

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

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

**EXECUTIVE DIRECTOR’S EXCEPTIONS TO PROPOSAL FOR DECISION
TO THE HONORABLE COMMISSIONERS:**

INTRODUCTION

The Executive Director of the Texas Commission on Environmental Quality (TCEQ or commission) files exceptions to the proposal for decision in the above-styled matter to support her analysis of Application No. 13098 by the San Antonio Water System (SAWS or Applicant). The Executive Director disagrees that the Lower Basin water rights held by Guadalupe-Blanco River Authority and Union Carbide Corporation (collectively Protestants) were granted based upon the use or availability of Applicant’s groundwater-based return flows, believes the Protestants’ water rights are not entitled to protection by any special conditions, and supports issuance of the Draft Permit prepared by program staff because SAWS satisfied all relevant statutory requirements and administrative rules.

ARGUMENT SUMMARY

The Executive Director’s analysis of this application was consistent with prior Tex. Water Code § 11.042(b) applications.¹ Protestants’ water rights were not granted based on the use or availability of SAWS’ return flows,² nor are they entitled to protection by permit special conditions. The burden of proof placed upon the Applicant was not consistent with prior § 11.042(b) applications because the Protestants moved successfully for an expanded burden of proof, which is set forth in the PFD on page 3. The Executive Director opposed the motion³ and excepts to the burden of proof formulated by the Administrative Law Judges because prior applicants

¹ Exhibit (Ex.) ED-1 pages 0012-0017.

² Ex. ED-1 page 0022 lines 1-3.

³ Executive Director’s Response to Protestants’ Motion to Confirm Alignment of Parties and Burden of Proof, filed with SOAH Sept. 12, 2022.

were required only to meet the burden of proof established in TCEQ rules.⁴

CONSISTENCY WITH PRIOR APPLICATIONS

Application 13098 seeks a permit authorizing SAWS to use the bed and banks of the San Antonio River and the Guadalupe River to convey its groundwater-based return flows for subsequent diversion for specified beneficial uses in several counties. The requested authorization has been the subject of several prior applications and the Executive Director reviewed SAWS' application in a manner consistent with those applications.⁵ The Executive Director excepts to the PFD on page 28, which states that the program staff's 5% rule [of thumb] demonstrated that there would be no practical impact on Protestants water rights and that further analysis was unnecessary. Dr. Alexander testified that if the analysis showed an impact of 5% or more, it would trigger a practical impact and a need for the program to research the water right(s) to determine whether they were granted based on the use or availability of the return flows analyzed.⁶ For this application, there was no such trigger indicating the need for further investigation.

The Executive Director staff evaluated the impact of this application on the Protestants' water rights in the proposed conveyance reach and found that the average impact was less than 1%,⁷ therefore the South Texas Watermaster's administration of water rights in the basin⁸ and the proposed accounting plan addressed this minimal impact,⁹ since the Protestants' water rights are not entitled to protection by any additional special permit conditions.

PROTESTANTS' WATER RIGHTS

The ED excepts to the PFD's conclusion on pages 46 and 62 that all of the Protestants' water rights were granted based on the use or availability of SAWS' return flows for two reasons. First, because the evidentiary record does not support the conclusion. Second, for those water rights that arguably were so granted, the amount

⁴ 30 Tex. Admin. Code § 80.17.

⁵ Ex. ED-1 pages 0012 to 0017.

⁶ Tr. Vol. 3 page 119, lines 1-15; Ex. Ed-1 page 0022 lines 13-22.

⁷ Ex. ED-1 page 0021 lines 15-23 and Table 3 continued to page 0022.

⁸ Ex. ED-3 pages 0039 first paragraph and page 0041, special condition 5.I. See also Ex. ED-1 page 0026 lines 25-33 and page 0028 lines 1-9.

⁹ Ex. ED-1 page 0023 lines 21-28.

of return flows that could be protected through special conditions is minimal, therefore special conditions are not necessary.

None of the Protestants' COAs are considered to be firm or 100 percent reliable.¹⁰ At the time the Protestant's largest water right - Permit 1614 - was issued, it was not determined to be firm but it was 98 percent reliable.¹¹ When the impact of SAWS' application on all of the COAs is analyzed, they remain at least 98 percent reliable because the average impact on their reliability is less than 1 percent.¹² The ED notes that the record shows that Permit 1614 was not issued based on use or availability of San Antonio's return flows.¹³

The San Antonio River is a tributary of the Guadalupe River.¹⁴ However, water rights within the San Antonio River Basin and the Guadalupe River Basin are administered separately by the TCEQ's Watermaster.¹⁵ In short, junior water rights in the San Antonio Basin cannot be curtailed based on assertion of senior water rights in the Guadalupe Basin or vice versa.¹⁶ Though the San Antonio River flows into the Guadalupe River, the Guadalupe River watershed includes many other tributaries. The ED does not believe the evidentiary record adequately quantifies and isolates the amount of San Antonio's groundwater-based effluent from other flows in the Guadalupe River downstream of its confluence with the San Antonio River at the time the Protestants' water rights were granted. In addition, the evidence in the record suggests that the modeled amount of water in the Guadalupe River at its mouth after Protestant's diversions far exceeds the volume of SAWS' return flows that were in the river during the modeled time period - 1940-1979.¹⁷ Footnote 17 references Protestants' Exhibit 308. Exhibit 308 was not paginated, therefore the relevant text is quoted in the footnote.

Each of the Protestants' COAs were issued based upon an underlying permit. All

¹⁰ Tr. Vol. 2 page 94 lines 6-7. *See also* Tr. Vol. 2 page 98 lines 25 and page 99 lines 1-10.

¹¹ Tr. Vol. 1 page 259 lines 22-25 and page 260 lines 1-5, Tr. Vol. 2 page 222 lines 9-25 and page 223 lines 1-11.

¹² Ex. ED-1 page 0021 lines 22-23 and Table 1 page 0021-0022.

¹³ PFD pages 14-16. *See also* Tr. Vol. 1 page 180 lines 21-25, page 181, and page 182 lines 1-6.

¹⁴ Protestants' (Prot.) Ex. 300 page 7 lines 9-10.

¹⁵ Ex. ED-1 page 0026 lines 25-33, page 0027 lines 1-9.

¹⁶ *Id.*

¹⁷ Prot. Ex. 308, *Revised Interim Report of Water Availability in the Guadalupe River Basin, Texas*, Tex. Dept. of Water Resources March 1983, Chapter II, page 5, General Conclusions: "(6) The simulated amounts of outflows into the Gulf of Mexico, amounting to **an annual average of 1,704,544 acre-feet during the 40 years of simulation**, are shown in Table 36."

of the terms and conditions stated in permits or certified filings continue in full force and effect in an adjudicated water right unless obsolete, irrelevant, or immaterial.¹⁸ An authorized diversion location is not an obsolete, irrelevant, or immaterial term or condition.

COA 18-5173 is based upon Permits 1319¹⁹ and 1623,²⁰ with authorizations to divert from tributaries of the Guadalupe River,²¹ therefore this COA is not entitled to protection because the permits did not authorize diversion from the Guadalupe River, the watercourse receiving San Antonio's return flows.

COA 18-5174 is based upon Permits 1362²² and 1624,²³ with authorizations to divert from tributaries of the Guadalupe River;²⁴ therefore this COA is not entitled to protection because the permits did not authorize diversion from the Guadalupe River, the watercourse receiving San Antonio's return flows.

Four COAs were based on permits with authorizations to divert from the Guadalupe River - COA 18-5175, based on Permit 1564 issued in 1951 authorizing diversion of 940 acre-feet from the river (plus 58 acre-feet from a drainage ditch);²⁵ COA 18-5176 based on Permit 1592 issued in 1951 authorizing diversion of 9,944 acre-feet;²⁶ COA 18-5177, based on permit 1375 issued in 1945 authorizing diversion of 42,615 acre-feet;²⁷ and COA 18-5178, based upon Permit 1614 issued in 1952²⁸ authorizing diversion of 120,000 acre-feet.²⁹ The evidentiary record demonstrates that the underlying program documents regarding Permit 1614 demonstrate that it was not based on San Antonio's effluent,³⁰ therefore it is not entitled to protection.

One COA - 18-5484 - is based on a permit with authorization to impound. Permit 2120 was issued in 1964 and authorizes maintenance of an impoundment of

¹⁸ Prot. Ex. 122 Roman numeral page 4 paragraph 6(d)." (emphasis added).

¹⁹ Prot. Ex. 110.

²⁰ Prot. Ex. 111.

²¹ Prot. Ex. 110 page 000001 third paragraph; Prot. Ex.11 page number 000004 first paragraph.

²² Prot. Ex. 112.

²³ Prot. Ex. 113.

²⁴ Prot. Ex. 112 page number GBRA 000011 fourth paragraph; Prot. Ex. 113 page GBRA 000023 first paragraph.

²⁵ Prot. Ex.114 page GBRA000024 third paragraph.

²⁶ Prot. Ex. 115 page GBRA 000058 third paragraph.

²⁷ Prot. Ex. 116 page GBRA 000016 fifth paragraph.

²⁸ Prot. Ex. 120.

²⁹ Prot. Ex. 120 page GBRA 000117 paragraphs 3 and 4.

³⁰ PFD pages 14-16. See also Tr. Vol. 1 page 180 lines 21-25, page 181, and page 182 lines 1-6.

600 acre-feet as a barrier against saltwater incursion. Any diversion from the impoundment is based upon other water rights.³¹

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.

If the Commission accepts the premise that granted and adjudicated are synonymous, only a portion of the total authorized diversion amount in these certificates would be entitled to protection. Simple arithmetic (based on the analysis in the paragraph above about the four COAs based on permits authorized to divert from the Guadalupe River) results in a total of 53,499 acre-feet that may have included an undetermined portion of San Antonio's historic effluent, which was discharged into the San Antonio River and flowed eventually to the confluence of the Guadalupe River when the permits underlying the COAs were issued. The evidence shows that the maximum amount of water used under all of the COAs at the time of the adjudication of Protestants' water rights was 89,942 acre-feet.³² Footnote 32 references Protestants' Exhibit 122. Exhibit 122 was not paginated, therefore the relevant text is quoted in the footnote.

The ED has acknowledged that it is possible that individual water rights could have been granted based on the fact that some portion of the historical discharges were in the river at the time those water rights were granted because water availability determinations have been done differently over time, including use of different models.³³ 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. The 158 water rights program staff identified as being affected by this application - including all of the Protestants' water rights - because impact on them is

³¹ Prot. Ex. 121 page GBRA 00133 paragraph number 1.

³² Prot. Ex. 122 page 54 Findings of Fact 30, "The maximum amount of water diverted and used since 1952 (the year Permit No. 1614 was issued) for industrial, irrigation, municipal and stock raising purposes in any one year by Carbide and the District's and GBRA's contractors under Permits Nos. 1319, 1362, 1375, 1375B and 1614, all as amended, and under Permits Nos. 1564 and 1592, was 89,942 acre-feet of water in the year 1975. (Exh. 710, tab 2)"

³³ Ex. ED-1 page 0019 lines 11-16.

adequately mitigated by the South Texas Watermaster's administration of SAWS' § 11.042(b) authorization, by the terms contained in the Draft Permit, and by the required accounting plan.³⁴ The ED noted that concerns about the accounting plan regarding channel losses below Goliad can readily be addressed,³⁵ as can concerns about travel time even though that issue is already addressed in the Draft Permit.³⁶

PROTECTION VIA SPECIAL CONDITIONS

The Executive Director did not include special conditions in the Draft Permit to protect water rights issued based on the use or availability of SAWS' groundwater-based return flows because it was unnecessary since all such water rights were owned by SAWS or based on contracts with SAWS.³⁷

The Executive Director agrees with the PFD's conclusion that there the record is insufficient only if the Commission decides to adopt the PFD's recommended findings regarding Protestants' water rights being based on the use or availability of SAWS' return flows; therefore all are entitled to protection under § 11.042(b). The Executive Director excepts to both special conditions suggested on page 57 of the PFD.

First suggested special condition: a restriction that would allow SAWS to exercise its rights under Permit 13098 only if a certain amount of water were flowing at the saltwater barrier. The Protestants' water right entitles it to impound 600 acre-feet of water to maintain its saltwater barrier.³⁸ The record reflects that the Protestants have not measured the impoundment;³⁹ therefore the Protestants may have more than 600 acre-feet impounded or may be technically incapable of limiting the impoundment to 600 acre-feet, nor can the Protestants measure the water diverted from its saltwater barrier at its diversion point.⁴⁰

Second suggested special condition: protection of the amount of water equivalent to San Antonio's return flows historically available at the diversion points during what the Protestants characterized as the Lookback Period. The evidentiary

³⁴ See Ex. ED-3 pages 0039 first paragraph and page 0041, special condition 5.I. See also Ex. ED-1 page 0026 lines 25-33 and page 00238 lines 1-9.

³⁵ Ex. ED-1 page 0030 lines 29-33 and page 0031 line 1-2.

³⁶ Ex. ED-1 page 0031 lines 2-7.

³⁷ Ex. ED-1 page 0023 lines 3-4.

³⁸ Prot. Ex. 109 page GBRA 007954.

³⁹ Tr. Vol. 2 page 62 lines 11-22.

⁴⁰ Tr. Vol. 2 page 72 lines 19-25, page 73 lines 1-7.

record reflects that while some of the original permits to Protestants' water rights were located on the Guadalupe River, other Lower Basin water rights were located on tributaries - therefore ascertaining which received historic effluent and quantifying the amount is unclear.⁴¹ In addition, none of the Protestants' water rights contain language granting the holders to exclusive rights to any return flows - therefore protecting any historic effluent for the Protestants ex post facto is inherently flawed absent additional evidence that may or may not exist.

The amount of return flows the Applicant discharges into the San Antonio River has increased significantly since the 1940s and 1950s.⁴² The Executive Director believes the PFD will result in the Protestants continuing to benefit from effluent discharged in the San Antonio River without holding explicit authorization for its use or reuse. In 1940, the amount of effluent discharged into the San Antonio River was 10.7 million gallons per day.⁴³ In 1950, the amount of effluent was 7.7 million gallons per day.⁴⁴ All of the permits underlying Lower Basin Protestants' Certificates of Adjudication were issued in the 1940s and 1950s, except for the permit issued in 1964 for the saltwater barrier authorization.⁴⁵ During technical review, the Executive Director program staff used the current level of Applicant's return flows - 93,291 acre-feet or 83.3 million gallons per day.⁴⁶

BURDEN OF PROOF

The Executive Director excepts to the burden of proof because it differed from the rule-based burden of proof in prior 11.042(b) applications. It required the Applicant to "...to prove that Water Use Permit 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 Applicant."⁴⁷

The burden of proof for this application essentially required SAWS to prove a negative because the Executive Director had already identified those water rights

⁴¹ Prot. Ex. 110 to 121.

⁴² Tr. Vol. 3 page 25 lines 1-6.

⁴³ Tr. Vol. 1 page 79 lines 8-10.

⁴⁴ Tr. Vol. 1 page 52 lines 1-6.

⁴⁵ Prot. Ex. 102.

⁴⁶ Ex. ED-1 page 0020 lines 20-27.

⁴⁷ PFD page 3.

granted based on the use and availability of return flows that were entitled to protection by permit special conditions – all such water rights were held by SAWS or based on contracts with SAWS.⁴⁸

SAWS provided evidence that there were water rights issued based on effluent and protected from diversion by others – Permit 1554 in 1951 and Permit 1614 in 1952, respectively⁴⁹ – but the evidence was apparently not sufficient to meet the modified burden of proof. The PFD concludes that the Protestants’ water rights were granted based on the use or availability of SAWS’ groundwater-based return flows because the Protestants’ water rights were granted when effluent was considered to be water available for appropriation once it entered a watercourse.⁵⁰

The Executive Director excepts to the PFD’s conclusion that the mere presence of effluent in a stream is sufficient to establish that water rights were granted based on the use or availability of return flows because that would nullify the authorization Tex. Water Code § 11.042(b) provides to the discharger who wishes to convey its return flows for indirect reuse. Such an interpretation fails to consider that there is water in a stream besides effluent. Water in a stream may come from runoff, spring flows, or rainfall that flows into a stream, mixes with effluent discharged into a stream, and that effluent cannot be segregated from other origins of state water.⁵¹ Tex. Water Code § 11.042(b) is a statutory mechanism granting authorization to a discharger to segregate its groundwater-based return flows for reuse. For such applications, the Executive Director has therefore used a two-step analysis to ensure that water rights granted based on the use and availability of return flows have been afforded protection with special conditions as appropriate in order to protect those rights.⁵²

If the Commission decides to accept the PFD’s recommended conclusion about Protestants’ water rights, the Executive Director believes that every water right holder downstream of future applications submitted under Tex. Water Code § 11.042(b) may request contested case hearings seeking protection by special conditions because “use and availability” will mean the mere presence of historic effluent in a watercourse at the time a water right is granted.

⁴⁸ Ex. ED-1 page 16 lines 25-30, page 17 lines 1-5.

⁴⁹ PFD page 14-16.

⁵⁰ PFD page 45-46.

⁵¹ Tr. Vol. 1 page 223 lines 15-25, page 224, and page 225 lines 1-17.

⁵² Ex. ED-1 page 0022 lines 23-25, page 0023 lines 1-2.

CONCLUSION

The Executive Director excepts to the PFD as set forth herein, re-iterates general support of the Applicant's proposed Findings of Fact and Conclusions of Law, and respectfully requests that the Commission grant the application and issue the Draft Permit without revising it to include any special conditions protecting the Protestants' water rights, and for such other relief as deemed proper and just.

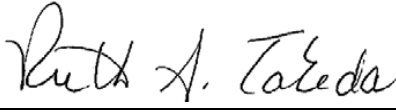
Respectfully submitted,

TEXAS COMMISSION ON
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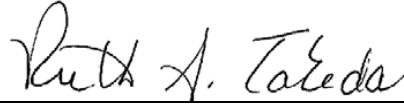
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CERTIFICATE OF SERVICE

I certify that on the 22nd day of January 2024, the foregoing *Executive Director's Exceptions to Proposal for Decision* was filed electronically with the State Office of Administrative Hearings and the Chief Clerk of the Texas Commission on Environmental Quality in Austin, Texas, and that a true and correct copy was delivered as indicated to the persons on the attached Mailing List.



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