

# **Briefing Memo on Water Quantity Issues in the 81<sup>st</sup> Texas Legislature**

## **Background**

Water issues – primarily related to water quantity and supply rather than water quality issues – were major issues in the 2007 regular session of the Texas Legislature. A major water bill – Senate Bill 3 – was enacted, an outgrowth of a number of interim studies and interest group negotiations in 2003-2006. Related bills (HB 3 & HB 4) incorporated parts of SB 3. SB 3 was a landmark in many ways; the new law, among other provisions:

- established a process for determining and eventually guaranteeing necessary water flows in rivers and streams to protect fish and wildlife and freshwater inflows for healthy coastal bays and estuaries;
- created a new state Water Conservation Advisory Council, expanded water conservation planning requirements to more retail water suppliers, and made other changes in state water law to encourage and facilitate water conservation;
- designated a number of areas as “unique reservoir sites” for possible future construction of water reservoirs (a highly controversial part of the bill); and
- addressed several local or regional water issues (such as spring flows from the Edwards Aquifer in South Central Texas) through specific initiatives.

As a result of the passage of this major water legislation in 2007 and a sense that these new water initiatives need some time to be implemented, the 2009 regular session is not expected to see a strong focus on water quantity issues, although some important water supply issues are anticipated to be on the agenda for discussion, and perhaps action.

## **Water Quantity Issues Most Likely to be on the Agenda for the 2009 Session**

(1) Funding of Water Infrastructure Projects – One of the issues that will be discussed is what level of funding is needed to continue the state’s general financial assistance program for water infrastructure projects through the Texas Water Development Board (TWDB) and/or to finance projects identified as part of the 2007 state plan – and whether a new revenue source will be created to provide money for at least some of that funding. A special interim committee – the Joint Committee on State Water Funding – studied that issue during 2008 and is expected to release its report in late February.

During the course of the Joint Committee’s hearings and deliberations TWDB provided a list of five potential options for additional revenue for water program funding, as follows:

- sales tax on retail utility water and sewer service
- water conservation & development fee
- water rights fee
- tap fee on public water supply connections
- sales tax on bottled water

Each one of these options, however, generates some opposition from one or more interest groups (for example, many retail water suppliers object to the tap fee which they would probably be required to collect but which would generate money only for the state, not the suppliers directly themselves).

The major environmental groups active on water at the Legislature (Lone Star Chapter of the Sierra Club, National Wildlife Federation, and Environmental Defense Fund) have taken the position that legislative decisions on water resources financing should be first guided by a clear set of fiscally- and environmentally-responsible principles, as follows:

- **Beneficiaries Pay** - Infrastructure or other projects that benefit one particular community or industry or local areas should be paid for by the direct beneficiaries of that project, wherever possible.
- **Need & “Least-Cost Analysis Required** – The Legislature should mandate, where state money is to be used, that funding applicants provide an analysis demonstrating a clear need for the project, a clear need for state funding, and proof that the project is the least-cost alternative for meeting that need.
- **Incentive to Conserve** – If the Legislature establishes a fee based on water use to generate revenue, that fee should be structured to promote water use efficiency.
- **Objectivity of Environmental Analyses** – If state funding is to be used to support environmental or other studies required for permitting a project, the state (rather than the project developer) should select the contractor for such studies.

The environmental community in general believes that the “need” for the number of water supply infrastructure projects in the state water plan is overstated, so major increases in funding for new infrastructure projects will be closely scrutinized.

(2) Water Conservation – TWDB has included in its legislative appropriations request to the Legislature for 2010-2011 an “exceptional item” (priority #5 in the agency’s list) for an additional \$6 million for water conservation activities for the biennium over and above the relatively modest amounts of money for conservation in the agency’s base budget. A big part of that request is to fund a statewide public awareness program on water that was created by SB 3 but not funded for 2008-2009. The state Water Conservation Advisory Council has recommended that the Legislature provide \$7.3 million for conservation in addition to the TWDB exceptional item. Funding major efforts on water conservation is considered critical by many groups because the state water plan projects that almost one-fourth of the future water demands in the state need to be met through water conservation. Environmental groups and others believe that even more water demands could be met through conservation beyond what the water plan projects.

(3) Groundwater Management – There may be legislation introduced again this session from different water interests to clarify the rights of landowners to water that might be pumped from underground (groundwater) sources. One legal opinion holds that the “right of capture” in Texas common law regarding groundwater means that a landowner has rights to groundwater only when he or she “captures” the water (pump it to the surface). A contrasting view is that a landowner has the right to the water underneath his or her land, regardless of whether or not it has been “captured.” This issue is currently in the state courts, so it is likely that the Legislature would not address this issue until the court process is completed, even if legislation is introduced.

Other legislation has been or will be introduced to address more regional water quantity issues (this includes, of course, legislation regarding water impacts of natural gas exploration and production in the Barnett Shale formation).