

Testimony before the Natural Resources Committee of the Texas House of Representatives

*Relating to the Effects of Current and Proposed Federal Initiatives
Impacting Implementation of the State Water Plan*

by **Kathleen Hartnett
White**

Distinguished Senior
Fellow-in-Residence
& Director of the
Armstrong Center
for Energy & the
Environment

Within the last 12 months, a series of federal initiatives signal a major change in the federal government's historical deference to state authority to allocate quantities of waters arising within state borders. The many federal actions at issue portend an unprecedented intrusion of federal authority into water policy decisions previously made by Texas.

The long-standing legal primacy of state authority over water quantity, i.e., water supply, is articulated at the beginning of the federal Clean Water Act.

"It is the policy of Congress that the authority of each state to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this Act. It is the further policy of Congress that nothing in this Act shall be construed to supersede or abrogate rights to quantities of water which have been established by any State."

~Federal Water Pollution Act, 33 U.S.C. 1251, Section 101(g)

These words were amended to the Clean Water Act by former Senator Malcolm Wallop of Wyoming in 1977. With notable exceptions, these findings have sustained an important distinction between federal primacy in water quality and state primacy in water quantity. And Texas, in contrast to many Western states, has acted without federal interference in the issuance and administration of rights to use Texas surface water for specific beneficial uses. More than other states, Texas water law further delegates authority from the state government to regional and local entities. In Texas, river authorities, mu-

nicipalities, local water districts and the private sector have successfully planned, financed and implemented water supply projects to meet the needs of the Texas population and economy.

The Texas Regional and State Water Plans were developed with the assumption that this state has the authority and responsibility to develop a water supply sufficient to meet formidable future demand. The new federal initiatives and expanded use of existing federal authority could complicate, delay and ultimately preclude many water supply strategies in the State Water Plan. The U.S. Department of Interior already has created a National Wildlife Refuge on the site officially designated for the Fastril reservoir. For draconian impacts, consider the situation in California arising from U.S. Fish and Wildlife rules to protect the Delta Smelt.

State primacy over water quantity and the Supremacy Clause of the U.S. Constitution creates a delicate balance between federal and state authorities. Federal environmental laws enacted in the 1970s have spawned multiple conflicts between state and federal laws, particularly in the western states. The U.S. Supreme Court has upheld these federal laws under the federal government's constitutional authority over interstate commerce.

State primacy over water quantity may be literally enshrined at the beginning of the federal Clean Water Act. Other federal laws, however, have ample authority to interfere with, if not "supersede," state control of water resources. The federal Endangered Species Act (ESA) certainly comes to mind, a law labeled the pit bull of federal laws because of the force of its authority. More than any other federal law,

ESA enforcement action by the federal government has unquestionably “abrogated” basic state decisions on urgent matters of water supply. Currently, federal actions to protect the Delta Smelt wreak havoc on the regional economy of California’s Central Valley. Now, 250,000 acres of the most productive farmland in the U.S. lay fallow and eroded. Unemployment in the Central Valley ranges from 20-40 percent. Federal rules mandate as much as 500,000 acre feet of water for the smelt instead of for municipalities and agriculture.

With the exception of the ESA issues surrounding the Edwards Aquifer, Texas has, to date, avoided protracted federal conflict with state water policy. Western states with vast tracts of federal land and critical Bureau of Reclamation water projects have far more legal struggles with federal authorities. Current federal water policy of the last 12 months, however, signals a major departure from the previous several decades. Through legislation, Executive Order, agency rule and existing authority, the current federal powers apparently dismiss state primacy to control water resources.

I offer some examples of recent federal water policy initiatives.

- **Clean Water Restoration Act (S. 787):** This bill would dramatically broaden the black letter regulatory jurisdiction of the federal government over state waters. By deleting the single word “navigable” from the existing definition of the “waters of the United States,” this legislation gives EPA and the U.S. Army Corps of Engineers new regulatory authority over all state water resources, potentially including groundwater. The bill was passed out of the Senate Public Works and Environment Committee. The House has not introduced a companion bill.
- **The Sustainable Watershed Planning Act:** The House Transportation and Infrastructure Committee has drafted but not yet introduced this bill. The bill would create a White House water Czar and a new federal office of watershed planning to develop a national water policy. Policy objectives focus on water quality and ecological health without mention of water supply.
- **Executive Order on Flood Plain Management:** Drafted by the White House Council on Environmental Quality, but not yet signed, the Order would extend federal regulatory authority over flood plan

land use. Provisions elevate the ecological “functions of flood plains” over flood control protection.

- **Notice of Intent to Sue TCEQ under the ESA:** The Aransas Project has given notice to TCEQ of suit for failure to provide adequate freshwater inflows for whooping crane habitat in Aransas Bay. The suit seeks to bar TCEQ from issuing new water rights in the San Antonio and Guadalupe river basins and could implicate reallocations of existing water rights. The water at issue was the same sought by the San Marcos River Foundation (SMRF) in a controversial TCEQ water right application for pure instream use of all the remaining unappropriated water in the Guadalupe basin.
- **Potential USWFS Listing of 11 Fresh Water Mussel Species:** Along various Texas surface waters, riparian and aquatic habitat for these species involve both water quality and water quantity issues.
- **Water Transfer Rule:** An EPA rule now at the Office of Management and Budget affects state authorization of inter-basin water transfers. The EPA rule may require federal discharge permits for any inter-basin transfers. The National Pollutant Discharge Elimination System (NPDES) permits could confound water transfers.

All major water supply projects in the State Water Plan require authorizations from TCEQ controlled by state law. As former chairman of TCEQ, I recall the complex state decisions presented by the SMRF application for almost one million acre feet of water. Subsequent instream flow applications totaling almost ten million acre feet of Texas surface water followed the SMRF application. If granted, these new water right applications for instream use would have taken all the remaining unappropriated water in Texas. Highly controversial, the Commission denied these permits as a matter of law. In other words, the Commission concluded that Texas water law provided no justification for issuing a water right “not to use” water.

Soon after the Commission’s decision, the Legislature enacted provisions reinforcing the TCEQ decision. In a subsequent legislative session, law was passed to develop a regionally driven process to determine appropriate environmental flows. Texas courts later upheld the Commission’s decision. Now, the Aransas Project’s law suit invokes the iron fist of the ESA to address the issue

already resolved by our state. Texas law, however filled with controversy, is a far better means of addressing the issue than the USFWS.

Texas authority—through the Legislature, state agencies and the courts—is immeasurably better suited to chart the Texas water future than the U.S. Congress and federal agencies. Our state faces formidable challenges in the timely implementation of water projects needed to increase available water supply. Texas, although with world-class plans, is woefully behind schedule in developing new supply. Under a severe drought, the Metroplex region of Dallas-Fort Worth could experience serious shortages within this year. The uniquely intense drought in Central Texas of only 20 months in 2008-2009 should be a shrill wake-up call to the urgency of expedited development of water supply projects.

Many western states share with Texas grave concern about expanded federal control of state water resources. I respectfully encourage the Natural Resource Committee and the entire Texas Legislature to join forces with like-minded states to resist the last year's unprecedented intrusion into long-standing state authority over water resources. The Texas U.S. Congressional delegation and federal agencies need to be reminded of the clear declaration of state water quantity primacy in the Wallop amendment of Section 101(g) of the federal Clean Water Act. The states have primacy in the allocation of water arising within the state borders. ★

About the Author

Kathleen Hartnett White joined the Texas Public Policy Foundation in January 2008. She is a Distinguished Senior Fellow-in-Residence and Director of the Armstrong Center for Energy and the Environment.

Prior to joining the Foundation, White served a six-year term as Chairman and Commissioner of the Texas Commission on Environmental Quality (TCEQ). With regulatory jurisdiction over air quality, water quality, water rights and utilities, and storage and disposal of waste. TCEQ's staff of 3,000, annual budget of over \$600 million, and 16 regional offices make it the second largest environmental regulatory agency in the world after the U.S. Environmental Protection Agency.

Prior to Governor Rick Perry's appointment of White to the TCEQ in 2001, she served as then-Governor George Bush's appointee to the Texas Water Development Board, where she sat until appointed to TCEQ. She also served on the Texas Economic Development Commission and the Environmental Flows Study Commission.

About the Texas Public Policy Foundation

The Texas Public Policy Foundation is a 501(c)3 non-profit, non-partisan research institute guided by the core principles of individual liberty, personal responsibility, private property rights, free markets, and limited government.

The Foundation's mission is to promote and defend liberty, personal responsibility, and free enterprise in Texas by educating and affecting policymakers and the Texas public policy debate with academically sound research and outreach. Our goal is to lead the nation in public policy issues by using Texas as a model for reform.

The work of the Foundation is primarily conducted by staff analysts under the auspices of issue-based policy centers. Their work is supplemented by academics from across Texas and the nation.

Funded by hundreds of individuals, foundations, and corporations, the Foundation does not accept government funds or contributions to influence the outcomes of its research.

The public is demanding a different direction for their government, and the Texas Public Policy Foundation is providing the ideas that enable policymakers to chart that new course.

