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## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

January 6, 2014

The Honorable Administrative Law Judge  
William G. Newchurch  
State Office of Administrative Hearings  
300 West 15<sup>th</sup> Street, Suite 502  
P.O. Box 13025  
Austin, Texas 78711-0325

Re: SOAH Docket No. 582-13-3040; TCEQ Docket No. 2013-0174-WR  
Brazos Watermaster Petition  
Executive Director's Exceptions to Proposed Order

Dear Judge Newchurch:

Enclosed please find the Executive Director's Exceptions to Proposed Order in connection with the above-referenced case. Please do not hesitate to contact me at (512) 239-0463 if you have any questions.

Sincerely,

A handwritten signature in cursive script that reads "Robin Smith".

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Robin Smith  
Staff Attorney  
Environmental law Division

Enclosures

**SOAH DOCKET NO. 582-13-3040  
TCEQ DOCKET NO. 2013-0174-WR**

PETITION FOR THE	§	BEFORE THE
APPOINTMENT OF A	§	
WATERMASTER IN THE	§	STATE OFFICE OF
BRAZOS RIVER BASIN FILED BY	§	
THE BRAZOS RIVER COALITION	§	ADMINISTRATIVE HEARINGS

**EXECUTIVE DIRECTOR’S EXCEPTIONS TO  
PROPOSED ORDER**

The Executive Director (ED) of the Texas Commission on Environmental Quality (TCEQ or Commission) files these exceptions to the Administrative Law Judge’s Proposal for Decision (PFD) and Proposed Order in this case. The ED agrees that a watermaster should be appointed for the Lower Brazos River, and that “threat” and “need” have been shown for the Lower Brazos Basin. However, the ED does not agree that the Upper Brazos River Basin should be part of the watermaster area. The ED also objects to several of the ALJ’s findings related to threat and need because there is no evidence, or the evidence relied upon does not support these findings.

**SPECIFIC EXCEPTIONS TO PROPOSED ORDER**

The ED excepts to the following Findings of Fact:

**18. Outside a watermaster area, it is difficult to administer and enforce the prior appropriation doctrine because there is little data available to enable each water right holder to know whether it can divert water without impairing senior water rights.**

This Finding combines the responsibilities of the TCEQ with those of the water right holder. The ED suggests that the finding be reworded to:

18. Outside a watermaster area, because there is little data available, it is difficult for a water right holder to know whether it can divert water without impairing senior water rights.

**23. Dow’s water right is the last major right on the Brazos River before it flows into the Gulf of Mexico. Because of its location, it is uniquely vulnerable, especially during low flow periods, to over-appropriations by junior diverters in the basin.**

There is no evidence to support this finding. Evidence at the hearing indicates that there are more senior water rights to Dow immediately above Dow. *See, Bell Group Ex. 100, Kathy Alexander’s deposition, Exhibit 2.* Accordingly there is no evidence that Dow’s location makes its water right unique.

Additionally, Dow is vulnerable to junior upstream diversions, not “over-appropriations.” Over-appropriations are diversions in excess of their water right.

The ED recommendation is that the word “uniquely” be deleted, and that “over-appropriations” be changed to “diversions.”

**27. The ED took 41 days to respond to Dow’s 2011 priority call, ultimately suspending all rights junior to August 8, 1960 (excluding municipal and power generation uses), and enlarging the area subject to the priority call to include all water rights in the Basin below Possum Kingdom Lake.**

The ED objects to the finding that the ED took 41 days to respond to the 2011 call. The evidence indicates that the ED took 30 days to respond to this call. The call was made on April 30, 2013. The ED’s letter suspending water rights was issued May 18. *Janes Ex. 100, Ex. 6, (Kellye Rila’s deposition), p. 22, lines 15 – 22.*

The ED requests that the finding be changed to 30 days rather than 41 days.

**28. Dow made a third priority call on November 14, 2012. In response, the ED suspended all water rights in the Basin below Possum Kingdom Reservoir (other than municipal and power generation rights) junior to 1942.**

If the Order includes a timeframe for ED action in Findings of Fact Nos. 25 and 27, this finding should also include how long it took for the ED to issue an order suspending water rights. Additionally, this finding omits the fact that the ED modified this order twice in January 2013, once to allow suspended water rights to take water during rainfall events, and one to suspend many of the non-suspended junior water rights. *Alexander, Ex. ED-1, p. 12, line 5 – p. 13, line 2.*

The ED recommends the following addition to Finding of Fact No. 28:

28. Dow made a third priority call on November 14, 2012. In response, five days later, on November 19, 2013, the ED suspended all water rights in the Basin below Possum Kingdom Reservoir (other than municipal and power generation rights) junior to 1942. The ED modified this order twice to allow suspended water rights to take water during certain rainfall events, and to suspend and adjust most non-suspended water rights.

**29. Dow made a fourth priority call on June 26, 2013. In response, the TCEQ suspended all water rights in the Basin below Possum Kingdom Lake (including municipal and power generation rights) junior to February 19, 1942.**

If the Order includes a timeframe for ED action in Findings of Fact Nos. 25 and 27, this finding should also include how long it took for the ED to issue an order suspending water rights. Additionally, not all municipal and power plants were suspended or

adjusted. The time frame is evident from *Bell County Group, Ex. 200*, (Kathy Alexander's deposition) *Ex. 7*. And, Dow's priority date was February 14, 1942.

The ED recommends the finding be amended as follows:

**29. Dow made a fourth priority call on June 26, 2013. In response, six days later, on July 2, the TCEQ issued an order suspending or adjusting most water rights in the Basin below Possum Kingdom Lake (including most municipal and power generation rights) junior to February 14, 1942.**

**30. None of the priority calls resulted in a significant increase in the amount of water available at Dow's facility.**

The ED does not believe the evidence supports this finding. Although Ms. Leathers testified that Dow did not observe any additional water at its pumps after it made the calls, *Tr. p. 46, line 15 to p. 47, line 3*, she also testified that she did not know whether any water from the call had reached the pumps. *Tr. p. 32, lines 8 – 14*. There was no evidence that the amount of water at the pumps had been measured to make a determination of whether the call had added water to the stream. Additionally, Dow made the call because it was becoming difficult for Dow to continue to pump into its reservoirs and the salt water wedge was moving up. *Tr. p. 25, lines 21 to 25*. However, after the suspension order, Dow never stopped operations. *Tr. p. 39, lines 14 – 18*. The evidence is insufficient that water from the calls did not reach the pumps, or how much water reached the pumps.

The ED recommends that Finding of Fact No. 30 be deleted from the Order.

**35. In the years 2009, 2011, and 2013, river flows were inadequate to enable GCWA to fully exercise its water rights, thereby forcing GCWA to also rely on its contracted water from BRA.**

The ED objects to the word "forcing" because GCWA was not forced to rely on contract water. It could have made a senior call under its most senior water rights in 2009 and 2011 but chose not to. *Tr. p. 57, line 2 - p. 58, line 9*.

The ED requests that the last clause of Finding of Fact No. 35 be deleted.

**39. In recent years, a number of junior water right holders in the Basin have made out-of-priority diversion or impoundments in violation of the prior appropriation doctrine.**

The ED objects to this finding because it is not supported by the evidence. There is no credible evidence in the record that a water right holder took water out of turn under the priority doctrine. As Dr. Alexander testified for the TCEQ, Dr. Furnans' analysis did not include a review of the terms of the water rights to properly link specific water rights, owners, and priority dates, and he did not determine that the junior water right was actually suspended or adjusted under a TCEQ Order. Additionally, Dr. Alexander's review indicated that most of the rights indicated by Dr. Furnans were not actually

curtailed. *ED-Ex. – 1, page 17, line 27 to p. 18, line 7.* This evidence is insufficient to indicate any one water right made out-of-priority diversions or impoundments.

Dr. Alexander testified that a junior water right taking water out-of-priority would not be enforced as a violation if there was no senior call. *Tr. p. 491, lines 18 – 22; Tr. p. 542, line 25 – p. 543, line 9.* Dr. Alexander never stated that she agreed with statements concerning juniors needing to determine whether seniors need the water before diverting it in the TCEQ General Information, *GCWA Ex-202, Document GI (General Information)-228, revised in 2009. Tr. p. 676, line 7 to p. 678, line 23.* In the introduction to that exhibit, it states that the document is meant to be a general overview of water law and a primer on the body of law, not the final word for specific fact situations. *GCWA Ex. 202, p. 1.* The document further states that most water right holders are unlikely to have complete knowledge of stream flows and other water rights in the basin. “The examples in the document show how water rights law would work if a complaint were to be filed in court.” *GCWA Ex. 202, p. 5.*

The ED recommends that the Finding of Fact be deleted because there is no evidence to support, and if not deleted, that the words “contrary to” be used instead of “in violation of.”

**40. A number of junior water right holders in the Basin made diversions in violation of the TCEQ’s 2013 priority call order.**

The ED objects to this finding because there is insufficient evidence to support it. See response to Finding of Fact No. 39. Dr. Brandes testified to finding several water rights that had taken water out of priority in violation of a Suspension Order, but admitted that he had not reviewed all of the water rights and Suspension Orders for each diverter. *Ex. Dow-200, p. 39, lines 1 – 19.*

The ED recommends that the finding be deleted.

**44. In recent years, at least two priority calls have been made by water right holders in the Upper Basin.**

The ED objects to this finding because it does not reflect the fact that these calls were for domestic and livestock riparian use. The fact that the calls were domestic and livestock calls indicates that this water could not be called upon by water right holders in the Lower Basin. Also, the finding does not reflect that the ED found these two calls to be futile calls and did not issue a Suspension Order. *Tr. Ex. ED-1, p. 14, line 7 - 15.* The fact that these calls were “futile” indicates the lack of water in the Upper Basin.

**45. Senior water rights are threatened throughout the Basin, including the Upper Basin.**

The ED objects to this finding because there is insufficient evidence that the Upper Basin water rights have been threatened. Dr. Brandes’ testimony, *Ex. Dow-200, pp. 44-51,* discussing impacts that he found relating to using strict natural priority in the Upper Basin, and prior appropriation in the Lower Basin, was criticized by Dr. Alexander. The

approach fails to consider the intricacies and nuances of specific permits in these basins, including Lakes Whitney and Waco. This would have an unquantified impact on Dr. Brandes' modeling. *Ex. ED-1, p. 19, line 27; Tr., p. 815, lines 1 – 7; Tr. p. 842, lines 13 – 24.* Janes Gravel argued that its water rights were “threatened,” *Ex. Janes 100, p. 13, lines 3 – 17.* However, even if these Lubbock reservoirs were found to have impounded water out of priority and were forced to release these flows, there are intervening senior impoundment rights that would have impounded flows before they could reach Janes. *Ex. ED-1, p. 17 line 7.* Additionally, Janes Gravel testified that it been able to take virtually all of its water in its water right in the worst drought of record, 2011, and that it may not have mattered if there had been a watermaster. *Tr. p. 133, line 9 – p. 135, line 24.*

The ED recommends that this finding be deleted.

**47. In times of water shortage, senior water right holders in the Basin are threatened by the disregard of prior appropriation by junior water right holders.**

The ED disagrees with this finding for the reasons stated under Findings of Fact 39 and 40.

The ED recommends that this finding be deleted.

**48. In times of water shortage, senior water right holders in the Basin are threatened by the storage of water by holders of junior water rights.**

The ED objects to this finding because it relies on an incomplete analysis that did not consider the BRA credit system or BRA's system operation of its reservoirs. *Ex. ED-1, p. 18, lines 18 – 27.* See also the ED's exceptions to Findings of Fact 39 and 40.

The ED recommends that this finding be deleted.

**49. In times of water shortage, senior water right holders in the Basin are threatened by the diversion, taking, or use of water in excess of the quantities to which other holders of water rights are lawfully entitled.**

The ED objects to this finding because there is no evidence to support a finding that water right holders in the basin were diverting water in excess of their water right.

The ED requests that after the word “water” in the second line, the words “by junior water rights in excess of amounts to which the junior water rights are lawfully entitled” be substituted for the words “in excess of the quantities to which other holders of water rights are lawfully entitled.”

**50. Under the current regime for managing water rights in the Basin without a watermaster, senior water right holders in low flow years cannot fully and reliably divert or impound the amounts of water to which they are**

**legally entitled under their water rights, even though junior water rights are able to divert or impound water.**

The ED objects to this finding because it implies that in watermaster areas, a senior will be able to fully and reliably divert or impound water under his water rights during low flows. The watermaster cannot make water. As testified by Steve Ramos, the watermaster will also protect municipal and power junior water rights under public health and welfare concerns. *Bell County Group (Ramos deposition excerpts), Ex. BEL-100, p. 24, lines 5 – 22.* Thus, his administration is similar to the Regular Staff's administration.

The ED recommends that the finding be deleted or that it acknowledge that watermasters cannot guarantee that senior water rights always get their authorized water.

**84. The Upper Basin is an integral part of the overall Brazos River system and should not be excluded from the watermaster's geographical and jurisdictional boundaries.**

The ED objects to this finding because the Lower Basin can be managed by a watermaster whether or not the Upper Basin is included. As argued under the exceptions below, there appears to be little threat to the Lower Basin from Upper Basin water rights, and parts of both the Rio Grande and Concho watermaster areas only partially cover their basins.

The ED recommends that the finding be deleted.

**85. Possum Kingdom Lake is completely dependent upon water flows from the Upper Basin.**

The ED does not agree that this finding supports the creation of a watermaster in the Upper Basin under the facts of this proceeding. See Finding of Fact No. 87 below.

The ED recommends that the finding be deleted.

**86. If the Upper Basin were excluded from the jurisdiction of a watermaster, BRA's large and relatively senior water rights associated with Possum Kingdom Lake would be less protected from the risk of out-of-priority diversions by upstream water right holders.**

**87. If the Upper Basin were excluded from the jurisdiction of a watermaster, BRA would pay watermaster fees associated with its Possum Kingdom Lake rights without getting the benefits and protections of the watermaster program for those rights.**

The ED disagrees that BRA will get no or less benefits and protections from the watermaster in the Upper Basin is not in the watermaster area if the Upper Basin were excluded from the watermaster area. If a watermaster is not created for the Upper

Basin, the watermaster in the Lower Basin can seek assistance from the Executive Director if needed. *Ex. Janes-6 (Deposition of Kellye Rila), p. 73, line 10 – p. 74, line 1.*

Also, BRA has subordination agreements with many of the water rights above Possum Kingdom, which shows that lack of a watermaster in the Upper Basin will not harm BRA's water rights. As Mr. Hibbs testified, most of the large reservoirs upstream of Possum Kingdom are either senior to or have a subordination agreement with the BRA. *Tr. p. 500, line 20 – p. 501, line 17.*

Also, all of BRA's other reservoirs are below Possum Kingdom Lake, and therefore will be benefitted by the watermaster. *Tr. p.442, lines 13-15.*

The ED recommends that these findings be deleted or state that BRA will be benefitted by a watermaster in the Lower Basin.

**88. The Basin includes numerous tributaries that are an integral part of the Brazos River system and should not be excluded from the watermaster's geographical and jurisdictional boundaries.**

The ED does not agree that tributaries in the Upper Basin should be included in the watermaster area for the reasons stated in the ED's exceptions to Findings of Fact Nos. 85 to 87, and 89.

**89. If a watermaster was appointed with jurisdiction over only a portion of the Basin, the watermaster's effectiveness would be impaired and the Commission's enforcement of the prior appropriation doctrine in the Basin would be more difficult, imprecise, inefficient, and expensive.**

The ED does not agree. There are watermaster programs in other watermaster areas that do not include the entire basin. The staff in the watermaster area will coordinate with the non-watermaster area. *Ex. Janes-6 (Deposition of Kellye Rila), p. 73, line 10 – p. 74, line 1. Ex. Janes-5 (Deposition of Steve Ramos), p. 64, lines 22 to p. 66, line 8; p. 73, line 10 to p. 74, line 22.*

The ED recommends that the finding be deleted.

The ED excepts to the following Conclusions of Law:

**10. A need exists for the appointment of a watermaster throughout the Basin.**

**11. A watermaster should be appointed with jurisdiction over the entire basin.**

The ED recommends that these findings be revised to apply only to the Lower Basin.

## PROPOSAL FOR DECISION

The ED believes that the Proposed Order is the legally determinative document in this proceeding. However, there are a few statements in the PFD that the ED disagrees with, and believes need a response.

1. On page 27, first full paragraph, lines 1 – 3, the ALJs state that Regular Staff performs an analysis using the Water Availability Model (WAM) to determine whether additional water could be made available for a water right holder who issued the priority call by suspending junior water rights.

Staff does not use the WAM for its analysis. Staff used a number of variables and data to make this determination. These include the actual information in the water rights, information on losses and water use, actual streamflow data and information from field investigations. *ED-1, p. 8, line 11 - p. 11, line 19.*

2. On page 31, starting with the last paragraph, to page 32, end of that paragraph, the PFD cites testimony from GCWA about its 2013 call. Mr. Langford states that the agency asked GCWA to set a date for the priority call and he felt that was inappropriate. GCWA chose 1955. Five days later TCEQ told GCWA that 1955 would not result in enough flows. On p. 47, the ALJs continue their discussion of GCWA's "frustration and confusion" and delay in dealing with Regular Staff regarding their priority calls. The ALJs state that it took twelve days to respond to GCWA's June 20, 2013 call.

The sequence of events is outlined in Dr. Alexander's testimony. From June 20, 2013 to the date of suspension, the ED was attempting to obtain appropriate information from GCWA, including what water right they were calling under, and GCWA took 5 days to provide that information. *Tr. p. 631, line 15 to p. 633, line 18.*

3. The ED also objects to the ALJ's definition of "need" for a watermaster. Although not a finding or conclusion in the Order, the ALJs stated that there would be a need if the evidence shows that a watermaster in the basin would be desirable or useful for the proper management of water in the basin. The ED believes that the test for need in this case should be determined by the examination of the totality of evidence and a cost-benefit analysis.

In conclusion, the ED recommends that a watermaster be created for the Lower Brazos River Basin, and that the Proposed Order be changed to reflect the ED's exceptions.

Respectfully submitted,

TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY

Zak Covar  
Executive Director

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by   
\_\_\_\_\_  
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ATTORNEY FOR THE  
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**CERTIFICATE OF SERVICE**

I hereby certify that on January 6th, 2014, the above document was filed with the State Office of Administrative Hearings and was served via hand delivery, facsimile transmission, email, or by first class mail to all the parties on the mailing list.

*Robin Smith*

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**Robin Smith**  
**Environmental Law Division**

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**IN THE BRAZOS RIVER BASIN**  
**SOAH DOCKET NO. 582-13-3040**  
**TCEQ DOCKET NO. 2013-0174-WR**

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