



Texas Public Policy Foundation

# Center for Energy & the Environment

## Texas Legislature's *83rd Session* in Review

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The first thing to note about energy and environmental policy in the 83rd Texas Legislature is what didn't happen. Far fewer environmental regulatory bills were filed this session than in the previous two sessions. The majority of the few environmental bills that were filed died in committee. In the 81st session, at least 120 bills were filed to increase environmental regulation, 15 of which involved global warming. This session had less than 20 bills filed that would have increased regulatory authority at the Texas Commission on Environmental Quality, and none involved climate change. Legislators remain more concerned with EPA's aggressive agenda that could impact the historical upsurge in oil and gas production.



On the other hand, while environmentalists were unable to increase the regulatory burden on the Texas economy, efforts to reform current environmental regulations, to impose systemic checks on agency action, or to streamline the permitting process were similarly stymied. Legislation, long

championed by TPPE, to require economic impact analysis of all proposed environmental rules, did not pass. By requiring a straightforward estimate of cost and of anticipated environmental results, the bill would throw light on regulations with high cost but with low to immeasurable benefit. Properly used, this form of regulatory impact analysis is a basic tool to preserve limited government. The bill passed the Senate but failed in the House Committee.

### Water

Continued growth in water demand and current drought conditions led to renewed legislative efforts to address Texas' long term water needs, albeit through a rather convoluted route. The Legislature first passed HB 4, which created a new state water infrastructure bank, known as SWIFT (for State Water Infrastructure Fund of Texas) that would make loans to support water projects. While there was widespread support among legislators for the creation of the SWIFT, the issue of how to fund it proved more controversial. HB 11, which would have transferred \$2 billion from the state's Economic Stabilization Fund to the SWIFT, was defeated through procedural tactics and a lack of support. Particularly controversial was the fact that passage of HB 11 would have required a vote to exceed the state's constitutional spending cap.

To avoid these difficulties, the Legislature passed SJR 1, which proposes to recreate the SWIFT as a constitutionally dedicated fund in a November referendum. The Legislature then included a \$2 billion EST transfer to the SWIFT in a supplemental appropriations bill, which was made contingent on the passage of SJR 1.

While officially about the creation of the SWIFT, SJR 1 is really about the Legislature side-stepping the spending limit issue. Because of the passage of HB 4, the SWIFT will be created regardless of the outcome of the SJR 1 election. Passing SJR 1, however, will allow \$2 billion to be transferred from the ESF without a need for the Legislature to vote to break the constitutional spending limit.

### Endangered Species

The Legislature also enacted HB 3509, but the Governor thankfully vetoed the bill. This bill created a centralized state authority to respond to federal endangered species issues by means of federal Candidate Conservation Plans (CCP) before listing and Habitat Conservation Plans (HCP) after listing. In short, a CCP is a voluntary but enforceable federal regulation! A rider to the budget provided an appropriation of \$5 million for the Habitat Protection and Conservation Fund created by the bill.

The possible listing of the Dune Sagebrush lizard under the Endangered Species Act threatened to impede the state's ongoing oil and gas boom. While the Dune Sagebrush lizard was ultimately not listed, there are currently more than 100 candidate species in the queue for possible, but not necessarily inevitable listing.

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Disparate perspectives on how and whether the state should respond to potential listing of the lizard in the Permian Basin, apparently, was the source of this legislation. Yet the vehicle the state had chosen in this bill was fundamentally flawed. The state task force set up by HB 3509 to deal with potential endangered species listings would have given great authority to career biologists at the Texas Parks and Wildlife Department (TPWD). And while the bill allowed state agencies other than TPWD to hold federally enforceable plans, TPWD would inevitably end up dominating the process due to its superior technical knowledge and staff resources. Giving TPWD authority to develop and enforce federal regulations for endangered species would have fundamentally transformed this state agency.

While late amendments significantly narrowed TPWD's formal role, the bill still assumed accommodation to federal action on endangered species as the only and least painful option. This approach is an unfortunate departure from the "Texas Model" of protecting private property rights and state sovereignty while legally challenging federal encroachment.

### Greenhouse Gases

A regrettable necessity, passage of HB 788 gives TCEQ the state authority to issue the greenhouse gas (ghg) component of federal air permits for large industrial facilities. In 2009, the EPA declared ghg to be a regulated pollutant under the

Clean Air Act, and began the process of requiring states to permit ghg emissions. When the Texas Commission on Environmental Quality (TCEQ) refused to do so (arguing that they lacked the necessary statutory authority), EPA partially revoked their State Implementation Plan, and began its own ghg permitting. Texas challenged EPA's actions in court, but as the case drags on the uncertainty and burden of a dual permitting system has created substantial road blocks for Texas industry. Over 70 air permits necessary for major economic growth projects connected to the oil and gas boom have indefinitely stalled inside EPA.

To resolve this impasse, HB 788 granted TCEQ additional, limited authority to issue ghg permits. TCEQ's ghg new authority will immediately terminate if Congress or courts over rule EPA's unjustified arrogation of ghg authority under the Clean Air Act. While not an ideal solution, the bill was necessary to prevent EPA from inflicting incalculable damage on the Texas economy industry while the current legal challenges are being resolved.

In July, the DC Court of Appeals unfortunately upheld EPA's authority to force Texas to regulate greenhouse gases in air permits for large industrial sources. Texas and other states have asked the U.S. Supreme Court to review the other rules through which EPA asserted authority over carbon dioxide. ★

