

Chairman Kathleen White
Commissioner Ralph Marquez
Commissioner Larry Soward

MARKED AGENDA

Friday, August 12, 2005

Texas Commission on Environmental Quality

9:30 a.m.
Room 201S, Building E
12100 Park 35 Circle

1. Discussion of the Monthly Enforcement Report.

Presented by Anne Dobbs, Enforcement Division, and John Racanelli, Section Manager, Revenues Section of the Financial Administration Division.

The Commissioners requested a report segregating uncollectible accounts in future reports on administrative penalty collection activity.

No action taken.

2. Consideration and approval of the Fiscal Year 2006 Recommended Operating Budget.

Presented by Linda Flores, Chief Financial Officer and Elizabeth Sifuentez, of the Budget and Planning Division.

The Commissioners suggested the Technical Amendment moving the funds for the River Compact be completed, and that the subsequent memoranda of Understanding mirror the movement of the funds.

The Commissioners moved to approve the operating budget with the transfer of the River Compact funds into TCEQ FY '06 Operating Budget. KW/LS; all agree

3. Consideration of issues relating to reuse of water in water rights permitting.

Presented by Todd Chenoweth, Water Rights Permitting & Availability Section of the Water Supply Division and Robin Smith of the Environmental Law Division, and Bruce Moulton of the Office of the Chief Engineer.

Ken Ramirez an attorney from the City of Austin addressed the Commissioners regarding this issue.

Transcript of the discussion:

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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

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COMMISSIONERS' WORK SESSION

10

AUGUST 12, 2005

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TRANSCRIPTION OF ITEM 3

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CONSIDERATION OF ISSUES

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RELATING TO REUSE OF WATER

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IN WATER RIGHTS PERMITTING

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IN ATTENDANCE

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3 Kathleen White, Chairman
4 Larry Soward, Commissioner
5 Ralph Marquez, Commissioner
6 Blas Coy, Public Interest Counsel
7 Derek Seal, General Counsel
8 Robin Smith
9 Todd Chenoweth
10 Bruce Moulton
11 Ken Ramirez, Outside Speaker
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1 P R O C E E D I N G S

2 MR. SEAL: Commissioners, that brings us
3 to Item No. 3 which is consideration of issues relating
4 to reuse of water in water rights permitting. We have
5 Robin Smith, Todd Chenoweth and Bruce Moulton here to
6 present this item for your consideration.

7 MS. SMITH: Thank you, Mr. Seal,
8 Commissioners. I have with me today Todd Chenoweth and
9 Bruce Moulton. And as you know, since the last reuse
10 work session which we had on February the 25th, we have
11 received 16 briefs and you've also received one from us
12 discussing many of the issues related to reuse in water
13 rights permitting. In our backup we have attempted to
14 give you a very broad general summary of those. The
15 main issues appear to be in an application for the
16 reuse of historically discharged water, is it a new
17 promotion, what type of analysis should be done,
18 whether it's a new appropriation or not, should that
19 analysis or that answer be different for groundwater
20 and surface water, and should there be -- what should
21 the priority dates be for that authorization.

22 I did want to point out that in our backup we
23 did unintentionally leave off four of the briefs that
24 were filed in our list because we received those late,
25 but it's my understanding the Texas Water Conservation

1 Association, Texas Parks and Wildlife, the Bayou
2 Preservation Association and the OPIC, Office of Public
3 Interest Council. And I apologize for that, but my
4 understanding is y'all have had those briefs all along
5 and we did receive them and we have read them and don't
6 believe that it substantially changes our summary. And
7 certainly available for any questions.

8 CHAIRMAN WHITE: No slide shows or
9 anything?

10 MS. SMITH: No. Sorry.

11 CHAIRMAN WHITE: Well, I am not certain
12 of the most effective way to address a number of these
13 questions. And I think this is important, and first of
14 all I thank everyone that submitted briefs. They were
15 very educational and stimulating, and I think that was
16 for me and I hope for others was useful to have that
17 range of briefs to review.

18 I would have found it preferable for
19 very explicit legislative language that was a guidebook
20 for how the agency should deal with these permits, and
21 we don't have that. And I think it is important that
22 we try, try to put some sort of coherence and
23 consistency into how we move forward on reuse. But I
24 do so with some trepidation because, among many other
25 reasons, I think the important, appropriate importance

1 is placed on reuse in all its forms, indirect, direct,
2 groundwater based, surface water based, historic, from
3 historically, historical return flows or from new,
4 newly developed water in the state's regional water
5 plants. And I thank you, Bruce, for the background
6 material you did on that.

7 And I'd actually like to ask a couple
8 questions about that before we get into the
9 specifically legal issues. And it appears that in
10 the -- this next phase of regional water plan there may
11 be actually a significant increase in the number of
12 strategies, water supply strategies that intend to
13 utilize reuse.

14 MR. MOULTON: Good morning, Chairman,
15 Commissioners, Counsel. My name is Bruce Moulton and
16 I'm with the chief engineer's office. Yes, indeed. In
17 my research over the past couple weeks to make sure we
18 had the facts and figures right. If you look at
19 the '02 water plan and what they were projecting
20 through the implementation of strategies identified at
21 that time, they were looking at a little over 400,000
22 acre-feet of water that could be developed through new
23 strategies for reuse.

24 If you look at the information that has
25 been submitted for the updates, and that water plan

1 will be produced in '06, that identified amount of
2 water will be about 1.3, 1.4 million acre-feet from
3 reuse strategies. And the other fact that -- I think
4 there were only about eight or nine of the regional
5 planning groups that identified that as a significant
6 source of water. Now you've got all 16 looking at
7 them.

8 CHAIRMAN WHITE: Thank you, Bruce. I
9 think maybe a good way to get off the discussion is
10 just to address the questions which -- many which don't
11 seem to me to be really amenable to yes or no. That
12 could be quick, I guess. But I welcome any comments
13 from my fellow commissioners before we start addressing
14 the specific issues.

15 COMMISSIONER SOWARD: Just to follow up
16 briefly on what Bruce said, as I understand what you're
17 saying and from your summary, that all the regions and
18 the planning are looking at reuse as a significant item
19 as they're doing their planning.

20 MR. MOULTON: Yes, sir.

21 COMMISSIONER SOWARD: And I know that
22 the -- I assume you're the author of this document or
23 just the -- or at least the compiler of the document,
24 and it talks about some of the opportunities and
25 advantages that the reuse aspect provides. And, you

1 know, I -- it makes a very common comment which I
2 hadn't even thought about, frankly. Maybe it is so
3 given that we don't think about it, but it says that as
4 the treated effluent is the only source of water that
5 actually increases as economic and population growth
6 occurs. So the more Texas grows in population and
7 economy, the only assurance is that wastewater's going
8 to grow. And so the opportunities for reuse are going
9 to grow. And so I really hadn't thought of it that
10 way. And I noted the different figures that Bruce
11 indicated.

12 I got -- I got just for my own interest
13 pulled together some numbers, for example, for the
14 Trinity River. We've all heard that especially the
15 Trinity below Dallas is almost totally wastewater
16 effluent. And if we had total reuse of that that there
17 would be significant flow impacts on the Trinity. And
18 just to give you an example, in 2004 there was
19 1.1 trillion gallons of wastewater discharged into the
20 Trinity River basin. That's 3.1 million acre-feet.
21 And so those are the kind of numbers that we're talking
22 about when we're dealing with this issue. It's
23 significant. And I do think that it -- as Bruce's
24 document indicates, that return flows and issues
25 associated with reuse are huge when it comes to

1 planning for the state's water needs in the coming
2 decades, not only from what we've kind of talked about
3 in the past about environmental issues, in-stream flows
4 and basin estuary impacts, but just the ability to meet
5 water needs in these basins.

6 So it's -- it's a huge issue that I think,
7 you know, it's -- unfortunately, I think we're going to
8 have to make a decision on.

9 CHAIRMAN WHITE: We have a number of
10 people who have registered and only one of which
11 expressed a desire to speak. So I don't know whether
12 we want to turn to that or not. I can -- I will share
13 a general way I at this point am trying to put all this
14 together, which might evoke more response. But
15 please -- please, Ralph.

16 COMMISSIONER MARQUEZ: Just the thought
17 occurred to me listening to Larry talk about the growth
18 of water discharge. I guess it's a -- we are saying
19 that conservation will not play a role. I think as I
20 look at the future, I got to question, well, if there's
21 more conservation water use, it's not inevitable that
22 discharges are going to grow.

23 COMMISSIONER SOWARD: If there's more
24 conservation -- you're saying if there's more
25 conservation, discharges won't grow.

1 COMMISSIONER MARQUEZ: Well, you know,
2 they probably will, but it will not be as significant
3 as just if we continue using water at the present rate
4 and discharging it.

5 COMMISSIONER SOWARD: I don't disagree
6 with the general proposition, but to me that also means
7 that less will be removed from the streams by the
8 municipalities or the industries because of their
9 conservation measures.

10 CHAIRMAN WHITE: But if the -- if you
11 contrast -- and my figures won't be precise, but the
12 average per capita usage in, say, Dallas versus
13 San Antonio where you have a very significant
14 difference, Dallas, I believe, currently still much
15 higher. If you imagine -- I mean, that's what I was
16 thinking about when you were saying if the average --

17 COMMISSIONER MARQUEZ: It's a very
18 difficult thing of where do we put emphasis in the
19 future if we look at conservation and really make a
20 greater effort to bring about conservation, how does
21 that play into the overall equation, you know, as we
22 decide what tools we use.

23 COMMISSIONER SOWARD: I think it stays
24 in the equation. Because, as I said, the more we
25 conserve, the less we have to take out of the rivers

1 and lakes to meet the demand. Or we can -- we can meet
2 a higher demand with the same amount of water that's
3 available with conservation. I think it's got to stay
4 in the equation as a significant aspect. It's not the
5 savior of our water issues by any means, but it's still
6 a very positive and significant aspect.

7 CHAIRMAN WHITE: Well, I will hazard a
8 general framework at this time I try to put this
9 together, both in terms if I try to interpret the
10 relevant sections of the water code, the rest of the
11 water code as it affects surface water and groundwater
12 loss in the state of Texas as I understand it.

13 I distinguish between historically
14 charged surface water based return flows and
15 groundwater based return flows. And at the least, I
16 think that indirect reuse applications based on
17 historically discharged surface water based return
18 flows need a new priority date. I also find it legally
19 the cleanest, in my opinion, cleanest way to go,
20 consider it a new appropriation. That raises a number
21 of different questions. But on historically discharged
22 surface water based return flows, at the very least I
23 think they need a priority date of the date of that
24 reuse application and not of the original water right.
25 And that leads to issues about relevant water

1 availability analyses also.

2 When I -- I find that to be legal -- the
3 legally most persuasive opinion at this time. Then
4 it -- all kinds of questions jump to mind in that I
5 understand probably in a variety of different means
6 that people have purchased wastewater effluent, not
7 necessarily from the original water right holder, and
8 consider perhaps in a number of different ways, you
9 know, their ownership of that wastewater effluent to be
10 something somehow outside our prior appropriation
11 system. And there are some very complex legal issues
12 on that.

13 But I just offer that as a first that's one
14 of several issues here. But I distinguish. And just
15 to add to that on groundwater based return flows, I do
16 not think that that is -- requires a new priority date
17 or a -- be considered a new appropriation but be
18 governed by 11.042(b) in the various analysis that
19 that -- and requirements that that entails.

20 COMMISSIONER SOWARD: With regard to
21 your comments about surface water, my study of the law
22 would agree with you that when it comes to return flows
23 of surface water I read the statute as very clear that
24 that would require a new appropriation application and
25 would require, therefore, a new priority date for

1 that -- for any subsequent appropriation of that return
2 flows. Once it's put into the water course, it becomes
3 state water again and it's subject to all the
4 appropriative requirements in the law.

5 So I agree with you to that extent. And I
6 think that if it is a new appropriation with a new
7 priority date, then we have to -- or we have to and
8 certainly should do a full water availability analysis
9 to determine whether that amount of water is available
10 for appropriation, for a new appropriation.

11 When it comes to surface -- groundwater, I --
12 I think the statute is a little grayer, but I'm not
13 sure that public policy should be different. Again,
14 once you put the water in the water course, it becomes
15 state water. I think the statute's specific language
16 dealing with return flows derived from privately-owned
17 groundwater merely state a more specific regulatory
18 mechanism of how that will be handled with beds and
19 banks. I don't think if you read 11.046 that it in any
20 way differentiates groundwater and surface water.

21 And so I would tend to take it a step further
22 and say that any return flows placed in a water course
23 then become subject to a new appropriation with a new
24 priority date and a new water availability analysis.
25 But as I said, I don't think the groundwater is as

1 clear-cut in my mind as the surface water is.

2 CHAIRMAN WHITE: Well, that -- and a
3 question first. You distinguish historically
4 discharged surface water based return flows from new or
5 developed water coming outside of a basin? I think I
6 distinguished new or developed water or future water,
7 surface water based return flows from historically
8 discharged surface water based return flows and from
9 groundwater. To me those are three very different
10 categories.

11 And on a lot of this I find it difficult to
12 make a final conclusion, but on, as the statute refers
13 to it, privately-owned groundwater, I don't. I do not
14 think that becomes state water when you put it within
15 the beds and banks. And I understand 11.042 as the
16 means of authorizing a person with -- who is returning
17 privately-owned groundwater within the beds and banks
18 as a means of that authorization to utilize the beds
19 and banks to transport privately-owned groundwater.
20 But that -- you know, we have a difference of opinion
21 on that. But that -- that's to me the clearest issue
22 among all these that --

23 COMMISSIONER SOWARD: Well, with regard
24 to your question about historically -- historical
25 return flows versus new or developed waters, to me it's

1 a different situation. If we're talking about future
2 return flows or developed waters based on future
3 actions, those issues are going to come up with
4 whatever authorizations are associated with those
5 new -- those future discharges and those future
6 developed waters. In other words, if we have a city
7 that comes in and expands their wastewater treatment
8 capacity and double their discharge, it is at that
9 point that we should look at the issue of return flows
10 and reuse potential as part of that expansion of the
11 discharge.

12 Historical, we've already made the
13 decision on the amount that's authorized to be
14 discharged, and we've had -- we know that historically
15 we have relied on or made the assumption that some
16 portion of that will be returned to the stream as
17 return flows. So I see them as two different animals.
18 We can -- we can look at future return flows and future
19 developed water issues when we look at the
20 authorizations requested for those items and decide one
21 way or the other how reuse will come into play for
22 those concepts. But historical, we already live with
23 that, so we have to decide are we going to let -- are
24 we going to allow a change from what has historically
25 been assumed, practiced and contemplated.

1 When it comes to groundwater, it -- as we
2 often see, the statutes sometimes are not as clear as
3 they may have intended to be, or they may be clear.
4 The only time that privately-owned groundwater is even
5 mentioned is 11.042(b) under the authorization in the
6 statute for beds and banks permits. It is not
7 mentioned when you look at 11.046 about returning
8 surplus water. And it seems to me that if the
9 legislature had intended to include groundwater from
10 the operation of 11.046, it would have been very easy
11 for them to do that, and they didn't do it.

12 CHAIRMAN WHITE: But I don't think it in
13 any way references something which touches upon
14 groundwater. And that section of 11.046 which is to me
15 one more persuasive grounds for considering reuse based
16 on surface water based effluent a new appropriation is,
17 you know, once water has been diverted under a permit,
18 certified filing or certificate of adjudication, which
19 is all surface water which does not deal with
20 groundwater and returned to the stream, it's considered
21 surface water subject to appropriation by others. I
22 don't think you need anything other than 11.042 for a
23 reuse application to transport privately-owned
24 groundwater. I don't think you -- 11.046 is necessary
25 or relevant to that authorization.

1 COMMISSIONER SOWARD: Well, one comment,
2 and I know that our rules are not determinative, but
3 our rules on surplus water says water taken from any
4 source. It doesn't say surface water.

5 CHAIRMAN WHITE: What's the cite for the
6 surplus water?

7 COMMISSIONER SOWARD: It's 297.1,
8 Definition 53. But that aside, I mean, as a practical
9 matter I'm not sure we're that far off because I read
10 11.042(b) even with privately-owned groundwater to
11 require authorization from this commission and which we
12 can then place special conditions in that authorization
13 based on the use or availability of return flows and
14 any special conditions to help maintain in-stream uses
15 and fresh water inflows to the basin estuaries.

16 So we can still deal with the issue even
17 though it's groundwater. We don't have to -- we don't
18 have to get to the debate about whether it's ground or
19 surface water because the statute says they have to get
20 authorization, and we can add special conditions and
21 restrictions on that authorization even for
22 privately-owned groundwater.

23 CHAIRMAN WHITE: But an authorization as
24 a new appropriation with --

25 COMMISSIONER SOWARD: That's where --

1 CHAIRMAN WHITE: -- a new priority date
2 is different than a bed and banks permit.

3 COMMISSIONER SOWARD: And I think that's
4 where you and I may philosophically differ. And as I
5 hear you, you would say you would not treat like the
6 groundwater part as a new appropriation with a new
7 priority date. And I'm -- and I understand your
8 position there. I'm saying I can read it to require a
9 new priority date and a new appropriation because I
10 believe that once water is put in a water course it
11 becomes state water.

12 CHAIRMAN WHITE: And I believe 11.042
13 was a qualification of that.

14 COMMISSIONER SOWARD: I understand. And
15 I think only the legislature's going to clear that up.

16 CHAIRMAN WHITE: But the added
17 complexity, if I understand right, is a lot of the
18 effluent, historically that's just called historically
19 discharged effluent, that may be the object of a reuse
20 permit is a mixture of groundwater and surface water.
21 And I understand years, perhaps years ago there were
22 authorizations this agency made that actually tried to
23 calculate what portion was, you know, drinking water
24 from the basins of drinking water supply, what
25 proportion was groundwater and surface water.

1 That's -- I don't know to what extent that is relevant
2 across the board, but --

3 COMMISSIONER SOWARD: But to me that
4 would -- the burden would be on the entity involved to
5 prove to us that which is groundwater in order to get
6 the exception. It's not our job to say, well, X
7 percent is groundwater and X percent is surface water.
8 It seems to me that the entity would have to say, here,
9 let me show you that X percent of my wastewater is
10 groundwater derived and therefore under your
11 interpretation, Chairman, excluded out of the priority
12 date appropriation issue.

13 They're the ones that's got to convince us of
14 that. We have their appropriative rights on record,
15 and it seems to me that -- and we have their discharge
16 records. They would have to -- they would have to tell
17 us what portion of those discharge amounts they can
18 demonstrate coming from groundwater. Otherwise, I
19 believe state policy is that it becomes surface water.
20 Even under your interpretation, which I respect,
21 groundwater -- under your interpretation groundwater is
22 an exemption or it's segregated out. Otherwise, it's
23 state water. So they're going to have to show --
24 they're going to have to prove up the exemption or it
25 defaults to state water.

1 CHAIRMAN WHITE: Mr. Marquez, do you
2 have any -- among a number of things we've talked
3 about, we have come -- the closest we agree that
4 surface water, if one imagines a pure beast called
5 historically discharged surface water based return
6 flows --

7 COMMISSIONER SOWARD: I think you and I
8 agree on that one.

9 CHAIRMAN WHITE: -- needs a new
10 priority. I can conclude it needs a priority date of
11 the date of the reuse application.

12 COMMISSIONER SOWARD: I agree with you.

13 CHAIRMAN WHITE: And I'm close to also
14 saying it is a new appropriation subject to the review
15 of any new appropriation. But I'd like to ask our
16 staff what are the vexing issues that considering it a
17 full new appropriation raises.

18 MS. SMITH: I don't know that there are
19 particularly any vexing issues that saying it's a new
20 appropriation raises. I mean, we would just then be --
21 those kind of applications would then be subject to all
22 the requirements of the other statutes like in 11.134
23 that not (inaudible) the public welfare and all of
24 that. I think, you know, just to say when we -- I
25 think the main reason we took the position that it

1 wasn't was just a purely legal one, that that was how
2 we saw the bed and banks statute as being separate from
3 a new appropriation.

4 CHAIRMAN WHITE: A different type of
5 authorization.

6 COMMISSIONER SOWARD: Did I hear you
7 right? You take the position that surface derived --
8 surface water derived discharges are not a new appro --
9 reuse of that?

10 MS. SMITH: That is the position we've
11 taken, yes.

12 COMMISSIONER SOWARD: Mr. Chenoweth,
13 it's my understanding that staff are processing reuse
14 applications and treating them as new appropriations
15 with new priority dates.

16 MR. CHENOWETH: It's a very nuanced line
17 that we're drawing. We are saying they're not a new
18 appropriation, but we are doing a water availability
19 run, not a full analysis necessarily, and we are giving
20 it a new priority date.

21 COMMISSIONER SOWARD: It still quacks
22 like a duck.

23 MR. CHENOWETH: And --

24 MS. SMITH: It's a slightly different
25 water availability analysis, I think, is it not?

1 MR. CHENOWETH: Yes, it is.

2 MS. SMITH: The difference is, I think,
3 that we're not holding them to a standard like we would
4 for a new appropriation.

5 COMMISSIONER SOWARD: What standard are
6 we holding them to?

7 MR. CHENOWETH: We just -- no injury to
8 any existing water rights and we just report the
9 reliability.

10 COMMISSIONER SOWARD: If there's no
11 water available for appropriation, how do you make a
12 no-injury finding?

13 MS. SMITH: Priority date.

14 COMMISSIONER SOWARD: By the priority
15 date?

16 MR. CHENOWETH: But if there -- if there
17 is no water available, then we would recommend a
18 denial, I guess, but there's always been some water.

19 COMMISSIONER SOWARD: For example, in
20 the Trinity -- what?

21 MR. CHENOWETH: There's always been some
22 water available, maybe not very long.

23 COMMISSIONER SOWARD: Isn't the Brazos
24 overappropriated?

25 MR. CHENOWETH: Parts of it.

1 COMMISSIONER SOWARD: So would we issue
2 a reuse permit in the Brazos?

3 MR. CHENOWETH: That issue hasn't quite
4 come up, so we haven't had to make that determination.

5 COMMISSIONER SOWARD: When did you go to
6 work for the lawyers?

7 MR. CHENOWETH: Chairman White --

8 CHAIRMAN WHITE: But as I understand,
9 and this is partly in response to Commissioner Soward,
10 but that -- and lots of people in this room have
11 wrestled with these two provisions of the water code
12 and probably were involved with their enactment. To
13 say -- and I -- seems to me a common understanding that
14 they were envisioned as a means of -- I was going to
15 say expediting, but reuse was an important means of
16 developing water supply and here are -- and here is
17 some help in the water code for that type of
18 authorization that is different in some ways. Perhaps
19 quacks like a duck but somehow is different without the
20 fine tuning on groundwater versus surface water versus
21 a combination of both in all of that.

22 But when I -- at this point in time when I
23 really try to look at the language and all the ways we
24 do this, I find it, including the language of the
25 statute, about once surface water's returned to the

1 stream it's subject to appropriation by others, it's a
2 new appropriation with a new priority date, which is --

3 COMMISSIONER SOWARD: And then -- and
4 I've already said I agree with you. What then do we do
5 with water availability analysis?

6 CHAIRMAN WHITE: That's my next
7 question.

8 COMMISSIONER SOWARD: Can I totally
9 confuse this by throwing in another concept here?
10 Let's assume that we establish the policy, it's a
11 new -- surface water.

12 CHAIRMAN WHITE: Historic. I have to
13 confine it to all that.

14 COMMISSIONER SOWARD: All right.
15 Historically discharged surface water. And I'll work
16 on you on the other issues later. If we treat it as a
17 new appropriation with a new priority date but then
18 we -- let's say we don't do the full water availability
19 analysis, we do the no-harm or no-injury application.
20 What if we added to that the concept that that reuse
21 authorization with that limited water availability
22 analysis had either a term or some kind of reopener
23 provision that said that if we got to a situation where
24 those reused waters became an issue to meet other needs
25 or demands that this agency would have the opportunity

1 to reopen that authorization to some extent or put a
2 term on it and say we're going to look at it every X
3 years and see if there's still no harm. Giving it a
4 permanent water right is troubling to me without a full
5 water availability analysis. I see lots of heads
6 shaking.

7 CHAIRMAN WHITE: But the difference in
8 the -- Todd, did you contrast the difference between
9 what Commissioner Soward means by a full water
10 availability analysis versus --

11 MR. CHENOWETH: Well, what -- the way
12 the staff uses those terms, when we're doing a full
13 availability analysis we're talking about a full
14 appropriation run where -- and we also look at --

15 CHAIRMAN WHITE: Full use.

16 MR. CHENOWETH: Yes, Chairman, full use
17 of all the existing water rights. And we also look at
18 criteria of is there unappropriated water available for
19 municipal use. It generally has to be a hundred
20 percent. For other uses we look at the 75/75 rule.
21 Under a no-injury analysis, it's simply -- and like if
22 we grant this permit, will other existing water rights
23 be harmed. They are -- they are similar, and if you
24 meet the availability criteria, you obviously meet the
25 no-injury criteria under the way our analysis works.

1 But sometimes you can have a -- by placing
2 appropriate special conditions on the permit or by
3 placing a priority on that water, you can have no
4 injury to existing water rights but have a very low
5 reliability for the particular water right that's going
6 to be granted.

7 CHAIRMAN WHITE: But you do not put the
8 return flows in question back into the --

9 MR. CHENOWETH: Well, for the way we've
10 been doing -- the way we've been doing the analysis
11 under 11.042 where we have been doing just that
12 abbreviated no-injury analysis, we look at it with
13 the -- with the return flows back in. So that gives
14 you more water.

15 COMMISSIONER SOWARD: Say that again?

16 CHAIRMAN WHITE: But that's key on me
17 because that's the water sought. You know, I mean,
18 that's why I think it's appropriate to put it back in.
19 It is in.

20 MR. CHENOWETH: Right.

21 CHAIRMAN WHITE: As opposed to our full
22 use.

23 COMMISSIONER SOWARD: But do a full
24 water availability analysis. I mean, if you put it
25 back in, you've got to put it back in all the way and

1 do a full analysis.

2 MR. CHENOWETH: If you want to treat it
3 as a new appropriation, then we would put the return
4 flows, all the return flows back in and subject to --
5 subject it to an availability analysis and a -- plus
6 beating that reliability --

7 CHAIRMAN WHITE: You mean back in the
8 availability pool, not subtracted from the availability
9 pool.

10 MR. CHENOWETH: That's right.

11 COMMISSIONER SOWARD: It would be
12 considered available water for any appropriation that
13 just happens to be being requested by the reuse
14 applicant.

15 MR. CHENOWETH: Right.

16 COMMISSIONER SOWARD: Put it back in as
17 available water in the stream and then you do your
18 analysis as to whether that amount is available.

19 MR. CHENOWETH: Right.

20 COMMISSIONER SOWARD: Because the
21 priority date, it may not be available anymore once you
22 put it in the stream.

23 CHAIRMAN WHITE: But that's not a full
24 use.

25 MR. CHENOWETH: That's a modification

1 of --

2 CHAIRMAN WHITE: Current conditions
3 rather than --

4 MR. CHENOWETH: That's a modification of
5 what the --

6 CHAIRMAN WHITE: I think that's
7 appropriate for this. That I can say also, that --
8 because the water sought to do a full use is to
9 subtract it. It is --

10 COMMISSIONER SOWARD: But you're putting
11 it in, but you're not doing a full analysis. You're
12 doing a no-injury analysis.

13 MR. CHENOWETH: That's what we're doing
14 right now.

15 COMMISSIONER SOWARD: Right.

16 CHAIRMAN WHITE: Is it confound all
17 kinds of things hydrologically or legally to consider
18 something a new appropriation under the relevant
19 sections of the code with a new priority date but do --
20 do not do a full use, do a no-injury analysis and if
21 the label is appropriate, current conditions?

22 MR. CHENOWETH: If you're going to call
23 it a new appropriation, I think that you need to do
24 a -- I think legally you're going to be required to --
25 we would be required to do a full availability

1 analysis.

2 CHAIRMAN WHITE: Which would take --
3 which would not put the return flows into the
4 availability model.

5 MR. CHENOWETH: Well, you know,
6 that's -- I think we're at one of the dilemmas of the
7 reuse. Under the Stacy Reservoir decision, you -- you
8 assume that there are no return flows coming back into
9 the stream, but under 11.046, and I'm -- let's talk
10 about a hypothetical world where there's only
11 historically based surface water effluent in the
12 stream, then if it's available for appropriation.

13 So on the one hand Stacy is telling you
14 assume it's not there, but then 11.046 says, well,
15 legally it really is there. So I think that you would
16 have to say that -- may put on my legal hat -- that
17 Stacy didn't really consider the question of return
18 flows in that decision and that if you're going to
19 grant a new appropriation based on return flows, that
20 you would put that water back in and maybe fashion some
21 special condition or fashion a term that if that
22 historical discharge isn't there, then -- then that
23 authorization is not going to be there either.

24 CHAIRMAN WHITE: As full use B?

25 COMMISSIONER SOWARD: When we issue

1 permanent water rights, we don't -- or let me ask, do,
2 do we, and we meaning the model, do we assume zero
3 return flows?

4 MR. CHENOWETH: That's correct.

5 COMMISSIONER SOWARD: When we issue
6 permanent water rights.

7 MR. CHENOWETH: That's correct right
8 now.

9 COMMISSIONER SOWARD: Right now.

10 MR. CHENOWETH: Historically maybe that
11 wasn't always true. And -- and obviously in hydropower
12 rights you're assuming that they're not going out of
13 the stream, so --

14 COMMISSIONER SOWARD: When we issue term
15 permits, do we assume zero return flows or do we assume
16 return flows?

17 MR. CHENOWETH: We assume return flows
18 in that case. And we also don't look at the full paper
19 authorization. We look at maximum diversion in the
20 last ten years and return flows.

21 COMMISSIONER SOWARD: And isn't it also
22 true that historically any considerations of
23 environmental protection for in-stream flows has been
24 based on an assumption that there would be return
25 flows?

1 MR. CHENOWETH: Well, we -- in the --
2 when we are determining what the environment needs, we
3 don't look at the issue of are there return flows or
4 not in setting the standard. But when we're looking at
5 whether the application or the water right holder is
6 allowed to divert, we certainly look at return flows
7 being in the stream. The water right holder gets
8 credit for everything that's in the stream past that
9 particular point, and if the flow's high enough to meet
10 the special condition, they can divert it.

11 COMMISSIONER SOWARD: I guess my point,
12 and I'll just throw this out, the Trinity's a perfect
13 example. If -- if we had zero return flows in the
14 Trinity, there wouldn't be any water in the Trinity
15 below Dallas except for maybe runoff from rains. So
16 our reliance on the environmental or in-stream use
17 protection for the Trinity has been placed solidly at
18 the feet of return flows.

19 MR. CHENOWETH: Yes, in that sense, yes,
20 sir.

21 CHAIRMAN WHITE: Have we -- you know, we
22 could be here like five or six days. We could. Have
23 we -- sure you don't want to participate in this?

24 COMMISSIONER MARQUEZ: I guess we're in
25 agreement on the first issue of historical discharged

1 surface water derived flows. And I'm still trying to
2 figure out all the things that talk about the
3 availability and no injury versus full availability
4 part of it. But I think the basic principle I think
5 has full agreement.

6 CHAIRMAN WHITE: Well, I am on the
7 priority date and the label new appropriation. These
8 issues about the water availability analysis and the
9 standard, no injury or 75, I think it's important that
10 the return flows that have been historically there be
11 put into the availability and not subtracted, if I
12 understand the traditional full use, that manner. And
13 I don't know whether we agree on that, but I do --

14 COMMISSIONER SOWARD: Let me ask you a
15 clarification. We may agree and we may not. If we
16 add -- you're saying add them in, but then do you do
17 the full availability analysis or do you do the no-harm
18 analysis?

19 CHAIRMAN WHITE: I would say the no
20 harm.

21 COMMISSIONER SOWARD: Then we don't
22 agree. I think it needs to be a full water
23 availability analysis. Otherwise, they're doing a
24 legal definition of no harm. And just like we saw in a
25 hearing request Wednesday, there was a legal no effect

1 but arguably an actual effect on a particular water
2 right. And so there's a difference between a legal
3 no-harm test and a full analysis of the impact on other
4 water rights.

5 CHAIRMAN WHITE: But the new priority
6 date to me to some extent addresses that. Perhaps not
7 in all cases of hydrological fact. And I also think
8 that the authority to impose special conditions of a
9 variety of sorts with a particular set of facts in a
10 particular application addresses maybe the questions
11 you think that raised because as I look at all of this,
12 staring at two brief sections of the water code, I do
13 think I feel comfortable in registering the policy
14 intents that these two -- these two sections of the
15 water code were I think intended to facilitate these
16 type of authorizations. And calling them a new
17 appropriation does not facilitate them in the greatest
18 sense of the term, so I think there's -- to me there's
19 adjustments which are appropriate.

20 COMMISSIONER SOWARD: Well, since we're
21 only talking about surface water at this point, I think
22 calling them a new appropriation does facilitate it.
23 It's totally consistent with the statute.
24 Groundwater's another issue that we're going to talk
25 about, but I think the legislature has made it clear

1 that -- I mean, it's not a -- I don't know how to say
2 this, but it's not -- it's frustrating facilitating
3 because the legislature intended it this way to begin
4 with. I mean, they set the process.

5 Let me -- can I ask a question and then
6 just -- what do we think the product of this
7 discussion's going to be? Is it going to be a policy
8 pronouncement or is it going to be, you know, staff,
9 here's what we say and go about their business or are
10 we talking about do we -- do we look at any kind of
11 rule making or -- I guess I haven't figured out
12 where -- what we're going to do.

13 CHAIRMAN WHITE: I haven't concluded
14 that, and I thought about that also. But I think that
15 it would be extremely important for if we have, it
16 seems as if there's the kernel of an agreement on one
17 aspect of these issues, that staff tries to translate
18 that into something written so we can look -- so we can
19 look at it. That's a different question than yours.

20 COMMISSIONER SOWARD: Yeah.

21 CHAIRMAN WHITE: Sometimes we have
22 written policy or guidance. Sometimes we have rules.
23 I guess I'm not -- at this stage I couldn't recommend,
24 you know, rule making today, but -- is guidance
25 something -- we've used that in a variety of ways in

1 water rights permitting, don't we?

2 COMMISSIONER SOWARD: We have the 75/75
3 rule.

4 MR. CHENOWETH: That's actually made it
5 into the rules.

6 COMMISSIONER SOWARD: Has it made it in
7 there?

8 CHAIRMAN WHITE: Was it first born as a
9 guidance?

10 COMMISSIONER SOWARD: Yes, it was. It's
11 a rule of thumb.

12 COMMISSIONER MARQUEZ: I have no
13 expectations that we'd come out today and vote on a
14 final policy.

15 CHAIRMAN WHITE: I agree.

16 COMMISSIONER SOWARD: Neither did I. I
17 had hope but --

18 COMMISSIONER MARQUEZ: But I believe
19 that, like the first step that was taken, that there
20 seems to be agreement as to one piece of it. And it
21 moves the ball further down the field now to get to the
22 details of the full availability versus no injury and
23 let us focus on that part of it. And we need to get,
24 you know, some material from staff and take time to
25 look at that piece of it now that we know that we have

1 an agreement on the main issue.

2 And I think if we can keep taking it the way
3 we lead that and zero in on one -- one with three parts
4 that I see. Maybe groundwater is the next one or maybe
5 it's developed water, surface water. But look at each
6 one and see how far we can take it down so that we can
7 narrow the issue for staff then to use further input,
8 further -- and others as to what the next step is. I
9 think that would be very helpful today.

10 CHAIRMAN WHITE: I agree, Commissioner
11 Marquez. And I would welcome all those interested or
12 impacted by this to remind us of the benefits or
13 hazards of what we're doing.

14 COMMISSIONER SOWARD: So we've agreed --
15 we agree that with regard to historical surface water
16 discharges that we would treat them as a new
17 appropriation with a new priority date, but we -- we
18 don't agree, even though there may be a consensus, as
19 to what type of water availability analysis will be
20 done.

21 CHAIRMAN WHITE: Take us to three?

22 COMMISSIONER SOWARD: What's three?

23 CHAIRMAN WHITE: Who can apply for these
24 direct reuse permits.

25 COMMISSIONER SOWARD: Are we going to

1 talk -- are we going to double back and talk about
2 developed waters and groundwaters?

3 CHAIRMAN WHITE: We can.

4 COMMISSIONER SOWARD: Whenever. Let me
5 just ask on the developed waters or future return
6 flows. I guess I'm confused as to what the issue
7 really there is. I mean, it seems to me that it will
8 have to be a new appropriation with a new priority date
9 because it's something in the future that's not even
10 authorized or contemplated now.

11 MS. SMITH: Commissioner, at this point
12 that is an issue in the City of Irving case which is
13 still pending over at SOAH. We haven't received an
14 opinion in that yet, so I just wanted to bring that up.
15 Because we've got it argued in all different directions
16 in that case as to how you do that.

17 CHAIRMAN WHITE: So the dye is cast that
18 that will come before us as a factual --

19 MS. SMITH: We're waiting for the
20 Publifer (phonetic) decision.

21 COMMISSIONER MARQUEZ: So are you
22 suggesting that that one we put aside and going to have
23 to come back and -- so groundwater, as far as the three
24 big issues, groundwater is what's next then, the other
25 piece, groundwater derived.

1 COMMISSIONER SOWARD: You're saying the
2 issue of developed water or future --

3 MS. SMITH: Future.

4 COMMISSIONER SOWARD: -- is being heard
5 and reviewed at SOAH and we'll get to make that
6 decision in a case that's coming in front of us.

7 MS. SMITH: It actually involves
8 developed water too, developed and future.

9 COMMISSIONER SOWARD: Future and
10 developed. Okay. So we get that category's going to
11 come in front of us in a future decision. So we could
12 I guess defer that one. Then that leaves us
13 groundwater derived, historical discharges.

14 CHAIRMAN WHITE: Well, and I don't know
15 whether I even distinguish between historically
16 discharged groundwater based reflows or new
17 groundwater, but I find 11.042(b) sufficient as an
18 authorization, a bed and banks authorization. But it
19 is not a new appropriation and therefore subject to
20 that review required by other sections of the water
21 code. It doesn't have a priority date, although the
22 statutory provision allows the commission to impose
23 special conditions to address impact on other water
24 rights or in-stream flows. That one to me doesn't
25 quite even quack like a duck, but it probably can swim

1 on water. But that's my probably typically West Texas
2 perspective.

3 COMMISSIONER MARQUEZ: How many cases we
4 have, and I don't expect an exact number, but where we
5 really have commingled surface and groundwater derived
6 effluence versus just pure surface or groundwater
7 derived?

8 CHAIRMAN WHITE: We just issued one and
9 that's been issued for a long enough time. It's not a
10 contested one. I believe the Tarrant County --

11 MS. SMITH: Tarrant Regional Water
12 District.

13 MR. CHENOWETH: Commissioner --

14 COMMISSIONER MARQUEZ: Is it mostly one
15 way or the other?

16 MR. CHENOWETH: It's mostly one way or
17 the other, but there are a handful, and I would expect
18 that number to grow, of mixed. There are a handful of
19 mixed, and I would expect that number to grow. And the
20 larger ones are more likely to be mixed. When
21 you're --

22 COMMISSIONER MARQUEZ: And when they're
23 mixed, the applicant tells which percentage -- how do
24 they come up with the percentage of the discharge?

25 MR. CHENOWETH: That's -- we certainly

1 rely on information provided by the applicant. I think
2 Commissioner --

3 CHAIRMAN WHITE: You go to the source of
4 original supply. I think that's probably sometimes
5 more or less clear, but --

6 MS. SMITH: We've been doing the
7 analysis basically the same, haven't we, for
8 groundwater and surface water?

9 MR. CHENOWETH: That's correct.

10 COMMISSIONER MARQUEZ: But how -- how
11 detailed we go through that analysis or the applicant
12 submits information to us in that analysis? Is it just
13 there's so much water taken from the surface, so much
14 from the ground, and that percentage applies to the
15 effluent? Is that the extent of the analysis?

16 MR. CHENOWETH: That's what we're forced
17 to do. We're forced to be somewhat general and deal
18 with averages. If you -- just for practical purposes,
19 you've got to -- just to make it a little more
20 complicated, because y'all like dealing with the
21 complexity of this, you've got to understand that that
22 number for a large system would likely vary from day to
23 day. If they're relying on groundwater and surface
24 water, they run into a drought, surface water starts to
25 dry up, they start to rely on groundwater more. So

1 there's seasonal variation. And then it may be growing
2 over time. For a hypothetical situation, a city that's
3 trying to get off of groundwater because of subsidence
4 will be trying to increase its surface water over time,
5 and that will change the mixture of the effluent.

6 COMMISSIONER MARQUEZ: You know, I'm
7 familiar reading the newspaper in Round Rock they've
8 been switching to surface water, and I guess the
9 percentage has been changing with time. So if we
10 issued their permit three years ago or five years ago
11 when they were mostly on groundwater and we set
12 groundwater aside and said they're treated differently,
13 that would be totally inaccurate today when probably
14 90 percent of the water is surface water.

15 CHAIRMAN WHITE: But I could confine
16 my -- and I think this is -- this is, as you
17 characterized it, Todd, very complex as far as how you
18 try to specify, calculate. But from a legal standpoint
19 for a reuse application based on the use of the bed and
20 banks to convey privately-owned groundwater, to me that
21 is separate from what you're talking about in actual
22 permits, maybe far more complex than that today. I
23 don't know quite how to answer that. But I think it --
24 is it -- I think maybe there's certain areas of the
25 state where this is more of an issue or not.

1 COMMISSIONER SOWARD: Mr. Marquez, I
2 hear what you say, especially your example about
3 Round Rock. But I would argue, if we've issued --
4 let's say we issued them a bed and banks permit for
5 reuse and a hundred acre-feet and it's based on
6 groundwater derived. Well, if they over the years have
7 switched to surface water and let's say their discharge
8 now is totally surface water, they have no
9 authorization anymore because we only authorized them
10 for groundwater derived. They would have to get a
11 separate, a new and separate authorization for any
12 surface water derived discharge. They can't just keep
13 discharging --

14 COMMISSIONER MARQUEZ: What forces --
15 what forces them to come here and get that new
16 authorization?

17 COMMISSIONER SOWARD: Our enforcement.

18 COMMISSIONER MARQUEZ: They've gone
19 from -- they've gone from 90 percent groundwater to
20 90 percent surface water. At which point in time do we
21 require them to come in and say change my permit, go
22 through a new analysis?

23 COMMISSIONER SOWARD: Well, in theory
24 when they discharge the first drop of surface water and
25 reuse it.

1 COMMISSIONER MARQUEZ: In theory, yeah.
2 In practice I wonder how much that happens.

3 COMMISSIONER SOWARD: Well --

4 COMMISSIONER MARQUEZ: When the mix is
5 continually changing.

6 COMMISSIONER SOWARD: Our water rights
7 enforcement's another issue.

8 CHAIRMAN WHITE: Well, but I think that,
9 in my opinion, starts to depart again from those
10 nebulous categories like the intention of both these
11 sections for reuse application. Legally I think it's
12 a -- you know, as you look at sections of it and
13 talking about groundwater based effluent with its
14 section and then another section on water, but I --
15 that's -- that's treating a reuse permit based on
16 surface water as a new water right. I mean, and I
17 think it is -- as we're calling it a new appropriation,
18 it is similar, but I think it is -- I think talking
19 about it being somewhat different. I don't know how --
20 I don't know how to resolve those today, and I will
21 not --

22 COMMISSIONER MARQUEZ: I'll be very
23 honest. I'm enjoying the legal discussion about it,
24 but I think you said it. We can be here for six days
25 and hear at least two different opinions, probably five

1 or six different opinions.

2 CHAIRMAN WHITE: And as we -- and I ask
3 the General Counsel this. As we can refer to
4 previously issued permits, the period for challenging
5 of which is over, correct, General Counsel?

6 MR. SEAL: Yes, Chairman, you can talk
7 about those to your heart's content.

8 CHAIRMAN WHITE: Because the Tarrant
9 County reuse permit is extremely complex in terms of a
10 lot of the things we're talking about, extremely
11 complex. It wasn't something I think fit into any of
12 these legally construed as tight categories.

13 COMMISSIONER MARQUEZ: And I -- what I
14 was going to say is that I'm looking at the
15 practicality of what we do in the future because I
16 think we're going to be 50/50 on the law. We're going
17 to probably take a vote one way or the other or get
18 challenged one way or the other. I'm not sure if the
19 legislature's going to come down on one side or the
20 other whenever they decide to do something about it.
21 So I'm looking more at the practicality of how -- how
22 we maintain a current system, one that can be, you
23 know, more practical to implement if we have different
24 standards for groundwater derived versus surface water
25 derived.

1 COMMISSIONER SOWARD: I think the
2 practical way to do it is say you put it in a stream,
3 it becomes state water.

4 COMMISSIONER MARQUEZ: I appreciate -- I
5 appreciate the history of Texas law and, you know, the
6 foundation that we have on groundwater being different
7 from surface water in every respect of that as far as
8 Texas history and Texas law in the past. But just from
9 a practical standpoint and as we move -- look forward,
10 I have great difficulty looking at a system that
11 there's no way that we can keep up with. Round Rock
12 will never come back here and tell you we changed. I
13 bet you they haven't. We changed our mix of
14 groundwater and surface water and now we have a -- you
15 know, there are different rights. And if we
16 continuously change it, I don't see how we can do that.

17 So I -- you know, I -- yeah, I hear both
18 sides of the law. I have nightmares about which one is
19 right or wrong, but I don't think it will ever be right
20 on that interpretation. So I'm looking more at the
21 practical aspect of it.

22 CHAIRMAN WHITE: The way I interpret
23 that is with great caution. I think the legal
24 interests at this day in Texas law in groundwater and
25 surface water are very different, and I don't want our

1 permitting ever to -- because of reasons of
2 practicality. To me that's -- the legally different
3 interests in the water is something, at whatever risk
4 to our conundrums here, I want to preserve until it
5 is -- it is clearly altered.

6 Do we want to try to get to another question?
7 Which I think is also complex.

8 COMMISSIONER SOWARD: So we have no
9 agreement on groundwater, so we're going to the next.
10 Okay.

11 COMMISSIONER MARQUEZ: I'm going to say
12 something that I believe is the third time I've said in
13 the last ten years, and I am not even sure where it
14 fits in. As we've dug groundwater and bed and banks
15 and special conditions in bed and banks, you know, I
16 still believe that the State of Texas should put a
17 surcharge on bed and banks and that if -- just like we
18 pay taxes to use the highways, I think if you put an
19 acre-foot of water, we transport it so many miles in a
20 state-owned waterway, a percentage of that water should
21 accrue to the state beyond just the routine losses.

22 CHAIRMAN WHITE: I think since water
23 is --

24 COMMISSIONER MARQUEZ: And that's a --

25 CHAIRMAN WHITE: Yeah, I think since

1 provision of water is such a basic public need that use
2 of the state's bed and banks other than the fees
3 imposed upon the permits is --

4 COMMISSIONER MARQUEZ: I'm not talking
5 money. I'm not talking money. I'm talking acre-feet.
6 You know, a certain percentage of the water that as it
7 gets transported, depends on how far you transport it
8 using a state waterway, we charge a fee that means a
9 certain percentage of the water goes to the state for
10 so many miles that it's transported.

11 COMMISSIONER SOWARD: In other words, it
12 stays in the river.

13 COMMISSIONER MARQUEZ: What's that?

14 COMMISSIONER SOWARD: It stays in the
15 river.

16 COMMISSIONER MARQUEZ: It stays in the
17 river. It becomes available for future appropriation,
18 whatever it is.

19 CHAIRMAN WHITE: If it's one city
20 transporting water to provide drinking water to another
21 city?

22 COMMISSIONER MARQUEZ: If we say if it
23 requires the bed and banks.

24 CHAIRMAN WHITE: I don't feel that way.

25 COMMISSIONER SOWARD: I think this

1 commission can tackle that issue if it wanted to.

2 CHAIRMAN WHITE: Shall we address
3 Question 3? I don't --

4 COMMISSIONER SOWARD: What is Question
5 3?

6 CHAIRMAN WHITE: I also find it is a
7 very complex one. Who can apply for an indirect reuse
8 permit. What, if the staff can speak generically, are
9 the issues which this question raise? What make -- you
10 know, what makes this interpretation of the answer to
11 this question --

12 MS. SMITH: I think again I can speak
13 legally again.

14 CHAIRMAN WHITE: Legally.

15 MS. SMITH: On the -- on the
16 groundwater, I think it's a little clearer because
17 that's talk about a discharger and the owner of
18 effluent. So I think the main issue, if y'all agree
19 with that, is that is it C, it's C, just uses the --
20 talking about 11.042(c), it just -- it uses the word
21 water. And so there's been a lot of discussion in the
22 different briefs about what that means and a lot of
23 difference of opinions. Some are arguing that that
24 means any water. Some are arguing that that would only
25 be imported water and groundwater. And I think there

1 is -- there is a legal basis for all of those positions
2 that we've -- you know, we've just looked at it as
3 water meaning everything because that seemed to be the
4 most general definition.

5 MR. CHENOWETH: And if I can add to
6 that. C also talks about a person who wishes to
7 convey.

8 MS. SMITH: Right.

9 MR. CHENOWETH: And so third parties
10 have come in and said, well, the -- I know there's
11 plenty of water here because there's a wastewater
12 treatment plant just upstream from the diversion point,
13 and they have -- third parties have -- are asserting a
14 right to get a bed and banks for somebody else's
15 effluent.

16 CHAIRMAN WHITE: That's in the stream
17 that would otherwise be -- how would you contrast that
18 again from someone seeking new water if they had no
19 legal relation to the --

20 MR. CHENOWETH: Just laying it out as
21 a --

22 COMMISSIONER SOWARD: Yeah, because then
23 you're squarely in the face of 11.046. You know, any
24 protection at all, and I find little or none, to the
25 actual person that had the water, used it, then going

1 to discharge it, is a different concept than a third
2 party that's saying I want a bed and banks to take this
3 person's effluent up here and reuse -- and take it
4 downstream. I don't see any statutory protection of
5 that. 11.046 makes it clear that if you're going to
6 take water out of a stream, other than it may be
7 otherwise characterized in 11.042, you've got to apply
8 for it as a new appropriation. To me that's just --
9 that's not even a question.

10 CHAIRMAN WHITE: Well, I imagine how you
11 could have competitive interests in the effluent for
12 the sake of argument between an original water right
13 holder who sold through contract that water and who the
14 person holding the contract discharged the water.

15 MR. CHENOWETH: And that -- I believe
16 that's the most troubling issue for us.

17 CHAIRMAN WHITE: If you could flip a
18 coin. I just mean it's a competitive interest in the
19 same water. That I think's a very difficult one to
20 answer, that one right there as far as original water
21 right holder versus -- what was the executive
22 director's position on that in your brief?

23 MS. SMITH: We've taken the position
24 that it can be the water right holder or the discharger
25 or a third-party person that has a contract for that

1 water.

2 COMMISSIONER SOWARD: But with a new
3 priority date?

4 MS. SMITH: Sorry?

5 COMMISSIONER SOWARD: New priority date?

6 CHAIRMAN WHITE: In a legal sense for
7 any of those three parties.

8 MS. SMITH: Right. If it's been
9 historically discharged, it would get a new priority
10 date.

11 CHAIRMAN WHITE: Well, if that's an
12 adequate answer to the question, I agree. Could be
13 either of those. Not considering any specific facts
14 legally, could be any of those parties.

15 COMMISSIONER SOWARD: Okay. You said
16 the original appropriator.

17 MS. SMITH: Discharger.

18 COMMISSIONER SOWARD: The discharger.

19 MS. SMITH: And a third-party person
20 that has an actual contract for that water.

21 COMMISSIONER SOWARD: Well, if you treat
22 it as a new appropriation with a new water priority
23 date, I'm trying to think if it makes any difference.

24 MS. SMITH: It's depending on the water
25 availability analysis.

1 COMMISSIONER SOWARD: Well, I know.
2 We're -- we don't have an agreement on that. I mean, I
3 would submit then you've got to do a new analysis if
4 it's other than the appropriator. Otherwise, we're --
5 I agree with Commissioner Marquez. We're losing the
6 practicality of this with all the legal nuances. I
7 mean, we've got an issue here in which we don't have
8 enough water to meet this state's demands in the coming
9 years and so we're going to have to start looking at
10 the water policy.

11 And, Chairman White, I agree with you that
12 the laws of this state currently have a separate system
13 of groundwater and surface water. But as I'm sure
14 you've heard me say before, I don't think that can
15 continue and meet this state's water demands, water
16 supply needs. And to the extent we can begin to make
17 the state's water policy more practical, I think we
18 should. And I just don't see how we can start
19 segregating all these things out. You know, it's water
20 going back in the river. We need to make sure that
21 it's, you know, available for meeting needs.

22 CHAIRMAN WHITE: Well, but I take -- I,
23 as I said, would far prefer to err on the side of
24 caution in making issues as far as practical permitting
25 issues that alters what I see as it's not ours to alter

1 in terms of those two currently legal interests.

2 For the standpoint of this discussion
3 today, though, the -- since we're not choosing, we're
4 saying or, as the question -- as you answered the
5 question, Robin, yeah, I think legally all, you know,
6 those -- the original appropriator, the discharger or
7 person who has contracted with the appropriator or the
8 discharger can apply for a reuse permit.

9 COMMISSIONER SOWARD: But with a new
10 priority date and treat it as a new appropriation with
11 whatever water availability analysis we decide.

12 CHAIRMAN WHITE: Yes. But the simplest
13 way if you're talking about practical to me would be
14 they're all new appropriations and they all -- then we
15 don't have reuse -- we don't have reuse as another
16 category in the water code. To me that is
17 inappropriate and hence why we're wrestling with this
18 as something somehow not exactly the same.

19 MS. SMITH: Getting back to the word
20 water, and see, I guess water could be groundwater too,
21 so that --

22 CHAIRMAN WHITE: Well, I --

23 MS. SMITH: That's a little different
24 too, so -- just another little complexity there.

25 COMMISSIONER SOWARD: Well, reuse is

1 only used in 11.042 except, you know, it talks in
2 11.046 if you reuse it prior to releasing it in the
3 water course. But 11.046 doesn't contemplate indirect
4 reuse, I don't believe. It's -- I believe it
5 contemplates a new appropriation once you put it in the
6 water course. But that's just --

7 CHAIRMAN WHITE: Has there been anything
8 resembling a response to Question 3 so we can move on?
9 The notice question is the next one. So the options
10 are whether a smaller subset of downstream water
11 holders versus the full basin, how have these issues
12 arisen in your previous permit.

13 MR. CHENOWETH: Well, our rule --

14 CHAIRMAN WHITE: As something more than
15 an administrative challenge.

16 MR. CHENOWETH: Well, our rules
17 generally allow -- well, they require a downstream
18 notice for these reuse, indirect reuse applications.
19 Of course, the -- we can notice anybody else in the
20 executive director's opinion that might be affected.
21 And we're at least theoretically seeing the
22 possibilities of some upstream effects too when -- if a
23 downstream water right is going to get shorted, then
24 they might be -- they might still get their water but
25 they would be exercising calls against people upstream

1 of the reuse application. And so we're trying to
2 resolve these on a case-by-case basis, but it's -- the
3 argument could be made that -- that upstream folks are
4 in general possibly affected as well. Therefore, we
5 should be doing full basin notice.

6 CHAIRMAN WHITE: There are thousands in
7 some cases, right?

8 MR. CHENOWETH: Potentially.

9 COMMISSIONER SOWARD: But if this were a
10 new appropriation outside the concept of reuse, it
11 would be full basin notice.

12 MR. CHENOWETH: That's correct,
13 Commissioner.

14 CHAIRMAN WHITE: Was that answered by
15 the consensus we've had limited to the historic surface
16 based? A new appropriation, does that answer that
17 question?

18 COMMISSIONER SOWARD: So we're saying
19 we're going to require full basin notice?

20 MR. CHENOWETH: You tell me,
21 Commissioner.

22 CHAIRMAN WHITE: Well, I'm --

23 COMMISSIONER SOWARD: I'm all for it.

24 CHAIRMAN WHITE: A lot of these things
25 are difficult to talk about without facts in front of

1 us. I can imagine permits where -- which -- where it
2 seemed warranted and ones where factually notice to
3 1,200 water right holders doesn't.

4 COMMISSIONER MARQUEZ: Let me make sure
5 I understood what you said about the upstream holders
6 being affected. It would depend on their priority
7 date, right?

8 MR. CHENOWETH: That's correct.

9 COMMISSIONER MARQUEZ: Junior rights
10 upstream could be affected because a senior right
11 downstream --

12 MR. CHENOWETH: Has to start calling on
13 that junior -- on that junior right.

14 COMMISSIONER MARQUEZ: So from a -- are
15 there any other circumstances under which upstream
16 holders would be affected that you've run into?

17 MR. CHENOWETH: Not that I can think of.

18 COMMISSIONER MARQUEZ: Because, you
19 know, I see full basin notification, it's -- yeah, it's
20 a way of doing it, but really we're really talking
21 about more junior rights than -- I don't know where
22 you -- where you get that line. A very senior right
23 upstream will never get affected by an upstream one.
24 There may be a date that provides something less than a
25 full basin notification being necessary. And I don't

1 know that it's worth even doing it. I'm just trying to
2 understand it.

3 COMMISSIONER SOWARD: When you do your
4 no-harm analysis, do you look at upstream senior
5 rights?

6 MR. CHENOWETH: Yes, we do. We look at
7 all the rights.

8 COMMISSIONER SOWARD: That seems if we
9 look at all the rights to determine no harm, we ought
10 to give all the rights an opportunity to know about it.
11 If there's -- if it's a given that there's no way a
12 reuse permit can affect an upstream senior, then that's
13 one thing. But obviously you look at it to make sure
14 that's not the case. It's not a given.

15 CHAIRMAN WHITE: It's not historically
16 based return flows.

17 MR. CHENOWETH: Well, if -- if we're
18 talking about purely future return flows, then -- then
19 we don't do an availability analysis.

20 CHAIRMAN WHITE: Now, it seems as if
21 this issue on a fuller basin notice is perhaps relevant
22 only to historically based return flows. Any further
23 comments on this?

24 COMMISSIONER SOWARD: Do we have an
25 agreement on that? Are we -- are we all okay with full

1 basin notice for historically surface water return
2 flows?

3 CHAIRMAN WHITE: And the next question,
4 N, is not difficult if we exclude groundwater in the
5 legal sense. If it is a priority date and if we're
6 talking about historically discharged surface water
7 based if it has a priority date, doesn't that answer
8 that question?

9 MR. CHENOWETH: Yes, it --

10 CHAIRMAN WHITE: And sets aside the
11 issues on --

12 MR. CHENOWETH: Groundwater based, yes.

13 CHAIRMAN WHITE: Or developed water.

14 MR. CHENOWETH: Right.

15 CHAIRMAN WHITE: Which I am setting
16 aside, I mean, so the -- unless -- because I think to
17 answer those -- to answer this Question 5 on
18 groundwater based reuse applications or new water would
19 require us resolving what I don't believe we could
20 resolve today.

21 COMMISSIONER SOWARD: My only concern,
22 we have, I believe, 18 pending reuse applications.

23 MR. CHENOWETH: We got two more this
24 week, Commissioner.

25 COMMISSIONER SOWARD: Oh, we've got 20.

1 MR. CHENOWETH: We've got 20.

2 COMMISSIONER SOWARD: So until we decide
3 these, how do we proceed on those 20?

4 CHAIRMAN WHITE: I think we need to
5 unless we -- and we often make decisions by the first
6 permit that comes up, which I don't think is
7 necessarily desirable because you do it on the basis of
8 a specific set of facts rather than preferably
9 something which was taking a broader perspective. But
10 I just didn't see how today --

11 COMMISSIONER SOWARD: Well, I don't know
12 about the two you just got, but 16 of the 18 that I had
13 are protested, so they're going to go through some
14 process. So I think we have some -- some time there.
15 But it just seems to me with -- we've always tried to
16 make sure that we didn't change the rules in the middle
17 of the game.

18 CHAIRMAN WHITE: Right.

19 COMMISSIONER SOWARD: Seems to me we
20 need a time-out in the game until we decide the rules,
21 we not process any reuse applications until we decide
22 these issues. I think file them and they'll get a
23 potential priority date, but we shouldn't proceed to
24 process them until we know what the policy's going to
25 be.

1 CHAIRMAN WHITE: I agree with you. I
2 think that it is -- it's difficult to do on a purely
3 legal policy hypothetical manner. And I would like --
4 I'm willing to, you know, reconsider it in that manner
5 if that's our only alternative at this point, but I'd
6 like to -- I would not like to be forced to a
7 conclusion today.

8 And that Question 6, we have an Option A,
9 it's still in position. It's direct reuse which is --
10 does not require a authorization.

11 COMMISSIONER SOWARD: I assume we've
12 already answered that one. If you put it -- if you put
13 it in the water course, you're going to have to get a
14 bed and banks one way or the other, groundwater or
15 surface water. Somebody's going to have to get it.

16 CHAIRMAN WHITE: Right.

17 MR. CHENOWETH: Well, and I guess -- I
18 guess the situation this was trying to address may be
19 more of a hypothetical situation, but it's where the
20 wastewater discharger and a third party enter into a
21 contract whereby the wastewater discharger says, okay,
22 I'm going to release any claim I have on my effluent;
23 you, the third party, are going to have to come in for
24 a bed and banks. And then because of the -- whatever
25 availability analysis or because of whatever special

1 conditions that we place on it for environmental flows,
2 that person may not get a bed and banks authorization.

3 CHAIRMAN WHITE: Or one for less than
4 the amount of water that was --

5 MR. CHENOWETH: That was requested. And
6 this was just to make sure that you're comfortable with
7 that person that is undertaking that risk when they
8 enter into such a contract before somebody's got a bed
9 and banks authorization.

10 COMMISSIONER MARQUEZ: I would
11 anticipate that that be a continued contract, you know.
12 The purchaser I don't think would just go ahead and
13 sign a contract regardless of the outcome of the bed
14 and banks authorization. Continued on so much, you
15 know, depending on how much water they actually get
16 from the commission.

17 MR. CHENOWETH: Okay. Well --

18 CHAIRMAN WHITE: The statute seems to be
19 clear that however we construe the reuse authorization
20 they're subject to carriage losses, impact on other
21 water rights or in-stream flows.

22 MR. CHENOWETH: Commissioners, if I may,
23 I just wanted to make sure that I understood with
24 regards to the pending permits that we'll hold on to
25 all of those, even the contested ones, until we get --

1 CHAIRMAN WHITE: We'll what?

2 MR. CHENOWETH: Will we not further
3 process those until --

4 CHAIRMAN WHITE: I don't -- I mean, I
5 think we better reflect here on how we intend to
6 proceed.

7 COMMISSIONER SOWARD: How many were at
8 SOAH?

9 MS. SMITH: Just one at SOAH right now.

10 COMMISSIONER SOWARD: Just one at SOAH.

11 MS. SMITH: Right now.

12 CHAIRMAN WHITE: How many -- well, I
13 would hazard an opinion that permits that have passed
14 the stage of technical completeness I would not alter
15 or hold. I think my opinion they should --

16 COMMISSIONER SOWARD: I strongly
17 disagree because we've got some major reuse permit
18 applications in-house that are going to significantly
19 impact the amount of water available in these streams.
20 And, I mean, if we're not going to make a policy
21 decision that affects some of these major applications,
22 then, you know, I don't know what we're doing. I
23 mean --

24 CHAIRMAN WHITE: Mr. Marquez? I think
25 we get into murky water when we -- I can think it comes

1 up frequently, we change the process in the latter
2 hours of the process.

3 COMMISSIONER SOWARD: It's not the
4 latter hours. We can send these applications back and
5 say, you know, conform your application to our policy,
6 or we can instruct staff to evaluate the application
7 consistent with the new policy. These are too --

8 CHAIRMAN WHITE: We can do that when --
9 if they proceed in the normal process as we remand or
10 continue or amend.

11 COMMISSIONER SOWARD: Well, I guess I
12 have some comfort in the fact that all of these are
13 protested and they're going to come in front of us, so
14 we'll get to decide and I'll get to vote no, I guess,
15 on some of them. But those that are uncontested, I
16 mean, we've had two uncontested reuse permits issued
17 since we last had a work session on this issue. And
18 that concerns me because, you know, that -- I just --
19 this is too huge of an issue to ignore.

20 CHAIRMAN WHITE: Yet I think another
21 recent one that was ultimately not contested was a very
22 carefully wrought permit that really addressed all the
23 issues I think we're talking about as far as impact on
24 water right holders, in-stream flow values and all of
25 that.

1 COMMISSIONER SOWARD: And as we all
2 recall, there was a lot of discussion about that
3 particular application, even though it was agreed to
4 and the impact it was going to have. Well, like I
5 said, I think 16 of these will come in front of us. We
6 can decide how they're going to be handled. But it
7 does concern me that whatever these applications
8 request that we ultimately decide them consistent with
9 the policy that we're trying to establish and not
10 some -- we don't have a policy heretofore. We have a
11 practice but not a policy. So it seems to me we need
12 to process these applications or eventually decide them
13 based on what policy the three of us adopt.

14 CHAIRMAN WHITE: Well, as far as process
15 it would be my opinion to distinguish those who have
16 passed the stage of technical completeness and in all
17 the manner in which from the general authority we have
18 to remand or amend, you know, questions of major
19 conflict with a new policy would be more appropriately
20 be addressed.

21 COMMISSIONER MARQUEZ: How many have
22 passed technical completeness now out of the 20?

23 MR. CHENOWETH: Seven.

24 COMMISSIONER SOWARD: Then, Todd, out of
25 that how many of those are uncontested?

1 MR. CHENOWETH: All of those are
2 contested at this point. I would point out that they
3 all have the potential to settle.

4 COMMISSIONER MARQUEZ: I guess a
5 commissioner always has the option to call a hearing on
6 his or her own.

7 CHAIRMAN WHITE: Actually on water
8 rights what did we -- yeah, on water rights one
9 commissioner. Didn't we --

10 MS. SMITH: The statute.

11 COMMISSIONER SOWARD: Then I'm
12 satisfied.

13 CHAIRMAN WHITE: So satisfied with
14 technical completeness moving without --

15 COMMISSIONER SOWARD: I just think that
16 we're sending the wrong message that we're about to
17 pronounce some major policy but it's okay, go ahead and
18 process all of these applications under some policy or
19 practice that may not be the one we're about to adopt.

20 COMMISSIONER MARQUEZ: And we've done
21 that a number of times on a number of subjects, so I'm
22 not -- and I wish we were more efficient and could make
23 decisions faster, but I don't think we're going to get
24 some policy decisions here fast enough to -- the
25 alternative is to put a moratorium. To me that's the

1 alternative. You put a moratorium, you will not move
2 any more forward.

3 COMMISSIONER SOWARD: And that'll
4 facilitate us pronouncing the policy.

5 COMMISSIONER MARQUEZ: And for six
6 months, and we'd come in to six months to have a
7 policy? Is that what you'd really want to do? Those
8 seven permits that are pending and while we
9 (inaudible).

10 COMMISSIONER SOWARD: I just think it's
11 better than having a hodgepodge of permits out there
12 affecting a significant amount of water in this state.

13 CHAIRMAN WHITE: But I'm not persuaded
14 that we have a hodgepodge of permits. We have issued
15 historically how many indirect reuse permits, something
16 like 35 or something like that?

17 MR. CHENOWETH: Something like that.
18 Slightly less than that, I believe.

19 COMMISSIONER SOWARD: Is it contemplated
20 that these 20 will be handled as a new appropriation
21 with a new priority date?

22 MR. CHENOWETH: As it stands -- as it
23 stands right now, it would --

24 COMMISSIONER SOWARD: I'm asking policy.

25 MR. CHENOWETH: The policy right now or

1 the practice, as you put it, right now is it looks like
2 a duck. I'm not -- I'm just trying to say that we're
3 saying not a new appropriation but it would carry a new
4 priority date.

5 CHAIRMAN WHITE: And again, since we can
6 talk about finally issued things, Tarrant County is
7 somewhat like that, correct?

8 MR. CHENOWETH: It received a new
9 priority date.

10 CHAIRMAN WHITE: Yes, with a elaborate
11 array of other aspects. I would -- to clarify, I
12 would -- I would not -- I would purport those permits
13 which have passed technical completeness moving forward
14 because I'm not persuaded we're making a revolution
15 here. Perhaps we are.

16 COMMISSIONER MARQUEZ: Say that again.
17 You support them moving forward if they've gone through
18 technical completion?

19 CHAIRMAN WHITE: Yes. That's my -- but
20 I just wanted to say it clearly because I don't know
21 what we're concluding here exactly. With the obvious
22 caveat we have authority to slow, stop. One
23 commissioner can -- in the water code. I would not
24 support a moratorium. I'm very willing to, you know,
25 again, reconsider the remaining issues we have not

1 addressed. And I would, as I said earlier, appreciate
2 if staff would translate what they imagine we had
3 clarified and not clarified as a means of deciding
4 where we move forward. And as I said before, I would
5 welcome also -- isn't that would be legally appropriate
6 would it not, Derek? I mean, we're talking about
7 policy. We're not talking about anything specifically
8 pending or factual.

9 MR. SEAL: You're free to --

10 CHAIRMAN WHITE: I would informally
11 welcome any of those interested concerned about changes
12 we have or may make to raise those issues to me.

13 MR. SEAL: You're certainly free to talk
14 policy.

15 COMMISSIONER MARQUEZ: Derek, I'm stuck
16 on this seven. By the way, I have no earthly idea of
17 who they are. I don't look at future cases, so -- if
18 we look at seven that are technically complete that are
19 going to move forward, they'd be coming to us at some
20 point in time or may be going directly to SOAH and
21 bypassing us for that matter.

22 CHAIRMAN WHITE: Or they might be
23 issued.

24 COMMISSIONER MARQUEZ: Well, you know,
25 that may be (inaudible), I guess, if one commissioner

1 really calls -- chips in and says now I want a hearing.
2 They may be issued if no commissioner asks for it and
3 there's no protest.

4 How much -- assuming they go to SOAH,
5 there's going to be a lengthy period of time before
6 SOAH really gets into the merits of the case, to a
7 hearing. How much discussion can we have and how much
8 policy can we be made and established during that
9 period of time? We've got cases sitting at SOAH. We
10 will always have cases sitting at SOAH, I guess.

11 MR. SEAL: Commissioners, you'll always
12 have cases sitting at SOAH, and that does not preclude
13 you from talking about policy or changing policy. You
14 just can't talk about the particular contested issues
15 and a particular permit. And the closer you get to
16 that line the more risk there is that your decision
17 will be subject to challenge. But as far as talking
18 about policy, we talk about air policy, waste policy.
19 We have lots of air permits at SOAH right now, so it's
20 not an unusual thing.

21 COMMISSIONER MARQUEZ: But those seven
22 would be at SOAH and really may -- whatever arguments
23 are made at SOAH will be based on historical policy
24 and/or practice or rules, not based on the debate that
25 we may be having at the same time.

1 MR. SEAL: They would be based on the
2 policy and the rule and the way the commissioners
3 interpreted that, the staff interpreted those policies
4 and rules at the time they went to SOAH.

5 COMMISSIONER MARQUEZ: At the time they
6 went to SOAH.

7 MR. SEAL: From time to time we have
8 enforcement actions, for example, that are calculated
9 under the 1999 penalty policy. Those older enforcement
10 items, you see those frequently. So I think it would
11 be -- it would be exactly the same thing.

12 COMMISSIONER MARQUEZ: I think it would
13 be important if these seven move on that it be
14 established under which set of conditions they're going
15 to SOAH, which policy or which practices, if we have to
16 change anything before they go to SOAH.

17 MS. SMITH: But there was never an
18 articulated policy or guidance on this, right?

19 COMMISSIONER SOWARD: All we have is the
20 rules which are somewhat ambiguous.

21 MS. SMITH: And we could get --

22 COMMISSIONER MARQUEZ: They'll debate
23 those at SOAH.

24 MS. SMITH: Then again we could get
25 certified questions.

1 COMMISSIONER MARQUEZ: That's right,
2 they could come back to us.

3 COMMISSIONER SOWARD: Let me be totally
4 fair, and I strive not to be arbitrary and capricious
5 even though some would probably disagree with that.
6 But in February, February 25th when we discussed this,
7 here's a statement I made. And we had talked
8 extensively at the very end about how we were going to
9 address this issue and I said, and I'm quoting, "But it
10 seems to me that we say that anything that is in-house
11 now we will process according to current practice, but
12 anything not in-house now may be subjected to a
13 different policy that might be developed by this
14 commission in the next six months."

15 So on February 25th I agreed with you,
16 and I'm willing to live by that. But I do think
17 that -- and I -- and I'm looking at the list and I see
18 of the 18 that I have, all of them were prior to
19 February 25th. So it would -- I think we're only
20 talking about the two that's come in recently that
21 would kind of fall under this. But as to me, I think
22 that -- I'm going to evaluate any application for reuse
23 that comes in front of me based on the policies that I
24 believe this commission are putting in place. They may
25 not be different that much than what the staff is

1 proceeding on, but I think this is too important an
2 issue for the state not to make the best decision we
3 can without regard to the dates that something gets
4 filed. I just think this -- I've always agreed with
5 you that we shouldn't change the rules in the middle of
6 the game, but this is too important an issue not to
7 take a really serious look at it no matter what time
8 the application was filed. But I'm going to agree with
9 you on the 18.

10 CHAIRMAN WHITE: Blas?

11 MR. COY: Chairman, we've submitted a
12 brief and we appreciate y'all taking it into
13 consideration. I have nothing further.

14 CHAIRMAN WHITE: Ken Ramirez is the only
15 person signed up wanting to speak. Do you still want
16 to?

17 COMMISSIONER SOWARD: Otherwise, he
18 can't get paid.

19 MR. RAMIREZ: Good morning. Is it still
20 morning? Commissioner White, Chairman White,
21 Commissioner Marquez, Commissioner Soward, Mr. Seal.
22 Thanks for the opportunity to visit about this today.
23 We too wish the legislature had shed light on this
24 issue because it's put you-all in a very difficult
25 position of having to do it yourselves. I think it's

1 safe to say that this is one of the most complex and
2 difficult issues currently in Texas water law and water
3 policy. If I'm not mistaken, you all are in your sixth
4 or seventh hour of having work sessions on just this
5 issue alone if you combine today with February 25 which
6 should bespeak that.

7 But that's also one of our chief
8 concerns. And I'm here, by the way, representing the
9 City of Austin. This effluent reuse issue raises
10 unique and complex issues, and of the now 20
11 applications that you have in front of you I'm willing
12 to bet you that every one of them's different than the
13 other one. Therefore, a one-size-fits-all method of
14 managing every one of these applications strikes me as
15 possibly being a little oversimplified. There's
16 enormous complexity in these applications depending on
17 who filed the application, depending on which basin
18 it's in, depending on who's downstream, depending on
19 senior water rights versus junior water rights,
20 depending on environmental flows, depending on all
21 kinds of conditions that really do differ application
22 by application, river basin by river basin.

23 We came today really prepared to talk about
24 the substance of this and we will talk about that for a
25 minute, but now I must say I'm more captured by the

1 process. I know that the commissioners are mindful of
2 the strictures of the Administrative Procedures Act and
3 the need to go through formal rule making when the
4 commissioners are making an interpretation of law that
5 has a sweeping impact. I can't imagine anything that
6 has a more sweeping impact than the discussion that
7 you're having here today, and it seems to me that you
8 all are -- that you are engaged in the process of
9 interpreting the law.

10 It sounds to me like you're interpreting
11 11.042, 11.046, and perhaps even 11.134. That seems to
12 me to be the kind of thing that needs to be done
13 through rule making. I completely agree with the
14 concept that the applications that are currently on
15 file need to be held, should not be processed until you
16 all have a chance to conclude this process, whether
17 that be through rule making or through a final policy
18 determination.

19 And let's face it, the practical matter is,
20 the commission is enunciating positions here today on,
21 for example, whether these ought to have a new priority
22 date, whether they ought to have a new -- whether there
23 ought to be a new appropriation. And your staff is
24 sitting here listening to that. Having spent four
25 years of my life working at this agency, if I were

1 them, I think I know what policy I would implement
2 based upon this discussion. I would -- I would hazard
3 a guess that's a dangerous situation to put everybody
4 in. I do think that you're -- that you are possibly
5 running against that admonition of changing the rules
6 after the applications have been filed. And so we
7 would strongly encourage the commissioners -- I'm
8 sorry, to -- to urge the staff not to process
9 applications until you finish your deliberations and
10 come out with either a policy or a rule, whichever you
11 think is most appropriate.

12 I'm just going to, if I can, take a couple
13 more minutes and address a couple of the substantive
14 issues if I may, most especially the new appropriation,
15 new priority. What concerns us about your
16 interpretation is that 11.042 says nothing about new
17 appropriations and new priority, never mentions it.
18 That silence has to be meaningful, and that silence has
19 to be instructive. If the legislature had wanted bed
20 and banks permits to be a new appropriation with a new
21 priority, they could have said so. They didn't. And
22 this is as recent as 1997. There is no language in the
23 statute that supports that conclusion. What's more,
24 this agency has abundant authority to apply any special
25 conditions you think are necessary to protect

1 environmental flows, to protect downstream water right
2 holders, to protect basin estuaries, whatever you think
3 is necessary. The statute is filled with the authority
4 for you to do that.

5 I fear that the new priority, new
6 appropriation concept is perhaps a -- attempting to
7 adopt, because it makes it simple, it would indeed make
8 it simple, there's no doubt about that, but we don't
9 support that from a legal standpoint. We believe that
10 would be legally incorrect.

11 I'm basically going to scrap the rest of my
12 comments because I kind of got caught up on the process
13 here. The only thing I would say in conclusion is that
14 at least from a municipal standpoint, the standpoint of
15 municipalities or at least the one I represent, please
16 remember that municipalities have an enormous
17 investment in infrastructure and diversion facilities,
18 treatment facilities, distribution facilities,
19 wastewater facilities, water treatment plants,
20 et cetera, millions and millions of dollars on the
21 line, and that to these cities, at least to the city I
22 represent, effluent is an asset that needs to be very
23 carefully preserved and protected.

24 The second concept that I would leave you
25 with is an example, and it's a very real example.

1 Sewage treatment plant with a power plant let's just
2 say 5 miles downstream. Power plants are the perfect
3 use for reclaimed water. I myself have worked on seven
4 different projects where a municipality has provided
5 reclaimed water to a power plant for cooling purposes,
6 ideal use.

7 There's two choices if you want to use
8 effluent or reclaimed water at that power plant. You
9 can build a pipeline for an amount that would probably
10 exceed \$5 million to get it 5 miles downstream and make
11 it direct reuse. You can let the bed and banks convey
12 that effluent 5 miles downstream and take it back out
13 again, accounting for losses, et cetera, and spend
14 almost nothing. That's an extremely important policy
15 consideration because it puts the municipality in the
16 position of having to spend enormous sums of money to
17 do direct reuse when it really wouldn't be necessary.
18 And I'm going to conclude my comments at that point.
19 Thank you very much for your consideration. I'm happy
20 to stand for questions if you'd like.

21 CHAIRMAN WHITE: And I just want to make
22 a quick comment as far as -- and some of your early
23 comments about, you know, what we're doing, whether it
24 should be in the form of a promulgated rule or
25 articulated policy document, all that. I'm aware of

1 all those questions and I haven't concluded because I
2 don't believe -- I mean, we have discussion here. We,
3 as you said, articulated some individual positions and
4 I'm going to look at, you know, how staff understood
5 and what we've done and reflect on what is the most
6 appropriate legal means --

7 MR. RAMIREZ: Sure. I understand.

8 CHAIRMAN WHITE: -- to conclude that.

9 MR. RAMIREZ: I know you will.

10 COMMISSIONER MARQUEZ: Again, you make a
11 real good example there to finish your talk on
12 transporting the water, you either spend \$5 million for
13 a pipeline and about all the hassle or do it for free
14 by sending it down the public waterway. If you're
15 looking at saving \$5 million, wouldn't it be worthwhile
16 just giving back to the state 1, 2, 3, 4, 5 percent of
17 that water?

18 MR. RAMIREZ: You mean rather than take
19 it all down there?

20 COMMISSIONER MARQUEZ: As a, you know,
21 as a transportation fee.

22 MR. RAMIREZ: You're back on the
23 surcharge.

24 COMMISSIONER MARQUEZ: I want to make it
25 clear. I'm going to keep harping on that one and if

1 there get to be some compromises as far as what we do
2 with some of the waters that get discharged, I'm going
3 to be -- I'm going to be in the middle of that one.

4 MR. RAMIREZ: I would say, you know,
5 taking off my hat as a practitioner and putting on my
6 hat as someone who likes to talk about this stuff, you
7 may be right. A surcharge might be a good idea.

8 Let me also point out in the case of the
9 City of Austin has donated, if you will, 15 percent of
10 its effluent to the state water trust so that that
11 water will remain in the basin for whatever purposes.
12 That's 15,000 acre-feet, by the way.

13 COMMISSIONER SOWARD: And, Commissioner
14 Marquez, you may have a friend somewhere on that issue.

15 Let me say, Ken, you do make one good point.
16 Or you make a number of good points, but one that
17 struck me is the one size fits all. I mean, that cuts
18 both ways, of course. But, you know, in your example,
19 which I find interesting, is you're talking about a bed
20 and banks for reuse of a non-consumptive purpose. And
21 so that's a different animal. If you run the water
22 through a power plant, it's non-consumptive for the
23 most part.

24 MR. RAMIREZ: Well, there is -- there
25 will be return, return flows, if you will.

1 COMMISSIONER SOWARD: And so that's a
2 little different issue than if you use a bed and banks
3 to another entity that consumes all or almost all of
4 that water. So I agree with you that on one size fits
5 all it's not practical. It's just going to be a
6 challenge to how to -- how to articulate a policy
7 whether in rule or otherwise that would recognize the
8 ability to be flexible.

9 MR. RAMIREZ: And we look forward to
10 continuing with this dialogue with you-all. Thanks
11 very much.

12 CHAIRMAN WHITE: Any additional comments
13 at this point? This concludes our -- no, we have one
14 more item.

15 MS. SMITH: Madam Chairman, could I just
16 ask, did you want to put a time line on what we give
17 you and then maybe a time line for response to that?

18 CHAIRMAN WHITE: What would you propose
19 as viable for you-all? Obviously we all sense a
20 timeliness of this, so I would like it to be front
21 burner, but --

22 MS. SMITH: I think Todd wants to kill
23 me, but --

24 MR. CHENOWETH: It's -- I'm just
25 thinking that this is going to take a little upper

1 management deliberation, so I'm thinking six weeks
2 would probably be -- well --

3 CHAIRMAN WHITE: What does upper
4 management think?

5 MR. CHENOWETH: I can say -- you tell me
6 then. Chairman, six weeks does seem a little bit long.
7 Maybe three or four weeks might be more appropriate.

8 COMMISSIONER MARQUEZ: So we would be
9 looking at having some of those briefing papers and
10 then scheduling another work session subject to --

11 MS. SMITH: Were you thinking you'd get
12 our statement and all the briefs at one time that
13 people want to give or that we would do a statement
14 first and they would file a brief after that?

15 COMMISSIONER MARQUEZ: Aren't there
16 enough briefs already here?

17 CHAIRMAN WHITE: Well, I mean, they
18 didn't know how we would respond to their brief, as you
19 see from one of -- commenter.

20 COMMISSIONER MARQUEZ: If there are new
21 comments, I think I'd welcome the brief. If it's a
22 repetition of what we've already received, you know --

23 CHAIRMAN WHITE: But we're all different
24 and if someone wants to respond, I just wanted to
25 welcome further input. I don't --

1 COMMISSIONER MARQUEZ: Just, you know,
2 mark the pages of what you're repeating so I don't have
3 to look at it.

4 CHAIRMAN WHITE: Is there anything just
5 again for the timeliness of this and all the issues
6 about permits in-house? Could it be simultaneous?

7 MS. SMITH: Three weeks.

8 CHAIRMAN WHITE: If there's no further
9 comment, thank you all for your patience as we struggle
10 through this. I think we all realize the importance of
11 it and the complexity of it if nothing else. I see
12 some shaking their hands, shaking their heads.

13 UNIDENTIFIED SPEAKER: Chairman, could I
14 just ask for a clarification on exactly what direction
15 the commissioners gave staff as far as moving forward
16 from the February 25th work session, what -- how -- the
17 difference between the now as I understand the 16
18 permits that were still pending on -- or that were
19 filed on February 25th and then there was a discussion
20 about the seven that have passed technical
21 completeness. I may be the only one confused about how
22 we're going to process with that.

23 CHAIRMAN WHITE: No, I -- yeah, because
24 actually your statement was general enough. In-house
25 was actually broader than what I said.

1 COMMISSIONER SOWARD: I agree. I guess
2 what I was saying is I am -- I'm going to live by what
3 I said on February 25th, and that is if it was in-house
4 on that date it will be processed under the then
5 current practice. But let me hasten to say that my
6 evaluation of those applications when they come in
7 front of me will be based on what I perceive to be the
8 policy at that time.

9 And I may be just one of the three of us, but
10 I think staff was told on the 25th to take the
11 applications that were in-house on that day and proceed
12 to process them with -- as -- with the practice that
13 was in place on that day. We didn't really
14 differentiate between technically complete or not. We
15 just said whatever's in the door. Because we talked
16 about if we put some future date, all these brilliant
17 lawyers out here will rush out and file an application.
18 So we said, okay, we're going to close the door today.
19 If you're in the barn, great. But -- so I really
20 didn't differentiate between technical completeness
21 and I just said in-house. If it's filed -- because the
22 filing date is the priority date, if there is a
23 priority date, not the technical completeness date. So
24 that's kind of why I was saying if it's in-house on
25 that day --

1 CHAIRMAN WHITE: I would support that,
2 and we agreed to that at the February 25th.

3 COMMISSIONER SOWARD: And the only
4 reason I'm willing to do that is because I said I would
5 do it on the 25th. I'm not sure I made the right
6 decision on the 25th, but I'll live with it.

7 CHAIRMAN WHITE: Is that clear enough?

8 UNIDENTIFIED SPEAKER: Thank you,
9 Commissioners.

10 CHAIRMAN WHITE: Any additional
11 questions from the staff? And for any of those that
12 feel this is fraught with peril, and I think it is, I
13 don't feel we have a choice because of the statutory
14 ambiguity, in my opinion.

15 MR. CHENOWETH: I'm sorry,
16 Commissioners. So I'm to understand that for those
17 applications filed after February 25th I am not to
18 process those or I'm to process them but they may be
19 subject to a new policy?

20 COMMISSIONER SOWARD: That's what we
21 said on the 25th.

22 CHAIRMAN WHITE: The latter.

23 MR. CHENOWETH: Okay. The latter.
24 Thank y'all.

25 (End of Discussion on Item No. 3)

REPORTER'S CERTIFICATE

I, KAREN L. SHELTON, CSR No. 7050, Certified Shorthand Reporter, certify that the foregoing is a correct transcription from the tape recording of the proceedings in the above-entitled matter.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to the action in which this hearing was taken, and further that I am not financially or otherwise interested in the outcome of the action.

SUBSCRIBED AND SWORN TO under my hand and seal of office on this the 8th day of December, 2005.

Karen L. Shelton

KAREN L. SHELTON, CSR No. 7050
Expiration: 12/31/2006
Curtis & Curtis Court Reporting
Firm Registration No. 442
7005 Terrace Green
Fort Worth, Texas 76179

4. **Discussion of state and federal legislative issues potentially affecting the TCEQ. The commission may consider legislative proposals and federal rulemakings, as well as other state actions and state's participation in federal legislative and regulatory activities.**

Presented by Leonard Olsen.

No Action Taken

5. **PUBLIC COMMENT SESSION: The Commission will receive comments from the public on any matters within the jurisdiction of the TCEQ, with the exception of pending permitting matters or other contested cases which are subject to the *ex parte* prohibition found in Texas Government Code §2001.061. In the interest of time, speakers will be limited to three minutes each, with the total time for public comment limited to one hour.**

Jim Braddock, of Haynes and Boone, representing Onyx Energy International addressed the Commissioners regarding the Texas Low Emission Diesel Program.

No Action Taken.

6. **Planning for the next Commissioners' Work Session.**

Brian Christian announced that the next Commissioners' Work Session will be held September 16, 2005. In addition to the standing issues regarding state and federal legislation, the enforcement report, public comment session and planning for subsequent work sessions, the September 16, 2005 work session will include the 2006 Biennial Audit Report, a presentation by Keep Texas Beautiful, 2006 Draft Workplan from OCE, and the agency's Enforcement Review regarding Compliance History Components, Classification and Use.

7. **Closed Session:**

- a. **Docket No. 2005-1137-EXE. The Commission will meet in closed session to deliberate the appointment, employment, evaluation, reassignment, duties, discipline, or dismissal of the Commission's Executive Director, as permitted by Section 551.074 of the Texas Open Meetings Act, Chapter 551 of the Government Code. The Commission may also meet in open session to take action on this matter as required by Section 551.102 of the Texas Open Meetings Act, Chapter 551 of the Government Code.**

No Action Taken.

- b. **Docket No. 2005-1138-EXE. The Commission will conduct a closed meeting to receive legal advice and will discuss pending or contemplated litigation, settlement offers, and/or the appointment, employment, evaluation, reassignment, duties, discipline or dismissal of specific Commission employees, as permitted by Sections 551.071 and 551.074, the Open Meetings Act, codified as Chapter 551 of the Government Code. The Commission may also meet in open session to take action on a legal or personnel matters considered in the closed meeting as required by Section 551.102 of the Texas Open Meetings Act, Chapter 551 of the Government Code.**

No Action Taken.

- c. **Docket No. 2005-1139-EXE. The Commission will conduct a closed session to discuss their duties, roles, and responsibilities as Commissioners of the TCEQ pursuant to Section 551.074 of the Open Meetings Act, Codified as Chapter 551 of the Government Code. The Commission may also meet in open session to take action on this matter as required by Section 551.102 of the Texas Open Meetings Act, Chapter 551 of the Government Code.**

No Action Taken.

(PERSONS WITH DISABILITIES WHO PLAN TO ATTEND THE TCEQ COMMISSIONERS' WORK SESSION AND WHO MAY NEED AUXILIARY AIDS OR SERVICES SUCH AS INTERPRETERS FOR PERSONS WHO ARE DEAF OR HEARING IMPAIRED, READERS, LARGE PRINT, OR BRAILLE ARE REQUESTED TO CONTACT THE OFFICE OF THE CHIEF CLERK AT (512) 239-3300 AT LEAST TWO (2) WORK DAYS PRIOR TO THE AGENDA, SO THAT APPROPRIATE ARRANGEMENTS CAN BE MADE. PERSONS WHO DESIRE THE ASSISTANCE OF AN INTERPRETER IN CONJUNCTION WITH THEIR ORAL PRESENTATION AT THIS TCEQ AGENDA ARE REQUESTED TO CONTACT THE OFFICE OF THE CHIEF CLERK AT (512) 239-3300 AT LEAST FIVE (5) WORK DAYS PRIOR TO THE AGENDA SO THAT APPROPRIATE ARRANGEMENTS CAN BE MADE.) REGISTRATION FOR AGENDA STARTS AT 9:00 A.M. UNTIL 9:30 A.M. PLEASE REGISTER BETWEEN THESE TIMES. LATE REGISTRATION COULD RESULT IN YOUR MISSING THE OPPORTUNITY TO COMMENT ON YOUR ITEM.)

Chairman Kathleen White
Commissioner Ralph Marquez
Commissioner Larry Soward

MARKED AGENDA

Friday, August 12, 2005

Texas Commission on Environmental Quality

1:30 p.m.
Room 201S, Building E
12100 Park 35 Circle

1. Consideration of the agency's Enforcement Review regarding Compliance History Components, Classification and Use.

Item presented by John Steib, Deputy Director, Office of Compliance and Enforcement, Matthew Baker, from the Office of Permitting, Remediation & Registration, John Sadlier, Director, Enforcement Division, and Paul Sarahan, Director, Litigation Division.

Commissioners discussed items supplied as backup material and recommendations for this item.

The Commissioners requested similar items be grouped together for the September 16, 2005 Work Session. No formal action will be taken on this item until the list is completed.

No Action Taken.