

The History of Senate Bill 3 (2007) – The Statute Establishing the Environmental Flows Standards Setting Process in Texas – Presented by Ken Kramer at the January 11, 2024 meeting of the Brazos Basin & Bay Area Stakeholder Committee

Background

The State of Texas has been issuing surface water rights since 1913 when the Texas Legislature created the State Board of Engineers and gave that agency the task of implementing a water rights appropriation system.

The Board of Engineers was succeeded by the Texas Water Rights Commission (as a separate agency or part of the Texas Department of Water Resources), Texas Water Commission, Texas Natural Resource Conservation Commission (TNRCC), and now Texas Commission on Environmental Quality (TCEQ)

Surface water rights may be issued for various “beneficial uses” including domestic & municipal, industrial, agriculture, mining and recovery of minerals, hydroelectric power, navigation, recreation and pleasure, public parks, game preserves, aquifer recharge, and “other beneficial purposes of use recognized by law” [see *Texas Water Code*, §11.1471(a)(2)]

In the 1960s, 1970s, and 1980s, there was a growing recognition of the value of instream flows in supporting fish & wildlife habitat and performing other functions such as water quality protection – and the importance of freshwater inflows in maintaining the productivity of the state’s bays and estuaries

However, prior to 1985, most of the volume of surface water allocated by water rights permits was done so without any requirements to maintain instream flows or freshwater inflows – and some river basins were considered fully appropriated (or even “over-appropriated, depending upon one’s perspective)

In **1985**, following years of discussion and failed legislation in 1983, the Texas Legislature enacted a “water package” ([HB 2](#)), which included requirements that, in deciding whether to grant a new water right or amend an existing one, the Commission had to “assess the effects, if any, on the issuance of the permit or amendment” on bays & estuaries, existing instream uses, fish & wildlife habitat, and water quality (among other factors) – also, for permits within 200 river miles of the coast, the Commission was directed to “include in the permit, to the extent

practicable when considering public interests, those conditions necessary to maintain beneficial inflows to any effected bay and estuary system.” These 1985 requirements applied only to new permits or amendments to existing permits but did not affect existing permits not seeking amendment.

In general, in the absence of specific conditions on a water rights permit, a permittee has the right to use all water allocated to them without returning any water to a stream for flows. In addition, any permit issued from 1985 on with environmental flow conditions was “junior” to all “senior” water rights issued in prior years. Junior rights are subject to reduction or suspension in times of drought in order that “seniors” be able to exercise their rights.

Over the next several years there was growing concern from environmentalists and others that the 1985 requirements – or other options considered, such as the Texas Water Trust established by SB 1 in 1997 – were insufficient to provide maintenance of instream flows and freshwater inflows necessary for good fish & wildlife habitat or bay & estuary productivity.

This concern stemmed in part from an increasing body of scientific studies by and recommendations from Texas Parks & Wildlife Department, Water Development Board, academic institutions, and others regarding the links between flows and aquatic habitat & coastal fisheries. The concern was enhanced by low flow conditions in certain streams during dry years that impacted aquatic species.

A Bold Move and the Reaction

In **2000**, a nonprofit organization called the San Marcos River Foundation (SMRF) brought the environmental flows issue back to the forefront of Texas water policy and politics. [SMRF applied for a surface water right for virtually all the unallocated water in the Guadalupe River Basin – 1.15 million acre-feet per year – for the purpose of maintaining instream flows and freshwater inflows.](#) Although the Commission had received and issued some permits to maintain flows in a river or creek, those permits were for very small amounts, like a few hundred acre-feet. The scale of this permit application made it instantly controversial.

The SMRF application was vigorously opposed by the Guadalupe-Blanco River Authority and other potential applicants for Guadalupe Basin water for traditional

consumptive uses. In addition, the application was opposed by others concerned about the precedent the permit would set – other river authorities and the Texas Water Conservation Association (TWCA), which represents many water suppliers and aligned engineering firms, among other members. Environmental groups and Texas Parks & Wildlife Department supported the application.

The major argument over the SMRF application was whether the Commission had the power to grant such a permit for this type of use. There was also the political question of whether the Commission, even if it felt it clearly had the authority to do so, would be able to ignore the powerful opposition to the SMRF proposal.

As might be expected, the matter wound up as a topic of state legislative debate in the **2003** legislative session before the process for reviewing and considering the proposed SMRF permit was completed. Sen. Ken Armbrister, chairman of the Senate Natural Resources Committee, introduced SB 1374. As filed, [SB 1374](#) put a temporary moratorium on granting a water right for instream uses. The bill also created a Study Commission on Water Rights for Instream Uses to examine the issue of protecting instream uses through the water rights permitting process, with directive that the Study Commission complete a report with its findings and recommendations before the beginning of the 2005 state legislative session.

To make a very long legislative story short, toward the end of the 2003 session, a House-Senate conference committee added revised language from SB 1374 onto a different water bill – SB 1639, which was enacted. The final version of [SB 1639](#) established a Study Commission on Water for Environmental Flows (composed of 15 members – including House & Senate members, water suppliers, resource protection organization representatives, and leaders of relevant state agencies). The Study Commission was tasked with holding public hearings, appointing a scientific advisory committee, and reporting back to the Legislature before the next session.

HOWEVER, due to the insistence of then Lt. Governor David Dewhurst), **SB 1639 did not just place a temporary moratorium on the issuance of water rights permits for instream uses. SB 1639 prohibited TCEQ from issuing “a new permit for instream uses dedicated to environmental needs or bay and estuary inflows.”** The new statute did say that TCEQ was not prohibited from issuing an amendment to an existing permit or certificate of adjudication to change the use

to or add a use for instream flows dedicated to environmental needs or bay and estuary inflows.” In sum, TCEQ could not issue a new permit for environmental flows but could amend an existing one for such purposes.

Inertia, Then Progress

The Study Commission struggled to move forward with a plan for addressing the environmental flow issue. One Study Commission member – Andy Sansom (former Executive Director of Parks & Wildlife) – on his own initiative assembled an informal group of environmental and water supply interests to hammer out a proposal. In addition to Sansom, members of the informal group were Joe Beal of the Lower Colorado River Authority (LCRA), Dean Robbins (TWCA), water rights attorney Mike Booth, Mary Kelly (Environmental Defense Fund), Myron Hess (National Wildlife Federation, and Ken Kramer (Sierra Club). **The group negotiated a compromise agreement for enhancing protection of flows that became – with some tweaks – the environmental flows standard setting process under which the Brazos BBASC and other such stakeholder committees operate.**

The Study Commission took the approach recommended by the informal group and made it the Study Commission’s recommendation to the Legislature in its December 2004 [report](#). For various reasons, however, a bill to incorporate these recommendations – [SB 3](#) – was not introduced until April of the **2005** regular legislative session. Although the bill passed the Senate, it was late in the session, and the House did not have time to conclude all its deliberations and pass the legislation before the end of the session.

After the session, Governor Rick Perry appointed an Environmental Flows Advisory Committee, which revisited the issue and released a [report](#) in December 2006. The Committee essentially endorsed the recommended environmental flows standards process proposed by SB 3 in the 2005 legislative session.

In **2007**, Sen. Kip Averitt introduced an omnibus water bill, also designated SB 3, that included the recommended environmental flows approach. Rep. Robert Puente filed a related bill (HB 3) in the House. After a somewhat convoluted legislative route and last-minute drama, both [SB 3](#) and [HB 3](#) (with the same provisions on environmental flows) were enacted, establishing the state’s environmental flows standard setting process.