

Holiday Coastal Update 2013

By Jim Blackburn

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Well, it is again time for the annual holiday update on coastal activity. This newsletter started as a report on the settlement that was reached with Formosa Plastics, a settlement that continues to generate benefits for the Texas coast. Formosa's overall improvement has continued through the 1990s and into the 21st century in all areas of plant performance. The agreements I made with Formosa exemplify the fact that creative solutions can be found to difficult issues.

This update is about searching for and hopefully finding creative ways to address a political environment that has pushed our bays and estuaries to their breaking point. Nueces Bay has been determined by the State of Texas to be ecologically dead because the freshwater needed to maintain its ecological health was cut off through the construction of Lake Corpus Christi and Choke Canyon Reservoir for municipal use. Now stop and think about that. We Texans of the latter 20th and early 21st centuries have killed a bay with our water management practices. Add to that the fact that we dried up the Rio Grande in 2000; a river that has flowed into the Gulf for millennia quit flowing during my lifetime.

As we move forward in the next few years, we should be very clear that we Texans have the ability to destroy that which is great about this wonderful place called Texas. We need to come together and find ways to avoid that outcome.

I hope you enjoy these reflections upon the passing of another year on the Texas coast. This year, I am asking you to contribute to and/or volunteer to help various efforts to protect the coast. Our groups and institutions to this point have failed to protect important coastal bays and estuaries. I am not being critical but merely stating a fact. Now the question is – can we find ways to unite and fight for that which we value.

1. **The Aransas Project (TAP)**

The Aransas Project is a non-governmental organization that was formed to advocate for the ecological health of San Antonio and Aransas Bays and to protect

the whooping crane. I was asked to lead an excellent litigation team that included Charles Irvine and Mary Conner of my firm, David Kahne of Houston and Jeff Mundy of Austin. We were fortunate to work with and present to the court a fabulous group of experts, including Dr. Ron Sass and Dr. Kathy Ensor, both of Rice University, computer modeler Joe Trungale, P.E., Dr. Paul Montagna of the Harte Institute of Corpus Christi, former TCEQ commissioner Larry Soward, Dr. Felipe Chavez-Ramirez of the Gulf Coast Bird Observatory, Dr. George Archibald of the International Crane Foundation, Dr. Andy Sansom of Texas State University and endangered species expert David Frederick, also formerly of the USFWS. “Mr. Crane” Tom Stehn, formerly of the United States Fish and Wildlife Service (USFWS), was subpoenaed at the court’s request and presented as a witness by us. We also had a number of local officials and citizens testify for us as well.

TAP filed suit in March 2010 against the Commissioners and Executive Director of the Texas Commission on Environmental Quality (TCEQ), alleging a violation of the federal Endangered Species Act by “taking” (e.g., killing) 23 whooping cranes during the winter/spring of 2008-2009 by the manner in which it allowed state surface water to be managed (or mismanaged). The Guadalupe-Blanco River Authority (GBRA), the San Antonio River Authority (SARA) and the Texas Chemical Council intervened on the side of the TCEQ officials, and GBRA took the lead in case preparation and presentation for the defendants. The suit was assigned to Corpus Christi federal judge Janis Jack, and the case of *TAP v. Shaw* was decided in March 2013, resulting in a decisive victory for TAP, the whooping cranes and San Antonio and Aransas Bays.

The trial itself was conducted over eight days in December, 2011 in the Corpus Christi federal courthouse which looks out over Corpus Christi Bay. TAP put on 10 experts and seven fact witnesses, GBRA put on 8 experts, TCEQ 2 and SARA 1. In her opinion, Judge Jack found that “[A]ll of TAP’s experts were accepted as such and the court finds their testimonies compelling and credible” p. 43. “In contrast, the court found an alarming trend in the experts that the GBRA offered, most of whom had limited experience and insignificant knowledge of whooping cranes in particular”. p. 43. “In conclusion, these witnesses, offered by GBRA, were not credible or reliable.” p. 44.

After trial and before the opinion was written and issued, there were some interesting procedures. First, the defendants tried to remove Judge Jack because

of her being a member of the Maine Audubon Society, a membership she disclosed as being due to her purchase of a pair of binoculars at a discount. Their motion to recuse the Judge was denied and that ruling was subsequently affirmed by the 5th Circuit Court of Appeals in New Orleans. And second, the U.S. Fish and Wildlife issued a preliminary report in early September that described a new method for estimating whooping crane numbers. GBRA then alleged that this new report raised questions about earlier USFWS reports on crane mortality that were relied upon during the trial. This led the defendants to file a motion to reopen the proceedings to consider this report. This motion was denied on the basis that the report was not final and was not reliable from an evidentiary standpoint. This subsequently became a point of appeal to the 5th Circuit.

The March 2013 opinion by Judge Jack was 124 pages in length and held, among other things, that the water management actions of the TCEQ commissioners and executive director caused the death of at least 23 whooping cranes. Judge Jack further ruled that these actions violated the Endangered Species Act and ordered the TCEQ officials to cease issuing any additional permits allowing water to be withdrawn from the San Antonio and Guadalupe Rivers. Judge Jack also ordered the TCEQ officials to apply for an Incidental Take Permit which requires the development and approval of a Habitat Conservation Plan (HCP) that should lead to the provision of additional freshwater inflow to San Antonio Bay. A full copy of the opinion can be found at:

<http://thearansasproject.org/wp-content/uploads/2013/03/TAP-Opinion.pdf>.

It is worth reading if you are interested in coastal issues and freshwater inflows and the science surrounding bays and estuaries.



Figure 1. Whooping crane catching a blue crab, one of the 80 crabs per day eaten by a typical whooper on the wintering grounds in Aransas National Wildlife Refuge.

After reviewing the opinion, the defendants filed an appeal with the 5th Circuit Court of Appeals which is located in New Orleans, and they obtained an interim ruling that stayed the order by Judge Jack and expedited the briefing and oral argument. Oral argument was heard in New Orleans on August 8, 2013 by a three judge panel comprised of Edith Jones, Jerry Smith and Emilio Garza. As of December 1, 2013, no decision has been issued by the Circuit. Depending upon the ruling, this case could be either headed back to the District Court or heading for further appellate review, either for en banc (full court) review by all of the justices of the 5th Circuit or potentially to the U.S. Supreme Court. We are all very anxious for this decision as you can imagine.

In the meantime, TAP has become engaged in additional legal action regarding the Guadalupe River and water rights. The GBRA has applied for a permit to withdraw water from the Guadalupe near Gonzales to fill an off-channel reservoir and has applied for a permit to take additional water “created” behind the salt water barrier through withdrawal points anywhere up to 200 miles upriver from the barrier. TAP’s attorneys have long been concerned about the operation of the salt water barrier that exists on the Guadalupe River just above the SH 35 bridge crossing the Guadalupe delta and are particularly concerned about the impact of

this proposed withdrawal permit. TAP has requested a contested case hearing on both of these new water withdrawal permits and will be actively opposing one or both of these permit applications when they become ripe for hearing.

The one thing that is clear from our experience in the TAP litigation is that those concerned about the future of the health of our bays will have to fight for these bays. There are many competing demands for water in our state. Frankly, I don't think Texas should be pursuing surface water for future water needs. The cost of surface water in terms of lost bay productivity is huge, although we do not consider or quantify these dollar damages or losses. If we did, desalinization would emerge as the water supply alternative of the future along with conservation. As we have found on San Antonio and Aransas Bays, under certain circumstances, help can be found through the Endangered Species Act. We should not have to resort to the federal endangered species law to protect our essential bays and estuaries. We should be able to go to, and depend upon, state processes and laws. Unfortunately, we cannot. That is just a fact of life in Texas in 2013, and if we don't understand that and if we don't fight back hard and creatively, we will lose our coastal bays and estuaries.

When I see a whooping crane in the Aransas marsh today, I don't just see a beautiful white bird. I also see a symbol of a healthy ecosystem and economy – an ecosystem that can and does produce blue crabs and wolfberries for the whooper – an ecosystem that also produces shrimp for the trout and shrimp for the shrimper and of course trout for the recreational fishermen and women – an ecosystem that supports tackle sales, home and motel rentals and house sales. Ecology and economy go together, and we need to emphasize that linkage every way that we can.

At this time, TAP is initiating a major fundraising effort to support these administrative law hearings as well as upcoming legal proceedings in *TAP v. Shaw*. If you would like to help TAP protect whooping cranes and the bay, please go to the TAP website at the address below and make a donation: <http://thearansasproject.org/get-involved/donate/>. Or, if you prefer, you can send a check to The Aransas Project, PO Box 1839. Rockport, TX 78381-1839.

2. Matagorda Bay

The concerns about bay health now extend northward to Matagorda Bay as well. In October, the Lower Colorado River Authority (LCRA) voted 9-6 to cut off freshwater inflows to Matagorda Bay from the Highland Lakes and requested that the TCEQ allow the management plan for the Highland Lakes to be altered to reflect this curtailment. And although the LCRA withdrew this request, they more recently voted 8-7 to seek relief from the management plan in 2014.

This is an unprecedented act and an important signal. There are those with political power in Texas who would kill a bay rather than asking citizens not to water their lawn or perhaps landscape their yard in a manner more suitable to the climate of Texas. We citizens of Texas seem to be more worried about maintaining lake levels than in keeping our bay alive. Harsh as that feels to us on the coast, such is simply the reality of the place we call home.

Texas has always been a hard place. Not much of value in Texas can be obtained without fighting and scratching and persevering. The bays are a gift to us – a gift of nature that we do not value appropriately. Ultimately, this is an economic as well as a political issue. The State of Texas gives its surface water away. We users are charged virtually nothing by the State to use surface water. Instead, all of the payments go to those who build water delivery systems and provide us with the water. On the other hand, when we take freshwater inflows away from the bay, we kill shrimp, oyster, blue crab, menhaden and countless other species, some of which have value in their own right and some of which are consumed by recreational species such as trout, redfish and flounder. Over several decades, these ecological losses translate into tens if not hundreds of millions of dollars in lost revenues for commercial fishermen, retail merchants and real estate agents. And the sooner we start talking in these terms, the sooner that we will get the attention of decision-makers.

In the meantime, it is clear that an attack is being waged upon Matagorda Bay by the LCRA and the citizens of Austin and the Highland Lakes region – citizens that value watering their lawns more than Matagorda Bay. At a recent meeting in Bay City sponsored by the Matagorda Bay Foundation and the Bay City Chamber of Commerce and Agriculture, about 120 concerned citizens came together to hear

about Colorado River water rights, the LCRA water management plan and what types of legal action can be taken to fight for Matagorda Bay. And there are some options for action.

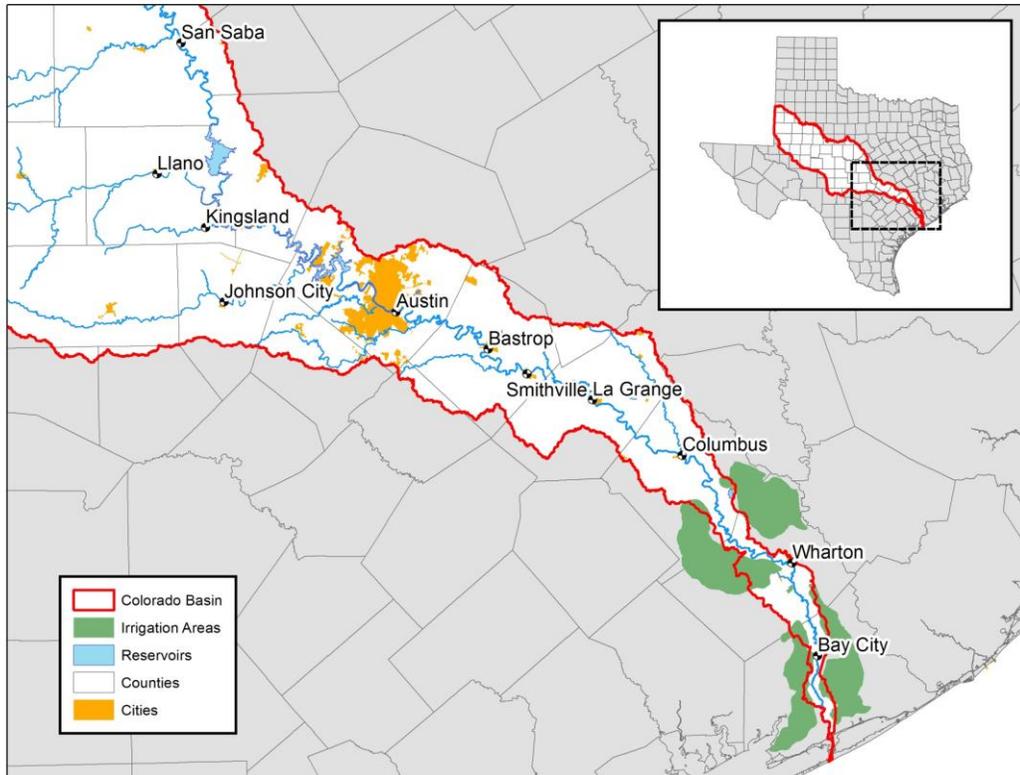


Figure 2. Watershed of the Lower Colorado River, culminating at Matagorda Bay south of Bay City, showing development around the Highland Lakes northwest of Austin as well as major water demands.

One clear line of action is to fight to keep the LCRA's efforts to reduce flows from being approved by the Texas Commission on Environmental Quality. The water management plan for the Colorado River is a bit different than the plan for other river systems due to the large amount of water held in storage in the Highland Lakes. Rather than a system of junior and senior water rights, the Colorado River water rights are primarily held by the LCRA which then allocates water to users. The right to use this water is either interruptible or firm. If it is interruptible, then when droughts occur, water can be cut off such as has occurred to rice farmers along the Colorado for the last three years.

Matagorda Bay has no legal right to water, but the LCRA water management plan provides that a monthly volume of water will be released from the Highland Lakes during low inflow periods up to an annual (as well as a multi-year) total inflow. It

is these inflows that the LCRA has voted to suspend, but they do not have the sole authority to stop these inflows. Instead, the LCRA must petition the TCEQ to allow an amendment to this management plan in order to curtail these inflow requirements (which are quite modest). These inflows are not intended to provide sufficient freshwater to keep the bay healthy but are intended instead to provide a small, sanctuary area to attempt to keep a “seed stock” of organisms alive. Rains in October led LCRA to cancel their initial request for relief, but they are now asking for relief from inflows during 2014. In short, Matagorda Bay will be in dire straits for the foreseeable future.

From a legal standpoint, there are options that can be and/or are being pursued. One option is to protest the LCRA request before the TCEQ. If the TCEQ does not support this change, then LCRA must follow through with the requirements. This involves administrative law procedures and may involve a hearing before an administrative law judge and/or a review by a state district court in Austin. There are several groups that are interested and willing to see if there is any good to be accomplished through the appeal process to the TCEQ.

One problem with this approach is that even if it is successful, it will only yield a small amount of freshwater inflow, yet studies show that much more inflow is needed and has traditionally reached the bay, even during times of drought. As a result of the TAP litigation, I asked Dr. Ron Sass, a biogeochemist and Rice professor, to look into whether there were any endangered species such as sea turtles that were dependent upon freshwater inflows and lower salinities in the Matagorda estuary. Ron reported back to me that there are three types of sea turtles in Matagorda Bay – green, loggerhead and Kemp’s ridley. Of these, the Kemp’s ridley’s main food source is blue crabs and blue crabs are definitely dependent upon freshwater inflows. So, there may be an action under the federal endangered species act to protect the environmental health of Matagorda Bay. And by the way, the habitat of the Kemp’s ridley sea turtle also includes Galveston Bay and Sabine Lake as well as Aransas and San Antonio Bays.



Figure 3. Kemp's Ridley sea turtle is found in Matagorda and other Texas bays. This endangered species depends upon blue crabs as its principal food source.

It is interesting to me that the blue crab plays such a pivotal role in the life cycle of these endangered species. Texas wildlife agencies and river authorities should focus a bit more upon making sure that we have sufficient blue crabs, and sufficient inflows, in all of our coastal estuaries. On the other hand, protection of blue crabs should emerge as a legal focus throughout the Texas coast. These crabs as well as the endangered species that feed upon them are indicators of the healthy coast that we need to maintain.

If we had the appropriate value for the loss of estuarine production, not to mention loss of endangered species, then alternative water supplies could and would be pursued in Austin, San Antonio, Dallas and Houston. We have excellent technology to convert brackish groundwater into drinkable water, but it costs more than the bargain basement prices we currently pay for surface water. For our money-based system to work, the prices must accurately reflect the "full price", including damages caused by a particular alternative. If the "full cost" of surface water were calculated and used, many other alternatives for providing municipal water would emerge. If water costs were higher, it might convince many citizens to conserve water and install drought resistant landscaping. These solutions are out there. We just are not sending the right market signals. And as a result, groups such as the Matagorda Bay Foundation may be forced to resort to filing a federal lawsuit and ask a federal judge to intervene to protect our bays,

our blue crabs and our endangered species, as well as to provide for the general ecological health of the coast.

The Matagorda Bay Foundation is committed to commissioning scientific studies and taking legal action in either state or federal court or both in order to protect Matagorda Bay. These efforts cost money. If you are willing to support the Matagorda Bay Foundation, please send a donation to the Matagorda Bay Litigation Fund, c/o Matagorda Bay Foundation, 4709 Austin St., Houston, Texas 77004. The money will be well spent. And if you want to volunteer to help on Matagorda Bay, drop us a note at matagordabayfoundation@gmail.com. I am the President of this organization and will make sure that you get involved.

3. The Lone Star Coastal Exchange

Every now and then I encounter and/or have a chance to work on the development of an idea that is so spectacular that it is difficult to believe it could be possible. Such is the case with the Lone Star Coastal Exchange (LSCE), a project emerging from the research I have been involved with in my capacity as the co-director of the SSPEED Center at Rice University, research that has been primarily funded by the Houston Endowment.

Hurricane Ike inundated thousands of square miles to the east of Galveston Bay with surge flooding, yet that flooding caused little economic damage to much of this landscape because the flooded ecosystems – the marshes, the prairie ranchlands and the bottomlands – could accept inundation and recover. If a human economy could be inundated and recover, much like the natural system did after Ike, that economy would be sustainable and would define resilience. After studying various storms and research, we concluded that a 20 foot surge represents a reasonable worst case storm along the coastline and began developing strategies for developing resilient economies in these areas as non-structural surge mitigation strategies. The 20 foot contour is shown on Figure 4.



Figure 4. 20 foot contour line along the Gulf Shoreline of Matagorda, Brazoria, Galveston and Chambers Counties.

In this regard, two major non-structural concepts have emerged from our work. One is the Lone Star Coastal National Recreation Area (LSCNRA) which is intended to generate an ecological tourism benefit for the Upper and Middle Texas Coast, and the other is the Lone Star Coastal Exchange (LSCE). The LSCNRA is an attempt to create a unit of the National Park System out of existing protected lands and will be set up to enhance ecologically-based tourism on the Upper and Middle Texas Coast. The effort to create the LSCNRA is led by Honorary Chair James Baker and Chairman John Nau of Houston along with the National Parks Conservation Association. The LSCNRA was recently featured in an article for *Rice Magazine* which can be found at:

<http://issuu.com/riceuniversity/docs/ricemagazinefall2013/26>.

The LSCNRA was a good starting point for creating a resilient economy, but it covered only about 220,000 acres, or about 15% of the roughly 1.6 million acres within this low-lying area. The remainder is owned by private landowners, and the challenge is to develop a concept that would work for them. Such a system

must respect private property rights and be based on the market rather than regulation. Out of these constraints came the LSCE.

The idea of the LSCE is to create an economy around the protection and enhancement of natural systems that are owned and managed by the private landowner. Those of you involved with the Clean Water Act wetlands program understand that if a property owner wishes to fill regulatory wetlands, that owner must obtain a permit from the U.S. Army Corps of Engineers and mitigate (e.g., offset) the loss of the wetlands. Mitigation is often accomplished by purchasing wetlands from a “bank”. Numerous landowners have created wetland banks and have sold wetland credits to those in need of offsets. This same process has been applied to various habitat conservation concepts implemented under the Endangered Species Act. But the interesting question is – can such a system of creating and selling ecological services work in the absence of regulation? Can it be simply based on the market system?

I believe that it can work and in fact will work, and that this type of thinking will become one aspect of future environmental thinking and action.

Today, if you look at many corporate websites, you will find a segment devoted to sustainability. Here, corporations tout various efforts to reduce their “footprint” which is the impact that the corporation has on natural resource use and pollution generation. Coca Cola devotes substantial attention to its “water footprint” because the product it sells is primarily water. For them, it is of strategic importance to their corporate future. Many corporations are beginning to focus upon their “carbon footprint” and their efforts to reduce or offset that footprint. And some corporations speak more generally about their “ecological footprint” and its reduction. This focus upon footprinting is an emerging trend that will begin to be more important as this type of thinking moves from being “add-on” to “strategic”, meaning that these concepts may define competitiveness in the market system of the future.

Similarly, many individuals are becoming concerned about their footprints and their interaction with the natural system. I consider my law firm to be carbon neutral due to our office’s solar panels, a green energy purchasing plan and the purchase of sequestration rights in a marsh created in Galveston Bay. And the

day may be coming when we give our significant others an interest in a created reserve for neo-tropical migrant birds (or perhaps not).

The point is that there is a market for ecological services that is developing in the corporate and other sectors. To take advantage of this market, we at the SSPEED Center are in the process of conceptualizing and hopefully creating a computer-based platform for buying and selling these ecological services through a system that we have labeled the Lone Star Coastal Exchange.

The basic idea is to create a transactional platform to put buyers and sellers of ecological services together. To this end, we have an extensive Geographic Information System data base that identifies key natural features, and we have developed a project team that includes experts who helped develop the ecological trading systems in the Willamette River valley in Oregon and in the watersheds adjacent to Chesapeake Bay. We must develop transactional rules to ensure that buyers get value and that sellers understand the terms and conditions that they must meet in order to receive income.

To date, we have just begun efforts to develop buyers for these services. We are working with a major NGO as well as several Houston-based corporations to better identify the ecological services for which a market may exist or may be developed. Buyers have expressed some Initial interest in carbon sequestration, endangered species credits, neo-tropical migrant habitat, fish and wildlife habitat generally and any potential methods for enhancing water supplies. Potential buyers also exist where natural resource damages have been inflicted by various types of spills or impacts. And there is a potential of traditional philanthropic buyers being willing to secure rights to production rather than ownership of the land per se, a move that will be well-received by landowners who wish to retain their land and have rejected traditional conservation easements.

From the seller standpoint, there is interest if the price is right. Unless a buyer simply seeks to preserve existing productivity, the seller will need to find a method for increasing – for adding to – existing ecological values. This could be achieved by managing to control invasive species, such as tallow trees, or this could be achieved by more substantial management, such as converting marginal agricultural land back to native prairie or replanting cleared bottomland forests. Again, the issue will come down to cost. One would expect that these native

restoration projects, once initiated, should be maintained with little to no incremental water or energy other than that provided by the Earth. And if this is achieved, hundreds of thousands of acres of coastal landscape would be ecologically restored and also resilient while providing farm and ranch income, thereby achieving the goal of creating a new economy that can accept surge waters and survive inundation.

In the next year, we hope to be able to get such a system designed if not up and running. There are ways to blend economy and ecology. There are win/win solutions. But to achieve these possibilities, a willingness to be open to new thinking is required.

4. Rollover Pass

Rollover Pass is a fabulous public access fishing venue that connects the Gulf of Mexico to East Bay in the Galveston Bay complex and is located on the Bolivar Peninsula. This artificial pass was completed in 1955 by the Texas Fish and Game Commission on property owned by the Beaumont Rod, Reel and Gun Club. Under the terms of the easement agreement between the State and the Club, the state was allowed to construct and maintain Rollover Pass on the land owned by the Club. The purpose of constructing Rollover Pass was to increase the salinity in East Bay, to increase the growth of sea grasses in East Bay and to help marine fish move to and from spawning and feeding areas. A map showing the location of Rollover Pass is shown in figure 5.

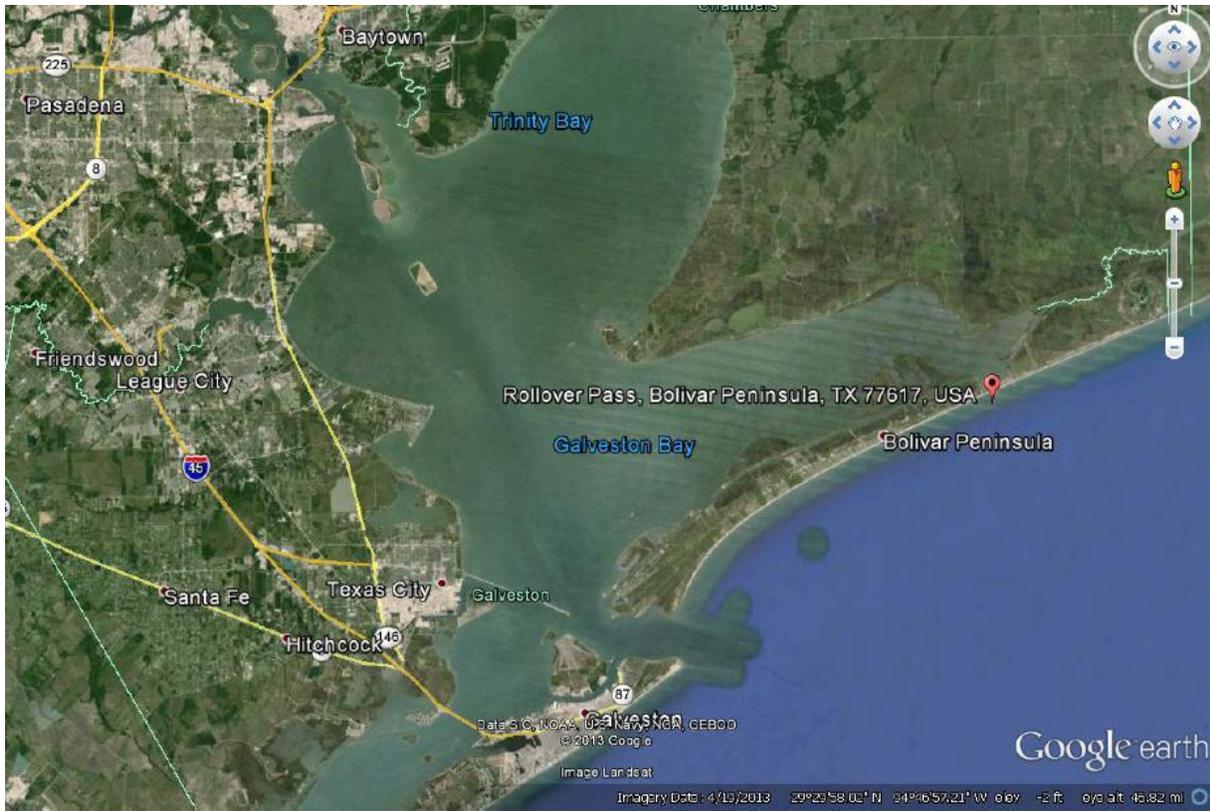


Figure 5. Map showing location of Rollover Pass relative to the Galveston Bay system.

In 2010, the General Land Office of the State of Texas, led by Commissioner Jerry Patterson, applied to the U.S. Army Corps of Engineers for a permit to fill in Rollover Pass, thereby seeking to close this public recreation asset that is used by all types of fishermen and women of all ages and ethnicities including disabled veterans and other people who need to fish near their cars and have no alternative locations. Additionally, the recreational fishery of East Bay, which is currently superb, is enjoyed by many excellent anglers and fishing guides. The GLO submitted this application even though they had no ownership interest in the property. Although this application was opposed by the landowner – the Beaumont Rod, Reel and Gun Club – along with many members of the Gilchrist Community Association (GCA) as well as countless other pass users, the permit allowing Rollover Pass to be filled was issued by the Corps in August, 2012. The Club and the GCA then filed suit against the Corps and the GLO in federal court in April, 2013. The trial is scheduled for 2014.

Neither the Club nor the GCA have much money or political influence, but they are committed to fishing, equal access, fair play and honesty, and they filed suit because something “does not smell right” about this closure. To start with, the

GLO has no ownership in the land and does not have the power of eminent domain, yet they represented to the Corps that they could obtain this property. As the Club is unwilling to sell, that may seem impossible at first blush, but the GLO has “convinced” Galveston County to undertake condemnation action against the Club as set out in a Memorandum of Agreement between the GLO and Galveston County executed in early October, 2013. However, according to public statements by politicians with knowledge, the County really did not want to condemn the land, but felt that they had to agree in order to continue to receive grants and other assistance from the GLO. Arguably, Galveston County was coerced by the GLO to agree to condemn Rollover Pass. That’s pretty nasty, even for Texas politics.

GLO has identified three reasons to support closing Rollover Pass. First according to the GLO, closing the Pass would “restore” East Bay to its original condition. Second, closing the Pass would stop sediment build-up in the Gulf Intracoastal Waterway (GIWW) supposedly caused by the operation of Rollover Pass and costing an additional \$1 million per year in dredging costs. And third, closing Rollover Pass would stop or significantly reduce beach erosion on the southwest side of the Pass. The Club, GCA and I question the validity of these rationales and the accuracy of the studies that support these claims.

First, consider the restoration of East Bay. East Bay in its natural condition was dominated by freshwater inflows, primarily from Oyster Bayou and various marsh drains on the northern shoreline of East Bay. In fact, the original reason for opening Rollover was to increase the salinity of East Bay because it was often too fresh. Regardless, the goal of restoring East Bay is currently not possible because in 2007, the Corps and the GLO permitted the diversion of Taylor’s Bayou in Jefferson County southward into the GIWW. During high flow situations, Taylor’s Bayou will now flow south through the so-called Needmore Diversion ditch and will empty millions of cubic feet of floodwaters into the GIWW. According to Corps documentation associated with the permitting of the diversion, water surface levels will rise from this diversion ditch westward into East Bay during flood discharges. To date, no analysis of the closure of Rollover Pass has considered the additional freshwater diverted into East Bay by this permitted ditch that is currently being constructed. In fact, the modeling submitted by the GLO to the Corps did not even include any inflows from Oyster Bayou much less from Needmore. When this diversion is completed and if the Pass is closed, East

Bay could be ruined as a marine fishery during wetter years. Far from restoring East Bay, the closure of the Pass will likely overwhelm East Bay with too much freshwater, a rare situation on the Texas coast where bays are normally killed because of too little freshwater inflow. And the real shame is that this issue was not evaluated by either the GLO or the Corps.

Second, consider the siltation of the GIWW. If siltation were a major concern, neither the State nor the Corps would have allowed the Needmore diversion to be permitted or constructed. Taylor Bayou during flood stage is loaded with sediment. Perhaps more importantly, the only quantification of additional dredging that has been established as attributable to the Pass in the Corps' background documents is 15,000 cubic yards a year (about \$60,000 per year), a far cry from the hundreds of thousand cubic yards a year at a cost of \$1 million put forth in publicity documents. And third, any sand coming in from the Pass could be reduced by the construction of a jetty along the north edge of the Pass and the Gulf such as was proposed in the original design of the Pass.

Finally, consider the issue of beach erosion. Beach erosion is prevalent throughout the Bolivar Peninsula and Galveston Island. It certainly exists east of High Island in Jefferson County along the beach where U.S. 87 had to be closed due to erosion. All of this erosion is not caused by Rollover Pass but rather from the lack of sand and sediment sources from the Gulf and possibly the Mississippi River. The closure of the Pass will have no effect on the presence of, or rate of, erosion at most places along the upper Texas coast. A report by the Bureau of Economic Geology titled "Texas Gulf Shoreline Change Rates Through 2007" shows in Figure 16 that the shoreline erosion in and around Rollover Pass is less than in many other coastal shoreline areas, including Jefferson County east of High Island and the Follet's Island area west of San Luis Pass. There is some localized increase erosion southwest of the Pass, but it is labeled as a moderate rate by the BEG and is not out of line with erosion rates in this part of the coast as is shown in Figure 6.

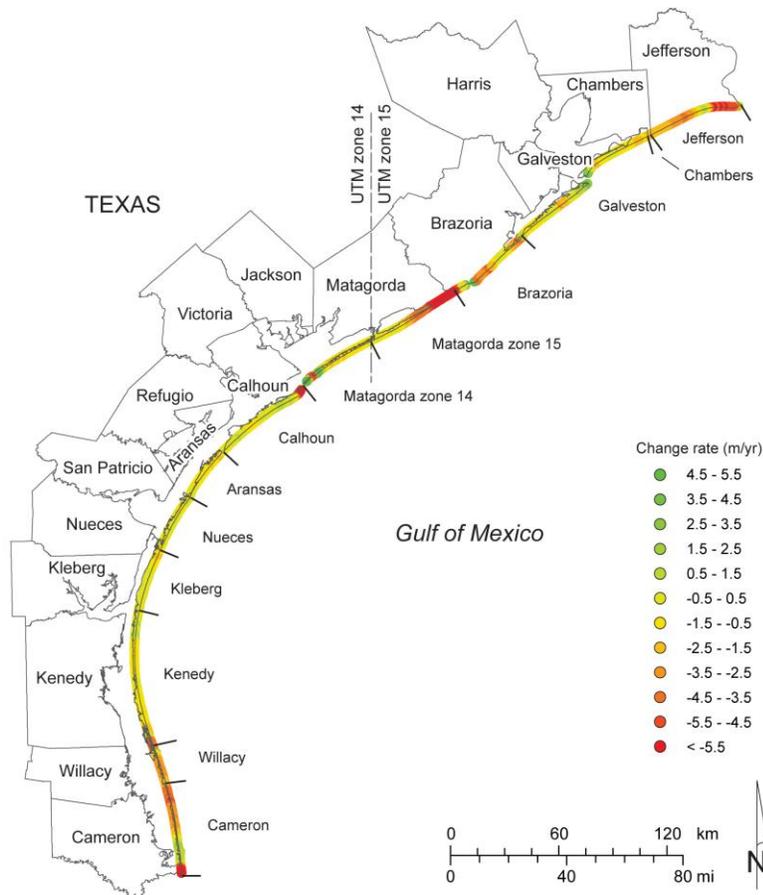


Figure 6. Map from Bureau of Economic Geology from report titled “Texas Gulf Shoreline Change Rates Through 2007” showing comparative erosion rates along the Texas coast.

So, the question remains: “Why is the GLO trying to close Rollover Pass?”

Rollover Pass does attract lower income, racially mixed crowds. It is a poor man and woman’s best place to have a chance to catch a really nice fish. Are we rushing to judgment here, going to the extent of strong-arming Galveston County into condemning the land, so that the GLO can appease some major donors by closing the Pass?

I am not sure if I am going to get the answers to this situation, but I intend to try. In federal court, the Club and GCA have claimed that the GLO has violated the U.S. Constitution in its actions to take control and close a Pass that it does not own. We are challenging the Corps on the basis that, in making their analysis of environmental impact they failed to consider the cumulative ecological impacts of the Needmore Diversion, a project that they permitted and know all about, yet a project that was left out of the impact analysis by both the GLO and the Corps. We have questions about the accuracy of fact-findings that were completed by

the Corps. And we are alleging that the closure of Rollover Pass will cause major socio-economic impacts on the Gilchrist community as well as on all users of Rollover Pass, particularly those who are disabled.

There are multiple issues and concerns about losing the Pass. I am particularly concerned about the potential harm to East Bay resulting from the closure. There are many of you who like to fish and, by my evaluation, fishing will be harmed. East Bay is a wonderful fishing hole and Rollover Pass is the reason why. Capt. Mickey Eastman once told me that he had no doubt that if he fished the Pass hard, he could catch a bona fide trophy trout there. Where else can you fish from the bank and have such a chance?

There are solutions that would allow Rollover Pass to stay open and that would reduce whatever problems are attributable to the Pass. The original plan for Rollover had a jetty that intercepted sediment and kept it from moving into East Bay. To the extent that concern exists that Rollover is actually causing such a problem, this jetty would solve it. And there is no doubt that the Rollover Pass infrastructure, which was damaged by Hurricane Ike, could be restored and repaired and turned into the recreational fishing jewel of the Upper Coast. All of this is possible if there were any interest in making it happen. An image of what Rollover Pass could be is shown below (without the jetty).



Figure 7. Rendering of restored and upgraded Rollover Pass recreational facility. Note the bird-watching platforms on the bay-side, continued vehicular access and migratory bird habitat. Rendering by SWA Architects.

If you care about the ecology of East Bay or about fairness in access to fishing, you might want to consider supporting the litigation that we have filed. This effort will be underwritten by some pro bono legal efforts, but we need to pay experts and a little income for the lawyers is always appreciated. If you want to donate to the Gilchrist Community Association Rollover Pass Fund, please send your contribution to Ted Vega, Gilchrist Community Association, P.O. Box 186, High Island, Texas 77623. The Rollover Pass website can be found at <http://www.rolloverpasstexas.com/>.

5. Poems

As has been the case in the recent past, I will conclude this update with a series of poems. This set of poems comes from the period leading up to the August 8 oral hearing on the whooping crane case before the three-judge panel of the 5th Circuit Court of Appeals.

The Ruby-Throated Hummingbird #2

At my law office
Planning the defense of the whoopers
Before the 5th Circuit Court of Appeals
In New Orleans.

I can feel the fear
Working the edges of my consciousness,
Probing for points of vulnerability,
Searching for my weakest defenses,
Looking for the path of entry
Into the essence that is me.

To fight the fear
I accept that it exists,
That it is real,
Much like the fear
That the tiny hummingbird must feel
As it strikes off to fly

Across the Gulf of Mexico
To complete its migration -
To complete its life cycle.

And then I smile to myself.
Why do I let fear bother me
When it doesn't stop my little friend?
It is simply another obstacle
That I must understand and defeat.

And so I start on my migration
To the banks of the Mississippi
To continue my quest
To protect the Whooping Crane.

The Red Shouldered Hawk

Jogging around the Rice campus
On a break from preparing
To defend the whooping crane decision
Before the 5th Circuit in New Orleans.

I hear the blue jays from the nearby trees
And they are upset,
Cackling and screeching in unison
About the cold-eyed intruder
That has come to perch on a limb
Within their territory.

I smile as I am reminded
Of the assault of words
Unleashed against our water litigation -
Against Judge Jack's district court decision
That has pierced the veil
Of Texas autonomy and supremacy

Over water,
Ordering state officials to change their ways,
Ordering them to develop a plan
To provide the water
That will sweeten the bay,
Water that nurtures the blue crabs
That provide the winter's food supply
For the last wild flock
Of whooping cranes.

And as I run on,
I am one with the intruder -
The red-shouldered hawk -
Hard, cold-eyed, measured,
Determined to withstand and repel
The noisy jays,
Determined to stay on my limb.