



TEXAS PUBLIC POLICY FOUNDATION
LEGISLATORS' GUIDE TO THE ISSUES

Surface Water Rights

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THE ISSUE

Texas law recognizes property interests in rights to surface water and groundwater. Like most western states, Texas has adopted the prior appropriation system to allocate quantities of surface water for specific beneficial uses. An exception to this legal system is the landowners' qualified riparian rights for domestic and livestock use. Under a categorically different legal regime, Texas law recognizes a landowner's vested property right in groundwater below the land surface.

Texas law declares that the state owns the surface water but grants private rights to use specific volumes of water for statutorily enumerated beneficial uses. (TWC 11.0235(a)) Each water right is assigned a priority date. In times of water shortage, earlier priority dates protect water appropriators before holders of water rights with later priority dates.

The current 2007 State Water Plan (SWP) includes water supply strategies to produce 4.4 million acre-feet of new surface water by 2060. These projects are critical to water needs in the eastern half of the state, especially the Dallas-Fort Worth (DFW) region.

Legal questions about water right amendments, indirect reuse authorizations, and environmental flow standards now complicate and could preclude key surface water projects. Surface water accounts for almost 50 percent of new water anticipated from strategies in the 2007 SWP. Dallas-Fort Worth plans on 1.6 million acre-feet of newly available surface water to meet demand.

In 2007, enactment of SB 3 established a program to protect environmental flows. The law created a multi-layered process leading to the Texas Commission on Environmental Quality's (TCEQ) adoption of Environmental Flow Standards for instream flows (rivers) and freshwater inflows (bays and estuaries).

SB 3 stipulated a bottoms-up process with six layers: Bay/Basin Stakeholder Groups and Bay/Basin Science Teams for each river basin; Environmental Flow Advisory Group appointed by the Governor; a statewide Science Advisory Group; and finally, TCEQ adoption of Environmental Flow Standards in rule. By May 2011, TCEQ is to adopt flow standards for the first two Bay/Basin groups: Sabine and Neches Rivers/Sabine Lake Bay Stakeholder Committee and the Trinity and San Jacinto Rivers/Galveston Bay Stakeholders.

Widely different scientific approaches and policy objectives trouble the prospect of consensus in the first two Bay/Basin groups. Some models involve greater volumes for environmental flows than anticipated in the State Water Plans and existing law.

For example, a key strategy for the DFW region involves a transfer of 600,000 acre-feet of water from Toledo Bend Reservoir on the Sabine River. The Science Team in the Sabine Bay/Basin group recommends environmental flow requirements which would decrease water available for this transfer, undermining this source of new supply for DFW. Science Team reports prompt federal authorities to interfere with Texas water decisions.

The SB 3 process for protection of environmental flows now competes with the SB 1 process to provide water for human demand. Environmental flows and human needs can both be met but should be legally integrated within the same process. In a state with widely varying rainfall and thus flows in our rivers, streams, and estuaries, environmental flows should be estimated to protect critical flows under drought conditions.

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THE FACTS

- ★ Texas surface water resources: 191,000 river miles running through 23 river basins, 9 major and 20 minor aquifers, 7 major and 4 minor bay and estuaries, and 2,125 miles of shoreline along the Gulf of Mexico.
- ★ Most of the state's existing surface water supply is stored in reservoirs.
- ★ Surface water strategies in the SWP expect to provide 4.4 million acre-feet of new water, and 49 percent of needed new supply.
- ★ Under drought conditions in 2060, 85 percent of the projected Texas population in 2060 will be short of water.

RECOMMENDATIONS

- ★ Legally integrate the Regional Water Planning process with the now separate Bay/Basin Environmental Flow process. Assert the priority of human need for water.
- ★ Establish policy objectives for environmental flow regimes to protect critical flows during drought and minimum standards for scientific rigor.

- ★ Clarify the “Four Corners Provision” (TWC 11.122(b)) that a water right amendment for only a change or addition of use is not subject to an administrative hearing.
- ★ Simplify the requirements for indirect re-use of water in TWC 11.042 and 11.046.
- ★ Articulate policy reinforcing the value of water marketing for efficient and timely implementation of water supply strategies in the SWP.

RESOURCES

Rights to Use Surface Water in Texas, Texas Commission on Environmental Quality, GI-228.

Science Advisory Committee Report on Water for Environmental Flows, prepared for Study Commission on Water for Environmental Flows (Oct. 26, 2004).

Water for Texas 2007, Volumes I, II, III, Texas Water Development Board (Jan. 2007) <http://www.twdb.state.tx.us>. ★

