



New Issues in Water – What Every City Attorney Needs to Know

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Overview:

- Introduction
- Federal SSO Enforcement
- New Issues regarding Endangered Species Act
 - Whooping Crane Litigation
 - Expedited Listings
- State Funding for Water Projects
- Other Issues – Looking Ahead

Introduction – Water Law

- Quickly evolving
 - Groundwater law
 - Surface water law
- New case precedent
- Interacting with:
 - Federal environmental laws
 - Water / wastewater operations



Federal Enforcement of Sanitary Sewer Overflows

- What is an SSO?
 - Causes
 - Frequency
- Jurisdiction
 - TCEQ
 - EPA
- EPA Enforcement
 - National initiative



Federal Enforcement of Sanitary Sewer Overflows

- EPA has prioritized federal enforcement of SSOs against certain targeted offenders.
- Targets include:
 - POTWs with wastewater service populations > 300,000 (although smaller POTWs have also been targeted)
 - Avg daily wastewater flows > 100 million gpd

Federal Enforcement of Sanitary Sewer Overflows

- EPA and the Department of Justice typically rely on a city's self-reported violations of permit conditions as basis for enforcement.
- Enforcement typically takes the form of a negotiated consent decree.
 - May require wastewater system upgrades, new maintenance and repair protocol, and enhanced documentation procedures related to identifying and reporting SSOs.

Federal Enforcement of Sanitary Sewer Overflows

- Consent decrees – Negotiation
 - DOJ often assumes lead role.
 - SSOs viewed as serious violations of the CWA.
- Consent decrees – Penalties
 - Generally, stipulated penalties for future violations.
 - Generally, a one-time civil penalty for past violations.
- Consent decrees – Remedies
 - Comprehensive and EXPENSIVE.

Federal Enforcement of Sanitary Sewer Overflows

- Consent decrees often go *well* beyond simply improving capability to reduce or even eliminate SSOs.
- SSO enforcement actions have and will cost cities tens of **billions** of dollars over the next two decades.



Preparing for and Mitigating Against SSO Enforcement

- Consider voluntary participation in TCEQ's Sanitary Sewer Overflow Initiative (SSOI)
- Perform a self-audit of within wastewater collection system, identify causes and remedies
- Work with wastewater staff to audit existing standard operating procedures and reporting mechanisms for SSOs
- Consider privilege for audit information

New Issues Regarding the Endangered Species Act



Whooping Crane Litigation

- *The Aransas Project v. Shaw, et. al.*
- Recent decision in federal lawsuit brought by environmental group against TCEQ officials for alleged action in managing flows of Guadalupe and San Antonio Rivers, to detriment of species.
- Lawsuit alleged that lack of inflows resulted in “take” of endangered whooping cranes in violation of the Endangered Species Act.

Whooping Crane Litigation

- March 11, 2013 – Federal District Court ruled in favor of The Aransas Project, holding TCEQ officials liable for “take” of endangered species.
- District Court’s order:
 - Enjoined TCEQ from approving new surface water permits in Guadalupe and San Antonio Basins (but subsequently amended to allow if necessary “to protect public health”)
 - Requires TCEQ to seek Incidental Take Permit and develop Habitat Conservation Plan

Whooping Crane Litigation

- GBRA and Texas' Solicitor General filed motions to stay judgment of district court.
 - District court denied motions.
- March 26, 2013 – 5th Circuit granted motions to stay and approved movants' request for expedited appeal.
- Parties have now begun expedited briefings schedule before the 5th Circuit.

Whooping Crane Litigation

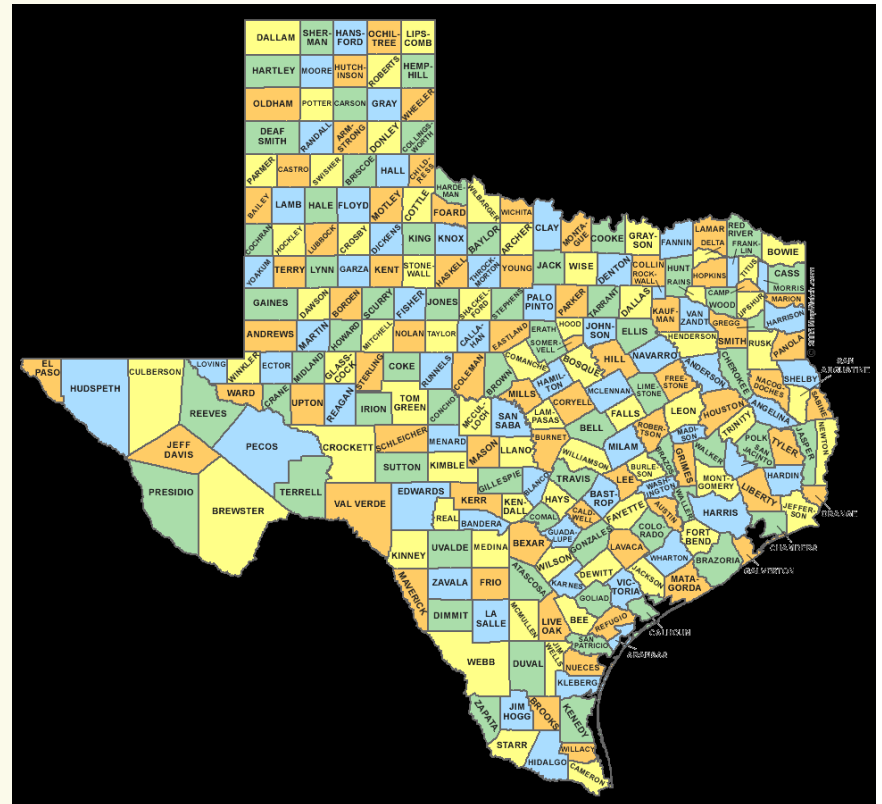
- *Significant* possible impacts should the 5th Circuit or U.S. Supreme Court uphold the district court's ruling.
- Could open the door for similar lawsuits across the State brought by environmental groups seeking to protect endangered species by prohibiting new surface water right permits.
- In short, huge impact on future water supply development.

Expedited Listings Under the ESA

- Series of federal lawsuits filed by environmental groups prompted court settlements regarding 251 candidate species under the ESA.
- Settlement agreements mandate that USFWS make a final determination on the listing of 251 species as threatened or endangered by September 30, 2016.
- Determinations being made on a staggered basis between 2012 and 2016.

Expedited Listings under the ESA

- Of the 251 candidate species, 21 are known to be found in Texas.
 - Spread across more than 60 counties and several river basins.



Expedited Listings under the ESA

- Could result in a tremendous increase in the number of species in Texas listed as endangered under the ESA.
- Negative impacts for cities involved in development and construction of new municipal infrastructure and water supplies.

Expedited Listings under the ESA

- Impacts to Sec. 404 applicant with potential to affect endangered species:
 - Required consultation between USFWS and U.S. Army Corps of Engineers
 - Required submission of Biological Evaluation
 - USFWS preparation of a Biological Opinion detailing agency's determination of impacts project may have on threatened or endangered species as precursor to final Corps action.

Expedited Listings under the ESA

- Proactive Measures:
 - Evaluate possible future water supply or infrastructure development to be undertaken by your city.
 - Evaluate possible future listings in the project area.
 - Actively participate in USFWS listings process.
 - Sec. 404 applicants may enter into Candidate Conservation Agreement with USFWS and agree to voluntary conservation measures to avoid action in event of a listing.

State Funding for Water Projects -- Background

- 2012 State Water Plan projects that Texas needs to generate 9 million acre-feet of additional water supplies by 2060 (dry year).
- Cost to fund water management strategies identified in the State Water Plan: **\$53 billion**.
- SWP estimates that municipal water providers will need \$27 billion in financial assistance to implement their water management strategies.

Funding for Water Projects – the Big Challenge

- Historically, political support for water funding initiatives has been a challenge.
- Reasons:
 - Budget shortfalls
 - Political climate
 - No one paying attention



2013 – The Perfect (Dust) Storm

- Texas in the midst of a long-running, historic drought.
- Budget surplus announced.
- Key leadership at Capitol committed to water-related initiatives.



HB 4 (Ritter) – State Water Implementation Fund

- Bill establishes the State Water Implementation Fund for Texas (SWIFT)
- Also establishes a SWIFT Advisory Committee comprised of appointees by the Governor, Lt. Gov., and Speaker to submit recommendations regarding distributions of the SWIFT.
- Contains special provisions relating to administration of the fund and distributions thereof.

HB 4 – Administration of Fund

- Of money disbursed from SWIFT for each 5-year planning cycle:
 - 10 % must be used to support rural political subdivisions or agricultural water conservation
 - 20% must be used to support projects designed for water conservation or reuse

HB 4 – Prioritization of Projects

- Requires each regional water planning group to prioritize projects in the RWP using the following criteria:
 - Decade of project need
 - Feasibility of project, including water availability
 - Viability of project
 - Sustainability, considering life of the project
 - Cost-effectiveness; unit cost of water
- Requires RWPGs to consider both short-term and long-term needs

HB 4 – Prioritization of Projects, cont'd

- TWDB to establish points system for prioritizing projects:
 - Projects serving large population
 - Provide assistance to diverse urban/rural populations
 - Provide for regionalization; or
 - Meet a high percentage of water supply; also
 - Impact on water conservation and water loss
 - Priority given to the project by RWPGs
- TWDB to adopt rules regarding use of fund and criteria.

HB 4 – Texas Water Development Board Composition

- Completely overhauls composition of TWDB – going from 6 part-time to 3 full-time board members.
- Prohibits current board members from serving in the future.
- Removes current Executive Administrator and provides for appointment of new EA.

WHERE DOES THE MONEY COME FROM?

- HB 11 (Ritter) – Appropriated \$2 billion from economic stabilization fund for deposit into SWIFT. (Killed in House on point of order)
- SJR 1 (Williams) – Proposing a constitutional amendment to create the SWIFT. Proposal to be presented to voters for election on Nov. 5, 2013.
- Ultimately, Legislature struck budget deal allowing for appropriation to SWIFT pending vote.

Other Issues – Looking Ahead

- Importance of long range water planning
- Ensuring projects are included in Regional Water Plans and State Water Plan
- Regional partnerships and collaboration to share supplies across a region
 - Appropriate legal framework for “vehicle”
 - Collaboration brings political support and cost savings

Other Issues – Looking Ahead

- Conservation and Reuse
 - Important sources of water for most cities
 - Often the first place to look for new supplies
 - 20% of SWIFT set aside for conservation and reuse projects .



Other Issues – Looking Ahead

- TCEQ Adoption of new Small MS4 General Permit
 - Will regulate storm water discharges of cities with service populations of 100,000 or less, as of the 1990 US Census.
 - Important to review terms and conditions of the proposed General Permit.
 - Prepare for adopting a revised and updated Storm Water Management Plan.

Down the Road

- Water law is dynamic, ever evolving.
- Important to stay up to speed on issues to advise your city departments.
- Ability to be proactive, not reactive, in managing these issues.



Questions?



Thank you for coming!