

**CASE NO. 13-40317**

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

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THE ARANSAS PROJECT,  
*Plaintiff-Appellee*

v.

BRYAN SHAW, in his official capacity as Chairman of the Texas Commission on Environmental Quality; BUDDY GARCIA, in his official capacity as Commissioner of the Texas Commission on Environmental Quality; CARLOS RUBINSTEIN, in his official capacity as Commissioner of the Texas Commission on Environmental Quality; MARK VICKERY, in his official capacity as Executive Director of the Texas Commission on Environmental Quality; AL SEGOVIA, in his official capacity as South Texas Watermaster,  
*Defendants-Appellants*

GUADALUPE-BLANCO RIVER AUTHORITY; TEXAS CHEMICAL COUNCIL; SAN ANTONIO RIVER AUTHORITY,  
*Intervenors Defendants-Appellants*

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**ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS,  
CORPUS CHRISTI DIVISION  
Case No. 2:10-CV-75**

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**JOINT AMICUS CURIAE BRIEF OF THE CITY OF KERRVILLE AND  
STRUCTURAL METALS, INC. D/B/A CMC STEEL TEXAS  
IN SUPPORT OF APPELLANTS**

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**SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS**

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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**STATEMENT OF COUNSEL FOR AMICI CURIAE**

In accordance with Fed. R. App. P. 29(c)(5), *Amici Curiae* City of Kerrville and Structural Metals, Inc. D/B/A CMC Steel Texas state that no party or parties' counsel authored any part of this brief or paid any costs associated with its preparation, and no person other than *amici curiae* contributed money that funded the preparation or submission of this brief.

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d/b/a CMC Steel Texas*

**CORPORATE DISCLOSURE STATEMENT**

In accordance with Fed. R. App. P. 26.1 and 29(c)(1), the parent corporation and 100% owner of Structural Metals, Inc. is Commercial Metals Company, a publicly held corporation.



**STATEMENT REGARDING ORAL ARGUMENT**

If the Court allows any other *amici* to present argument, *Amici Curiae* City of Kerrville and Structural Metals, Inc. d/b/a CMC Steel Texas also wish to appear if it is in the interest of the Court.

**CONSENT OF PARTIES**

I hereby certify that *Amici* City of Kerrville and Structural Metals, Inc. d/b/a CMC Steel Texas conferred with counsel for appellee and with counsel for appellants and that all parties consented to the filing of this brief.

Respectfully submitted,

/s/ Amy M. Emerson

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**STATEMENT OF AMICI'S IDENTITY, INTEREST, AND AUTHORITY**

The City of Kerrville (the "City") is a home-rule city located in Kerr County, Texas, with a population of approximately 22,500 people. The City operates as a retail public utility charged with the responsibility of providing continuous and adequate potable water supply to its citizens and customers. The City holds rights to Guadalupe River Basin surface water under six appropriations issued by the State of Texas and regulated by the Texas Commission on Environmental Quality (the "TCEQ"), the state agency implicated in this case. Pursuant to its appropriations, the City is authorized to divert 6,198.945 acre-feet of surface water annually from the Guadalupe River. The City plays a significant part in the economy of Central Texas through its role as a tourist center, location for youth camps, center for agribusiness, and accommodation of industry and commerce. To meet ever-increasing water supply demands in the area, the City relies primarily on Guadalupe River Basin surface water to provide water service necessary to maintain the health and safety of its citizens and customers.

Structural Metals, Inc. d/b/a CMC Steel Texas ("CMC") is a commercial manufacturer of steel located in Seguin, Texas, with property abutting the Guadalupe River. CMC diverts surface water pursuant to Certificate of Adjudication No. 18-3837 issued by the State of Texas and regulated by the

TCEQ. Pursuant to its water right, CMC is authorized to withdraw surface water for industrial purposes with a time priority of June 25, 1914 under Texas's prior appropriation doctrine. In addition to its water right, CMC has contracted for surface water rights water under an agreement with the Guadalupe-Blanco River Authority ("GBRA"), an intervenor-appellant in this case. CMC employs approximately 1,000 people at its steel manufacturing and recycling plants. CMC is one of the largest industries in the Guadalupe River Basin, and the largest in Guadalupe County. CMC's industrial activities produce materials that are used for construction, fabrication, and manufacturing activities across the State of Texas and Southwest region of the United States. Since it was founded in 1947, CMC has invested over \$600 million and developed 270 acres of industrial facilities at its plant in Seguin based, in large part, on the reliability of surface water for its operations.



### **SUMMARY OF THE ARGUMENT**

The district court's decision to ignore the tenets of the *Burford* doctrine was an abuse of discretion in light of the comprehensive state law system in place to address environmental flows, known as Senate Bill 3 ("S.B. 3"). The district court's decision disregards all of the factors that should result in abstention according to this Court's precedent. The district court's decision, if allowed to stand, would prevent the uniform application of the S.B. 3 environmental flows process and the policy considerations that the process is designed to address. In addition, the district court's decision is a prime example of a federal court second-guessing a complex and specialized state regulatory matter. Furthermore, the district court's decision will undoubtedly result in conflicts in the interpretation of how the S.B. 3 environmental flows process addresses the considerations it is designed to address, namely the environmental considerations that protect species like the endangered Whooping Crane.

The district court's decision should also be reversed because the district court has not allowed enough time to pass since the initial enactment and subsequent full-scale implementation of S.B. 3 began. The environmental flows at issue in this case were just adopted, according to the S.B. 3 process, in August 2012. This Court has held on previous occasions in the context of education that

sufficient time be allowed for a state law program to be implemented before a federal court can determine whether the program has worked or not.

Finally, the district court's decision fails to recognize the other laws and factors that the TCEQ is required to balance when it makes decisions affecting water rights and stream flows. Both the United States and Texas Constitutions require the TCEQ to consider the vested property rights that water rights holders have in their appropriations and to afford adequate due process in the event the water right is to be amended. In addition, the district court disregards a number of other state laws that TCEQ must consider when making decisions impacting water rights and environmental factors.

## ARGUMENT

### **I. *Burford* Abstention Doctrine Requires Court to Refrain from Deciding Case Due to Existing State Regulatory Scheme**

The well-established *Burford* abstention doctrine requires a federal court to abstain from ruling in a case when a state has established a “comprehensive scheme governing a matter of vital state interest, and one where uniform application of rules [is] important.” *Sierra Club v. City of San Antonio*, 112 F.3d 789, 796 (5th Cir. 1997). This Court has expressly held that “[t]he purpose of *Burford* abstention is to discourage such federal court second-guessing of state regulatory matters.” *Id.* The United States Supreme Court has held that federal courts should abstain from making decisions on matters of state law where “[c]onflicts in the interpretation of state law, dangerous to the success of state policies, are almost certain to result from the intervention of the lower federal courts.” *Burford v. Sun Oil Co.*, 319 U.S. 315, 334 (1943). The district court’s decision does exactly what this Court and the United States Supreme Court’s precedent maintain should not happen—it prevents a uniform application of Texas’s environmental flow statutes and rules, second-guesses state regulatory policies and protocol, and presents unavoidable conflicts in the interpretation of state law.

In *Sierra Club, Inc. v. Sandy Creek Energy Associates, L.P.*, 627 F.3d 134 (5th Cir. 2010), this Court distinguished between *Sierra Club v. City of San Antonio* types of cases where the regulatory framework at issue was created by a state legislative body as opposed to other types of cases where the regulatory framework involves federal law. The abstention facts of this case are closely related to the abstention facts in *Sierra Club v. City of San Antonio* because both cases involve elaborate regulatory frameworks created by the Texas Legislature. While this Court held that abstention was not appropriate in *Sandy Creek*, the case is nonetheless important to show this Court's preference in allowing state law regulatory schemes to be carried out without federal intervention.

**A. Environmental Flows Process is State Law Protocol that Should Not be Undone By Federal Courts**

The S.B. 3 environmental flows process is much more than the district court's mischaracterization of it as a "mere existence of a state-created administrative body." USCA5.7765. On the contrary, the state's environmental flows process involves, considers, and respects all surface water users and environmental needs and requires a methodical approach to evaluating the interests and scientific evidence associated with environmental flows for each river bay and

basin system, including the Guadalupe and San Antonio bay and basin system.

Section 11.1471(a)(1) of the Texas Water Code requires the TCEQ to:

adopt appropriate environmental flow standards for each river basin and bay system in this state that are adequate to support a sound ecological environment, to the maximum extent reasonable considering other public interests and other relevant factors.

Tex. Water Code § 11.1471(a)(1). Furthermore, § 11.1471(a)(2) of the Texas Water Code requires TCEQ to adopt rules that set forth the amount of water that must be set aside to fulfill the environmental flow standards adopted by TCEQ. *Id.* § 11.1471(a)(2). Further, § 11.0235(d-3)(2) of the Texas Water Code takes into account a situation where the use of preexisting surface water rights causes an inadequate amount of water to be available to meet appropriate environmental flow needs. The statute provides that “a variety of market approaches...must be explored and pursued” in such a situation. *Id.* § 11.0235(d-3)(2). The district court neither considered this statutory safeguard nor allowed it to play out in the San Antonio and Guadalupe River Basins.

The S.B. 3 environmental flows process provides a uniform protocol for addressing environmental flows throughout the state, so that all species, including those on the Endangered Species list, will be protected. Abstention is not limited to situations where a regulatory scheme is fully established. *Sierra Club v. City of*

*San Antonio*, 112 F.3d at 796. Just as the Edwards Aquifer Authority was in the process of applying its regulatory tools to address the Endangered Species issues in *Sierra Club v. City of San Antonio*, Texas is currently in the process of exercising the authority granted to the TCEQ by the Legislature in S.B. 3 to implement the environmental flows protocol established to protect ecological habitats throughout the state. Any action to undermine the state's ongoing S.B. 3 environmental flows process at this stage not only second-guesses the state's regulatory efforts and the progress made to this point, but also circumvents a system designed to consider *all* surface water users and *all* species that rely on surface water to survive.

**B. Permitting Criteria and Special Permit Conditions Also Require TCEQ to Consider Environmental Flows in Addition to the S.B. 3 Process**

The district court also erroneously dismissed the other areas of state law, beyond the S.B. 3 environmental flows process, that address environmental flows and that demonstrate the state's existing regulatory scheme. *See* USCA5.7762-7763. The comprehensive permitting system under Chapter 11 of the Texas Water Code requires the TCEQ to consider the effect, if any, that the issuance of a water right would have on the bays and estuaries of Texas, instream uses, and water quality. Tex. Water Code §§ 11.147(b),(d). State law specifically requires the TCEQ to review a proposed appropriation's effect on the fish and wildlife habitats

in the applicable basin. *Id.* § 11.147(e). Similarly, another provision in Chapter 11 of the Water Code requires the TCEQ to consider the potential impact that a proposed appropriation could have on water quality. *Id.* § 11.150.

While water right amendments that seek an increase in the amount of water are required to be evaluated in the same manner as new water right applications, other water right amendments require the TCEQ to evaluate whether the requested change will cause any additional adverse impacts on other water right holders or the environment. *Id.* § 11.122(b). In *City of Marshall v. City of Uncertain*, 206 S.W.3d 97 (2006), the Texas Supreme Court affirmed that the TCEQ is required to consider the effects of a proposed amendment on the environment as well as on other water rights holders. This consideration must include an environmental impact review to determine whether special permit conditions are necessary to provide adequate environmental protections. *Id.* at 111.

By way of example, a condition in one of *Amicus* City's water rights provides that during October through May of each year, the City may divert water only if the flow of the Guadalupe River exceeds 40 cubic feet per second ("cfs"), and that during June through September of each year, the City may divert water only if the river flow exceeds 30 cfs. Texas Natural Resource Conservation

Commission, Amendment to Permit to Appropriate State Water No. 5394-B, issued April 10, 1998.

**II. S.B. 3 Environmental Flows Process Must Be Given Sufficient Time to Accomplish its Purposes**

Environmental flows were adopted for the San Antonio and Guadalupe Rivers bay and basin system less than one year ago, in August 2012. Precedent from this Court provides that a complex regulatory process like the S.B. 3 environmental flows process should be given sufficient time in order to afford a legitimate opportunity to demonstrate whether it is capable of accomplishing the purposes for which it is designed. In *U.S. v. Texas*, 601 F.3d 354, 371 (5th Cir. 2010), this Court held in the context of education that “[w]e find this period of time insufficient to show” whether the use of a particular program designed to achieve results effectively produced the intended results, thus facilitating compliance with applicable laws. Similarly, in *Castaneda v. Pickard*, 648 F.2d 989, 1010 (5th Cir. 1981), this Court also held that education-oriented programs must be evaluated in a way that allows them to be “employed for a period of time sufficient to give the plan a legitimate trial.”

The educational programs at issue in *U.S. v. Texas* and *Castaneda v. Pickard* are similar to the complex S.B. 3 environmental flows process adopted by the



Texas Legislature and implemented by the TCEQ, which are designed to achieve adequate environmental flows for the protection of species like the Whooping Crane. The lower court in *U.S. v. Texas* ruled that the educational system in place at the time had not achieved satisfactory results, but this Court overturned that decision because the district court only relied on two years' worth of data during which the system was in place. Just as the district court did in *U.S. v. Texas*, the district court in this case mistakenly decided to insert itself into a state law process that was less than a year old and which has not yet had adequate time to demonstrate whether it will accomplish its intended purposes.

### **III. TCEQ is Required to Balance a Number of Other Laws and Factors in Implementing Environmental Flows**

#### **A. Surface Water Rights are Vested Rights**

Although the State of Texas owns all surface waters, an appropriator owns a usufructuary right to take, store, and divert the water, and once the right is perfected by putting the water to beneficial use, it becomes a vested property right. Tex. Water Code §§ 11.025-.026; *Board of Water Engineers v. McKnight*, 229 S.W. 301 (Tex. 1921); *Clark v. Briscoe Irrigation Co.*, 200 S.W.2d 674, 679 (Tex. Civ. App.—Austin 1974, no writ). From the TCEQ's perspective, the issuance of a water right only absolves the appropriator from enforcement liabilities for taking

water, but from the water right holder's perspective a water right is a vested property right to withdraw water subject to continued regulation by the state. Contrary to what the district court suggests in its opinion, USCA5.7771, the TCEQ cannot retroactively enforce new conditions on an existing water right that would cause a taking of private property without compensation under the Fifth Amendment to the United States Constitution and under Article 1, Section 17 of the Texas Constitution. U.S. Const. amend. V; Tex. Const. art. I, § 17.

**B. TCEQ Must Afford Adequate Due Process in Making Changes to Existing Water Rights**

The district court also does not consider that in applying the S.B. 3 environmental flows process to existing water rights, the TCEQ is required to afford affected water right holders with adequate due process in addition to its obligations under Chapter 11 of the Texas Water Code. *See Bowlby v. City of Aberdeen, Miss.*, 681 F.3d 215, 220 (5th Cir. 2012). Once issued, a permit "may become essential in the pursuit of a livelihood." *Id.* Unlike the district court's suggestion that the TCEQ simply has not made the effort to consider species like the Whooping Crane in its application of the provisions in Chapter 11 of the Texas Water Code, USCA5.7846, the S.B. 3 environmental flows protocol requires the

TCEQ to follow an appropriate methodology that allows the TCEQ to consider all of the laws in place that are implicated by the environmental flows process.

**C. Limited Decisions to Depart from Priority System Represent TCEQ's Adherence to Other Laws**

Contrary to the district court's interpretation of TCEQ's decision to depart from the prior appropriation system for the City during the 2008-2009 time period as for "[a purpose] not expressly specified by statute," USCA5.7846, the TCEQ is required to consider other laws related to the provision of public water service when making decisions on allocating water. For example, the Texas Utilities Code provides that:

- (a) Continuous service by a public utility is essential to the life, health, and safety of the public. A person's willful interruption of that service is a public calamity that cannot be endured.
- (b) A public utility is dedicated to public service. The primary duty of a public utility, including its management and employees, is to maintain continuous and adequate service at all times to protect the safety and health of the public against the danger inherent in the interruption of service.
- (c) *Each court and administrative agency of this state shall:*
  - (1) recognize the policy stated in this section; and
  - (2) *interpret and apply this subchapter in accordance with that policy.*

Tex. Util. Code § 186.002(a)-(c) (emphasis added). “Public utility” is defined as a private corporation, municipality, state agency, authority or subdivision that furnishes water to the public. *Id.* § 186.001. Additionally, Chapter 13 of the Texas Water Code requires a retail public utility that possesses a certificate of convenience and necessity to serve every customer within its certificated service area and render “continuous and adequate service within the area.” Tex. Water Code § 13.250. The district court’s decision does not take into account these other considerations that the TCEQ is bound by law to balance in reaching a decision impacting water rights and environmental flows.

### **CONCLUSION**

*Amici Curiae* City of Kerrville and Structural Metals, Inc. d/b/a CMC Steel Texas respectfully request that the district court’s judgment be reversed for the reasons set forth herein and as argued by Appellants.

Respectfully submitted,

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Dated: May 9, 2013

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of *Amici Curiae* City of Kerrville and Structural Metals, Inc. d/b/a CMC Steel Texas was served this 9<sup>th</sup> day of May, 2013, through the Court's CM/ECF filing system to all of the following counsel of record in the case:

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 2,844 words, excluding the parts of the brief exempted under Fed. R. App. P. 32(a)(7)(B)(iii).
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Dated: May 9, 2013