

Coastal Holiday Update 2010

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Another year has come and gone on the Texas Coast and I am again writing up my summary of some of the important issues that I have encountered. This newsletter started as a report on the agreement that I made with Formosa Plastics in an attempt to improve the environmental performance of that plant. Over the years, it has become a holiday greeting from me to those of you who care about the coast. So, enjoy the holidays and read about some of the ongoing battles to save the Texas coast. I want to acknowledge the assistance of Mary Carter, Mary Conner and Charles Irvine of my office in helping to pull together some of the information in this newsletter. The legal analysis of the Open Beaches case is from Ms. Conner. Please pass this Holiday Update along to anyone who you think might enjoy it or needs to read it.

Freshwater Inflow to Bays

Freshwater inflow is the life-blood of Texas Bays and is of overwhelming importance to the productivity of our coastal estuaries. Ask anyone in the Rockport area about the winter of 2008 and the spring and summer of 2009 and they will tell you that there were virtually no speckled trout to be caught. The United States Fish and Wildlife Service estimates that 23 whooping cranes died over the winter/spring of 2008/2009 and litigation that has been filed in federal court in Corpus Christi ties crane mortality to the lack of freshwater inflow into San Antonio Bay from the Guadalupe and San Antonio Rivers. The economy of the coast - commercial and recreational fishing, bird-watching, eco-tourism, home sales, rentals and retail sales – is inextricably tied to freshwater inflows. And given the BP spill and the continued interest in offshore drilling, the economic success of the offshore oil industry may be tied to protection and preservation of a functional Gulf Coast ecosystem.

Stated another way, the argument about freshwater inflows is about the long-term maintenance and sustainability of the coastal economy. Interestingly, this battle has so far been fought by environmental and sportsmen groups. It is time that real estate developers, retail merchants, oil producers and others joined with recreational fishing and environmental interests to define and fight for our coastal economy. Dallas and San Antonio are organized. We coastal interests really are not. In order to get water, we are going to have to fight for it. And now is the time to start.

We are not starting from scratch. S.B. 3 was passed in 2007 and created a multi-layered system to develop environmental flows for Texas's river basins. From the outset, it should be noted that SB 3 has no effect on existing water rights but does establish a process whereby a specified inflow amount will be protected when new water rights are issued.

The process created by S.B. 3 is complicated. The bill established the Environmental Flows Advisory Group to oversee the proposal of environmental flows for all coastal bays. The EFAG included a Science Advisory Committee. The Environmental Flows Advisory Group is tasked with appointing a team of stakeholders called the Basin and Bay Area Stakeholder Committee ("BBASC" or "Stakeholder Committee") for each river basin. The Stakeholder Committee, in turn, has the responsibility to appoint a team called the Basin and Bay Expert Science Team ("BBEST" or "Expert Science Team"). The Expert Science Team (BBEST) is to provide a recommended flow regime based on "best available science" that will support a sound ecological environment. Once the expert science team develops the recommended flow regime, then the stakeholder committee (BBASC) is to consider the recommendation, in conjunction with other broader factors. After its consideration and review, the BBASC then has the responsibility to report its recommendation to the TCEQ. Finally, the TCEQ is tasked with taking the recommendations of all of these groups—the expert science teams (BBEST), the stakeholder committee (BBASC) and the statewide Advisory Groups—and then preparing and adopting a rule on environmental flow standards for each basin.

This S.B. 3 process has been initiated in the Sabine, Galveston, Matagorda, San Antonio and Nueces systems. Sabine and Galveston are at the TCEQ action stage whereas Matagorda and San Antonio are now into the science development stage and Nueces Bay is only now getting underway. Both San Antonio Bay and Matagorda Bay have to have the basic science worked out by March 1, 2011.

In Galveston Bay, the process broke down: neither the BBEST nor the BBASC reached a consensus regarding their recommendations. Within the BBEST, two recommendations were developed. One recommendation was by 8 of

the 15 BBEST members, (the “Regime Group”). The other recommendation was by the “Conditional Group.” The Regime Group presented a highly detailed concept that included over 700 specific targets for the two river basins (the San Jacinto and the Trinity). In contrast, the recommendation by the Conditional Group presented a limited number of monitoring stations and limited flow regime values.

The statewide Science Advisory Committee (SAC) charged with providing scientific oversight for the overall process determined that the recommendation by the Conditional Group did not meet the statutory requirement of protecting the environment. In their written report, they stated “[T]he Conditional group did not conduct an environmental flow analysis grounded in a scientifically derived process” and “[T]he SAC does not believe the Conditional group considered ‘all reasonably available science’”. However, the Texas Commission on Environmental Quality is now proposing a rule that essentially adopts the position of the Conditional group.

The bottom line is that politics are overwhelming the science. The process has broken down between water purveyors and those who want water for the bay. Although the Commissioners of the TCEQ always say that they want “sound science”, when the science disagrees with politics, politics win. And while some would argue that any dedicated water is better than none, do not believe that this process is protecting the bays for the future. The comment deadline to TCEQ is past but I urge you to contact your state Senator or Representative if you are concerned about this problem.

A similar problem has arisen on Sabine Lake. Here, the BBEST (the local science group) proposed scientifically defensible numbers for inflows to the bays. However, the BBASC (which essentially oversees the BBEST) recommended no numbers because they believed that there was "not enough information". These conflicting positions were then submitted to the TCEQ. The TCEQ first drafted rules based on BBEST numbers. Then, the BBEST was reconvened and came up with another set of numbers, which were weaker and which I do not consider to be protective of the Sabine and Neches river systems. The new numbers were the result of pressure from water purveyors on the BBEST committee members. Now,

BBASC has adopted the new numbers as a revised recommendation, and this revised recommendation will be submitted as comments to the TCEQ rules. In short, politics has overridden science in the Sabine Basin as well as the Galveston Basin.

The Matagorda, San Antonio and Nueces Bay proposals are in various stages of development. If anything, the issues will be more difficult in these basins because many of the rivers draining into these bays are already over-allocated. Unfortunately, S.B. 3 has no effect on existing water rights.

The good news is that there are some very dedicated proponents for the bays who are working in the trenches of these various committees – citizens trying to understand the science – scientists and engineers trying to fight the politics of the water purveyors. What is needed is for all of us to stand up and let our legislators and our friends know that politics as usual will NOT protect our bays. There is a vibrant economy on the coast that we have to protect. This is not just about fish and birds. It is about real estate, retail and offshore oil and gas. All of these interests will ultimately suffer if the coastal estuaries fail.

Open Beaches

For as long as I can remember, it has been understood that Texas beaches were open to everyone. All of us had the right to walk and play between the vegetation line and the water. The reality of barrier islands is that they move. They are not stable land masses. As the beach erodes, the vegetation line moves back and private homes sometime end up on the open beach. At that point, there is a conflict between the rights of public to an open beach and the rights of the homeowner to private property. Over the years, the public right to beach access has prevailed over the private right and over time the house would have either been removed or not rebuilt when damaged. That's been the law in my lifetime. Suddenly, the Texas Supreme Court has issued a ruling that may change this long-standing public right and it is a scary thought to someone like myself who is an advocate for the public interest.

The case is called *Severance v. Patterson*. Severance owned beachfront property on Galveston's West End and brought suit against State of Texas officials in anticipation of the officials' enforcing a public easement on her property. The landowner's property lines had shifted dramatically following Hurricane Rita, such that the entire portion of the property was located seaward of the vegetation line. The federal district court dismissed the suit, and the federal appellate court retained one of the claims, certifying Texas property law questions to the Texas Supreme Court. In a 6-2 divided opinion, the Texas Supreme Court majority wrote:

“On this issue of first impression, we hold that Texas does not recognize a ‘rolling’ easement on Galveston’s West Beach. Easements for public use of private dry beach property do change along with gradual and imperceptible changes to the coastal landscape. But, avulsive events such as storms and hurricanes that drastically alter pre-existing littoral boundaries do not have the effect of allowing a public use easement to migrate onto previously unencumbered property.”

In many respects, this is a strange decision that seems, on the one hand, to recognize a limit to private property rights over the long term but fails to enforce the open beaches act in situations where storms cause a sudden and often major change in the beach and vegetation lines.

The words of the two dissenting Justices are worth reading:

“Texas beaches have always been open to the public.”

* * *

“The OBA recognizes the dynamic nature of beach boundaries by defining the public beach by reference to the vegetation line and tide lines, which shift with the movements of the ocean, whether those movements are gradual from erosion or dramatic from storm events. Requiring that existing easements be re-established after every hurricane season defeats the purpose of the OBA: to maintain public beach access.”

The dissent went on to argue that the “vague distinction” between gradual and sudden changes to the Texas coast jeopardized the public’s right to open beaches, and thereby “threatens to embroil the state in beach-front litigation for the next 200 years.”

A motion for rehearing has been filed by the State of Texas officials. The officials lodged numerous criticisms, including the illogical application of different rules for the wet and dry beaches: “there is simply no discernible principle...that permits both the (correct) holding that so-called avulsive events may alter the wet beach’s dynamic boundaries and the (incorrect) holding that the same avulsive events may *not* alter the intertwined dynamic boundaries on the dry beach.” The officials also criticized the majority for refusing to apply established precedent.

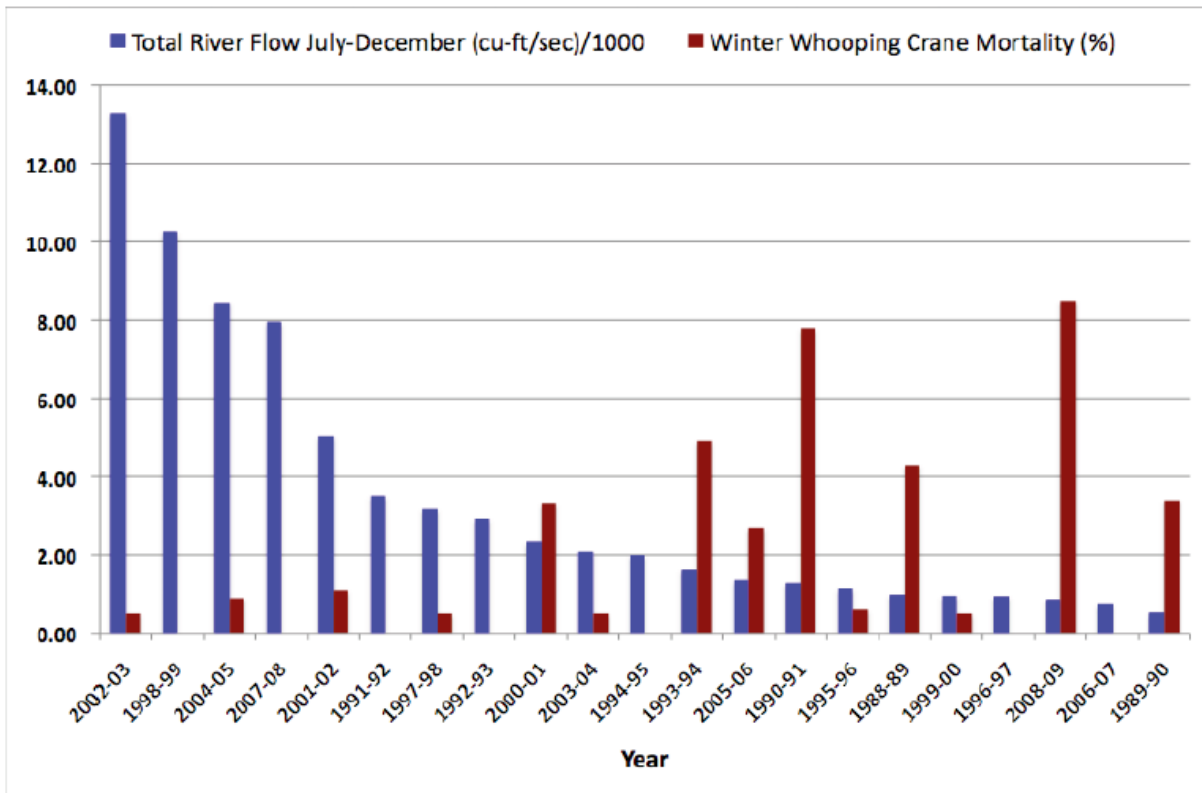
Although the decision was generally viewed as a victory for property-rights advocates and libertarians, there has been some negative fallout for beachfront private property owners. Jerry Patterson recently cancelled a \$40 million beach restoration project in West Galveston Island because it is impermissible to spend public funds on private beaches. Simply put, Commissioner Patterson said that if the homeowners now claim the beach is private property, he can’t spend tax dollars to put sand there.

Once again, if we don’t fight for our public rights, we are going to lose them. I urge each of you to write a letter to the Texas Supreme Court asking them to take up the Motion for Rehearing and reconsider their ruling. The mailing address for the Texas Supreme Court is P.O. Box 12248, Austin, TX 78711

Whooping Crane Litigation

During the 2008/2009 wintering season, the United States Fish and Wildlife Service determined that 23 whooping cranes died. Of these, 16 were juveniles. During this same time period and extending through the spring and summer, fishing was horrible in Aransas and San Antonio Bays. Good fishermen could not catch trout. Fishing guides drove their boats and clients from the Rockport area north to Matagorda Bay or south to the Laguna Madre to find fish.

In the wake of this disaster, a group called The Aransas Project (TAP) was formed to attempt to address this situation. Based on scientific research, TAP determined that both the loss of the whooping cranes and the horrible fishing were related to the absence of freshwater inflows from the Guadalupe and San Antonio river systems. The relationship of inflows to whooping crane mortality over time can be seen in Figure 1 that was prepared by Dr. Ron Sass of Rice University. This diagram is from a paper prepared by Dr. Sass titled “Grus Americana and a Texas River: A Case for Environmental Justice” that has been published by the Baker Institute at Rice University. <http://bakerinstitute.org/publications/GCC-pub-SassGrusAmericana-110910.pdf>.



In order to attempt to address this problem, TAP has initiated litigation under the federal Endangered Species Act in federal court in Corpus Christi. This litigation has been filed against the Commissioners of the Texas Commission on Environmental Quality, the Executive Director of the TCEQ and the watermaster for the Guadalupe River in their official capacities. The litigation claims that the TCEQ is responsible for managing the surface water in the Guadalupe and San Antonio River systems and that the water rights that have been issued by the State in the past are too high to protect the cranes and the bay. Stated otherwise, the litigation asks the court to require the development of a plan to manage the water in the river (in this case, a form of drought management plan) so that during low flow conditions, the bay and the cranes will be protected.

This litigation is quite controversial and has generated substantial interest among various water purveyors and water rights holders. Two parties – the Guadalupe Blanco River Authority and the Texas Chemical Council – were allowed to intervene in the litigation. The intervention requests of five other entities – the San Antonio River Authority, the San Antonio Water System, the Texas Farm Bureau, the American Farm Bureau and Union Carbide – were denied

by the District Court. These parties then appealed to the 5th Circuit Court of Appeals and a stay was granted in August that is still in effect.

Prior to the stay being issued, the District Court did issue a major ruling that the lawsuit should not be dismissed under various theories advanced by Attorney General's office and the two Intervenors. In their Motions to Dismiss, the Attorney General's office (on behalf of the TCEQ Commissioners) and the Intervenors argued that the TAP lawsuit was unnecessary because the S.B. 3 process was sufficient to protect San Antonio and Aransas Bays in the future. TAP argued that S.B. 3 could not protect the whooping cranes because the reduction of inflows leading to crane mortality results from the use of existing water rights and the existing management program and because S.B. 3 specifically exempts existing water rights from the inflow requirements. In turn, these existing rights and associated reduced inflows impact the abundance of blue crabs which are a primary food source for the cranes and also reduce the availability of drinking water for the cranes that can drink brackish water only up to about 23 parts per thousand (sea water is 32 ppt).

So at this point in time, the lawsuit has survived a major challenge but is stayed pending a decision by the 5th Circuit as to additional parties being added to the fray. Currently, there are a number of questions regarding the effect of the stay on the case management schedule. Once the 5th Circuit rules, the timetable for proceeding with the litigation will be among the first issues to be addressed by the parties and the District Court.

The most encouraging thing about this litigation so far is the partnership that was formed to create TAP. TAP is a non-profit 501(c)(3) organization with a wide range of members including governmental organizations such as Aransas County, Aransas County Navigation District, the City of Rockport and the Town of Fulton, political organizations including the Aransas County Republican Party and the Aransas County Democratic Club, national and international organizations such as the American Bird Conservancy, the International Crane Foundation and the Whooping Crane Conservation Association, Texas organizations such as the Aransas Bird and Nature Club, the Coastal Bend Audubon Society, the Coastal Bend Guides Association, Environment Texas, Galveston Bay Conservation and Preservation Association, Houston Audubon Society, Travis Audubon Society, and Texas Conservation Alliance as well as local businesses such as Anthony's By the Sea, Casterline Fishing Company, The Crane House, C-Side Decorating, Durham and Associates, Falcon Group Sustainable Services, Hamilton A/C, Electric and Plumbing, Inc., James Fox Guide Service, Key Allegro Properties, LLC, Livin' On

The Bay, MasterPlan Design, Pelican Rentals, PSpencer Consulting, LLC, Rockport Birding and Kayak Adventures, Ron Outen Associates, LLC, Scheumack Builders, L.P. and Scheumack Investments, Inc. In essence, this is a coastal community putting aside political differences and coming together to fight for the cranes, for the bays and for its economic future. For more on TAP, see <http://thearansasproject.org/about/>. I am proud to disclose that my firm represents TAP.

The Lavaca River, Formosa Plastics and Economics

Formosa Plastics is back on the environmental radar of those of us interested in the Texas coast. At this time, the Lavaca Navidad River Authority (LNRA) is evaluating whether or not to construct the second phase of the Palmetto Bend (Lake Texana) Reservoir Project in Jackson County on or adjacent to the Lavaca River. Ostensibly the reason for this project is to provide water to Formosa Plastics for its future usage along with others looking at future growth.

An initial report that was prepared for the LNRA recommended against building a reservoir on the Lavaca River, citing environmental issues as well as water yield issues, and the LNRA Board has delayed further action on moving forward with this option. However, the potential for the construction of an off-channel reservoir seems alive from both an economic and engineering perspective. And while an off-channel reservoir has less environmental impact than does an on-channel reservoir, it still will take water away from Lavaca and Matagorda Bays and it will require that thousands of acres of coastal land be taken from private property owners.

From my perspective, the most important question is the “why” of this project. Publicly, Formosa has denied that they asked the LNRA to pursue development of this water supply. Formosa states they have not gone to the LNRA Board requesting water, and they have told me they have sufficient water for the two plants coming on-line in 2011. I know from scientific and engineering feasibility studies completed under the agreement that Diane Wilson and I signed with Formosa Plastics years ago that Formosa has the capability to recycle wastewater and reduce the millions of gallon of water currently being discharged into Lavaca Bay. In their initial action under the agreements, Formosa found a way to recycle 2.5 million gallons of water per day. Many ways exist whereby Formosa can develop additional water supplies if it needs more water. The alternatives exist. The requirement to pursue these alternatives, however, does not exist.

We in Texas have a system where water purveyors and a state water development and management system are allowed to destroy the environment as a first alternative rather than as a last alternative. No concept of environmental stewardship is enforced upon our water organizations at the state and regional level. This is similar to the problem encountered in the permitting process at the TCEQ. Good and bad applicants are treated the same. They all get permits.

The State of Texas can enforce stewardship standards without being anti-business. We can and should require that before we allow destruction of our bays and our natural systems, all alternatives must be fully evaluated and that less damaging alternatives that can achieve the project should be chosen rather than the most destructive, cheap alternatives. In truth, these alternatives that damage the natural system are not cheap. It is just that the cost is passed on to others – to you and me.

The natural system supports our coastal economy. Frankly, I don't think that we have begun to understand the value of our natural system. People travel overseas for eco-tourism opportunities that are less compelling than what I have experienced on the Texas coast. There is nothing quite like a kayak in the marshes and mangroves and grass flats of the Texas coast. We have fabulous bird-watching - near Sabine Pass, at High Island and Bolivar Flats, around Christmas Bay and Quintana, at the mouth of Colorado, at Welder Flats and the Aransas Refuge, in Rockport and Port Aransas, at Hazel Bazemore Park and in downtown Corpus, at Laguna Atascosa and on South Padre – bird-watching that causes people from around the U.S. and other parts of the world to travel to our coast. And then there is the fishing which is simply spectacular. We have an abundance of resources but we have not fully understood how to use them for ourselves and for others.

When we allow damage to the natural environment as a “cheap” alternative, we are harming ourselves because we are not charging the “full cost” of the project. It is an economic sleight of hand to allow some project to reduce shrimp yields, to reduce recreational fishing, to damage our coastal birding, to reduce home rentals, to reduce home sales and then call that project economic development. Cheaper does not mean economically better than an alternative that costs a bit more, but does no residual damage to the natural system and the economy based on that system.

I'm tired of so-called economic interests stealing our coastal economy in the name of their concept of economic growth and development. That is a false concept of economy. Just as certain companies almost brought down the global

economic system, certain economic development concepts will bring down our coastal economy. For my part, I believe that Formosa Plastics will work with coastal interests to find a “cheaper” way to meet their water supply needs. However, that belief comes from years of working with, arguing with and on occasions disagreeing with this company in an attempt to improve its overall environmental, social and economic performance. It is a belief that I don’t share about all Texas or coastal business. It is time for “good” companies to begin to separate themselves from the “bad” ones. It is time for us on the coast to recognize the better companies and reward them and also identify the bad actors and publicize them. Ultimately, we can vote with our expenditures –with those products that we buy.

So as you go forth into 2011, think about coastal stewardship – about rewarding those who do good and not rewarding those who do not. We need to reconsider our concept of economy and economics in light of the fact that our current concept allows the destruction of the coastal economy so that some other economy can be developed. That is simply not sustainable over the long term. We have to find a way to protect the existing economic system as we realize new economic opportunities. It is not anti-business to protect one economy from another. It is good business.

Water Rights Challenges

There are two ongoing challenges to permit applications that seek to appropriate water rights that affect coastal waters. One involves Matagorda Bay and the other involves Galveston Bay. In the first instance, the Lower Colorado River Authority has applied to appropriate most if not all of the remaining unappropriated water in the Colorado River. In the second instance, the City of Houston has applied to reuse certain wastewater that it has discharged into the bayou system. Both of these applications have been pending for a long time and both are contested and both may soon be resolved to the benefit of the coast.

In the case of the Colorado River application, several groups, including the National Wildlife Federation (NWF), the Matagorda Bay Foundation, the Coastal Conservation Association (CCA) and the Sierra Club, have challenged the permit application and Texas Parks and Wildlife is participating in the proceeding. After lengthy negotiations, a settlement agreement was reached among the various parties, including Texas Parks and Wildlife and LCRA. However, this settlement agreement was rejected by the staff of the TCEQ.

A hearing was subsequently called by the Administrative Law Judge William G. Newchurch who wrote a decision recommending that the Commissioners of the TCEQ adopt the settlement agreement or, if the Commission did not wish to approve the non-unanimous settlement (since TCEQ staff disagreed), asking that the Commission provide him with guidance regarding incorporation of party agreements into permits. A date for a hearing before the Commissioners of the TCEQ has not yet been set.

The second case involves an application by the City of Houston whereby the City sought permits allowing it to recycle and reuse treated wastewater that it had discharged into the bayou system. This discharged wastewater provides inflow to Galveston Bay and was relied upon by the Corps of Engineers in their justification for widening and deepening the Houston Ship Channel where they determined that the salt wedge that would be brought in by a deeper and wider channel would be offset by inflows, including treated wastewater, coming into Galveston Bay from Buffalo Bayou and the San Jacinto Rivers. This reuse issue will become very important in the future as more and more communities seek to reuse wastewater rather than allowing treated wastewater to move downstream.

These permit applications were opposed by Galveston Bay Conservation and Preservation Association, the Galveston Bay Foundation, the CCA and NWF. To date, negotiations are ongoing with the City of Houston and the chances are good that a settlement will be finalized in the near future that hopefully will set aside the first firm water ever dedicated to Galveston Bay.

These two permit applications and the subsequent legal process have been very important. For the first time, there is a chance that substantial amounts of water will be dedicated to the Galveston and Matagorda Bays. Second, it is important to be aware that the staff of the Texas Commission on Environmental Quality has been adversarial to the settlement on the Colorado River system. As of this time, we have no indication of any concerns on the part of the TCEQ staff with regard to the City of Houston proposed settlement. I would also note that it is important to note and support those groups that are willing to stand up and take a public position in contested case hearings and in litigation to support the coast. Many groups are hesitant to participate in these activities because it can hurt fund-raising in this State. Without them, many of the issues discussed in this update would not be happening to the long-term detriment of the coast.

Poetry

In closing, I would like to leave you with a couple of poems that I have written about coastal stewardship and endangered species. If you like these poems, you are welcome to purchase a book titled *Birds: A Collection of Verse and Vision*, with art by Isabelle Scurry Chapman and poetry by me. You can e-mail me at jbb@blackburncarter.com to make arrangements for a great addition to your library. Have a great 2011.

the LITTLE BLUE HERON

Out of my car window I see
The little blue heron wading
In the clear stained water
Of Linville Bayou in Matagorda County
Just off State Highway 521.

It stands looking for fish in a bayou
That was dead not long ago,
Killed by the discharge from a refinery,
Killed by toxic metals and polar organics
Concealed beneath a smelly foam
That meandered with the water
Through the Columbia Bottomlands,
Water where the frogs and crawfish
And minnows could no longer exist.

The little blue heron fishes today
Because of the action of citizens
Living near the bayou,
Citizens like K.J. Richardson
Who loved to fish for flounder in the fall,
Citizens who worked for the company
And knew that it could and should do better,
Citizens who were willing to take a stand
And go into court and complain
That the oil giant was not doing right.
The little blue heron fishes today
Because someone cared enough
To take a stand for stewardship,
For the ethical conduct of business,
For corporate responsibility.

The little blue heron never knew K.J.
But they are inextricably linked
In the wonderful way that ethical action
In defense of the Earth
Links all living things together.
Forever.

the IVORY-BILLED WOODPECKER

I've heard the story about my uncles
When they were boys -
A story about a bird they saw
Down in the Cocodrie Swamp -
A bird that My Uncle Charles called
The "Good God Woodpecker" as in
"Good God. Look at that Woodpecker".

It happened during the '30s
And I always wondered
If they were talking about
The Ivory-Billed –
A magnificent bird that has been
Denied to me.
A bird that I may never see
A bird that has apparently
Ceased to be.
It's just not here anymore.

It isn't simply that one specimen died
But instead it's that an entire species
Has left the Earth.
Left us with less.
Left me wishing for the Good God
For whom it was named,
The same God with whom
I am angry
For letting us humans be so blind,
For letting us destroy other living things
Without thought and without care.
AAGGHHHHHHHHH.
Good God I miss that woodpecker.