



Armstrong Center for Energy and the Environment: Review of the 82nd Session of the Texas Legislature

By Kathleen Hartnett White, Distinguished Fellow-in-Residence and
Director, Armstrong Center for Energy and the Environment

OVERVIEW

- ★ Last November's elections, budgetary constraints, and EPA overreach led to an 82nd legislative session significantly different than the 81st session in bills related to energy and the environment. Texas voters sent 28 new representatives to the Capitol, almost all of whose campaigns championed limiting the size and scope of government. The budgetary challenges of the recent session also dampened, if not precluded, bills to expand regulatory programs. EPA's assault on Texas industries and state agencies evoked multiple resolutions and bills to protect existing state authority rather than bills to increase regulatory authority.
- ★ Numbers tell a striking contrast between the 81st and 82nd legislative sessions. In the 81st session, over 120 bills were devoted to strengthening state environmental standards and regulation beyond federal requirements. At least 15 bills were filed to mandate greenhouse gas reduction, "carbon footprint" reduction, and climate adaptation. In the 82nd session, only one bill to require climate adaptation plans was filed and went nowhere. Only 42 bills related to environmental protection were filed and only seven of these bills passed. Furthermore, most of the environmental bills that *did* pass aim to limit existing regulatory authority. The 28 new members in the House provided a critical mass to stall problematic bills passed by the Senate. The will of Texas' voters matters!

OWNERSHIP OF GROUNDWATER

- ★ A victory for private property rights! Although the road to passage was rocky, the Legislature, indeed, passed SB 332 by wide margins in both chambers. The bill does not create new groundwater law but is a critical clarification and re-affirmation under existing law that "a landowner *owns the groundwater* below the surface of the

landowner's land *as real property*." SB 332 is the outcome of an effort sustained over the last two years to create a broad coalition of the majority of all Texas landowners in support of landowners' groundwater rights. Texas and Southwestern Cattle Raisers' Association, the Texas Farm Bureau, and the Texas Wildlife Association led this coalition. Hundreds of members of these organizations testified until 2:30 a.m. at the hearings on SB 332.

- ★ For more than a century, Texas courts have recognized that ownership of the surface extends to what is in and below the land—including oil, gas, sand, gravel, stone, and groundwater. SB 332 was needed to reaffirm the landowner's ownership of the groundwater "in place" only because of the rapid growth in regulation by local districts, new state laws on aquifer management, and influential voices claiming that landowners never owned the groundwater under Texas law. These critics confused the legal "rule of capture" with a landowner's vested ownership of groundwater. The "rule of capture" does not define the groundwater right but describes the method by which a landowner can exercise his real property right. Under the 1917 Conservation Amendment to the Texas Constitution and subsequent law, groundwater may be regulated. As a landowner's real private property right, however, the right is protected by the Texas and U.S. Constitutions from regulation that goes too far. With passage of SB 332, the Texas Legislature made a historic choice for private property rights instead of unlimited government control.

AIR QUALITY: PERMITTING AUTHORITY FOR OIL AND GAS PRODUCTION SITES

- ★ In January 2011, TCEQ adopted a 1,000 page rule to impose stringent and complex new permitting requirements for all oil and gas production sites. The regulation was based on computer modeling of worst case scenarios of air

emissions. At the last hour, TCEQ limited initial applicability to sites in the Barnett Shale area but with plans to include the entire state in 2012. SB 1134 is a major constraint on what new regulation TCEQ can impose on Oil and Gas Production Sites (OGS) and may lead to revisions of the rule already adopted for the Barnett Shale area. SB 1134 requires TCEQ to use “credible air quality monitoring data”—physical measurement of emissions by monitors located to reflect average conditions to which the public would be exposed. The bill prohibits TCEQ from using worst-case emission scenarios in modeling simulations to justify regulation. TCEQ has consistently determined that “monitored” air emissions from OGS in the Barnett Shale area and elsewhere in Texas do not have short-term or long-term health effects. Passage of SB 1134 establishes an important, realistic foundation for OGS permitting which should be extended to all air quality permits.

ENERGY: THE TEXAS ENERGY POLICY ACT

- ★ Texas avoided state government’s centralized planning of our still entrepreneurial, highly productive energy sector when the House refused to move SB 15, the Texas Energy Policy Act, after swift passage by the Senate. SB 15 would have created an Energy Policy Council within the Public Utility Commission composed of legislators, agency officials, and academics, but *no* representatives from energy industries. The Council would have formulated a plan for “the development, production, delivery, commercialization, distribution, and utilization of energy.” The envisioned plan would focus on environmental impact, air pollution reduction, energy efficiency, and identification of the “10 percent of electric generation capacity most impacted [aka dirtiest] by environmental regulation.”
- ★ Senate Bill 15 was apparently inspired by legislation passed in Colorado intended to increase demand for natural gas by forcing closure of coal-fired power plants. SB 15’s veiled but obvious intent to favor one energy source is major interruption of the market dynamics of the Texas energy sector. Historically, centrally planned energy policies have led to higher energy prices, jeopardizing the energy-intensive industries that have made Texas the leading energy and manufacturing state, as well as the engine of U.S. job creation.

GOVERNANCE: REGULATORY IMPACT

- ★ Conservative governance must incorporate limits on the regulatory authority of executive agencies and must measure the actual results of regulation. To this end, HB 125 would have required TCEQ to conduct a cost-effectiveness analysis of all proposed rules. Unlike EPA and many states, Texas has never clearly required an assessment of the economic impact of environmental rules. Provisions in the General Government Code (Section 2001.0225) require a similar analysis of environmental rules defined as major. TCEQ, however, has conducted this analysis on only one rule in the 14 years since the provisions were enacted. HB 125 sailed through the House by a large, bipartisan majority. After many delays in the Senate, HB 125 was sent to the Senate floor but after the deadline for consideration. The Foundation will continue efforts to make regulators disclose the economic impacts of their proposed rules and to measure the real-world effects of the rules that agencies keep churning out.

RESISTANCE TO FEDERAL OVERREACH

More than previous sessions of memory, the 82nd session featured many resolutions and bills to assert state authority against federal encroachment. Here are some of the measures:

- ★ HCR 66, urging the U.S. Congress to prevent EPA’s regulation of greenhouse gases, passed the House but was never scheduled for a Senate floor vote.
- ★ HCR 61 and HCR 78 expressed opposition to federal interference with state waters.
- ★ HR 1955 urged the U.S. Fish and Wildlife Service to withdraw its proposal to list the Dunes Sagebrush Lizard as an endangered species.
- ★ HB 3188 would have prohibited the state to implement any federal program to regulate greenhouse gases. The House amended the bill to a Senate bill, but it was stripped by a conference committee.

