

Environmental Issues Important To Whooping Cranes

Houston Environmental Attorney Jim Blackburn wrote an update on environmental issues for 2007. His section on waste issues is attached. This all has relevance to whooping cranes in regards to fresh water inflows. Please read Mr. Blackburn's update for information on efforts that are important to whooping cranes.

Freshwater Inflows

One of the most important issues on the Texas coast is securing sufficient inflows of freshwater from our river systems into our bays to maintain the productivity of our bays and estuaries. During this last year, there have been important developments regarding freshwater inflow and while inflows are not yet secured, it does appear that progress is being made. However, progress has been made because groups and individuals are willing to fight for these inflows.

There are three different levels of this freshwater inflow fight. (1) There is a legislative initiative that was passed by the Texas Legislature during the session that ended in May. (2) There is litigation over the refusal of the Texas Commission on Environmental Quality to accept and process applications for certain water rights for the bays. (3) And there are administrative law proceedings where environmental groups have intervened in the applications of river authorities and cities to have water set aside for the bays at the same time that water rights are being given out for additional uses. Together, these various efforts represent progress in the fight for water for our bays and estuaries.

Legislative Action

This last session, the Legislature passed SB3. This bill created a process for identifying the amount of water needed by various bays. In theory, the amount of inflow agreed to would eventually be set aside and guaranteed for the bay. Under the law, each major estuary on the coast is the subject of a process to establish and ultimately set aside the inflow for that system. Each bay will have a stakeholder group and a group of scientific experts who ultimately will make a determination of the target inflows that will then guide future decisions on water rights. Galveston Bay will be the first bay to be evaluated. San Antonio Bay – arguably the most threatened of all of our bay systems with regard to freshwater inflow – is scheduled to be in the second of three groups to be evaluated and scheduled to start in the fall, 2008. The process is not fast, but it is underway and it does establish a basis under Texas law for water to be set aside for inflow into the bay system, a major improvement over the old law.

Legal Action

Before this new legislation was passed, the old Texas Natural Resources Conservation Commission had passed rules that identified bay and estuarine inflows

as a beneficial use under Texas law. Texas law also allows any person to apply for a water right for a beneficial use. Under this provision, the San Marcos River Foundation (SMRF) applied for about 1.1 million-acre feet of inflow for San Antonio Bay. This application was soon followed by applications by the Matagorda Bay Foundation for inflows from the Lavaca and Navidad Rivers, the LCRA for inflows from the Colorado River, and Galveston Bay Conservation and Preservation Association and Galveston Bay Foundation for Trinity River inflows to Galveston Bay. The Caddo Lake Association also submitted an application for inflows to Caddo Lake. After the legislature and Governor Perry expressed displeasure at these applications and concern that Texas law did not allow such set asides, the TCEQ dismissed the permit applications. In turn, the TCEQ was sued by each of the groups whose applications had been dismissed (except for LCRA, who chose not to sue).

In 2006, Judge Covington of the Travis County District Court ruled in favor of SMRF, Caddo Lake, MBF and GBCPA/GBF, holding that the TCEQ had authority to process these permit applications and remanding the permits back to the agency. In turn, the Attorney General's office, on behalf of the TCEQ, appealed Judge Covington's decision to the Court of Appeals. Due to an overloaded appeals court docket, the case was transferred to the Corpus Christi Court of Appeals who heard oral arguments on all of the cases in October, 2007. We are now waiting for the Appeals Court decision to determine if these applications must be processed by TCEQ or not.

Contested Case Hearings on Permit Applications for Water Rights

Over the last few years, various water users have filed several permit applications in an attempt to get more water set aside, arguably before freshwater inflow requirements are clearly established. The City of Houston and San Jacinto River Authority have several permit applications pending in the Galveston Bay system. The Lower Colorado River Authority has applied for authorization to divert, store, and use those excess floodwaters and un-appropriated flows of the Colorado River downstream of O.H. Ivie Reservoir and downstream of Lake Brownwood in an amount not to exceed 853,514 acre-feet of water per year. The application by the Guadalupe Blanco River Authority, the San Antonio River Authority and the San Antonio Water System for almost 300,000 acre feet of Guadalupe River water was withdrawn after several years of opposition by the D.M. O'Connor Interests.

Early next year, the LCRA permit application; arguably for all of the un-appropriated water left in the Colorado River, will go to hearing before the TCEQ. At this time, the Matagorda Bay Foundation, the National Wildlife Federation, the Coastal Conservation Association, the Sierra Club and Texas Parks and Wildlife have intervened in the hearing process. These groups are prepared to contest this application if an agreement cannot be reached with the LCRA and TCEQ regarding setting water aside for Matagorda Bay. At this point, the parties are cautiously optimistic that an agreed settlement for Matagorda Bay might be possible.

The most threatened estuary on the coast is clearly San Antonio Bay. Recently, the GBRA has been negotiating with Exelon Corporation to provide approximately 75,000 acre- feet of surface water for the two new nuclear power plants proposed for Victoria County. GBRA had also promised that same water to be transported via pipeline to Kendall and Hayes Counties. There is simply not enough surface water in

the Guadalupe River system to meet the commitments that have been made and are being made. Similarly, there are limited amounts of fresh groundwater to meet the basin's needs. The regional water planning process for this region – Region L – has its job cut out for it and is arguably a bona fide mess! Stay tuned. This region and this bay system will generate a lot of news in the water world in the future.

Groups Involved In These Fights

There are many groups that are involved in the fight for freshwater on the coast, including:

NWF (<http://www.nwf.org/>),
Environmental Defense (<http://www.environmentaldefense.org/>)
Sierra Club (<http://www.sierraclub.org/>)
CCA (<http://www.ccatexas.org/>)
SMRF (<http://www.sanmarcosriver.org/>)
MBF (<mailto:jbb@blackburncarter.com>)
GBCPA (<http://www.gbcpa.net/>)
GBF (<http://www.galvbay.org/>)

These groups have been active at the legislature and have been willing to go to court for freshwater inflows. SMRF, MBF and GBCPA/GBF have each put up \$25,000 to file these permit applications. MBF, NWF, CCA and Sierra are fighting administratively for the Colorado River. Other administrative proceedings are pending. Without these groups, we would not be as far as we are. These groups all need financial assistance. Please consider sending something to one or more of these groups this holiday season, either in your name or in the name of a friend.

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