

**SOAH DOCKET NO. 582-10-4184
TCEQ DOCKET NO. 2005-1490-WR**

CONCERNING THE	§	BEFORE THE STATE OFFICE
APPLICATION BY THE	§	
BRAZOS RIVER AUTHORITY	§	OF
FOR	§	
WATER USE PERMIT NO. 5851	§	ADMINISTRATIVE HEARINGS

**PROTESTANT BRADLEY B. WARE’S
EXCEPTIONS TO THE PROPOSAL FOR DECISION**

TO THE HONORABLE COMMISSIONERS OF THE
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

COMES NOW, Bradley B. Ware (“Ware”), protestants in the above styled and docketed water rights contested case hearing before the Texas Commission on Environmental Quality (“TCEQ”) and the State Office of Administrative Hearings (“SOAH”) regarding the Application for Water Rights Permit No. 5851 by the Brazos River Authority (hereafter “BRA”) and respectfully files the following Exceptions to the Proposal for Decision. To that end, Protestant respectfully states as follows:

I. INTRODUCTION

As the record in the second phase of this hearing establishes, Bradley B. Ware was unable to participate in this phase of this complex request by BRA for virtually all unappropriated water remaining in the Brazos River Basin. As a result of Mr. Ware’s lack of participation, the Administrative Law Judges’ (“ALJs”) analysis of the impact on this water right on water for agricultural purposes is woefully lacking. The paragraph discussion provided by the ALJs on Page 195,

“H. Agricultural Use of Water,” is woefully inadequate in terms of its discussion of a significant policy issue, and far out of touch with the reality of the agricultural industry in Texas. The farmers and ranchers of Texas deserve much more consideration than is offered in this Proposal for Decision.

II. APPLICABLE LAW

In stating the applicable water rights permitting law, the ALJs overlook the most important law governing this contested case hearing, the Administrative Procedure Act, Tex. Gov’t Code, §2001.001, *et seq.* (“the APA”). The purpose of the APA is stated as follows:

Tex. Gov’t Code, Sec. 2001.001. PURPOSE. It is the public policy of the state through this chapter to:

- (1) provide minimum standards of uniform practice and procedure for state agencies;
- (2) provide for public participation in the rulemaking process;
and
- (3) restate the law of judicial review of state agency action.

Accordingly, even before the ALJs begin to apply Tex. Water Code, Ch. 11, Water Rights, they must ensure that the proceedings are such that participants in the hearing are afforded due process as specified in the APA. In this case, in proceeding to decide major issues of policy and procedure for the TCEQ, the ALJs did not follow the requirements of the APA. Specifically, as noted in detail in their discussion of return flows, there was no notice and opportunity to be heard on this

important issue for any affected party who was not a participant in this contested case hearing.

The consideration of return flows by the TCEQ pursuant to both Tex. Water Code, §11.042 and §11.046 is a matter of general application and should be accomplished via the notice and comment procedures of the APA. Specifically, the ALJs are not empowered to conduct a rulemaking through a contested case hearing, but are required to consider a case before them under TCEQ established rules. Specifically, as to both Tex. Water Code, §11.042 and §11.046, the APA provides:

Sec. 2001.004. REQUIREMENT TO ADOPT RULES OF PRACTICE AND INDEX RULES, ORDERS, AND DECISIONS. In addition to other requirements under law, a state agency shall:

- (1) adopt rules of practice stating the nature and requirements of all available formal and informal procedures;
- (2) index, cross-index to statute, and make available for public inspection all rules and other written statements of policy or interpretations that are prepared, adopted, or used by the agency in discharging its functions; and
- (3) index, cross-index to statute, and make available for public inspection all final orders, decisions, and opinions.

The TCEQ has taken no such action with respect to the consideration of return flows. Instead, the TCEQ has considered matters on a case by case basis without following the due process procedures set out in Tex. Gov't Code, Ch. 2001, Subch. B, Rulemaking. A contested case hearing such as BRA's Application No. 5851

does not provide the due process specified in the APA for actions implementing State statutes, such as TWC, §11.042 and §11.046.

Under the APA, after adopting rules through the due process procedures specified to implement TWC, §11.042 and §11.046, TCEQ is then required to provide those rules to SOAH for each contested case hearing. Specifically:

Sec. 2001.058. HEARING CONDUCTED BY STATE OFFICE OF ADMINISTRATIVE HEARINGS. (a) This section applies only to an administrative law judge employed by the State Office of Administrative Hearings.

(b) An administrative law judge who conducts a contested case hearing shall consider applicable agency rules or policies in conducting the hearing, but the state agency deciding the case may not supervise the administrative law judge.

(c) A state agency shall provide the administrative law judge with a written statement of applicable rules or policies.

In this case, the TCEQ provided the ALJs with various position statements and statements of policy, but those positions, as the ALJs noted, do not have the effect of duly adopted rules implementing TWC, §11.042 and §11.046. Accordingly, the specific factual determinations of the ALJs based upon non-existent regulatory determinations are voidable upon judicial review. Without affording the public—not just the persons who had standing to participate in this contested case hearing—the procedural due process specified under the APA, the actions of the TCEQ with respect to the Proposal for Decision would be reversible under a substantial evidence review as being made through unlawful procedure or

arbitrary, capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion in accordance with Tex. Gov't Code §2001.174.

III. WATER FOR AGRICULTURAL PURPOSES

The central premise of the ALJs' discussion is that BRA should be authorized to appropriate remaining water available in the Brazos River Basin because BRA with its reservoir system can then make that water available to Brazos River Basin family farmers and ranchers. The problem with that analysis is that it is at odds with the facts of this case. There are significant water rights holders in the Brazos River Basin such as Ware who were, and/or still are holders of term permits with priority dates superior to the priority date of BRA's Application No. 5851. Consequently, granting Application No. 5851 is not a benefit to the Brazos family farmers and ranchers. The ALJs propose to follow unwritten TCEQ policies which:

- A. Do not recognize or consider term permits in Brazos River Basin Water Availability Models;
- B. Do not recognize or consider the priority dates of term permits, such as Permit No. 5594, previously owned by Ware as compared to later applicants for water rights such as BRA; and
- C. Proposes to appropriate water to BRA under Permit No. 5851 which water, primarily in the form of return flows was previously permitted to farmers and ranchers for agricultural purposes.

The ALJs' Proposal for Decision recommends that water, primarily in the form of return flows, which was previously available *and authorized to be appropriated for agricultural purposes under individual water rights*, will now be appropriated

to BRA under Permit No. 5851. The ALJs' determination that Permit No. 5851 is not detrimental to the public welfare under Tex. Water Code, §11.134(b)(3)(C) is inconsistent with the actual granting Permit No. 5851 will have on agricultural water rights with earlier priority dates. Again, the ALJs propose to take action in this limited contested case hearing setting on matters which have wide ranging consequences beyond the participants in this hearing without affording affected members of the public due process as specified in Tex. Gov't Code, Ch. 2001, Subch. B, Rulemaking.

IV. CONSIDERATION OF RETURN FLOWS

As specified above in the discussion of applicable law, the ALJs failed to provide members of the public who would be affected by the determinations of TCEQ policy on return flows with due process as specified by Tex. Gov't Code, Ch. 2001, Subch. B, Rulemaking. The ALJs' Proposal for Decision performs a rulemaking function using an unlawful, contested case hearing procedure. Just as the TCEQ did with the environmental flows requirements, this case should be held in abeyance until the TCEQ adopts rules to implement TWC, §11.042 and §11.046.

V. SUMMARY AND CONCLUSIONS

CONSIDERING THE FORGOING, Ware respectfully requests that the Commission grant these exceptions and hold any decision on this Proposal for Decision in abeyance until such time as the Commission adopts in accordance with the APA, Tex. Gov't Code, §2001.001, *et seq.* written policies and rules

specifying: (1) the consideration of term permits in determinations of water availability; (2) the availability of State water in the form of return flows on the basis of priority; and (3) the consideration of return flows in water rights permitting.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served via hand delivery, facsimile, electronic mail, overnight mail, U.S. mail and/or Certified Mail Return Receipt Requested on all parties whose names appear on the attached mailing list on this the 20th day of August, 2015.

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