

Will Water Rights Be on the Legislature's Agenda?

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by Kate Galbraith
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Next legislative session, during the few minutes not taken up with the budget, redistricting and immigration, an old stand-by of an issue could creep onto the agenda: water.

Observers say legislative proposals on groundwater rights are probable, given that Texas is just wrapping up a controversial process for planning the allocation of water from aquifers, while environmentalists will be pushing more measures for water conservation. The discussions will be amplified because the Texas Water Development Board, which finances water and wastewater infrastructure projects around the state, is up for review by the Sunset Advisory Commission, as is the Texas Commission on Environmental Quality, which regulates water pollution.

Water "should be an important issue in this next session," says Russell Johnson, a water law expert with the McGinnis, Lochridge & Kilgore law firm who has done work for the Texas and Southwestern Cattle Raisers Association and the Texas Wildlife Association on groundwater-related matters. However, he adds, "whether it will be or not in light of all the other things that are happening this legislative session is an open question."

Last session, one of few notable water-related bills to pass was a conservation bill carried by state Rep. Allan Ritter, D-Nederland, that tightened water-efficiency requirements for toilets sold in Texas, as well as for faucets or shower heads. (The only other state to enact similar requirements for toilets is California.)

The biggest water issue before the Legislature is likely to be balancing the long-term health of Texas' aquifers with property rights. The state has just completed an intensive planning process, established by the Legislature in 2005, in which local authorities decide how much they will allow their aquifers to be depleted in 50 years (the resultant numbers are called the "desired future conditions" of the aquifers). The Texas Water Development Board is processing these aquifer-depletion numbers and will soon send back to local authorities calculations on how much water per year they can draw down, given their 50-year outlooks.

But some groups are unhappy about the planning process and may well urge legislation amending it. In particular, water marketers — entities seeking to gather groundwater rights and sell water in bulk to thirsty municipalities — say their property rights have been abridged, because their potential use of the aquifers was not taken into account in the 50-year plans.

Existing legislation "does not provide for a dispute resolution process," says Joel Katz, a manager of End-Op, a water-marketing firm that wants to sell water to the fast-growing Interstate 35 and Highway 130 corridors. End-Op is currently battling the Lost Pines groundwater conservation district around Bastrop for the right to do so. (Johnson also represents End-Op's interests.)

The Sunset Advisory Commission's report on the Water Development Board, released this month, seems to agree that a remedy is needed. As it stands, the groundwater planning process "does not provide for a complete administrative process that ensures the basic elements of due process," the report states. Currently, Katz says, the only option for filing an objection is the relatively mild step of complaining to the Water Development Board, which can then ask local authorities to reconsider their plans.

Legislation on other aspects of the groundwater-planning process could also be forthcoming. A group called the Texas Water Conservation Association has been working to bring together a range of water interests — cities, river authorities, industry consultants — to reach consensus on desired improvements to the groundwater management process. Several areas of agreement have been reached, according to Dean Robbins, the group's assistant general manager — including, for example, how information about the process gets published.

The Sunset Commission staff report also calls for better coordination among various authorities involved in the groundwater-planning process. And other possible groundwater-related legislation hinges on the long-awaited outcome of *Edwards Aquifer Authority v. Day*, currently pending at the Texas Supreme Court, which will weigh the balance between landowners' rights to water beneath their land and the authority of groundwater authorities to regulate it.

Besides groundwater planning, conservationists will also be putting forward proposals next session. Among them: remedying municipal water-conservation reporting requirements, which currently do not adhere to a common standard, thus making it hard for the state to judge the success of conservation efforts. State Sen. Florence Shapiro, R-Plano, has already filed a bill on the subject, and the Sunset report recommends making this change.

Another bill would require most water utilities to audit their water losses (from leaky pipelines or other glitches) each year, as opposed to the current requirement of every five years. A bill to do this was pushed last session by state Rep. Tara Rios-Ybarra, D-Padre Island. But it "got lost in muddle," says Carole Baker, the Texas-based chairwoman of the national Alliance for Water Efficiency (Rios-Ybarra was beaten in the March primary). Legislation to encourage rainwater harvesting was also introduced last session by Rep. Doug Miller, R-New Braunfels, and defeated state Rep. Patrick Rose, D-Dripping Springs; rainwater's backers could try again.

Then there is Sunset. Unlike other agencies subject to Sunset review, the Texas Water Development Board will not be automatically abolished if Sunset legislation is not passed. But the Sunset process will increase scrutiny of the agency, which, as the report notes, is "not accustomed to being square in the eye of controversy" but is currently in the crossfire of concerns about its groundwater-planning process.

The Water Development Board also badly needs something else from the Legislature to keep it going: up to \$6 billion in bond-issuance authority, money that will go toward projects like fixing sewer systems or keeping tap water safe, as well as assisting small rural water utilities. The board generally has to request the money (not its only source of funding, but its largest) every few years, and current bond money "may be exhausted as soon as the end of fiscal year 2011,"

according to the Sunset report. Any bonding authority must also be approved by voters and will presumably be on the ballot next November.

But getting bonding authority approval is "going to be semi-controversial," says Ken Kramer, the Texas director of the Sierra Club. The reason is that, unlike past bond issues, the Water Development Board is requesting up to \$6 billion in permanent, or "evergreen" authority — meaning that, unlike in the past, it will not need to keep going back to the voters unless truly vast sums are needed. "That is something that many of us have a problem with because it takes away one layer of accountability," Kramer says. The environmental community, he says, is "probably going to be in opposition to the evergreen provision."

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