

**SOAH DOCKET NO. 582-08-1698  
TCEQ DOCKET NO. 2008-0181-WR**

<b>APPLICATION BY</b>	§	<b>BEFORE THE STATE OFFICE</b>
	§	
<b>BRADLEY B. WARE</b>	§	
	§	
<b>TO AMEND WATER USE</b>	§	<b>OF</b>
	§	
<b>PERMIT NO. 5594</b>	§	<b>ADMINISTRATIVE HEARINGS</b>

**EXECUTIVE DIRECTOR'S EXCEPTIONS  
TO THE PROPOSAL FOR DECISION AND ORDER**

TO THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

The Executive Director (ED) of the Texas Commission on Environmental Quality (TCEQ or Commission) respectfully submits these exceptions to the Administrative Law Judge's (ALJ's) Proposal for Decision (PFD) and Order in the above-referenced matter. The ED fully supports the ALJ's conclusion that the application by Bradley B. Ware to amend Water Use Permit No. 5594 should be denied. However, the ED wishes to clarify certain statements made by the ALJ in the Findings of Fact and Conclusions of Law in the proposed Order. The ED's position on those items is presented below. In addition, the ED offers corrections to errors noted in the Findings of Fact and Conclusions of Law.

**I. Exceptions**

A. Finding of Fact No. 34

The ALJ states that the period of record for the Brazos River Basin Water Availability Model (the WAM) was "developed by the Commission in conjunction with other state agencies." The ED would add that certain outside consultants were also involved with the development of the various data included in the WAM. The period of record was developed as a result of a collaborative effort that included individuals not associated with the TCEQ or other state agencies.

The ED recommends revising Finding of Fact No. 34 to read: "The historical period was developed by the Commission in conjunction with other state agencies and outside consultants."

### B. Finding of Fact No. 37

The ALJ noted that the “Commission gathers information about water within streamflows by relying on gauge information.” The ED is not familiar with the ALJ’s term “water within streamflows” and suggests that this Finding of Fact would be clearer if it were reworded so that it does not use that term.

Gage readings are incorporated into the WAM as one component among many to estimate the natural flow of a stream under normal conditions and absent impacts on the stream caused by human activity such as diversion or discharge of water. The resulting computation is known as naturalized flow. Historical stream flow data collected from an extensive network of in-stream gages is used in conjunction with several other data sources to generate the naturalized flow information. The model used by the ED to determine water availability incorporates naturalized flows as a component of modeling stream conditions for the purpose of predicting future availability.

The ED also takes exception to this finding of fact to the extent that it suggests that gage flow data is the sole source of data used in developing naturalized flows. As noted herein, and in testimony presented at hearing, several factors are used in the construction of naturalized flows.

The ED recommends revising Finding of Fact No. 37 to read: “The Commission gathers information about ~~water within~~ streamflows by relying on gauge information and data from other sources.”

### C. Finding of Fact No. 38

The statement that naturalized flows are the result of the ED estimating gage flow data is incorrect. The ED uses gage data along with numerous other data to create a model of stream flows as they would exist absent human impacts on the stream. The resulting information is the naturalized flows. Where certain gage data is unavailable, the missing data may be accurately filled in by using flow relationships from nearby gages from which data is available.

The ED recommends revising Finding of Fact No. 38 to read: “Where gauge information is unavailable, then the Commission may extrapolate information based on the readings at nearby gauging stations, ~~a process producing data known as ‘naturalized flows.’~~ This type of adjustment occurs during the creation of the naturalized flow data set.”

D. Finding of Fact No. 39

The ALJ states that naturalized flow data reflects the monthly average of the flow in a stream. Naturalized flows do not reflect the actual monthly average flow in a stream. Rather, naturalized flows are an estimation of stream conditions as they would exist absent human impacts on a stream, e.g. diversion of water.

The ED recommends revising Finding of Fact No. 39 to read: “Naturalized flow data has value to the Commission because it reflects the ~~monthly average of the flow in a stream within a reporting period~~ flows that would have occurred without the impacts created by human diversions and storage of water.”

E. Finding of Fact No. 43

The ED generally agrees that inclusion of more recent gage data would not affect the historical period of record, but would note the following in clarifying that statement. The inclusion of additional gage flow data collected in years outside of the period of record would not necessarily impact the availability analysis performed by the WAM because that data likely would fall within the range of data already reflected during the period of record. If more recent data reflected a period of drought or flood more extreme than any during the period of record, inclusion of that data might alter the analysis performed by the WAM.

After a study of the issue, the most recent determination by the ED is that expanding the period of record or including more recent data would have no affect on how the WAM performs *at this time*. To date, no period of drought or flood in years following the period of record has been severe enough to change the range of data reflected in the period of record. Merely adding or subtracting years of data arbitrarily to the period of record will not make water any more or less available.

The ED recommends revising Finding of Fact No. 43 to read: “At this time, the inclusion of more recent gauge flow data would have no effect on the range of data reflected in the historical period of record used in the Model.”

F. Finding of Fact No. 45

The ED generally agrees that the return flows described in the PFD are only available at the furthest downstream point in the Brazos River Basin, but would clarify that those return flows could potentially be diverted by the Brazos River Authority (BRA) at locations other than the lowest point in the basin in conjunction with the various conditions coincident with BRA's System Operation Permit. The ED would also note that no decision has been made as to the issuance or denial of the application submitted by BRA.

The ED recommends revising Finding of Fact No. 45 to read: “The full amount of the Brazos River Authority's requested return flows become available only at the furthest downstream point in the basin; diversions at other points are possible due to specific facts and circumstances of that application.”

#### G. Conclusion of Law No. 40

The Executive Director agrees with the ALJ's restatement of the rule but would note that 30 TAC 297.42 requires that in order for water to be available for use, 75% of the water requested must be available 75% of the time “*when distributed on a monthly basis* and based upon the available historic stream flow record” (emphasis added). It is important to note that the rule does not require that water be available 75% of the time based on annual distribution because fluctuation of irrigation usage is likely depending on the time of year.

The ED recommends revising Conclusion of Law No. 40 to read: “For direct diversions from a stream without sufficient water storage facilities, an applicant must prove that approximately 75% of the water requested is available approximately 75% of the time when distributed on a monthly basis and based on the available historic stream flow record. 30 TAC 297.42.”

## II. Corrections

#### A. Finding of Fact No. 24

The ALJ states that the “ED's hydrology team determined that “little to no water” was available[.]” For purposes of technical accuracy, the ED notes that hydrologists on the Surface Water Availability and Interstate Compacts Team made that determination. There is no “hydrology team” per se.

The ED recommends revising Finding of Fact No. 24 to read: “After Mr. Ware filed his Application, the ED’s ~~hydrology team~~ Surface Water and Interstate Compacts Team determined that “little to no water” was available at Mr. Ware’s diversion point on the Lampasas River, without regard to whether the amended Permit would have a perpetual or limited term.”

B. Finding of Fact No. 25

The ALJ states that the “surface water availability and interstate compacts team confirmed the hydrology team’s conclusion[.]” As indicated above, the determination that water sufficient to satisfy the Applicant’s request is not available was made by hydrologists on the ED’s Surface Water Availability and Interstate Compacts Team. The two teams referenced by the ALJ are the same.

The ED recommends revising Finding of Fact No. 25 to read: “The ED’s surface water availability and interstate compacts team confirmed the ~~hydrology team’s~~ hydrologist’s conclusion in a water availability review memo that calculated that insufficient water was available at Mr. Ware’s diversion point to support even the original 130 acre-feet of term-limited appropriation rights.”

C. Finding of Fact No. 29

The ALJ incorrectly states that the ED found through application of the Water Availability Model (WAM) that the Applicant’s request “could be satisfied at a 100% level in none of the years, at least 75% in none of the years, and at least 50% in only 27 of the years.” The PFD cites to the Water Availability Analysis for the Applicant’s original request for a diversion in 1997.

The analysis performed for the Applicant’s renewal request filed in 2006 found that the amount requested was available at 100% in none of the years and at 75% in 5.2 of the years. That analysis, indicating insufficient availability to satisfy the Applicant’s request pursuant to 30 TAC §297.42, was documented in the Water Availability Review memo dated November 14, 2006, which was entered into evidence as App. Exh. 47.

The ED recommends revising Finding of Fact No. 29 to read: “The Model predicts that Mr. Ware’s current request could be satisfied at a 100% level in none of the years, ~~at least 75% in none of the years, and at least 50% in only 27 of the years~~ and at 75% in 5.2 of the years.”

### III. Conclusion

The ED recommends that the Commission deny the application of Bradley B. Ware to amend Water Use Permit No. 5594 and adopt the ALJ's PFD and Order with the changes described above.

Respectfully submitted,

Texas Commission on Environmental Quality

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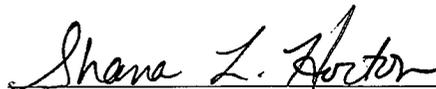


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**CERTIFICATE OF SERVICE**

I certify that on March 1, 2010 the "Executive Director's Exceptions to the Proposal for Decision and Order" was filed with the Texas Commission on Environmental Quality's Office of the Chief Clerk and transmitted by the method indicated to the parties listed below.



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