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Legal Issues with Permitting Amenity Ponds

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1. Introduction

Amenity ponds are often constructed in new subdivisions for aesthetic, recreational, drainage, and irrigation purposes. Cities and other governmental entities may have small lakes for recreational and drainage purposes on golf courses or in parks. In many cases, these lakes were domestic and livestock lakes before they were converted to amenity ponds. Depending on the location and source of water for the pond, such as state-owned surface water, groundwater, storm water, or reclaimed water, the permitting requirements can vary greatly. This paper will explore the permitting requirements for these amenity ponds and examine alternative sources of water for those ponds.

2. Location of Pond a Determinative Factor for State Permitting Requirements

In Texas, water that is of the "ordinary flow, underflow, and tides of every flowing river, natural stream, and lake, and of every bay or arm of the Gulf of Mexico, and the storm water, floodwater, and rainwater of every river, natural stream, canyon, ravine, depression, and watershed in the state is the property of the state." *See* TEX. WATER CODE § 11.021(a). Before state water may be impounded, stored, or diverted, a person must obtain a water right from the Texas Commission on Environmental Quality (TCEQ) that authorizes the use, storage, and diversion of the water. *See* TEX. WATER CODE §§ 11.022, 11.081, and 11.121.

What constitutes a watercourse for purposes of defining state water has been further defined by the Texas courts over the years. In 1925, the Texas Supreme Court stated that a watercourse has a well-defined bed and banks, a current of water, and a permanent source of supply. *Hoefs v. Short*, 273 S.W. 785, 787 (Tex. 1925). Although the bed and banks of a watercourse may be "slight, imperceptible, or absent" in some instances, it will not lose its character as a watercourse. *Id*. at 787; *Domel v. City of Georgetown*, 6 S.W.3d 349, 353 (Tex. App.–Austin 1999, pet. denied). The flow of water in the watercourse "need not be continuous and the stream may be dry for long periods of time." *Hoefs*, 273 S.W. at 787; *Domel*, 6 S.W.3d at 353.

With respect to the permanent source of supply, the supreme court stated in *Hoefs* that this "merely means that the stream must be such that similar conditions will produce a flow of water, and that these conditions recur with some regularity, so that they establish and maintain a running stream for considerable periods of time." *Hoefs*, 273 S.W. at 788. In *Hoefs*, the creek in question had a permanent supply of water because it usually ran for "a day or two" after a big rain, and the creek ran between one and twenty-two times a year. *Id.* at 802. This was sufficient to constitute a permanent source of water. *Id*. at 788.

Thus, if an amenity pond is or will be located on a watercourse, it is impounding state water and will require a water rights permit issued by the TCEQ. Even if the pond was previously exempt

from the permitting requirements because it was used for a domestic, livestock, wildlife management, or sediment control at a mining operation, if the use of the pond changes, *i.e.* it is now used for aesthetic or recreational purposes, the pond will need a permit. Failure to obtain a permit for an existing pond could lead to enforcement by the TCEQ.[1]

3. Water Availability and Alternative Sources of Water

A. Water Availability

To impound state water in an on-channel amenity pond or to divert state water from a water course to an off-channel amenity pond, the owner of the facility must demonstrate that "unappropriated water is available in the source of supply," and that the proposed appropriation "does not impair existing water rights or vested riparian rights." TEX. WATER CODE § 11.134(b)(2) and (b)(3)(B); 30 TEX. ADMIN. CODE § 297.41. An application for a new appropriation will be denied unless "there is a sufficient amount of unappropriated water available for a sufficient amount of time to make the proposed project viable . . . ." 30 TEX. ADMIN. CODE § 297.42(a).

For irrigation water rights, this means that seventy-five (75) percent of the water must be available seventy-five (75) percent of the time when distributed on a monthly basis and based on historic stream flow records. *Id.* at § 297.42(c). For an application for an on-channel storage facility for domestic and municipal uses, the diversion right of the reservoir must be equal to the firm yield of that reservoir. *Id*. at § 297.42(e). However, other projects that are not required to have continuous availability of historic, normal stream flow, the required availability of unappropriated water may vary and will be determined on a case-by-case basis, based upon whether the proposed project can be viable for its intended purpose. *Id*. at § 297.42(d).

In addition to the availability analysis, the TCEQ must determine if the new appropriation will cause an adverse impact to the uses of other senior appropriators. *Id.* at § 297.45(a). An adverse impact to another appropriator includes: (1) possibly depriving the existing water right holder of the equivalent quantity or quality of water that would have been available to that water right; (2) increasing a water right holder's legal obligation to a senior water right holder; or (3) substantially affecting the continuation of stream conditions as they would exist with the full exercise of the existing water right at the time the water right was granted.

Thus, when applying for a permit for an on-channel amenity pond or applying for a permit to divert state water to an off-channel reservoir, an applicant will be required to demonstrate that there is sufficient unappropriated water available and that the new appropriation will not injure existing water rights. In many instances, applicants for these types of permits are not able to meet these requirements and, thus, must find an alternative source of water.

[1] *See e.g.* December 10, 2014 Default Order In the Matter of an Enforcement Action Concerning LGI Land, LLC, TCEQ Docket No. 2013-2128-MLM-E.

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