

# Groundwater ruling's dire consequences

Dr. Larry McKinney is executive director of the Harte Research Institute for Gulf of Mexico Studies at Texas A&M University-Corpus Christi. Dr. Paul Montagna is the institute's Endowed Chair for

Corpus Christi Caller

Monday, March 12, 2012

CORPUS CHRISTI — In a decision reminiscent of the recent controversy generated by its ruling in the *Severance v. Patterson* case dealing with public beach access, the Texas Supreme Court has once again issued an important judicial decision that places the interests of private property owners above those of the public and the conservation of the state's natural environment. On Feb. 24, the court issued its long-awaited *Edwards Aquifer Authority v. Day* decision, finding that landowners have a constitutionally protected ownership interest in groundwater underneath their property that is similar to rights granted to oil, gas and minerals.

Groundwater is currently regulated by local or regional groundwater conservation districts, which adopt rules for "the conservation, preservation, protection, recharging, and prevention of waste of groundwater ... and to control subsidence." In applying these regulations, districts may restrict how much groundwater individual property owners are permitted to use.

As a consequence of the new constitutional rights provided by the Day decision, property owners may now claim compensation from the district if they believe that the district's regulation has "gone too far" in preventing them from using groundwater under their property. Before awarding compensation for the governmental taking of their property, courts are required to balance the landowner's investment-backed expectations against the benefits provided by the regulation to see if the government is unfairly depriving the property owner of a valid use of the property. The success or failure of these so-called "takings claims" is based on case-by-case considerations of each individual property and are expensive to litigate. Because the risks associated with losing such claims and the expense of defending them in court are so high, many local districts will likely refrain from regulating groundwater use as assertively as they have in the past. Moreover, the vital state interest in coordinated groundwater management will be weakened as courts are forced to deal with groundwater regulation in a piecemeal fashion.

Just as importantly, the court's decision ignores the many differences between groundwater and oil and gas. The sole value of oil and gas is as a commodity to be sold in the marketplace. In contrast, groundwater is not only for selling, but also serves a variety of essential human needs including drinking, recreation, agriculture, and environmental protection. Water is the lifeblood of Texas' natural landscapes. As we know all too well in South Texas, insufficient freshwater inflows significantly degrade the environmental health of our coastal bays and estuaries.

The consequences of this decision on efforts to assure that adequate environmental flows remain in our rivers and reaches our coastal estuaries, could be devastating. Freshwater inflows that reach Texas estuaries like the Nueces are vital to productivity. The inflows bring nutrients that fuel the food web, sediments that build the wetlands and the salinity gradients that meet the life cycle needs of all of our most valuable fish and shellfish. A multibillion-dollar commercial and recreational fishery is at risk.

It goes without saying that rivers actually have to have water in them to function as a river. Our rivers not only provide important recreational opportunities but they provide the ecosystem service of naturally treating wastewater discharges. Without enough water to dilute these municipal, agricultural and industrial discharges, we will either have to pay millions of dollars in additional treatment costs or resign ourselves to living next to rivers and bays that are essentially sewage ponds.

Groundwater and surface waters are now so inexorably linked in use they cannot be separated despite what the law says. They are becoming more so because of population and economic growth. To meet these growing demands, every source of water has been factored into water development planning. The Day decision turns all of that on its head. The environment will suffer for it.

After working to prepare and to enact the provisions of Senate Bills 1, 2 and 3, the most comprehensive water legislation ever brought forward in Texas, we can see the terrible consequences of this decision. It will spawn multiple lawsuits by property owners making claims against one another. It will pit agricultural, municipal, industrial and environmental interests against one another, much as it was before Lt. Governor Bob Bullock's farsighted legislation set us on a more positive course. It will likely set water planning and development back into that dark age when knowledge of the underground movements of ground water were thought to be "unknowable and occult." Those who think they may have been winners because of this decision will likely not fully realize their good fortune as it will bring rural agricultural and urban municipal water users into head-to-head confrontation. If that scenario plays out there will be no winners and Texas will be the clear loser.

<http://www.caller.com/news/2012/mar/12/groundwater-rulings-dire-consequences/>

*FAIR USE NOTICE This document contains copyrighted material whose use has not been specifically authorized by the copyright owner. The Texas Living Waters Project, which is a nonprofit undertaking, is making this article available in our efforts to promote comprehensive water planning in Texas. We believe that this constitutes a "fair use" of the copyrighted material as provided for in section 107 of the US Copyright Law. If you wish to use this copyrighted material for purposes of your own that go beyond "fair use", you must obtain permission from the copyright owner.*