

SUBJECT: Creating 17 groundwater districts with limited authority

COMMITTEE: Natural Resources — committee substitute recommended

VOTE: 7 ayes — Counts, T. King, Cook, Hamric, R. Lewis, Puente, Walker
1 nay — Shields
1 absent — Corte

SENATE VOTE: On final passage, May 17 — 30-0

WITNESSES: No public hearing

DIGEST: CSSB 1911 would create 17 groundwater conservation districts with limited powers. These districts would not have the authority to hold elections, issue bonds, impose taxes, exercise the right of eminent domain or annexation, develop comprehensive long-term management plans, or prohibit the transfer of water out of a district. Confirmation elections for the districts could not be held unless the 77th Legislature decided to ratify their creation. If the districts were not ratified, they would be dissolved September 1, 2001.

The boundaries of most of the districts would follow county boundaries. These districts are:

- ! Bergesland Groundwater Conservation District in Kendall County;
- ! Blanco-Pedernales Groundwater Conservation District in Blanco County;
- ! Brazos Valley Groundwater Conservation District in Robertson and Brazos counties;
- ! Crossroads Groundwater Conservation District in Victoria County;
- ! Lavaca Groundwater Conservation District in Lavaca County;
- ! Lone Wolf Groundwater Conservation District in Mitchell County;
- ! Lost Pines Groundwater Conservation District in Bastrop and Lee counties, but if the voters of only one county confirmed the creation of the district, the boundaries would coincide with only that county;
- ! McMullen Groundwater Conservation District in McMullen County;
- ! Middle Pecos Groundwater Conservation District in Pecos County;
- ! Refugio Groundwater Conservation District in Refugio County;

- ! Texana Groundwater Conservation District in Jackson County;
- ! Trans-Pecos Groundwater Conservation District in Loving and Reeves counties; and
- ! Tri-County Groundwater Conservation District in Foard, Hardeman, and Wilbarger counties.

Four of the districts would have boundaries that would not follow county lines exactly:

- ! Hays Trinity Groundwater Conservation District in Hays County, which would exclude any of the county within the Barton Springs-Edwards Aquifer Conservation District or the Edwards Aquifer Authority;
- ! Red Sands Groundwater Conservation District near and partly within Hidalgo County;
- ! Southeast Trinity Groundwater Conservation District in the part of Comal County located within the Hill Country Priority Groundwater Management Area; and
- ! Trinity Glen Rose Groundwater Conservation District near and partly within Bexar County.

The 17 districts created by CSSB 1911 would be created pursuant to the Texas Constitution, Art. 16, sec. 59, and the temporary directors of the districts would have the same permitting and general management powers as those granted to directors of groundwater conservation districts under Water Code, chapter 36, including the authority to impose user fees to pay for the operation of the district. The districts would *not* have authority to:

- ! hold confirmation elections, elections including propositions for bond and tax proposals, or general elections for district directors;
- ! exercise eminent domain powers;
- ! develop comprehensive district management plans in conjunction with surface water entities;
- ! issue bonds and notes and hold elections for bonds secured by taxes;
- ! assess or collect taxes; or
- ! add territory to a district through annexation or consolidation.

The temporary directors could regulate but not prohibit the transfer of groundwater out of the district. The directors or their designees could enter any public or private property within the district to inspect a water well.

Districts could not adopt comprehensive water plans required by Water Code, sec. 36.1071. These plans are required to ensure the consistency of districts' long-term management plans with the regional planning process and with the statewide water plan authorized by SB 1 by Bivins, the omnibus water bill enacted by the 75th Legislature in 1997.

A district created by CSSB 1911 could be modified by subsequent acts of the Legislature. The modification could be in response to the recommendations of an interim study or committee, including the possibility of merging the district with other districts for the purposes of the efficient and effective management of a common groundwater resource.

Appointment of temporary directors. The commissioners court of a county containing territory within one of these districts would have to appoint temporary directors in accordance with Water Code, sec. 36.016, governing the appointment of temporary directors by county commissioners courts.

For districts composed of more than one county, each county commissioners court would have to appoint an equal number of temporary directors, but the total number of members could be no fewer than five nor more than 11. The current statutory provision that the commissioners court cannot make any more appointments after 90 days would not apply to the appointment of temporary directors for districts created by CSSB 1911.

Elections on September 1, 2001. No earlier than September 1, 2001, the temporary directors would have to call an election to confirm the district and elect the initial directors. A confirmation election could not be held, however, unless the 77th Legislature had taken action to ratify creation of the districts. If a district were not ratified in this manner, it would be dissolved September 1, 2001. The districts also could not hold an election for the imposition of a tax before September 1, 2001.

To qualify as a candidate for initial director, a person would have to be a resident of the district. Initial directors would have to draw lots to determine their terms, and half or a majority of them would have to serve four-year terms, and the others, two-year terms. Elections would be held every two years thereafter.

This bill would take effect September 1, 1999.

SUPPORTERS
SAY:

CSSB 1911 would create 17 groundwater districts that would work to conserve and protect the state's groundwater resources. SB 1 by Brown et al., the omnibus water bill enacted by the 75th Legislature, expressly provided that groundwater conservation districts are the preferred method of managing groundwater in Texas.

Groundwater in many areas of the state is being depleted faster than it can be recharged. It is important for all areas of the state to create districts to exert some control over the management of groundwater resources.

Creating 17 new groundwater conservation districts would be a step in the right direction. Although these districts could not exercise the full powers of chapter 36 districts and would have to be ratified by the 77th Legislature, the temporary directors of the districts could impose fees, begin to make plans on how to protect the groundwater resources of the region, educate the public concerning the district, and undertake studies of area water use.

A single-county district may not track the boundaries of an aquifer, but single-county districts can work with each other and, if they adopt the same kind of pumping limits, well-spacing guidelines, and other regulations, they can work together to protect water in their area. Local residents know best about local issues and water usage and what they have to do to preserve, protect, and conserve their own water supplies. Texans will not accept a statewide water plan or groundwater regulations unless they feel they have had significant input into the process.

While the state claims regulatory authority over surface water, historically it neither has claimed ownership nor regulated withdrawal of groundwater. The state has ceded the "right of capture" to landowners, who can tap any groundwater they collect from their property with few restrictions, so long as the water is used beneficially and not wasted. Courts generally have upheld the right of capture, even when pumping affects the wells of neighboring landowners or diminishes spring flows and related surface streams.

Groundwater districts, however, can use their regulatory authority to specify how wells are spaced, for example, in order to slow water withdrawals. Three districts have a strong legislative mandate to regulate groundwater withdrawal: the Harris-Galveston Coastal Subsidence District, the Fort Bend Subsidence District, and the Edwards Aquifer Authority. The state has been

creating groundwater districts since the 1950s, many of them single-county districts, and these districts have worked very hard, sometimes in concert with other districts, to develop similar management practices for the aquifers or other groundwater sources that lie beneath them.

On May 6, 1999, the Texas Supreme Court affirmed an appeals court ruling in a case pitting Ozarka Spring Water, a bottled water company, against people who lived near Ozarka's wells, who claimed that the company was depleting their wells. In *Bart Sipriano, et al. v. Great Spring Waters of America, Inc. a/k/a Ozarka*, No. 98-0247, the court upheld the rule of capture. Justice Craig Enoch voiced the opinion that it would be wise to wait and see the effect of SB 1 before trying to determine if the common-law framework should be changed and the rule of capture abandoned.

Since SB 1 designated groundwater districts as the preferred manner for managing groundwater in the state, it would be wise for the state to create additional districts to avoid water-use regulation in the future by judicial fiat. Justice Enoch said, "It is more prudent to wait and see if Senate Bill 1 will have its desired effect, and to save for another day the determination of whether further revising the common law is an appropriate prerequisite to preserve Texas' natural resources and protect property owners' interests." Justice Nathan Hecht concurred, adding, "I agree with the Court that it would be inappropriate to disrupt the processes created and encouraged by the 1997 legislation before they have had a chance to work. I concur in the view that, for now — but I think only for now — *East* should not be overruled." *Houston & Texas Central Railway Co. v. East* is the 1904 case in which the court adopted the common-law rule of capture.

These opinions should serve as a clear warning to the state that if districts are not created to protect groundwater resources, the courts could refuse to uphold the rule of capture in the future.

It is essential that districts have the power to regulate the transport of water outside their boundaries. If they do not have this power, they cannot manage the district's groundwater resources effectively. Because of the rule of capture, a water bottling company could buy land in a district and, with multiple wells, could take so much water out of the local aquifer as to harm the other users in the district. CSSB 1911 would give a district at least some ability to regulate this transport.

OPPONENTS
SAY:

CSSB 1911 would create 17 groundwater conservation districts based on political rather than hydrological boundaries. This would make it difficult for these districts to conserve and protect the groundwater sources they were supposed to manage. Creation of these districts also could impede the regional planning process proposed by SB 1.

Although SB 1 provided that groundwater conservation districts were the preferred method of managing groundwater in Texas, the primary goal of the bill was to come up with a statewide plan that would benefit all Texans, while taking into account local needs. Single-county groundwater districts do not lend themselves to the regional planning laid out in SB 1, and the process will falter if additional restrictions are placed on the management of Texas' water supplies.

The creation of these new groundwater districts should be delayed until the Legislature has had an opportunity to review new data that the Texas Water Development Board (TWDB) is gathering on groundwater availability models for Texas aquifers. The data gathered from these studies will help both local and state officials make decisions based on science when planning and managing water resources. In the 1904 *East* decision, the Supreme Court noted that the movement of groundwater was "so secret, occult and concealed" that it was essentially ungovernable. Today, state water planners know much more about aquifers, and the TWDB data will add knowledge on the subject. Regional planning groups also must be given more time to assess and determine the water needs of each separate region.

In the meantime, the Legislature needs to study groundwater during the interim and make recommendations to the 77th Legislature on all aspects of groundwater resources in the state, including the creation of groundwater conservation districts.

Only 44 groundwater conservation districts have been created in Texas over the past 50 years. These 44 districts cover only 26 percent of the state and include all or part of 84 counties. While some of these districts have done a good job at protecting water, many make no attempt to regulate the amount of water being withdrawn. Most of the districts are burdened by exemptions from permitting under Water Code, sec. 36.117, which exempt wells incapable of producing more than 25,000 gallons per day, domestic wells, livestock wells, and other activities permitted by the Texas Railroad

Commission. Other districts were created for political reasons and have done little to preserve groundwater resources. Indeed, five of the districts created since 1989 remain unconfirmed.

CSSB 1911 proposes to create 17 more districts, most of them single-county districts like those the Legislature has created for years. Yet county boundaries have nothing to do with aquifers, watersheds, or the geological configuration of groundwater resources. Even if one district actively uses its regulatory authority to specify how wells are spaced and constructed, for example, if a neighboring district over the same aquifer or a hydrologically connected aquifer allows free rein to landowners, groundwater cannot be managed effectively. For this reason, it would behoove the state to study all these issues and come up with a plan for creating districts that would have the authority and the geographic scope to protect, conserve, and preserve groundwater resources.

OTHER
OPPONENTS
SAY:

The bill should be amended to allow the newly created groundwater districts to hold immediate confirmation elections and exercise the normal power of chapter 36 districts. CSSB 1911 would create “shadow” districts run by appointed, rather than elected, boards that could do little but collect fees from users and wait until 2001, hoping that the 77th Legislature would ratify their creation.

The bill should be amended to allow a groundwater district to prohibit, rather than merely regulate, the transfer of water outside of the district. Groundwater districts cannot predict or control water usage or craft meaningful water management plans if some wells are allowed to go unregulated or if an unknown amount of water can be exported outside the district’s boundaries. Unless a district has the power to regulate how much someone can transport outside of the district, it cannot manage its groundwater resources effectively.

The bill should be amended to delete language allowing districts to regulate the transport of water outside a district if that water is from a well owned by a city and used for municipal purposes. Cities bought these wells to ensure that they could ensure a reliable supply of water for their residents. A reliable supply might not be available if cities no longer could access their own water due to pumping limits or other water district regulations. Cities use the water for municipal needs, and in order to protect public health and safety, they need to be guaranteed access to the water they own.

NOTES:

The committee substitute differs from the Senate version of the bill in several ways. CSSB 1911 added the provision that would allow temporary directors to regulate, but not prohibit, the transfer of groundwater out of the district and the provision that the statutory 90-day limit for the appointment of temporary directors would not apply to the districts created under this bill. The substitute also deleted a section that would have allowed temporary directors to impose certain fees on well owners in the district.

The Senate version of SB 1911 would have created 22 rather than 19 districts. The districts not included in the committee substitute are Brewster Groundwater Conservation District in Brewster County, Coastal Plains Groundwater Conservation District in Matagorda County, and Presidio Groundwater Conservation District in Presidio County.