

Myron Hess

Interviewed by Dr. Jen Brown

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Transcribed by Kenya Zarate

**[Dr. Jen Brown]:** It is October 1, 2021, and this is Jen Brown, and I'm talking with Myron Hess, and today we're doing an oral history with him to talk about his work with environmental law in Texas, and particularly water and freshwater inflow issues. So, for the record, do I have your permission to record?

**[Myron Hess]:** Yes, you do.

**[Brown]:** Okay, great. Well, we'll just start with the very beginning here, and this is typical of oral histories. Can you tell me more about your background and early life?

**[Hess]:** Well, sure, I am a native Texan. I was born and grew up in North Texas in a very small town, Muenster, which is not too far from the Red River. I spent my early years on a farm, and then we moved to town, which is a pretty small town. So, I spent a lot of my childhood outdoors. You know, that's where I like to be, just always had a real fascination with the natural world, which kind of influenced my decisions from there.

**[Brown]:** Okay, and what sort of farm was it?

**[Hess]:** So, in those days, farms were much smaller. It had a small dairy. We moved off the farm before I was old enough to have to milk cows, and my older siblings never stopped giving me grief about that. So, we had a dairy, grew some grain, wheat, and oats primarily, with some hay, and that was it mostly.

**[Brown]:** Okay, and can you talk more about your childhood? What years were these growing up? Was this the drought of the—

**[Hess]:** —So, no I (both speaking at once)—

**[Brown]:** You're not that old, I was—

**[Hess]:** Yeah, yeah, yeah (both laugh). I was going to say gee, no. I was born in '55 which was towards the end of the drought, so, I don't have any memories of that drought. I mean, '57 was kind of the really wet year that ended that drought period. I didn't really experience the heart of the drought. We were on the farm only until I was about eight years old, but by that time I've kind of grown to understand the importance of water for our farm. Also, just building on that, I spent time outdoors. One of the things that was really obvious to me is that the creeks, and when I could get down to the rivers, were really the most interesting places where there was so

much going on ecologically, so I think starting from those early years I've had that interest in water, because I recognized what a critical role that it played in sort of supporting natural habitats which was a real area of interest and joy to me.

**[Brown]:** And can you talk about, you mentioned in your chapter in *The Living Waters of Texas*, that you are near the Red River and like basically over there as well. So, can you describe those rivers of your youth and those creeks and water?

**[Hess]:** Yeah, well, a lot of the creeks near town—so, technically Muenster in the Trinity Basin, kind of near the upper edge of the Basin, the small tributaries flow into the Trinity. The Red River Basin in that area is pretty narrow. But those local creeks were often dry. They had water for a while, after a rain, but there were not very many that flowed consistently. But, in spite of that, the vegetation, the amount of animal activity was so much greater in those riparian areas along the streams, and it was during that time that they were an area of fascination. The Red River is, at least by Texas standards, a big river. It's kind of a bit more exotic because it's big enough that it has these big sandbars. And at that time, I think I was seeing Tarzan on TV and they talked about quicksand, and so I imagined the potential for quicksand at the Red River, so it seemed like a pretty exotic place. It's the first place where I canoed and really kind of got to see the landscape from the river perspective. It had a big influence on me. And sort of thinking about it being so different and so interesting: lots of mysteries about what's going on underneath the river.

**[Brown]:** I was struck about your comments about the need for access to rivers in Texas in that chapter. Just thinking about the landowners who are just letting kids go and play on the rivers and the lands and can you talk a little bit more about your arguments about access?

**[Hess]:** Well, it's just that, particularly in my youth, people were much more open to allowing access and maybe that's partly because there weren't as many concerns about liability issues, as there are today. But also, I guess there's just maybe less trust, it seems like, between people. So now it can be hard for people, who don't own land that's waterfront land, to access rivers. You have to be careful and it's certainly fair to say that people abuse the access at times, that does happen. But the concern for me really is that I think people are kind of disconnected from the rivers, because it is hard to get out there and enjoy them. You see that in various places where there's a highway crossing. There will be a river access point where you can get down on a public right-of-way, get down to the river itself, which many of the larger rivers are state owned streambeds. And on weekends, in a lot of areas, there will be, just be masses of people there because it's a place they can actually get down to the river and enjoy that water. I just think it's a really sad thing about Texas, that it is difficult for people to access rivers. There are some states where there's a much broader recognition of public right of access. I don't think we're going there in Texas, and I'm not really advocating for that, but I do think it's really important to try to find ways to provide access to people to experience rivers, because people don't tend to care about things they haven't experienced and don't understand. So if we give people the chance to enjoy a river experience, some of the mystique about it, I think people will care more.

**[Brown]:** Well, it sounds like a charming childhood, spending time outdoors. Did you know- So early on, you have this appreciation of the outdoors, did you know you wanted to study environmental law and be a lawyer, or how did you go that path?

**[Hess]:** Not at all. I never thought about law at all. So, when I did graduate from high school, I still was pretty undecided on a major and actually went to a junior college for a couple of years. I think, in my mind, I changed majors probably several times in those couple of years and then ended up going to Texas A&M [Texas A&M University-College Station] and majoring in Wildlife and Fisheries Science, but in what they call the teaching option, so I got my teaching certificate. One of the interesting things about that curriculum is that you got exposed to sort of a wide variety of courses. You didn't really specialize in one area, which I guess kind of makes me dangerous with knowledge on lots of things, but not in-depth knowledge in too many things. And I did go into education in various ways out of college. For a few years, I was working at the Y.O. Ranch, which was an exotic game ranch outside of Kerrville. In that program, then called the Outdoor Awareness Program, we worked with school kids to come out and do a short stay on the ranch, and we would do various conservation education activities with them. And then, I left there and ended up being the head of middle school in a small private school in Denton: the Selwyn School. I was actually head of a middle school which meant that I was responsible for several eighth-grade boarders. Including some eighth-grade girls who were boarding at a school with a lot of high school boarding students. I started figuring out, you know I don't think I'm quite trained to be responsible—a surrogate parent—for a bunch of middle schoolers. So, I decided, well, I think I need to rethink my career path. That's when I said, well, I know I want to do environmental issues and ended up going to law school. So, it was kind of desperation, trying to figure what am I going to do next?

**[Brown]:** But why the law tack?

**[Hess]:** Well, it just seemed like a way to be able to work on environmental issues and hope to make a difference on those issues. But honestly, I don't think I knew that well going into law school what it would look like to practice law. But, it just seemed like well, this is a good way to try to build on this interest and find a way to participate in these important issues.

**[Brown]:** And you went to UT [University of Texas at Austin] Law, correct?

**[Hess]:** I did, yeah, which at the time had almost no environmental law courses. But it was very affordable.

**[Brown]:** Yeah, I was going to ask, what was the training like back when you went to law school for environmental law?

**[Hess]:** Well, basically, there was one true environmental law course, it was a survey course. So, one semester, that just sort of did a survey of the Clean Water Act, Clean Air Act, the waste laws, NEPA [National Environmental Policy Act]. Actually, I think NEPA was a voluntary lecture

you could go to one day. So, not a lot. There was a water law course and there were a couple of seminars on sort of wildlife law. But, mostly, I just took a lot of different courses trying to give myself a broad background. And, I had looked at law schools that had more of an environmental concentration, but, frankly, at the end of the day, it's like I really don't want to end up with a huge amount of debt, because that's really going to limit what I can do with my career. So, I mean, UT was just incredibly affordable, at that time. It's changed a lot since then, but I was very fortunate in that aspect.

**[Brown]:** And, so, you graduated in what year?

**[Hess]:** '86 is when I graduated from law school.

**[Brown]:** Okay, and where did you start working from there?

**[Hess]:** So, I spent a year in Denver, at a large law firm. And, frankly, I wanted to learn: I thought, well, I'm going to go to a big law firm and learn to practice law and then I'll see what I want to do from there. For various reasons, I ended up only staying a year. Then I came back to Austin and worked for a year with a small law firm here, that I would later go back to, that represented landowners, conservation groups, kind of doing, I guess, what I see as the pro-environmental work. I did that, for a short time and then had an opportunity to take a position at the Texas Parks and Wildlife Department. So, I worked there for five years and then came back to a new version of that law firm for about five years, then moved to the National Wildlife Federation. I was there for a little over nineteen years and have been in private practice now for a few years as I'm trying to slow down.

**[Brown]:** So, dealing with environmental law from these state agencies to NGOs, can you talk a little bit about the differences of culture and expectations and kind of the nuts and bolts of, say, working at Texas Parks and Wildlife to the National Wildlife Federation?

**[Hess]:** Well, I mean, I see a couple things. One, I feel really fortunate to have been able to work in both of those places. Obviously working at a state agency, there are sort of political realities of what positions are going to be appropriate for the agency to take. And you've kind of got to factor in how is this going to be perceived, and be somewhat careful in the positions that were taken. But, I was in a position that the department had only fairly recently gotten authority under some statutory changes to participate in hearings to be sort of an environmental advocate. And so, at the time I was there, we were kind of building the department's participation and trying to figure out, okay, what were the truly important issues and cases to be involved in. So that was a tremendous experience and I had the good fortune of having a lot of scientific expertise available to me at the Agency to bring to bear. The department would not, per se—we were not in the position of opposing particular projects. We were in the position of trying to make sure that there were good environmental protections incorporated into permits that were being issued. At the National Wildlife Federation, there is more freedom to take a more aggressive stance and decide, what's appropriate, what do we think the right outcome was and if, in some cases, it was we didn't think that permit should be issued, then we

would take that position. But I didn't have the luxury of having those scientific experts around me all the time. So, in all of this there are constraints—whether it's fiscal constraints or just time and capacity— trying to decide what issues merit that level of involvement, because it is time and resource intensive.

**[Brown]:** Can you talk about some of the issues and cases you were involved in at, first, the Texas Parks and Wildlife?

**[Hess]:** Well, there were—let me get my memory straight on which ones were at which entity. So, at Parks and Wildlife, I know one was a reservoir case, a proposed reservoir, on the Bosque River that also involved kind of what they call an enlargement for Lake Waco—raising the conservation pool storage in Lake Waco—to develop additional water supply for the Brazos River Authority. And then there were several other water rights permits, some that were reservoir related. Sometimes we would, we would end up with a negotiated resolution rather than actually doing a contested case hearing, where the decision will be made by an administrative law judge. So, I'm remembering now, there were a couple of those where we had negotiated permit conditions. Also, did some water quality work. One was a big proposed discharge for Formosa Plastics to discharge into Lavaca Bay. There were concerns about just some of the chemicals in that discharge and impacts that might have on the bay. Anyway, those are a few that come to mind at Parks and Wildlife. Really, at the National Wildlife Federation, we were involved in quite a number of hearings. Again, a number of times, well a number of permit proceedings and a number of those it really became more about negotiating, again, improved, often environmental flow protection provisions, but sometimes also, sort of, mitigation for terrestrial impact. So, if there are reservoirs being built, it's going to flood a lot of wildlife habitat and the State has the authority to require mitigation for that and, depending on the circumstances, the federal government does too, depending on the type of habitat affected. So typically for wetlands, the federal government has jurisdiction on that, but on some of the other non-wetland, terrestrial habitats, the state has that authority but not so much the federal government. So, we would be also working on trying to figure out what's an appropriate mitigation requirement to try to offset adverse effects to the state's fish and wildlife resources. That was mostly Parks and Wildlife, and we did some of that also at NWF.

**[Brown]:** What do you think is, um, the most important issue that you've worked on over the years?

**[Hess]:** Well, I think it's—it's flow. Just because, it's such a master variable in the rivers inland but also for the coast and the bays, the estuaries along the coast. The freshwater inflow is that master variable that's coming in there and providing sediments, nutrients and it's creating a salinity gradient that really is kind of the key to the productivity of that whole estuarine system. In Texas, it's a big place. We've got a tremendous diversity of habitats, but water is critical to all of them, really. And that's what I kind of figured out pretty early on, in addition to my personal interest, was just, particularly when I started at NWF, they were just opening and sort of expanding a real Texas office, and we had conversations about what should the focus be for this office? And we pretty quickly concluded, yeah, it needed to be water.

**[Brown]:** And so, is that when you first started getting involved in environmental flow issues or did it come previously as well?

**[Hess]:** Well, I mean I've been in, so, when I was at the Parks and Wildlife Department, we were doing environmental flow issues. So, I kind of had that background coming into NWF. And I'll admit, I certainly was arguing for it to be the area of focus, just because of that prior experience. And even, I guess, going back to that water law course in law school. You know, just reading cases, thinking about the resources that were at stake, you know, that sort of opinion about, wow, this is, this is really a critical issue, that had formed pretty early.

**[Brown]:** Um, so, and you were involved in the drafting of Senate Bill 3 in 2007 or all of the one, two, and three?

**[Hess]:** Um, so, I wasn't involved in too many of the earlier versions of previous water legislation, but by the time Senate Bill 3 in 2007 came around, yeah, I had been involved in that, starting back, I guess, around 2003 when the initial efforts kind of got underway to figure out what approach the state was going to use for environmental flow protection. So, there had been a big change in state law in 1985, which was while I was still in law school. I wasn't paying too much attention to what was going on in the legislature, but it was kind of an interesting process that played out. The state was trying to pass bonds to build reservoirs and a lot of infrastructure. I don't remember exactly when this started in the early '80s I guess. The Sierra Club, in particular, and various other environmental organizations, had really opposed those bonds, because they were concerned about the environmental destruction that would come from building a lot of new reservoirs with this funding source. And that bond election failed, and so there was then a kind of a negotiation process, I think, with the Sierra Club and those other environmental organizations, to see what it would take to get them to stop opposing the passage of those bonds. And out of that came a number of legislative changes that were enacted in 1985, and then bonds were passed after those provisions were put into law. But they strengthened the state's consideration of environmental impacts of permitting. That's also when the Parks and Wildlife Department got its authority to participate in hearings on those kinds of matters, on various kinds of environmental matters, to advocate for flow protection. So that, I guess, sort of set the stage for my position that I later had at the Parks and Wildlife Department. So, I kind of understood what was going on with those changes, but it also became pretty clear, even with those changes in the law, we still weren't doing a good enough job of protecting flows, as we were doing water rights permitting. And that kind of led to a rather bold attempt led by the San Marcos River Foundation. They filed an application for a water right for the environment, basically, in the Guadalupe and San Marcos Rivers, saying, well, the state's been doing studies—and that was related to the '85 amendments—about what are the freshwater inflow needs and they've come up with some numbers and we think the state needs to protect that water. So, they applied for a water right permit. And I don't remember the exact number, it's like 1.2 million acre feet of water, which is a lot. And that got a lot of attention (laughs). A few other organizations filed similar applications, Caddo Lake Institute for inflows into Caddo Lake in East Texas, the Matagorda Bay Foundation, I think there's one in the

Galveston area. I'm probably forgetting some others. Those applications really sort of created the impetus that ultimately led to Senate Bill 3 in 2007. And, although I wasn't directly involved in those applications, NWF, we were doing some amicus briefing on that and started following it at the agency and then all of the legislative responses going forward from there—so that's kind of when I got involved.

**[Brown]:** Um-hm and can you tell me more about your involvement?

**[Hess]:** Yeah, well, so there was sort of a multi-phase process before there was actual legislation. Well, before there was actually this sort of comprehensive legislation on doing flows protection, there was some initial legislation created and then a couple of study processes that were started through legislation. I'm trying to remember what they were called. There was one: the Study Commission on Water for Environmental Flows, I think that was the first one. So, I was following that. We were providing input and sort of the way I'm recalling it now, there were kind of two primary players who provided proposals on how the state might move forward. One of those was from the Texas Water Conservation Association, which is an organization of a lot of the water providers in the state. And then the other was from the environmental community: at that time, primarily the National Wildlife Federation, Environmental Defense Fund, Sierra Club—Lone Star Chapter of the Sierra Club, and the Texas Center for Policy Studies. Both of those groups submitted, if you will, competing proposals for what the process might look like. And ultimately, we were sort of asked to see if we could work together to come up with something that both groups might live with. So, that ended up with spending a lot of time involved in that negotiation process and then, as that eventually got acceptance, then working on trying to figure out how to translate that into statute.

**[Brown]:** Um-hm. I wanted to ask you more about that negotiation process. Can you talk a little bit about the differences between the environmental groups, and then the Texas water group, um, going into it and then what the negotiation process looked like?

**[Hess]:** Uh (laughs), like any negotiation process, it was pretty messy (laughs). I remember one of the fundamental differences that we ended up sort of not being able to prevail on was trying to have a stronger role for the Texas Parks and Wildlife Department, as the scientific experts, if you will, on inflow needs and instream flow needs. As opposed to the approach that we ended up with, which was more, sort of basin and bay specific science committees, which isn't necessarily a bad concept, but it gets tricky in making sure that the people you've put on there are really just bringing the science to the table, which was the concept and saying let's put the science out there first: let's define what does the science say we need. We may have to make tradeoffs and say, you know, we just can't do that much, but we felt like it was really critical to start with saying: well, here's what the science says, now we can talk about what we're actually going to do, but let's at least be transparent about the fact that we're not doing what the science said we should be doing and acknowledge that we're making these tradeoffs. Which is important for a piece that was in Senate Bill 3, that still hasn't really been acted on, which is something called affirmative strategies. So they're saying, okay we're going to protect what we can by putting conditions on new permits or by, in theory, setting aside some unappropriated

flow for the environment. But that's probably not going to be enough to really protect what's needed because we've been issuing water rights in Texas since the late 1800s. And it wasn't until 1985 that we even had a law that said we really need to start looking systematically at what are the environmental needs. As is true in many, many places, water right authorizations are perpetual authorizations. For most of the State of Texas, the oldest water right has the first claim on the water: a prior appropriation system. So what we started with in 1985, or 2007, is all these existing water rights have been issued without any kind of environmental flow protections in them. So we start way behind where we need to be in protecting flow, it means figuring out some way to incorporate environmental flow protection in those existing permits. It's probably going to be by voluntary means, but we need to figure out what does that look like, how we can acquire some of those rights or negotiate some way to do protections. We sort of recognize that is a critical piece and that, somehow, we have to define where do we need to get to, not just what are we willing to do in putting limits on new water rights, but where do we really need to get to from a river and bay health perspective? So, we didn't get the Parks and Wildlife lead role in that, but at least we were successful in saying we need to have this separate statement of what the scientists say (in this case, the bay and basin specific expert science teams), but at least you know that's out there saying here's what the scientists say we need. And then, yes, we might do flow standards that are much less protective than that, but we at least have the concept of saying, and now we need to be looking at these affirmative strategies: how do we try to do something to get the protected flow closer to what the scientists say is needed than what we're able to achieve with limits on new water rights. Sorry, that was a long explanation, but I hope it made sense.

**[Brown]:** Yeah, and so when going into these negotiations, how receptive was, say the water user community to environmental flows and environmental protections? And then—or I guess, maybe the other question would just be like just how messy were the negotiations?

**[Hess]:** Well, you know, I'd say it was a little bit of a mixed bag. Some of the folks were more open to it than others. So it was not an easy negotiation process, but one of the things, I sort of feel like we had some legislative direction that we should really try to come up with something reasonable. So, it's true in Texas, that the environmental community doesn't necessarily have the most clout. We were aware of that, but also, I think there was a recognition by at least a number of the folks negotiating from the Texas Water Conservation Association that it was appropriate to try to come up with a reasonable approach moving forward. I've been disappointed in how it's been implemented. I think the approach that was set out has the potential to work a lot better than it has actually proven to accomplish in practice, which is a real disappointment.

**[Brown]:** Yeah, I actually wanted to ask about that, um, in terms of, you know, I think you kind of answered, did you accomplish everything (both laugh) you had wanted in different aspects? Looking back, evaluating it, what do you think has worked well and what hasn't worked out so well, or what were some of the issues that you thought arose after the bill was passed?

**[Hess]:** Well, I mean, I guess, as much as anything else, I've been really disappointed in how it



has been implemented at the Texas Commission on Environmental Quality, and I recognize they have a lot of pressures on them and, you know, maybe they're having political pressure in how things get implemented, but I feel like we could have done a lot better with the structure that was in the legislation. We still can. I mean, one of the good things about the legislation is that it has an adaptive management component. That wasn't fleshed out as well as it should have been. That's certainly something I wish we had done a better job on. At the time, I think we were focused on trying to get the initial structure put in place and didn't think through what it would take to do an effective adaptive management strategy aspect. The other thing that, I guess, we maybe left—punted too much on— was trying to figure out the approach for how we would actually implement this affirmative strategies piece. How would we pay for it? What would that look like? I didn't realize at the time just how little water we would be able to get protected through the environmental flow standards, and certainly did not anticipate that the agency would decline to set aside any unappropriated flow for the environment. I mean, I think that was a big mistake. I'd like to see them rectify it and I still think we've got to find a way to do a better job on that, just because we need to identify some water that the state is going to have available to try to manage in future droughts and you can do that two ways. One is setting aside some unappropriated water so it's water that nobody's gotten a permit for and SB3 contemplated, we were going to set aside that water and say it's for the environment we're not going to issue permits to anybody for that. TCEQ declined to do any set asides. So that's a big problem because the only ways we can manage water in the future is either through those kind of set asides or going back and acquiring some rights from people who do have existing permits and right now we don't really have a funding mechanism to do much of that. Another piece that's been disappointing is—so the implementation of the flow standards, you know, is primarily done through conditions on permits that do get issued for other uses, and there are various kinds of permit conditions that could be put on a permit. One of those is a pass-through requirement that just says, if you're diverting or you're impounding water, we're going to say you have to allow a certain amount of water to flow downstream and then you can divert the rest and that's kind of what we call a pass-through. But, TCEQ also has authority to do other kinds of permit conditions. Examples would be, actually, if you're building an impoundment, you can be allowed to impound water, but a certain amount of that can be sort of required to be available for releases for the environment during really dry periods. There's clear authority under the law that TCEQ can do that kind of permit condition, but they declined to do any of those as part of the flow standards. Another permit condition that they could impose is a quantified return flow requirement. So, you know, a lot of water when it gets used doesn't get fully consumed so some of that water gets put back in the river but, unless there's a quantified requirement to put back a specific quantity of water, the water right holder has the right to fully consume it. More and more, we're looking at, in the state, types of reuse of water, and reuse makes sense. It's a way to make more efficient use of water, but I also think we need to have a certain amount of that water that really does get reserved, if you will, to help meet environmental needs during droughts, because we're taking a lot of water out during this period, so how can we build that back. So those are all things we haven't done a good job on so far. There's still a chance to do better, going forward, through the adaptive management process. We're kind of right at the point under Senate Bill 3 when that kind of review process for the adoption of standards and implementation is supposed to kick in. So, there's an

opportunity here to revisit that and say, okay, how can we do a better job on various aspects of this?

**[Brown]:** One of the things you mentioned was the basin or the bay committees, the stakeholder committees instead of having the scientific expertise from Texas Parks and Wildlife. Can you talk a little bit more about how that played out after the bill's passage?

**[Hess]:** So, just one clarification, under Senate Bill 3 there are two types of committees at the bay and basin level. There are bay and basin expert science teams, and so they really are intended to be scientists, looking at the scientific aspects. Then, within each of these bay and basin areas, there are also stakeholder committees, and they have sort of distinct roles and the stakeholder committees appoint the members of the expert science teams. These are supposed to be people who have particular expertise, they don't necessarily have to live in that basin, but that they should have particular expertise about various aspects of environment flow needs. That's the role that the environmental community had kind of envisioned, we wanted Parks and Wildlife to be more in that role in developing those recommendations. But, as it turned out, the expert science teams were created. I think that, for the most part, the science teams really tried to do the best job they could. I wouldn't say I feel like that's universally true, I think, in some cases, there were groups of people who were—they are certainly scientists, but I think, maybe were a little too driven by concerns about making sure that they weren't adversely affecting the ability to do new water projects, instead of really focusing on what does the science say the environment needs. Admittedly, this is hard. There isn't a whole lot of clear-cut information: this is exactly what is needed, you can't just go look that up somewhere. It's a very complicated science and we haven't been doing it for a long time. So, I'm not saying there isn't room for disagreement, but, again, I would say, by and large, I was pretty pleased with the efforts made by the expert science teams in trying to come up with reasonable recommendations about what the environment needed. In the case of the Trinity and San Jacinto, the Galveston Bay area, that science team was never able to reach agreement, they ended up with two competing recommendations, which pretty much made it impossible then for the stakeholder committee, you know, to come to agreement on what they would recommend. So, the stakeholder committee ended up with two competing sets of recommendations. In my opinion, we ended up with very inadequate flow standards in that area kind of as a result of that. That was probably the most disappointing, particularly on the science team level, and on the other science teams, there were certainly disagreements, there was a lot of back and forth in what they could come up with, but, I do feel like the people were trying to come up with things that seemed scientifically valid.

**[Brown]:** Um-hm. So, what do you think is needed to effectively address or, you know, make this—the process better?

**[Hess]:** Well, one thing is, I think we need to rededicate some resources to this adaptive management process of saying the first go around when we did the initial recommendations. Excuse me (coughs), let me get a drink. The first go around, there was money set aside to actually pay for the scientists for their time, to pay for them to have a contract with some folks

to do some work—kind of to support their efforts—and again, that’s part of what’s not fleshed out for the adaptive management process, that’s missing. So, we need to figure out how we can put some resources into revisiting some of that science, particularly with the focus on saying okay, let’s sort of acknowledge where we are today in issuance of water rights, what water might be available as unappropriated water. There’s certainly some of that, and we need to get some of that set aside, but what we’ve never really done a good job of, is looking at this affirmative strategies component. Even in the first round, the stakeholder committees, which are again those bay and basin area of stakeholders, various stakeholders, who had interest in water issues, they didn’t really have funding, the expert science teams provided some support for them, but they didn’t have funding in stakeholder committees. In fact, a lot of the stakeholder committee participants, in a number of them, actually contributed funds to hire facilitators to help them have an efficient process. But one of the charges for the stakeholder committee was to say, well, you need to recommend some affirmative strategies. And given that there really wasn’t much money, that didn’t get much farther than a list of the types of things we could do. We could purchase, maybe, some water rights that are not being fully used. We could pursue commitments of a portion of return flows and say, these are going to actually be protected for bay inflows or for river flows. So, those things were acknowledged, but there really wasn’t the capacity to come up with an actual specific suite of approaches: rights that might be considered for purchase, how much return flow would you need, that sort of computation, and then saying, well how are we going to pay for this? Somewhere there has to be a funding mechanism to actually implement these affirmative strategies. So, I think that it’s always a hard sell to get money committed to these sorts of things, but if we’re going to protect our natural heritage, we’re going to have to do it. That’s really a key piece of it, we need to define that adaptive management process more precisely and we need to fund it.

**[Brown]:** Do you think the approach of going, bay and basin versus statewide is effective or is there something to be said about doing it statewide due to various water laws that are the same?

**[Hess]:** Well, I mean, ultimately when you get down to actually implementing things on the ground, although there are inter-basin transfers, primarily the flows affecting Sabine Lake are what’s happening in the Sabine-Neches Basins, primarily. And, the situation there in East Texas is a lot different than the situation in the watersheds flowing into Nueces Bay. So, there’s a basic logic of saying, well, you might use different approaches in these different basins. I don’t know that I think the science is that different and I guess that’s why I supported having Parks and Wildlife being the lead on the science side of things. Really, though, from a science perspective, I sort of feel like when you look at it, that the scientists ended up, for the most part, approaching things in a pretty similar way. Although again, the salinity regimes are quite different in somewhere like Sabine Lake versus Nueces Bay, dramatically different, but, again sort of in the basic approach of how you might look at it, they weren’t that different. I guess Sabine Lake was a poor example of that because, in that case, the science committee actually did not do specific freshwater inflow recommendations. They did their instream flow recommendations and, when they looked at the amount of flow they had recommend to be protected at the downstream locations, decided they thought that would be enough to protect

the Sabine Lake Estuary. Unfortunately, when the flow standards got adopted, they are dramatically less protective than what the expert science team had recommended, but TCEQ ultimately said, well we're not going to do freshwater inflow standards because the science team said the instream flow recommendations are adequate to protect the bay. My point is that well, yes, but you didn't protect anywhere near what this science team said you needed to protect at the instream level in order to protect the bay. So, there we ended up with a bay without freshwater inflow protections and, unfortunately, with the instream flow protections that are far less than what the science team said would be adequate to protect the bay. In that case, there is a big difference, but in the other bay systems there are various differences in methodology, but I think the basic approaches are fairly similar. So, I don't know, still I think it would have been better to have Parks and Wildlife do it, but I think we could still move forward from where we are now and do a better job of it, without having to change that aspect.

**[Brown]:** Um-hm. Can you go back to when the bill passed a little bit?

**[Hess]:** Yeah

**[Brown]:** You were involved in a lot of the negotiations leading up to it, can you talk more about how you go from this essentially, bringing the two sides together and doing the compromise to the legislative process to get it passed?

**[Hess]:** So, it was a pretty rocky road. It didn't pass the first session when it was introduced in 2005. It passed in 2007 on the absolute last day that anything could get passed in that session, and only after points of order and lots of conference team negotiations. It was unclear until that last day, whether it was going to make it or not. So, it's always an interesting process. You have the concepts, and they have to be negotiated into statutory language. You have your Senate Bill sponsor and your House Bill sponsor who may have different perspectives on what the language should be, so you have to work through with those sponsors in trying to have agreed language. In this case, as I recall it, we didn't have a lot of tension there. We had a change in Senate sponsor between those two years. It was Kip Averitt in '05, and then Ken Armbrister in the '07 Session, who was the sponsor of the bill, but it was Robert Puente who was the house sponsor both times, and, you know, my feeling was they were very committed to making it happen, to getting the bill through and that's a huge key. And also Lieutenant Governor [David] Dewhurst had, you know, I think he had sort of made a decision that he didn't want the state to move down the road of issuing the individual permits like the San Marcos River Foundation had applied for, for environmental flow protection. He wasn't comfortable with that. But he also wanted to take care of the flow needs in some manner, so he wanted something that was a reasonable way to address the issue, and so, you know, I think his support for it made a lot of difference as well, and there were a lot of other folks who made it possible. I think once the bill had been negotiated—to my knowledge—the folks who had negotiated it continued to support it to try to see it through. So, despite that it was a rocky road, eventually it did make it into law.

**[Brown]:** When it was passed into law, how did you feel?

**[Hess]:** Um (laughs), a little panicked, because, as hard as it is to pass legislation, that's just the tip of the iceberg, because you start looking at, my gosh, now we've got to do this work. We've got to, across all these basins in a relatively short period of time, we've got to develop the science, we've got to get the stakeholder committees in place. So, we were scrambling to say okay, we need to try to identify people who can serve as stakeholders to be the environmental representative or public interest representatives or can we find folks, who from an agricultural perspective, also appreciate the importance of water flowing by their land, who would be good representatives on it. So, identifying those people, helping to identify who are the scientists that ought to be on these expert science committees, and then thinking, okay, this is nice in concept, but how do we make this a reality? So yeah, it was a little daunting to think about, okay, now we've got to actually try to implement that, so I spent a lot of years of my life on that.

**[Brown]:** And, so what was your role in the implementation of it all?

**[Hess]:** So, I was on one stakeholder committee for the Colorado-Lavaca, and I guess I'm still the vice chair of that. But I was fairly involved in almost all of the stakeholder committees, not all of them, attending a lot of the meetings, trying to coordinate with some of the stakeholders to strategize on approaches, also following the science a fair bit. There was also a statewide science advisory committee that was functioning at the same time. Their job was kind of trying to provide guidance to the individual bay and basin specific expert science teams, so that was one of the mechanisms that we had come up with to try to have some, some continuity, I guess, if you will, through having this science advisory committee that could provide some guidance for those individual expert science teams. And, I think that's probably a big part of the reason that there ended up being fairly consistent approaches for the most part, was the influence of that statewide committee, but following those meetings and staying up with all that. Yeah, it was a lot. Putting on quite a few miles going to meetings and stuff around the state during the course of that.

**[Brown]:** So that must have been your primary job responsibility then?

**[Hess]:** Well, that's a good question. It certainly was a significant part of my job. We were still doing a number of other things (laughs), I'm sure, including fundraising to pay staff. I wasn't alone in doing that, you know other people on the staff, it was a big area of focus for the National Wildlife Federation during that time absolutely.

**[Brown]:** Um-hm. Well, you know, what's interesting I think about the '85 Bill, and then the Senate Bill 3 in 2007 is Texas isn't exactly known for its environmental regulations but, I mean, how would you evaluate the, uh, freshwater inflow regulations in Texas compared to other states?

**[Hess]:** Well, I think that structurally and conceptually, the framework is very good and very comprehensive. Unfortunately, when it comes to implementation, I don't feel like we've done

nearly as well, and the longer we wait to flesh out these other pieces, so these affirmative strategy type approaches or getting some unappropriated water set aside for the environment because we continue to issue new water rights, and so we've got a ways to go in implementing it effectively. We haven't been—we haven't reached the dire levels that some of the more western states have, primarily because we have a lot of water rights that have been issued, but they're not exercised as fully as they are in a lot of other, particularly western drier states. But we've got climate change, we know it's here, we know the impacts are going to be increasing, and we still evaluate water availability based on a repeat of historical hydrology, and that's not the future. We really need, while we're still in a pretty reasonable state of affairs in terms of the health of rivers and bays, to get on top of that. We still have a little time, but you know, I don't feel like we have a huge amount, and you know it's illustrated by the fact that, like right now the Fish and Wildlife Service is accepting comments on the proposal to list six species of mussels in Central Texas as threatened and endangered. We're going to see more and more of that as we feel the effects of climate change. I think we've got a good structure in place, we need to flesh it out. Particularly on this affirmative strategies component, we need to figure out, how are we going to fund doing that in a way that's consistent with meeting other water needs. We still have time, I guess is the way I would look at it, to do both, but if we don't act fairly soon, we're going to end up with more things like endangered species requirements driving management instead of having a flexible approach available to us: to say, okay, let's be creative here, let's think about how we balance these things right now. We still have time. We got a good basic structure in place, but we've got to flesh it out and we can't really keep dithering on this just because of climate change, it's here, it's worsening, and we're not exempt from it.

**[Brown]:** Do you think there are other demands in the future for Texas water, besides climate change?

**[Hess]:** Other demands?

**[Brown]:** Well, I mean are there future issues that need to be addressed that hadn't really been thought of in those earlier bills and time periods?

**[Hess]:** Well, I don't know if I would say necessarily future issues so much, I think that we have to get more creative in the way we look at water use, and figure out, one, how do we use a limited resource more efficiently, I mean we still pour just an incredible amount of fully treated drinking water on lawns, and water is still incredibly cheap, and so, the incentives are not there to use it as efficiently as it could be used. Somehow, we've got to break that pattern. So I don't know if it's, you know, so much new uses. I think that there are going to be existing uses that are going to change. Are we going to continue to generate electricity in the same ways we've been generating it, which uses a fair amount of water, or is that going to change enough, and maybe some of that water is then going to become available, and how do we seize for other uses—how do we seize that opportunity for other uses—including environmental protection? I don't think that we're doing a great job. We have a good water planning process in Texas, we look fifty years out, but, really, I don't know that we're being very creative in that planning

process and we tend to say, well, fifty years from now, our population is going to grow this much and the water use levels per person aren't going to change very much. We're assuming the same sort of methodologies for water conservation for water use as exists today and I don't think that's particularly likely. So, we could certainly be more creative about that. The other thing that we're failing to do in that water planning process is that planning for water for the environment isn't really a proactive piece of it. They do evaluate, well, how much additional impact would there be, if we add this new water supply project in, fifty years from now. But we're not doing the additional stuff saying, well, what's our bay inflow going to look like fifty years from now. We're also not really factoring in climate science into that water planning right now. So, we can definitely improve the way we're doing things. But it's not like the State of Texas is particularly, you know, that I would say laggards on any of that, it's just that we've got a lot of room to do a much better job than we're doing

**[Brown]:** And you mentioned also like the prior appropriation, right, we're dealing with water laws of the nineteenth century, so there you're also kind of constrained by that, I suppose, as well.

**[Hess]:** Yeah, I don't think it's likely there's going to be a change from that broad scale: in a big way. But I think, there are ways to work within that system more effectively. A lot of it really is going to come down to funding, to find ways again for people to use water more efficiently and that may include helping—you know the state helping to pay to use water more efficiently. And then a portion of the water that gets saved some of that can be available for other demands and some of that can be made available for flow protection. So, I'm not ready to advocate saying yeah, we need to fundamentally change that approach. I'm not going to tilt at that windmill. But I do think, you know, even working within that, there are ways we can do things within that structure to manage water a lot better than we're doing right now.

**[Brown]:** Well, what have I missed with freshwater inflow? Do you want to talk about some of the other environmental issues you've worked on, or is there something else that you're dying (laughs) to share with them about freshwater and environmental flows?

**[Hess]:** One of the things that I have continued to struggle with is helping to communicate effectively the threat that exists, like for freshwater inflows to a bay. You go out and look at a bay, unless there's a big fish kill, the bay doesn't dry up, the salinity may be higher than it needs to be, but that's not clearly obvious. Our bay and estuary organisms, they are pretty resilient and the system won't crash overnight. It's kind of a slow process. One of the things that I continue to feel like (coughs) I haven't done a great job on is figuring out how to communicate the threat that exists for those bay systems and sort of what that means to the natural heritage that future Texans will be able to enjoy. Even in my lifetime, there's been a lot of change in Texas, but we still have fairly healthy bay systems. I really worry, you asked a long time ago about that '50s drought, right? And we had the '50s drought. The bay systems were certainly adversely affected, but they came out of it. But if we have that same scenario again or have that scenario multiplied by climate change, and on top of that, we have all the increased water use from a population that's grown so dramatically since then, it's really scary to me what that

might mean for rivers and for our bay systems. And, boy, I wish we could get some things in place before we experience that, you know, to be more proactive in managing for that inevitable outcome. We're going to have that drought, and likely something worse, repeated and, wow, it could be just a massive hit if we can't get things in place.

**[Brown]:** Yeah, and you talked about it's hard to communicate freshwater inflow, right, because it's nothing obvious that you can necessarily see. When you were eventually going around the state setting up those stakeholder committees, how did you sell it then to get people on board and serve on these committees?

**[Hess]:** Uh, I don't know, I have to go back and look at my PowerPoint slides. I mean, we talked about the fact that we know—well, first, let me just clarify that our role was trying to get people willing to serve on those committees, but they were actually appointed by a separate group called the Environment Flows Advisory Group: legislators and state agency representatives primarily. But we were going around urging people to participate, urging people to submit comments, that sort of thing, and we were relying a lot on the science that was out there, we were relying on things like changes that have happened in some of our bay systems like pretty much the loss of oysters from the Nueces system, which there are multiple causes for that, but certainly reduced inflows are a big part of it as the expert science team concluded. But, even in any of our bay systems, if you look back at some of the historical documentation, in the Matagorda Bay, and oysters is one of those examples because there are pictures of it, of what the oyster fishery was like historically in those bays compared to what it's like today, even though there's what we think of as a relatively healthy oyster fishery in a comparative way. Wow, compared to what it was, it's very, very tiny in comparison to that. And there's a lot of other things that are probably gone from the systems we don't know about. So, certainly, you know communicating some of that to folks. There are various kinds of fisheries, recreational fisheries, that are certainly not what they were in the past. So, just using those kinds of messages, I guess was what we were trying to do, say look, you enjoy this bay today and that's great and we need to make sure that future generations can enjoy that too, and that's certainly not automatic. We've got this huge driver, this freshwater, that's such a master variable for the system that we're making critical decisions now that affect the future, so if you care about it get involved. Anyway, that was it, I guess.

**[Brown]:** Yeah. Well, is there anything else you wanted to talk about today or add to the oral history?

**[Hess]:** I guess maybe just a couple of things. One of the keys, I think, is trying to get people involved to try to figure out, as you were asking, how do you talk to people about being concerned about it, trying to find ways to make the issue resonate with folks. I continue to struggle with that. I'm not a media person, and I'm pretty much an introvert so it's always hard for me to work on those things, but I think a real key to being successful is finding people who are willing to be that spokesperson. We actually had some help during the passage of Senate Bill 3 from Don Henley, who was very involved with the Caddo Lake Institute and protecting Caddo Lake, but concerned about protection of the natural world as well. He was able to, I



guess, if you will, help draw some media attention and other things to the issue. Other organizations like the Coastal Conservation Association, their recreational fishing folks, getting them involved, the commercial fishing folks, finding a way for them to have time, because they're worried about their day-to-day activities, but getting them to focus on the fact that if we don't take care of some of these things now, that industry could collapse in the future. So, I don't have the answer to it, how do we communicate to people what's really at stake, and that we can't wait till the system crashes to try to deal with it. We've got to try to get ahead of it. I still try to think of how to do that, but I hope somebody will come up with some better ideas.

**[Brown]:** (laughs) Okay, well, if that's it, I'll turn off the recorder, but maybe I'll just chat with you minute afterwards.

**[Hess]:** Sure.

**[Brown]:** —if you don't have anything more to add.

[end of recording]