

# Current Issues Involving Surface Water and Cities

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# Management of Water Supplies During the Drought



## The 2011 Drought

- In 2011, Texas saw the worst one-year drought since 1895, when the Texas rainfall records begin.
- 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 suspended non-municipal diversions in those basins in an effort to honor the calls.
- 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.

# Management of Water Supplies During the Drought

## 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.
- Retail water suppliers are required to adopt drought contingency plans.



- The plan must include:
  - ❖ monitoring information
  - ❖ specific criteria for the initiation and termination of drought response stages
  - ❖ rationale for basis for such triggering criteria
  - ❖ quantified targets for water use reductions to be achieved
  - ❖ specific water supply or water demand management measures to be implemented during each stage of the plan
  - ❖ procedures for the enforcement of mandatory water use restrictions

# Management of Water Supplies During the Drought

## **Drought Contingency Planning**

- Two key elements that determine the effectiveness of a drought contingency plan:
  - (1) the enforcement provisions in the plan; and
  - (2) the factors used to trigger the water use restrictions under the plan
- Incorporate into the drought ordinance flexibility to give your city officials the ability to adjust drought restrictions and when they are implemented.

# Management of Water Supplies During the Drought

## **Drought Contingency Plans Example:**

### **Stage 2:**

- Maximum day water use exceeds 90% of the City's maximum daily supply capacity for ten consecutive days.
- Water supplies available from all sources are reduced by 5% to 10% below projected needs.

### **The following restrictions shall apply:**

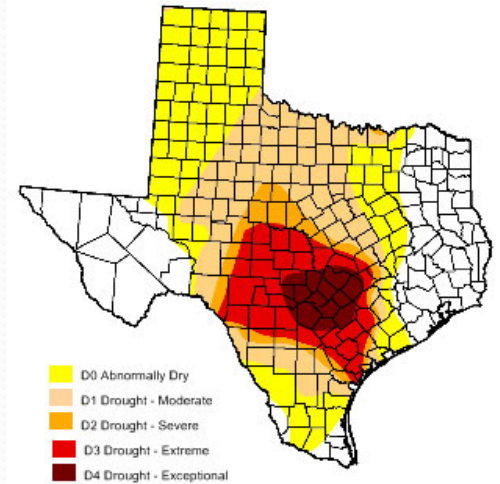
- On your irrigation day, you may water from 12:00 a.m. to 10:00 a.m. and then again from 6:00 p.m. to 11:59 p.m.
- Landscape irrigation is restricted to one day per week. Irrigation schedules will be based on the last digit of the address:
  - 1 – Tuesday
  - 2 – Wednesday
  - 3/4 – Thursday
  - 5/6 – Friday
  - 7/8 – Saturday
  - 9/0 – Sunday
- Irrigation shall provide a maximum of 1.5 inches per zone per week. Irrigation shall occur without significant water runoff, which can be accomplished by correctly cycling the sprinkler system and allowing time for the water to soak into the landscape between irrigation events.
- Water customers will refrain from or significantly limit aesthetic and non-essential water use. Water shall not be used to wash down hard surfaced areas, including without limitation, sidewalks, parking lots, gutters and patios. Water shall not be used for dust control. However, water may be used for road construction or to clean surfaces for painting.
- Hand watering, physically holding the water hose, for landscape irrigation purposes is allowed on a daily basis regardless of the time of the year.

# Management of Water Supplies During the Drought

## New Drought Rules

## Background

- Dow's 2009 Priority Call
- Suspension of non-municipal and power generation rights
- Sunset Commission recommendation



# Management of Water Supplies During the Drought

## Texas Water Code § 11.053

- During times of drought, 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.
- 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.)
  - ❖ does not require the release of lawfully stored water
- The provision requires the commission to adopt rules to implement § 11.053.

# Management of Water Supplies During the Drought



## TCEQ Drought 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 33<sup>rd</sup> 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.
- 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.



# Management of Water Supplies During the Drought

## TCEQ Drought Rules

- 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. The executive director may 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.
- The executive director must consider the water rights holder's compliance with and implementation of water conservation and drought contingency plans.
- The executive director may require the junior water rights holders whose rights are not suspended to implement more restrictive levels of their drought contingency plans. If the executive director issues an order suspending water rights, the order must set a time and place for a hearing before the commission.

# Management of Water Supplies During the Drought

## 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.
- The TCEQ Sunset Bill requires evaluation of basins without watermasters.
- The TCEQ has started this process.
- Stakeholder meetings in the Brazos and Colorado River Basins during the month of June.
- Proposed options.
- How it will affect your city.

# City's Ability to Obtain New Surface Water Supplies

## Sources of Supply:

- Unappropriated surface water
- Interbasin transfers of surface water
- Water supply contracts
- Purchase of existing water rights
- Direct and indirect reuse of existing supplies
- The conjunctive use of surface water and groundwater
- Aquifer storage and reclamation facility
- Water conservation measures that extend existing supplies

# City's Ability to Obtain New Surface Water Supplies

## **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 and through a stakeholder process, prepare and adopt standards for each basin.
- 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.



# City's Ability to Obtain New Surface Water Supplies

## **Environmental Flows**

- 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.
- 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 mimic the natural monthly and yearly variability of river flows.
- 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.

# City's Ability to Obtain New Surface Water Supplies

## Environmental Flows

- The remaining river basins are working through the process.
- The TCEQ published proposed environmental flow rules for the Colorado and Lavaca Rivers and Matagorda and Lavaca Bays Basin and the Guadalupe, San Antonio, Mission, and Aransas Rivers and Mission, Copano, Aransas, and San Antonio Bays on April 13, 2012, with the comment period closing on May 14, 2012.
- 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 and 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.
- 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.

# City's Ability to Obtain New Surface Water Supplies

## 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.
- 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.
- On one side of the debate are those that argue that 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 water course it becomes state water and available for appropriation.
- Why does this matter?

# City's Ability to Obtain New Surface Water Supplies



## Indirect Reuse

- The question regarding who has a right to appropriate return flows is a contested issue in the *Application of the Brazos River Authority for Water Use Permit No. 5851*.
- Brazos River Authority argued that return flows from any source should be treated as “state water” available for appropriation to the extent those return flows continue to be discharged to the Brazos River Basin.
- 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 flows discharged of water supplied from the Brazos River Authority’s water rights or from wastewater treatment facilities owned or operated by the Authority.



# City's Ability to Obtain New Surface Water Supplies

## Indirect Reuse

- The ALJs concluded that to divert another person's surface-water based return flow, a person needs to obtain an appropriative right under Section 11.046(c) and not a bed and banks permit.
- At the January 25, 2012 TCEQ Commission Agenda, the Commissioners were concerned about granting a right to appropriate future return flows, but were otherwise comfortable with the ALJs' determination.
- 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 only be allowed to appropriate up to the limit of its existing discharge permit.

# City's Ability to Obtain New Surface Water Supplies

## Endangered Species

*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 against the TCEQ and its commissioners.
- 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.
- Guadalupe-Blanco River Authority, San Antonio River Authority, and the Texas Chemical Council intervened.
- A bench trial was held before Judge Janis G. Jack from December 5, 2011 to December 15, 2011.

# City's Ability to Obtain New Surface Water Supplies

## Endangered Species

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

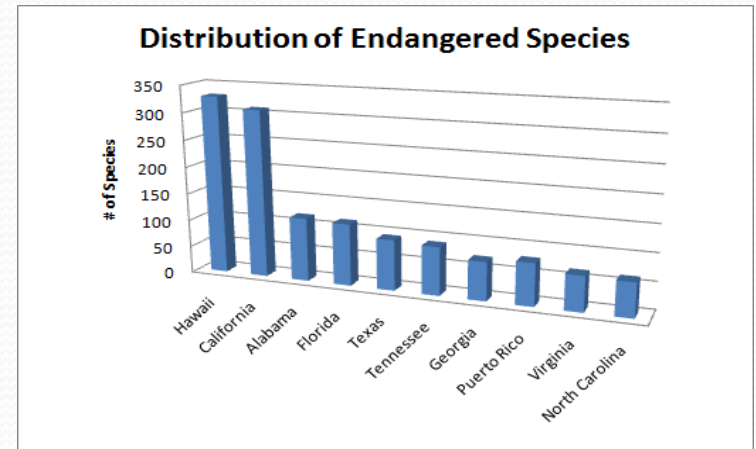


- TAP asserts that twenty-three (23) whooping cranes died during the winter of 2008 and 2009 because the TCEQ did not evaluate the whooping crane's need for water and took no action to restrict withdrawals during the winter of 2008-2009.
- The TCEQ maintains that it does not have the authority to order 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.
- The TCEQ and the Intervenors also assert that TAP failed to establish causation. They claim that TAP has not proven that twenty-three whooping cranes actually died. TCEQ and the Intervenors argue that TAP has not proven causation by showing the state regulation of water diversion caused reduced freshwater inflows to the San Antonio Bay.

# City's Ability to Obtain New Surface Water Supplies

## 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.
- On September 9, 2011, the District of Columbia District Court approved stipulated settlements that provide for a multi-year listing work plan to systematically review and address the needs of more than 250 species listed on the November 10, 2010 Candidate Notice of Review. There are more than 45 species in Texas that will be reviewed as part of the stipulated agreements.



# City's Ability to Obtain New Surface Water Supplies

## Proposed Listing of New Threatened and Endangered 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 Texas fawnsfoot, all freshwater mussels, as threatened or endangered.
- According the USFWS, the major factors contributing to the decline:
  - 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
  - climate change
  - non-native species
- 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.



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