

**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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**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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**AMICUS CURIAE BRIEF OF THE TEXAS WATER CONSERVATION  
ASSOCIATION IN SUPPORT OF APPELLANTS**

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**CERTIFICATE OF INTERESTED PERSONS**

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Local 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 AMICUS CURIAE**

In accordance with Fed. R. Civ. P. 29.2(d), *Amicus Curiae* Texas Water Conservation Association (TWCA) states 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 *amicus curiae*, its members, or its counsel, contributed money that was intended to fund preparing or submitting the brief. Appellants Guadalupe-Blanco River Authority, Texas Chemical Council, and San Antonio River Authority are dues paying members of TWCA, but have not directly contributed any money intended to fund preparation or submission of this brief.

Respectfully submitted,

/s/ Lyn E. Clancy  
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*Counsel for Amicus Curiae Texas  
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**STATEMENT REGARDING ORAL ARGUMENT**

If the Court allows any other amicus to present argument, *Amicus Curiae* Texas Water Conservation Association also wishes to appear and answer the Court's questions.

**CONSENT OF PARTIES**

I hereby certify that *Amicus Curiae* Texas Water Conservation Association conferred with counsel for appellee The Aransas Project and with counsel for appellants. All parties consented to the filing of this brief.

Respectfully submitted,

/s/ Lyn E. Clancy  
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**INTEREST OF AMICUS CURIAE**

The Texas Water Conservation Association (TWCA) is a statewide association of governmental and private entities in Texas that are vitally interested in the water resources of the state. TWCA's membership consists of approximately 400 members, including municipalities, river authorities, water districts and industries, as well as firms and individuals in the engineering, hydrology, legal, and water supply planning fields, and other individuals and businesses active in various phases of water supply and development. Many of TWCA's members own surface water rights on which they rely to provide drinking water for millions of Texans, as well as water for other beneficial uses critical to the state's economy. The broadly stated purpose of TWCA is to foster the development, conservation, protection, and utilization of the State's water resources for beneficial use by its citizens. TWCA is also a forum for developing and recommending water policy initiatives, and TWCA provides a voice for Texas 'water interests' on a wide array of state and federal issues.

## SUMMARY OF ARGUMENT

By ignoring specific, significant aspects of state law and erroneously concluding that the Texas Commission on Environmental Quality (TCEQ) can retroactively modify existing water rights to address instream flows and freshwater inflow needs (collectively, “environmental flows”), the lower court’s far-reaching opinion has undermined the value and the security of all Texas surface water rights. The opinion improperly threatens Texas’ ability to provide for its long-term water needs and, more immediately, to respond to one of the worst droughts Texas has experienced in decades. *See* Office of the Governor, State of Texas, Proclamation Renewing the Certification that Exceptional Drought Conditions Pose a Threat of Imminent Disaster (April 18, 2013), *available at*: <http://governor.state.tx.us/news/proclamation/> (last visited May 5, 2013);<sup>1</sup> Tex. Comm’n Env’tl. Quality, Map of Water Systems under Water Use Restriction <http://www.tceq.texas.gov/drinkingwater/trot/location.html> (last visited April 27, 2013). Contrary to the lower court’s conclusion, TCEQ’s authority is quite limited

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<sup>1</sup> This drought disaster proclamation, or a variant thereof, has been in effect in Texas since at least July 5, 2011. *See generally*, Office of the Governor, State of Texas, Disaster Proclamation for Threat of Extreme Wildfires and Exceptional Drought Conditions (July 5, 2011), *available at*: <http://governor.state.tx.us/news/proclamation/16356/> (last visited May 5, 2013).

when it comes to adding or modifying requirements to existing water rights to address environmental flow needs. None of those limited situations are relevant in this case.

## **ARGUMENT**

### **I. TCEQ Has Very Limited Authority to Modify Water Rights to Increase Environmental Flows.**

As a state agency, TCEQ “may only exercise those powers granted by statute, together with those necessarily implied from the statutory authority conferred or duties imposed.” *City of Sherman v. Public Util. Comm’n of Texas*, 643 S.W.2d 681, 686 (Tex. 1983). If the Texas Legislature (Legislature) had intended to authorize TCEQ to take the significant actions suggested by the lower court, it would have clearly done so. Instead, the State's public policy regarding the allocation and management of the State's waters, consistent with the Texas Constitution, has been properly and legally defined and declared by the Legislature through a number of statutes, none of which unambiguously or impliedly grant TCEQ the authority that the lower court claims to have found in this case.

#### **A. The Texas Constitution and State Policy Regarding Waters of the State Clearly Limit TCEQ’s Authority.**

Neither State policy nor any common law allows TCEQ to retroactively modify existing water rights to impose additional environmental requirements,

except as authorized by terms and conditions of the water right itself, or in other very limited cases, discussed below.

The focal point upon which the State's water policy is founded is Article 16, Section 59 of the Texas Constitution. Subsection (a) states:

The conservation and development of all the natural resources of this State, including the control, storing, preservation and distribution of its storm and flood waters, the waters of its rivers and streams, for irrigation, power and all other useful purposes, the reclamation and irrigation of its arid, semi-arid and other lands needing irrigation, the reclamation and drainage of its overflowed lands, and other lands needing drainage, the conservation and development of its forests, water and hydro-electric power, the navigation of its inland and coastal waters, and the preservation and conservation of all such natural resources of the State are each and all hereby declared public rights and duties; and the Legislature shall pass all such laws as may be appropriate thereto.

*See* TEX. CONST. art. XVI, § 59 (a).

The Constitution is clear; it supports development and use of the State's resources pursuant to statutes adopted by the Legislature to implement this policy. All Texas water laws must be construed in light of this constitutional amendment and its objectives, whether express or reasonably implied. The Legislature must determine the policy and prescribe definite standards and criteria for the exercise of delegated duties. *See Clark v. Briscoe Irr. Co.*, 200 S.W.2d 674, 684 (Tex. Civ. App. — Austin 1947, no writ).

Here, the Legislature has expressed its intent through the promulgation of several statutes that, when read together, highlight the errors in the lower court's analysis. See TEX. GOV'T CODE § 311.021(2) ("In enacting a statute, it is presumed that...the entire statute is intended to be effective");<sup>2</sup> *Atmos Energy Corp. v. Cities of Allen*, 353 S.W.3d 156, 160 (Tex. 2011). A court must presume the Legislature intends a just and reasonable result. TEX. GOV'T CODE § 311.021(3). The lower court was obligated to interpret the applicable Texas statutes as a Texas court would have interpreted them.<sup>3</sup> *United States v. Cobb*, 975 F.2d 152, 156-57 (5th Cir. 1992). In Texas, courts interpret statutes as a matter of law. *Hoyt v. City of El Paso*, 878 F.Supp.2d 721, 734 (W.D. Tex. 2012). Notably, however, rather than conduct a legal analysis of all of these statutes, the judge relied on the "expert" opinions (some from non-lawyers) regarding the meaning and effect of only a few selected statutes to inform her opinion. R. 7768-7776.

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<sup>2</sup> The Code Construction Act, TEX. GOV'T CODE ch. 311, generally applies to construction of the Texas Water Code. TEX. WATER CODE § 1.002.

<sup>3</sup> TWCA believes that the errors in the Judge's analysis of TCEQ's authority to modify or curtail existing water rights to address environmental flow needs under Texas law are so blatant and clearly contrary to law that this Court could and should readily reverse the trial court on this basis, even though the Texas Supreme Court has not directly addressed the issue. If there is any doubt, however, it may be appropriate to seek guidance from the Texas Supreme Court through a certified question. Indeed, resolution of this issue has far-reaching consequences for the security of Texas surface water rights beyond the interplay with the federal Endangered Species Act.

TCEQ's public trust responsibilities regarding environmental flow needs have long been codified in Texas statutes addressing the issue.<sup>4</sup> TCEQ, as the state agency with primary responsibility for implementing these responsibilities, has express authority related to providing for environmental flows. *See* TEX. WATER CODE §§ 1.003, 5.012, 5.013, 11.0235, 11.0236, 11.0237, 11.024, 11.122, 11.134, 11.147, 11.1471, 11.148, 11.1491, 11.150, 11.152. Read together, these statutes clearly do not support the court's holding in this case.

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<sup>4</sup> Any public trust obligation to protect environmental flow interests in the context of water rights permitting is wholly subsumed into the Texas Water Code and associated administrative regime and cannot rest on the common law Public Trust Doctrine, which in Texas, is quite limited. *See* Tex. Comm'n Env'tl. Quality, *Application of the Lower Colorado River Authority to Amend its Drought and Water Management Plans*, SOAH Docket No. 582-95-1160, TCEQ Docket No. 95-1317-WR Proposal for Decision at 15, 20, (March 10, 2003) (recommending that "the Commission find that neither state law nor the common law principles of the public trust doctrine require LCRA to afford instream uses 'first priority,' or preference over other uses, of its interruptible water supply."); *see also* Jacqueline Lang Weaver, *THE PUBLIC TRUST DOCTRINE AND TEXAS WATER RIGHTS ADMINISTRATION: COMMON LAW PROTECTION FOR TEXAS' BAYS AND ESTUARIES?*, 15-2 ST. BAR TEX. ENVTL. L. J. 1, 8 (1985). Significantly, there are only two very limited circumstances where the "public trust" has been relied upon in the water rights context. In both circumstances, the Texas Supreme Court sought to end what it perceived to be the wasteful *non-use* of water. The Court held that there was no vested right to the nonuse of water and used the Public Trust Doctrine to modify or terminate rights and thus free up water so it could be diverted from the streams for beneficial use by others. *See In re the Adjudication of the Water Rights of the Upper Guadalupe Segment of the Guadalupe River Basin*, 642 S.W.2d 438 (Tex. 1982); *Texas Water Rights Comm'n v. Wright*, 464 S.W.2d 642 (Tex. 1971).

The State's declared policy regarding waters of the state makes clear that TCEQ's authority is limited in many respects. In relevant part, Texas Water Code § 11.0235 states that:

- (a) The waters of the state are held in trust for the public, and the right to use state water may be appropriated only as expressly authorized by law.
- (b) Maintaining the biological soundness of the state's rivers, lakes, bays, and estuaries is of great importance to the public's economic health and general well-being. The legislature encourages voluntary water and land stewardship to benefit the water in the state, as defined by Section 26.001.
- (c) The legislature has *expressly* required the commission while balancing all other public interests to consider and, to the extent practicable, provide for the freshwater inflows and instream flows necessary to maintain the viability of the state's streams, rivers, and bay and estuary systems *in the commission's regular granting of permits for the use of state waters*. As an essential part of the state's environmental flows policy, all *permit conditions* relating to freshwater inflows to affected bays and estuaries and instream flow needs must be subject to temporary suspension if necessary for water to be applied to essential beneficial uses during emergencies.
- (d) The legislature *has not expressly authorized* granting water rights exclusively for:
  - (1) instream flows dedicated to environmental needs or inflows to the state's bay and estuary systems; or
  - (2) other similar beneficial uses.

TEX. WATER CODE § 11.0235(a)-(d) (emphasis added). Among other things, this language demonstrates that, when the Legislature intends to grant or deny TCEQ



authority over environmental flow needs, it does so *expressly*. Nothing in the specific statutes relied upon by the lower court in this case *expressly* grants TCEQ authority to adjust or suspend water rights to address environmental flow concerns. Rather, as discussed below, specific statutes grant TCEQ very limited authority in this regard.

B. TCEQ Can Modify Environmental Flow Requirements Only in Certain Existing Water Rights.

As described more fully below, TCEQ can impose environmental flow requirements on existing water rights either when authorized by the special conditions of a water right or when the water right is being amended. Absent one of those two situations, TCEQ cannot unilaterally impose additional conditions on an existing water right.

***1. TCEQ can modify environmental flow requirements in water rights that contain reopener conditions.***

Since September 2007, TCEQ has been required to include in any permit for a new appropriation and certain amendments to existing water rights a reopener provision allowing for adjustment of any environmental flow permit conditions if TCEQ concludes it is needed to achieve compliance with applicable environmental flow standards. TEX. WATER CODE § 11.147(e-1). Recognizing the need to balance certainty of water supply with the need to address shifting priorities and improved scientific understanding of environmental flow needs, the Legislature specifically

capped the amount by which TCEQ can adjust these special conditions. *Id.* The Legislature further commanded that any such adjustments be based on appropriate consideration of the priority of other water rights and give due consideration for any voluntary mechanisms that have been implemented to help provide for environmental flow needs. *Id.*

To uphold the court's conclusion that the Commission can simply suspend or modify existing water rights any time a drought impacts the amount of water available to meet environmental flow needs would render meaningless these clear statutory limitations on TCEQ's authority and would have the effect of negating the need for TCEQ to include in permits *any* special conditions or reopener provisions concerning environmental flows. This is an illogical and insupportable result. *See Chevron Corp. v. Redmon*, 745 S.W.2d 314, 316 (Tex. 1987) (a court "will give effect to all the words of a statute and not treat any statutory language as surplusage if possible").

**2. *TCEQ can adjust requirements in existing rights that have special conditions that provide for adaptive management.***

Prior to enactment of Texas Water Code § 11.1471(e-1) in 2007,<sup>5</sup> TCEQ occasionally found it appropriate and practicable to include special conditions in water rights that allowed for periodic review and adjustment of environmental flow conditions. The inclusion of these types of special conditions derived from the Commission's authority under Texas Water Code § 11.147 and, in some instances, court orders adjudicating water rights or the willingness of applicants to voluntarily address these issues. For instance, in 1989, TCEQ issued an order approving a reservoir operations plan for Lakes Buchanan and Travis, two central Texas reservoirs managed by the Lower Colorado River Authority (LCRA), that included specific environmental flow requirements consistent with Texas Water Code §§ 11.147, 11.150 & 11.152. *See* Tex. Comm'n Env'tl. Quality, *Order Approving Lower Colorado River Authority's Water Management Plan and Amending Certifications of Adjudication Nos. 14-5478 and 14-5482*, Findings of Fact Nos. 34-38, 58, Ordering Provisions ¶¶ 1(h), (k)-(l) (Sept. 1989) (1989 LCRA Order),

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<sup>5</sup> Texas Water Code § 11.1471 was part of a larger piece of legislation (Senate Bill 3), which made significant changes to the laws governing how TCEQ addresses environmental flow needs. *See* Act of May 28, 2007, 80th Leg., R.S., ch. 1430, §§ 12.01–12.12, 2007 Tex. Gen. Laws 5848, 5901. The lower court's misunderstanding of Senate Bill 3 is discussed in Section III of this brief.

available at [http://www.lcra.org/library/media/public/docs/water/wmp/orders\\_approving\\_lcras\\_wmp.pdf](http://www.lcra.org/library/media/public/docs/water/wmp/orders_approving_lcras_wmp.pdf) (last visited May 9, 2013). TCEQ has approved several revisions to the LCRA reservoir operations plan, including modifications to the environmental flow conditions, to reflect changes in competing demands for water supply and improvements in the scientific understanding of environmental flow needs. Compare 1989 LCRA Order, *supra*, with Tex. Comm'n Env'tl. Quality, *Agreed Order Approving Amendments to Lower Colorado River Authority's Water Management Plan*, TCEQ Docket No. 2010-0025-WR Findings of Fact Nos. 10-15, Ordering Provisions ¶¶ 1(b), (d)-(f) (Jan. 2010), available at [http://www.lcra.org/library/media/public/docs/water/wmp/orders\\_approving\\_lcras\\_wmp.pdf](http://www.lcra.org/library/media/public/docs/water/wmp/orders_approving_lcras_wmp.pdf) (last visited May 9, 2013).

**3. TCEQ can add environmental flow requirements when existing water rights are amended, but only in specific and limited circumstances.**

Since 1975, TCEQ and its predecessor agencies have had authority to assess the effects of water rights permits on environmental flows. See Act of June 19, 1975, 64<sup>th</sup> Leg., R.S., ch. 344, 1975 Tex. Gen. Laws 925 (S.B. 137). Today, TCEQ addresses concerns for environmental flows in the water rights permitting process as specified in Texas Water Code §§ 11.147 and 11.1471. Pursuant to these statutes, TCEQ must consider the effect of new permits, if any, on existing environmental flows and water quality. TEX. WATER CODE § 11.147(d). Moreover,

TCEQ must consider the effect, if any, of new water rights on fish and wildlife habitats. TEX. WATER CODE § 11.147(e). Following the passage of Senate Bill 3 in 2007, TCEQ implemented an aggressive program for setting environmental flow standards. *See generally* Tex. Comm'n Env'tl. Quality, Environmental Flow Resources,

[http://www.tceq.texas.gov/permitting/water\\_rights/eflows/resources.html](http://www.tceq.texas.gov/permitting/water_rights/eflows/resources.html) (last visited May 5, 2013); 30 TEX. ADMIN. CODE ch. 298. Since then, most of the state's major bay and basin areas have had environmental flows established, or such flows will soon be established, including the Guadalupe-San Antonio River bay and basin area. *See* 30 TEX. ADMIN. CODE ch. 298. Where TCEQ has adopted environmental flow standards, these standards guide TCEQ's development of special conditions to address environmental flow needs. TEX. WATER CODE §§ 11.134(b)(3)(D), 11.147(d), 11.147(e-3).

As discussed below, however, only in limited circumstances may TCEQ add new environmental flow requirements to an existing water right. First, additional or modified environmental flow requirements may be triggered when an applicant before TCEQ seeks to amend an existing water right in a manner that increases the amount of water to be stored, taken, or diverted. TEX. WATER CODE § 11.1471. For applications involving bay and basin areas where TCEQ has adopted environmental flow standards, those standards must be relied upon to develop

appropriate special conditions for water rights amendments that authorize an increase in the amount of water to be stored, taken, or diverted. TEX. WATER CODE § 11.1471(d). Such permit amendments must also contain appropriate conditions to ensure protection of any environmental flow set-asides that are adopted by TCEQ. *Id.*

When a water rights holder seeks an amendment to an existing water right, the impacts of the requested amendment on environmental flows can also come into play even when the amount to be taken, stored or diverted does not change. If the proposed amendment would affect the environment in a manner *greater* than if the water right were fully exercised under its original terms, then special conditions for environmental flows may be appropriate. *See* TEX. WATER CODE § 11.122(b).

As a general matter, a water right holder is entitled to fully use its water right in accordance with the prior appropriation doctrine, subject only to the special conditions expressly contained in the right. Existing rights cannot be impaired or divested by the Commission except through the formal cancellation process. *See Lower Colorado River Authority v. Tex. Dep't of Water Res.*, 689 S.W.2d 873, 882 (Tex. 1984); TEX. WATER CODE § 11.171 *et seq.* The Texas Supreme Court recently spoke to the issue of when it might be appropriate to consider additional environmental requirements in an amendment to an existing water right in *City of Marshall v. City of Uncertain*, 206 S.W.3d 97 (Tex. 2006). That case involved an

application by the City of Marshall to amend its existing water right to add industrial use as an authorized use, but did not involve a request to change the authorized amount of the water right or the rate of diversion. *Id.* at 99. The TCEQ's Executive Director issued the requested amendment without notice and the City of Uncertain sought to overturn the decision, arguing that they were entitled to notice and an opportunity for a hearing on the impacts of the proposed amendment on Caddo Lake and Big Cypress Bayou. *Id.* at 100-01. Although that case primarily addressed the issue of whether TCEQ was required to provide notice and an opportunity for a hearing, the analysis of the Court makes clear that the Commission can only evaluate the impacts on the environment of an application to amend an existing water right by assuming the "full use" of the water right as it exists pre-amendment. *Id.* at 207. In sum, the Texas Supreme Court's interpretation in *Marshall* clearly supports a conclusion that the Commission has very limited authority to amend or modify existing water rights to address environmental flow issues, contrary to the lower court's holding that is the subject of this appeal.

Finally, when a water rights holder seeks to amend an existing water right to use the water outside the basin of origin, TCEQ must consider (and may include special conditions related to) the effects of the proposed transfer that are reasonably expected to occur on environmental flows, water quality, aquatic and

riparian habitat, and bays and estuaries, but “only in relation to that portion of the [water right] proposed for transfer” and “based on historical uses of the [water right].” TEX. WATER CODE § 11.085(k)(2)(F).<sup>6</sup>

## II. The Judge Misconstrued Texas Water Code § 11.053 While Ignoring Clear Statutes Limiting TCEQ’s Authority.

In determining the intent of a statute, like Texas Water Code § 11.053, the lower court should have considered the entire nature and purpose of the statutes under which TCEQ administers water rights and construed Texas Water Code § 11.053 in a manner consistent with the overall purpose of those statutes, and considering the consequences of the court’s particular construction. *Atmos Energy Corp.*, 353 S.W.3d at 160; TEX. GOV’T CODE § 311.023. A court must presume that a just and reasonable result is intended by the Legislature. TEX. GOV’T CODE § 311.021(3). The lower court’s construction of Texas Water Code § 11.053, however, which was enacted *after* this suit was filed and makes *no mention of*

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<sup>6</sup> Rather than allowing TCEQ to impose *additional* environmental flow requirements in a drought, the Legislature has instead granted TCEQ express authority to do the opposite. TEX. WATER CODE § 11.148. TCEQ may suspend or modify special conditions related to environmental flows if the water right holder demonstrates: (1) that the drought presents an imminent threat to the public health, safety, and welfare, (2) that overrides the necessity to comply with general procedures and criteria for changing the conditions in a water right, and (3) there are no feasible, practicable alternatives. *Id.* Again, the court’s expansive interpretation of TCEQ’s emergency powers and its general authority over water rights is directly contrary to this *express* authority of TCEQ relative to managing water for environmental flow needs.



*environmental flow needs whatsoever*, effectively renders meaningless the other limited exceptions in the statute discussed above that do allow for adjustments to environmental flow conditions. R.7770-7776. Such an interpretation cannot stand. *See Chevron*, 745 S.W2d at 316; *Alleghany Mut. Cas. v. Texas*, 710 S.W.2d 139, 141 (Tex. 1986) (statute should be construed to avoid creation of a needless conflict). Here, the court has unreasonably and unnecessarily implied authority that is directly contrary to the Legislature's clear directive in other statutes.

- A. Texas Water Code § 11.053 simply clarifies TCEQ's authority to implement a senior call, not to address environmental flow needs.

The history of Texas Water Code § 11.053's adoption makes clear that its intent was entirely focused on addressing water shortages suffered by senior water rights holders and *not* shortages of water for environmental flow needs. In 2009, a senior water right holder (Dow Chemical Company) in the Brazos River basin requested that TCEQ curtail junior water rights holders so that its water needs could be satisfied. *See generally* 2011 TEX. SUNSET COMM'N, SUNSET ADVISORY COMM'N GUIDELINES: TEXAS COMMISSION ON ENVIRONMENTAL QUALITY AND ON-SITE WASTEWATER TREATMENT RESEARCH COUNCIL 56 (Jan. 2011), [http://www.tceq.texas.gov/assets/public/comm\\_exec/sunset/SSAC-Commission-](http://www.tceq.texas.gov/assets/public/comm_exec/sunset/SSAC-Commission-)

[Decision-Jan2011.pdf](#). During the legislative session that immediately followed, in 2011,<sup>7</sup> the Legislature clarified TCEQ's authority to respond to such requests by owners of senior water rights by enacting Texas Water Code § 11.053. *See* Act of May 28, 2011, 82<sup>nd</sup> Leg., R.S., ch. 1021, § 5.03, 2011 Tex. Gen. Laws 2579, 2593. And, although the scope of TCEQ's authority under this statute is limited to impacts on *other* water rights holders and is the focus of an ongoing dispute in state court,<sup>8</sup> no one except Appellee, The Aransas Project, has ever seriously contended that the Legislature intended for Texas Water Code § 11.053 to be used to address environmental flow needs.

To the contrary, TCEQ's rules implementing the statute make clear that the *only* time the agency will implement the statute is when a senior water right or downstream user is not receiving water to which it is otherwise entitled. Specifically, 30 TEX. ADMIN. CODE §36.5(a) provides:

- (a) The executive director may issue a Suspension or Adjustment Order or modify or extend an existing order under §36.4 of this title (relating to Suspension or Adjustment Order) if the following conditions have been met:

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<sup>7</sup> The Texas Legislature meets every other odd-numbered year from mid-January through late May or early June.

<sup>8</sup> *Texas Farm Bureau v. Tex. Comm'n on Env'tl. Quality*, No. 003937 (98<sup>th</sup> Dist. Ct., Travis County, Tex. Dec. 14, 2012).

- (1) at the time of issuance of the order, all or part of the river basin is in a drought, or an emergency shortage of water exists;
- (2) senior water rights are unable to divert the water they need or store inflows that are authorized under a water right;
- (3) one or more senior water right holders who will benefit from the order can beneficially use, as defined in Texas Water Code, §11.002(4), the water they will be able to divert or use under the order; and
- (4) suspending or adjusting junior water rights would result in conditions under which the senior water right holder may divert water or impound inflows under its water right for a beneficial use.

*See also* 30 TEX. ADMIN. CODE § 36.2(4) (defining an “emergency shortage of water” as “the inability of a senior water right holder to take surface water during: (A) emergency periods posing a hazard to public health or safety; or (B) conditions affecting hydraulic systems which impair or interfere with conveyance or delivery of water for authorized users.”); 30 TEX. ADMIN. CODE § 36.2(3)(C) (defining “drought” to include conditions of below normal precipitation where the demand for surface water exceeds the available supply as evidenced by a senior water right holder making a senior call.).

B. Texas Water Code § 11.053 cannot be used to limit water rights holders’ diversions to benefit environmental flows

A court must “presume that the legislature chooses a statute’s words with care, purposefully choosing each word it includes, while purposefully omitting

words not chosen.” *Gomez v. Texas Education Agency*, 354 S.W.3d 905, 912-13 (Tex. App. —Austin 2011, pet. denied); *In the Interest of M.N.*, 262 S.W.3d 799, 802 (Tex. 2008). Nowhere in Texas Water Code § 11.053 did the Legislature include terms related to environmental flows, water quality or aquatic habitat. Yet, the lower court nevertheless read them into the law.

Moreover, rather than appropriately defer to TCEQ’s reasonable interpretation of the statute, *see City of Corpus Christi v. Public Util. Comm’n of Texas*, 51 S.W.3d 231 (Tex. 2001), the lower court ignored it. Specifically, in response to public comments on its proposed rules to implement Texas Water Code § 11.053, TCEQ *expressly* disclaimed the application of the statute to environmental flow conditions. 37 Tex. Reg. 3096, 3110 (April 27, 2012). (Stating that the statute “does not contemplate suspending or adjusting water rights for environmental uses, unless there is a senior water right for that use.”) Moreover, TCEQ declined to conduct a regulatory assessment of its proposed rules implementing Texas Water Code § 11.053, concluding that it was not a "major environmental rule" under TEX. GOV’T CODE §2001.0225 “because the specific intent of the rulemaking is not to protect the environment, and it is not for the purpose of reducing risks to human health from environmental exposure.” 37 Tex. Reg. 3096, 3098 (April 27, 2012).

Only in the event that a water right is authorized for environmental flow purposes, *see* TEX. WATER CODE § 11.0237(a), or if TCEQ has set aside unappropriated water for environmental flows pursuant to Texas Water Code § 11.1471, could Texas Water Code § 11.053 be used to protect such flows. *See* TEX. WATER CODE §§ 11.0235(d-1); TEX. WATER CODE § 11.0841(c) (granting Texas Parks & Wildlife Department the rights of a water right holder for purposes of enforcing any environmental flow set-asides in civil court); *see also* TEX. WATER CODE § 11.1471(e) (providing that an environmental flow set-aside must be assigned a priority date).<sup>9</sup>

### **III. The Court Misinterpreted the Impact of Senate Bill 3 and Should Have Abstained under *Burford*.**

Contrary to the lower court's characterization in this case, R. 7757-7765, Senate Bill 3 *does* seek to address, concern, protect, and assist in the development of mechanisms and strategies to address environmental flow needs. Indeed, the Legislature elevated the importance environmental flows to the overall economy of the state by expressly recognizing the need for water rights permitting decisions to

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<sup>9</sup> Even if Texas Water Code § 11.053 could be used to adjust water rights to meet environmental flow needs, the agency's rules also make clear that the statute does not apply in a watermaster area, 30 TEX. ADMIN. CODE § 36.1(b), such as the geographic area of concern in this lawsuit within the Guadalupe and San Antonio River basins.

carefully consider environmental flow needs and established a very thorough, deliberative and adaptive approach to addressing these issues.<sup>10</sup> The Intervenor-Defendants-Appellants' Brief accurately details this process and TWCA agrees that abstention under *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), would have been appropriate in this case. *See* Intervenor-Defendants-Appellants' Brief at 14-24. Further, only by ignoring key aspects of the Senate Bill 3 process could the lower court have reached its conclusion that Senate Bill 3 does not afford a

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<sup>10</sup> The successful adoption of Senate Bill 3 in 2007 represents the culmination of several years of attention from state leadership. Beginning in 2001, the Legislature established a Joint Committee of Water Resources and charged this committee with “determining the appropriate role of environmental and wildlife concerns in water permitting and water development” and receiving information relating to “identifying reasonable mechanisms, including measures for encouraging donating of water rights, for protecting instream uses.” *See* Act of June 15, 2001, 77th Leg., R.S., ch. 966 §§ 5.01-5.04, 2001 Tex. Gen. Laws 1991, 2074. In 2003, the Legislature created the Study Commission on Water for Environmental Flows “in recognition of the importance that the ecological soundness of our riverine, bay, and estuary systems and riparian lands has on the economy, health, and well-being of the state...” *See* Act of June 20, 2003, 78th Leg., R.S., ch. 1242, § 2, 2003 Tex. Gen. Laws 3507, 3508. The precursor to the 2007 version of Senate Bill 3 that was enacted was nearly passed in 2005. *See* S.B. 3, 79th Leg., R.S., art. 1 (as reported from House Nat. Resources Comm. May 21, 2005). And thereafter, by Executive Order, the Governor created the Environmental Flows Advisory Committee to continue the efforts of the Study Commission created in 2001, recognizing again the need to “examine relevant issues and make recommendations for commission action and legislation on methods for making future decisions to protect instream flows and freshwater inflows, while integrating such needs with human needs, including methods to address allocation of flows during drought conditions...” Office of the Governor, State of Texas, Executive Order No. RP-50 Relating to the Creation of an Environmental Flows Advisory Committee (Oct. 28, 2005).

meaningful opportunity to address additional environmental flow needs that may exist for the bay and estuary system that is the subject of this lawsuit.

A. The stakeholders must develop strategies to meet environmental flow standards.

Because many river basins within Texas are already fully appropriated, the lower court correctly recognized that adoption of environmental flow standards<sup>11</sup> that apply to new appropriations or certain water rights amendment may not result in the full environmental flow need being satisfied. What the court failed to acknowledge, however, is that the work of the stakeholders is just beginning, once environmental flow standards for the State's bay and basin areas are adopted. The Legislature and the stakeholders appointed to address Senate Bill 3's environmental flows protocol, including the Commission, are also charged with developing the strategies necessary for meeting the environmental flow standards adopted for such areas. TEX. WATER CODE § 11.02362(o). For instance, where surface waters are fully appropriated in a particular basin or segment of a basin, "a variety of market approaches, both public and private, for filling the gap must be

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<sup>11</sup> The lower court mistakenly represents that environmental standards have yet to be adopted, R. 7765; to the contrary, TCEQ has adopted environmental flow standards in many of the state's river basins and bay systems, including the basins affected by this suit. *See* 30 TEX. ADMIN. CODE § 298.

explored and pursued.” TEX. WATER CODE § 11.0235(d-3)(2). If TCEQ had the authority to mandate changes to existing water rights that the court suggests, exploration and pursuit of such approaches would not be necessary, much less mandated.

B. Environmental flow standards are subject to revision over time to allow for adaptive management and new scientific understanding.

In disregarding the impact that the Senate Bill 3 environmental flows process could have on flows in the Guadalupe-San Antonio River basin and bay system, the court also failed to recognize the adaptive nature of the Senate Bill 3 legislation. In enacting Senate Bill 3, the Legislature expressly recognized that “management of water to meet instream flow and freshwater inflow needs should be evaluated on a regular basis and adapted to reflect both improvements in science related to environmental flows and future changes in projected human needs for water. In addition, the development of management strategies for addressing environmental flow needs should be an ongoing, adaptive process that considers and addresses local issues.” TEX. WATER CODE § 11.0235(d-5).

As such, TCEQ may alter an environmental flow standard or set-aside on a periodic basis. TEX. WATER CODE § 11.1471(f). Further recognizing the importance of adaptive management, the stakeholders are also charged with developing a work plan, with the assistance of the associated basin and bay expert



science team. TEX. WATER CODE § 11.02362(p). This plan *must* establish a periodic review of the analysis and recommendations; prescribe specific monitoring, studies, and activities; and establish a schedule for continuing the validation or refinement of the basin and bay environmental flow analyses and environmental flow regime recommendations, the environmental flow standards adopted by the Commission, and the strategies to achieve those standards. *Id.*

#### **IV. Texas Surface Water Rights are Property Rights.**

In this lawsuit, The Aransas Project is attempting to achieve what its members and supporters have been unable to achieve over the last decade through its efforts at the TCEQ and the Legislature – the retroactive modification of existing water rights to give environmental concerns a priority interest over other competing water needs without compensating the owners for the taking of their property rights. Indeed, in concluding that TCEQ’s authority to administer water rights gives rise to a “take” of endangered whooping cranes, the court has entirely misunderstood the nature of Texas law regarding water rights.

Although TWCA supports the State-Defendant-Appellants’ arguments regarding the lack of causation in this case, TWCA strongly disagrees that a water right “is no different than issuing a hunting license” or that a water right “simply” protects a diverter from enforcement by TCEQ. *See* State-Defendant-Appellants’ Brief at 15-16. Rather, Texas jurisprudence and the Legislature have repeatedly

recognized that a Texas water right is a property right. *See* TEX. WATER CODE § 11.026; *Motl v. Boyd*, 116 Tex. 82, 286 S.W. 458, 475 (1926); *Clark v. Briscoe Irr. Co.*, 200 S.W.2d 674, 679 (Tex. Civ. App.—Austin 1947, no writ). Once a water right is issued, TCEQ’s authority over the water right largely takes the form of enforcement and monitoring compliance with the terms and conditions of the water right.<sup>12</sup> It is primarily during the permit issuance process that TCEQ can impose environmental flow restrictions on diversions of water, pass-through requirements for reservoirs, and conditions that established environmental flow requirements be satisfied. *See, e.g.* TEX. WATER CODE § 11.147, § 11.1471.

Many Texas water rights originated prior to the existence of a state agency or state supervision. Initially, water rights passed from the State, the Republic of Texas, or prior sovereigns as riparian rights accompanying lands granted by the sovereign. *See generally Motl v. Boyd*, 116 Tex. 82, 286 S.W. 458 (1926); *State v. Valmont Plantations*, 346 S.W.2d 853 (Tex. Civ. App.—San Antonio 1961), *aff’d* 163 Tex. 381, 355 S.W.2d 502 (1962). Since 1889, the State of Texas has authorized the appropriation of state water for beneficial use. Act of March 19,

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<sup>12</sup> The only significant exception to this general rule is the cancellation process. TCEQ can cancel water rights that have not been used for an extended period of time, using the procedures provided by TEX. WATER CODE § 11.171, *et. seq.*, based upon the concept of abandonment. *Texas Water Rights Comm’n v. Wright*, 464 S.W.2d 642 (Tex. 1971).

1889, 21<sup>st</sup> Leg., R.S., ch. 88, 1889 Tex. Gen. Laws 100. Not until 1913 did the State create TCEQ's predecessor, the Board of Water Engineers, to oversee the process of appropriation of state water. Act of April 9, 1913, 33<sup>rd</sup> Leg., R.S., ch. 171, 1913 Tex. Gen. Laws 358. Until 1975, consideration of the effect of granting water right permits on bays and estuaries was not specifically required,<sup>13</sup> although such issues could be raised under the general "not detrimental to the public welfare" standard associated with the issuance of water rights, now found in Texas Water Code § 11.134(b)(3)(C). Yet, all water rights issued prior to that time were property rights, and not impaired or limited by acts of the legislature codified in the Texas Water Code. *See* TEX. WATER CODE § 11.001.

Well before the effective date of the Endangered Species Act (December 28, 1973), the State of Texas had authorized surface water appropriations (*i.e.* granted property rights) on the Guadalupe and San Antonio rivers for almost 5,000,000 acre-feet of water per year.<sup>14</sup> TCEQ's ability to "manage" those rights is limited to

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<sup>13</sup> *See* 1975 Tex. Gen. Laws at 925 (requiring the commission to "assess the effects, if any, of the issuance of the permit on the bays and estuaries of Texas.") This requirement was recodified in Texas Water Code § 11.147 in 1977. *See* Act of June 16, 1977, 65<sup>th</sup> Leg., R.S., ch. 870, 1977 Tex. Gen. Laws 2207, 2234.

<sup>14</sup> A comprehensive listing of permanent water rights is available on TCEQ's website at: [http://www.tceq.texas.gov/permitting/water\\_supply/water\\_rights/wr\\_databases.html](http://www.tceq.texas.gov/permitting/water_supply/water_rights/wr_databases.html). That listing shows that 227 water rights, for a total appropriation of 4,775,604 acre-feet per year, have a priority date before the effective date of the Endangered Species Act; 130 water rights

requiring exercise of each right according to its terms and ensuring that junior water rights do not use water to which senior rights are entitled. *See* TEX. WATER CODE § 11.027, § 11.081 and § 11.082.

The agency's authority is limited to those powers expressly conferred by statute and those *necessarily* implied. *Public Utility Comm'n of Texas v. City Public Service Bd. of San Antonio*, 53 S.W.3d 310, 315 (Tex. 2001); *Brazoria County v. Texas Comm'n on Environmental Quality*, 128 S.W.3d 728, 734 (Tex. App.—Austin 2004, no pet.). A power will not be implied where the statutes in question expressly delegate particular power and prescribe the method of its exercise. *See Sexton v. Mt. Olivet Cemetery Ass'n*, 720 S.W.2d 129, 141 (Tex. App.—Austin 1986, writ ref'd n.r.e.). In holding that the Finance Commission of Texas had no authority to reopen proceedings regarding the Association's plan for prepaid funeral services, the *Sexton* court specifically recognized that, “[w]here the culmination of the administrative proceeding is the creation of a substantial right of property, ... the Legislature's omission to delegate expressly and specifically the power to reopen suggests an unmistakable inference *contrary* to any implied grant of that power.” *Id.* at 141.

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on the San Antonio River, for a total of 133,354 acre-feet per year, predate the Endangered Species Act.

Moreover, TCEQ is not the only enforcement (or “management”) authority. Individual water right holders, including the Texas Parks and Wildlife Department, may seek judicial enforcement or protection of water rights. TEX. WATER CODE § 11.0841. The fact that a water right holder has the right to enforce its water right against others in civil court further supports the conclusion that a water right is more than a simple regulatory authorization.

Thus, after permit issuance, the State is not actively involved in “managing” the use of water under those permits except through enforcement of those rights and the conditions therein. The TCEQ’s exercise of some discretion in deciding how or whether to seek enforcement against any particular water right holder for failure to comply with the terms of his or her water right does not, as the court suggests, R. 7771, equate to granting TCEQ discretion to impose *new* conditions in an existing water right.

Real property rights to the waters of the San Antonio and Guadalupe rivers were granted prior to adoption of the Endangered Species Act. TCEQ’s “management” authority over such rights is quite limited and does not include the authority to curtail exercise of those rights except on a priority basis and to ensure compliance with any restrictions upon use that are part of the permit. In that regard, TCEQ’s authority over the property rights reflected in water rights permits differs markedly from the regulatory authority over the licensing of gillnets and

lobster pots or regulation of beachfront lighting, as represented in *Strahan v. Coxe*, 127 F.3d 155 (1<sup>st</sup> Cir. 1997) and *Loggerhead Turtle v. County Council of Volusia County*, 148 F.3d 1231 (11<sup>th</sup> Cir. 1998). Any curtailment of these rights beyond the Commission's authority to administer such rights consistent with its authority under chapter 11 of the Texas Water Code would require the state to condemn these rights and provide just compensation to the water rights holders consistent with the Texas and U.S. Constitutions. TEX. CONST. art. I, § 17; U.S. CONST. amend. V.

### **CONCLUSION**

For the reasons set forth above, *Amicus Curiae* TWCA urges this court to specifically and unequivocally reverse the lower court's holding in this case as it relates to the Texas Commission on Environmental Quality's authority to retroactively adjust existing water rights to add environmental flow requirements. Further, TWCA supports Appellants' request for federal abstention in this case under *Burford*.

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