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Permitting Indirect Reuse in Texas: Before the Brazos Sysops Permit

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1. Introduction

Once considered a threat to surface water quality and viewed by municipalities and industries as waste to be rid of, treated wastewater is now viewed by many as a valuable water supply. The ability to rely on treated wastewater as a water supply can allow a water provider to delay development of additional, more expensive water supplies. However, as a practical matter, this can reduce water available to others downstream who have come to rely on the treated wastewater being discharged to the watercourse (“return flows”¹). And, to some extent, these return flows have provided beneficial flows for the riverine environment and freshwater inflows to the Texas estuaries up and down the coast.

Direct reuse of treated wastewater involves delivery of treated wastewater through pipelines and other infrastructure directly from the wastewater treatment plant to an end user without any discharge to a watercourse.² This method of reuse is widely recognized as allowed under Texas law, so long as the reuse is consistent with any special limitations or conditions in the underlying water right from which the effluent was derived.³

However, “indirect reuse,” which involves the beneficial use of treated wastewater after discharge to a state watercourse, is an entirely different matter. Who and how one can secure a legal right to indirectly reuse return flows has been the source of debate, dispute, and confusion since at least the mid-1990s. The issues surrounding indirect reuse are not discreet, nor are they simple. How one issue is resolved can ripple through many other aspects of how indirect reuse is handled. Moreover, variation across the state in such things as ownership and operation of treatment plants and water rights, contracts, sources of water supply, historical permitting decisions, and priority of water rights, can affect the “winners” and “losers” in any particular indirect reuse effort.

This paper provides some background regarding the issues involved with indirect reuse and provides a high level summary of several permits that the Texas Commission on Environmental Quality (TCEQ) has issued allowing indirect reuse. Because of the complexity of the issues, and before the recent decision in the Brazos System Operations proceeding,⁴ this summary demonstrates that the issues remained unresolved or were resolved mostly on an ad hoc basis through negotiated settlements. This approach largely allowed TCEQ to avoid contested proceedings that would have required the agency to reconcile the law’s ambiguities and make policy decisions favoring one stakeholder over another. Although neither a clear pattern nor uniform approach could be discerned from these permits, they still provide some insights into the various matters of concern to the agency, the applicant, and others potentially affected by

¹ 30 TEX. ADMIN. CODE § 297.1(43).

² *See id.* § 297.1(44).

³ TEX. WATER CODE § 11.046(c).

⁴ Water Use Permit No. 5815.

the indirect reuse of effluent. And they provide context for the more recent direction provided by the Commission in the Brazos case, discussed in a companion paper to this piece, and which many believe still leaves significant room for future disputes.

2. Current Statutory Framework

Since 1997, when certain amendments to chapter 11 of the Texas Water Code were enacted, the dispute over indirect reuse has centered on various approaches to reconciling two particular provisions in the Texas Water Code, section 11.046(c) and section 11.042. Section 11.046(c) provides:

(c) Except as specifically provided otherwise in the water right, **water appropriated under a permit, certified filing, or certificate of adjudication may, prior to its release into a watercourse or stream, be** beneficially used and **reused** by the holder of a permit, certified filing, or certificate of adjudication **for the purposes and locations of use provided** in the permit, certified filing, or certificate of adjudication. **Once water has been diverted** under a permit, certified filing, or certificate of adjudication **and then returned to a watercourse or stream, however, it is considered surplus water and therefore subject to reservation for instream uses or beneficial inflows or to appropriation by others** unless expressly provided otherwise in the permit, certified filing, or certificate of adjudication.

Section 11.042, “Delivering Water Down Bed and Banks,” is the other section of the Water Code of interest. Specifically, subsections (b)-(d) provide:

(b) A person who wishes to **discharge and then subsequently divert and reuse the person's existing return flows derived from privately owned groundwater** must obtain prior authorization from the commission for the diversion and the reuse of these return flows. The authorization may allow for the diversion and reuse by the discharger of existing return flows, less carriage losses, and shall be subject to special conditions if necessary to protect an existing water right that was granted based on the use or availability of these return flows. Special conditions may also be provided to help maintain instream uses and freshwater inflows to bays and estuaries. A person wishing to divert and reuse future increases of return flows derived from privately owned groundwater must obtain authorization to reuse increases in return flows before the increase.

(c) Except as otherwise provided in Subsection (a) of this section [relating to release of water from storage], **a person who wishes to convey**

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