

AN ACT

1-1 relating to the development and management of the water resources  
1-2 of the state; providing penalties.

1-3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

1-4 ARTICLE 1. WATER PLANNING: DROUGHT, CONSERVATION,  
1-5 DEVELOPMENT, AND MANAGEMENT

SECTION 2.06. Section 11.042, Water Code, is amended to read  
as follows:

27-20  
27-21 Sec. 11.042. DELIVERING WATER DOWN BANKS AND BEDS.

27-22 (a) Under rules prescribed by the commission, a person,  
27-23 association of persons, corporation, [e~~r~~] water control and  
27-24 improvement district, water improvement district, or irrigation  
27-25 district supplying stored or conserved water under contract as  
28-1 provided in this chapter may use the bank and bed of any flowing  
28-2 natural stream in the state to convey the water from the place of  
28-3 storage to the place of use or to the diversion point [plant] of  
28-4 the appropriator. [The commission shall prescribe rules for this  
28-5 purpose.]

28-6 (b) A person who wishes to discharge and then subsequently  
28-7 divert and reuse the person's existing return flows derived from  
28-8 privately owned groundwater must obtain prior authorization from  
28-9 the commission for the diversion and the reuse of these return  
28-10 flows. The authorization may allow for the diversion and reuse by  
28-11 the discharger of existing return flows, less carriage losses, and  
28-12 shall be subject to special conditions if necessary to protect an  
28-13 existing water right that was granted based on the use or  
28-14 availability of these return flows. Special conditions may also be  
28-15 provided to help maintain instream uses and freshwater inflows to  
28-16 bays and estuaries. A person wishing to divert and reuse future  
28-17 increases of return flows derived from privately owned groundwater  
28-18 must obtain authorization to reuse increases in return flows before  
28-19 the increase.

28-20 (c) Except as otherwise provided in Subsection (a) of this  
28-21 section, a person who wishes to convey and subsequently divert  
28-22 water in a watercourse or stream must obtain the prior approval of  
28-23 the commission through a bed and banks authorization. The  
28-24 authorization shall allow to be diverted only the amount of water  
28-25 put into a watercourse or stream, less carriage losses and subject  
29-1 to any special conditions that may address the impact of the  
29-2 discharge, conveyance, and diversion on existing permits, certified  
29-3 filings, or certificates of adjudication, instream uses, and  
29-4 freshwater inflows to bays and estuaries. Water discharged into a  
29-5 watercourse or stream under this chapter shall not cause a  
29-6 degradation of water quality to the extent that the stream  
29-7 segment's classification would be lowered. Authorizations under  
29-8 this section and water quality authorizations may be approved in a  
29-9 consolidated permit proceeding.

29-10 (d) Nothing in this section shall be construed to affect an  
29-11 existing project for which water rights and reuse authorizations  
29-12 have been granted by the commission before September 1, 1997.

HOUSE  
RESEARCH  
ORGANIZATION bill analysis

5/21/97

SB 1  
Brown, et al. (R. Lewis)  
(CSSB 1 by R. Lewis)

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**SUBJECT:** Water resources development and management

**COMMITTEE:** Natural Resources — committee substitute recommended

**VOTE:** 7 ayes — Counts, Walker, Cook, Culberson, R. Lewis, Moffat, Puente

0 nays

2 absent — Corte, King

**SENATE VOTE:** On final passage, April 3 — 31-0

**WITNESSES:** For — Mary Miksa, Texas Association of Business and Chambers of Commerce; Bill Powers, Texas Farm Bureau; Ed Small, Texas and Southwestern Cattleraisers Association; Wade Stansell, Association of Electric Companies of Texas; Ken Kramer, Sierra Club; Gary Bushell, Corpus Christi and Greater Corpus Christi Business Alliance; Michael Thuss, San Antonio Water System; Frederick Perrenot, Houston; Michael White, Greater Houston Partnership; Cathy Golden, Greater Dallas Chamber; C.E. Williams, Texas Alliance of Groundwater Districts; Tommy Duck, Texas Rural Water Association; Janet Hamilton, Champion International Corporation; Michael Booth, Tarrant Regional Water District; Stanford Lynch, Dallas County Utility and Reclamation District; Jim Oliver, Tarrant Regional Water District; Lee Arrington, South Plains Underground Water Conservation District; John Grant, Colorado River Municipal Water District; Richard Bowers, North Plains Ground Water Conservation District Number 2; Hector Gutierrez, El Paso Utilities Public Service Board; Ronald Kaiser

Against — Terrace Stewart, City of Dallas; Bill Clayton, Uvalde Underground Water Conservation District; Dennis Clark

On — Monte Akers, Texas Municipal League; Cyrus Reed, Texas Center for Policy Studies; Tom Goynes, Texas Rivers Protection Association; Ken Bull, McCulloch County Property Owners Association; Bennett Raley; Rodney Smith

CSSB 1 at least should require the TNRCC to weigh the projected impacts of a transfer on existing water rights in the basin of origin. Those rights should be considered as if they were being fully exercised, rather than by reference to historical use only. Some entities have made a point of purchasing additional water rights to meet future needs, and those rights need to be protected even if the water has not yet been used.

Interbasin transfers may adversely affect economic development in the basin of origin or adjoining basins in ways state regulators would never have foreseen. The receiving basin should be required not only to implement extensive conservation measures to avoid waste of water but also to plan for a new source of supply to replace the transferred water by the end of the transfer period.

**Water use and reuse.** CSSB 1 would establish procedures for the TNRCC to use in considering proposed uses of water.

- **Surplus water** — In granting an application for a water right, the commission could include conditions providing for that surplus water to be returned to a waterway and at a specific point on a watercourse. CSSB 1 would define “surplus water” as water in excess of the initial or continued beneficial use of the appropriator. Unless specifically provided otherwise, a water right holder could directly use and reuse water any number of times prior to releasing it. Once the water was returned to a water course or stream, however, it would be considered surplus water and be subject to reservation for instream uses, beneficial inflows, or appropriation by others unless the permit expressly provided otherwise.
- **Indirect groundwater reuse** — Entities using privately owned groundwater would have to obtain prior authorization before diverting and reusing existing return flows. TNRCC authorization could allow for carriage losses — loss of a certain amount of water during its transport down a stream — and could specify special conditions to protect existing water rights or maintain instream flows or freshwater inflows to bays and estuaries.

- **Indirect surface water reuse** — A bed and banks permit would be required to convey and subsequently divert water from a state watercourse. The TNRCC would take carriage losses into account, and the permit would be subject to any conditions that would address the effects that the diversion could have on existing permits, instream uses, and freshwater inflows to bays and estuaries. The agency also would have to ensure that water quality was not degraded to the point that it would have to reclassify that segment of the stream and disallow certain uses of the water. These bed and banks provisions would not affect an existing project with water rights and reuse permits granted prior to September 1, 1997.
- **Emergency authorizations** — The TNRCC would be authorized to grant an emergency permit for a retail or wholesale water supplier to use water if there was an imminent threat to the public health and safety and no practicable alternatives. An emergency authorization could be granted only for a temporary transfer of all or part of a permit, filing or certificate of adjudication for other than domestic and municipal use, and would be good for an initial period of not more than 120 days, up from the current 30 days. The action could be renewed once for not longer than 60 days. Emergency authorizations could be granted without prior notice or hearing, but TNRCC would have to hold a hearing within 20 days to affirm, modify, or set aside an emergency permit issued without notice or hearing. The entity granted an emergency authorization would be liable for the fair market value of the water transferred as well as any damages caused by the transfer. Disagreements about the amount due could be resolved through TNRCC dispute resolution or administrative procedures or through civil suit in district court.
- **Multi-use permits** — The TNRCC could authorize appropriation of a single amount of water for multiple purposes, so long as the permit contained a special condition limiting the total amount of water that could be diverted for all purposes to the amount of water appropriated.

**Supporters say:** CSSB 1 would establish clear guidance for the TNRCC in permitting decisions involving a variety of water uses. The recent drought highlighted inadequacies of current policy and law in these areas.

For example, although reuse has been around for many years and several reuse projects are in place or have been proposed in the state, only recently have cities begun to seriously consider indirect reuse as a way to increase their water supply. Downstream water rights holders are worried that water will not reach them if it is subject to reuse by upstream rights. CSSB 1 would provide protection for both downstream users and the environment while also permitting the TNRCC to authorize appropriate reuse projects. Establishing a statewide policy concerning reuse would allow cities and other entities to make their plans without fear that downstream users would litigate out of concern that their water rights would be affected.

Emergency transfer authorization is needed so the TNRCC can respond to water shortages threatening public health and safety. The need for these types of transfers became glaringly apparent during the recent drought.

Allowing TNRCC to authorize appropriation of a single amount of water for multiple uses would give major water suppliers flexibility to meet new and changing regional water needs without being subject to lengthy permit amendment proceedings.

**Opponents say:** CSSB 1 would improperly impinge on the privileges of water rights holders. These entities should have the first right to any water they have returned to a watercourse or stream — this water should not be considered “surplus” and subject to other appropriation. Many water rights holders have incurred large costs to develop water resources and should have priority to reuse their water. Those who have developed water supplies on their own through dams and reservoirs, for example, clearly have a vested interest in beneficially using or reusing their water.

Emergency authorizations should not be allowed before notice and hearing to allow water rights holders the opportunity to present information on how urgently needed that water may be in the future. The TNRCC should be required to forward an application for an emergency permit to the water right holder from whom water would be transferred to allow time for planning.

Major manufacturers that depend on large supplies of water could be damaged if emergency transfers were allowed without notice or hearing.

For these entities, a steady source of water may be critical to operations and continued viability of their facilities. Instead of allowing large amounts of water to be transferred from one non-municipal user, the bill should provide that emergency needs could be met by transferring smaller amounts from several users. The liability for damages due to a transfer described by the bill could also have the unhappy effect of pitting large non-municipal users against small municipal users.

Authorizing appropriation of a single amount of water for multiple uses could lead to abuses by water speculators. These parties could use the multiple-use permit to apply for water they did not really need and it would be hard for TNRCC to detect this under a multi-use permit. This could leave water unavailable to those who might have a genuine need for it. Pumping permits should keep specifying a single use for water and how much of that water is needed. State regulators would still be able to judge whether or not there was really a need for that water and whether it was being beneficially used.

**Other opponents say:** Indirect reuse projects should not be allowed at all, either from effluent derived from privately owned groundwater or from surface water returned to a state watercourse. There is simply too much potential harm from reuse projects to those who hold downstream rights. Furthermore, some water “reuse” projects actually may be water purification projects, since it is an established fact that running effluent through a watercourse helps remove impurities. State streambeds should not be used to clean water for entities that can — and should — pay for those cleanup costs themselves.

**Water rights.** CSSB 1 would amend various provisions dealing with water rights, including:

- **The Wagstaff Act** — The bill would repeal the Wagstaff Act, which specifies that any city or town can preempt without payment appropriations of state waters other than from the Rio Grande made after May 17, 1931, for any uses other than domestic and municipal use.