

**SOAH DOCKET NO. 582-22-1990  
TCEQ DOCKET NO. 2021-1391-WR**

**APPLICATION OF SAN ANTONIO § BEFORE THE STATE OFFICE  
WATER SYSTEM FOR WATER USE § OF  
PERMIT NO. 13098 § ADMINISTRATIVE HEARINGS**

**SAN ANTONIO WATER SYSTEM'S  
RESPONSE TO EXCEPTIONS TO THE PROPOSAL FOR DECISION**

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**SAN ANTONIO WATER SYSTEM'S  
RESPONSE TO EXCEPTIONS TO THE PROPOSAL FOR DECISION**

The San Antonio Water System (SAWS or Applicant) hereby timely files its Response to Exceptions to the Proposal for Decision (PFD), and in support thereof would show the following:

**I. INTRODUCTION**

The preponderant record evidence in this proceeding shows SAWS met the requirements for issuance of Permit No. 13098, and establishes that Protestants' water rights were not granted based on the use or availability of SAWS's privately owned groundwater-based return flows. As such, there is no legal basis on which to "protect" Protestants' water rights from SAWS's requested § 11.042(b) authorization. The Commission should issue the Draft Permit with no changes.

However, should the Commission find that Protestants' water rights *were* granted based on SAWS's return flows, SAWS supports the Executive Director's position<sup>1</sup> that permit special conditions are not necessary to "protect" these rights: any potential impact will be adequately mitigated by the South Texas Watermaster's administration of SAWS's § 11.042(b) authorization, by the terms in the Draft Permit, and by the accounting plan. In the event the Commission determines special conditions *are* necessary, remand is required to determine what the existing record evidence would support regarding special conditions necessary to protect the amount of Protestants' water rights the Commission determines were "granted" based on the use or availability of SAWS's return flows during the Lookback Period. The three options recommended

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<sup>1</sup> ED Exceptions to the PFD at 5-6.

by Protestants are inappropriate, unworkable, contrary to public policy, and not supported by the record evidence—thus the Commission should reject them. Protestants’ other exceptions propose changes that are inappropriate and unnecessary. These too should be rejected.

## II. ARGUMENT

It is unsurprising that Protestants’ “exceptions” to the PFD laud the ALJs for following the “guidance” of Protestants’ witnesses who propositioned that Protestants’ certificates of adjudication (CAs) were “granted” based on the use or availability of SAWS’s return flows during the Lookback Period of the water rights adjudication process. It is also predictable that Protestants quickly pivot in an effort to capitalize on the PFD’s naked conclusion by suggesting special conditions in an effort to hastily conclude this case without further scrutiny of the PFD. The ALJs and the Commission should decline Protestants’ invitation.

### **A. Protestants’ exceptions highlight the flawed logic used to support the PFD’s conclusion**

Protestants’ exceptions provide a quote from the PFD that is useful in illustrating the flawed logic relied on by the ALJs in concluding Protestants’ CAs were granted based on the use or availability of SAWS’s return flows: “Based on the facts adduced through hearing, [the ALJs] determined the ‘preponderant evidence indicates that San Antonio’s effluent discharged during the Lookback Period became *available, unappropriated* water upon entering the water course.’”<sup>2</sup> This statement begs the question: If San Antonio’s effluent became unappropriated water upon discharge because it was “no longer appropriated after Permit 1554 was cancelled,”<sup>3</sup> *through what statutory authority did it become appropriated to Protestants?* The short answer to this question

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<sup>2</sup> Protestants Exceptions to the PFD at 9 (emphasis added).

<sup>3</sup> PFD at 45. Permit No. 1554 appropriated to third parties “water purchased by applicants from the City of San Antonio and delivered into the river by said city . . . .” See SAWS Ex. 16 at 040088.

is *none*, because the Water Rights Adjudication Act (the Act) provided no authorization to grant appropriative water rights.

As championed by Protestants in their exceptions, the PFD concludes that the Act was the vehicle through which SAWS's return flows were appropriated to Protestants. But as SAWS has already pointed out,<sup>4</sup> in encouraging the Commission to reach this novel and unprecedented legal conclusion, the PFD contains no legal analysis of the Act, and no conclusions of law to support the premise that SAWS's "unappropriated" return flows were appropriated to Protestants pursuant to the Act. The reason such analysis is absent in the PFD is clear: there is no legal underpinning for the PFD's unprecedented and erroneous conclusion. The ALJs, in discharging their task of reviewing the record as a whole to determine whether Water Use Permit No. 13098, as drafted, includes all necessary special conditions pursuant to Texas Water Code § 11.042(b), including all special conditions necessary to support and protect water rights that were granted based on the use or availability of SAWS's groundwater-based return flows, invite the Commission to issue an order which will reverse decades of agency precedent while providing a dearth of legal support.

Despite Protestants' commendations<sup>5</sup> of the ALJs' proposal, the PFD's conclusion that Protestants' appropriative water rights were "granted" a second time based on their "use" of SAWS's return flows during the Lookback Period of the Act is contrary to Texas Water Code provisions governing the granting of an appropriative water right and the determination of the validity of a claim for an existing water right pursuant to the Act.

As shown in SAWS's exceptions, the granting of an appropriative water right under Texas statutes is accomplished solely pursuant to a permit application, which has always required some

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<sup>4</sup> See SAWS Exceptions to the PFD at 7–14.

<sup>5</sup> Protestants Exceptions at 1.

determination of water availability—although both the legal standards and method of determination have varied over time.<sup>6</sup> Protestants’ appropriative water rights were granted in the 1940s and 1950s, and the record evidence shows that SAWS’s effluent was permitted to third parties through Permit 1554 at that time—thus Protestants’ rights could not have been granted based on the use or availability of SAWS’s return flows.<sup>7</sup>

In contrast to applicable statutes governing the granting of an appropriative water right, the Act was the legislatively-created method for determining the legal validity of claims to water rights that existed *prior* to the adoption of the Act, including appropriative water rights.<sup>8</sup> The Act provides no authority or procedure for determining water available for appropriation, or for the granting of appropriative water rights—and no such authority has been cited in the PFD or by Protestants.

Despite Protestants’ assertions in their exceptions, the PFD’s unprecedented and erroneous conclusion is also contrary to the record evidence in this case, including testimony by Protestants’ own witnesses. The record evidence shows, *inter alia*:

- Protestants’ CAs did not grant Protestants appropriative rights they did not previously have.<sup>9</sup>
- The adjudication process could not grant additional or new water rights.<sup>10</sup>
- Protestants’ CAs did not change the water rights that were granted to them based on the permits they were issued in the 1940s and 1950s.<sup>11</sup>

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<sup>6</sup> SAWS Exceptions at 8–10, 16.

<sup>7</sup> See PFD at 46 (“San Antonio’s discharged effluent was *no longer appropriated* after permit 1554 was cancelled in 1963”) (emphasis added); SAWS Reply to Protestants’ Closing Brief at 15–19.

<sup>8</sup> *In re Adjudication of Water Rights of Brazos III Segment of the Brazos River*, 746 S.W.2d 207, 209 (Tex. 1988) (“The Water Code assigns to the Water Commission the authority to issue water permits upon application after appropriate notice and hearing is given. . . . Section 11.304 of the Water Rights Adjudication Act authorizes the adjudication of water rights, and Section 11.303 *recognizes only those water rights that are valid under existing law.*”) (emphasis added); see also SAWS Exceptions at 10–14.

<sup>9</sup> SAWS Exceptions at 15; Tr. V2 at 152:13–22. (Settemeyer Cross).

<sup>10</sup> SAWS Exceptions at 16; Tr. V2 at 163:20–24 (Settemeyer Cross).

<sup>11</sup> SAWS Exceptions at 15; Tr. V2 at 152:13–22 (Settemeyer Cross).

- The priority date provided in a CA was based on the date the application for the underlying permit was accepted for filing by the state agency.<sup>12</sup>
- CAs were issued without any determination of water availability.<sup>13</sup>
- A legacy water availability model existed at the time Protestants' CAs were issued, but it was not applied in the adjudication process.<sup>14</sup>
- Through the water rights adjudication process, the agency went through a process to determine whether claims to existing water rights would be recognized or not recognized.<sup>15</sup>
- All Protestants CAs were based on the amount permitted in their underlying water rights and none were based on the amount of water actually used during the Lookback Period.<sup>16</sup>
- All of the terms and conditions stated in the underlying permits continue in full force and effect, except for obsolete, irrelevant, or immaterial terms and conditions which were to be deleted from certificates of adjudication when issued.<sup>17</sup>

Protestants' quoted language from the PFD also begs the question of what determination concerning water *availability*, if any, was made in "granting" an appropriative water right to Protestants through the water rights adjudication process. Protestants' own witness, Mr. Settemeyer, answered this question through his direct testimony: "There was no analysis of water availability like the agency performed for new applications for water rights."<sup>18</sup> Accordingly, there was no determination of water availability requisite to the granting of an appropriative water right under Texas law. And as comprehensively articulated by SAWS throughout the hearing and more recently in its exceptions,<sup>19</sup> Protestants' own evidence shows that Texas water statutes in effect at the time Protestants' rights were granted in the 1940s and 1950s clearly stated the process for

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<sup>12</sup> Protestants Ex. 122 at 10.

<sup>13</sup> *Id.* at 16; Protestants' Ex. 400 at 7:35–36 ("There was no analysis of water availability like the agency performs for new applications for water rights."); *see also* Tr. V2 at 152:23–53:3 (Settemeyer Cross).

<sup>14</sup> Tr. V2 at 232:17–20 (Vaugh Cross).

<sup>15</sup> *Id.* at 154:3–55:12 (Settemeyer Cross).

<sup>16</sup> Tr. V3 at 180:4–20 (Brandes Rebuttal).

<sup>17</sup> Protestants Ex. 122 at 4, ¶ 6(d).

<sup>18</sup> Protestants Ex. 400 at 7:35–36.

<sup>19</sup> *See* SAWS Exceptions at 9,16, n.52.

seeking and obtaining an appropriate water right and provided the then-applicable standard concerning water availability.<sup>20</sup>

If SAWS's effluent discharges during the Lookback Period were not diverted by others and remained present in the stream at Protestants' diversion points, they would be "available" in the same sense that *any* unused water, including unconsumed water appropriated to another water right holder, was "available." If present in the stream, such water may be available for diversion for use, but simply using the water available in the stream at any given moment in time would not give rise to a new appropriation. As succinctly stated by the Executive Director's expert witness Dr. Kathy Alexander, "Someone sitting there on the river can certainly divert that water; it doesn't mean they have a claim to it."<sup>21</sup> SAWS joins the Executive Director's exception to the PFD's conclusion that the mere presence of effluent in the stream is "sufficient" to establish that water rights were granted based on the use or availability of return flows.<sup>22</sup>

**B. If the Commission determines Protestants' water rights were issued based on the use or availability of SAWS's return flows during the Lookback Period, any impact is already mitigated by the Draft Permit**

Although SAWS believes both the controlling statutes and the preponderant record evidence cannot lead to any conclusion other than Protestants' water rights *were not granted* based on the use or availability of SAWS's return flows during the Lookback Period, should the Commission find to the contrary, SAWS supports the Executive Director's position that permit special conditions are not necessary to "protect" these rights.<sup>23</sup> Any potential impact to Protestants'

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<sup>20</sup> See Protestants Ex. 616 at Art. 7542–7507. Similar provisions are currently codified at Tex. Water Code §§ 11.121–135.

<sup>21</sup> Tr. V2 at 43:15–16.

<sup>22</sup> ED Exceptions at 8 ("Such an interpretation fails to consider that there is water in a stream besides effluent.").

<sup>23</sup> ED Exceptions at 5 ("If the Commission is persuaded that San Antonio's historic groundwater-based effluent was so appropriated by Protestants, the Executive Director maintains her position that special conditions are not necessary to 'protect' the Protestants water rights.").

water rights is adequately mitigated by the South Texas Watermaster’s administration of SAWS’s § 11.024(b) authorization, by the terms in the Draft Permit, and by the accounting plan.<sup>24</sup> Moreover, the record evidence shows that Protestants’ lower basin water rights were *never* firm.<sup>25</sup>

**C. If the Commission determines special conditions are necessary, remand is required to consider the existing record evidence**

In the event the Commission determines both that: (1) Protestants’ water rights were granted a second time pursuant to the Act based on their use of an undetermined amount of SAWS’s return flows *and* (2) special conditions are necessary to protect these rights, remand is required to determine what, if anything, the existing record evidence would support regarding special conditions necessary to protect the amount of SAWS’ return flows that can be proven to have been the basis for the granting of Protestants’ water rights a second time. On this limited point, SAWS agrees with the Protestants: “the Commission can and should use existing record evidence to draft the special conditions.”<sup>26</sup>

**D. Protestants’ proposed special conditions are inappropriate, unworkable, contrary to public policy, and not supported by record evidence**

As an initial matter, Protestants’ urging in their exceptions that the Commission should hastily rush this proceeding to a close is most evident in their assertion that Executive Director’s Staff should not even be afforded an opportunity to review Protestants’ proposed special conditions.<sup>27</sup> Regardless of how the Commission answers the question of whether any of Protestants’ rights were granted based on the use or availability of SAWS’s return flows and whether special conditions are necessary to protect those rights, SAWS is confident the Commission will take the time

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<sup>24</sup> ED Exceptions at 5–6.

<sup>25</sup> Tr. V2 at 94:6–7 (Perkins Cross) (“I mean, as a whole, all six certificates of adjudication are not firm.”); ED Exceptions at 3 (“None of the Protestants’ COAs are considered to be firm or 100% reliable. At the time the Protestants’ largest water right—permit 1614—was issued, it was not determined to be firm, but it was 98% reliable.”).

<sup>26</sup> Protestants Exceptions at 1.

<sup>27</sup> *See id.* at 3 (“*Rather than remanding to Staff*, the Commission should adopt one of these proposed special conditions and add it to the Draft Permit.”) (emphasis added).



required to get it right, which would include remanding—at a minimum—to allow the Executive Director’s Staff as well as SAWS and OPIC to properly assess and vet any proposed special conditions.

**1. Each of Protestants’ options for a special condition would endanger the bays and estuaries that SAWS seeks to protect through the Application and are contrary to public policy**

Protestants have recommended three options for special conditions to be imposed on SAWS’s requested 11.042(b) authorization. Each shares a common objective of ensuring that during times of drought, Protestants’ appropriative water rights would have unfettered access to SAWS’s privately owned groundwater-based return flows discharged to the river. By denying SAWS the ability to convey, divert, and reuse its own privately owned groundwater-based return flows, each of Protestants’ recommended special conditions would eviscerate SAWS’s primary goal in filing its § 11.042(b) application—to voluntarily commit 50,000 acre-feet of SAWS’s privately owned groundwater-based return flows to water stewardship to assist in maintaining the biological soundness of the State’s rivers, bays, and estuaries consistent with State policy enacted through Texas Water Code § 11.0235(b).<sup>28</sup> As stated by SAWS witness Gregg Eckhardt, “in order to get to the bays and estuaries, [SAWS’s privately owned groundwater-based return flow] has to remain in the river, and that is our objective, *to ensure that even in the dry times that we get some water all the way down the river into the bays and estuaries.*”<sup>29</sup> This need for a reliable source of water for the Guadalupe River’s bays and estuaries, such as that provided by SAWS’s voluntary contribution of its privately owned groundwater-based return flows, is demonstrated by Table 36 of Protestants’ Exhibit 308 showing zero outflows from the Guadalupe River in 18 months from

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<sup>28</sup> SAWS Ex. 1 at 039869:1–16. Notably, the PFD makes no mention of SAWS’s commitment of its currently available surplus return flows to environmental stewardship in support of state policy.

<sup>29</sup> Tr. V1 at 132:13–21.

1952 through 1956 (the drought of record). SAWS's commitment and its requested authorization would provide a reliable source of water to assist in maintaining the biological integrity of Texas's bays and estuaries even during a repeat of the drought of record.

## **2. Priority dates are inappropriate for § 11.042(b) authorizations**

Protestants' Option A invites the Commission to reverse its consistent agency practice by adding a priority date to SAWS's authorization based on the date SAWS's application was accepted for filing. The priority system is based on Texas Water Code § 11.027: "As between appropriators, the first in time is first in right." This doctrine applies *solely* to appropriators, *i.e.* persons who make beneficial use of state water.<sup>30</sup> The PFD acknowledges this reality in FOF 50: "In the City of Bryan interim order, the Commissioners stated that applications under Section 11.042(b) do not involve state water and required the cities' applications *not to be processed* under statutes and rules applicable to state water." SAWS's application expressly states it is not seeking an appropriative right to use state water because no such right is needed to reuse SAWS's return flows derived from privately owned groundwater.<sup>31</sup> The Draft Permit does not authorize the use of state water.

The primary justification offered by Protestants for their Option A is that it was the practice for § 11.042(b) authorizations *before* the Commission issued its interim order in the *City of Bryan* case in 2006. In short, Protestants want the Commission to *reverse* its decision in the *Bryan* proceeding, and also to ignore all other § 11.042(b) authorizations based on that decision that have been granted in the past eighteen years. None of the Commission's post-*City of Bryan* authorizations have priority dates, and all include language stating they are not subject to senior

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<sup>30</sup> See Tex. Water Code § 11.002(6); see also 30 TAC § 297.1 (4) ("Appropriative right: the right to impound, divert, store, take, or use a specific quantity of state water acquired by law.").

<sup>31</sup> SAWS Ex. 3 at 039883.

water rights.<sup>32</sup> Coming from Protestants, this absurd request is unsurprising given that each of their witnesses testified that the prior appropriation doctrine was the basis for their opinions asserting that Protestants' senior water rights (*i.e.*, those with a priority date prior to SAWS's application) are deserving of protection through a special condition mandated by § 11.042(b).<sup>33</sup>

Protestants cite SAWS's Permit No. 5705 as an "example" of a pre-*City of Bryan* § 11.042(b) authorization that used a priority date to protect existing water rights,<sup>34</sup> but in using this permit for their example, Protestants fail to reveal that Permit No. 5705 provides that its authorization to divert SAWS's return flows is subject to senior water rights in the *San Antonio River Basin only*.<sup>35</sup> No such protection was afforded to rights in the Guadalupe River Basin under Permit No. 5705. Permit No. 5705's protection of senior water rights only in the San Antonio River Basin is consistent with the Executive Director's position that the Guadalupe and San Antonio River Basins are administered separately by TCEQ's Watermaster.<sup>36</sup>

The Commission should decline Protestants' invitation<sup>37</sup> to return to the agency's pre-2006 confusion and continue the well-established post-*City of Bryan* practice of acknowledging that bed and banks applications requesting authorization to divert and reuse return flows derived exclusively from privately owned groundwater do not involve state water as a matter of law, and

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<sup>32</sup> ED Ex. 1 at 0012:4–7 (Dr. Alexander referring to Table 2: "none of the authorizations issued after 2006 have priority dates and include language stating they are not subject to senior water rights.").

<sup>33</sup> See SAWS's Reply to Protestants' Closing Brief at 6–7 for testimony of Protestants' witnesses Finley, Vaughn and Settemeyer; see also Tr. V2 at 129:12–16 for testimony of Protestants' witness Perkins (Q: "And is it your opinion that all water rights in the river that are senior to this application should be granted special conditions to protect them simply because they are senior to the application itself? A: Correct.").

<sup>34</sup> Protestants Exceptions at 6.

<sup>35</sup> See Protestants Ex. 624 at SAWS 033133 (Permit 5705, stating "This permit is issued subject to all superior and senior rights in the San Antonio River Basin.").

<sup>36</sup> ED Exceptions at 3.

<sup>37</sup> Protestants Exceptions at 7 ("Going forward, the Commission could also distinguish among § 11.042(b) authorizations . . .").

shall be processed solely under § 11.042(b) and the Commission's bed and banks authorization rules—not under statutes and rules applicable to state water.<sup>38</sup>

Unable to overcome the reality of the Commission's order in the *City of Bryan* proceeding that renders their arguments flaccid, Protestants cling to a 2001 memorandum<sup>39</sup> written by a subordinate staff member of the TNRCC's Water Rights Permitting section to his supervisors asking permission to publish on the agency's website a staff memo outlining what the author described as "the only acceptable approach" [for explaining the Commission's rules for bed and banks permits] as the Commission's prescribed methodology.<sup>40</sup> As noted by Dr. Kathy Alexander, the ED's expert witness in this proceeding, the 2001 memo outlining a staff position was never posted on the agency's website.<sup>41</sup>

The reliance on this unpublished memo by both Protestants and the PFD<sup>42</sup> is misplaced:

"Power of decision resides in the agency and not in the staff. An agency staff only serves the agency. Staff recommendations may be accepted in whole or in part by the agency, or such recommendations may be rejected outright. It is the order of the agency that is reviewed by the courts, not the recommendation of the staff."<sup>43</sup>

However, if the Commission were to determine that a special condition imposing a priority date on SAWS's requested authorization is required based on the PFD's finding that "Protestants' CAs were granted based on the actual use of flows with origins as SAWS effluent" during the Lookback Period, Protestants' rights should be modified to reflect a priority date based on the date

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<sup>38</sup> SAWS Ex. 3 at 039898–901; Tr. V3 at 16:9–17:24; *see also* ED Ex. 1 at 0011:31–17:25; SAWS Ex. 21 at 040133:3–35:8; *id.* at 040136:11–39:16.

<sup>39</sup> Protestants Exceptions at 7 n.8, 8, 13 n.14

<sup>40</sup> Protestants Ex. 312 at 005316.

<sup>41</sup> *See* ED Ex. 1 at 0014:6–7.

<sup>42</sup> *See* Protestants Exceptions at 7 n.8, 8, 13 n.14; *see also* PFD at 20, 42 n.184, 49 n.214, 52 n.228.

<sup>43</sup> *City of Frisco v. Texas Water Rights Comm'n*, 579 S.W. 2d 66 (Tex. App—Austin 1979, writ ref'd).

their CAs were issued, and with their authorized diversions limited to their actual use of water in the year of maximum use during the Lookback Period.<sup>44</sup>

**3. Protestants' Options B & C are unworkable because Protestants are unable to measure their diversions of water from the Guadalupe River and cannot account for unauthorized diversions lost in their canal system**

Protestants' Option B requests subordination of SAWS's requested authorization to divert its privately owned groundwater-based return flows to Protestants' lower basin water rights so that Protestants' rights are "fully satisfied" before SAWS may divert under Permit No. 13098. Option C would "give Protestants the first right to divert the maximum annual volume of San Antonio's effluent that flowed to the Saltwater Barrier at the time of the adjudication"<sup>45</sup> and then allow SAWS to divert only if water is flowing over the Saltwater Barrier in order to ensure that "the lower basin rights held by GBRA and UCC, which divert from the pool created by this barrier and dam, must first be satisfied."<sup>46</sup>

Both options are designed to ensure Protestants' water rights are fully satisfied by SAWS's return flows, even though Protestants rights were never firm.<sup>47</sup> And both options are fundamentally flawed because *Protestants admitted at the hearing that they are unable to measure their diversions of water from the Guadalupe River*, claiming efforts to do so "futile."<sup>48</sup> Protestants also admitted during the hearing that they cannot account for the diversion of water that is lost in Protestants' canal system between the unmeasured diversion point at the river and a pump station

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<sup>44</sup> Protestants' witness, Mr. Settemeyer, did not recall looking at the amount of water used by any of Protestants' lower basin water rights other than Permit 1614 (now reflected in CA 19-5168). He confirmed that CA 19-5168 was issued for the full permitted amount of 106,000 acre-feet per year, even though only 23,441 acre-feet had been diverted under its underlying permit in the maximum use year of the Lookback Period. Tr. V2 at 159:7–61:14.

<sup>45</sup> Protestants Exceptions at 9.

<sup>46</sup> *Id.* at 10.

<sup>47</sup> *See supra* n.25.

<sup>48</sup> Tr. V2 at 84:4–86:6.

located 20 to 30 *miles* down the canal.<sup>49</sup> Lacking the ability to measure and account for the rate and amount of their diversions from the Guadalupe River, Protestants' Options B & C are unworkable because Protestants are unable to provide the most fundamental information needed to determine when their water rights have been satisfied and to otherwise administer SAWS's § 11.042(b) authorization and Protestants' water rights—even if those rights are assumed to have been granted based on SAWS's return flows.

#### **4. Protestants' Options B & C are not supported by the record evidence in this case**

Through proposed Options B and C, Protestants assert that they should have the first right to divert the maximum annual volume of SAWS effluent that flowed to the Saltwater Barrier at the time of the adjudication in order to accomplish the protection that § 11.042(b) “mandates.” However, there is no record evidence showing the amount of SAWS's effluent that flowed to the Saltwater Barrier or that was actually used by Protestants during the Lookback Period.<sup>50</sup> Instead, the only evidence in the record related to SAWS's effluent in the Guadalupe River is the amount that was discharged *to the San Antonio River*, approximately 200 miles upstream of Protestants' unmeasured diversion point.

Assuming *arguendo* that SAWS's effluent discharges during the Lookback Period were “available” as found by the PFD, there is no evidence of the amount of those return flows that were diverted by other appropriators upstream of Protestants or the amount that flowed to Protestants'

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<sup>49</sup> Tr. V2 at 84:4–86:6; *see also* ED Exceptions at 6 (“The record reflects that Protestants have not measured the impoundment [created by the Saltwater Barrier]; therefore, the Protestants may have more than 600 acre-feet impounded or maybe technically incapable of limiting the impoundment to 600 acre-feet, nor can the Protestants measure the water diverted from the Saltwater Barrier at its diversion point.”).

<sup>50</sup> The Executive Director appears to share SAWS's view of the record evidence: “For the Protestants' COAs originally authorized to divert from the Guadalupe River, the Executive Director disagrees that the evidentiary record establishes the amount of inflow to the Guadalupe River that originated from San Antonio's historic groundwater-based effluent, nor does the evidence establish any amount of that effluent as appropriated to COAs 18-5175, 18-5176, 18-5177, or 18-5484.” *See* ED Exceptions at 5.

diversion point. Those “other appropriators” would include the water right currently recognized as CA 19-2162 that authorizes San Antonio’s City Public Service Board to divert to Calaveras Lake up to 60,000 acre-feet per year of water, including sewage effluent released upstream, and that specifically authorized the owner to use the bed and banks of the San Antonio River for the conveyance of sewage effluent from the point of release to the point of diversion.<sup>51</sup> City Public Service Board’s diversion point under CA 19-2162 is only “a few miles downstream” of SAWS’s discharge points.<sup>52</sup> Lacking record evidence of the amount, if any, of SAWS’s effluent discharge that was actually used by Protestants in the Lookback Period, there is no legal basis to impose a special condition to protect Protestants’ water rights even assuming *arguendo* that SAWS’s discharges became unappropriated state water at the moment of discharge.<sup>53</sup>

**5. Assuming *arguendo* that Protestants’ appropriative water rights were granted a second time pursuant to the Water Rights Adjudication Act, SAWS’s return flows during the Lookback Period were not needed to issue Protestants’ CAs and were an insignificant portion of the source of water supply**

The PFD’s analysis correctly frames the § 11.042(b) standard for identifying existing water rights granted based on the use or availability of an applicant’s groundwater-based return flows through its summation of the position of the Office of Public Interest Counsel: “The determination in this case must rely on water availability models to attempt to extrapolate *whether, at the time Protestants’ rights were granted, Applicant’s return flows were a necessary basis for their*

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<sup>51</sup> See Protestants Ex. 314 at SAWS 039129–30.

<sup>52</sup> SAWS Ex. 1 at 039848:22–24.

<sup>53</sup> SAWS disputes that its discharges legally constituted state water when discharged in the 1940s, 1950s, and during the Lookback Period. As defined in Tex. Water Code § 11.021(a), state water generally includes the “ordinary flow” and the “floodwater” of every “natural stream.” As noted by Justice Jack Pope in *In re Adjudication of the Water Rights of the Upper Guadalupe River*, 642 S.W. 2d 438, 441, “mean flow, average flow and ordinary flow are measures that have not been judicially addressed.” As noted by Dr. Alexander, the PFD in the Lubbock bed and banks authorization case concluded that groundwater-based return flows would not be considered state water and that Texas Water Code § 11.046 does not apply to groundwater-based return flows. ED Ex. 1 at 0016:15–26. Even the Texas House of Representatives report addressing SB 1 of the 1997 Texas Legislature considered “the question of whether water discharged into a state watercourse should automatically be considered state water is a legal grey area.” Protestants Ex. 514 at 12.

*issuance.*” Even if the Commission accepts the PFD’s unsupported conclusion that Protestants’ appropriative water rights were granted a second time as a result of the Water Rights Adjudication Act, there has been no showing that SAWS’s groundwater-based return flows were a necessary basis for this putative granting.

Protestants’ exceptions offer a hypothetical analysis of SAWS’s discharges during the 1972–82 span of the Lookback Period to speculate on the amount of SAWS’s discharged effluent that “would have arrived at the Saltwater Barrier.”<sup>54</sup> As shown in II.D.4 above, there is no record evidence of either the amount of SAWS’s return flows that actually reached Protestants’ diversion point at the Saltwater Barrier, nor the amount of SAWS’s return flows that Protestants actually diverted during their year of maximum use in the Lookback Period (which the Executive Director identified as 1975).<sup>55</sup>

What the record does show is:

- In 1975, outflows of water from the Guadalupe and San Antonio River Basins to the Gulf of Mexico were 2,928,154 acre-feet after all water rights were exercised at their full authorized amounts.<sup>56</sup>
- During 1975, SAWS’s discharges to the San Antonio River more than 200 miles upstream of the Saltwater Barrier totaled 114,340 acre-feet or 3.9% of the quantity of water flowing by Protestants’ Saltwater Barrier.<sup>57</sup>

With 2,928,154 acre-feet of water flowing past Protestants’ diversion point in 1975, there is no basis to conclude that SAWS’s upstream discharges equal to 3.9% of the water flowing past Protestants’ diversion point was a “*necessary basis*” for Protestants’ certificates of adjudication.

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<sup>54</sup> Protestants Exceptions at 10.

<sup>55</sup> ED Exceptions at 5 n.32.

<sup>56</sup> Protestants Ex 308, Table 36.

<sup>57</sup> SAWS Ex. 3 at 039965 (converted from MGD to acre feet per year).



**E. SAWS has agreed to amend its accounting plan**

Protestants except to the PFD to assert that SAWS “must correct” its accounting plan.<sup>58</sup>

SAWS has consistently agreed—at the hearing, in its closing arguments, and in its exceptions to the PFD—to amend its accounting plan to add the time of travel between its discharge points and its proposed diversion reach and the channel losses derived from the 2021 WAM that were not available to SAWS prior to receiving the Draft Permit. As noted in SAWS’s exceptions and shown in the record, SAWS’s analysis of channel losses using the 2021 WAM indicated that there were *no losses* below the Saltwater Barrier to the estuary at the mouth of the Guadalupe River.<sup>59</sup> This reach encompasses SAWS’s proposed diversion reach. Notwithstanding the above, SAWS remains committed to submitting an accounting plan revision for the Executive Director’s review and approval if ordered to do so by the Commission and as stated in the PFD.

**F. Protestants are not entitled to a special condition mandating notice and opportunity for a contested case hearing on any amendment**

The Draft Permit includes special condition 5.F stating that changes in the location of the diversion point or addition of diversion points shall require an amendment of the permit. TCEQ has comprehensive and robust rules concerning public notice, including rules specifically applicable to requests to convey water in the bed and banks of a public watercourse, as applied in the current proceeding.<sup>60</sup> There is no need to craft a red-carpet special condition solely applicable to Protestants’ desire to be pre-determined as affected persons for a speculative future amendment of SAWS’s requested authorization.

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<sup>58</sup> Protestants Exceptions at 12.

<sup>59</sup> SAWS Exceptions at 25; SAWS Ex. 14 at 040081–82.

<sup>60</sup> 30 TAC § 39; *id.* at § 295.161.

### **G. Protestants' miscellaneous corrections are unnecessary and inappropriate**

Protestants' requested "factual correction" of the PFD's summary description testimony of SAWS's witness concerning CA 19-2162 is unnecessary, inappropriate, and more than slightly officious. The PFD cites, through footnote 20, the source of the testimony summarized and accurately characterizes the cited testimony. There is no need to adopt Protestants' proposed re-write.

Protestants' request represents their unsupported interpretation of how SAWS's witness should have described the third-party water right authorized by CA 19-2162 along with other water rights that are based on contracts to use SAWS's effluent return flows. This testimony was offered to identify the amount of return flows SAWS currently has that are surplus to SAWS's current commitments.<sup>61</sup> Such water rights were included in SAWS's accounting plan, and, to the extent diversions are made pursuant to those water rights, they will be reflected as a subtraction of the amount of privately owned groundwater-based return flows SAWS will be authorized to divert. Protestants' proposed re-write is inappropriate, unnecessary, and officious.

Protestants' proposed alteration of the PFD is also inaccurate. It would delete the term "bed and banks authorization" from the PFD's description of CA 19-2162<sup>62</sup> despite the permit's own language stating "Owner is authorized to use the bed and banks of the San Antonio River and its tributaries named herein for the conveyance of sewage effluent from the point of release in Bexar county to the point of diversion authorized herein."<sup>63</sup> Protestants also want the re-write to state that the authorization is subject to a 1967 priority date without disclosing that the CA is issued subject to senior and superior water rights in the *San Antonio River Basin only*, with no mention

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<sup>61</sup> SAWS Ex. 1 at 10:11–11:13.

<sup>62</sup> Protestants Exceptions at 16.

<sup>63</sup> Protestants Ex. 314 at SAWS 039130.

of senior water rights in the Guadalupe River Basin. This too is consistent with the Executive Director's position that water rights in the Guadalupe and San Antonio River Basins are administered separately by the Watermaster.<sup>64</sup>

Similarly, there is no need to amend the PFD to change its description of Mr. Perkins' testimony that the firm supply for Protestants' lower basin rights is 8,870 acre-feet per year. That was his testimony<sup>65</sup> and the PFD contained an appropriate citation to SAWS Ex. 35, the 2021 South Central Texas Regional Water Plan that was the basis of his testimony. Mr. Perkins further testified that he did not disagree with the hydrologic assumptions used in the planning process.<sup>66</sup> Protestants' requested change to the PFD is nothing short of an effort to rewrite Mr. Perkins's testimony after the record has closed.

### III. CONCLUSION

The applicable law and the evidence admitted into the record in this contested case, together with the testimony from the hearing on the merits, support the conclusion that Water Use Permit No. 13098, as drafted, includes all necessary special conditions pursuant to Texas Water Code § 11.042(b), including all special conditions necessary to support and protect water rights that were granted based on the use or availability of wastewater discharged by the Applicant. For the foregoing reasons, SAWS respectfully requests the TCEQ issue the Draft Permit without changes, and the ALJs' Proposed Order be amended as proposed in SAWS's Exceptions to the Proposal for Decision filed in this proceeding, incorporated herein for all purposes.

In the alternative, should the Commission find that Protestants' water rights *were* granted based on SAWS's return flows, SAWS supports the Executive Director's position that permit

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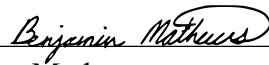
<sup>64</sup> ED Exceptions at 3.

<sup>65</sup> Tr. V2 at 98:7-19.

<sup>66</sup> *Id.* at 99:2-10.

special conditions are not necessary to “protect” these rights. If the Commission determines special conditions *are* necessary, the Commission should remand this proceeding to SOAH to determine what the existing record evidence would support regarding special conditions necessary to protect the amount of Protestants’ water rights the Commission determines was granted based on the use or availability of SAWS’s return flows. The three special condition options recommended by Protestants should be rejected. Protestants’ other exceptions should likewise be rejected.

Respectfully submitted,



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**SOAH DOCKET NO. 582-22-1990  
TCEQ DOCKET NO. 2021-1391-WR**

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing document has been e-filed and served on the following counsel/persons by electronic filing or electronic mail on this 12th day of February, 2024.

  
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Benjamin Mathews

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