



Special Considerations in Reservoir Permitting – A Lawyer’s Perspective

World Lakes Conference

November 2, 2011

Presented by:

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“Whiskey’s for drinkin’...water’s for
fightin’!”

- Overview of Presentation:
 - State Water Right Permitting
 - Federal Construction Permitting
 - Legislative Support for Projects
 - Land Acquisition of Project Sites
 - Reservoir Access Issues

- Water Rights Permitting
 - Issued by TCEQ under TWC Chapter 11
 - Authorizes the impoundment and diversion of state water
 - May include IBT authorization
 - Water availability analysis required
 - Protection of instream uses and downstream water rights required
 - Public notice and hearing opportunity

- Sand, Gravel, Marl or Mudshell Permit
 - Issued by TPWD
 - Disturbance of sedimentary material within a state-owned streambed
 - Texas Parks and Wildlife Code 86.002
- Antiquities Permit
 - Issued by THC
 - Authorizes archeological studies prior to disturbance

- Clean Water Act 401 Water Quality Certification
 - Issued by TCEQ to support issuance of 404 permit by USACE
 - Ensures the proposed discharge will comply with state water quality standards
 - Requires an alternatives analysis

- Clean Water Act 404 Permit
 - Authorizes the discharge of dredged or fill materials into navigable waters
 - Requires steps to avoid and minimize impacts to aquatic resources
 - Requires mitigation for unavoidable impacts
 - Public notice and meetings
 - Reapplication allowed only if new and material evidence is offered

- NEPA Process
 - Triggered for “major federal actions” impacting the environment
 - In re reservoirs, directs the USACE to prepare an Environmental Impact Statement before a 404 permit is issued
 - Drives an alternatives assessment based on the “purpose and need” for a project

- EPA Veto Authority
 - Authorized under CWA 404(c)
 - Public notice and comment opportunities
 - Must be for an “unacceptable adverse effect” on i) municipal water supplies, ii) fish and wildlife, or iii) recreational areas
 - 12 projects vetoed since 1981

- Legislative Support
 - Unique Reservoir Designations under Texas Water Code 16.051
 - Permitting directives via the Conservation Amendment
 - Funding directives via the Conservation Amendment

- Land Acquisition
 - Fee simple ownership or flood easements
 - Typically includes conservation pool and some additional floodways
 - Dam safety rules require that spillways be designed to accommodate inflows for the PMF event
 - Legal interest in property up to the PMF event not necessary

- Reservoir Access Issues
 - Public access cannot be denied to state water, as long as no trespass on private property
 - Permittees are not required to afford access
 - TWDB funding requires permittees to afford “adequate” public recreational access.

What Have We Learned?

- Permitting of new reservoirs involves long-term commitment by applicants
- Permitting of new reservoirs involves many moving parts
- Permitting of new reservoirs requires coordination with various state and federal agencies
- Permitting outcomes are uncertain
- Development of new water supplies is challenging



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