

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

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

**EXECUTIVE DIRECTOR'S REPLY TO 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 this reply to Applicant's Exceptions to the Administrative Law Judge's (ALJ's) Proposal for Decision (PFD) and Order in the above-referenced matter. With limited exceptions laid out in Section I below, the ED objects to and disagrees with all of the Applicant's proposed changes to the ALJ's PFD and Order. The Applicant's Exceptions largely mischaracterize the facts and the law in this case. It would be impractical to attempt to address each and every statement with which the ED disagrees. Therefore, in this Reply, the ED will address the Applicant's overarching themes and main points. Finally, the ED takes exception to and categorically denies several serious accusations leveled by the Applicant against the ED, including accusing the ED and the ALJ of collusion. The accusations are meritless and unsupported.

**I. The Applicant suggests some modifications to the ALJ's PFD and Order to which the ED has no objection.**

Finding of Fact No. 22: On page 7 of the Applicant's Exceptions, the Applicant proposes a change to Finding of Fact No. 22 to state that the hearing on the merits was rescheduled by mutual agreement of the parties, and was ultimately rescheduled to convene October 29 through 30, 2009. This is an accurate statement and the ED has no objection to this revision.

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Conclusion of Law No. 12: On page 23 of the Applicant's Exceptions, he proposes revisions to the ALJ's Conclusion of Law No. 12. This Conclusion of Law currently reads: "In a contested hearing, the ED may provide information that opposes an application, as long as the information is within the limits of the law." The Applicant proposes that it be revised to read: "In a contested hearing, the Executive Director is not authorized to withhold 'information developed by the Commission' which is relevant and probative to the pending water rights application. The Executive Director must present evidence of all the water available for appropriation at the contested case hearing, without reserving or setting aside water available for appropriation for some applicants but not others." The ED disagrees with the reasoning for the Applicant's requested revision and believes that the revision is unnecessary. However, the Applicant's proposed Conclusion of Law is a true and accurate statement of the law, which the ED followed in all respects. Therefore, the ED does not object to its inclusion.

**II. The Applicant was not deprived of any information or data at any time in this proceeding.**

Section III of Applicant's Exceptions, relating to the Proposed Findings Regarding the ED's Recommendation to Deny the Application Based on Water Availability, requests the alteration of several Findings of Fact to include references to an "updated" version of the Brazos River Basin Water Availability Model (WAM), which the Applicant states that, with the ED, the ALJ deliberately concealed and denied the existence of. Additionally, in Section IV of Applicant's Exceptions, relating to proposed Findings Regarding Standing, Applicant contends that the ED "held back significant probative and material evidence benefitting Applicant, and objected to its introduction into the hearing record" (App. Exceptions, 11). Several of the Applicant's Exceptions seek to change the PFD to validate these contentions.

The Applicant cites as evidence of his charges against the ED that the ED objected to the introduction of evidence of the model and the existence of an additional 74,347 acre-feet of water (App. Exceptions, 7). He also states that he never had access to the model in its most current form (App. Exceptions, 2). These statements are incorrect.

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Early in the discovery process, the ED provided the Applicant with the software necessary to run the Brazos River Basin Water Availability Model as well as all of the input decks, which are data sets used by the model. The Applicant was provided with exactly the same tools and information the ED used in making his determination regarding water availability. Contrary to Applicant's statement in his Exceptions, the ED never objected to evidence of the model. In fact, the ED offered into evidence the entire printed explanation of the Brazos WAM; the *Applicant* objected to this large binder of evidence as being overly burdensome to the record, and the ED withdrew the exhibit (Tr. at 167, lines 16-18).

The ED initially objected to the introduction of evidence regarding a pending application by Brazos River Authority. This objection was made in good faith on the basis that the BRA application had absolutely no bearing on the ED's water availability findings for Mr. Ware's application. First, no final decision has been made regarding the BRA application, so citing to it is premature. More importantly, the requests made by the BRA application were not factored into the WAM when the model was run for Mr. Ware's application. It remains the ED's position that this separate application is not relevant to the decision made on Mr. Ware's application. Despite this disagreement, the ED withdrew his objection (Tr. at 255, lines 7-10).

Finally, the ED fails to see how the Applicant could have been harmed or prejudiced in any way due to alleged attempts at concealment of evidence because the ED withdrew his objection to the evidence of which the Applicant complains and the evidence *was admitted*. The ED made a good faith objection based on the Texas Rules of Evidence, subsequently withdrew the objection, and the evidence was brought into the record and considered by the ALJ.

In several places, the Applicant claims the ED or ALJ "attempt to conceal the existence of an updated version of the Model" (App. Exceptions, 2). There is no "updated" model, as claimed by Applicant. As previously stated, the Applicant was provided in the discovery period with the current model and input decks for the Brazos River Basin WAM.

**III. All term permits are subordinate in priority to all permanent water rights; this is supported by law and hydrology.**

In Section VI of Applicant's Exceptions, relating to Proposed Findings Regarding Priority Date, Applicant proposes revisions to the ALJ's PFD based on the contention that the ED and ALJ have misinterpreted the priority of term permits. Applicant states that the ED "could find no legal support...whatsoever" for the proposition that as a term permit holder, Bradley B. Ware's right is junior to all non-term permit holders in the Brazos River Basin (Exceptions p. 3). To the contrary, throughout this hearing process, the ED cited both the statute and rule for allocating term water permits in support of this construction (the first reference in the record is on pages 2-3 of the Executive Director's Opening Statement on Issues and Applicable Law, filed on August 10, 2009).

Tex. Water Code § 11.1381. TERM PERMITS. (a) Until a water right is perfected to the full extent provided by Section 11.026 of this code, the commission may issue permits for a term of years for use of state water to which a senior water right has not been perfected.

...

(d) A permit issued under this section is subordinate to any senior appropriative water rights.

30 Tex. Admin. Code § 297.19. Term Permit under Texas Water Code, §§11.1381 and 11.153-11.155. (a) The commission may issue a permit for a term of years for the use of unused appropriated water when there is insufficient unappropriated water in the source of supply to satisfy the application.

...

(d) A term permit is subordinate to any vested or senior appropriative water right.

By statute, a term permit is a right to use water that has already been appropriated but has not been perfected—that is, it has been allocated to a permanent water right holder, but that permittee is not currently using all of the water under the permit. The derivative nature of a term permit from a permanent water right necessarily subordinates all term

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permits to all permanent water rights. Not only is it specifically laid out in the law and rules, any other interpretation would lead to an absurd result, that is, a massive overappropriation of the state's water resources. This argument has been fully briefed, most recently in the ED's Response to Closing Arguments (pp. 2-5), and will not be repeated here.

**IV. Conclusion**

The Honorable Administrative Law Judge listened to two days of testimony in this case and has been briefed repeatedly on the parties' legal arguments. All of the evidence offered by the Applicant was heard and considered by the ALJ. Notably, the ALJ found that the testimony offered by the Applicant's sole expert was not reliable enough to even be admissible as evidence under the law. In his Exceptions, the Applicant merely restates the arguments he has already made and which have already been rejected by the ALJ. The ED recommends that the Commission adopt the ALJ's PFD with the revisions suggested in the ED's Exceptions, filed March 1, 2010.

Respectfully submitted,

Texas Commission on Environmental Quality

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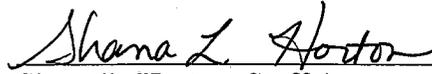


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**CERTIFICATE OF SERVICE**

I certify that on March 10, 2010 the "Executive Director's Reply to 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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