

TEXAS COASTAL GREETINGS 2003 FROM JIM BLACKBURN

Hello and happy holidays. I am once again writing at this time of the year to give you an update on my observations about conditions on the Texas coast over the last year. I wish I had good news to report, but I don't. 2003 was a tough year for the coast. I'll be glad to welcome in 2004.

FRESHWATER INFLOW FOR BAYS AND ESTUARIES

Scientists and policy makers have known for decades that the natural productivity of our bays and estuaries is directly related to freshwater inflows. Freshwater inflow keeps salinity levels down, allowing oyster reefs to thrive. Freshwater inflow also brings in nutrients such as nitrogen, phosphorus and silica that support the growth of phytoplankton, the microscopic plant life that is the base of the bay food chain. Oysters, shrimp, crabs, mullet, croaker, redfish, speckled trout, flounder and virtually every living thing in the bay system are linked to freshwater inflow and those nutrients in one way or another.

In 2003 the Texas Commission on Environmental Quality (TCEQ) denied several permit applications that would have granted water rights for freshwater inflow to San Antonio, Matagorda and Galveston Bays. These applications were filed, respectively, by the San Marcos River Foundation (SMRF), the Matagorda Bay Foundation (MBF), and the Galveston Bay Conservation and Preservation Association (GBCPA)/Galveston Bay Foundation (GBF). Although the TCEQ had passed regulations that identified freshwater inflows as a beneficial use for which water rights permits could be issued, the TCEQ ruled in denying the water rights application for San Antonio Bay that there was no clear legal authority that allowed those rules to be passed in the first place. In essence, the TCEQ disregarded its own rules and denied these applications without a hearing on the merits.

The TCEQ was under considerable pressure to deny these permits by the Texas "water lobby" and our elected politicians. Lt. Governor Dewhurst filed a brief with the Commission urging that it dismiss these permit applications seeking water for the bays and estuaries. After the TCEQ's denial of the San Antonio Bay application, State Sen. Ken Armbrister passed legislation that prevented the TCEQ from issuing water rights permits for the bays and estuaries. Instead, Sen. Armbrister's bill set up a committee to study the issue of freshwater inflows. As of mid December, Lt. Governor Dewhurst still had not announced his appointees, essentially keeping the process from starting.

Sen. Armbrister's approach might have been acceptable if all water rights permit applications had been halted during this study. However, all other permit applications for water rights are still being processed. Only the water rights permits for bays and estuaries and in-stream river flows are being held up. Essentially, our bays and estuaries have been sent to the back of the line; all other permit applications that were filed after these bay and estuary permit applications are now ahead of bays and estuaries in terms of

the priority date. The priority date is the key date in the world of water rights. It determines who gets water first when flows are limited. This means that applications filed after the water rights applications for San Antonio, Matagorda and Galveston Bays were allowed to move ahead in line. They will get water before the bays get water unless the current rules are changed soon.

The point here is that the bays and estuaries are not being protected by our current set of politicians. We must either convince these politicians to protect the bays and estuaries or we must get another group. That, in turn, means that those of us who care about the coast must start getting tough about politicians and politics. It is time to quit being nice about this and other issues. The coast is being sold out to the highest bidder.

BAYPORT AND GALVESTON BAY

And speaking of being sold to the highest bidder, I want to focus on Bayport for a minute. I and many others have been fighting Bayport for over five years now, and I am sick and tired of the ineffective government that we have in Texas and in the U.S. when it comes to protecting coastal resources and coastal communities. Bayport is a \$1.2 billion container port that is proposed by the Port of Houston Authority. It is to be constructed on the south side of the Bayport channel on the northwest shoreline of Galveston Bay. Over 10,000 people live within one mile of its boundaries in Shoreacres, Seabrook, Pasadena, LaPorte, El Lago and Taylor Lake Village. Bayport will require the filling of over 146 acres of freshwater wetlands. It will cause a violation of noise and air quality standards. It will jam up SH 146 with over 5000 trucks in and out per day.

However, of most importance to me is the fact that Galveston Bay is at risk from this project. The Port's application seeks to construct docks to 56 feet of depth although the Houston Ship Channel is only authorized to 45 feet. The Port's cranes are being sized to handle Post-Panamax vessels that require from 45 to 53 feet of depth. The Corps has even stated in the environmental impact statement that it is likely that a deeper channel will be required in the future, yet those of us fighting Bayport have been unable to get any federal or state agency to stand up and argue that the time to discuss this deeper channel is now, before the port is built.

The problem with a deeper ship channel in Galveston Bay is that salt water comes in from the Gulf along deepwater channels. Just as I am concerned about freshwater inflow reductions, I am also concerned about more salt coming from the Gulf. In the 1980s, we had a major fight over widening and deepening the Houston Ship Channel. Texas Parks and Wildlife Commissioners stood with us in the fight to protect the bay system. Today, however, Texas Parks and Wildlife is not raising this important issue. Instead, Texas Parks and Wildlife just made a deal agreeing to withdraw their objections to Bayport if the Port of Houston Authority would purchase land in the Katy Prairie west of Houston as well as up on the San Jacinto River to mitigate impacts from the filling of over 140 acres of freshwater wetlands adjacent to Galveston Bay at Bayport.

On December 5, 2003, the Corps announced its intention to issue the Bayport permit to the Port. The TCEQ issued certification under the Clean Water Act and the Texas Coastal Management Program on December 16, 2003, certifying that the project meets their requirements. Those of us opposed to Bayport are trying to get three votes in order for an appeal to be heard by the Coastal Coordination Council (CCC), the agency created to oversee the Texas Coastal Management Program (CMP). So far, we have no indication as to whether or not we will be successful in that appeal.

The cities of Shoreacres, Seabrook, Taylor Lake Village and El Lago along with the Galveston Bay Conservation and Preservation Association and seven other environmental groups will likely be in federal court in late December or early January to seek a preliminary injunction to stop construction pending a full hearing under federal environmental law. Stay tuned.

DO WE HAVE A COASTAL MANAGEMENT PROGRAM IN TEXAS?

During the course of the Bayport fight, Rick Lowerre, an Austin environmental lawyer working with us on the Bayport fight, and I have discovered that the Texas Coastal Management Program (CMP) is not being implemented as mandated by state law. Texas law requires that all major projects in the coastal zone be evaluated to determine their consistency with the Texas coastal management program, yet we have discovered that the TCEQ has not been fulfilling its responsibility under the coastal program.

Under the current CMP, agencies undertaking actions involving major projects within the boundaries of the Texas coastal zone must evaluate whether that action is consistent with the Texas CMP. Essentially, the coastal consistency evaluation is layered on top of the review criteria under the agency's normal process. So, for example, when the TCEQ reviews a Corps permit to determine whether or not the permit meets state water quality criteria (the so-called §401 review), the TCEQ is also supposed to review for consistency with coastal management rules if the project is within the coastal zone. Such a review should consider the long-term impacts of a project on the Texas coast, alternative sites for projects and the impact of the project on coastal natural resources and coastal communities in addition to traditional water quality issues. That is the way that the Texas CMP is structured under state law.

However, the program has not been working the way it was designed. Rick and I have discovered that the TCEQ was issuing the coastal certification, but they were not undertaking the substantive review and they were not applying the rules and regulations of the Texas coastal program. Additionally, we discovered that the TCEQ has signed an agreement with the Corps stating that they will complete all §401 and coastal reviews within 10 days. Under Texas law, citizens are given 13 days after the TCEQ action to pursue an appeal to the Coastal Coordination Council, the agency set up to oversee the Texas Coastal Management Program. Additionally, if three members of the CCC vote to hear the appeal, then another 13 days are provided under Texas law in order to hear the

appeal. Neither of these appeal processes are either mentioned or provided for under the TCEQ agreement with the Corps, even though they are part of the Texas CMP process.

On December 17, 2003 GBCPA as well as the Cities of Shoreacres, Seabrook and Taylor Lake Village filed suit in Travis County District Court against the TCEQ over several procedural and substantive errors regarding Bayport. We are also attempting to force them to recognize and respect the appeal to the CCC as part of the Texas CMP consistency program. Unfortunately, it has come down to litigation because, among other things, the TCEQ has refused to tell the Corps that Texas law provides for a 13-day appeal to the CCC.

It is clear to me that citizens of the Texas coast – the people affected by the Texas agency permitting actions - are not the clients or focal point of certain state agencies such as the TCEQ that are only concerned with getting the permits issued. They won't even give us the time required by law to try to appeal their decision. That's wrong and it hurts all of us on the Texas coast.

The State of Texas has a coastal management program on the books but not in fact. Jerry Patterson, the Commissioner of the General Land Office, is the elected official who is responsible for the Texas Coastal Management Program. He inherited a program from then-Commissioner David Dewhurst that was a sham. Today the program remains a sham. Let them both hear from you. Tell them both that you are concerned about the coast. Tell them you want the coast protected.

This situation with coastal consistency review pretty much sums up my concerns about the situation on the coast today. On paper and in rhetoric, it appears that we have a process to protect the coast, but we are being duped. There is no protection. There is no serious review. As things stand now, we could lose our oyster reefs and our natural bay productivity as well as long-established coastal communities without any notice or action from the state agencies set up to protect these resources. All of our state agencies appear to be focused on speeding-up the issuance of permits regardless of how ill-advised the projects may be. This situation must change.

Each of us is part of this problem until we start demanding more than what we are getting from our elected officials. And if they won't help us, then we have to vote against them. Protection of the Texas coast is a bi-partison concern. If we only vote party lines and don't require specific commitments for coastal protection from our officials, then the coast will continue to be harmed by the actions of our elected politicians.

CLEAN AIR AND BUSINESS AS USUAL IN HOUSTON

I usually don't write about clean air issues in this coastal update but the situation with air quality in the Houston and Beaumont-Port Arthur area is sufficiently bleak that it deserves a word or two. There is a group called the Business Coalition for Clean Air Appeals Group (BCCA Appeals Group) that was formed to insure that the air quality requirements for the Houston area were met "in a way that maintains the economic

vitality of the region”. Among the tasks undertaken by the BCCA Appeals Group was to litigate against the state agency (originally the TNRCC, now the TCEQ) and the EPA regarding the requirement that nitrogen oxide (NO_x) emissions in the Houston area be reduced by 90% in order to meet the ozone standard. The members of the BCCA Appeals Group include Air Products, L.P., Chevron Phillips Chemical Company LP, The Dow Chemical Company, Dynegy Inc., Entergy Gulf States, Inc., Enterprise Products Operating L.P., ExxonMobil Chemical Company, a division of ExxonMobil Corporation, the Greater Fort Bend Economic Development Council, Infineum USA LP, Lyondell Chemical Company, Reliant Energy, Incorporated, Shell Oil Company and Texas Petrochemicals LP. These companies have earned a few words.

Volatile organic compounds (VOCs) and NO_x combine in the atmosphere in the presence of sunlight to form ozone, a dangerous air pollutant. The regulatory strategy to meet ozone standards is determined by computer models. In 2000 an aerial study of air pollution over the Houston Ship Channel discovered much larger concentrations of VOCs such as ethylene, propylene and butadiene than were predicted to be present by the computer models. It was subsequently determined that the amounts of these pollutants (ethylene, propylene and butadiene) being emitted by area industries were much higher than had been self-reported by these industries. Not surprisingly, the computer models that were based on the erroneous self-reports were incorrect to some extent.

The BCCA Appeals Group argued in court that the 90% NO_x reduction rule previously enacted by TNRCC lacked a reasoned justification because the computer modeling was not dependable and could not be relied upon as “sound science”. On this basis, the Group argued that the 90% NO_x rule should be overturned by the Travis County District Court. After the BCCA Appeals Group presented their direct case, the TNRCC reached an out-of-court settlement with them that led to the repeal of the 90% NO_x rule in late 2002. As a result of this litigation and settlement, the progress toward ozone attainment in Houston was once again delayed. Now, TCEQ is refocusing on additional VOC controls to address these ethylene, propylene and butadiene emissions.

In Houston, the control strategy for ozone reduction since 1973 has been to reduce VOC emissions. It is amazing to me that after almost thirty years of regulation of VOCs in Houston we have discovered that the VOC emissions had been incorrectly estimated and that they were much higher than previously thought. In my opinion, our air pollution agencies have not been looking real hard for VOC emissions. Harris, Galveston and Brazoria Counties produce about 12% of the world supply of ethylene, 16% of the propylene and 12% of the butadiene. One would expect high releases of these substances simply on the basis of volume of production. These production figures are not a secret, but it appears that neither the TNRCC/TCEQ nor the EPA was paying attention.

So, as things now stand, the BCCA Appeals group has been successful in getting the TCEQ to revoke the 90% NO_x reduction rule on the basis that the role of ethylene, propylene and butadiene, as well as certain other VOCs, was incorrectly considered in the computer models upon which the ozone control strategy was based. The interesting fact here is that many of the members of the BCCA Appeals Group are among the highest

producers of ethylene, propylene and butadiene in the region. Dow, Chevron Phillips Chemical, ExxonMobil Chemical and Shell Chemical are among the largest emitters of ethylene; Dow, Chevron Phillips Chemical, Shell Chemical, Exxon Mobil Chemical and Lyondell Chemical are among the largest emitters of propylene; and Texas Petrochemicals, Shell Chemical, Dow Chemical and ExxonMobil Chemical are among the largest emitters of butadiene.

Essentially, these companies and others have benefited from underreporting ethylene, propylene and butadiene emissions. They have caused costly NOx regulations to be revoked because the TCEQ computer modeling that is based on erroneous emission estimates does not meet the “sound science” requirements of law. At the same time, they have been emitting more VOCs than they would have been allowed to if they had reported these VOC emissions correctly in the first place. It seems to me that something doesn’t smell right here. How about you?

COASTAL ACTIVISM – HEROES AND HEROINES OF THE COAST

At the end of a bad year, the one thing that I trust for the future is citizen activism. I trust people who are willing to stand up and fight for the coast. Citizens are compelled to action for various reasons. Some are ethically/spiritually driven. Others are fighting for what they have enjoyed and want to pass on to others. Some just like the serenity of an afternoon on an isolated piece of coastal real estate. Some like to catch fish. I know that citizen action works. So, on this holiday season, let’s not lament the problems but let’s look at what activism has accomplished in the past on the Texas coast.

Starting in the 1970s and ending in the 1990s, the Wallisville Reservoir was defeated by a coalition of recreational and commercial fishing groups and environmentalists. Today almost 20,000 acres of land is set aside for recreational use at the top of Trinity Bay. Spartina wetlands and Cypress swamps that would have been inundated are still functioning. It was a great environmental victory.

In the late 1980s and early 1990s, a compromise was reached on the widening and deepening of the Houston Ship Channel due to opposition from environmental groups and state and federal agencies. In addition to compromising on 45 feet of depth rather than 50 feet, the Corps and the Port of Houston agreed to beneficially use the dredged material rather than open bay dumping over 10,000 acres of Galveston Bay as proposed. Today’s concern about Bayport, in part, is that this excellent 45 foot compromise will be undermined by the investment of \$1.2 billion of taxpayers money at a location up the bay that will necessitate a deeper channel than was agreed to in the compromise.

In the early 1980s, Ellyn Roof and Mary Beth Maher and other members of GBCPA as well as others like shrimper Johnny Valentino opposed and defeated HL&P’s proposal to abandon the cooling towers at the P.H.Robinson plant near Bacliff on Galveston Bay. This hot water would have interfered with fish and shellfish movement along the shoreline and disrupted the nursery function of the bay.

In the early 1990s, GBCPA, GBF and several Galveston Island residents defeated the proposal by Texas Copper to build a copper plant on Virginia Point next to the I-45 bridge crossing to Galveston Island. In the 1990s, Evangeline Whorton of Scenic Galveston took on a proposal to develop a tract of land across from Virginia Point in federal court. Today, Scenic Galveston, led by Evangeline's daughter Lalise Whorton Mason, is in the process of obtaining Virginia Point as a nature reserve and is replanting Spartina grasses where the development was defeated.

In the mid 1990s, Sharron Stewart of Lake Jackson filed suit in federal court to protect the Columbia Bottomlands, the wonderful forest that extends all the way to the coast along the Brazos and San Bernard and Colorado Rivers. Sharron along with Laurence Armour of the Pierce Ranch and Mike Lange of the U.S. Fish and Wildlife Service and many others have been able to make preservation of the bottomlands a goal of the four-county area and have helped save much of this forest that is critical to migrating neo-tropical songbirds.

In the early 1980s, Roy and Muriel Tipps along with the Texas Parks and Wildlife Commission took on the Corps of Engineers in federal court over open bay disposal of dredged material in East Matagorda Bay. Today, much of the improved dredge management in the upper Texas Coast can be traced to Roy and Muriel's litigation and Parks and Wildlife Commissioner Dick Morrison's leadership.

In the late 1980s, shrimper Diane Wilson and I took on Formosa Plastics and their plans to expand their plant at Point Comfort. Although Formosa obtained their permits, the fight had a major impact on Formosa, causing it to change its practices and become one of the better performing companies on the Texas coast.

In the mid to late 1970s, Steve Frishman of Port Aransas took on the Port of Corpus Christi and the Corps of Engineers over plans to develop a superport on a mangrove wetland known as Harbor Island. After years of fighting, the Port abandoned the proposal. Today, Harbor Island is a protected area that is the site of the Texas Parks and Wildlife Lighthouse Lakes Kayak Trail.

In the late 1980s, George Bolin, Dick Morrison and Walt Kittleburger of Port Mansfield opposed plans by American General Realty to construct a destination resort on the north end of South Padre Island across from Port Mansfield on the Lower Laguna Madre. With the help of State Sen. Carlos Truan, that proposal was defeated. Today, the land has been purchased by the Nature Conservancy and is now a nature reserve.

In the mid 1980s, a plan was hatched to develop approximately 20,000 acres of land on the south and east sides of South Bay at the far end of the Laguna Madre. Playa Del Rio was defeated by the action of Merriwood Ferguson, Mary Lou Campbell and a coalition of environmental groups and other individuals from the Rio Grande Valley. The land that was to be developed as Playa Del Rio is now a part of the Lower Rio Grande Valley Wildlife Refuge.

These are some examples of what has been achieved on the Texas coast by activism. Activism works. We need more people and more groups to stand up to those that would destroy the Texas coast. We owe a debt of gratitude and great big thank you to those who have stood up so that all of us could have resources to enjoy.

E-MAIL YOUR OFFICIALS

In closing, let me urge you to send an E-Mail to our state officials this holiday. Offer them some holiday cheer. Let them know what you think. Here are some of the more notable of our leaders.

Governor Rick Perry – rickperry@rickperry.org

Lt. Governor David Dewhurst – www.senate.state.tx.us/75r/LTGOV/Contact

Land Commissioner Jerry Patterson – jerry.patterson@glo.state.tx.us

Sen. Ken Armbrister – mike.sizemore@senate.state.tx.us

Parks and Wildlife Commissioner Ned Holmes – NSHolmes@parkwayinvestments.com

TCEQ Executive Director Margaret Hoffman – execdir@tceq.state.tx.us

Thanks for reading this. Have a happy holidays and please send this coastal newsletter on to anyone that you think would read and enjoy it and maybe even act on it.

Blackburn.