

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

February 8, 2010

Les Trobman, General Counsel
Texas Commission on Environmental Quality
P.O. Box 13087
Austin Texas 78711-3087

Re: SOAH Docket No. 582-08-1698; TCEQ Docket No. 2008-0181-WR; In Re:
Application of Bradley B. Ware to Amend Water Use Permit No. 5594

Dear Mr. Trobman:

The above-referenced matter will be considered by the Texas Commission on Environmental Quality on a date and time to be determined by the Chief Clerk's Office in Room 201S of Building E, 12118 N. Interstate 35, Austin, Texas.

Enclosed are copies of the Proposal for Decision and Order that have been recommended to the Commission for approval. Any party may file exceptions or briefs by filing the documents with the Chief Clerk of the Texas Commission on Environmental Quality no later than March 1, 2010. Any replies to exceptions or briefs must be filed in the same manner no later than March 10, 2010.

This matter has been designated **TCEQ Docket No. 2008-0181-WR; SOAH Docket No. 582-08-1698**. All documents to be filed must clearly reference these assigned docket numbers. All exceptions, briefs and replies along with certification of service to the above parties shall be filed with the Chief Clerk of the TCEQ electronically at <http://www10.tceq.state.tx.us/epic/efilings/> or by filing an original and seven copies with the Chief Clerk of the TCEQ. Failure to provide copies may be grounds for withholding consideration of the pleadings.

Sincerely,


Paul D. Keeper
Administrative Law Judge

PDK:cm
Enclosures
cc: Mailing List

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

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

PROPOSAL FOR DECISION

TABLE OF CONTENTS

I. INTRODUCTION.....	1
II. PARTIES.....	1
III. JURISDICTION.....	2
IV. PROCEDURAL HISTORY.....	2
V. BACKGROUND FACTS.....	3
A. History of the Ware Farm and the Permit.....	3
B. ED's recommendation to deny the Application.....	4
C. The issues.....	5
VI. DID THE ED HAVE STANDING TO OPPOSE THE APPLICATION?.....	6
A. Did the ED's party status depend on whether the ED was an affected person?.....	7
B. Did the scope of the ED's authority include the right to present an opposing case?..	7
C. Was the information that the ED presented within the limits of the law?.....	8
VII. WAS THIS AN UNCONTESTED MATTER?.....	9
VIII. DID THE ED IMPROPERLY RELY SOLELY ON THE MODEL?.....	9
A. The burden of proof and the evidentiary standard for scientific testimony.....	9
B. The regulatory scheme for the Commission's issuance of permits.....	11
C. The determination of the availability of water for appropriation.....	13
D. Discussion.....	15
1. Legal issues.....	15
a. Does the law require the use of the Model?.....	15
b. If not, may other analytical tools be used?.....	16

- c. Is the use of the Model appropriate in evaluating a request for a small amount of water? 17
- 2. Mr. Jones' analysis..... 18
- IX. IS THE MODEL FATALLY FLAWED? 20
 - A. Naturalized flows 20
 - B. Impervious cover..... 21
 - C. Wastewater treatment plant return flows 22
- X. PRIORITY DATES 23
 - A. The ED's arguments 23
 - 1. Does the Permit authorize Mr. Ware to appropriate water? 23
 - 2. Does the Permit authorize Mr. Ware to use state water? 24
 - B. Mr. Ware's arguments 24
 - 1. Did the ED disregard Mr. Ware's priority rights under the Permit? 24
 - 2. Did the ED manipulate the priority dates of Mr. Ware's application so that its priority would be inferior to that of the Brazos River Authority's permit application? 26
- XI. CONCLUSION..... 27

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

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

PROPOSAL FOR DECISION

I. INTRODUCTION

Bradley B. Ware, Applicant, seeks to amend his Water Use Permit 5594 (Permit). The ten-year term Permit authorizes him to annually withdraw 130 acre-feet of water from the Lampasas River. The amendment would either extend his term Permit for another ten-year period or convert his Permit to a perpetual right.¹ In addition, Mr. Ware seeks authority to withdraw 20 more acre-feet of water annually and to irrigate 31 more acres of his farm. The Executive Director (ED) of the Texas Commission on Environmental Quality (Commission) and the Office of Public Interest Counsel (OPIC) oppose the application. The application should be denied.

II. PARTIES

The attorneys who appeared in this proceeding were Gwendolyn Hill Webb and Stephen Webb for Mr. Ware, Shana Horton and James Aldredge for the ED, and Garrett Arthur for OPIC.

¹ Mr. Ware's evidence and arguments request two different terms of renewal. In his application, Mr. Ware proposed to renew his ten-year rights under the Permit. Ware Ex. 2. In a January 28, 2000, letter to the ED, Mr. Ware stated that he sought to remove the ten-year term period and establish a permanent right. Ware Ex. 8. In his initial post-hearing brief, Mr. Ware referred to his request to "renew the 10 year term" Applicant's Closing Argument at 2. In his final brief, Mr. Ware argued for the right to renew "for an additional term or in perpetuity." Applicant's Reply to Closing Arguments at 9. The proposal for decision will treat the application as seeking the two periods in the alternative.

III. JURISDICTION

The parties did not contest the jurisdiction of the Commission or of the State Office of Administrative Hearings (SOAH) to hear the case. The attached Proposed Order contains the necessary findings and conclusions about jurisdiction.

IV. PROCEDURAL HISTORY

On November 7, 1997, the Commission issued the original ten-year term Permit to Mr. Ware. By its written terms, the Permit was to expire on November 7, 2007, unless before that date, Mr. Ware received the Commission's approval to extend the term or to convert the Permit to a perpetual right.

On November 15, 2005, Mr. Ware timely filed his Application for Amendment to a Water Right (Application). On January 5, 2006, the ED determined that the Application was administratively complete. On June 7, 2006, the Brazos River Authority contested the application. On November 6, 2006, the ED recommended denial of the Application. On January 8, 2007, Mr. Ware requested a contested case hearing at SOAH. On January 25, 2008, the ED requested and the Commission directly referred the case to SOAH for a hearing on the merits on the agreed issue:

Whether sufficient water exists in the Brazos River Basin and all applicable statutory and regulatory requirements have been met to warrant issuing Bradley B. Ware's proposed Water Use Permit No. 5594A?²

On April 3, 2008, the SOAH administrative law judge (ALJ) convened a preliminary hearing and took jurisdiction. On January 12, 2009, the Brazos River Authority was granted the

² The original Permit was issued as Water Use Permit No. 5594. The proposed permit, if issued, would be Water Use Permit No. 5594A.

right to withdraw as a protesting party.³ The hearing adjourned on October 29, 2009, and the administrative record closed on December 21, 2009.

V. BACKGROUND FACTS

A. History of the Ware Farm and the Permit

In the mid-1870's, Mr. Ware's family acquired 261 acres of property along the Lampasas River near present-day Killeen. Mr. Ware's great-grandfather and grandfather farmed the land, drawing water along the property's two miles of river frontage. During Mr. Ware's parents' ownership of the land, they failed to seek an adjudication of water appropriation rights.⁴ The farm was not in production from the mid-1960s until 1996, when Mr. Ware acquired the property from his parents.

In 1997, Mr. Ware obtained from the Commission the term Permit that authorized him for ten years to divert and use 130 acre-feet of water from the Lampasas River to irrigate 100 acres. The Permit required him to limit his withdrawals, subject to the river's rate of flow during specific months. The Permit also established July 1, 1997 as "the priority date of this permit and all extensions hereof"⁵

During the twelve years in which Mr. Ware has had appropriation and irrigation rights,⁶ he has farmed hay, pumpkins, wheat, sorghum, oats, and winter peas. He has tried to impound

³ When the Brazos River Authority withdrew its protest, it clarified that it had no objection to the issuance of a ten-year extension of Mr. Ware's original term Permit. The Brazos River Authority did object to the Commission's conversion of Mr. Ware's Permit to a perpetual right. Ware Ex. 42.

⁴ By rule, the Commission has defined "appropriations" as "[t]he process or series of operations by which an appropriative right is acquired. A completed appropriation thus results in an appropriative right; the water to which a completed appropriation in good standing relates is appropriated water." The Commission has also defined "appropriative right" as "[t]he right to impound, divert, store, take, or use a specific quantity of state water acquired by law." 30 TEX. ADMIN. CODE (TAC) § 297.1 (3) and (4).

⁵ Ware Ex. 2.

⁶ Although the Permit was to expire on November 7, 2007, his right to appropriate water has remained in effect pending a final administrative ruling on the Application.

his water by installing six or seven earthen tanks, but the composition of the soil limits the amount of water that the tanks will retain. He has purchased 100 acre-feet of water rights and installed 8,000 to 10,000 feet of two-inch pipes, plus an eight-inch pipe to a central pivot system.⁷

In addition to farming, Mr. Ware has issued hunting leases to gain additional income to fund the farm's operations. He has also made his land available at no cost to educational, non-profit, and public events, including summer camp programs held at the Parrie Haynes Ranch, a Texas Parks and Wildlife Department facility adjacent to his farm.

B. ED's recommendation to deny the Application

After Mr. Ware filed his Application in 2005, the ED's hydrology 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.⁸ The ED's surface water availability and interstate compacts team confirmed the hydrology team's conclusion in a Water Availability Review memo.⁹ The memo stated that the team had 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. The team's calculation relied on the Commission's Water Availability Model for the Brazos River Basin (Model). The calculation used a historical period of record of 1940 to 1997. The team used a priority date of January 5, 2006, the date on which the ED had determined the Application to be administratively complete.

⁷ Tr. I at 33, 44, and 65

⁸ ED Ex. 5.

⁹ ED Ex. 47.

C. The issues

Mr. Ware made five separate challenges to the ED's recommended denial of his Application. First, Mr. Ware contended that the ED had no authority to oppose his Application. He asserted that the law restricts the ED's role to the presentation of information about the Application. That restriction, according to Mr. Ware, does not give the ED the authority to actively oppose his Application, particularly in the absence of any challenges brought by other holders of water appropriation rights in the Brazos River Basin.

Second, Mr. Ware contended that the ED had a procedural duty to treat the Application as an uncontested matter when the Brazos River Authority withdrew its opposition. Mr. Ware argued that the ED's failure to withdraw its request for a contested case hearing and failure to approve the Application as an uncontested case were breaches of due process.

Third, Mr. Ware contended that the ED improperly relied solely on the Model in making the recommendation to deny the Application. Nothing in Texas water law restricts the evaluation of the Application to the ED's Model, argued Mr. Ware. Further, Mr. Ware contended that his due process rights were violated when the ED failed to consider factors that the ED had used in 1997 when evaluating Mr. Ware's original Permit application.

Fourth, Mr. Ware contended that the Model failed to protect his existing water rights. He asserted that the Model disregarded the prior appropriation doctrine. Mr. Ware also complained that the Model relied on a data set that was non-current and inaccurate.

Fifth, Mr. Ware argued that in creating the Model, the ED impermissibly relied on a priority date other than that stated in and required by the 1997 Permit. In doing this, Mr. Ware asserted, the ED disregarded the Commission's order and violated Mr. Ware's procedural and property rights.

VI. DID THE ED HAVE STANDING TO OPPOSE THE APPLICATION?

In his written opening statement,¹⁰ during the hearing,¹¹ in his closing brief,¹² and in his reply brief,¹³ Mr. Ware challenged the authority of the ED to assert the rights of a protestant. A challenge to a person's status as a party is a jurisdictional challenge.¹⁴ The challenge is rejected.

Mr. Ware's argument was that the ED's role in a contested case is limited to the provision of information to complete the administrative record. Mr. Ware noted that for any person, including the ED, to claim the status of an "affected person," he must demonstrate the existence of "a *personal* justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the administrative hearing."¹⁵ Mr. Ware argued that the ED's actions and interests were based solely on his status as the agent of the Commission. In that role, he contended, the ED's justiciable interest, if any, could never be a personal interest.

The ED argued that the intention of the law's limitation of his role was to ensure that the ED does not aid an applicant in meeting his burden of proof. But, argued the ED, the limitation was not intended to prevent the ED from demonstrating that an application should be denied if it fails to protect state water resources.

¹⁰ "Additionally, Applicant must question the role of the Executive Director in this proceeding, where the Executive Director has assumed the position of a party protestant" Opening Statement by Applicant, Bradley B. Ware at 8.

¹¹ Tr. I at 14.

¹² "This case was unique in that the [ED] of the [Commission] appeared in this case as a self-styled 'protestant'" Applicant's Closing Argument at 1.

¹³ "[T]he authority and power [that the ED] seeks to exercise has been legally precluded by action of the Texas Legislature in prescribing the role of . . . the [ED] specifically in the Texas Water Code." Applicant's Reply to Closing Arguments at 2.

¹⁴ See *M.D. Anderson Cancer Center v. Novak*, 52 S.W.3d 704, 710-11 (Tex. 2001).

¹⁵ TEX. WATER CODE ANN. § 5.115(a). [Emphasis added.]

A. Did the ED's party status depend on whether the ED was an affected person?

It did not. By statute, "any person" may appear at a hearing at which the issuance of a permit is to be considered.¹⁶ By Commission rule, the ED is required to participate as a party in contested hearings relating to applications about water rights.¹⁷ Whether the ED meets the definition of an "affected person" is irrelevant to these proceedings by virtue of the ED's statutory standing as a party.

B. Did the scope of the ED's authority include the right to present an opposing case?

It did. By statute, the ED is required to represent the Commission in hearings that raise matters that affect the public's interest in the state's environment and natural resources, including matters that have been determined to be policies of the state.¹⁸ In contested case permit hearings, the ED's presentation is limited to "the sole purpose of providing information to complete the administrative record."¹⁹ That information is further limited to "information developed by the Commission"²⁰ And, in presenting the Commission's information, the law clearly prohibits the ED from assisting an applicant in permitting matters.²¹

But, the law does not prohibit the ED from providing information that opposes an application, as long as the information is within the limits of the statute. The law permits "any person" to object to the issuance of a permit.²² The law does not restrict the form in which the ED may present his information, either through documentary or testimonial evidence. Finally, the Commission has adopted procedural rules that guarantee all parties the right to present a

¹⁶ TEX. WATER CODE ANN. § 11.133.

¹⁷ 30 TAC § 80.108(b)(1).

¹⁸ TEX. WATER CODE ANN. § 5.228(a).

¹⁹ TEX. WATER CODE ANN. § 5.228(c).

²⁰ TEX. WATER CODE ANN. § 5.228(a).

²¹ 30 TAC § 80.108(e)

²² TEX. WATER CODE ANN. § 11.133.

direct case and to cross-examine an opposing party's evidence.²³ The rule does not create a special category that limits or expands the ED's rights as a contesting party.

C. Was the information that the ED presented within the limits of the law?

It was. For this hearing, the ED called two Commission employees as expert witnesses in its direct case, Steve Ramos and Kathy Alexander. Mr. Ramos testified about the Commission's water rights permitting process, and Ms. Alexander testified about the Model. The ED also elicited expert testimony from a third Commission employee, Jeffrey Thomas, a hydrologist whom Mr. Ware had called as an adverse witness. Like Mr. Ramos, Mr. Thomas also testified about the Commission's permitting practices.

The ED cross-examined Mr. Ware and his expert witness, Samuel Jones, a professional engineer who had worked for the Commission's predecessor agencies. The scope of the cross-examination focused on three main issues: (1) how the Model was developed, (2) whether the Model was an accurate predictor of water availability in the Brazos River Basin, and (3) what factors the Commission had historically considered in processing applications for extensions of term permits. All of this testimony related to the Commission's information.

The ED offered five exhibits, each of which was admitted: the resumes of the Commission's three testifying employees,²⁴ a letter from the ED to Mr. Ware,²⁵ and the deposition of Mr. Jones.²⁶ All of the evidence presented by the ED was generated by the Commission or was offered to support the integrity of the Commission's underlying information. All of the information presented was within the limits of the law.

²³ 30 TAC § 80.115(a).

²⁴ ED Exs. 1, 4, and 6.

²⁵ ED Ex. 5.

²⁶ ED Ex. 3.

The ED had standing to appear as a party in this proceeding and was authorized to present the Commission's evidence and arguments in opposition to Mr. Ware's case.

VII. WAS THIS AN UNCONTESTED MATTER?

No, this was a contested matter. An applicant may request that an application be remanded to the ED for action as an uncontested matter if: (1) all timely hearing requests have been withdrawn or denied or (2) all parties to a contested case reach a settlement so that no facts or issues remain controverted.²⁷ A hearing was required in this case because the ED remained a party to a contested case after the Brazos River Authority withdrew its opposition and because there was not a settlement between the remaining parties.

VIII. DID THE ED IMPROPERLY RELY SOLELY ON THE MODEL?

A. The burden of proof and the evidentiary standard for scientific testimony

For each of the substantive issues raised in this hearing, Mr. Ware, as applicant, was required to show that the factual support for his contentions outweighed the factual support presented by the other party.²⁸

Mr. Ware's burden was particularly difficult to sustain because he had to prove the availability of sufficient unperfected water rights in the Brazos River basin at his diversion point, after giving proper recognition to all superior water rights. That proof required Mr. Ware to present scientific testimony, an area reserved by law to expert witnesses, and expert testimony must be based on a reliable foundation.²⁹ The law permits the finder of fact to determine the reliability of the evidence, and "[u]nreliable expert testimony is not evidence."³⁰

²⁷ 30 TAC § 80.101.

²⁸ 30 TAC § 80.17.

²⁹ TEX. R. EVID. 702.

³⁰ *Gross v. Burt*, 149 S.W.3d 213, 237 (Tex. App.—Fort Worth 2004, pet. denied).

To establish the reliability of an expert's testimony, an offering party must first establish the reliability of the analysis that the expert used in reaching his conclusions. The Supreme Court of Texas has articulated six nonexclusive factors to be used in determining whether scientific testimony is reliable:

(1) the extent to which the theory has been or can be tested; (2) the extent to which the technique relies upon the subjective interpretation of the expert; (3) whether the theory has been subjected to peer review and publication; (4) the technique's potential rate of error; (5) whether the underlying theory or technique has been generally accepted as valid by the relevant scientific community; and (6) the non-judicial uses that have been made of the theory or technique.³¹

Although Mr. Jones' credentials established him as an expert, he did not establish that his method of analysis had been tested, subjected to peer review or publication, or generally accepted as valid by any scientific community. Mr. Jones admitted that he had not developed a systematic or analytical framework by which he could determine the core issue in this case: whether water was available at a given point in the Brazos River basin.³²

Further, the interpretation of Mr. Jones' results was his alone, in part because Mr. Jones generated no written report that was available for review. Instead, he reached his conclusions based on "his review of the file and his review of the information on that [which] is available regarding water availab[ility] at this diversion point."³³ Finally, as to the non-judicial uses of Mr. Jones' method, Mr. Jones established that his analysis was much like a method that had been previously used by the Commission but later had been abandoned.³⁴ Mr. Ware did not establish that Mr. Jones' method of analysis was reliable.

³¹ *Id.* at 237-38, citing *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 714 (Tex. 1997), *cert. denied*, 523 U.S. 1119 (1998) and *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 557 (Tex. 1995).

³² Tr. II at 294.

³³ Tr. I at 223-24.

³⁴ Ware Ex. 49.

In addition, much of Mr. Ware's evidence focused on the alleged inadequacies of the ED's method of analysis, the Model, rather than on Mr. Ware's methods. Mr. Ware also paid particular attention to alleged flaws in the data on which the Model relied. Mr. Ware presented this line of evidence (much of it through cross-examination) in trying to establish the preponderance of his expert evidence over that offered by the ED. Although Mr. Jones' testimony was admitted by the ALJ, counsel for the ED timely objected to its reliability. Rather than conduct a *Daubert*-style hearing-within-a-hearing³⁵ to determine reliability before considering the merits of the same evidence, the ALJ granted the ED a running objection, subject to the ED's right to reassert the objection. The ED objected to the reliability of Mr. Jones' testimony, and the objection is now sustained.

Nonetheless, the ALJ has reviewed all of Mr. Ware's evidence and has compared the relative weight of Mr. Ware's evidence to that of the ED's. Even if Mr. Ware's evidence were not rejected for lack of reliability, Mr. Ware would not prevail on the preponderance of evidence standard. The ALJ presents this additional analysis to avoid the need for a remand if the Commission were to conclude that Mr. Ware's expert evidence is reliable.

B. The regulatory scheme for the Commission's issuance of permits

The water of every flowing river in the State of Texas is the property of the state, and the Commission is the state's agent for the regulation of its water.³⁶ The Commission has the authority to allow persons to appropriate state water for specific uses.³⁷ Although the Commission may grant permits to applicants who seek to appropriate unappropriated state water,³⁸ the amount of water for which the Commission may grant permits may not be more than is available.³⁹

³⁵ See TEX. R. EVID. 104(c).

³⁶ TEX. WATER CODE ANN. § 11.021(a).

³⁷ TEX. WATER CODE ANN. § 11.022.

³⁸ TEX. WATER CODE ANN. § 11.124.

³⁹ TEX. WATER CODE ANN. § 11.023(e).

That policy was established by law in 1967 when the Texas legislature abandoned the chaotic condition of the state's former system of recognizing both riparian and appropriative rights.⁴⁰ In its place, the legislature adopted a new system that the Texas supreme court characterized as "an orderly forum and procedure for the [Commission's] adjudication and administration of water rights."⁴¹ The Texas legislature later required the Commission to "provide certainty in water management" by evaluating the state's major river basins.⁴² Using that information, the Commission now has the authority to grant a variety of types of water use permits. For all permits, the holder has the right to appropriate water only to the extent and for the purposes stated in the permit⁴³ and subject to the protection of the holders of senior water rights.⁴⁴

In addition, the holder's rights to appropriate water may be affected by the amounts that the holder actually uses or can beneficially use.⁴⁵ "[A]ll water not so used is considered not appropriated."⁴⁶ If the holder of a permit does not beneficially use his water, then the right of appropriation is considered to be not perfected.⁴⁷

Unperfected appropriative water rights may be reallocated by the Commission to persons other than the permanent permit holder. An applicant may seek a term permit to use these unperfected water rights for a term of years rather than in perpetuity.⁴⁸ A term permit creates derivative rights, not original rights, so that the maximum use of water may be achieved.⁴⁹

⁴⁰ *In re Adjudication of Water Rights of Brazos III Segment of Brazos River Basin*, 746 S.W.2d 207, 209 (Tex. 1988). [*Brazos III*, herein].

⁴¹ *Id.*

⁴² TEX. WATER CODE ANN. § 11.0235(d-2).

⁴³ TEX. WATER CODE ANN. § 11.135(a).

⁴⁴ TEX. WATER CODE ANN. § 11.1351.

⁴⁵ An "appropriative right" is the right to impound, divert, store, take, or use a specific quantity of state water acquired by law. 30 TAC § 297.1(4).

⁴⁶ TEX. WATER CODE ANN. § 11.025.

⁴⁷ TEX. WATER CODE ANN. § 11.026.

⁴⁸ TEX. WATER CODE ANN. §§ 11.1381(a) and 11.026.

⁴⁹ TEX. WATER CODE ANN. § 11.123.

The Commission may deny an application for a term permit if the permit will jeopardize financial commitments for water projects⁵⁰ or if the permit will prevent the holder of the senior appropriative right from beneficially using his rights during the period of the term permit.⁵¹ If the Commission approves a permit, then the rights that it confers are subordinate to any senior appropriative rights.⁵²

The Commission has adopted a rule governing its issuance of term permits. The rule adds three relevant provisions to the language of the statute.⁵³ First, the Commission may issue a term permit “when there is insufficient unappropriated water in the source of supply to satisfy the application.”⁵⁴ Second, a holder of a senior appropriative right may challenge an application for a term permit by showing that the Commission’s issuance of a term permit would adversely affect the holder’s beneficial use of its senior rights. In proving this adverse effect, the holder may use as its proof: water use projections in the state or regional water plans, economic indicators, population growth projections, electrical generation needs, or “other reasonable projections based on accepted methods.”⁵⁵ Third, the Commission clarified that it may deny an application if the issuance of a proposed permit would be detrimental to the public welfare.⁵⁶

C. The determination of the availability of water for appropriation

In 1997, the Texas legislature mandated the Commission to adopt an updated water availability model for six river basins in Texas.⁵⁷ The Commission contracted with a hydrologist at Texas A&M University to develop a software package, the Water Rights Analysis Package, for the purpose of determining water availability.⁵⁸ The software is designed to be used in

⁵⁰ TEX. WATER CODE ANN. § 11.1381(b).

⁵¹ TEX. WATER CODE ANN. § 11.1381(c).

⁵² TEX. WATER CODE ANN. § 11.1381(d).

⁵³ 30 TAC § 297.19

⁵⁴ 30 TAC § 297.19(a).

⁵⁵ 30 TAC § 297.19(b)(2).

⁵⁶ 30 TAC § 297.19(b)(4).

⁵⁷ TEX. WATER CODE ANN. § 16.012(g).

⁵⁸ Tr. I at 72-73.

conjunction with a data set for each of the Texas river basins. The output is a water availability model that projects the availability of water over time at a particular diversion point. The software has been updated a number of times since its original adoption. The software is now used by the ED to model twenty-three river basins in Texas.⁵⁹

The Model begins with the ED's development of "naturalized flows," a term that refers to the ED's estimate of the flow in a river in the absence of the diversion of water by human intervention.⁶⁰ Based on this estimate, the ED may run two simulations.⁶¹ A "full authorization simulation" is used to determine all water rights at their full authorized amount. That simulation includes no return flows and includes reservoirs at their as-built capacities.⁶² The full authorization simulation is used in determining the availability of unappropriated water.

The ED also may run a "current conditions simulation" to simulate all the water rights in the basin at their maximum amounts reported in the last 10 years, rather than at their authorized amounts. The current conditions simulation includes reservoirs that have diminished capacities due to siltation and includes return flows. The current conditions simulation reflects the water rights at their highest reported use.⁶³ Based on the current conditions simulation, the ED is able to determine the availability of water to a particular applicant at a particular location. The ED uses the current conditions simulation to determine the availability of unperfected water rights for term permit applicants.

In determining water availability, the ED is guided by the provisions of a Commission rule.⁶⁴ The rule requires that for direct diversions from a stream without sufficient water storage

⁵⁹ Tr. I at 86.

⁶⁰ Tr. I at 79-80.

⁶¹ Tr. I at 82-83.

⁶² Tr. I at 82. The full authorization simulation does not include return flows unless mandated by the terms of the permit. The reason for not including return flows is that interruptible amounts are not counted toward the total available for permitting.

⁶³ Tr. I at 87.

⁶⁴ 30 TAC § 297.42.

facilities, approximately 75% of the water request must be available approximately 75% of the time based on the available historic stream flow record. Under that rule, Mr. Ware's original 1997 application was found to comply because his request exceeded the 75% criterion in 78% of the years.⁶⁵ But, Mr. Ware's current Application was found to fail because his request met a 100% criterion in none of the years, at least 75% in none of the years, and at least 50% in only 27 of the years.⁶⁶

Although previous water availability models were developed and used by the Commission, the current Model has been in use since 2001. The Commission has relied on the Model in evaluating all applications for appropriative rights since then.⁶⁷

D. Discussion

Mr. Ware's expert, Mr. Jones, contended that the Model was only one of many tools that should be considered in evaluating water availability.⁶⁸ That argument prompted a series of legal challenges about the authority of the ED to rely solely on the Model, including: (1) does the law require the use of the Model in evaluating the Application; (2) if not, may other analytical tools be used; and (3) is the use of the Model appropriate when the request is for a quantity of water as small as that requested by Mr. Ware?

1. Legal issues

a. Does the law require the use of the Model?

It does not. Although the law requires the ED to evaluate river basins in the state,⁶⁹ neither the statutes nor the Commission's rules require the ED to use the Model. The

⁶⁵ Tr. I at 100-101; Ware Ex. 49.

⁶⁶ Ware Ex. 49.

⁶⁷ Tr. I at 72-73, 99, and 168.

⁶⁸ Tr. I at 223. Mr. Jones testified about his conclusions but prepared no report of his findings.

⁶⁹ TEX. WATER CODE ANN. § 11.0235(d-2).

Commission is similarly not required to evaluate an application based on its compliance with the state water plan and regional water plan. The law provides for a waiver if conditions warrant.⁷⁰ The ED's expert witness, Kathy Alexander, testified that although that the ED is not required to rely on the Model, he relies on it as the best modeling tool available.⁷¹

In testimony and in briefs, the ED described how the Model has been used in all applications involving water availability since the Water Rights Analysis Package was approved for use and delivered to the Commission.⁷² Although the record reflects that the Commission commissioned the development of the Water Rights Availability Package and has used it for nine years, the record in this proceeding included no reference to the adoption of any statutory or regulatory requirement that this package of software and databases be used. In short, the ED and Mr. Ware are not required to use the Model in determining whether water is available in any river basin in Texas.

b. If not, may other analytical tools be used?

The ED has the authority to use whatever analytical tools he finds most appropriate. By statute, the Commission has the authority to contract for "scientific and technical environmental services," including scientific data analysis, to be used in the ED's modeling.⁷³ The ED has the authority to enforce the terms and conditions of any permit.⁷⁴ Although not specifically stated, a logical assumption is that the ED also has the authority to use his scientific data analysis in enforcing the terms of a permit and in presenting information about an application for a permit. Neither the statutes nor the rules include any prohibitions against the ED's use of any specific type of information in evaluating an application.

⁷⁰ TEX. WATER CODE ANN. § 11.134(b)(3)(E).

⁷¹ Tr. I at 200.

⁷² Tr. I at 168.

⁷³ TEX. WATER CODE ANN. § 5.2291(a).

⁷⁴ TEX. WATER CODE ANN. § 5.230.

In this case, Mr. Ware argued that tools other than the Model are available. The Commission's own rules authorize a contesting permit holder to rely on "reasonable projections based on accepted methods."⁷⁵ A reasonable conclusion is that an applicant and the ED may do the same.

c. Is the use of the Model appropriate in evaluating a request for a small amount of water?

It is. Mr. Ware argued that the Model was inadequate to use in considering applications for small requests for water. He pointed out that his request to withdraw 150 acre-feet of water annually translated into no more than 2.5% of the estimated annual evaporative losses to the Brazos River Authority's downstream Stillhouse Hollow Lake.⁷⁶ Mr. Ware challenged the reliability of the Model to evaluate changes of such a tiny magnitude.

Ms. Alexander explained that the Model is designed to be the most accurate method available to the ED without regard to the size of the request for water. That design relies in part on the Model's use of a period of record. The period of record gives the Commission a set of historical boundaries ranging from the most severe basin-wide drought to the most severe flood periods ever recorded. Ms. Alexander explained that the historical period was developed by the Commission in conjunction with other state agencies. The Commission has relied on the Model for the Brazos River basin since the Model was put into use.

Ms. Alexander also explained that the Model relies on an applicant's particular location within a river basin to determine availability. She explained that if an applicant's diversion point is located within a large drainage area, then the applicant would be able to rely on large streamflows and potentially greater water availability.⁷⁷ The Commission gathers information about water within those streamflows by relying on gauge information. Where gauge

⁷⁵ 30 TAC § 297.19(b)(2).

⁷⁶ Tr. II at 273-74.

⁷⁷ Tr. I at 194.

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.”⁷⁸ The data has value to the Commission because it reflects the monthly average of the flow in a stream within a reporting period.⁷⁹

Finally, Ms. Alexander explained that the Model takes into account an application’s priority date in evaluating a request. The role of the priority date is to determine the seniority status of a particular appropriative right previously given by the Commission. In Ms. Alexander’s words, the ED examines the priority date to determine

who has full – who [h]as perpetual authorizations in your area and in fact in the whole Brazos River Basin because one of the things that the [water availability models] do is allow us to look at availability and effect on other water rights on a basinwide scale, which we believe is a requirement under the Water Code because we can’t grant a permit that would harm someone else.⁸⁰

Ms. Alexander explained that by examining an application in terms of these three factors, period of record, location, and priority date, the ED is able to evaluate an application of any size in terms of the current conditions presented. As an example, Ms. Alexander related her efforts to examine Mr. Ware’s application in terms of his expanded request of 150 acre-feet, the original 130 acre-feet, and diminished amounts as small as 10 acre-feet. The Model is capable of producing a result that projected availability without regard to the size of the request.

2. Mr. Jones’ analysis

In addition to arguing that the design of the Model was flawed, Mr. Jones also advanced his own analysis. That analysis relied in part on a balance between the scope of Mr. Ware’s request and the then-current withdrawal rates of the most proximal water rights users and the inflow rates.

⁷⁸ Tr. I at 77-81.

⁷⁹ Tr. II at 354.

⁸⁰ Tr. II at 372.

Mr. Jones examined the difference between the amount of water being reported as used by Mr. Ware's neighbors and the amount of water that they are permitted to withdraw (more than required for his Permit);⁸¹ the number of complaints about lack of water availability filed by downstream permit holders (none);⁸² the streamflow gauge readings near Mr. Ware's farm, particular at Kempner, closest to Mr. Ware's diversion point (adequate);⁸³ the amount of impervious cover developed since 1997 (substantial),⁸⁴ and the volume of return flows created by wastewater treatment plants (large).⁸⁵ Mr. Jones easily concluded that sufficient amounts of water were available at Mr. Ware's diversion point and that if the Commission approved the amounts that Mr. Ware had requested, downstream permit holders would experience no adverse effects.

Although the data on which Mr. Jones relied was clear, his method of analysis did not satisfy the elements of the law controlling the award of a term permit. In brief, Mr. Jones did not evaluate the claims that senior water rights holders have on the unused water identified by Mr. Jones. Although the law takes into account any objections by senior water holders, the law requires the objecting parties to present evidence in support of their objections. But, the law does not take into account the absence of complaints.⁸⁶

Although the streamflow gauge readings near Mr. Ware's farm showed that water may have flowed near his property, the gauge readings do not take into account the rights of existing permit holders with superior rights.⁸⁷ Although the amount of impervious cover developed since 1997 may return more water to the basin than anticipated in the historical period of record, Mr. Ware did not show that Model's period of record failed to accurately reflect the historical

⁸¹ Ware Exs. 9, 10, 13, 14, 18, 21, 22, 24, 25, 28, 29, 32, 33, 36, 37, and 40.

⁸² Tr. I at 233.

⁸³ Tr. I at 234.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ TEX. WATER CODE ANN. § 11.1381.

⁸⁷ 30 TAC § 297.45(a). The rule provides an application must "not create an adverse impact to an existing water right"

highs and lows as required by law. Although the return flows to be created by wastewater treatment plants may accurately be projected to add more water to the basin, the record does not reflect that their discharges have been approved or that Mr. Ware's right to withdraw that water (if granted) would be superior to that of other permit holders.⁸⁸

At best, Mr. Jones' analysis was a determination of whether the approval of Mr. Ware's request could be sustained from the flow of the river in recent years without adversely impacting the rights of some of the surrounding permit holders. Although Mr. Ware's request may have met that test, that method of evaluation did not satisfy the requirements of law.

IX. IS THE MODEL FATALLY FLAWED?

Mr. Ware argued that the Model relies on flawed data

A. Naturalized flows

The first of these flawed data, according to Mr. Ware, arises from the ED's mistaken reliance on "naturalized flows." Mr. Ware objected to the ED's practice of using estimates, interpolations, or projections in determining these amounts. Mr. Ware characterized these naturalized flow figures as "hypothetical constructs"⁸⁹ and the products of a mere "computer simulation," the credibility of which was rooted in an equally questionable "article of faith."⁹⁰ In contrast, he defended Mr. Jones' opinion as more reliable than that of the Model because Mr. Jones' opinion was the product of analysis using empirical data.⁹¹

⁸⁸ Ware Ex. 50.

⁸⁹ Tr. I at 81.

⁹⁰ Tr. I at 115-116. These terms were developed in Mr. Ware's cross-examination of the Commission's employees.

⁹¹

Mr. Ware argued that the Commission should rely on empirical information instead of estimates, where possible. He challenged the ED's use of the estimates because of the possibility that they understated the amount of rain returned by runoff created by new impermeable cover. That understatement, contended Mr. Ware, could be sufficient to account for the exceedingly small amount of additional water for which he was seeking approval.

The ED argued that the determination of future availability of water is a process that necessarily relies on imperfect but best-available historical data. Mr. Thomas explained that sometimes an estimate is needed where no data is available because there are some areas where there are not complete gauge flow histories for the entire historic period of record.⁹² He explained that those estimates are developed by relying on a variety of sources, including nearby rainfall amounts and estimating techniques that are built into the Model.

Although Mr. Ware may find greater reliability in the precision of the gauge reports than in the naturalized flow estimates, nothing in the law reflects that same prejudice. To the contrary, the Commission's own rule authorizes the use of approximate numbers in estimating water availability in permit application proceedings.⁹³ The overall reliability of the ED's conclusions is not suspect or made less credible because they include estimates. The argument is rejected.

B. Impervious cover

Mr. Jones argued that the Model failed to consider the increased inflow into the Brazos River basin from increased impervious cover. Mr. Jones used a watershed map of Bell County⁹⁴ and historical reports of gauged flows at the United States Geological Service gauging station at Kempner to support his contention that water was available at Mr. Ware's diversion point.

⁹² Tr. I at 76-77.

⁹³ 30 TAC § 297.42(c).

⁹⁴ Ware Ex. 54.

The ED did not contest Mr. Jones' assertion that development in the Brazos River basin had increased in the last ten years. But, Ms. Alexander testified that inclusion of more recent gauge flow data would have no effect on the historical period of record used in the Model.⁹⁵ And, Mr. Thomas testified that the addition of "new water," if it were proved to exist, would be subject to all prior appropriation rights of senior water rights holder and could not be treated as available for new allocation.⁹⁶

The provisions of the Texas Water Code support the ED's argument. Return flows are subject to reservation for other downstream uses.⁹⁷ This part of Mr. Ware's argument is rejected.

C. Wastewater treatment plant return flows

Mr. Jones argued that the Brazos River basin contains wastewater treatment plant return flows (most of which were identified in the Brazos River Authority's jurisdiction) that would be available for Mr. Ware's appropriation.⁹⁸ These returns, argued Mr. Jones, effectively put more water into the basin than the Model originally identified. Mr. Jones argued that Mr. Ware should be entitled to use these flows in calculating water availability at his diversion point.

The ED showed that the Brazos River Authority's return flows become available only at the furthest downstream point in the basin. The Brazos River Authority has the right to divert that water at upstream locations, but only if its application for a System Operation Permit is granted. That right is contingent on the Brazos River Authority's having water storage capacity, an element not included in Mr. Ware's application. In addition, the ED showed that Mr. Ware's right to withdraw water, if granted, would be inferior to the Brazos River Authority's senior appropriative rights status.⁹⁹ Mr. Ware's argument failed to take into account these requirements of law and is rejected.

⁹⁵ Tr. II at 341-49; ED Ex. 6.

⁹⁶ Tr. II at 295.

⁹⁷ TEX. WATER CODE ANN. § 11.046(c)

⁹⁸ Ware Exs. 41 and 50.

⁹⁹ 30 TAC § 297.45.

X. PRIORITY DATES

Mr. Ware argued that in denying Mr. Ware's application, the ED was improperly trying to preserve water for use by the Brazos River Authority.¹⁰⁰ Mr. Ware claimed that the ED manipulated the priority dates of Mr. Ware's Application so that its priority would be inferior to that of the Brazos River Authority's permit application.

In making these allegations, Mr. Ware accurately noted that July 1, 1997, is the priority date stated in the Permit and is the priority date for all its extensions.¹⁰¹ But, the legal consequence of the Commission's inclusion of that provision became an issue in this proceeding. Mr. Ware contended that the ED's use of a date other than July 1, 1997, in evaluating his application was the ED's single most important error in his review of the Application.¹⁰² The effect of that error, according to Mr. Ware, was that the ED disregarded the statute that states, "As between appropriators, the first in time is the first in right."¹⁰³ In contrast, the ED argued that the Commission had never granted Mr. Ware the right to appropriate water and that he never had the right to claim the use of state water pursuant to an appropriative right.¹⁰⁴

A. The ED's arguments

1. Does the Permit authorize Mr. Ware to appropriate water?

It does. On its first page, the Permit states, "NOW, THEREFORE, this permit to appropriate and use State Water is issued to Bradley B. Ware, . . ."¹⁰⁵ A clearer statement of the Commission's intention to give Mr. Ware the right to appropriate state water under the term Permit would be difficult to draft.

¹⁰⁰ Applicant's Reply to Closing Arguments at 17.

¹⁰¹ Ware Ex. 2.

¹⁰² Applicant's Closing Argument at 14.

¹⁰³ TEX. WATER CODE ANN. § 11.027.

¹⁰⁴ Executive Director's Response to Closing Arguments at 8.

¹⁰⁵ Ware Ex. 2.

2. Does the Permit authorize Mr. Ware to use state water?

It does. The Permit states that Mr. Ware has the authority to “divert and use not to exceed 130 acre-feet of water per annum from the Lampasas River to irrigate 100 acres of land” The definition of “appropriative right” includes the right to divert or use a specific quantity of state water acquired by law—precisely the activity in which Mr. Ware has engaged on his farm for the last twelve years.¹⁰⁶ Mr. Ware holds appropriative rights under his Permit until it expires or is not extended.

B. Mr. Ware’s arguments

1. Did the ED disregard Mr. Ware’s priority rights under the Permit?

The ED did not. The law provides that for every permit, a priority date is established for the “appropriation of water” and for “the claimant’s right to use the water.”¹⁰⁷ The measuring date for these priority dates is the date of filing of an administratively complete application.¹⁰⁸ And, the date on which a priority date comes into being is “[w]hen the Commission issues the permit”¹⁰⁹

The Commission has the right to include in any permit a variety of limitations. For example, an applicant’s right to take and use water is limited “to the extent and purposes stated in the permit.”¹¹⁰ A permit may also include special conditions that limit the total amount of

¹⁰⁶ 30 TAC § 297.1 (4).

¹⁰⁷ TEX. WATER CODE ANN. § 11.141.

¹⁰⁸ *Id.* and 30 TAC § 297.44(c).

¹⁰⁹ *Id.*

¹¹⁰ TEX. WATER CODE ANN. § 11.135(a).

water that may be diverted.¹¹¹ With respect to all types of permits, the Commission may include “. . . conditions and restrictions . . . to protect the priority of senior water rights.”¹¹²

Each term permit is subject to the statutory limitation making term permits “subordinate to any senior appropriative rights.”¹¹³ The phrase is undefined, and the courts generally interpret undefined terms according to their ordinary meaning.¹¹⁴ In affirmative sentences, the ordinary meaning of “any” is “every” or “all.”¹¹⁵ Relying on that ordinary meaning, the rule makes term permits subordinate to all senior water rights.

In the Permit issued by the Commission to Mr. Ware, the priority date applies to the Permit and to “all extensions hereof . . .”¹¹⁶ The Permit does not state that the priority date will apply if the Permit is converted to a regular permit with a perpetual right. Instead, it states that the Permit will become null and void on November 7, 2007, unless “prior to such date permittee applies for an extension hereof and such application is subsequently granted for an additional term or in perpetuity.”¹¹⁷ In other words, the condition allows Mr. Ware to divert water from the Lampasas River until November 7, 2007. That right may be extended if Mr. Ware obtains an extension of that term or if he obtains a perpetual right to divert water. The priority date applies to “extensions” of the Permit, but the priority date has no relation to applications for new permits or to any matter other than establishing when the permit holder began the “appropriation of water” and when the permit holder acquired the “right to use the water.”¹¹⁸

¹¹¹ TEX. WATER CODE ANN. § 11.135(b)(5).

¹¹² TEX. WATER CODE ANN. § 11.1351. The law controlling the issuance of temporary permits, a different type of permit, includes a similar provision: “*As between temporary permits, the one applied for first has priority.*” TEX. WATER CODE ANN. § 11.138(c). [Emphasis supplied.]

¹¹³ TEX. WATER CODE § 11.1381(d).

¹¹⁴ TEX. GOV'T CODE ANN. § 311.011(a); *Geters v. Eagle Ins. Co.*, 834 S.W.2d 49, 50 (Tex. 1992).

¹¹⁵ BRYAN A. GARNER, GARNER'S MODERN AMERICAN USAGE 52 (3d ed. 2009).

¹¹⁶ Ware Ex. 2 at 2.

¹¹⁷ *Id.*

¹¹⁸ TEX. WATER CODE ANN. § 11.141.

These limitations on Mr. Ware's authority under the Permit may be taken into account by the ED when considering applications. As Ms. Alexander testified, the ED uses priority rights as one of three basic factors in reviewing water availability for permit applications. But, the law does not require the ED to use a priority date to establish a term permittee's rights with regard to non-term permit holders' rights. At best, Mr. Ware may rely on his priority date to establish the priority of his water rights in disputes with other term permit holders. As described in greater detail in the section that follows, the ED did not disregard Mr. Ware's priority rights under the Permit.

2. Did the ED manipulate the priority dates of Mr. Ware's application so that its priority would be inferior to that of the Brazos River Authority's permit application?

The ED did not. This allegation had the least legal or factual support of any made in this proceeding. Mr. Ware argued in effect that the ED is engaged in comparing Mr. Ware's application to that of the Brazos River Authority, a former protesting party in this proceeding. The Brazos River Authority is seeking a permit from the Commission to appropriate an additional 421,449 acre-feet per year of unappropriated water,¹¹⁹ or several thousand times the amount that Mr. Ware is seeking authority to appropriate from the same river basin.

In evaluating the merits of this claim, the first question to be addressed was whether Mr. Ware's Permit, if granted as an *extension of the original term Permit*, would be subject to a prior and superior water right of the Brazos River Authority.¹²⁰ It would because, as discussed in the previous section, every term permit issued by the Commission is subordinate to all senior appropriative rights.¹²¹ As an inferior priority date holder, Mr. Ware's renewed term Permit, if

¹¹⁹ Ware Ex. 41 at 2. The amount requested in the application is to be increased to over 1,000,000 acre-feet per year in the form of 331,449 acre-feet per year of firm water and 670,000 acre-feet per year of interruptible supply. *Id.* at 3. The parties' arguments often focused on 74,387 acre-feet of this total. Mr. Ware's point was almost any comparison between his Application and that of the Brazos River Authority involved grossly disproportional amounts.

¹²⁰ 30 TAC § 297.44.

¹²¹ TEX. WATER CODE ANN. § 11.1381(d); 30 TAC § 297.19(a).

granted, would give him no priority-based claim to challenge the application of the Brazos River Authority.

The next question was whether Mr. Ware's Permit, if granted as a *regular permit in perpetuity*, would be subject to a prior and superior water right of the Brazos River Authority. The evidence is that the priority date for the new permit that the Brazos River Authority seeks is October 15, 2004.¹²² The Brazos River Authority's application's priority date is earlier than that of Mr. Ware's application, which is January 5, 2006, when his application was administratively complete. Thus, the doctrine of "first in time, first in right" would establish Mr. Ware's application as an inferior water right, if it were granted.¹²³ Moreover, Mr. Ware filed his Application on November 15, 2005, which was more than one year after the Brazos River Authority filed its application. As with his rights under a term Permit, Mr. Ware's rights under a regular permit, if granted, would give him no priority-based claim for challenge the Brazos River Authority's application. The ED engaged in no manipulation of the priority dates in recommending the denial of Mr. Ware's application.

XI. CONCLUSION

In his briefing, Mr. Ware characterized this case as "simply Applicant's epic battle to force the [ED] to apply the fundamental principal of 'first in time, first in right,' to the water in the Brazos River Basin which he knows to be available for appropriation."¹²⁴ That fundamental principal prevails in this case, but not to Mr. Ware's advantage.

¹²² Ware Ex. 41 at 13. This date was included in a draft permit that had not been adopted by the Commission. The parties did not dispute that the date on which the Brazos River Authority's application was administratively complete was before the date on which Mr. Ware's Application was administratively complete. The parties did dispute whether Mr. Ware's priority date should be measured by the administrative complete date or the date stated in the Permit.

¹²³ TEX. WATER CODE ANN. § 11.027.

¹²⁴ Applicant's Closing Argument at 4.

Further, Mr. Ware described the dispute in this case as whether his Application satisfies the provisions of TEX. WATER CODE ANN. §§ 11.134(b)(2) and 11.134(b)(3)(B).¹²⁵ The two sections require the Commission to grant an application only if unappropriated water is available at the source of supply and if the proposed appropriation does not impair existing water rights or vested riparian rights. The evidence in this case does not support a finding that unappropriated water is available or that Mr. Ware's proposed appropriation will not impair existing water rights.

Mr. Ware contended that 74,387 acre-feet of water is available for appropriation from new wastewater return flows, described by Mr. Ware as the "central point" in his analysis of the ED's water availability review.¹²⁶ Although Mr. Ware accurately stated that additional water may become available for appropriation, he failed to take into account the status of other priority rights with regard to the water.

Finally, with regard to the issue to which the parties agreed in seeking a contested case referral, Mr. Ware did not sustain his burden of proving that sufficient water exists in the Brazos River basin or that all applicable statutory and regulatory requirements have been met to warrant issuing to him the proposed Water Use Permit No. 5594A. The application should be denied.

SIGNED February 8, 2010.



PAUL D. KEEPER
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

¹²⁵ *Id.* at 8.

¹²⁶ Applicant's Reply to Closing Arguments at 8.

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



APPLICATION OF BRADLEY B. WARE TO AMEND
WATER USE PERMIT NO. 5594
SOAH DOCKET NO. 582-08-1698
TCEQ DOCKET NO. 2008-0181-WR

On _____, the Texas Commission on Environmental Quality (TCEQ of Commission) considered the application (Application) of Bradley B. Ware to Amend Water Use Permit No. 5594 (Permit). A Proposal for Decision (PFD) was presented by Paul D. Keeper, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), who conducted a hearing in this case from October 28 through October 29, 2009, in Austin, Texas.

After considering the ALJ's PFD, the Commission adopts the following Findings of Fact and Conclusions of Law:

I. FINDINGS OF FACT

General Findings

1. The applicant is Bradley B. Ware. Mr. Ware owns a 261-acre farm on the Lampasas River, about 15 miles southwest of Killeen, Texas.
2. Mr. Ware's street and mailing address is 911 Gann Branch, Killeen, Texas 76549.
3. Mr. Ware's farm is located in Bell County, Texas, and is within the Brazos River basin.

History of the Permit

4. On November 7, 1997, the Commission issued Mr. Ware the Permit for a ten-year term.

5. The Permit authorized Mr. Ware to divert and use 130 acre-feet of water annually from the Lampasas River to irrigate 100 acres.
6. The Permit also established July 1, 1997 as “the priority date of this permit and all extensions hereof”
7. The Permit was to expire on November 7, 2007, unless before that date, Mr. Ware received the Commission’s approval to extend the term or to convert the Permit to a perpetual right.
8. Mr. Ware’s rights under the Permit remained in effect pending a final administrative ruling on the Application.
9. During the twelve years in which Mr. Ware has had irrigation rights, he has farmed hay, pumpkins, wheat, sorghum, oats, and winter peas.
10. Mr. Ware has tried to impound his water by installing six or seven earthen tanks, but the composition of the soil limits the amount of water that the tanks will retain.
11. Mr. Ware has purchased 100 acre-feet of water rights and installed 8,000 to 10,000 feet of two-inch pipes, plus an eight-inch pipe to a central pivot system.
12. On November 15, 2005, Mr. Ware timely filed his Application to: (1) either extend his Permit for another ten-year period or convert his Permit to a perpetual right, (2) withdraw 20 more acre-feet of water annually, and (3) irrigate 31 more acres of his farm.
13. On January 5, 2006, the ED determined that the Application was administratively complete.
14. On June 7, 2006, the Brazos River Authority contested the application.
15. On November 4, 2006, the ED’s surface water availability and interstate compacts team completed a water availability review and determined that there was not sufficient water available at the Applicant’s location to support the requested demand.
16. On November 6, 2006, the ED recommended denial of the Application.

17. On January 8, 2007, Mr. Ware requested a contested case hearing at SOAH.
18. On January 25, 2008, the Commission directly referred the case to SOAH for a hearing on the merits.
19. On April 3, 2008, the SOAH administrative law judge (ALJ) convened a preliminary hearing and took jurisdiction.
20. On January 12, 2009, the Brazos River Authority was granted the right to withdraw as a protesting party.
21. On October 1, 2008, the ALJ issued an order following a telephonic prehearing conference and notified the parties that the hearing on the merits would be held March 18 through 19, 2009.
22. At the request of Mr. Ware, the hearing on the merits was rescheduled to convene October 29 through 30, 2009.
23. The hearing convened on October 28, 2009, and adjourned on October 29, 2009. The administrative record closed on December 21, 2009, after closing arguments and replies were filed.

ED's recommendation to deny the Application

24. After Mr. Ware filed his Application in 2005, the ED's hydrology 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.
25. The ED's surface water availability and interstate compacts team confirmed the hydrology team'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.

26. In recommending denial of the Application, the ED relied on the Commission's Water Availability Model for the Brazos River basin (Model). The calculation used a historical period of record of 1940 to 1997.
27. Although previous water availability models were developed and used by the Commission, the current Model has been in use since 2001. The Commission has relied on the Model in evaluating all applications for appropriative rights since then.
28. In evaluating the Application with the Model, the ED used a priority date of January 5, 2006, the date on which the Application was administratively complete.
29. 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.

Standing

30. The evidence presented by the ED at the hearing on the merits was generated by the Commission or was offered to support the integrity of the Commission's underlying information.

The reliability of the Model

31. The Model is designed to be the most accurate method available to the ED without regard to the size of the request for water.
32. The design relies in part on the Model's use of a period of record.
33. The period of record gives the Commission a set of historical boundaries ranging from the most severe basin-wide drought to the most severe flood periods ever recorded.
34. The historical period was developed by the Commission in conjunction with other state agencies.
35. The Model relies on an applicant's particular location within a river basin to determine availability.

36. If an applicant's diversion point is located within a large drainage area, then the applicant would be able to rely on large streamflows and potentially greater water availability.
37. The Commission gathers information about water within streamflows by relying on gauge information.
38. 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."
39. Naturalized flow data has value to the Commission because it reflects the monthly average of the flow in a stream within a reporting period.
40. The Model takes into account an application's priority date in evaluating a request.
41. The role of the priority date is to determine the seniority status of a particular appropriative right previously given by the Commission.
42. By examining an application in terms of period of record, location, and priority date, the ED is able to evaluate an application of any size in terms of the current conditions presented.
43. The inclusion of more recent gauge flow data would have no effect on the historical period of record used in the Model.
44. The addition of "new water," if it were proved to exist, would be subject to all prior appropriation rights of senior water rights holder and could not be treated as available for new allocation.
45. The Brazos River Authority's return flows become available only at the furthest downstream point in the basin.

Priority dates

46. The priority date of Mr. Ware's current Permit is July 1, 1997, and applies to "all extensions"

47. The priority date in the Permit has no relation to applications for new permits or to any matter other than establishing when the permit holder began the appropriation of water or when the permit holder acquired the right to use the water.
48. The priority date of Mr. Ware's application was established on the date on which it became administratively complete, January 5, 2006.
49. The Brazos River Authority is seeking a permit from the Commission to appropriate an additional 421,449 acre-feet per year of unappropriated water, or several thousand times the amount that Mr. Ware is seeking authority to appropriate from the same river basin.
50. The priority date of the application of the Brazos River Authority is October 15, 2004.
51. The priority date of the Brazos River Authority's application is earlier than that of Mr. Ware's application.
52. The ED engaged in no manipulation of the priority dates in recommending the denial of Mr. Ware's application.

II. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the determination of water rights in Texas rivers and streams. TEX. WATER CODE ANN. ch. 11.
2. Notice was provided in accordance with TEX. WATER CODE ANN. § 11.132, 30 TEX. ADMIN. CODE (TAC) ch. 295, subch. C; and TEX. GOV. CODE ANN. §§ 2003.051 and 2003.052.
3. SOAH has jurisdiction to conduct a hearing and to prepare a Proposal for Decision in contested cases referred by TCEQ. TEX. GOV. CODE ANN. § 2003.47.
4. The Application became administratively complete on January 5, 2006. TEX. WATER CODE ANN. § 11.141 and 30 TAC § 297.44(c)

5. The Application was processed and the proceedings described in this Order were conducted in accordance with applicable statutes and the rules of the Commission and SOAH. TEX. WATER CODE ANN. ch. 11; 30 TAC ch. 80, 1 TAC ch. 155.
6. Mr. Ware held the burden of proof. 30 TAC § 80.17(a). Mr. Ware did not meet his burden.
7. Any person may appear at a hearing at which the issuance of a permit is to be considered. TEX. WATER CODE ANN. § 11.133.
8. The ED is required to participate as a party in contested hearings relating to applications about water rights. 30 TAC § 80.108(b)(1).
9. The ED is required to represent the Commission in hearings that raise matters that affect the public's interest in the state's environment and natural resources, including matters that have been determined to be policies of the state. TEX. WATER CODE ANN. § 5.228(a).
10. In contested case permit hearings, the ED's presentation is limited to "the sole purpose of providing information to complete the administrative record." TEX. WATER CODE ANN. § 5.228(c).
11. In a contested hearing, the ED's presentation is limited to "information developed by the Commission" TEX. WATER CODE ANN. § 5.228(a).
12. 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. TEX. WATER CODE ANN. § 11.133.
13. All parties to a contested case have the right to present a direct case and to cross-examine the opposing party's evidence. 30 TAC § 80.115(a).
14. The ED has standing to appear as a party in this proceeding and was authorized to present the Commission's evidence and arguments in opposition to Mr. Ware's case.

15. An applicant may request that an application be remanded to the ED for action as an uncontested matter if: (1) all timely hearing requests have been withdrawn or denied or (2) all parties to a contested case reach a settlement so that no facts or issues remain controverted. 30 TAC § 80.101.
16. A hearing was required in this case because the ED remained a party to a contested case after the Brazos River Authority withdrew its opposition and because there was not a settlement between the remaining parties.
17. Scientific testimony presented by a party must be offered through the testimony of an expert, and that testimony must be based on a reliable foundation. TEX. R. EVID. 702.
18. A finder of fact is to determine the reliability of the evidence, and “[u]nreliable expert testimony is not evidence.” *Gross v. Burt*, 149 S.W.3d 213, 237 (Tex. App.—Fort Worth 2004, pet. denied)
19. To establish the reliability of an expert’s testimony, an offering party must first establish the reliability of the analysis that the expert used in reaching his conclusions. Six nonexclusive factors are used in determining whether scientific testimony is reliable:
 - (1) the extent to which the theory has been or can be tested; (2) the extent to which the technique relies upon the subjective interpretation of the expert; (3) whether the theory has been subjected to peer review and publication; (4) the technique’s potential rate of error; (5) whether the underlying theory or technique has been generally accepted as valid by the relevant scientific community; and (6) the non-judicial uses that have been made of the theory or technique.

Gross v. Burt, 149 S.W.3d at 237, citing *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 714 (Tex. 1997), *cert. denied*, 523 U.S. 1119 (1998) and *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 557 (Tex. 1995).
20. Mr. Ware did not establish that the method used by Mr. Jones, Mr. Ware’s expert witness, was reliable.

21. The water of every flowing river in the State of Texas is the property of the state, and the Commission is the state's agent for the regulation of its water. TEX. WATER CODE ANN. § 11.021(a).
22. The Commission has the authority to allow persons to appropriate state water for specific uses. TEX. WATER CODE ANN. § 11.022.
23. The Commission may grant permits to applicants who seek to appropriate unappropriated state water. TEX. WATER CODE ANN. § 11.124.
24. The amount of water for which the Commission may grant permits may not be more than is available. TEX. WATER CODE ANN. § 11.023(e).
25. In 1967, the Texas legislature abandoned the state's former system of recognizing both riparian and appropriative rights. *In re Adjudication of Water Rights of Brazos III Segment of Brazos River Basin*, 746 S.W.2d 207, 209 (Tex. 1988).
26. In place of the former system, the legislature adopted "an orderly forum and procedure for the [Commission's] adjudication and administration of water rights." *Brazos III*, 746 S.W.2d at 209.
27. The Commission is required to "provide certainty in water management" by evaluating the state's major river basins. TEX. WATER CODE ANN. § 11.0235(d-2).
28. For all permits, the holder has the right to appropriate water only to the extent and for the purposes stated in the permit and subject to the protection of the holders of senior water rights. TEX. WATER CODE ANN. §§ 11.135(a) and 1351.
29. An "appropriative right" is the right to impound, divert, store, take, or use a specific quantity of state water acquired by law. 30 TAC § 297.1(4).
30. The holder's rights to appropriate water may be affected by the amounts that the holder actually uses or can beneficially use, and "all water not so used is considered not appropriated." TEX. WATER CODE ANN. § 11.025.

31. If the holder of a permit does not beneficially use his water, then the right of appropriation is considered to be not perfected. TEX. WATER CODE ANN. § 11.026.
32. The Commission has discretionary authority to temporarily reallocate unperfected appropriative water rights to persons other than the regular permit holder. An applicant may seek a term permit, a permit that is issued for a term of years rather than in perpetuity. TEX. WATER CODE ANN. §§ 11.1381(a) and 11.026.
33. A term permit allows an applicant to use water rights that have not been perfected by the holders. A term permit creates derivative rights, not original rights, so that the maximum use of water may be achieved. TEX. WATER CODE ANN. § 11.123.
34. The Commission may deny an application for a term permit if the permit will jeopardize financial commitments for water projects or if the permit will prevent the holder of the senior appropriative right from beneficially using his rights during the period of the term permit. TEX. WATER CODE ANN. § 11.1381(b) and (c).
35. If the Commission approves a permit, then the rights that it confers are subordinate to any senior appropriative rights. TEX. WATER CODE ANN. § 11.1381(d).
36. The Commission may issue a term permit “when there is insufficient unappropriated water in the source of supply to satisfy the application.” 30 TAC § 297.19(a).
37. A holder of a senior appropriative right may challenge an application for a term permit by showing that the Commission’s issuance of a term permit would adversely affect the holder’s beneficial use of its senior rights. In proving this adverse effect, the holder may use as its proof: water use projections in the state or regional water plans, economic indicators, population growth projections, electrical generation needs, or “other reasonable projections based on accepted methods.” 30 TAC § 297.19(b)(2).
38. The Commission may deny an application if the proposed permit would be detrimental to the public welfare. 30 TAC § 297.19(b)(4).

39. In 1997, the Texas legislature mandated the Commission to adopt an updated water availability model (Model) for six river basins in Texas. TEX. WATER CODE ANN. § 16.012(g).
40. For direct diversions from a stream without sufficient water storage facilities, an applicant must prove that approximately 75% of the water request is available approximately 75% of the time based on the available historic stream flow record. 30 TAC § 297.42.
41. Neither the ED nor an applicant is required to use the Model in determining whether water is available in each river basin in Texas.
42. The Commission has the authority to contract for “scientific and technical environmental services,” including scientific data analysis, to be used in the modeling to be conducted by the ED. TEX. WATER CODE ANN. § 5.2291(a).
43. The ED has the authority to rely on scientific data analysis in enforcing the terms of a permit and in presenting information about an application for a permit. TEX. WATER CODE ANN. § 5.230.
44. A contesting permit holder may rely on “reasonable projections based on accepted methods,” and an applicant and the ED may do the same. 30 TAC § 297.19(b)(2).
45. The Commission may use approximate numbers in estimating water availability in permit application proceedings. 30 TAC § 297.42(c).
46. For every permit, a priority date is established for the appropriation of water and for the claimant’s right to use the water. TEX. WATER CODE ANN. § 11.141.
47. The measuring date for these priority dates is the date of filing of an administratively complete application. 30 TAC § 297.44(c).
48. The date on which a priority date comes into being is “[w]hen the Commission issues the permit” 30 TAC § 297.44(c).

49. An applicant's right to take and use water is limited "to the extent and purposes stated in the permit." TEX. WATER CODE ANN. § 11.135(a).
50. A permit may include special conditions that limit the total amount of water that may be diverted. TEX. WATER CODE ANN. § 11.135(b)(5).
51. With respect to all types of permits, the Commission may include "... conditions and restrictions . . . to protect the priority of senior water rights." TEX. WATER CODE ANN. § 11.1351
52. Each term permit is subject to the unique statutory limitation making term permits "subordinate to any senior appropriative rights." TEX. WATER CODE § 11.1381(d).
53. Courts generally interpret undefined terms according to their ordinary meaning. TEX. GOV'T CODE ANN. § 311.011(a); *Getters v. Eagle Ins. Co.*, 834 S.W.2d 49, 50 (Tex. 1992).
54. In affirmative sentences, the ordinary meaning of "any" is "every" or "all." BRYAN A. GARNER, *GARNER'S MODERN AMERICAN USAGE* 52 (3d ed. 2009).
55. Term permits are subordinate to all senior water rights. TEX. WATER CODE ANN. § 11.1381(d); 30 TAC § 297.19(a).
56. Mr. Ware failed to carry his burden of proving that sufficient water exists in the Brazos River basin or that all applicable statutory and regulatory requirements have been met to warrant issuing to him the proposed Water Use Permit No. 5594A
57. Pursuant to the authority of, and in accordance with, applicable laws and regulations, the requested Permit should not be granted.
58. Pursuant to 30 TEX. ADMIN. CODE ANN. §§ 80.23(d)(2), the Executive Director and Office of Public Interest Counsel may not be assessed any portion of the transcript and reporting costs.

NOW, THEREFORE, BE IT ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, IN ACCORDANCE WITH THESE FINDINGS OF FACT AND CONCLUSIONS OF LAW THAT:

1. The application of Bradley B. Ware to amend Water Use Permit No. 5594 is denied.
2. The Applicant shall pay the court reporting and transcript costs for this case.
3. The Chief Clerk of the Commission shall forward a copy of this Order to all parties, and no amendment to Water Use Permit No. 5594 shall be issued.
4. All other motions, requests for specific Findings of Fact or Conclusions of Law, and other requests for general and specific relief, if not expressly granted, are denied for want of merit.
5. If any provision, sentence, clause, or phrase of this Order is for any reason held to be invalid, the invalidity of any portion shall not affect the validity of the remaining portions of this Order.
6. The effective date of this Order is the date the Order is final, as provided by 30 TAC § 80.273 and TEX. GOV. CODE ANN. § 2001.144.

ISSUED:

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

**Buddy Garcia, Chairman
For the Commission**

STATE OFFICE OF ADMINISTRATIVE HEARINGS

AUSTIN OFFICE
300 West 15th Street Suite 502
Austin, Texas 78701
Phone: (512) 475-4993
Fax: (512) 475-4994

SERVICE LIST

AGENCY: Environmental Quality, Texas Commission on (TCEQ)
STYLE/CASE: BRADLEY B. WARE
SOAH DOCKET NUMBER: 582-08-1698
REFERRING AGENCY CASE: 2008-0181-WR

**STATE OFFICE OF ADMINISTRATIVE
HEARINGS**

ADMINISTRATIVE LAW JUDGE
ALJ PAUL D. KEEPER

REPRESENTATIVE / ADDRESS

PARTIES

DOCKET CLERK
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
OFFICE OF THE CHIEF CLERK
PO BOX 13087
AUSTIN, TX 78711
(512) 239-3300 (PH)
(512) 239-3311 (FAX)

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

GARRETT ARTHUR
STAFF ATTORNEY
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
OFFICE OF PUBLIC INTEREST COUNSEL
MC-175 P.O. BOX 13087
AUSTIN, TX 78711-3087
(512) 239-5757 (PH)
(512) 239-6377 (FAX)
garthur@tceq.state.tx.us

OFFICE OF PUBLIC INTEREST COUNSEL

SHANA HORTON
ATTORNEY
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
P.O. BOX 13087, MC-175
AUSTIN, TX 78711-3087
(512) 239-1088 (PH)
(512) 239-3434 (FAX)

EXECUTIVE DIRECTOR

GWENDOLYN HILL WEBB
ATTORNEY AT LAW
P. O. BOX 1329
AUSTIN, TX 78767
(512) 472-9990 (PH)
(512) 472-3183 (FAX)
gwen.hill.webb@sbcglobal.net

BRADLEY B. WARE

STEPHEN P WEBB
WEBB & WEBB ATTORNEYS AT LAW
515 CONGRESS AVENUE, SUITE 1270
AUSTIN, TX 78701
(512) 472-9990 (PH)
(512) 472-3183 (FAX)

BRADLEY B. WARE

JAMES ALDREDGE
ATTORNEY
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
P.O. BOX 13087
AUSTIN, TX 78711-3087
(512) 239-2496 (PH)
(512) 239-0606 (FAX)
jaldredge@tceq.state.tx.us

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

xc: Docket Clerk, State Office of Administrative Hearings