



Red Tape Stalls Water Projects

Testimony before the Senate Agriculture, Water, and Rural Affairs Committee on SB 225

by Kathleen Hartnett White

Chairman Perry, Vice Chairman Rodriguez, and Members of the Agriculture, Water, and Rural Affairs Committee:

My name is Kathleen Hartnett White. I am the distinguished senior fellow and director of the Armstrong Center for Energy and the Environment at the Texas Public Policy Foundation, former chairman of the Texas Commission on Environmental Quality (TCEQ), former officer of the Lower Colorado River Authority, and former director of the Texas Water Development Board.

It is a privilege to testify before this Committee on matters surrounding water rights—issues that occupied my close attention throughout my tenure as chairman of the TCEQ. Specifically, I am here to testify in favor of Senator Taylor’s SB 225 and SB 226. I think these bills create a thoughtful and needed legal framework to expedite issuance of simple water right amendments without increasing impacts on other water right holders or on the environment.

The experience of the city of Marshall is worth recalling. When I was chairman of TCEQ, perhaps the most exasperating and longest review of a water right amendment involved the city of Marshall. The city sought TCEQ approval of an amendment to add industrial use to an original water right for municipal use. The amendment would not increase the volume of water, the point of diversion, or the rate of diversion. Marshall sought only to sell the same water for industrial use. This slight change would allow Marshall to avoid the considerable cost of treating water for municipal use and then selling for industrial use.

Many lawyers supposed Marshall’s application was for a minor water right amendment that would be simply issued under the now infamous provision of the Texas Water Code known as the “four corners” provision—without a contested case hearing (Texas Water Code Section 11.122b). This was hardly the outcome! Marshall’s application arrived at TCEQ in 2001. The Texas Supreme Court made a ruling on this application in June of 2006. Then, TCEQ spent a couple of years trying to understand how to apply the Court’s ruling. Ultimately, the city of Marshall withdrew its application.

In the early years following the landmark water bill still known as SB 1, water right amendments for a change or addition of beneficial use were considered to be a simple but essential mechanism for water development. It is now twenty years since 1997 that the Texas Legislature adopted SB 1, the first of the state’s four major water bills over the last two decades. In the original SB 1, the Legislature made clear that it envisioned that “voluntary redistribution of [existing] water resources” would provide the bulk of the water supply necessary to meet future demand.¹

As an example of such a “redistribution,” a holder of a water right for irrigation use might want to transfer—as in sell—his irrigation right to a municipality. The value of this voluntary transfer would depend upon TCEQ’s approval of a water right amendment for change in use. To expedite such transfers, SB 1 had included the “four corners” provision intended to simplify approval of water right amendments for change of use by avoiding referral to the State Office of Administrative Hearing (SOAH) for a contested case hearing. Regrettably, the four corners provision—as applied—has not streamlined issuance of water right amendments.

¹ SB 1 established the current regional water planning process overseen by the Texas Water Development Board. SB 2 focused on groundwater issues particularly on Local Groundwater Districts. SB 3 created a process for establishing standards for protection of environmental flows. HB 4 established funding mechanisms for water projects.

SB 225 offers a thoughtful set of conditions for fast-track review of simple water right amendments. Provisions to maintain the commission's legal authority over the scope of contested case hearings at SOAH are important. SOAH is a fact-finder—not a policy maker. If disputed mixtures of fact and law arise, SOAH should send to the commission certified questions of law.

SB 226 would exempt three types of minor water right amendments from full TCEQ review to include notice, technical review, and potentially contested case hearings at SOAH. These factors go a long way in articulating sound legal criteria for fast-track review of select water right amendments as well as whether amendments would have greater adverse impacts on other water right holders or the environment.

The length of time it can take for processing government authorizations of all stripes is a growing problem at the state, federal, and local levels. At the federal level, the review required under the National Environmental Policy Act (NEPA) can add three-six years delay before final approvals. Evidently, it took 25 years of permitting process to gather all the local, state, and federal approvals necessary to build a new La Guardia airport.

Texas may have more efficient permitting procedures than federal and most state authorities, but we also have cumbersome “red tape”—regrettably demonstrated by Marshall's fate. Many small and large water projects to increase water availability depend upon timely authorizations. Shortening the permitting process for straightforward water right amendments need not diminish the rigor of environmental and legal reviews.

Over the last two decades, Texas has developed sophisticated plans and strategies and identified projects to expand the existing water supply. Yet, due to unrealistic expectations and unexpected consequences, very few projects have been initiated or completed.

While the overall water planning process in Texas has received praise from across the country, the overwhelming majority of water management strategies in the State Water Plan (SWP) remain to be executed. Only 14 percent of the over 3,000 water supply strategies in the 2012 SWP have reported any progress over the last five years. They remain simply strategies on paper.

Current provisions of the Texas Water Code can add formidable time and costs that discourage or preclude even simple water development. Uncertainty about approval of simple water right amendments are one of several regulatory barriers to needed water development.

I applaud the committee's focus on these issues. ★

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