

## **BILL ANALYSIS**

C.S.H.B. 40  
By: Puente  
Natural Resources  
Committee Report (Substituted)

### **BACKGROUND AND PURPOSE**

C.S.H.B. 40 advances strategies to ensure adequate environmental flows and water infrastructure financing. C.S.H.B. 40 also authorizes state water that is set aside by the Texas Commission on Environmental Quality (TCEQ) to meet instream needs, as well as freshwater inflows to affected bays and estuaries. This legislation creates the Environmental Flows Commission (flows commission), in place of the Study Commission on Water for Environmental Flows (study commission) and changes the composition of the flows commission. The flows commission will evaluate options for providing adequate environmental flows, taking notice of the strong public policy imperative that exists in this state recognizing that environmental flows are important to the biological health of our public and private lands, streams and rivers, and bay and estuary systems.

### **RULEMAKING AUTHORITY**

Rulemaking authority previously granted to the Study Commission on Water for Environmental Flows is transferred to the Environmental Flows Commission in SECTION 7 of this bill. Rulemaking authority is expressly granted to the Environmental Flows Commission in SECTION 8 of this bill.

Rulemaking authority is expressly granted to the Texas Commission on Environmental Quality in SECTION 18 of this bill.

### **ANALYSIS**

SECTION 1. Amends the heading to Section 5.506, Water Code, to read as follows:

Sec. 5.506. EMERGENCY SUSPENSION OF PERMIT CONDITION RELATING TO, AND EMERGENCY AUTHORITY TO MAKE AVAILABLE WATER SET ASIDE FOR, BENEFICIAL INFLOWS TO AFFECTED BAYS AND ESTUARIES AND INSTREAM USES.

SECTION 2. Amends Section 5.506, Water Code, by adding Subsection (a-1) and amending Subsections (b) and (c), as follows:

(a-1) Authorizes state water that is set aside by the Texas Commission on Environmental Quality (TCEQ) to meet the needs for freshwater inflows to affected bays, estuaries, and instream uses under Section 11.1471(a)(2) to be made available temporarily for other essential beneficial uses if TCEQ finds that an emergency exists that cannot practically be resolved in another way.

(b) Requires TCEQ to give written notice of the proposed action, rather than suspension, to the Texas Parks and Wildlife Department (TPWD) before TCEQ suspends a permit condition under Subsection (a) or makes water available temporarily under Subsection (a-1). Requires TCEQ to give TPWD an opportunity to submit comments on the proposed action, rather than suspension, for a period of 72 hours from receipt of the notice and requires TCEQ to consider those comments before issuing an order implementing the proposed action, rather than imposing suspension.

(c) Authorizes TCEQ to suspend a permit condition under Subsection (a) or make water available temporarily under Subsection (a-1) without notice except as required by Subsection (b).

SECTION 3. Amends Section 5.701(j), Water Code, to provide that a fee is not required for a water right that is deposited into the Texas Water Trust.

SECTION 4. Amends Section 11.002, Water Code, by adding Subdivisions (15), (16), (17), (18), and (19) to define "environmental flow analysis," "environmental flow regime," "environmental flow standards," "flows commission," and "science advisory committee."

SECTION 5. Amends Section 11.023(a), Water Code, to authorize state water to be appropriated, stored, or diverted for specific uses, to the extent that state water has not been set aside by TCEQ under Section 11.1471(a)(2) to meet downstream instream flow needs or freshwater inflow needs.

SECTION 6. Amends Section 11.0235, Water Code, by amending Subsections (c) and (e) and adding Subsections (d-1), (d-2), (d-3), (d-4), (d-5), and (f), as follows:

(c) Provides that the legislature has expressly required TCEQ, while balancing all other public interests to consider and, to the extent practicable, provide for the freshwater inflows and instream flows necessary to maintain the viability of the state's streams, rivers, bay, and estuary systems in TCEQ's regular granting of permits for the use of state waters. Requires all permit conditions relating to freshwater inflows to affected bays, estuaries, and instream flow needs, as an essential part of the state's environmental flows policy, to be subject to temporary suspension if necessary for water to be applied to essential beneficial uses during emergencies.

(d-1) Requires the state to have a process with specific timelines for prompt action to address environmental flow issues in the state's major basin and bay systems, especially those systems in which unappropriated water is still available, based on legislative findings that provide certainty in water management and development and provide adequate protection of the state's streams, rivers, bays, and estuaries.

(d-2) Sets forth legislative findings regarding basins in which water is available for appropriation and those in which unappropriated water is not available.

(d-3) Sets forth legislative findings regarding limitations on tools available to meet freshwater inflow needs for bays and estuaries, proposed state improvements, and the need for more extensive reviews and examinations of program details.

(d-4) Sets forth legislative findings regarding the management of water to meet instream flow and freshwater inflow needs, to be evaluated on a regular basis and adapted to reflect scientific improvements and future changes, and the development of management strategies for specific environmental flow needs.

(d-5) Sets forth legislative findings regarding recommendations for state action to protect instream flows and freshwater inflows through a regional consensus-based approach involving balanced representation throughout the state.

(e) Provides that pressures and demands on water resources require priorities to be effectively addressed by detailing the manner in which environmental flow standards are to be developed using the environmental studies and determine the manner in which those standards will be integrated into the regional water planning and water permitting process.

(f) Sets forth legislative acknowledgement of the need for effective implementation of the approach provided by this chapter in order to protect instream flows and freshwater inflows, thus requiring more effective water rights administration and enforcement systems than currently available.

SECTION 7. (a) Makes application of this section contingent upon this Act taking effect immediately.

(b) Amends the heading to Section 11.0236, Water Code, to read as follows:

Sec. 11.0236. ENVIRONMENTAL FLOWS COMMISSION.

(c) Amends Section 11.0236, Water Code, by amending Subsections (a)-(c), (e)-(j), (n), and (o), and adding Subsection (p), as follows:

(a) Sets forth the creation of the Environmental Flows Commission (flows commission), in place of the Study Commission on Water for Environmental Flows (study commission).

(b) Sets forth members of the flows commission. Deletes existing text requiring additional members serving on the study commission.

(c) Sets forth requirements for members appointed to positions under Subsection (b)(1). Deletes existing text regarding additional requirements for membership.

(e) Provides that each member of the flows commission serves at the will of the person who appointed the member.

(f) through (i) Makes conforming changes.

(j) Requires the flows commission, in evaluating the options for providing adequate environmental flows, to take notice of the strong public policy imperative that exists in this state recognizing that environmental flows are important to the biological health of our public and private lands, streams and rivers, and bay and estuary systems and are high priorities in the water management process. Requires the flows commission to specifically address ways that the ecological soundness of those systems will be ensured in the water administration, enforcement, and allocation process and appropriate methods to encourage persons voluntarily to convert reasonable amounts of existing water rights to use for environmental flow protection, temporarily or permanently. Makes conforming and nonsubstantive changes.

(n) Authorizes the flows commission to adopt rules, procedures, and policies as needed to administer this section, to implement its responsibilities, and to exercise its authority under Sections 11.02361 and 11.02362.

(o) Provides that Chapter 2110 (State Agency Advisory Committees), Government Code, does not apply to the size, composition, or duration of the flows commission.

(p) Requires the flows commission to issue and promptly deliver to specific government officials, not later than December 1, 2006, and every two years thereafter, copies of a report summarizing specific hearings, proposed legislation, progress made in the implementation of Sections 11.02361 and 11.02362, and any other findings and recommendations of the flows commission. Deletes existing text abolishing the study commission and providing for the expiration of this section.

SECTION 8. (a) Makes application of this section contingent upon this Act not taking effect immediately.

(b) Amends Subchapter B, Chapter 11, Water code, by adding Section 11.0236, as follows:

Sec. 11.0236. ENVIRONMENTAL FLOWS COMMISSION. (a) Creates the Environmental Flows Commission (flows commission).

(b) - (f) Sets forth terms, composition, and appointment procedures for members of the flows commission.

(g) Provides that a member of the flows commission is not entitled to receive compensation for service on the flows commission but is entitled to reimbursement of the travel expenses incurred by the member while conducting the business of the flows commission, as provided by the General Appropriations Act.

(h) Provides that the flows commission may accept gifts and grants.

(i) Requires TCEQ to provide staff support for the flows commission.

(j) Requires the flows commission to conduct public hearings and study public policy implications for balancing the demands on the water resources of the state resulting from a growing population with the requirements of the riverine, bay and estuary systems including granting permits for instream flows dedicated to environmental needs or bay and estuary inflows, use of the Texas Water Trust, and any other issues that the flows commission determines have importance and relevance to the protection of environmental flows. Requires the flows commission, in evaluating the options for providing adequate environmental flows, to take notice of the strong public policy imperative that exists in this state recognizing that environmental flows are important to the biological health of our public and private lands, streams and rivers, and bay and estuary systems and are high priorities in the water management process. Requires the flows commission to specifically address certain issues.

(n) Authorizes the flows commission to adopt rules, procedures, and policies as needed to administer this section, to implement its responsibilities, and to exercise its authority under Sections 11.02361 and 11.02362.

(o) Provides that Chapter 2110 (State Agency Advisory Committee), Government Code, does not apply to the size, composition, or duration of the flows commission.

(p) Requires the flows commission to issue and promptly deliver to specific government officials, not later than December 1, 2006, and every two years thereafter, copies of a report summarizing specific hearings, proposed legislation, certain studies, progress made in the implementation of Sections 11.02361 and 11.02362, and any other findings and recommendations of the flows commission.

SECTION 9. Amends Subchapter B, Chapter 11, Water Code, by adding Sections 11.02361 and 11.02362, as follows:

Sec. 11.02361. TEXAS ENVIRONMENTAL FLOWS SCIENCE ADVISORY COMMITTEE. (a) Provides that the Texas Environmental Flows Science Advisory Committee (science advisory committee) consists of at least five but not more than nine members appointed by the flows commission.

(b) Requires the flows commission to appoint persons who will provide an objective perspective and diverse technical experience in specific fields pertinent to the evaluation of environmental flows to the science advisory committee.

(c) Provides that members of the science advisory committee serve five-year terms expiring March 1. Provides that a vacancy on the science advisory committee is filled by appointment by the co-presiding officers of the flows commission for the unexpired term.

(d) Provides that Chapter 2110, Government Code, does not apply to the size, composition, or duration of the science advisory committee.

(e) Requires the science advisory committee to serve as an independent scientific body to advise and make recommendations to the flows commission on issues relating to the science of environmental flow protection and develop recommendations to help provide overall direction, coordination, and consistency relating to specific issues concerning environmental flows.

(f) Requires TCEQ, TPWD, and the Texas Water Development Board (TWDB), to assist the flows commission in assessing the extent to which the recommendations of the science advisory committee are considered and implemented, to provide written reports to the flows commission, at intervals determined by the flows commission, that describe the actions taken by each agency in response to each recommendation, each recommendation not implemented, and reasons for it not being implemented.

Sec. 11.02362. DEVELOPMENT OF ENVIRONMENTAL FLOW REGIME RECOMMENDATIONS. (a) Requires the flows commission, no later than January 1, 2006, and for the purposes of this section, to define the geographical extent of each river basin and bay system in the state for the purpose of developing environmental flow regime recommendations under this section and adoption of environmental flow standards under Section 11.1471.

(b) Requires the flows commission to give priority in descending order to the following river basin and bay systems of the state for the purpose of developing environmental flow regime recommendations and adopting environmental flow standards:

(1) the river basin and bay system consisting of the Trinity and San Jacinto Rivers and Galveston Bay and the river basin and bay system consisting of the Sabine and Neches Rivers and Sabine Lake Bay;

(2) the river basin and bay system consisting of the Colorado and Lavaca Rivers and Matagorda and Lavaca Bays and the river basin and bay system consisting of the Guadalupe, San Antonio, and Aransas Rivers, and Copano, Aransas, and San Antonio Bays; and

(3) the river basin and bay system consisting of the Nueces River and Corpus Christi and Baffin Bays, the river basin and bay system consisting of the Rio Grande, the Rio Grande estuary, the Lower Laguna Madre, and the Brazos River and its associated bay and estuary system.

(c) Requires that for the river basin and bay systems listed in Subsection (b)(1):

(1) the flows commission appoint the basin and bay area stakeholders committee not later than January 1, 2006;

(2) the basin and bay area stakeholders committee establish a basin and bay expert science team not later than March 1, 2006;

(3) the basin and bay expert science team finalize environmental flow regime recommendations and submit them to the basin and bay area stakeholders committee, the flows commission, and TCEQ not later than March 1, 2007;

(4) the basin and bay area stakeholders committee submit to TCEQ its comments on and recommendations regarding the basin and bay expert science team's recommended environmental flow regime not later than September 1, 2007; and

(5) TCEQ adopt the environmental flow standards as provided by Section 11.1471 not later than September 1, 2008.

(d) Requires the flows commission to appoint the basin and bay area stakeholders committees for the river basin and bay systems listed in Subsection (b)(2), no later than September 1, 2006, and those river basin and bay systems listed in Subsection (b)(3) no later than September 1, 2007. Requires the flows commission to establish a schedule for the performance of the tasks listed in Subsection (c)(2)-(5) with regard to the river basin and bay systems listed in Subsection (b)(2) and (3) that will result in the adoption of environmental flow standards for that river basin and bay system by TCEQ, as soon as is reasonably possible. Requires each basin and bay area stakeholders committee and basin and bay expert science team for a river basin and bay system listed in Subsection (b)(2) or (3) to make recommendations to the flows commission with regard to the schedule applicable to that river basin and bay system. Requires the flows commission to consider the recommendations of the basin and bay area stakeholders committee and basin and bay expert science team, as well as coordinate with, and give appropriate consideration to the recommendations of, TCEQ, TPWD, and the TWDB in establishing the schedule.

(e) Requires the flows commission, for a river basin and bay system or a river basin that does not have an associated bay system in this state not listed in Subsection (b), to establish a schedule for the development of environmental flow regime recommendations and the adoption of environmental flow standards. Requires the flows commission to develop the schedule in consultation with TCEQ, TPWD, TWDB, and the pertinent basin and bay area stakeholders committee and basin and bay expert science team. Authorizes the flows commission, on its own initiative or on request, to modify a schedule established under this subsection to be more responsive to particular circumstances, local desires, changing conditions, or time-sensitive conflicts. Provides that this subsection does not prohibit an effort to develop information on environmental flow needs and ways in which those needs can be met by a voluntary consensus-building process, in a river basin and bay system for which the flows commission has not yet established a schedule for the development of environmental flow regime recommendations.

(f) Requires the flows commission to appoint a basin and bay area stakeholders committee for each river basin and bay system in this state for which a schedule for the development of environmental flow regime recommendations and the adoption of environmental flow standards is specified by or established under Subsection (c), (d), or (e). Provides that Chapter 2110, Government Code, does not apply to the size, composition, or duration of a basin and bay area stakeholders committee. Requires each committee to consist of at least 17 specific members representing appropriate enumerated stakeholders.

(g) Provides that members of a basin and bay area stakeholders committee serve five-year terms expiring March 1. Requires the remaining members of the committee, if a vacancy occurs on a committee, to appoint a member to serve the remainder of the unexpired term by majority vote.

(h) Requires meetings of the basin and bay area stakeholders committee to be open to the public.

(i) Requires each basin and bay area stakeholders committee to establish a basin and bay expert science team for the river basin and bay system for which the committee is established. Requires establishment of the basin and bay expert science team within six months of committee establishment. Provides that Chapter 2110, Government Code, does not apply to the size, composition, or duration of a basin and bay expert science team. Requires each basin and bay expert science team to be composed of technical experts with special expertise in the river basin and bay system or regarding the development of environmental flow regimes. Authorizes a person to serve as a member of more than one basin and bay expert science team at the same time.

(j) Provides that the members of the basin and bay expert science team serve five-year terms expiring April 1. Provides that a vacancy on a basin and bay expert science team is filled by appointment by the pertinent basin and bay area stakeholders committee to serve the remainder of the unexpired term.

(k) Requires the science advisory committee to appoint one of its members to serve as a liaison to each basin and bay expert science team to facilitate coordination and consistency in environmental flow activities throughout the state. Requires TCEQ, TPWD, and TWDB to provide technical assistance to each basin and bay expert science team including information about the studies conducted under Sections 16.058 (Collection of Bays and Estuaries Data: Conduct of Studies) and 16.059 (Collection of Instream Flow Data: Conduct of Studies), and authorizes them to serve as nonvoting members of the basin and bay expert science team to facilitate the development of environmental flow regime recommendations.

(l) Requires meetings of a basin and bay expert science team, where reasonably practicable, to be open to the public.

(m) Requires each basin and bay expert science team to develop environmental flow analyses and a recommended environmental flow regime for the river basin and bay system for which the team is established through a collaborative process designed to achieve a consensus. Requires the science team, in developing the analyses and recommendations, to consider all reasonably available science, without regard to the need for the water for other uses, and requires the recommendations to be based solely on the best science available. Requires any uses attributable to Mexican water flows, for the Rio Grande below Fort Quitman, to be excluded from environmental flow regime recommendations.

(n) Requires each basin and bay expert science team to submit its environmental flow analyses and environmental flow regime recommendations to the pertinent basin and bay area stakeholders committee, the flows commission, and TCEQ in accordance with the applicable schedule specified by or established under Subsection (c), (d), or (e). Prohibits the basin and bay area stakeholders committee and flows committee from changing the environmental flow analyses or environmental flow regime recommendations of the basin and bay expert science team.

(o) Requires each basin and bay area stakeholders committee to review the environmental flow analyses and environmental flow regime recommendations submitted by the committee's basin and bay expert science team and consider them in conjunction with other factors, including the present and future needs for water for other uses related to water supply planning in the pertinent river basin and bay system. Requires the basin and bay area stakeholders committee, for the Rio Grande, to also consider the water accounting requirements for any international water sharing treaty, minutes, and agreement applicable to the Rio Grande and the effects on allocation of water by the Rio Grande watermaster in the middle and lower Rio Grande. Prohibits the Rio Grande basin and bay expert science team from recommending any environmental flow regime that would result in a violation of a treaty or court decision. Requires the basin and bay area stakeholders committee to develop recommendations regarding environmental flow standards and strategies to meet the environmental flow standards and submit those recommendations to TCEQ and to the flows commission in accordance with the applicable schedule specified or established under Subsection (c), (d), or (e). Requires the basin and bay area stakeholders, in developing its recommendations, to operate on a consensus basis to the maximum extent possible.

(p) Requires each basin and bay area stakeholder committee, with the assistance of the pertinent basin and bay expert science team, in recognition of the

importance of adaptive management, after submitting its recommendations regarding environmental flow standards and strategies to meet the environmental flow standards to TCEQ, to prepare and submit a work plan for approval by the flows commission. Sets forth content requirements for the work plan.

(q) Requires the flows commission, with input from the science advisory committee, in accordance with the applicable schedule specified or established under Subsection (c), (d), or (e), to review the environmental flow analyses and environmental flow regime recommendations submitted by each basin and bay expert science team. Requires the flows commission, if appropriate, to submit comments on the analyses and recommendations to TCEQ for use by TCEQ in adopting rules under Section 11.1471. Requires comments to be submitted not later than six months after the date of receipt of the recommendations.

(r) Authorizes an estuary advisory council, in the event TCEQ, by permit or order, has established said council, to continue in full force and effect.

SECTION 10. (a) Makes application of this section contingent upon this Act taking effect immediately.

(b) Amends Sections 11.0237(a) and (b), Water Code, to authorize TCEQ to approve an application to amend an existing permit or certificate of adjudication to change the use or to add a use for instream flows dedicated to environmental needs of bay and estuary flows. Provides that in addition to specific sections previously listed, this section does not alter TCEQ's obligations under Sections 11.042(b) or (c), 11.1471, 11.150, and 11.152.

SECTION 11. (a) Makes application of this section contingent upon this Act not taking effect immediately.

(b) Amends Subchapter B, Chapter 11, Water Code, by adding Section 11.0237, as follows:

Sec. 11.0237. WATER RIGHTS FOR INSTREAM FLOWS DEDICATED TO ENVIRONMENTAL NEEDS OR BAY AND ESTUARY INFLOWS. (a) Prohibits TCEQ from issuing a new permit for instream flows dedicated to environmental needs or bay and estuary inflows. Authorizes TCEQ to approve an application to amend an existing permit or certificate of adjudication to change the use to or add a use for instream flows dedicated to environmental needs or bay and estuary inflows.

(b) Provides that this section does not alter TCEQ's obligations under certain sections of the water code.

SECTION 12. Amends Section 11.082(b), Water Code, to authorize the state to seek those penalties [described in Subsection (a)] regardless of whether a watermaster has been appointed for the water division, river basin, or segment of a river basin where the unlawful use [of state water] is alleged to have occurred. Makes a nonsubstantive change.

SECTION 13. Amends Section 11.0841, Water Code, by adding Subsection (c), as follows:

(c) Provides that for purposes of this section, TPWD has:

(1) the rights of a holder of a water right that is held in the Texas Water Trust, including the right to file suit in a civil court to prevent the unlawful use of such a right; and

(2) the right to act in the same manner that a holder of a water right may act to protect the holder's rights in seeking to prevent any person from appropriating water in violation of a set-aside established by the commission under Section 11.1471 to meet instream flow needs or freshwater inflow needs; and



(3) the right to file suit in a civil court to prevent the unlawful use of a set-aside established under Section 11.1471.

SECTION 14. Amends Section 11.0842(a), Water Code, to authorize TCEQ to assess an administrative penalty for a violation relating to a water division or a river basin or segment of a river basin regardless of whether a watermaster has been appointed for the water division or river basin or segment of the river basin. Makes a nonsubstantive change.

SECTION 15. Amends Section 11.0843(a), Water Code, to authorize the executive director of TCEQ, or a person designated by the executive director, including a watermaster or the watermaster's deputy, upon witnessing a violation of this chapter, a rule, order, or a water right issued under this chapter, to issue the alleged violator a filed citation alleging that a violation has occurred and providing the alleged violator with specific options. Makes nonsubstantive changes.

SECTION 16. Amends Section 11.134(b), Water Code, to require TCEQ to grant the application only if the proposed appropriation considers any applicable environmental flow standards established under Section 11.1471. Makes a nonsubstantive change.

SECTION 17. Amends Section 11.147, Water Code, by amending Subsections (b), (d), and (e) and adding Subsections (e-1), (e-2), and (e-3), as follows:

(b) Requires TCEQ, for permits issued within an area that is 200 river miles of the coast, to commence from the mouth of the river thence inland, to include in the permit any conditions considered necessary to maintain freshwater inflows to any affected bay and estuary system, to the extent practicable when considering all public interests and the studies mandated by Section 16.058 as evaluated under Section 11.1491. Deletes existing text regarding conditions necessary to maintain beneficial inflows.

(d) Requires TCEQ, in determining what conditions to include in the permit under this subsection, to consider the studies mandated by Section 16.059 and any water quality assessment performed under Section 11.150.

(e) Requires TCEQ, in determining what conditions to include in the permit under this subsection, to consider any assessment performed under Section 11.152.

(e-1) Requires any permit for a new appropriation of water or an amendment to an existing water right that increases the amount of water authorized to be stored, taken, or diverted to include a provision allowing TCEQ to adjust the conditions included in the permit or water right to provide for protection of instream flows or freshwater inflows. Prohibits the provision, with respect to an amended water right, from allowing the commission to adjust a condition of amendment other than a condition that applies only to the increase in the amount of water to be stored, taken, or diverted authorized by the amendment. Provides that this subsection does not affect an appropriation of or an authorization to store, take or divert water under a permit or amendment to a water right issued before November 1, 2005. Requires TCEQ to adjust the conditions upon determining, through an expedited public comment process, that such an adjustment is appropriate to achieve compliance with applicable environmental flow standards adopted under Section 11.1471. Provides that the adjustment:

(1) in combination with any previous adjustments made under this subsection, is prohibited from increasing the amount of the pass-through or release requirement for the protection of instream flows or freshwater inflows by more than 12.5 percent of the annualized total of that requirement contained in the permit as issued or of that requirement contained in the amended water right and applicable only to the increase in the amount of water authorized to be stored, taken, or diverted under the amended water right.

(2) is required to be based on appropriate consideration of the priority dates and diversion locations of any other water rights grants in the same river basin that are subject to adjustment under this subsection; and

(3) is required to be based on appropriate consideration of any voluntary contributions to the Texas Water Trust that contribute toward meeting the environmental flows standards.

(e-2) Provides that any water right holder making a contribution described by Subsection (e-1)(3) is entitled to appropriate credit of such benefits against adjustment of the holder's water right pursuant to Subdivision Subsection (e-1)(1).

(e-3) Requires TCEQ, notwithstanding Subsections (b)-(e), for the purpose of determining the environmental flow conditions necessary to maintain freshwater inflows to an affected bay and estuary system, existing instream uses and water quality of a stream or river, or fish and aquatic wildlife habitats, to apply any applicable environmental flow standard, including environmental flow set-aside, adopted under Section 11.1471 instead of considering the factors specified by those subsections.

SECTION 18. Amends Subchapter D, Chapter 11, Water Code, by adding Section 11.1471, as follows:

Sec. 11.1471. ENVIRONMENTAL FLOW STANDARDS AND SET-ASIDES. (a) Requires TCEQ, by rule, to:

(1) adopt appropriate environmental flow standards for each river basin and bay system in this state that are adequate to support a sound ecological environment, to the maximum extent reasonable considering other public interests and other relevant factors;

(2) establish an amount of unappropriated water, if available, to be set aside to satisfy the environmental flow standards to the maximum extent reasonable when considering human water needs; and

(3) establish procedures for implementing an adjustment of the conditions included in a permit or an amended water right as provided by Section 11.147(e-1) and 11.147(e-2).

(b) Requires TCEQ, in adopting environmental flow standards for a river basin and bay system under Subsection (a)(1), to consider specific factors regarding the definition of the geographical extent of the river basin and bay system and the definition and designation of the river basin by the board, schedule for the adoption of environmental flow standards, the environmental flow analyses and the recommended environmental flow regime developed by the applicable basin and bay expert science team, recommendations and strategies of the applicable basin and bay area stakeholder committee, specific characteristics of the river basin and bay system, economic factors, the human and other competing water needs in the river basin and bay system, reasonably available scientific information, and any other appropriate information.

(c) Requires environmental flow standards adopted under Subsection (a)(1) to consist of a schedule of flow quantities, reflecting seasonal and yearly fluctuations that may vary geographically by specific location in a river basin and bay system.

(d) Prohibits TCEQ, as provided by Section 11.023, from issuing a permit for a new appropriation or an amendment to an existing water right that increases the amount of water authorized to be stored, taken, or diverted if the issuance of the permit or amendment would impair an environmental flow set-aside established under Subsection (a)(2). Requires a permit for a new appropriation or an amendment to an existing water right that increases the amount of water authorized to be stored, taken, or diverted that is issued after the adoption of an applicable environmental flow set-aside to contain appropriate conditions to ensure protection of the environmental flow set-aside.

(e) Requires an environmental flow set-aside established under Subsection (a)(2) for a river basin and bay system other than the middle and lower Rio Grande to be assigned a priority date corresponding to the date TCEQ receives environmental flow regime recommendations from the applicable basin and bay expert science team and be included in the appropriate water availability models in connection with an application for a permit for a new appropriation or for an amendment to an existing water right that increases the amount of water authorized to be stored, taken, or diverted.

(f) Authorizes an environmental flow standard or environmental flow set-aside adopted under Subsection (a) to be altered by TCEQ in a rulemaking process undertaken in accordance with a schedule established by TCEQ. Prohibits TCEQ's schedule from providing for the rulemaking process to occur more frequently than once every 10 years unless the applicable work plan approved by the flows commission under Section 11.02362(p) provides for a periodic review under that section to occur more frequently. Authorizes TCEQ, in that event, to provide for the rulemaking process to be undertaken in conjunction with the periodic review upon determining that schedule to be appropriate.

SECTION 19. Amends the heading to Section 11.148, Water Code, to read as follows:

Sec. 11.148. EMERGENCY SUSPENSION OF PERMIT CONDITIONS AND EMERGENCY AUTHORITY TO MAKE AVAILABLE WATER SET ASIDE FOR ENVIRONMENTAL FLOWS.

SECTION. 20. Amends Section 11.148, Water Code, by adding Subsection (a-1) and amending Subsections (b) and (c), as follows:

(a-1) Authorizes state water that is set aside by TCEQ to meet the needs for freshwater inflows to affected bays and estuaries and instream uses under Section 11.1471(a)(2) to be made available temporarily for other essential beneficial uses, if TCEQ finds that an emergency exists that cannot practically be resolved in another way.

(b) Requires TCEQ, before suspending a permit condition under Subsection (a) or making water available temporarily under Subsection (a-1), to give written notice to TPWD of the proposed action, rather than suspension. Requires TCEQ to give TPWD an opportunity to submit comments on the proposed action within 72 hours from the time TCEQ is required to consider those comments before issuing its order implementing the proposed action. Makes conforming changes.

(c) Authorizes TCEQ to suspend the permit condition under Subsection (a) or make water available temporarily under Subsection (a-1) without notice to any other interested party other than TPWD as provided by Subsection (b).

SECTION 21. Amends Section 11.1491(a), Water Code, to require publication of reports completed under this section to be submitted for comment to TCEQ, TPWD, the flows commission, the science advisory committee, and any applicable basin and bay area stakeholders committee and basin and bay expert science team. Makes conforming and nonsubstantive changes.

SECTION 22. Amends Section 11.329(g), Water Code, to prohibit TCEQ from assessing costs under this section against a holder of a water right placed in the Texas Water Trust for a term of at least 20 years. Deletes existing text regarding this subsection affecting the fees assessed on a water right holder by TCEQ under specific chapters.

SECTION 23. Amends Section 11.404(e), Water Code, to prohibit the court from assessing costs and expenses under this section against a holder of a water right placed in the Texas Water Trust for a term of at least 20 years.

SECTION 24. Amends Subchapter I, Chapter 11, Water Code, by adding Section 11.4531, as follows:

C.S.H.B. 40 79(1)

Sec. 11.4531. WATERMASTER ADVISORY COMMITTEE. (a) Requires the executive director of TCEQ, for each river basin or segment of a river basin for which the executive director appoints a watermaster under this subchapter, to appoint a watermaster advisory committee consisting of at least nine but not more than 15 members. Requires a member of the advisory committee to be a holder of a water right or a representative of a holder of a water right in the river basin or segment of the river basin for which the watermaster is appointed. Requires the executive director, in appointing members to the advisory committee, to consider geographic representation, amount of water rights held, different types of holders of water rights and users, including water districts, municipal suppliers, irrigators, and industrial users, and experience and knowledge of water management practices.

(b) Provides that an advisory committee member is not entitled to reimbursement of expenses or to compensation.

(c) Provides that an advisory committee member serves a two-year term expiring August 31 of each odd-numbered year and holds office until a successor is appointed.

(d) Requires the advisory committee to meet within 30 days after the date the initial appointments have been made and to select a presiding officer to serve a one-year term. Requires the committee to meet regularly as necessary.

(e) Requires the advisory committee to make specific recommendations, reviews, and comments, and perform other advisory duties to the executive director of TCEQ.

SECTION 25. Amends Sections 11.454 and 11.455, Water Code, as follows:

Sec. 11.454. DUTIES AND AUTHORITY OF THE WATERMASTER. Provides that Section 11.327 applies to the duties and authority of a watermaster appointed for a river basin or segment of a river basin under this subchapter in the same manner as the section applies to the duties and authority of a watermaster appointed for a water division under Subchapter G. Deletes existing text regarding duties of a watermaster.

Sec. 11.455. New heading: COMPENSATION AND EXPENSES OF WATERMASTER. (a) Provides that Section 11.329 applies to the payment of the compensation and expenses of a watermaster appointed for a river basin or segment of a river basin under this subchapter in the same manner as that section applies to the payment of the compensation and expenses of a watermaster appointed for a water division under Subchapter G.

(b) Requires the executive director of TCEQ to deposit the assessments collected under this section to the credit of the watermaster fund.

(c) Authorizes money deposited under this section to the credit of the watermaster fund to be used only for the purposes specified by Section 11.3291 with regard to the watermaster operation under this subchapter with regard to which the assessments were collected. Deletes existing text authorizing TCEQ to assess the costs of the watermaster against all persons who hold water rights in the river basin or segment of the river basin under the watermaster's jurisdiction.

SECTION 26. Amends Subchapter F, Chapter 15, Water Code, by adding Section 15.4063, as follows:

Sec. 15.4063. ENVIRONMENTAL FLOWS FUNDING. Authorizes TWDB to authorize the use of money in the research and planning fund for specific compensations and contracts.

SECTION 27. Amends Section 15.7031, Water Code, by amending Subsection (c) and adding Subsection (e), as follows:

(c) Requires the dedication of any water rights placed in trust to be reviewed and approved by TCEQ, in consultation with TWDB, TPWD, and the flows commission. Authorizes the Department of Agriculture and the basin and bay area stakeholders committee and basin and bay expert science team established under Section 11.02362 for the river basin and bay system to which the water right pertains to provide input to TCEQ, as appropriate, during the review and approval process for dedication of water rights.

(e) Provides that while a water right is held in the trust, the water authorized for beneficial use under the terms of the water right is considered to be held for instream flows, water quality, fish and wildlife habitat, bay and estuary inflows, or other environmental uses without the need for a permit amendment. Requires the use of the water right or portion of the water right withdrawn, after the water right is withdrawn in whole or in part from the trust, to be in accordance with the terms of the water right.

SECTION 28. Amends Section 16.059(d), Water Code, to require the priority studies to be completed not later than December 31, 2014, rather than 2010.

SECTION 29. Reenacts and amends Section 26.0135(h), Water Code, as amended by Chapters 234 and 965, Acts of the 77th Legislature, Regular Session, 2001, as follows:

(h) Provides that irrigation water rights, non-priority hydroelectric rights of a water right holder that owns or operates privately owned facilities that collectively have a capacity of less than two megawatts, and water rights held in the Texas Water Trust for terms of at least 20 years will not be subject to the assessment [to recover the costs of administering water quality management programs]. Makes nonsubstantive changes.

SECTION 30. (a) Makes application of this section contingent upon this Act taking effect immediately.

(b) Repealer: Sections 11.0236(d) (referring to member appointments under Subsection (b)(3)); (k) (referring to duties of study commission); (l) (referring to study commission's report summary); (m) (referring to delivery of copies to members of the legislature); and Section 11.0237(c) (referring to expiration date of section), Water Code.

SECTION 31. Repealer: Section 11.1491(b) (referring to creation and establishment of advisory council for data collection and studies), Water Code.

SECTION 32. (a) Makes application of this section contingent upon this Act taking effect immediately.

(b) Abolishes the Study Commission on Water for Environmental Flows on the effective date of this Act.

SECTION 33. (a) Requires the governor, lieutenant governor, and speaker of the house of representatives to appoint the initial members of the Environmental Flows Commission as provided by Section 11.0236, Water Code, as amended by this article, as soon as practicable on or after the effective date of this Act.

(b) Requires the initial members of the Environmental Flows Commission, as soon as practicable after taking office, to appoint the initial members of the Texas Environmental Flows Science Advisory Committee as provided by Section 11.02361, Water Code, as added by this Act. Provides that the terms of the initial members of the committee expire on March 1, 2010.

(c) Requires the Environmental Flows Commission to appoint the members of each basin and bay area stakeholders committee as provided by Section 11.02362, Water Code, as added by this Act. Provides that the terms of the initial members of each

committee expire March 1 of the fifth year that begins after the year in which the initial appointments are made.

(d) Requires each basin and bay area stakeholders committee to appoint the members of the basin and bay expert science team for the river basin and bay system for which the committee is established as provided by Section 11.02362, Water Code, as added by this Act. Provides that the terms of the initial members of each committee expire March 1 of the fifth year that begins after the year in which the initial appointments are made.

(e) Requires the executive director of TCEQ to appoint the members of the watermaster advisory committee under Section 11.4531, Water Code, as added by this Act, for each river basin or segment of a river basin for which the executive director appoints a watermaster under Subchapter I, Chapter 11, Water Code. Provides that the terms of the initial members of the committee expire August 31 of the first odd-numbered year that begins after the year in which the initial appointments are made.

SECTION 34. Provides that the changes in law made by this article relating to a permit for a new appropriation of water or to an amendment to an existing water right that increases the amount of water authorized to be stored, taken, or diverted apply only under certain circumstances.

SECTION 35. Effective date: upon passage or November 1, 2005.

#### **EFFECTIVE DATE**

Upon passage or November 1, 2005.

#### **COMPARISON OF ORIGINAL TO SUBSTITUTE**

C.S.H.B. 40 provides for immediate effect if the Act receives the necessary vote under the provisions of Article III, Texas Constitution. If the Act does not receive the necessary vote, the Act takes effect November 1, 2005. As filed, the bill would take effect November 1, 2005.

In addition, C.S.H.B. 40 sets out certain alternate provisions re-enacting sections of the Water Code that would expire prior to the effective date of the Act, depending on whether or not the Act takes immediate effect or takes effect November 1, 2005. The added sections are as follows:

SECTION 8. (a) Makes application of this section contingent upon this Act not taking effect immediately.

(b) Amends Subchapter B, Chapter 11, Water code, by adding Section 11.0236, as follows:

Sec. 11.0236. ENVIRONMENTAL FLOWS COMMISSION. (a) Creates the Environmental Flows Commission (flows commission).

(b) - (f) Sets forth terms, composition, and appointment procedures for members of the flows commission.

(g) Provides that a member of the flows commission is not entitled to receive compensation for service on the flows commission but is entitled to reimbursement of the travel expenses incurred by the member while conducting the business of the flows commission, as provided by the General Appropriations Act.

(h) Provides that the flows commission may accept gifts and grants.

(i) Requires TCEQ to provide staff support for the flows commission.

(j) Requires the flows commission to conduct public hearings and study public policy implications for balancing the demands on the water resources of the state

resulting from a growing population with the requirements of the riverine, bay and estuary systems including granting permits for instream flows dedicated to environmental needs or bay and estuary inflows, use of the Texas Water Trust, and any other issues that the flows commission determines have importance and relevance to the protection of environmental flows. Requires the flows commission, in evaluating the options for providing adequate environmental flows, to take notice of the strong public policy imperative that exists in this state recognizing that environmental flows are important to the biological health of our public and private lands, streams and rivers, and bay and estuary systems and are high priorities in the water management process. Requires the flows commission to specifically address certain issues.

(n) Authorizes the flows commission to adopt rules, procedures, and policies as needed to administer this section, to implement its responsibilities, and to exercise its authority under Sections 11.02361 and 11.02362.

(o) Provides that Chapter 2110 (State Agency Advisory Committee), Government Code, does not apply to the size, composition, or duration of the flows commission.

(p) Requires the flows commission to issue and promptly deliver to specific government officials, not later than December 1, 2006, and every two years thereafter, copies of a report summarizing specific hearings, proposed legislation, certain studies, progress made in the implementation of Sections 11.02361 and 11.02362, and any other findings and recommendations of the flows commission.

SECTION 11. (a) Makes application of this section contingent upon this Act not taking effect immediately.

(b) Amends Subchapter B, Chapter 11, Water Code, by adding Section 11.0237, as follows:

Sec. 11.0237. WATER RIGHTS FOR INSTREAM FLOWS DEDICATED TO ENVIRONMENTAL NEEDS OR BAY AND ESTUARY INFLOWS. (a) Prohibits TCEQ from issuing a new permit for instream flows dedicated to environmental needs or bay and estuary inflows. Authorizes TCEQ to approve an application to amend an existing permit or certificate of adjudication to change the use to or add a use for instream flows dedicated to environmental needs or bay and estuary inflows.

(b) Provides that this section does not alter TCEQ's obligations under certain sections of the water code.