

August 19, 2010

Mr. Ron Ellis
Texas Commission on Environmental Quality - MC 160
P.O. Box 13087
Austin, Texas 78711-3087

Re: Rulemaking under SB 3 for the Galveston Bay-Trinity & San Jacinto Rivers System
and the Sabine Lake-Sabine & Neches Rivers System

Dear Mr. Ellis:

In response to the notice and invitation, I offer the following comments. They cover the five issues in the handout at the 12 August public meeting and some additional ones.

Incidentally, my comments pertain predominantly to the Trinity River Basin and Galveston Bay, consistent with my membership on the G-T-SJ BBEST and full time work on the Trinity River since 1970.

Issue 1 – Selection of appropriate strategies. I gather that this refers to the specific regional planning strategies mentioned at the public meeting and the fact that they are ‘short term’ strategies. I urge that the horizon be broadened to cover more strategies throughout the 50-year planning period for SB 1 and the State Water Plan. There was agreement on the G-T-SJ BBASC, I believe, that the SB 1 and SB 2 work should be coordinated, and it is obvious why. They are both state law. The latter half of the SB 1 strategies designed to meet the tremendous population increases that are now occurring and are not expected to stop, should not be ignored.

Issue 2 - Set-asides. SB 3 allows for set-asides, but they were not dealt with at all in the BBEST. Everything to date has been focused on regime recommendations. There are a number of key questions involved. If a standard exceeds unappropriated water, any set-aside would have to differ from the standard. A set-aside would not appear to be a water right proper, but it would appear to have that effect, i.e., it would be put into the WAM and effectively reduce the available unappropriated water. Since SB 3 protects existing water rights, it would have to be assigned a priority date junior to those rights. However, any other consideration of a set-aside depends on what the standard is. It particularly depends on how the standard compares in magnitude to currently unappropriated water. I suggest the question be taken up after TCEQ finally approves standards. Then it could be handled in a timely fashion without the confusion of other issues that have to be settled first.

Issue 3 – Amendments not involving additional water. SB 3 exempts these from SB 3 requirements. The standards would not apply. An environmental review of a diversion point amendment, for example, would have to be case by case and would concern just the reach between existing and amended points. An application of the standard would violate SB 3 and the nature of the amendment.

Issue 4 – Application of standard to large vs. small applications. The standard would be the same but the application would be customized to each case.

Issue 5 – Tributaries without gages. The issue should be broadened to apply to any site where there is not a specific standard or set-aside, not just those without gages. As phrased, it would appear that on a tributary with a gage, one could just run that gage record through HEFR or some other desktop program and use it as if it was a standard even if there was never a standard on that tributary. This applies to over 90% of all gages. Handling applications where there is not a standard is a site-specific matter, regardless of whether there is a gage on that tributary or not. The presence of a gage helps a lot, but it is still a case by case site-specific matter.

Uncertainty. Uncertainty is a major factor in this entire matter. The most precise data available in the entire undertaking is the USGS flow data. Even that has an uncertainty of 5-15%, depending on the gage and immediate conditions. Habitat is variable over time and place, and the responses of an array of living organisms even more. However, some recommended regimes specify scores of exact flows to the last cfs by season to be attained every year. The only recognition of uncertainty in any recommendation so far is in those that state a percent of occurrence over a period of time commensurate to the length of record used to obtain the flow number. That feature should be included in any and all parts of a proposed standard, and it should not be relegated to a footnote or separate text. That, however, does not address the uncertainty in all the other aspects of environmental flows. Those need to be addressed in the proposed rule.

Predictive capability. SB 3 defines and mandates that a regime must be obtained by a method that can predict changes in ecosystem condition to changes in flow. None of the recommendations so far do that, nor is the data available to do so. In the Trinity and San Jacinto basins, there is not even one single calibration between specific flows and ecosystem functions. The assertion that these relationships can be specified remotely from other basins is false. General relationships can be compared, but not exact flows, and exact flow regimes have been the focus of the entire effort. The proposed rule should acknowledge that the predictive capability called for in the law was not achieved.

Mr. Ron Ellis
August 19, 2010
Page 3

Simplify – Reduce the number of numbers. The lack of certain types of data and the variability of that which exists, from a scientific point of view, calls for a simplified conclusion, one that does not presume to know a great deal of detail when the information is limited, general, and variable. Moreover, a rule that has to be implemented in the practical world will be implemented much better if it is not more intricate than is absolutely necessary. Consequently, the rule should not elaborate three hydrologic conditions. The cause and connection of three conditions to the environment was requested many times in the BBEST and no functional environmental connection was made. They have the effect of creating not one but three regimes at each site. All recommendations have seasonal variations that relate to hydrologic conditions but they do not have a clear connection between those particular flows and ecological responses. Seasonal flows more than adequately cover the hydrological conditions.

Thank you for your consideration of these comments.

Sincerely,

RICHARD M. BROWNING, Ph.D, Senior Manager
Planning and Environmental Management Division

RMB/am