

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

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

EXECUTIVE DIRECTOR'S REPLY TO PROTESTANTS' EXCEPTIONS TO THE
PROPOSAL FOR DECISION

TO THE HONORABLE COMMISSIONERS:

INTRODUCTION

The Executive Director of the Texas Commission on Environmental Quality (TCEQ or commission) files this reply to the exceptions to the proposal for decision filed by Protestants (Guadalupe-Blanco River Authority and Union Carbide Corporation). The Executive Director disagrees that any of the Protestants' lower basin water rights warrant protection through special conditions pursuant to Tex. Water Code Sec. 11.042(b) and replies to the Protestants' Option A, Option B, and Option C proposed as special conditions.

OPTION A

The Executive Director does not support Protestants' Option A because it does not comport with how the Executive Director has processed Sec. 11.042(b) applications since approximately 2006.

First, priority dates have not been assigned to Sec. 11.042(b) applications based on the Commission holding that groundwater-based return flows are not state water.¹

Second, priority dates were considered by the Commission in the past in the context of Sec. 11.042(b) applications and were not adopted as policy.²

Third, no water rights permits granted under Sec. 11.042(b) since 2006 have been assigned priority dates, and the permits include language stating that they are not subject to senior rights.³

Priority dates rely on the concept embedded in the prior appropriation doctrine,

¹ See Tr. Vol. 3 page 95 lines 4-9 and Ex. ED-1 page 0015 lines 23-31.

² Ex. ED-1 page 0014 lines 10-14 and lines 21-28; page 0015 lines 6-21. See also Ex. ED-4, 5, 6 and 7.

³ Ex. ED-1 page 0012 lines 4-7.

codified as first in time is first in right and applicable only to rights between appropriators.⁴ The Executive Director's position is that an authorization for use of bed and banks to convey groundwater-based return flows is not an appropriative water right because the Commission has held that groundwater-based return flows under Sec. 11.042(b) are not state water.⁵

OPTION B

The Executive Director does not support Protestants' Option B because it does not comport with how Sec. 11.042(b) applications have been processed since approximately 2006.

Subordination language was considered by the Commission in the past in the context of Sec. 11.042(b) applications and was not adopted as policy.⁶

The Executive Director does not believe that subordination language is appropriate for Sec. 11.042(b) authorizations because any water rights explicitly granted on the use or availability of the return flows at issue will be reviewed by the program. For example, there was one water right in the City of Bryan Sec. 11.042(b) application that was explicitly authorized based on the applicant's return flows, and it included the amount of those return flows.⁷ Though the ALJs struck the City of Bryan permit (SAWS Ex. 27) issued by the TCEQ from evidence, it is obvious that no subordination provision would be required because simple arithmetic could be used to subtract the amount of return flows authorized for use by an existing water right holder from the amount of return flows authorized for re-use under Sec. 11.042(b).

OPTION C

The Executive Director does not support Protestants' Option C because it assumes that the Protestants have and will maintain exactly 600 acre-feet of water in the saltwater barrier impoundment and that Protestants can measure diversions from

⁴ Tex. Water Code Sec. 11.027.

⁵ Tr. Vol. 3 page 95 lines 4-9 and Ex. ED-1 page 0015 lines 23-31. *See also* Tex. Water Code Sec. 11.021; Tex. Water Code Sec. 11.002(5) and 30 Tex. Admin. Code Sec. 297.1(62), defining water right, and Tex. Water Code Sec. 11.002(5), defining appropriator; and 30 Tex. Admin. Code Sec. 297.1(4), defining appropriative right as "The right to impound, divert, store, take, or use a specific quantity of state water acquired by law."

⁶ Ex. ED-1 page 0014 lines 10-14 and lines 21-28, page 0015 lines 6-21. *See also* Ex. ED-4, 5, 6 and 7.

⁷ SAWS Ex. 26 page SAWS 039381/ 040187 paragraph 1, page SAWS 039384/ 040190 paragraph 4.

the saltwater barrier. Both assumptions are not supported by the record, as discussed in the Executive Director's exceptions.⁸

The Protestants urge that Sec. 11.042(b) should afford their water rights protection beyond historic effluent levels without providing a legitimate basis for doing so. The evidentiary record already reflects that the historic outflow from the Guadalupe River into the Gulf of Mexico far exceeded the amount necessary to satisfy the Protestants' water rights.⁹

Therefore the Executive Director believes the result of expanding the scope of protection beyond the level of historic effluent will result in the Protestants' continued enjoyment of increased volumes of groundwater-based return flows to the watercourse at the expense of the San Antonio Water System, who as discharger is entitled to reuse of the full amount of those return flows pursuant to Sec. 11.042(b) because the Protestants water rights were not granted based on their use or availability.

The Executive Director does not support Option C's additional provision, which would require notice of any amendment to Permit No. 13098, because it is unnecessary since notice of water rights amendments have been sufficiently addressed by the Texas Legislature in statute¹⁰ and by the TCEQ in rule.¹¹

CONCLUSION

The Executive Director continues to respectfully request that the Commission grant the application because the San Antonio Water System met all applicable regulatory requirements, that the Commission issue the Draft Permit without revision, adjusting the Applicant's accounting plan as the Commission deems necessary, and for such other relief as deemed proper and just.

⁸ *Executive Director's Exceptions to Proposal for Decision* page 6 third paragraph under the heading of Protection Via Special Conditions.

⁹ 1,704,544 AF outflows minus 89,942 AF used by all Prot. WRs = 1,614,602 AF. Effluent from San Antonio in the 1940s was about 11.98 AF (10.7 million gallons per day multiplied by 365 days per year = 3,905.5 million gallons per year divided by 325,851 gallons per acre-foot = 11.98 AF per year(See ED Exceptions FN 32, FN 17, and the paragraphs about increase in return flows since the 1940s).

¹⁰ Tex. Water Code Sec. 11.132.

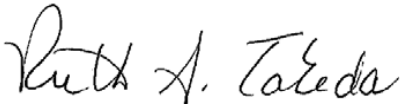
¹¹ 30 Tex. Admin. Code Sec. 295.158.


Respectfully submitted,
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

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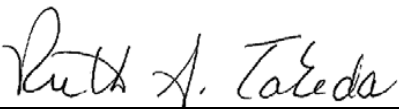
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CERTIFICATE OF SERVICE

I certify that on the 12th day of February 2024, the foregoing *Executive Director's Reply to the Protestants' Exceptions to the 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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SOAH Docket No. 582-22-1990; TCEQ Docket No. 2021-1391-WR

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