Current Issues Involving Surface Water and Cities

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Table of Contents

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I. Introduction

It goes without saying that surface water is important to Texas cities as a source of supply, for its recreational value, and for its contribution to economic development. As water suppliers, as sewer service providers, and as land use and development regulators, cities affect and are affected by the availability of the surface water and quality of the surface water. Whether a city has a sufficient supply of water to meet current and future water needs depends on many factors, many of which a city cannot control. This paper discusses issues that affect a city's surface water supply, including the management of the supply during times of drought, and hurdles that may affect a city's ability to obtain new surface water supplies.

II. Factors Affecting the Management of Water Supplies During the Drought

In 2011, Texas saw the worst one-year drought since 1895, when the Texas rainfall records begin.[1] The record warm weather during 2011 was the primary cause of the lack of rainfall, but the extreme heat and evaporation further depleted stream flow and reservoir levels. *Id.* Most water suppliers were affected in some way by the state-wide drought. During 2011, the Texas Commission on Environmental Quality ("TCEQ") reports that it received fifteen (15) senior priority calls for water in five river basins and, as a result, suspended non-municipal diversions in those basins in an effort to honor the calls.[2] The Lower Colorado River Authority ("LCRA"), the regional water supplier for central Texas, estimates that over 192,000 acre feet[3] of water evaporated from LCRA's six central Texas reservoirs (Lakes Austin, Travis, Inks, Marble Falls, LBJ, and Buchanan). In that same year, the City of Austin pumped just over 170,000 acre-feet of water to meet its municipal water supply needs.[4] Similar estimates of evaporation loss are found throughout Texas. As of February 17, 2012, there were 1,010 public water supplies systems implementing outdoor watering restrictions, and there were fourteen water systems that had less than 180 days of a water supply remaining.[5]

The effect of the severe drought brings to focus the need to manage a water supply during times of drought.

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[1] *See* OSC Report: The 2011 Texas Drought at p. 3.

[2] *See* http://www.tceq.texas.gov/response/drought.

[3] An acre-foot of water is equivalent to 325,851 gallons of water. On average, a household uses about 1/3 of an acre-foot of water per year.

[4] *See* LCRA Water Use Summary 2011, released March 30, 2012 (available at www.lcra.org).

[5] http://www.tceq.texas.gov/response/drought.

A. Drought Contingency Planning

The primary purpose of drought contingency plans is to stretch the water supply to ensure that basic water needs are met during drought or water shortages. As part of Senate Bill 1, the 1997 comprehensive water management and planning bill, the Texas Legislature adopted the requirement that all wholesale and retail water suppliers adopt drought contingency plans.[6] In response to the legislative mandate, the TCEQ adopted Chapter 288 of its rules.[7] Section 288.20 applies to plans for municipal uses by public water suppliers. It requires the plan to be prepared through a public participation process and requires coordination with the regional water planning group. The plan must include a description of the information to be monitored by the water supplier, and specific criteria for the initiation and termination of drought response stages, accompanied by an explanation of the rationale or basis for such triggering criteria. The plan must include specific, quantified targets for water use reductions to be achieved and the specific water supply or water demand management measures to be implemented during each stage of the plan. The management tools typically include curtailment of non-essential water uses, and the utilization of alternative water sources or alternative delivery mechanisms (*e.g.,* interconnection with another water system, temporary use of a non-municipal water supply, use of reclaimed water for non-potable purposes, etc.). The drought contingency plan must include procedures for the enforcement of mandatory water use restrictions, including specification of penalties (*e.g.,* fines, water rate surcharges, discontinuation of service) for violations of such restrictions. Finally, drought contingency plan must be reviewed by the supplier at least every five years and updated as needed.[8]

> **Practice Tip:**
> While the TCEQ calls these "plans," the requirements with which your city's customers must comply should be adopted as an ordinance.

There are two key elements that determine the effectiveness of a drought contingency plan as a tool for the management of the water supply during a drought: (1) the enforcement provisions in the plan; and (2) the factors used to trigger the various water use restrictions under the plan. Drought contingency plans must have enforcement provisions to ensure that the customers comply with the mandatory water use restrictions.[9] These enforcement tools often include fines and penalties, and termination of service. However, enforcement can be difficult and challenging, as it is often difficult to catch the violators and some communities do not have adequate resources to devote to effective enforcement.

The other major challenge in adopting effective drought plans is establishing the levels at which the restrictions on water use are triggered. Interestingly, nowhere in Chapter 288 of the

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[6] TEX. WATER CODE § 11.1272.

[7] *See* 30 TEX. ADMIN. CODE Ch. 288.

[8] *Id.* at § 288.20.

[9] *Id.* at § 288.20(a)(1)(J).

> **Practice Tip:**
> Incorporate into the drought ordinance flexibility to give your city officials the ability to adjust drought restrictions and when they are implemented.

TCEQ rules is "drought" defined. So, the triggering points are determined by the entity adopting the plan. Experience is likely the main tool used by cities in determining when restrictions should be implemented and how much water use should be restricted. However, as seen from the intensity of the drought during 2011, the historical trigger levels may not effectively address threats to the water supply in a timely manner to have a meaningful effect on the water supply.

Finding the balance between protecting the water supply and protecting property values, jobs, and businesses that rely heavily on water is difficult and politically challenging. As Texas emerges from the current drought, water suppliers will be assessing how they fared during the drought and how their drought contingency plans worked as a tool to manage the water supplies.

B. TCEQ's Management of Surface Water Supplies During Times of Drought: the New Drought Rules and New Watermaster Programs

The TCEQ, as the agency charged with the enforcement of water rights, is responsible for managing the surface water supplies as between water users.[10] This management includes suspending diversions of junior water rights holders upon receipt of a senior priority call, managing the supply through watermaster programs, and evaluating and issuing emergency orders related to surface water supplies. The TCEQ's management of the water supply during 2011 raised several issues that cities with surface water supplies should be aware of.

i. The New Drought Rules

During the 2009 drought, the TCEQ received a senior priority call from Dow Chemical Company, who owns a senior water right at the mouth of the Brazos River.[11] In response, the TCEQ, by letter to the water rights holders in the Brazos Basin, suspended diversions and storage of state water for non-municipal uses under all water rights junior to 1980.[12] Again, in 2011, upon receipt of several senior priority calls, the TCEQ suspended nearly 1,200 junior water rights in five different river basins. As with the 2009 suspension of water rights in the Brazos River Basin, the TCEQ did not suspend the water rights for municipal uses, domestic uses, and power generation.[13] The TCEQ reasoning for not suspending junior municipal water

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[10] TEX. WATER CODE § 5.013(a)(1).

[11] 2011 TEX. SUNSET COMM'N, SUNSET ADVISORY COMMISSION GUIDELINES: TEXAS COMMISSION ON ENVIRONMENTAL QUALITY AND ON-SITE WASTEWATER TREATMENT RESEARCH COUNCIL 56 (Jan. 2011, http://www.tceq.texas.gov/assets/public/comm_exec/sunset/SSAC-Commission-Decision-Jan2011.pdf [hereinafter referred to as the TEX. SUNSET COMM'N Report].

[12] Letter from Mark Vickery, Exec. Dir., Tex. Comm'n on Envtl. Quality to Water Right Holder (Aug. 10, 2009), *available at* http://www.tceq.texas.gov/response/drought.

[13] *See e.g.,* Letter from Mark Vickery, Exec. Dir., Tex. Comm'n on Envtl. Quality to Water Right Holder (May 18, 2011), *available at* http://www.tceq.texas.gov/response/drought.

rights was to protect public health and safety. Nevertheless, for the municipal water rights holders, the TCEQ required that the municipalities implement mandatory water use restrictions to prevent outdoor lawn watering. The TCEQ stated in its letter to the municipalities, "This action is required because the TCEQ cannot continue to protect municipalities under its concern for and duty to protect public health and welfare if the municipalities are still allowing outdoor watering of lawns and landscapes."[14] The TCEQ later clarified that the municipalities were not required to prohibit outdoor watering unless such a restriction was already required under their respective drought contingency plans. The TCEQ went on to require municipalities to implement higher level of mandatory drought contingency restrictions than may otherwise be required under their plan.[15]

The TCEQ's decision to only suspend non-municipal and non-power generating water rights was controversial to many senior water rights holders, including some with municipal water rights, because suspending only non-municipal water rights seems contrary to the established prior appropriation doctrine (*i.e.,* "first in time, first in right"), and places most of the burden to satisfy the senior calls on ranchers, farmers, and industry.

While the TCEQ was managing the drought and addressing senior priority calls, the Texas Legislature, upon the recommendation of the Texas Sunset Commission and after significant debate and revision, included in the TCEQ Sunset Bill Texas Water Code § 11.053. Section 11.053 states that, during times of drought (which is not defined), the executive director may, by order, and in accordance with the prior appropriation doctrine, suspend the right of any person who holds a water right and adjust the diversions of the water right holder.[16] The executive director must ensure that the action taken maximizes the beneficial use of the water, minimizes the impact on water rights holders, prevents waste, takes into consideration the efforts of the water rights holder to implement a water conservation plan and a drought contingency plan, conform, if possible, to the preferences outlined in Texas Water Code § 11.024 (municipal, agricultural and industrial, mining, hydroelectric power, etc.), and does not require the release of lawfully stored water.[17] The provision requires the commission to adopt rules to implement section 11.053, which are to include conditions under which the executive director may issue an order, the terms of the order, and the procedures to appeal to the commission of any order issued by the executive director to the commissioners.[18]

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[14] *See e.g,.* Letter from Mark Vickery, Exec. Dir., Tex. Comm'n on Envtl. Quality to Junior Municipal Water Right Holders Whose Water Rights Have Not been Suspended in an Area Where There is a Senior Call (August 8, 2011), *available at* http://www.tceq.texas.gov/response/drought.

[15] *See e.g.,* Letter from Mark Vickery, Exec. Dir., Tex. Comm'n on Envtl. Quality to Junior Municipal Water Right Holders Whose Water Rights Have Not been Suspended in an Area Where There is a Senior Call (Sept. 16, 2011), *available at* http://www.tceq.texas.gov/response/drought.

[16] TEX. WATER CODE § 11.053(a).

[17] *Id.* at § 11.053(b)

[18] *Id.* at § 11.053(c)

After one stakeholder meeting, the TCEQ proposed rules implementing section 11.053 on November 4, 2011.[19] The practice of the executive director to suspend only non-municipal water rights was incorporated into the rules proposed by the TCEQ.[20] In response to the proposal, the TCEQ received twenty-eight written comments from all segments, including farmers, river authorities, industry, electric power generators, state agencies, environmental groups, and municipalities. Most of the comments were from water rights holders likely to be cut off by a priority call.[21] Numerous among the criticisms were concerns that the executive director would be circumventing the prior appropriation doctrine through his emergency orders, the definition of a "drought" was too broad, the duration of the orders were too long, and the preferred junior water rights holder should be required to implement their drought contingency plans.[22] With some amendments, the TCEQ adopted the proposed rules on April 11, 2012.[23]

Under the adopted rules, "drought," is defined when at least one of the following criteria is met: (1) conditions in all or part of the watershed are classified as "moderate" by the National Drought Mitigation Center; (2) streamflows at the USGS gaging stations in the drainage area are below the 33rd percentile of the period of record available for the impacted watershed; or (3) there is below normal precipitation in the watershed for the preceding three-month period, a senior call is made, and the demand for the surface water exceeds the available supply as evidenced by a senior water right holder making a senior call.[24] The executive director may issue an order suspending water rights of any water right holder if conditions are such to qualify as a drought or if there is an emergency shortage of water.[25]

The rules also give the executive director of the TCEQ the authority to not suspend junior water rights based on public health, safety, and welfare concerns.[26] The executive director may, but is not required, to direct these junior water right holders to (1) provide information demonstrating that it has made efforts to obtain alternative water sources, (2) demonstrate that reasonable efforts have been made to conserve water by providing its water use data to the executive director every fourteen (14) days, and (3) provide information on what it has done to identify long-term additional or alternative water sources within thirty (30) days of the issuance of the executive director's order.[27] Additionally, the executive director must consider the water rights holder's compliance with and implementation of water conservation and drought contingency plans, and the executive director may require the junior water rights holders whose rights are not suspended to implement more restrictive levels of their drought contingency

[19] 36 TEX. REG. 7468 (Nov. 4, 2011).

[20] *Id.* at 7468 (§ 36.6(b)).

[21] Douglas Caroom, *The Allocation of Water During Times of Drought: TCEQ's Proposed Rules Under Texas Water Code § 11.053*, 42 ST. B. TEX. ENVTL. L.J. 139, 147 (2012).

[22] *Id.*

[23] 37 TEX. REG. 3096 (April 27, 2012).

[24] *See* 30 Tex. Admin. Code § 36.2(3).

[25] *Id.* at § 36.3(a).

[26] *Id.* at § 36.5(c).

[27] *Id.* at § 36.5(c).

plans.[28] Finally, if the executive director issues an order suspending water rights, the order must set a time and place for a hearing for the commission to affirm, modify, or set aside the order with notice of the hearing provided to all water rights holders.[29]

The final rule remains controversial among senior water rights holders and the agricultural community. The main complaint is that the rule appears to disregard the prior appropriation doctrine. Those senior water rights holders, which could include cities, who may have spent significant amounts of money to acquire senior water rights to ensure they have a secure and reliable supply of water, are questioning whether the right they purchased has the value it once had, or the same reliability. There could be challenges to both the rule and the implementation of the rule. Some entities may request that the legislature revisit Texas Water Code § 11.052 to further clarify its intent.

Municipalities are likely to benefit from the new drought rules generally because the TCEQ, as it did during 2011, is likely to allow municipal junior water rights holders to continue to divert while requiring more senior non-municipal water rights holders to suspend diversions. However, expect to see the TCEQ press these benefited cities to have more robust water conservation and drought contingency plans and active enforcement of those plans.

ii. New Watermaster Programs

The TCEQ has three watermaster programs: (1) Rio Grande, which serves the Rio Grande Basin below Fort Quitman to the Gulf of Mexico and a portion of the Nueces-Rio Grande Coastal Basin; (2) Concho, which serves the Concho River Basin; and (3) South Texas, which serves the Guadalupe, Lavaca, Lavaca-Guadalupe Coastal, Nueces, San Antonio-Nueces Coastal, San Antonio, and a portion of the Nueces-Rio Grande Coastal River Basins. A watermaster is the "boots-on-the-ground" person who works to ensure water rights holders divert water in accordance with their respective water rights. Additionally, during times of drought, the watermaster is charged with allocating available water among the water rights holders in accordance with priority. The watermaster may suspend water rights or otherwise reduce diversion, and enforce against those diverting water that has been released from storage for delivery to others. The water rights holders in watermaster areas work closely with the watermaster, including filing declarations of intent to divert, and reporting usage and diversion rates.[30]

The TCEQ Sunset Bill[31] requires the TCEQ to evaluate all river basins in the state without watermaster programs every five years to determine the need for a watermaster. The TCEQ has started this process and on February 12, 2012 issued a letter to stakeholders in the Brazos River Basin asking for input on the process and what the agency should consider during

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[28] *Id.* at § 36.7.

[29] *Id.* at § 36.8.

[30] *See* 30 TEX. ADMIN. CODE Ch. 303 and 304.

[31] Act of May 28, 2011, 82nd Leg., R.S., ch. 1021, 2011 Tex. Gen. Laws 2579.

its evaluation.[32] If, though this process, the TCEQ appoints new watermasters, these appointments will likely affect and potentially change how a city's water utility manages its water supply.

III. Factors Affecting a City's ability to Obtain New Surface Water Supplies

Going hand-in-hand with management of the water supply during times of drought, cities and other water suppliers are and will be taking steps to obtain "new" surface water supplies and to make existing supplies more reliable. There are several sources a city could look to for new, reliable surface water, including unappropriated surface water, interbasin transfers of surface water, water supply contracts, and the purchase of existing water rights. Cities and water suppliers are also looking at ways to make greater use of existing surface water supply sources, including direct and indirect reuse of existing supplies, the conjunctive use of surface water and groundwater to make one of the sources more treatable or reliable, the use of an aquifer storage and reclamation facility to store surface water for use during droughts, and the implementation of water conservation measures that extend existing supplies. The following are some current issues that will affect the viability/reliability of one or more of the aforementioned sources of water.

A. Environmental Flows

In 2007, the Texas Legislature made it a priority to evaluate freshwater inflows and instream flow necessary to maintain the viability of the state's streams, rivers, bays and estuary systems.[33] The legislature prioritized the river basins, requiring the appointed advisory committee to appoint a basin and bay area stakeholders committee for each river basin listed in Texas Water Code § 11.02362(b), and a basin and bay expert science team for each basin.[34] These committees with the help of the science team are to develop environmental flow regime recommendations and environmental flow standards for the basin, and submit those to the TCEQ for consideration. The TCEQ is then required to propose and adopt environmental standards for the river basin.[35] Once adopted, new water rights or amendments that increase an existing water right will be required to comply with the flow regimes established by these new rules.[36]

The TCEQ has received recommendations from, and adopted environmental flow standards for Trinity River, San Jacinto River, Galveston Bay, Sabine River, Neches River, and Sabine Lake Bay.[37] The rules adopt a flow regime approach whereby the amount of instream flows and freshwater inflows that are required to maintain aquatic stability vary in an attempt to

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[32] *See* Letter from Ricky Anderson, Watermaster Section Manager, Tex. Comm'n on Envtl. Quality to Stakeholders in the Brazos River Basin (Feb. 17, 2012), available at http://www.tceq.texas.gov/response/drought.

[33] TEX. WATER CODE § 11.0235.

[34] *Id.* at § 11.02362.

[35] *Id.*

[36] *Id.* at § 11.147(e-1).

[37] 30 TEX. ADMIN. CODE Ch. 298, Subch. B and C.

mimic the natural monthly and yearly variability of river flows.[38] New appropriations in these river basins will be required to pass base flows that will vary with the hydrologic condition and season, a certain number of high pulse flows (flows that are short in duration and high in magnitude), and subsistence flows.[39]

The remaining river basins are working through the process, and once completed, rules will be proposed and adopted for the remaining basins listed by the statute. The Environmental Flows Recommendation Reports from the Colorado and Lavaca Rivers and Matagorda and Lavaca Bays Basin and Bay Stakeholder Committee ("BBASC") and from the Guadalupe, San Antonio, Mission, and Aransas Rivers and Mission, Copano, Aransas, and San Antonio Bays BBASC were submitted to the TCEQ on August 30, 2011 and September 1, 2011, respectively. The TCEQ published proposed environmental flow rules for these two basins on April 13, 2012, with the comment period closing on May 14, 2012.[40] The Nueces River and Corpus Christi and Baffin Bays Basin and Bays Expert Science Team ("BBEST") completed its Environmental Flows Recommendation Report in October 2011. The Nueces River and Corpus Christi and Baffin Bays BBASC is currently developing its own recommendations report, which is due September 1, 2012, that evaluates the balance of "human needs" along with environmental needs. The Environmental Flow Regime Recommendations Report from the Brazos River BBEST was submitted to the Brazos River BBASC on March 1, 2012. Next, the BBASC will take the BBEST Report and attempt to balance it with all the other needs in the basin. Finally, the BBASC and the BBEST for the Rio Grande, Rio Grande Estuary, and Lower Laguna Madre Basin and Bay Area continue to work on the Environmental Flows Recommendation Report.[41]

B. Indirect Reuse

"Indirect reuse of return flows" generally refers to the discharge of wastewater into a state watercourse and the transportation of that water via the watercourse to the user's diversion point. Many water suppliers are seeking to obtain rights to discharged wastewater to increase the amount of available water supply. Who has the right to obtain the authorization to use this water, and what kind of authorization is required, has been the source of debate since at least 2005.[42] On one side of the debate are those that argue who wastewater return flows are not subject to the permitting requirements that apply to new appropriations but may be authorized for diversion through a bed and banks permit. On the other side are those who assert that once the water is returned to a state watercourse it becomes state water and is available for appropriation.[43]

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[38] *Id.*

[39] *Id.*

[40] 37 TEX. REG. 2521 (April 13, 2012).

[41] *See* http://www.tceq.texas.gov/permitting/water_rights/eflows.

[42] *See* Commissioners' Work Session, Texas Comm'n on Envtl. Quality, August 12, 2005.

[43] *See* Tex. Water Dev. Bd., "Water Rights and Wastewater Reuse, prepared by the Reuse Committee of the Texas Water Conservation Association," *Water for Texas 2007* (Doc. No. GP-8-1), at Vol. 1, p. 29 (2007 Texas State Water Plan).

The question regarding the property legal treatment of return flows is a contested issue in the *Application of the Brazos River Authority for Water Use Permit No. 5851* (commonly referred to as the "Brazos System Operation Permit").[44] The Brazos River Authority has requested its new appropriation in part based on the availability of return flows, current and future, from all sources once they are discharged to the watercourse. In the contested proceedings, the Brazos River Authority has argued that return flows from any discharger should be treated as "state water" available for appropriation to the extent those return flows continue to be discharged to the Brazos River Basin as is provided by Texas Water Code § 11.046(c).[45] These return flows would be subject to environmental flow requirements and subject to calls by senior water rights.

Practice Tip:
The reuse debate is over the treatment of surface water based return flows. Reuse of groundwater derived return flows is addressed as part of Texas Water Code § 11.042(b).

The Executive Director of the TCEQ, in preparing the draft System Operation Permit, instead proposed authorizing bed and banks transportation and use of all return flow discharges of water supplied from the Brazos River Authority's water rights or from wastewater treatment facilities owned or operated by the Authority. Relying on Texas Water Code § 11.042(c), the Executive Director advocated that the return flows should not be considered an appropriation, and that only historically discharged return flows would be subject to the environmental flow requirements of the proposed permit. Additionally, the Executive Director proposed limiting this portion of the water right authorization to the current Texas Pollutant Discharge Elimination System ("TPDES") permitted discharges; any increases in those discharge limits would necessitate an amendment to the System Operation permit bed and banks authorization.[46]

The Administrative Law Judges ("ALJs") concluded that bed and banks provisions in Texas Water Code § 11.042(c) do not create an independent right to appropriate water, as those allow merely an authorization to "convey and subsequently divert" water for which the permittee already holds an appropriative right.[47] The ALJs concluded that to divert another person's surface-water-based return flow, a person only needs to obtain an appropriative right under Section 11.046(c) and not a bed and banks permit.[48] With respect to future return flows, the ALJs found that, with the special conditions in the proposed System Operation Permit that would limit the Authority's ability to divert only return flows that are actually being discharged, the Authority's approach was sufficiently tailored so as to avoid authorizing diversions of return flows that are not actually available.[49]

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[44] TCEQ Docket No. 2005-1490-WR; SOAH Docket No. 582-10-4184.

[45] Proposal For Decision, *Application of the Brazos River Authority for Water Use Permit No. 5851*, TCEQ Docket No. 2005-1490-WR; SOAH Docket No. 582-10-4184, at 137 – 139 ("PFD").

[46] *Id.*

[47] *Id.* at 149.

[48] *Id.* at 151.

[49] *Id.* at 154.

At the January 25, 2012 TCEQ Commission Agenda, at which the System Operation permit proposal for decision was considered, the Commissioners expressed concern about granting a right to appropriate future return flows, but were otherwise comfortable with the ALJs' analysis.[50] At this time, no decision has been made on the Authority's permit application. Currently, the Authority's application has been remanded to the State Office of Administrative Hearings for the Authority to prepare and submit, and the Executive Director to evaluate, a water management plan. Once that plan is completed, the draft permit and the plan will be subject to another contested case hearing. How return flows should be treated is likely to remain a contested issue going forward. Nevertheless, assuming the Commissioners do not change their position regarding return flows, it appears that, if a city wants to appropriate its surface-water-based return flows, it will need to obtain a new appropriation, the water right will need to comply with the basin's environmental flow requirements, and at most the city will be allowed to appropriate up to the limit of its existing discharge permit.

C. Endangered Species

In addition to state law requirements that could affect a city's ability to obtain new water surface water supplies, litigation arising out of the federal Endangered Species Act as well as new listings of species under the Act could affect a city's new and existing surface water supply projects.

i. *The Aransas Project v. Shaw, et al.*, United States District Court for the Southern District of Texas, No. 2:10-cv-00075

On March 10, 2010, The Aransas Project ("TAP"), an environmental group whose focus is water management of the Guadalupe and San Antonio River basins and their bays and estuaries, filed suit in the United States District Court, Corpus Christi division, seeking declaratory and injunctive relief under the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531, et seq., against five State of Texas officials including the three commissioners of the TCEQ (collectively "State Defendants"). TAP has asked the district court to declare that these State Defendants, through an alleged failure to adequately regulate the use of surface water in the Guadalupe and San Antonio River basins, have violated Section 9 of the ESA, 16 U.S.C. § 1538, by "taking" whooping cranes, including by significantly modifying and destroying crane habitat and "harassing" cranes; and that the State's water use and diversion laws are preempted by federal law to the extent they result in "takes" of cranes. The Court granted motions to intervene in the proceeding filed by the Guadalupe-Blanco River Authority, San Antonio River Authority, and the Texas Chemical Council (collectively referred to as the "Defendants Intervenors"). However, the Court denied motions to intervene filed by the Texas Farm Bureau, American Farm Bureau Federation, San Antonio Water System, San Antonio City Public Service Board, Union Carbide Corporation finding that each are adequately represented by already-admitted parties to the litigation. A bench trial was held before Judge Janis G. Jack from December 5, 2011 to December 15, 2011.

[50] *See* TCEQ Commission Agenda Webcast for January 25, 2012 available at http://www.texasadmin.com/tceqa.shtml.

The core issue in the case is whether the TCEQ regulated surface water rights in 2008 and 2009 in such a way that resulted in the "take" of whooping cranes. TAP seeks injunctive relief that would enjoin the TCEQ from (1) allowing water diversion and use under existing state water rights that would alter or destroy crane habitat, and (2) approving or processing new or pending water permits. TAP asserts that twenty-three (23) whooping cranes died during the winter of 2008 and 2009.[51] TAP argues that there is a "strong statistically significant correlation between winter whooping crane mortality and freshwater inflows."[52] According to TAP, because the TCEQ, which TAP claims is in charge of water diversions on the Guadalupe and San Antonio River systems, did not evaluate the whooping crane's need for water and took no action to restrict withdrawals during the winter of 2008-2009, the TCEQ's inaction is the causation leading to the twenty-three (23) deaths of the cranes.[53]

The TCEQ maintains that it does not have the authority to order water rights holders to refrain from diverting water to allow it to flow to the bays and estuaries. The TCEQ contends that it only has the authority to require junior water rights holders to suspend diversions when a more senior water right makes a call on the water. In its Initial Post-Trial Brief, the State Defendants also cautioned the court that accepting TAP's argument that TCEQ has broad implied powers to regulate surface water rights to require existing water rights holders to suspend diversions to direct more water to the bays and estuaries "ignores the fundamental point that the right to divert water is a vested property right of the appropriator."[54] If the court was to require the TCEQ to withhold water from water rights holders so as to comply with the Endangered Species Act, this could result in a taking of property under the Constitution's Fifth Amendment thereby requiring the federal government, not the state, to pay compensation.[55]

The TCEQ and the Defendants-Intervenors also assert that TAP failed to establish causation.[56] They claim that TAP has not proven that twenty-three whooping cranes actually died. According to the Defendant-Intervenors, there was physical evidence of the death of only four birds, and cause of death of these birds cannot be linked to water diversions.[57] With respect to the remaining nineteen birds, the death of these birds cannot be assumed simply because the cranes were not seen during aerial surveys.[58] Further, Defendant-Intervenors argue that TAP has not proven that:

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[51] Closing Argument of Plaintiff The Aransas Project, The Aransas Project v. Shaw, No. C-2:10-cv-00075 (S.D. Tex. April 19, 2012) at 6.

[52] *Id.*

[53] *Id.* at 15 – 19.

[54] Initial Post-Trial Brief of State Official Defendants, The Aransas Project v. Shaw, No. C-2:10-cv-00075 (S.D. Tex. April 19, 2012) at 16 – 17.

[55] *Id.* at 17.

[56] *Id.* at 21.

[57] Joint Post-Trial Brief of Defendant-Intervenors, The Aransas Project v. Shaw, No. C-2:10-cv-00075 (S.D. Tex. April 19, 2012) at 8 – 9.

[58] *Id. 9 – 14.* In the winter 2009-2010, a "surprisingly high" (17 more than expected) arrived at the Aransas preserve, further raising questions by the Defendant-Intervenors about the validity of the assumption that absence from the aerial surveys means death of the birds. *Id.* at 15.

1. the state regulation of water diversion caused reduced freshwater inflows to the San Antonio Bay;
2. the reduced freshwater inflows caused an increase in salinity in the San Antonio Bay;
3. the incremental increased salinity in the San Antonio Bay caused a decrease in blue crab and wolfberry abundance, food sources for the cranes;
4. the alleged decrease in blue crab and wolfberry abundance caused the injury or death of the whooping cranes;
5. the incremental increased salinity in the San Antonio Bay cause the whooping cranes to fly to upland freshwater ponds; and
6. these trips to the upland ponds resulted in energy expenditures that cause injury or death to the whooping crane.[59]

Currently, the parties are awaiting a decision by the judge. It is almost certain that the non-prevailing party will appeal the decision. While only those cities and communities in the San Antonio and Guadalupe River basins are directly affected by the outcome of this litigation, if TAP is successful, it could lead to similar suits in other basins, and potentially a shift in how environmental flows are addressed in Texas.

ii. Proposed Listing of New Threatened and Endangered Species

There are fifty-seven (57) threatened or endangered animal species and twenty-eight (28) threatened or endangered plant species listed for the State of Texas.[60] However, these numbers are likely to increase over the coming years. On September 9, 2011, the District of Columbia District Court approved stipulated settlements in two cases involving failures by the U.S. Fish and Wildlife Service to meet certain statutory deadlines with respect to considering the listing of certain species.[61] The stipulated agreements provide for "a multi-year listing work plan that will enable the agency to systematically, over a period of six years, review and address the needs of more than 250 species listed on the November 10, 2010 Candidate Notice of Review[62] to determine if they should be added to the Federal Lists of Endangered and Threatened Wildlife and Plants."[63] There are more than 45 species in Texas that will be reviewed as part of the stipulated agreements, and include several aquatic species.

On October 6, 2011, the U.S. Fish and Wildlife Service published its 12-Month finding on a petition to list the Texas fatmucket, golden orb, smooth pimpleback, Texas pimpleback, and

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[59] *Id.* at 16 – 40.

[60] *See* http://ecos.fws.gov/tess_public/pub/stateListingAndOccurrenceIndividual.jsp?state=TX.

[61] *See* Order Granting Joint Motion for Approval of Settlement Agreement and Order of Dismissal of Center for Biodiversity's Claims, In Re Endangered Species Act Section 4 Deadline Litigation, Misc. Action No. 10-377 (EGS), MDL Docket No. 2165 (Sept. 9, 2011); Order Granting Joint Motion for Approval of Settlement Agreement and Order of Dismissal of Wildearth Guardian's Claims, In Re Endangered Species Act Section 4 Deadline Litigation, Misc. Action No. 10-377 (EGS), MDL Docket No. 2165 (Sept. 9, 2011).

[62] 75 Fed. Reg. 69,222 (Nov. 10, 2010).

[63] *See* http://www.fws.gov/endangered/improving_ESA/listing_workplan.html.

Texas fawnsfoot, all freshwater mussels, as threatened or endangered.[64] The Texas fatmucket is found in the Colorado and Guadalupe River systems. The golden orb is found in Lake Corpus Christi, the Guadalupe River, the lower San Marcos and lower San Antonio Rivers. The smooth pimpleback is now only found in the Brazos River Basin, although it once existed in the Colorado River Basin. The Texas pimpleback is found in the San Saba River, Concho River, Guadalupe River, and San Marcos River. Although little is known about the Texas fawnsfoot, live populations have been found in the Brazos River near its confluence with the Navasota River, and in the Colorado River.[65]

According the USFWS, the major factors contributing to the decline of these species are impoundments, sedimentation due to agricultural activities and urbanization, dewatering (*i.e.,* water use), sand and gravel mining, chemical contaminants and non-point source pollution, inadequate state and federal regulations designed to regulate sand and gravel mining and water quality, climate change, and non-native species.[66] In its finding, the USFWS concluded that listing the mussel species was warranted, but listing the species was precluded by higher priority actions to list other species.[67] Cities using surface water in these basins should closely follow USFWS's actions with respect to these species. If and when these species are listed, critical habitats will be designated which could affect a city's ability to pump and use surface water.

IV. Conclusion

"When the well is dry, we know the worth of water." (Benjamin Franklin, Poor Richard's Almanac 1946). Certainly, after 2011, we better understand Benjamin Franklin's words. While managing surface water supplies during drought has its challenges, ensuring adequate supplies are available and reliable in the future is equally as important. Cities, as the primary suppliers of water, should be aware of the challenges with obtaining new, reliable supplies, and actively participate in the discussions and debates over regulation of those supplies.

[64] 76 Fed. Reg. 62,166 (Oct. 6, 2011).

[65] *Id.*

[66] *Id.*

[67] *Id.*