

# **WATER LAW UPDATE**

**by  
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Water will continue to be a dominant issue in the upcoming legislative session as it has in the last several sessions. A look at the interim charges issued in both the House and Senate will tell one that once again, there are a number of unresolved issues in the water world that the Legislature may feel compelled to address.

Lt. Governor Dewhurst issued the following charge, Interim Charge No. 2, to the Senate Committee on Natural Resources:

Study and assess all issues related to ground and surface water law, policy, and management, including, but not limited to:

the role of federal, state, regional, and local governments, including river authorities and other water management entities, and their jurisdiction, authority, and coordination in setting consistent, nondiscriminatory water policies;

the statutory, regulatory, and/or economic impediments to implementing key water management strategies recommended in the Regional and State Water Plans;

the role of groundwater conservation districts;

conjunctive use of both ground and surface water resources;

rule of capture;

historic use standards;

water infrastructure and financing, including financing sources for new water resources;

interbasin transfers;

water rights, including environmental flows, junior water rights;

the transition of water rights from agricultural to municipal and industrial uses and coordination among transitioning water management authorities;

conservation;

drought preparedness; and

water marketing.

Speaker of the House Craddick issued 6 interim charges to the House Natural Resources Committee, 3 of which pertained to water issues:

Consider the potential for increased outdoor water savings through landscape water conservation, including irrigation audit requirements, turf replacement programs and the provision of certain landscape options for prospective homebuyers.

Examine state wastewater re-use policies, including an assessment of potential changes or clarifications to the Texas Water Code.

Continue the study of the Commission on Water for Environmental Flows, and further evaluate options for providing adequate environmental flows.

Although this is an extensive list of charges regarding water, I really expect the Legislature to focus on four major areas:

Indirect and direct wastewater reuse;

Environmental Flows;

Water Conservation; and

Senate Bill 1 Regional Planning process.

Of course, members always have issues that they feel need to be addressed. For example, I anticipate a bill being filed that would address the Edwards Aquifer Authority and help deal with the pumping caps and drought management of the springflows in the Edwards, similar to what was contained in SB3 last session that did not make it to the finish line. The Lt. Governor remains concerned about the possible financing of water infrastructure that is going to be needed over the next 40-50 years, and that may arise again next session.

Although these are not specifically water related issues, there is quite a bit of discussion on eminent domain and water quality ordinances that we faced last session and during the special session last summer. All of our water and municipal clients are particularly concerned about the eminent domain statute that was passed and whether future water projects could be endangered.

The bill, SB7 by Senator Janek, strictly prohibits the use of eminent domain powers for economic development purposes; however, it does not take much imagination to develop scenarios that would normally be considered public projects that someone may argue is purely economic development. For example, extending a water or wastewater line or building a road to a community industrial park or developing a flood control project that spruces up an area and creates economic opportunities. I would submit that these fall outside the boundaries of SB7, but one can understand the nervousness associated with going down this path. I suspect we will see some attempts to tweak this statute in the upcoming session.

### **Environmental Flows:**

Environmental flows are: instream flows – the amount of water needed in rivers and streams to support fish and wildlife in and along waterways; and, freshwater inflows to bays and estuaries (B&Es) – flows needed to maintain acceptable salinity levels and supply nutrients and sediments for B&Es that support marine life and other species.

In July 2000, the San Marcos River Foundation requested a permit from the TCEQ for 1.15 million-acre feet of water for nonconsumptive, environmental flow purposes. On March 13, 2003, TCEQ commissioners unanimously determined the agency had no statutory authority to issue such a permit. Subsequently, the agency denied five other pending water rights applications for similar uses that had, collectively, requested the appropriation of over 10 million acre-feet of state water.

Environmental Flows has been an issue for the past two legislative sessions. During the 79<sup>th</sup> session (2003), SB 1639 passed, which prohibited the TCEQ from issuing new permits for instream flows dedicated to environmental needs or bay and estuary flows until September 1, 2005. SB 1639 also set up a study commission, which made recommendations to the legislature about how to deal with this issue in the future. Those recommendations became part of SB 3 during the 79<sup>th</sup> session, but also died with SB 3.

While I believe it is unlikely that the TCEQ would begin issuing such permits, this will continue to be a major issue until the legislature acts. Most parties involved, be they municipalities, industry or the environmental community, want to see this issue resolved so that they will have some certainty as to how their water rights will be affected when seeking new permits or amending current ones.

### **Wastewater Reuse:**

The law surrounding wastewater reuse is somewhat unsettled in Texas at this time. Traditionally in Texas, water users have been able to directly reuse their wastewater effluent prior to its release into a receiving stream and pursuant to an authorization to reuse such reclaimed water, except in limited cases where the surface water right specified consumptive limitations or discharge requirements. Many Texas cities and industries currently directly reuse

wastewater for such purposes as irrigation and cooling. Direct reuse has been encouraged and is actually included in the definition of “conservation” in the Texas Water Code (Sec. 11.002(8)).

Indirect reuse, or the reuse of effluent after it is put into a waterway, has been a more difficult question to answer. Interest in and competition for return flows is becoming more intense. Return flows have traditionally been important in maintaining stream flows for fish and wildlife and in allowing the grant of additional water rights, as well as strengthening downstream water rights. The TCEQ and its predecessor agencies, in issuing water rights permits, over the years assumed that much of the water used would not be totally consumed and would end up as return flows in the streams and rivers from which they came. Permits were granted based upon return flow assumptions. Those water rights holders, therefore, depend on return flows to firm up the amount of water available to them. Certain streams that are currently overappropriated could face problems with the more junior rights in the basin with increased reuse.

The TCEQ currently has dozens of applications pending for indirect reuse permits, and only a small handful of permits have been granted. It appears that the TCEQ commissioners may want to see some settling of the law in this area or may be waiting for the Legislature to act before granting future authorizations. For obvious reasons, water rights holders in certain basins as well as environmental groups will want to be involved in whatever solution the Legislature may come up with. Needless to say, although direct reuse projects have been looked upon favorably, and indirect reuse is more difficult to have authorized, the downstream interests are harmed whether or not the water was put back in the waterway before reusing it, so to discriminate against these two types of reuse seems counterproductive, because in the case of indirect reuse, the stream has the benefit of having the water for at least some period of time.

### **Water Conservation:**

The past two sessions have seen a flurry of bills dealing with water conservation. The Water Conservation Implementation Task Force established before the 79<sup>th</sup> Legislature developed Best Management Practices (BMPs) and targets and goals for per capita water use. All of these are fine and worthy, assuming this is all voluntary. El Paso and Orange shouldn't be held to the same standards, in other words, and all cities should be allowed to choose what's best for them and their area. Bills filed last session would have required that each municipality or entity required to file a water conservation plan must include BMPs and must establish a target for per capita use. Those who did not do so, under these bills, would be subject to administrative penalties from the TCEQ. This hardly seems voluntary.

One of the difficulties we have found is that in order to obtain a permit for an interbasin transfer of water, one of the requirements is that the applicant must have “implemented a water conservation plan that will result in the highest practicable levels of water conservation and efficiency achievable within the jurisdiction of the applicant.” (*See TEXAS WATER CODE*, § 11.085(1)(2)). Exactly what the term “highest practicable levels of water conservation” means could be the subject of litigation. Some have suggested that unless a water supplier or municipality has adopted all of the BMPs in the Guide, that level has not been reached, and any

transfer of water from another basin should not be granted. I believe this section of the law may need to be tweaked in upcoming sessions to avoid this very issue.

With the current drought being experienced in so many parts of the state, water conservation is naturally a topic of great interest. Legislators from arid areas of the state naturally want to encourage more conservation among other parts of the state since their communities are required to reach higher levels by necessity. I expect to see a number of conservation bills again this session, and as I caution my municipal clients, we must look at them very closely to ensure the voluntary nature is maintained and that our cities are not unduly burdened with requirements that may or may not be necessary in each and every community.

### **Regional Planning Process:**

Senate Bill 1, passed in 1997, began the process of regional water planning and the state water plan that we have today. Under the planning process outlined in Texas Water Code, Section 16.053, the regional planning groups are required to submit an updated plan every five years. Some, including folks at the Texas Water Development Board, have interpreted that to mean that if a plan is not submitted by a region by the deadline, the previously adopted plan is no longer in effect, and the entire region, therefore, has no regional water plan. Without a regional water plan, cities within the region are prohibited from obtaining Water Development Board grants and funding or from obtaining new water permits from TCEQ.

The dilemma here is this gives quite a bit of power to groups interested in scuttling water supply projects. Environmentalist groups opposed to the construction of **any** reservoirs, citizen groups opposed to the exportation of groundwater, property rights groups opposed to the condemnation of lands for pipelines, or taxpayer watch groups are all examples of groups who have created enough of a furor to push planning board members (and even TWDB members) to vote against regional plans. Some believe that the law should be changed so that if a regional planning group fails to update its plan, the existing one stays in effect. This will take away the incentive for a small few to wreak havoc in the process by creating public outcry and writing letters to the editors of local newspapers.

### **Conclusion**

As Texas continues to grow, the need to supply water to our citizens will grow with it. Municipalities are becoming more and more aware of the future water supply and infrastructure necessary to maintain growth and economic viability. As competition for those resources soars, we will continue to focus on water issues and water law each and every legislative session, and as an important factor for our clients, we must watch and work with our legislators to help shape and develop positive water law policy.