



# Public Law Report

MARCH 2009

## Drought Contingency and Water Conservation Planning

BY JOSHUA W. GOLDEN

The climate in Texas is highly unpredictable, and occasional droughts are inevitable. As a range of climatological conditions developed, the Legislature recognized the need for measures to reduce peak water demands and greater coordination of drought response and water conservation measures. In response, the Texas Legislature enacted legislation in 1997 directing the Texas Commission on Environmental Quality (the "TCEQ") to adopt rules for establishing unified drought planning requirements for water suppliers throughout the state.

The drought contingency rules adopted by the TCEQ require all wholesale public water suppliers, retail public water suppliers serving 3,300 connections or more (the "Major Retail Public Water Suppliers"), and irrigation districts to submit drought contingency plans to the TCEQ.

(Continued on page 2)

## 2009 Legislative Session Update

Vol. 1—Generators, Generators and More Generators<sup>1</sup>

BY JONATHAN D. POLLEY

The hottest topic in this 81<sup>st</sup> Legislative Session affecting the water district community is backup generators. On the date this *Public Law Report* went to press, four (4) generator-related bills were pending, each taking a different approach to mandating backup generators. In order of date filed, these bills are Senate Bill No. 221 ("SB 221") by Sen. Robert Nichols, Senate Bill No. 361 ("SB 361") by Sen. Dan Patrick, House Bill No. 632 ("HB 632") by Rep. Sylvester Turner, and House Bill No. 1014 ("HB 1014") by Rep. Frank Corte.

**SB 221.** SB 221 proposes to amend Section 13.139 of the Texas Water Code to require nearly all water utilities to "maintain on-site automatically starting auxiliary

(Continued on page 3)

<sup>1</sup>The goal of this article is merely to inform you, the water district community, of the ideas currently under consideration in Austin and not to encourage or discourage any of these bills. However, personally, this author hopes any readers particularly favoring or opposing any of these bills, will make their opinions heard by contacting their legislators.

## Can I Be Liable For System Failures?

BY ANDREW P. JOHNSON, III

Picture this: A lift station fails in an electrical storm. The resulting back-up of wastewater inundates the customer closest to the lift station. After the insurance company refuses to pay because the water district has sovereign immunity, the customer sues the water district for damages.

Who wins in this scenario? Well, it depends. If this was the water district's first offense, then there is no liability according to *City of Van Alstyne v. Young*, 146 S.W.3d 846 (Tex.App.—Dallas, 2004, no pet.h.). But, what if it happens again?

The Court in *City of Van Alstyne* provided insight as to how it might rule in the future. It would hold the city liable for the damages for the second flooding.

Why? The Texas Constitution prohibits any governmental entity from taking, damaging, destroying, or applying to public use any private property without adequate

(Continued on page 4)

## In the News...



**Regina D. Adams** has been elected as the Treasurer of Texas Women Lawyers (the "TWL") for the 2009-2010 program year. Ms. Adams has served as an at-large director of TWL since 2007.

# Drought Contingency

*(Continued from page 1)*

Additionally, all public water suppliers serving less than 3,300 connections must adopt a drought contingency plan and make it available to the TCEQ upon request.

On January 10, 2008, an amended set of rules became effective requiring all Major Retail Public Water Suppliers to submit drought contingency plans to the TCEQ no later than May 1, 2009, and every five (5) years thereafter. Any new plans must be submitted to the TCEQ within 90 days of adoption by the governing body.

Each drought contingency plan for a retail water utility should include:

- Specific, quantified targets for water use reductions (New Requirement)
- Drought response stages
- Triggers to begin and end each stage
- Supply management measures
- Demand management measures
- Descriptions of drought indicators
- Notification procedures
- Enforcement procedures
- Procedures for granting exceptions
- Public input to the plan
- Ongoing public education
- Adoption of plan
- Coordination with regional water planning group

In addition to drought contingency plans, Major Retail Public Water Suppliers and any holder of a surface water right of 1,000 or more acre feet must prepare, submit to the Texas Water Development Board, and implement a water conservation plan that contains and satisfies the following minimum requirements:

- Specific, quantified five-year and ten-year targets for water use reductions (New Requirement)
- Utility profile including, but not limited to, population and customers, water use, water supply systems, and wastewater systems
- Metering devices with accuracy of plus or minus 5.0%
- Plans for universal metering of customer and public water uses
- Measure to determine and control water accountability
- Non-promotional water rate structure that does

- not encourage excessive water use
- Reservoir systems operations plan for coordinated operation of reservoirs under common ownership
- Enforcement procedures
- Coordination with regional water planning group
- Ongoing public education
- Adoption of plan
- Plans for public drinking water suppliers serving a current population of 5,000 or more and/or a projected population of 5,000 or more within 10 years, must include: (i) a program for leak detection and repair to regulate water accountability, and (ii) a record management system to (x) document the volume of water pumped and delivered and (y) desegregate water sales and losses among residential, commercial, public/institutional, and industrial user classes.

Beginning in March, JRPB will add Drought Contingency and Water Conservation Planning to water district agendas in time for boards to prepare and adopt any required plans or changes prior to the May 1 deadline. If you have any questions, please contact your district's attorney for more information.

## JRPB Employee Profile

### Meet Jolie Lenz



Jolie Lenz is JRPB's newest associate attorney. Jolie joined JRPB at the beginning of 2009 and brings to the Firm an established banking practice, is heading the Firm's real estate practice and assisting with the Firm's public law and public finance practices.

Jolie obtained her undergraduate degree from the University of Houston (BA, summa cum laude, 1981), and her law degree from South Texas College of Law (JD, summa cum laude, 1985).

Jolie has represented both local and national financial institutions and various real estate investors and developers for over 20 years. Her representation of financial institutions includes advice with regard to regulatory and compliance matters and extensive loan documentation in both consumer and complex commercial transactions. Her representation of real estate investors and developers includes transactions involving commercial and residential properties.

Jolie is a native Houstonian, who enjoys exploring Texas and its history, and spending time outdoors with her family and friends.

# Legislative Update

(Continued from page 1)

generators capable of ensuring the operation of the utility's water and sewer systems during an extended power outage." Interestingly, SB 221 does not apply to utilities providing wholesale service. In addition, this bill does not expound upon what level of facility operation would comply. However, Sen. Nichols' proposal would require the Texas Commission on Environmental Quality (the "TCEQ") to establish rules providing minimum operating standards for these generators, including the minimum run-time and operating capacity.

**SB 361.** Like SB 221, SB 361 accomplishes its goal by also amending Section 13.139 of the Texas Water Code, but in a different manner. SB 361 requires retail and wholesale water utilities to (1) ensure operation of their facilities "during an extended power outage" and (2) adopt and submit an emergency preparedness plan (an "EPP") to the TCEQ for approval.

Sen. Patrick's proposal requires the TCEQ to promulgate an EPP template and provides that EPPs "may" address maintenance of automatically starting generators, sharing of auxiliary generator capacity with other water utilities and using portable generators to serve multiple facilities, among other things. However, the text is ambiguous as to whether Sen. Patrick intends the word "may" to provide a list of examples of the kinds of issues an EPP could address or to limit the topics an EPP is allowed to address. In any event, if a utility follows the TCEQ's template, compliance should not be problematic.

In the initial version of SB 361, the deadline by which a particular water system must submit its EPP depends on how far from the coast the entity is located. However, at the first hearing regarding SB 361 on March 4<sup>th</sup>, Sen. Patrick announced his intent to amend the bill so it only applies to utilities within 100 miles of the coast.

While this proposed amendment seems to strike a balance in scope, SB 361 includes some potentially onerous TCEQ approval requirements. First, the TCEQ would approve or disapprove each EPP and, if disapproved, the TCEQ must respond in writing stating the reasons for disapproval. Second, SB 361 states that a generator used as part of an EPP must comply with a design "submitted and sealed by a registered professional engineer and approved by the [TCEQ]." This latter requirement begs the question of whether currently existing generators, the designs of which were not sealed by a professional engineer or approved by the TCEQ, may be "grandfathered" into and used as part of an EPP.

**HB 632.** In contrast to SB 221 and SB 361, which both propose amending Section 13.139 of the Texas Water Code, HB 632 seeks to require backup generators by amending Section 341.0359 of the Health and Safety Code. Rep. Turner's bill requires retail public utilities to install and maintain auxiliary generators capable of ensuring that, "in the event of a local power outage," the utility can still provide water and sewer service. One wonders if the widespread outages the Houston area endured during and after Hurricane Ike qualify as "local." In addition,

under this proposal, the TCEQ would be required to conduct annual inspections of facilities to ensure compliance.

HB 632 also includes a key component lacking in SB 221 and SB 361: enforcement. HB 632 empowers the TCEQ to fine licensed operators up to \$10,000 and the Attorney General to sue to collect these fines. In addition, the TCEQ will have authority to revoke a retail public utility's "license to operate."

**HB 1014.** Like SB 221, Rep. Cortez's proposal would require most water and sewer utilities to "maintain on-site automatically starting auxiliary generators" so they can provide service "during an extended power outage." However, HB 1014 applies to retail water or sewer service providers, which by definition excludes wholesale providers, that are located in a county the TCEQ deems as having a "high" or "very high" risk of a major disaster and have more than 1,000 customers.

To determine which counties fall into the "high" or "very high" risk categories, the bill requires the TCEQ to assign every county a risk level of "low," "moderate," "high," or "very high," based on historical information regarding the number of federal disaster declarations for each county. In addition, the TCEQ would be required to establish minimum operating standards for auxiliary generators, which must include the minimum run-time and operating capacity during an extended power outage.

**Summary.** SB 221, SB 361 and HB 1014 all require generators capable of allowing water and sewer service to continue during an "extended" power failure; HB 632 requires generator sufficient to ensure operations during a "local" power outage. While none of these bills offer additional insight into the scope of the outage these generators should weather, all of them require the TCEQ to provide additional guidance. Under rules effective in August 2008 for sewer facilities, the TCEQ may require generators capable of operating such facilities for a period equal to the longest power outage over the preceding two (2) years, which for many facilities in southeast Texas is now approximately two (2) weeks. Perhaps the TCEQ would apply this same standard to its rules under whichever of these bills becomes law, but we will not know in what direction the TCEQ decides to head until it publishes proposed rules.

In addition, no one knows which of these bills might emerge as law, what amendments could be proposed or if another completely different proposal may be forthcoming. However, one thing is clear: water districts will be required to have backup power. With the Texas Legislature still in session, and the June 1<sup>st</sup> start of hurricane season fast approaching, water districts must balance the need to prepare for the 2009 hurricane season with the need to maintain flexibility, in order to comply with the new obligations burgeoning from the 81<sup>st</sup> Legislative Session. Hopefully, this article will assist your efforts to strike that balance.

**JOHNSON RADCLIFFE PETROV & BOBBITT PLLC**  
**1001 MCKINNEY STREET, STE. 1000**  
**HOUSTON, TX 77002-6424**

PLEASE CALL 713.237.1221 OR E-MAIL [JRPB@PUBLICLAW.COM](mailto:JRPB@PUBLICLAW.COM) WITH REQUESTS FOR MORE INFORMATION, COMMENTS, ADDRESS UPDATES OR CORRECTIONS.

**MARCH 2009**

PUBLISHED FOR CLIENTS AND OTHER INTERESTED PERSONS BY **JOHNSON RADCLIFFE PETROV & BOBBITT PLLC.**

JOHNSON RADCLIFFE PETROV & BOBBITT PLLC PROVIDES COUNSEL PRIMARILY TO GOVERNMENT ENTITIES, INCLUDING MUNICIPALITIES, PUBLIC NON-PROFIT CORPORATIONS AND SPECIAL DISTRICTS, WATER SUPPLY CORPORATIONS AND RELATED REAL ESTATE INTERESTS, DEVELOPERS, AND NON-PROFIT CORPORATIONS WITH A VARIETY OF NEEDS, RANGING FROM PUBLIC FINANCE TO CONTRACT NEGOTIATION, ELECTIONS AND ADMINISTRATIVE PROCEEDINGS. THE DIVERSE EXPERIENCE OF THE FIRM'S ATTORNEYS IN REGULATORY, ENVIRONMENTAL, REAL ESTATE DEVELOPMENT AND FINANCE MATTERS, OFFERS THE ABILITY TO MEET THE VARIED NEEDS OF SUCH CLIENTS. THE ARTICLES IN THIS PUBLICATION ARE NOT INTENDED TO PROVIDE SPECIFIC LEGAL ADVICE FOR ANY INDIVIDUAL SITUATION. RATHER, THEY ARE INTENDED AS GENERAL INFORMATION ONLY. FOR INDIVIDUAL LEGAL ADVICE, PLEASE CONTACT JOHNSON RADCLIFFE PETROV & BOBBITT PLLC OR ANOTHER PROFESSIONAL ADVISOR.

© 2009 JOHNSON RADCLIFFE PETROV & BOBBITT PLLC. ALL RIGHTS RESERVED.

## System Failures?

*(Continued from page 1)*

compensation (a "Taking"). Governmental entities do pay when condemning offsite easements—that is understood. But how is a sewer backup a Taking?

To reach the level of a Taking, the governmental entity must have performed an intentional act to form the basis for the liability. In setting the standard for determining whether damage to private property was intentional, the Texas Supreme Court, in *City of Dallas v. Jennings*, 142 S.W.3d 310, 314 (Tex. 2004), said that if the governmental entity either "(1) knows that a specific act is causing identifiable harm; or (2) knows that the specific property damage is substantially certain to result from an authorized government action—that is, that the damage is necessarily an incident to, or necessarily a consequential result of the government's action," liability could result.

Though law in this area is still developing in Texas, cases in other states have held governmental entities liable for a Taking when chemicals leaked out of a sewer system, causing a loss in value to neighboring land, and failure to timely and adequately repair a water line leak, resulting in the loss of a home (by sliding down a hill).

In *City of Van Alstyne*, the Dallas Court of Civil Appeals ruled that a history of raw sewage backups in the city's sewage system that causes damage to a home could rise to the level of a Taking. First, there must be an action by the governmental body

that forms the basis of the claimed Taking. In the *City of Van Alstyne* case, the alleged action by the city was the failure by the city to replace old pumps at a lift station near the plaintiff's home, even though a new lift station was under construction nearby. The Court recognized that the city had no "intent" to cause damage to the Young's property, so the Court next looked to "knowledge."

The Court acknowledged that mere knowledge of alleged problems with the sewer lines was different than knowledge that failure to replace the sewer lines was substantially certain to result in flooding of the Young's home. Further, the Court recognized that a single incident generally would not give rise to a Taking claim. Based on this, the Court did not find the city liable in the original flooding.

However, before the case was concluded, the lift pumps failed again in an electrical storm, and flooded the Young's house a second time. Though evidence of the second flooding was not before the Court, the Court did state that the second incident of failure and flooding could rise to the level of knowledge required to hold the city responsible for the damage.

What is the lesson here? Courts in several states are expanding the ability of private persons to find governmental entities liable for a Taking. Although the case law is still very fact specific, regular maintenance and promptly addressing known problems is now a must if a governmental entity is to avoid potential liability for damages to private parties.