

## **New Issues in Water**

**Texas City Attorneys Association  
Summer Conference  
South Padre Island – June 5-7, 2013**

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## **1. Introduction**

Among the wide array of legal issues addressed by Texas city attorneys on behalf of the cities they serve, legal and regulatory issues associated with water supply and wastewater services are likely among the most important. Water law is one of the most dynamic, quickly evolving areas of the law in Texas today, with new policies being shaped in real time, alongside frequent, historic case precedent emerging from state and federal courts. While it is not possible to cover the breadth of new issues associated with water law herein, this paper will provide an overview of a few of the most current developments in the arena. These new issues in water law and water policy may well serve to impact the operations of municipal water and wastewater system operations across the state, and, in turn, present new legal challenges to be addressed by cities and their lawyers.

## **2. Federal Enforcement of Sanitary Sewer Overflows**

A recent increase in EPA enforcement actions against cities for “sanitary sewer overflows” (“SSOs”) poses significant challenges for municipal wastewater systems, affecting their long-term capital improvement program implementation, and associated utility budgets, and may well result in significant increased costs to municipal ratepayers. In order to address the potential risks associated with federal enforcement actions and the sometimes dramatic costs associated with same, city attorneys may find it appropriate to coordinate with their cities’ wastewater utility staff in order to audit existing SSO protocol, particularly the manner in which SSOs are reported, and consider same in light of the possibility of enforcement, thereby taking proactive steps to prepare for and mitigate against future EPA actions.

**a. Background**

Every city that operates a publicly owned treatment works (“POTW”) maintains a sanitary sewer system designed to collect and transport municipal sewage for treatment and ultimate disposal or reuse, pursuant to state and federal Clean Water Act authority.<sup>1</sup> SSOs are occasional, unintentional discharges, spills, or releases of raw or partially-treated sewage from sanitary sewer collection systems before reaching treatment plants. SSOs have a variety of causes, including line blockages, line breaks, lift station failures, vandalism, and other defects, including lapses in sewer system operation and maintenance, power failures, or inadequate sewer design. The U.S. Environmental Protection Agency (“EPA”) Office of Waste Water Management estimates that there are tens of thousands of SSOs every year across the nation (not including sewage backups into private property).<sup>2</sup>

Texas has been delegated authority to administer the National Pollution Discharge Elimination System (“NPDES”) program in the State pursuant to authority included in the Clean Water Act.<sup>3</sup> As such, the Texas Commission on Environmental Quality (“TCEQ”) maintains day-to-day regulatory oversight over sanitary sewer systems and SSOs in the State. However, pursuant to the MOA, EPA retains concurrent jurisdiction over water quality enforcement, including SSO enforcement.<sup>4</sup> Despite active TCEQ oversight and enforcement related to SSOs in Texas, EPA has in recent years begun to prioritize enforcement actions against municipalities with large numbers of reported SSOs, targeting dozens of cities throughout the nation and seeking to force a reduction in the number and frequency of SSOs.

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<sup>1</sup> See 33 U.S.C. § 1251 et seq.; also Tex. Water Code § 26.001 et seq.

<sup>2</sup> U.S. Env'tl. Prot. Agency, *Sanitary Sewer Overflows and Peak Flows Frequently Asked Questions*, available at [http://cfpub.epa.gov/npdes/faqs.cfm?program\\_id=4](http://cfpub.epa.gov/npdes/faqs.cfm?program_id=4).

<sup>3</sup> See Memorandum of Agreement between Texas Natural Resource Conservation Commission and U.S. Environmental Protection Agency Region 6 pt. IV.C.3 (Sept. 14, 1998).

<sup>4</sup> *Id.*; also 33 U.S.C. §§ 1251(a), 1319(b), and 1319(g).

As President Obama's second term agenda begins under a new EPA Administrator, several Texas cities have already been subject to EPA and Department of Justice ("DOJ") enforcement for SSOs, and many others may soon find themselves targets of federal enforcement, leading to the possibility of liability that can be measured in the hundreds of millions of dollars to individual cities. In advance of any federal involvement, cities may consider a variety of options to address their historic and ongoing SSOs, improve reporting and documentation efforts, and prepare for the possibility of federal scrutiny of their wastewater utility operations.

**b. Enforcement and Implications**

EPA has determined that SSOs represent "national environmental problems with significant environmental impacts" and has prioritized federal enforcement against certain targeted offenders.<sup>5</sup> EPA's SSO Enforcement Guidelines provide guidance as to the factors used by the agency to identify those POTWs that may find themselves on the agency's prioritized "short list" for SSO enforcement, including (but not limited to) POTWs with wastewater service populations greater than 300,000 and average daily wastewater flows greater than 100 million gallons/day.<sup>6</sup>

The DOJ and EPA typically rely on a city's self-reported violations of permit conditions and the Clean Water Act's prohibition on unpermitted "discharges" of "pollutants" to "waters of the United States"<sup>7</sup> as the primary basis for enforcement, and as leverage in negotiating consent decrees. Such reliance is particularly significant today in the context of a city's response to an SSO enforcement action, in light of the current state of the law concerning EPA's jurisdiction

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<sup>5</sup> U.S. Env'tl. Prot. Agency, *Guidelines for Federal Enforcement in CSO/SSO Cases*, available at <http://www.epa.gov/enforcement/water/documents/policies/csosso-guidelines-enf.pdf> (April 10, 2005).

<sup>6</sup> *Id.*

<sup>7</sup> See 33 U.S.C. § 1311(a).

under the Clean Water Act, including the Supreme Court’s recent efforts at defining “waters of the United States”.<sup>8</sup> Whether an SSO actually reached such “waters” in order to trigger EPA’s jurisdiction under the Clean Water Act is a critically important “fact” in any analysis of a city’s possible response, from its reporting of same to its reaction to an SSO enforcement action.

EPA’s SSO enforcement protocol typically takes the form of a negotiated consent decree. These decrees usually identify all manner of short and long range projects, studies, modeling work, and reporting guidelines for the POTW to initiate and implement. These efforts will, in part, result in new wastewater system upgrades, new maintenance and repair protocol, and enhanced documentation procedures related to identifying and reporting SSOs. Consent decrees often also include stipulated penalties for future violations, along with a one-time civil penalty for past violations.

While EPA is actively involved in the negotiation of all such consent decrees, the DOJ often assumes a lead role in the negotiation process. Although a consent decree is a document agreed upon by the affected municipality and the federal government, cities should be mindful that the baseline for negotiations is EPA’s position that SSOs are to be eliminated, as in EPA’s view they are serious violations of the Clean Water Act. Thus, to the extent an SSO enforcement action is resolved through a consent decree, this negotiation position will almost always necessitate significant upgrades and repairs to a city’s wastewater collection and treatment system.

Because of the varying causes of SSOs within a sanitary sewer system, the remedies proposed by EPA and DOJ as part of a consent decree are often both comprehensive and expensive. Once EPA and DOJ initiate enforcement, typically through issuance of

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<sup>8</sup> See *Solid Waste Agency of Northern Cook Cty. v. Army Corps of Engineers*, 531 U.S. 159 (2001); also *Rapanos v. United States*, 547 U.S. 715 (2006); see also EPA Draft Guidance on Identifying Waters Protected by the Clean Water Act (April 2011).

Administrative Orders from EPA, in most cases a city's entire wastewater collection and treatment system is placed under the federal microscope, including its Capacity, Management, Operation & Maintenance ("CMOM") program, inspection procedures, cleaning practices, capacity limitations, emergency response protocol, and SSO response and reporting protocol.<sup>9</sup>

Further, while SSOs from a POTW's collection system are EPA's primary focus in recent SSO enforcement actions (having essentially driven the actions), effluent violations and wastewater treatment plant operations are also common subjects of scrutiny in the consent decree process. As a result, remediation actions required by EPA and DOJ through consent decrees often go well beyond simply improving the capability of the POTW to reduce or eliminate SSOs. These decrees also often include requirements to improve wastewater treatment plant infrastructure and adjust wastewater treatment plant operations. As such, SSO enforcement actions have and will cost cities across America literally billions of dollars over the next two decades. Although EPA has initiated several "affordability frameworks and guidelines" directly or tangentially related to SSO-associated remediation costs,<sup>10</sup> by and large these guidelines have not yielded significant cost savings for cities facing federal enforcement of SSOs.

The dramatic costs resulting from consent decrees and the associated projects required therein impact city budgets and capital improvement programs, and those costs trickle down to municipal ratepayers as a result. While municipal lobbying efforts, including efforts by the U.S. Conference of Mayors, have begun to aggressively engage EPA and the Administration in a dialogue about costs and overall affordability of wastewater treatment plant and SSO-related

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<sup>9</sup> U.S. Env'tl. Prot. Agency, *Guidelines for Federal Enforcement in CSO/SSO Cases*, available at <http://www.epa.gov/enforcement/water/documents/policies/csosso-guidelines-enf.pdf> (April 10, 2005).

<sup>10</sup> See EPA Combined Sewer Overflows Guidance for Financial Capability Assessment and Schedule Development, available at <http://www.epa.gov/npdes/pubs/csofc.pdf> (February 1, 1997); also EPA Integrated Municipal Stormwater and Wastewater Planning Approach Framework, available at [http://www.epa.gov/npdes/pubs/integrated\\_planning\\_framework.pdf](http://www.epa.gov/npdes/pubs/integrated_planning_framework.pdf) (June 5, 2012).

required improvements, EPA has to date exhibited significant resistance to making material changes to its policies or its manner of implementing same. For this reason alone, the role of city attorneys in assisting their cities in addressing SSOs, whether proactively or not, is vitally important.

**c. Preparing for and Mitigating Against Potential Enforcement**

In order to prepare for the possibility of SSO enforcement by EPA and DOJ, Texas cities should consider several advanced planning measures that may decrease the likelihood of federal enforcement. Such measures may also serve to mitigate the impact of enforcement actions when they do occur. Cities with a significant number of reported SSOs should first consider voluntary participation in TCEQ's Sanitary Sewer Overflow Initiative ("SSOI"), a state-run compliance mechanism designed to address SSOs. Participation in this program may help to shield cities from becoming targets of federal SSO enforcement.<sup>11</sup> Cities should also consider the impacts of SSOs within their respective wastewater collection systems, potential causes of SSOs, and seek to identify remedies for same. City attorneys may wish to work with wastewater utility staff to audit the city's existing standard operating procedures for SSOs, reporting mechanisms, and tracking protocol. Although EPA does not usually bless the entirety of a city's SSO reduction plan in consent decree negotiations, cities that are diligent have had some success in demonstrating the effectiveness of their existing programs and procedures, and aspects of those efforts have sometimes been incorporated into consent decrees in ways that actually save cities money.

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<sup>11</sup> See TCEQ Summary of the Sanitary Sewer Overflow Initiative (GI-389), *available at* [http://www.tceq.texas.gov/publications/gi/gi-389.html/at\\_download/file](http://www.tceq.texas.gov/publications/gi/gi-389.html/at_download/file) (August 2012).

### 3. New Endangered Species Act Issues

Two recent landmark cases relating to violations of the federal Endangered Species Act (“ESA”) are likely to have significant impacts on future water supply development and other infrastructure projects across Texas. City attorneys should be aware of the issues and pitfalls resulting from these cases as they counsel city departments regarding water project planning.

#### a. Whooping Crane Litigation

On March 11, 2013, the U.S. District Court for the Southern District of Texas (Corpus Christi Division) issued its long-awaited decision in *The Aransas Project v. Shaw, et al.*<sup>12</sup> This case involves a suit brought by The Aransas Project, an environmental group, against Texas Commission on Environmental Quality (“TCEQ”) officials for their alleged actions (and inaction) in managing freshwater flows of the Guadalupe and San Antonio Rivers, and thus inflows to their associated bay and estuary system, all allegedly resulting in a “take” of endangered whooping cranes in violation of the ESA.<sup>13</sup>

After many months of protracted litigation, the district court ruled in favor of The Aransas Project and held that TCEQ officials are liable for the unauthorized “take” of the whooping crane, in violation of the ESA.<sup>14</sup> The court initially issued an order enjoining TCEQ from approving new surface water permits in the Guadalupe and San Antonio River Basins without demonstrating to the court that the withdrawals will not result in further “take” of whooping cranes.<sup>15</sup> While the court subsequently amended its order to add language that would allow TCEQ to issue new permits in the Guadalupe and San Antonio River Basins, the court determined that such authority could be exercised only if necessary to protect the public health

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<sup>12</sup> No. 2:10-CV-00075, slip op. (S.D. Tex. Mar. 11, 2013).

<sup>13</sup> See 16 U.S.C. § 1531 et seq.

<sup>14</sup> *Id.* at 121-22.

<sup>15</sup> *Id.* at 122.

and safety.<sup>16</sup> The court's order also provides that TCEQ must seek an Incidental Take Permit ("ITP") and develop a Habitat Conservation Plan ("HCP") within 30 days of the date of the ruling. If unaltered, this decision would effectively put administration of the State's surface water rights program in the Guadalupe and San Antonio River Basins in the hands of a federal judge.

In reaching its decision, the court found that increased surface water withdrawals from streams in the Guadalupe and San Antonio River Basins resulted in less fresh water, and higher levels of salinity, within San Antonio Bay, which has led to a reduction in certain vegetation impacting the viability of the cranes' primary food source, including the blue crab.<sup>17</sup> The court reasoned that reduction of the cranes' food sources, along with the cranes having to fly further to search for fresh drinking water and food, caused, and will continue to cause, crane malnourishment and death.<sup>18</sup> The court also opined that Senate Bill 3, enacted by the Texas Legislature in 2007 to establish an environmental flows process and regime for each basin and bay system in the state, fell short of federal requirements in the ESA to protect the whooping cranes.<sup>19</sup>

Both the Guadalupe Blanco River Authority ("GBRA") and the Texas Solicitor General, on behalf of TCEQ officials, filed motions for the judgment of the district court to be stayed until the case is appealed and a final judgment is rendered. While the district court denied these motions to stay, on March 26, 2013, the 5<sup>th</sup> Circuit Court of Appeals granted the motions and approved the movants' requests for an expedited appeal.<sup>20</sup> The parties have now begun an

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<sup>16</sup> No. 2:10-CV-00075, D.E. 362 (S.D. Tex. March 15, 2013).

<sup>17</sup> No. 2:10-CV-00075, slip op. at 43-48.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 109.

<sup>20</sup> *The Aransas Project v. Guadalupe-Blanco River Authority*, No. 13-40317 (5<sup>th</sup> Cir. Mar. 26, 2013).

expedited briefing and argument schedule before the Fifth Circuit while the district court's ruling is stayed.<sup>21</sup>

While the outcome of this case is uncertain until the appeals process is completed, the possible impacts of this decision on water right holders throughout the State are significant. Should the Fifth Circuit, or ultimately the U.S. Supreme Court, uphold the district court's ruling regarding the alleged "take" of the endangered whooping crane, and restrict TCEQ from granting new surface water rights within the Guadalupe and San Antonio River Basins, any such decision would open the door for similar lawsuits across the State, in other river basins, brought by environmental groups seeking to protect endangered species by prohibiting or limiting the granting of new surface water right permits in those basins.

Most cities throughout the State face sizeable water supply deficits in the course of the state's fifty-year planning cycle for water,<sup>22</sup> and legal challenges brought pursuant to the ESA pose a serious threat to cities' abilities to develop new water supplies to serve their growing populations. Thus, cities should be mindful of the important implications this case may have on future water supply development, particularly in basins where endangered species that are reliant on fresh water flows for their survival may arguably be harmed by reductions in stream flows that may result from the issuance of new surface water permits or even the use of existing water rights.

#### **b. Expedited Listings Under the ESA**

Another series of recent federal cases and resulting settlement agreements have prompted expedited listing schedules for hundreds of species throughout the nation under the ESA, and these cases may well have significant implications for future water supply and other

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<sup>21</sup> *Id.*

<sup>22</sup> See 2012 Texas State Water Plan, available at <http://www.twdb.state.tx.us/waterplanning/swp/2012/index.asp> (January 5, 2012).

infrastructure developments to be pursued by Texas cities. Prompted by a perceived failure on the part of the United States Fish and Wildlife Service (“USFWS”) to promptly designate species as threatened or endangered under the ESA, several environmental groups have filed lawsuits against the USFWS over the last several years. These actions were based on USFWS’ alleged failure to formally list species for which petitions for listing had been filed, and where, nonetheless, such species remained on the USFWS’ candidate species list for years or even decades, without action by the agency.<sup>23</sup> Two of the plaintiffs in those lawsuits – WildEarth Guardians and the Center for Biological Diversity – entered into settlement agreements with the Secretary of the Interior and USFWS in the fall of 2011. These agreements require USFWS to pursue an expedited listings determination for 251 species throughout the United States, some of which are indigenous to Texas.<sup>24</sup>

At a minimum, the settlement agreements require USFWS to make determinations on whether to list those 251 species by September 30, 2016.<sup>25</sup> The determinations will be made on a staggered basis between fiscal years 2012 and 2016, with the species facing the most imminent threats given listing deadlines that ended in fiscal year 2012. Of the 251 candidate species subject to the expediting listing schedules across the nation, 21 of those are known to be found in Texas, spread across more than 60 counties and several river basins.<sup>26</sup> As the USFWS moves forward to consider listing additional species, proposed rules will be published in the *Federal*

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<sup>23</sup> See *WildEarth Guardians v. U.S. Sec’y of the Interior*, 4:08-CV-00508-EJL-LM, 2011 WL 1225547 (D. Idaho Mar. 28, 2011) (concerning the Columbian sharp-tailed grouse (*Tympanuchus phasianellus columbianus*)); *In re Polar Bear Endangered Species Act Listing & Section 4(d) Rule Litig.*--MDL No. 1993, 709 F.3d 1 (D.C. Cir. 2013) (listing the Center For Biological Diversity as intervenors); *Ctr. for Biological Diversity v. Salazar*, 695 F.3d 893 (9th Cir. 2012) (CFBD failed in alleging oil and gas exploration activities in Chukchi Sea and on adjacent coast of Alaska violated Marine Mammal Protection Act (MMPA)).

<sup>24</sup> *Wildearth Guardians v. U.S. Sec’y of the Interior*, 4:08-CV-00508-EJL-LM, 2011 WL 1225547 (D. Idaho Mar. 28, 2011) (concerning the Columbian sharp-tailed grouse (*Tympanuchus phasianellus columbianus*)); *In re Polar Bear Endangered Species Act Listing & Section 4(d) Rule Litig.*--MDL No. 1993, 709 F.3d 1 (D.C. Cir. 2013) (listing the Center For Biological Diversity as intervenors).

<sup>25</sup> *Id.*

<sup>26</sup> See *id.*

*Register* and will open an opportunity for public comment on the proposed listing before final action is taken by USFWS.

This expedited listing process may well result in a tremendous increase in the number of species in Texas listed as endangered under the ESA, and such listings can negatively impact cities involved in the development and construction of new municipal infrastructure. For example only, such listings can significantly impact the development of water supply and other infrastructure projects that require Clean Water Act Section 404 permitting by the U.S. Army Corps of Engineers (“Corps”). If a proposed municipal project requiring Sec. 404 permitting has the potential to affect threatened or endangered species or their designated critical habitat, the ESA requires the Corps to consult with USFWS (or National Marine Fisheries Service (“NMFS”), as applicable) before making a permitting decision.<sup>27</sup> Additionally, a Sec. 404 permit applicant would be required to prepare and submit a Biological Evaluation as part of its application,<sup>28</sup> detailing the implications of the project to the natural environment and listed species, and to consult with USFWS (or NMFS) over the possible “take” of listed species resulting from issuance of the Sec. 404 permit and construction and operation of the project. Thereafter, the USFWS (or NMFS) is required to prepare a Biological Opinion detailing the agency’s determination of the impacts the project will have to threatened or endangered species, as a precursor to final action by the Corps.<sup>29</sup>

The Corps’ processing of a Sec. 404 permit application will be affected by a listing of a species if it is determined to be in the area of the project, even if an applicant filed its application prior to the formal listing of the species. However, Sec. 404 permit applicants can take certain proactive measures to ensure compliance with the ESA, in anticipation of a listing that might

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<sup>27</sup> See 16 U.S.C. § 1536(a)(2).

<sup>28</sup> See 16 U.S.C. § 1536(c)(2).

<sup>29</sup> See 16 U.S.C. § 1536(c)(1).

occur within the project area. For instance, an applicant may avail itself of USFWS protocol, established under the authority of Section 10 of the ESA, by seeking to enter into a candidate conservation agreement with USFWS.<sup>30</sup> A Sec. 404 permit applicant entering into such an agreement could agree to certain voluntary conservation measures, and in exchange could receive an ESA Sec. 10 permit from USFWS that provides assurance that additional land, water, or resource use restrictions under the ESA will not be imposed on the applicant in the event a species is listed subsequently.<sup>31</sup> While these agreements provide a means to ensure regulatory certainty for Sec. 404 permit applicants in anticipation of a listing, the time frame required to develop and implement these agreements is generally lengthy, which requires lead time, particularly in light of the ongoing, expedited listings process.

Ultimately, the listing of endangered species throughout Texas may have significant impacts on many municipal projects, including future water supply and infrastructure development. For cities with long-term projects currently in the planning stage, they should determine possible species located within the area of the project and closely monitor and actively participate in the listings process for those species. Proactive measures to evaluate the possible impacts of future listings on important city projects will help ensure the viability of those projects, and reduce the risk of ESA-related challenges down the road.

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<sup>30</sup> See U.S. Fish and Wildlife Service Candidate Conservation Agreements Fact Sheet, *available at* <http://www.fws.gov/endangered/esa-library/pdf/CCAs.pdf> (March 2011).

<sup>31</sup> See *id.*

#### 4. State Funding for Water Projects

The 2012 State Water Plan (the “Plan”) projects that Texas’ population will grow by 82% between the years 2010 and 2060, adding roughly 10 million people to our existing population.<sup>32</sup> Over the course of the fifty-year planning horizon, the Plan projects that the State’s annual water demands will increase by 4 million acre-feet, primarily as a result of projected population growth, associated commercial and industrial growth, and reduction in existing water supplies.<sup>33</sup> In order to meet those demands during a period of severe drought, Texas needs to generate approximately 9 million acre-feet of additional water supplies by 2060.<sup>34</sup>

The capital cost to design, construct, and implement the Plan’s recommended water management strategies in order to generate this additional amount of water is projected at \$53 billion, with municipal water providers being expected to need nearly \$27 billion in state financial assistance to implement their water management strategies.<sup>35</sup> These staggering figures underscore the importance of and need for a funding mechanism to implement the Plan, without which the water management strategies identified as critical to meet the State’s future water demands, including the demands of cities, simply may not be developed. Historically, finding political support for this major funding initiative has been a challenge. However, acts of the current Texas Legislature may hold promise for State Water Plan implementation funding.

The start of the 83<sup>rd</sup> Session of the Texas Legislature in January 2013 marked the beginning of an unprecedented commitment to the funding of water projects. An initiative was led by Rep. Alan Ritter, Chairman of the House Natural Resources Committee, to create a new fund to implement the State Water Plan, with money appropriated from the State’s economic

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<sup>32</sup> See 2012 Texas State Water Plan, Executive Summary p. 7 available at <http://www.twdb.state.tx.us/waterplanning/swp/2012/index.asp> (January 5, 2012).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

stabilization or “rainy day” fund to support the measure. House Bill 4 (“HB 4”), authored by Chairman Ritter, creates the State Water Implementation Fund for Texas (“SWIFT”) and provides for the operation and administration of that fund by the Texas Water Development Board, as well as a SWIFT advisory committee comprised of appointees by various legislative officials.<sup>36</sup>

HB 4 stipulates that the SWIFT should be used to fund only those projects identified in the State Water Plan, including conservation and reuse projects, and requires the Texas Water Development Board to adopt rules relating to eligibility for use of the SWIFT.<sup>37</sup> At the time of writing, HB 4 had passed both the House and Senate but was referred to a Conference Committee due to the House’s refusal to accept Senate amendments to the bill.<sup>38</sup> While the provisions of HB 4 may evolve in the remaining days of the 83<sup>rd</sup> Session, it is possible that some version of this measure will be passed and signed into law.

Notwithstanding HB 4’s possible passage, an appropriation of money to fund the SWIFT is somewhat less certain at the time of writing. House Bill 11 (“HB 11”), also filed by Chairman Ritter, would have appropriated \$2 billion from the rainy day fund for deposit into the SWIFT, representing a one-time infusion of capital to fund the SWIFT over a period of several decades.<sup>39</sup> However, due in part to opposition stemming from a perceived failure to adequately fund public education, HB 11 was made subject to a point of order in the House on April 29, 2013,<sup>40</sup> and the point of order effectively killed the bill.<sup>41</sup>

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<sup>36</sup> Tex. H.B. 4, 83<sup>rd</sup> Leg., R.S. (2013).

<sup>37</sup> *Id.*

<sup>38</sup> H.J. of Tex., 83<sup>rd</sup> Leg., R.S. 2360 (2013).

<sup>39</sup> Tex. H.B. 11, 83<sup>rd</sup> Leg., R.S. (2013).

<sup>40</sup> H.J. of Tex., 83<sup>rd</sup> Leg., R.S. 2019 (2013).

<sup>41</sup> Tex. H.R. Deadlines Calendar, 83<sup>rd</sup> Leg., R.S. (2013).

While HB 11 has been eliminated as a possible vehicle for appropriation of funds to the SWIFT, other bills moving through the legislative process as of this writing hold promise for a SWIFT funding mechanism. For example, Senate Joint Resolution 1 (“SJR 1”) by Senate Finance Committee Chairman Tommy Williams has been voted out of the Senate and referred to the House Appropriations Committee.<sup>42</sup> SJR 1 proposes the transfer of \$2 billion from the rainy day fund to the credit of the SWIFT for water projects, but makes such appropriation contingent upon an affirmative vote by the citizens of Texas in the November 2013 election.<sup>43</sup> SJR 1 would also appropriate from the economic stabilization fund \$2.9 billion for transportation projects, and \$500 million for public education.<sup>44</sup> While SJR 1 accomplishes the same transfer of funds contemplated in HB 11, the additional requirement of statewide voter approval of such a measure may ultimately pose an obstacle for appropriation of money to fund the SWIFT.

At the time of writing, there are also other legislative vehicles for such an appropriation of funds, but it remains unclear which, if any, measures will be passed and then signed into law. Many involved in the legislative process speculate that Governor Perry will call a special legislative session devoted to water issues if a funding measure does not pass by the end of regular session on May 27. Ultimately, some measure of the value of HB 4 is dependent upon an appropriation of money to the credit of the SWIFT. Without such an appropriation to infuse the fund, the SWIFT holds little promise for implementing the State Water Plan from a financing perspective.

These water funding measures, if successful, may have a significant positive impact on cities throughout the State that are in need of financial assistance in the development of future water supply infrastructure. In planning ahead for water supply development, cities should seek

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<sup>42</sup> See Tex. S.J. Res. 1, 83<sup>rd</sup> Leg., R.S. (2013); H.J. of Tex. 83<sup>rd</sup> Leg., R.S. 3189 (2013).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

to actively participate in the state's regional water planning process, so as to ensure that needed city projects – including conservation and reuse projects – are enumerated in their regional water plans as itemized projects. The inclusion of future projects in regional water plans, and their inclusion in the State Water Plan, will certainly play an important role in future state funding decisions, thereby affording cities the opportunity for low-interest state funding as a financing alternative.<sup>45</sup>

## **5. Other Water Issues; A Look Ahead**

Each of the foregoing topics address significant water-related developments that have the potential to impact cities across the State. But, they are just a sample of the important water issues facing many Texas cities. Other matters deserving some attention include:

Long range water planning. Municipalities may wish to consider the importance of long-range water planning and development for their communities. As identified in the 2012 State Water Plan,<sup>46</sup> the significant water deficits projected for many cities throughout the State over the next fifty years will require new, innovative strategies to meet those demands.

Collaboration in water supply development. In developing new supplies, regional collaboration among cities, and sharing existing supplies, each in a manner that maximizes efficiencies of scale, may well be an important part of any region's future water supply development and management—particularly as some new water supplies will be inherently expensive or will need to be moved great distances to meet municipal needs. Thus, regional collaboration and partnerships with respect to water supply development and management will become ever more important to communities across the state. Establishing the proper legal framework for such collaboration is critically important if the effort is to be successful. There

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<sup>45</sup> Tex. Water Code § 15.975(a)(3).

<sup>46</sup> See 2012 Texas State Water Plan.

are many vehicles available for use by cities, including vehicles as simple as interlocal agreements and contracts, but also more sophisticated vehicles that can be utilized through the creation and use of stand-alone entities such as local government corporations, public utility agencies, and municipal water districts.

Conservation and reuse. Additionally, a city's distribution of potable water to customers for their use, and its collection and reclamation of wastewater resulting from such use, affords cities the opportunities to conserve and reuse such supplies. Indeed, water conservation and water reuse are increasingly important supply strategies for many cities across the State. These strategies serve to maximize the value and use of water supplies. Various legal and regulatory issues associated with the development and implementation of water conservation initiatives and water reuse strategies make participation by city attorneys particularly important.

Small MS4 General Permit. Finally, TCEQ is poised to adopt a new Municipal Separate Storm Sewer System ("MS4") general permit to authorize the storm water discharges of cities having service populations of less than 100,000, as of the 1990 Census. This Small MS4 General Permit, expected to be adopted by TCEQ this summer or fall, will provide state and federal discharge authority from municipal storm sewer systems necessary to comply with the Clean Water Act. Cities owning or operating storm sewer systems and having service populations less than 100,000 should be reviewing the terms and conditions of the proposed Small MS4 General Permit, which includes several substantive changes proposed by TCEQ, and prepare a revised and updated Storm Water Management Plan in anticipation of the adoption of the Small MS4 General Permit.

Water law and regulation is dynamic and the ever-changing landscape evident in this area of the law can have sizeable implications to cities. Thus, the importance of staying abreast of

new issues on the water front, and of looking forward and staying ahead of water-related challenges, cannot be overemphasized. In an era of significant legal, regulatory, and permitting challenges at the state and federal levels, funding challenges, and other obstacles to municipal growth, prudent, proactive, long-range water supply and water quality assessment and planning has never been more critical to cities and the lawyers that represent them.