

**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 REPLIES TO EXCEPTIONS TO  
PROPOSED ORDER**

The Executive Director (ED) of the Texas Commission on Environmental Quality (TCEQ or Commission) files these replies to 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.

**25 Water Right holders**

Leonard Trust, Brazos Family Farmers and Ranchers (BFFR), and Bell County Group contend that the ALJs erred in not finding that the lack of 25 water right holders supporting a watermaster at the time of hearing and the Commission’s decision renders the Commission without jurisdiction.

The ED does not agree that Tex. Water Code Section 11.451 requires that the 25 water right holders supporting a petition that file the petition have to remain on the petition throughout the proceedings for the commission to order the ED to designate a watermaster. Section 11.451 provides that “on petition of” 25 water right holders, the commission may authorize the ED to appoint a watermaster. A petition meeting this description was filed. Section 11.452 provides the procedure for that, stating that “on receiving” a petition for a watermaster, the commission shall call and hold a hearing. Section 11.452 does not render Section 11.451 a nullity – Section 11.451 does not require that 25 petitioners remain in the proceeding through the hearing and until the need for watermaster is ruled on.

Additionally, the water right holders that signed the petition are not indispensable for the proceeding to continue. The statute says that any water right holder may testify at the hearing. Tex. Water Code § 11.452(b).

The Commission has agreed that withdrawal of petitioners does not take away Commissioner’s jurisdiction in other contexts. In retail rate cases at the TCEQ, a certain number of persons are required to initiate a rate proceeding. Tex. Water Code § 13.043. The Commission has determined that once a petition confers jurisdiction on the

Commission, subsequent withdrawal of petitioners does not remove the TCEQ's jurisdiction. SOAH DOCKET No. 582-11-5999 (2011), rate appeal of South BUDA WCID No. 1.

### **Threat and Need**

The ED does not agree that "threat" as used in Section 11.451 requires that actual harm must have occurred to senior water rights. Additionally, the proposed definitions of other parties such as requiring a finding that existing tools are not working, are not required. The ED agrees that a threat to senior water rights has been shown in the Lower Brazos River Basin because there have been senior calls and suspensions of junior water rights. This is the best evidence that a threat exists.

The Water Code, Chapter 11, Section 11.451 - .458 does not indicate that the legislature intended a much stronger evidentiary showing than what the ALJs have stated in the PFD. The Upper Basin Coalition (UBC) specifically cites Section 11.456, allowing the TCEQ to issue protective orders and the Texas Attorney General to seek court-ordered injunctions to protect water right holders during these proceedings, for the argument that a strong evidentiary showing of threat is required. The ED does not agree that this statute shows that the legislature wanted these proceedings to require that a more substantive "threat" be shown, but believes that it actually shows the opposite. It indicates that the legislature foresaw that water rights in river basins would need protection in these areas prior to the designation of a watermaster. This indicates that the legislature thought it would be necessary to protect water rights in at least some basins.

BFFR states that in the ALJs' order denying the Aligned Parties' Motion for Partial Summary Disposition (Order No. 8) the ALJs stated that the standard used in the Concho River Case would not control this hearing. It states that the ALJs changed their position when they determined in their PFD that the definition "provides reasonable guidance for this case."

The ED does not agree that the ALJs changed their position on the definition of "threat." One reason is that neither the ALJs' Order No. 8 nor the proposed Order contains a definition of "threat" to senior water rights. Also, the ED understands the ALJs' Order No. 8 to say that they did not have enough facts before them to know whether the Concho River cases' definition of threat should be considered "controlling law" in the case at that time.

On need, the ED does not agree with Leonard Trust's and BFFR's 3-prong test for need because it requires much more than what is required by the statute or is even reasonably inferred from the statute. The ED believes that a cost/benefit analysis is required, but believes that the benefits do outweigh the costs of a watermaster in the Lower Brazos River Basin, and agree that a "need" has been shown for designation of a watermaster in the Lower Brazos River Basin.

## Upper Brazos River Basin

Concerning UBC's exceptions to the ALJ's findings related to the Upper Brazos River Basin being part of the watermaster area, the ED agrees that the Upper Brazos River Basin should not be part of the watermaster area. The ED does not necessarily agree with all the arguments made by these parties.

Based on the lack of senior calls, subordination of water rights in the Lower Brazos River Basin to water rights in the Upper Brazos River Basin, low flows, and a cost/benefit analysis for the Upper Brazos River Basin, the ED does not believe that there is a threat in, or that a watermaster is needed in, the Upper Brazos River Basin.

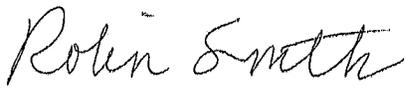
In conclusion, the ED respectfully requests that the Commission agree with the ED's exceptions and determine that a watermaster is needed for the Lower Brazos River Basin, but is not needed in the Upper Brazos River Basin.

Respectfully submitted,

TEXAS COMMISSION ON  
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**CERTIFICATE OF SERVICE**

I hereby certify that on January 16, 2014, "The Executive Director's Reply to Exceptions to Proposed Order" was filed with the Office of the Chief Clerk, Texas Commission on Environmental Quality, Austin, Texas and sent via email or first class mail to the parties.

  
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Robin Smith, Attorney

**MAILING LIST**  
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**IN THE BRAZOS RIVER BASIN**  
**SOAH DOCKET NO. 582-13-3040**  
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