priority to those whose water rights have greater seniority.

In 1997, the 75th Legislature enacted SB 1 by Brown, which established the Texas Water Trust. Donation into the trust allows private water rights to be left in the state’s rivers and used for the benefit of the environment.

In 2001, the 77th Legislature enacted SB 2 by Brown. Among its provisions, the bill established an instream flow program under which state environmental agencies would collaborate to study river and stream flow conditions necessary to support a sound ecological environment.

On October 28, 2005, Gov. Rick Perry signed executive order RP-50, which created the Environmental Flows Advisory Committee to examine how best to protect instream flows and freshwater inflows. The committee conducted public hearings and issued its recommendations to the Legislature in December 2006.

DIGEST:

CSHB 3 would create an administrative process to determine the environmental flow needs in Texas’ rivers, bays, and estuaries. After establishing these environmental needs, the bill would require TCEQ to adopt rules to provide environmental flow standards, including set-asides in basins where unappropriated water was available.

Establishing environmental flow standards and set-asides.

Under CSHB 3, TCEQ would be charged with:

- determining the environmental flow standards that are necessary to support the ecological environment of each river basin and bay system in the state;
- establishing an amount of unappropriated water to be set aside to satisfy the environmental flow standards; and
- creating a process for reducing the amount of water available under a water rights permit in order to protect environmental flows. This provision would apply only to a permit approved after the bill’s effective date.

After determining environmental set-asides in basins with unappropriated water rights, TCEQ could not grant an appropriation of water that interfered with those set-asides. After an environmental flow set-aside had

been determined, any new water permit or new amendment to an existing water right increasing the size of that water right would have to include conditions for the protection of the environmental flow set-asides. Environmental flow standards would consist of flow quantities that reflected seasonal and yearly fluctuations that could vary geographically by location in a river basin and bay system.

TCEQ would take these actions in response to recommendations from a structure of advisory groups operating in an administrative process created under the bill. Four new types of entities would contribute to the administrative process established under CSHB 3:

- an environmental flows advisory group;
- an environmental flows science advisory committee;
- environmental flows stakeholders committees for each river basin and bay system in the state; and
- expert science teams for each river basin and bay system in the state.

In adopting environmental flow standards for a river basin and bay system, the TCEQ would consider multiple criteria, including:

- the geographical definition of the river basin and bay system;
- the schedule that was established for adopting environmental flow standards for the river basin and bay system;
- environmental flow analyses and recommended environmental flow regimes developed by the river basin and bay system expert science team;
- recommendations from the river basin and bay system stakeholders committee;
- comments from the environmental flows advisory group;
- specific characteristics of the river basin and bay system;
- economic factors;
- other competing water needs in the river basin and bay system; and
- scientific information, including information provided by the science advisory committee.

The bill would prohibit TCEQ from issuing a new permit for instream flows dedicated to environmental needs or bay and estuary inflows. TCEQ could approve an application to amend a permit or certificate of

adjudication to change a use to environmental needs or bay and estuary inflows.

Administrative process for developing flow recommendations.

Environmental Flow Advisory Group. CSHB 3 would create an environmental flows advisory group. Through studies and public hearings, the advisory group would examine the balance between the water needs of Texas' population and the protection of environmental flows of the state's river, bay, and estuary systems. The advisory group would consider the ecological concerns of river, bay, and estuary systems as they relate to the administration, enforcement, and allocation of water rights in the state. The advisory group also would work to encourage voluntary conversion of water rights for environmental flow protection.

The environmental flows advisory group would consist of nine members:

- three members of the Senate appointed by the lieutenant governor;
- three members of the House of Representatives appointed by the speaker of the House;
- one member of TCEQ appointed by the governor;
- one member of the Texas Water Development Board (TWDB) appointed by the governor; and
- one member of the Texas Parks and Wildlife Department (TPWD) appointed by the governor.

The senator and House member with the most seniority would serve as co-presiding officers.

By December 1, 2008, and every two years thereafter, the advisory group would be required to issue a report summarizing its activities. The report would include proposed legislative changes and would document progress in developing environmental flow regime recommendations initiated under this bill.

Advisory group members would not be entitled to compensation but could be reimbursed for travel expenses. The group could accept gifts and grants to help carry out its functions. TCEQ would provide staff support to the advisory group.

The advisory group would be abolished when TCEQ had adopted environmental flow standards for all of the state's river basin and bay systems in the state.

Environmental flows science advisory committee. CSHB 3 would establish the environmental flows science advisory committee to aid the environmental flows advisory group's evaluation of environmental flows. The science advisory committee would consist of between five and nine specialists appointed by the environmental flows advisory group. Specialists would serve five-year terms.

Environmental flows stakeholders committees. For each river basin and bay system in the state, the environmental flows advisory committee would appoint a river basin and bay area stakeholders committee consisting of at least 17 members serving five-year terms. Each committee would reflect a balance of interest groups concerned with environmental flows in the basin, including representatives of:

- agricultural water users;
- recreational water users;
- municipalities;
- soil and water conservation districts;
- industrial water users;
- commercial fishermen;
- public interest groups;
- regional water planning groups;
- groundwater conservation districts;
- river authorities; and
- environmental interests.

An existing estuary advisory council would act as the stakeholders committee for the applicable river basin and bay system. TCEQ would appoint additional members to the existing council to comply with membership requirements under the bill.

Expert science teams. Each river basin and bay area stakeholders committee would establish an expert science team comprising technical experts with specific knowledge about the basin or about developing environmental flow regimes. Expert science team members would serve five-year terms. A member of the science advisory team would serve as a liaison to each expert science team in order to coordinate environmental

flow activities throughout the state. Technical assistance to each science advisory team would be provided by TCEQ, TPWD, and TWDB. Meetings of the expert science teams would be public when practicable.

Schedule for developing environmental flow recommendations. By November 1, 2007, the environmental flows advisory group would have to geographically define each river basin and bay system in the state for the purpose of studying and making recommendations about environmental flows.

The bill specifies that priority be granted to certain river basins when initiating the environmental flow study and recommendation process. In descending order, the order of priority would be:

1. The Trinity River/San Jacinto River/Galveston Bay system and the Sabine River/Neches River/Sabine Lake Bay system;
2. The Colorado River/Lavaca River/Matagorda Bay/Lavaca Bay system and the Guadalupe River/San Antonio River/Aransas River/Copano Bay/Aransas Bay/San Antonio Bay system; and
3. The Nueces River/Corpus Christi Bay/Baffin Bay system, the Rio Grande River/Rio Grande estuary/Lower Laguna Madre system, and the Brazos River system.

For the two primary priority systems — the Trinity River/San Jacinto River/Galveston Bay system and the Sabine River/Neches River/Sabine Lake Bay system — the environmental flows advisory group would appoint the systems' stakeholders committees by November 1, 2007. The stakeholders committees would appoint expert science teams for the two basin and bay systems by March 1, 2008. The expert science teams would present their environmental flow regime recommendations to the stakeholders committees, the advisory group, and TCEQ by March 1, 2009. TCEQ would adopt environmental flow standards for the two river basin and bay systems by September 1, 2010.

For the two secondary priority river basin and bay systems — the Colorado River/Lavaca River/Matagorda Bay/Lavaca Bay system and the Guadalupe River/San Antonio River/Aransas River/Copano Bay/Aransas Bay/San Antonio Bay system — the environmental flows advisory group would appoint the systems' stakeholders committees by September 1, 2008. For the three tertiary priority river basin and bay systems — the Nueces River/Corpus Christi Bay/Baffin Bay system, the Rio Grande

River/Rio Grande estuary/Lower Laguna Madre system, and the Brazos River system — the advisory group would appoint the systems' stakeholders committees by September 1, 2009. For river basin and bay systems in the two lowest-priority groups, the environmental flows advisory group would establish a schedule that would result in the adoption of environmental flow standards for those systems as soon as reasonably possible.

For river basin and bay systems not listed in one of the three priority categories, the environmental flows advisory group would establish a schedule for development of environmental flow regime recommendations and adoption of flow standards. If the environmental flows advisory group had not yet established a schedule for a river basin and bay system, the bill would not prohibit efforts to develop information on environmental flow needs as well as methods by which those needs could be addressed through a consensus-based process.

Developing and submitting environmental flow recommendations.

Each river basin and bay system expert science team would be required to develop environmental flow analyses and recommend an environmental flow regime for the corresponding river basin and bay system. The recommendations would be developed through a collaborative, consensus-oriented process. The analyses and recommendations of an expert science team would be made without regard for other water uses and be based solely on the best available science.

For the Rio Grande below Fort Quitman, uses attributable to Mexican water flows would be excluded from environmental flows recommendations. The expert science team for the Rio Grande could not recommend an environmental flow regime that would violate a treaty or court decision.

Each expert science team would submit its recommendations to its corresponding stakeholders committee, the environmental flows advisory group, and TCEQ. Neither a stakeholders committee nor the advisory group could change the environmental flows analyses and recommendations submitted by an expert science team.

Each stakeholders committee would consider the recommendations from its expert science team in conjunction with factors such as present and future water needs in the river basin and bay system. The stakeholders

committee for the Rio Grande also would consider requirements of any international water treaty or agreement in addition to effects that the Rio Grande watermaster had on water allocation.

A river basin and bay system stakeholders committee would develop recommendations regarding environmental flow standards and strategies. Recommendations would be developed through a consensus-based process to the maximum extent possible. Those recommendations would be submitted to TCEQ and to the environmental flows advisory group in accordance with the schedule laid out in CSHB 3 or established by the advisory group.

The environmental flows advisory group would be authorized to submit to TCEQ comments on environmental flow analyses and recommendations for use by TCEQ in determining environmental flow standards and set-asides.

The bill would establish means to periodically review environmental flow recommendations, standards, and strategies at least once every 10 years.

Adjustment of permit or amendment. A new permit or amendment to an existing water right that would increase the amount of water that could be taken would have to provide for the protection of environmental flows. With respect to an amendment, this provision would affect only the increase in the amount of water to be taken as authorized under the amendment. After an expedited public comment process, an adjustment could be made by TCEQ if such an adjustment was required to comply with environmental flow standards.

Taken with any other adjustments by TCEQ, an adjustment to a permit for compliance with environmental flow standards could not increase the amount of water taken for protection of environmental flows by more than 12.5 percent of the annualized amount of that requirement contained in the permit. For an amended water right, no more than 12.5 percent of the annualized total of the amount of the increase in the water authorized under the amended right could be taken for protection of environmental flows.

In adjusting a permit or amended water right to account for environmental flow standards, TCEQ would have to consider the priority dates and diversion locations of any other water rights in the river basin that were

subject to adjustment under CSHB 3. In addition, such an adjustment would have to consider grants made to the Texas Water Trust or other water use amendments that dedicated water for environmental flows and contribute toward meeting environmental flow standards. A water-right holder would receive credit for contributing water for the benefit of environmental flows against an adjustment considered by TCEQ.

A permit or water right amendment issued before September 1, 2007, would be exempt from provisions allowing an adjustment of the water right by TCEQ for compliance with environmental flow standards.

Enforcement. CSHB 3 would grant TPWD the rights of a water-right holder for water rights held in the Texas Water Trust. TPWD also would be authorized to act as a holder of a water right may act in order to prevent a person from violating an environmental flow set-aside established by TCEQ. TPWD could file suit in civil court to prevent unlawful use of an environmental flow set-aside.

Emergency authority to suspend set-asides. CSHB 3 would allow water that had been set aside by TCEQ to meet environmental flow needs to be used temporarily for other essential needs in the event of an emergency that TCEQ determined could not be addressed in another way.

The date by which the environmental flow studies authorized and taking place under current law must be completed would be extended from December 31, 2010, to December 31, 2016.

Other provisions

Funding. The bill would authorize TWDB to use money in the research and planning fund for implementation of CSHB 3. Money could be authorized for:

- compensation and expense reimbursement for members of the environmental flows science advisory committee;
- contracts with state and federal agencies, universities, and private entities for providing technical assistance;
- compensation and expense reimbursement of river basin and bay system expert science teams; and

- contracts with political subdivisions for expenses incurred in conducting meetings of river basin and bay system stakeholders committees or expert science teams.

Watermaster provisions. For a river basin in which a watermaster had been appointed, the executive director of TCEQ would appoint a watermaster advisory committee consisting of between nine and 15 members. Such a committee would make recommendations to the TCEQ executive director about activities to benefit water rights holders in the basin, review and comment on the annual budget of the watermaster operation, and perform other advisory duties recommended by the executive director. A member of the committee would have to hold a water right or represent a person who held a water right in the river basin. In appointing a watermaster advisory committee, the executive director would consider geographic representation, amount of water rights held, diversity among types of water rights users, and experience with water management practices. Members would not be entitled to expense reimbursement or compensation and would serve two-year terms.

Repealed. The bill would repeal a section of current law governing TCEQ and TPWD review of environmental flow studies.

Applicability. To the extent CSHB 3 deals with a permit for a new appropriation of water or with an amendment to an existing water right, changes in law would apply only to a permit or amendment that was pending before TCEQ on the bill's effective date or was filed with TCEQ on or after the bill's effective date.

Effective date. CSHB 3 would take effect September 1, 2007.

**SUPPORTERS
SAY:**

CSHB 3 would mark an historic step toward protecting the environment by dedicating instream flows for rivers and freshwater inflows for bays and estuaries. Currently, no state law provides designated protection to ensure a minimum of flow in rivers and into bays and estuaries. Instead, priority is given to other uses such as agricultural, commercial, and residential uses. Water rights in several river basins have been over-permitted, and other basins likely will follow suit. CSHB 3 would provide a means to balance agricultural, commercial, and residential needs with important environmental considerations.

While important for the environment, instream flows do more than support fish, aquatic organisms, and wildlife. River flows provide recreation, dilute and disperse treated wastewater, and support commercial activity. Aquatic species need sufficient flows of water to facilitate their life cycles. Coastal wetlands rely upon freshwater flows from rivers to sustain their unique habitats. These bays and estuaries support the economy of the Texas Gulf Coast through the tourism industry and commercial fishing and shrimping. For these reasons and many more, environmental flows are crucial to Texas' economy and quality of life.

In order to determine standards and set-asides for environmental flows, CSHB 3 would establish a consensus-based process relying upon the best available science to determine the amount of flows needed for environmental considerations. The bill would allow input from stakeholders from every group with a substantial interest in water rights and flows, while expert science teams would report the environmental needs of river basins and bays directly to TCEQ. Under this process TCEQ could balance the best available science with the other water needs of Texas' growing population. In this manner, the process would resemble the successful regional water planning process established under SB 1, enacted by the 75th Legislature in 1997. Because water is a vital resource for so many diverse interests, it is important that the environmental flow planning process be as inclusive as practicable.

The planning process established under CSHB 3 would create set-asides in rivers where unappropriated water still existed. The bill would not infringe on the water rights of existing water rights holders. A "reopener" clause would only enable the limited adjustment of water rights that were pending or approved on or after the bill's effective date. The bill would include protections for other beneficial uses in case a drought or emergency situation required diversion of environmental flows for other needs.

The issue of environmental flows is complex, and while CSHB 3 would not finally solve this issue in every river basin in the state, it would establish a robust framework for progress to be made. By strengthening the Texas Water Trust, an important program that serves to retire unused water rights for environmental purposes, the bill would facilitate voluntary conversion of water rights in river basins that are over-appropriated. In addition, the bill would establish market-based methods to allow a permit holder seeking a permit for more water to purchase and convert under-

utilized water rights for environmental purposes. Further, the bill would leave open the option to the state of buying back water rights from private water rights holders in the future.

Concerns that CSHB 3 would create a complicated bureaucracy are off base. The different advisory, stakeholder, and science groups established under the bill would be abolished when TCEQ had adopted environmental flow standards in each river basin and bay system. The bill would not create a permanent layer of bureaucracy. While it may seem complicated at first blush, the administrative process established under CSHB 3 vitally would recognize the importance of consulting with local stakeholders and scientists who possess immediate knowledge about their river basins and bay and estuaries.

CSHB 3 would provide the certainty needed by water supply interests that struggle under the current system. Under current law, TCEQ considers environmental flow needs on a permit-by-permit basis, and agreed-upon environmental flow standards are lacking. Adoption of uniform environmental flow standards and set-asides would help water suppliers plan for the future and account for the needs of their customers.

**OPPONENTS
SAY:**

CSHB 3 would establish an unnecessarily complicated tangle of bureaucracy. The bill would create two new statewide committees as well as stakeholder and science boards in every river basin and bay system in the state. Recommendations made by these four groups would have to work their way up to TCEQ, which would make the final determination on environmental flow standards and set-asides. Aside from the elected officials on the environmental flows advisory board, the majority of members on these policymaking bodies would not be accountable to the voters. These bodies would be granted excessive influence, a serious concern since the bill would contemplate seizing water rights for what could be marginally important purposes. Such important and binding determinations should not be delegated by the Legislature to TCEQ.

**OTHER
OPPONENTS
SAY:**

CSHB 3 would not go far enough in protecting environmental flows. The bill would provide no remedy for the many basins in which all available water has been permitted. In addition, the provision enabling diversion of environmental flows during an emergency is problematic. When a drought strikes — precisely the time that instream flows are so crucial to river and bay ecosystems — environmental flow set-asides would be available for diversion to other uses. The only reasonable method for reliably protecting

environmental flows would be to buy back more senior water rights from private interests and keep those flows in the river. If the Legislature fails to appropriate funds for this purpose, it is unlikely that CSHB 3 would substantially benefit river basins that are most desperately in need of a base level of flows.

Rather than allowing for a limited reopener of pending and future water rights, CSHB 3 should institute a moratorium on new water rights while the process established under this bill takes place. By the time TCEQ adopts environmental flow standards in each river basin, the commission might not have enough room to meet the standards under the allowable 12.5 percent adjustment for new permits and amendments under the bill.

NOTES:

According to the Legislative Budget Board, CSHB 3 would result in a cost of \$3.2 million in general revenue in fiscal 2008-09 from staff and other administrative costs associated with implementing the bill.

The committee substitute added provisions dealing with the estuary advisory council. It also added a provision stating that TCEQ would have to consider voluntary conversion of existing water rights for environmental flows by a permit holder when determining adjustment of a permit holder's water right. The committee substitute explicitly states that a water right holder making a contribution of water rights for environmental flows would receive credit against the adjustment of that holder's water right. The substitute also removed a provision that would have required the review of water rights placed in the Texas Water Trust.

SB 3 by Averitt includes environmental flow provisions similar to those in CSHB 3, as well as provisions concerning water conservation, groundwater management, and designation of unique reservoir sites. SB 3 has been referred to the Senate Natural Resources Committee.

On February 5, Gov. Perry declared legislation relating to the management of the water resources of the state, including the protection of instream flows and freshwater inflows, to be an emergency matter for immediate consideration by the Legislature.