

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

APPLICATION OF	§	BEFORE THE
SAN ANTONIO WATER SYSTEM	§	TEXAS COMMISSION ON
FOR WATER USE PERMIT NO. 13098	§	ENVIRONMENTAL QUALITY

**PROTESTANTS' EXCEPTIONS
TO THE PROPOSAL FOR DECISION**

TO THE HONORABLE COMMISSIONERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

Protestants Guadalupe-Blanco River Authority (“GBRA”) and Union Carbide Corporation (“UCC”) respectfully file these Exceptions to the Proposal for Decision (“PFD”) and Proposed Order recommended by the SOAH Administrative Law Judges (the “ALJs”). Protestants agree with the vast majority of the PFD’s recommendations, in particular with the ALJ’s conclusion that the Draft Permit cannot issue as drafted. Protestants’ exceptions are accordingly narrow, largely limited to offering suggestions for how the Commission can and should use existing record evidence to draft the special conditions the ALJs determined are necessary to protect Protestants’ existing water rights and thus comply with the law, obviating the need for any remand.

Protestants also commend the ALJs for their management of this fact-intensive case. The ALJs heard and saw evidence spanning nearly 100 years; held Applicant San Antonio Water System (“SAWS”) to its burden of proof; afforded all parties more than adequate due process throughout the proceeding; and successfully situated Texas Water Code § 11.042(b), adopted in 1997, within its historical context.

Most importantly, guided by witnesses who participated in the historic adjudication of surface water rights across Texas’s river basins, the ALJs properly weighed the evidence to arrive at 73 findings of fact. Among those findings, the ALJs determined that “Protestants’ CAs 18-

5173, 18-5174, 18-5175, 18-5176, 18-5177, and 18-5178 were granted based on the use or availability of the return flows SAWS seeks to divert,” PFD at Finding of Fact (“FOF”) 66, and that “[s]pecial conditions in Permit 13098 are necessary to protect Protestants’ water rights,” PFD at FOF 69. The ALJs also rightly concluded that neither the existing Draft Permit special conditions, nor the SAWS accounting plan, currently protect Protestants’ Lower Basin Water Rights.¹ PFD at 56; PFD at FOF 68. Accordingly, the evidence dictates the outcome of SAWS’s requested authorization: “additional special conditions are necessary to protect Protestants’ water rights,” should the Commission choose to issue Permit No 13098 at all. PFD at 2. Finally, the ALJs correctly determined that “SAWS’s accounting plan should be amended to incorporate the Kennedy Memo and to account for any losses between GBRA’s saltwater barrier and the proposed diversion reach.” PFD at 62; PFD at FOF 64-65.

The existing evidentiary record not only supports inclusion of special conditions as an abstract matter, it also contains the necessary evidence to draft one or more special conditions that, if added to Draft Permit 13098, would appropriately protect Protestants’ Lower Basin Water Rights. *Cf.* PFD at 57. Protestants have identified the following three record-supported options that would fulfill that statutory mandate:

- **Option A** (the “Priority Date Option”) – Add a priority date to Permit 13098 equivalent to the date SAWS’s application was declared administratively complete (May 9, 2016);
- **Option B** (the “Subordination Option”) – Subordinate SAWS’s Permit 13098 to Protestants’ Lower Basin Water Rights so that Protestants’ rights are fully satisfied before SAWS may divert under Permit 13098; and

¹ Protestants’ “Lower Basin Water Rights” are those encompassed by Certificates of Adjudication (“CAs”) 18-5173, 18-5174, 18-5175, 18-5176, 18-5177, and 18-5178.

- **Option C** (the “ALJs’ Option”) – Allocate to Protestants’ Lower Basin Water Rights the right to divert—before others—the maximum volume of effluent historically discharged by SAWS during the “Lookback Period,”² less carriage losses between SAWS’s points of discharge and Protestants’ Lower Basin Water Rights’ diversion points,³ and restrict SAWS’s ability to divert under Permit 13098 to times when, after Protestants’ Lower Basin Water Rights’ diversion, water is flowing over the GBRA Saltwater Barrier and the other conditions (*e.g.*, SAWS’s actual discharge of effluent, less channel losses) are satisfied.⁴

Rather than remanding to Staff, the Commission should adopt one of these proposed special conditions and add it to the Draft Permit.

In addition to including one of these options in Permit 13098, the Commission should also add a condition affording Protestants notice of any future amendment proposed for Permit 13098 and providing Protestants with an opportunity for contest. This backstop would help ensure Protestants the opportunity to confirm that any amendment to Permit 13098—for instance, to add to or change SAWS’s authorized diversion locations—would continue to protect Protestants’ existing water rights. *See* Prot. Ex. 300 (Vaugh PFT) at 30:31-38 (describing how a no-notice amendment of Permit 13098 could undermine Protestants’ water rights). Coupled with one of the above options, the addition of a notice-and-contest special condition to Permit 13098 would assure Protestants the opportunity to adequately protect their existing water rights, as contemplated by

² As explained by Protestants’ expert Mr. Settemeyer, the relevant “Lookback Period” for the Lower Guadalupe River Segment adjudication is approximately 1972-1982. Prot. Ex. 400 (Settemeyer PFT) at 15:9-10.

³ Recognizing that the SAWS discharge points are located roughly 200 miles upstream of Protestants’ diversion locations for their Lower Basin Water Rights, applying (corrected) SAWS accounting plan calculations to the maximum volume of effluent SAWS discharged during the Lookback Period would provide the historically discharged effluent volume present in the source of supply, and thus available to Protestants’ water rights during the adjudication.

⁴ Prot. Ex. 300 (Vaugh PFT) at 11:3-12 (“For water to be flowing over this barrier and dam, the lower basin rights held by GBRA and UCC, which divert from the pool created by this barrier and dam, must first be satisfied.”).

the ALJs and required by Texas Water Code § 11.042(b), while allowing the Commission to issue SAWS's requested authorization without further proceedings.

The existing record also supports the rehabilitation necessary to correct SAWS's accounting plan. Specifically, the Commission can require SAWS to modify the plan to add travel time and additional channel losses, in accordance with the modifications made by Mr. Kennedy in SAWS Ex. 14, and include the omitted channel losses in the 2.7-to-7-mile stretch of the Guadalupe River below the Saltwater Barrier to the endpoints of SAWS's selected diversion reach. PFD at 59 ("SAWS's accounting plan needs to account for losses between the saltwater barrier and the diversion reach"). Incorporating these changes as well as the necessary special conditions, detailed above, into SAWS's accounting plan, would yield a practical tool that could implement a 200-mile bed-and-banks authorization while protecting Protestants' water rights.⁵

The Commission has before it a fully supported PFD on SAWS's indirect reuse application, backed by a robust and detailed evidentiary record. As the ALJs concluded, the Draft Permit requires the addition of special conditions to protect Protestants' water rights and a few further, more minor fixes—but the existing evidentiary record provides adequate information and evidence to both support and draft the terms of those conditions. And, by incorporating the changes outlined by Mr. Kennedy, plus losses associated with the 2.7-to-7-mile reach downstream of the Saltwater Barrier and ensuring Protestants the first right to all SAWS discharges up to 139,495 acre-feet per year, the Commission could also require SAWS to fix its accounting plan and allow this proceeding to come to a close.

⁵ Because "[a]n accounting plan is a tool" that must appropriately "subtract[] volumes...an applicant is not...entitled to divert," SAWS's accounting plan must reflect not only the special conditions necessary to protect Protestants' water rights but also any diversion limitations (*e.g.*, priority dates) that apply to water rights within the accounting plan. PFD at 21.

With the addition of (1) one or more of the record-supported special conditions described in more detail below and (2) a requirement that Protestants receive notice and an opportunity to contest any proposed amendment to Permit 13098, Protestants respectfully ask the Commission to adopt the findings and conclusions recommended by the ALJs in their Proposed Order and order SAWS to complete its accounting plan as recommended in the PFD.⁶

I. Argument

The facts established through the SOAH evidentiary hearing prove that Draft Permit 13098 lacks necessary special conditions to protect Protestants' Lower Basin Water Rights, which were granted based on the availability or the use of the historically discharged effluent SAWS now seeks to divert. PFD at FOF 66-69. The Draft Permit must therefore be revised to include the protections that Texas Water Code § 11.042(b) requires.⁷

Those special conditions could take many forms, and the existing record supports several. Protestants respectfully ask that the Commission select one of the three record-supported special condition options Protestants describe below and make it a condition of issuance for the Draft Permit. Any one of these would protect Protestants' existing water rights, as required by statute.

a. The Record Supports at Least Three Special Conditions, Any One of Which Would, If Added to Permit 13098, Protect Protestants' Lower Basin Water Rights.

The ALJs are correct that Draft Permit 13098 must be revised to include the special conditions that are necessary to protect Protestants' water rights. In fact, the existing evidentiary

⁶ Protestants agree to splitting transcript costs equally with SAWS, with 50% paid by SAWS and 50% paid by the Protestants, as recommended by the ALJs.

⁷ Especially given the ALJs' finding that "SAWS failed to carry its burden" of proof, PFD at 57, Protestants neither agree that the Commission should issue Permit 13098 nor waive arguing against permit issuance in future briefing. However, for the sake of brevity, this brief focuses solely on the specific topics raised by the PFD, not the generic and general fundamental question of whether SAWS's permit should be denied outright.

record supports at least three options for such conditions: Option A (Priority Date), Option B (Subordination), and Option C (ALJs' Option).

i. Option A: Add a Priority Date of May 9, 2016 to Permit 13098

The evidence in this case proves, conclusively, that TCEQ has previously employed and could again include priority dates in § 11.042(b) authorizations. Nothing precludes the Commission from adding a priority date to Permit 13098. *See* Tr. Vol. 3 at 89:7-9 (Alexander) (“Q: The TCEQ could decide to put a priority date on the SAWS permit? A: I mean, the Commission could certainly do that.”). Indeed, pre-2006, the ED considered the inclusion of priority dates in § 11.042(b) authorizations an essential mechanism for protecting existing water rights after the passage of SB 1. *See* ED Ex. 1 (Alexander PFT) at 10:5 (“The authorizations issued prior to 2006 include priority dates....”); ED Ex. 8 at 0184 (“[A] priority date can be placed on the authorization to protect existing water rights or protect the applicant from future reuse applicants.”). The Commission has ordered priority dates in previous § 11.042(b) authorizations, including those held by SAWS. *See* ED Ex. 1 (Alexander PFT) at 10:1-12 (listing issued § 11.042(b) authorizations and noting SAWS’s Permit 5705 includes a priority date).

If the Commission included a May 9, 2016, priority date in Permit 13098, in accordance with when SAWS’s Application was declared administratively complete, SAWS would still have a right to indirectly reuse a great deal of its requested flow, but the priority date would protect Protestants by allowing their senior water rights to “call” on this flow in times of shortage. *See* Prot. Ex. 300 (Vaugh PFT) at 7:37-8:3. Also, with a priority date on Permit 13098, in times of plenty, SAWS could divert up to its entire requested volume at its requested diversion reach, subject to the restrictions of actual discharge and channel losses.

Applying a priority date to Permit 13098 need not upset years of agency practice or create sweeping statewide precedent. The Commission has discretion to craft a tailored special condition for Permit 13098 that would protect Protestants' Lower Basin Water Rights while recognizing—as TCEQ's predecessor agencies did—the unique role that San Antonio's discharge of Edwards-derived effluent has historically played in the Guadalupe-San Antonio Basin over the course of the last century.⁸ Going forward, the Commission could also distinguish among § 11.042(b) authorizations that warrant a priority date based on use type, impacts, or other features—*e.g.*, whether the applicant confirms that no currently firm water rights are reduced below 100% reliability by the § 11.042(b) authorization. If the applicant *cannot* make such a showing, the Commission could apply a priority date to remedy the impact.

However narrowly this Commission might choose to apply priority dates to future § 11.042(b) authorizations, the addition of a priority date in *this* proceeding to *this* authorization is an example of a special condition that would protect Protestants' existing water rights and that would give the Commission a simple, record-supported mechanism for enforcing SAWS's obligations, consistent with Texas Water Code § 11.042(b). *See* Prot. Ex. 300 (Vaugh PFT) at 7:37-8:3. The Commission need go no further.

ii. Option B: Subordinate Permit 13098 to Protestants' Lower Basin Water Rights

Should the Commission prefer to avoid adding a “priority date” and its term-of-art connotations to Permit 13098, the Commission could accomplish a similar objective as Option A

⁸ *See, e.g.*, Prot. Ex. 300 (Vaugh PFT) at 19:35-20:5 (discussing how March 1983 water availability model for the Guadalupe-San Antonio Basin included San Antonio's effluent in its preferred run); Prot. Ex. 312 (Chenoweth Memo) at GBRA_005320 (“The adjudication for the San Antonio River basin relied on historical discharges to that basin. Thus, these assumed return flows were available to be appropriated to other water rights applicants. . . . [T]hese [downstream] water rights have grown to rely on these return flows.”); 30 TAC § 297.59(a) (“The commission will incorporate into every permit or certificate of adjudication any condition, restriction, limitation or provision reasonably necessary for the enforcement and administration of the water laws of the state and the rules of the commission.”).

by directly subordinating Permit 13098 to Protestants' Lower Basin Water Rights. This approach has precedent: TCEQ has issued many water rights with subordination provisions⁹ and has contemplated the use of subordination in the context of indirect reuse. *See* Prot. Ex. 625 (Jordan Memo, Dec. 1996) at GBRA_005325 (pre-SB1, TCEQ's predecessor agency contemplated subordinating all indirect reuse authorizations to affected downstream water rights).

Like a priority date, subordination would ensure that, during times of drought, Protestants' water rights would be protected while, during times of plenty, SAWS could divert up to its entire requested volume of water at its requested diversion reach. *See* Prot. Ex. 300 (Vaugh PFT) 8:1-3. A subordination would allow Protestants to effectively "call" on return flows discharged by SAWS, in accordance with what 2001 agency's staff called the "only acceptable approach given the statute and agency rules." Prot. Ex. 312 (Chenoweth Memo) at GBRA_005316; *see also id.* at GBRA_005320 ("[D]ownstream water rights which may have relied on these return flows will be protected...by allowing these water rights to 'call' on this water if needed to meet their needs.").

iii. Option C: Authorize Diversions Under Permit 13098 Only for Discharged Effluent Volumes in Excess of the Maximum Volume Discharged During the 1972-1982 Lookback Period, and Then Only If Water Is Also Flowing over the Saltwater Barrier

As suggested by the ALJs, the Commission could also protect Protestants' water rights by including in Permit 13098 a volume-based special condition coupled with a requirement that SAWS's diversion be permitted only if, after Protestants' diversion, water is spilling over the Saltwater Barrier. PFD at 57. The ALJs' recommendation, based on the evidence adduced through the hearing, flows from their factual findings that "Protestants used the available state water during the Lookback Period, and that such use was the basis of their CAs," PFD at 42, and that, "[a]t the

⁹ For instance, GBRA holds CAs 18-5172 and 18-5488 (Hydro Rights) that, as amended, contain subordination conditions.

time Protestants' CAs 18-5173, 18-5174, 18-5175, 18-5176, 18-5177, and 18-5178 were adjudicated, San Antonio's effluent discharge flowed in the Guadalupe River and was part of the water used by Protestants during the lookback period," PFD at FOF 47.

Giving Protestants the first right to divert the maximum annual volume of San Antonio effluent that flowed to the Saltwater Barrier at the time of the adjudication would accomplish some of the protection § 11.042(b) mandates for water rights granted based on the use or availability of return flows. The ALJs engaged in a "deeper consideration" of "[w]hether the water Protestants used during the Lookback Period included SAWS's return flows." PFD at 42. Based on the facts adduced through hearing, they determined that the "preponderant evidence indicates that San Antonio's effluent discharged during the Lookback Period became available, unappropriated water upon entering the watercourse." PFD at 45. And, when Protestants received their certificates of adjudication based on their use of state water during the Lookback Period (plus the right to diligently develop up to the full volume of their permitted appropriation), "Protestants' CAs were granted based on the actual use of flows with origins as SAWS effluent." PFD at 46.

While the facts are undeniable, Protestants caution against reading § 11.042(b) too narrowly. The statute mandates the inclusion of "special conditions if necessary to protect" water rights granted based on the availability or the use of effluent. TEX. WATER CODE § 11.042(b). So long as SAWS's discharged effluent became state water upon discharge (it did) that flowed into the Lower Guadalupe River basin where Protestants held the most senior water rights (it did), § 11.042(b) does not tether the degree of its protection to the volumes of water historically discharged.

Recognizing the logic of a volume-based approach, however, should the Commission elect to protect Protestants' water rights by including in Permit 13098 a volume-based special condition, the evidentiary record establishes these facts:

- The Lower Guadalupe River Segment adjudication's Lookback Period spanned approximately 1972-1982. Prot. Ex. 400 (Settemeyer PFT) 15:9-10.
- Using the monthly effluent discharge volumes provided by SAWS in its application, and converting those volumes from millions of gallons per day to acre-feet per year, the maximum annual effluent volume discharged by San Antonio during the years 1972-1982 occurred in the year 1981 was approximately 139,495 acre-feet.¹⁰
- Protestants' Lower Basin diversion points are just upstream of, and divert from the pool formed by, the Saltwater Barrier. See Prot. Ex. 300 (Vaugh PFT) at 11:7-9.
- Mr. Kennedy roughly approximated a 30-40% loss factor from San Antonio's points of discharge to the Saltwater Barrier. Tr. Vol 1 at 148:6-18 (Kennedy) (testifying that, from SAWS's discharges to the saltwater barrier, "losses...range from the average of 30 to 40 percent").
- Using a 40% loss factor, when San Antonio discharged 139,495 acre-feet to the San Antonio River in 1981, approximately 83,697 acre-feet would have arrived at the Saltwater Barrier.¹¹

In addition, requiring that water be flowing over GBRA's Saltwater Barrier before Permit 13098 could divert would also protect Protestants' Lower Basin Water Rights. This is because, as explained by Mr. Vaugh, "[f]or water to be flowing over this barrier and dam, the lower basin rights held by GBRA and UCC, which divert from the pool created by this barrier and dam, must first be satisfied." Prot. Ex. 300 (Vaugh) at 11:7-9. Accordingly, the record supports adding to

¹⁰ SAWS Ex. 3 (Application) at SAWS 039964-66 (daily average discharge volumes for January 1972 – December 1982 for Rilling Road, Leon Creek, Salado Creek, Dos Rios, and Medio Creek wastewater treatment and recycling centers).

¹¹ According to SAWS's application, the maximum annual effluent volume discharged during the Lookback Period of 1972-1982 was 139,495 acre-feet per year in 1981. See SAWS Ex. 3 (Application) at SAWS 039966. This total includes the Rilling Road, Salado Creek, and Leon Creek wastewater treatment plants ("WWTPs") but does not include the Medio Creek WWTP, for which SAWS indicated it had "no data." Mr. Kennedy approximated a 30-40% loss factor from each of SAWS's outfalls to the Lower Basin. Tr. Vol. 1 at 148:11-18 (Kennedy). A 40% loss factor, applied to 139,495 acre-feet per year results in 83,697 acre-feet per year.

Permit 13098 the same restriction present in “[m]ore than a third of the water rights authorized to divert from the San Antonio River between the Bexar/Wilson County line and the San Antonio River’s confluence with the Guadalupe River” that “no diversions are allowed unless water is flowing over the GBRA Saltwater Barrier and Diversion Dam.” Prot. Ex. 300 (Vaugh) at 11:3-7.

Permit 13098 could protect Protestants’ Lower Basin Water Rights by including a volume-based limitation¹² and flow requirement¹³ at the Saltwater Barrier. Applied carefully, this condition could allow SAWS to divert under Permit 13098, at its requested diversion reach, the volumes of effluent it discharges that exceed 83,697 acre-feet per year, *as measured at the Saltwater Barrier*, so long as water is also spilling over the Saltwater Barrier and SAWS otherwise satisfies the actual-discharge and carriage loss limitations inherent in any § 11.042(b) authorization. The ALJs’ suggested special condition, supported by the record, would protect the volume of state water that originated as San Antonio effluent and that was available at the Saltwater Barrier for Protestants to use under their Lower Basin Water Rights at the time of the Lower Guadalupe River segment’s adjudication.

b. Protestants Must Receive Notice and an Opportunity to Contest Any Future Amendments of Permit 13098.

To provide meaningful protection for Protestants’ existing water rights into the future, Permit 13098 must not only contain one of the special conditions described above but also mandate

¹² As a practical matter, Option C would need to be applied on a daily or instantaneous basis in order to actually protect Protestants’ water rights. Otherwise, SAWS could take advantage of a single springtime flood to satisfy its annual volume obligation at the Saltwater Barrier, and Protestants’ water rights could have no protection for remainder of the year. Even without a single high-flow event, SAWS could achieve its discharge volumes by early fall, leaving Protestants’ water rights unprotected for the remaining months of the year. This clearly does not satisfy the purpose of the protections embedded in § 11.042(b).

¹³ Example language includes the Special Condition I in Temporary Water Use Permit 13679: “Permittee shall not divert the water authorized hereunder during times when no water is flowing over the Guadalupe-Blanco River Authority’s saltwater barrier and diversion dam authorized by Certificate of Adjudication No. 18-5484.”

that Protestants be afforded both notice and the opportunity to seek a contested case hearing on *any* amendment.

TCEQ has broad discretion to include a limited notice-and-hearing requirement among the conditions necessary to protect Protestants' existing water rights. *See* TEX. WATER CODE § 11.042(b); 30 TAC § 297.59(a). As the record demonstrates, under the as-drafted Permit, SAWS could—without notice—amend Permit 13098 in a variety of ways that would risk injury to Protestants' existing water rights. *See, e.g.*, Prot. Ex. 300 (Vaugh PFT) at 30:12-24, 30:29-31:5. Such injurious amendments include, but are not limited to, SAWS requesting new diversion reaches or changing its accounting plan to favor certain interests over Protestants' rights. *See, e.g.*, Prot. Ex. 200 (Finley PFT) at 14:20-41 (discussing potential SAWS amendment of diversion point); Prot. Ex. 300 (Vaugh PFT) at 30:12-31:11 (describing how SAWS could use Permit 13098 to benefit water rights owned by or contractually related to SAWS, for instance CA 19-2162, without regard for prior appropriation, and at the expense of Protestants' rights). Providing Protestants the necessary special condition protection *in Permit 13098*—in the form of notice and an opportunity to contest permit amendments—ensures that Protestants have the opportunity to insist that Permit 13098, if revised, will continue to protect Protestants' water rights in fact and in the future, not only in name or at initial permit issuance.

Like the special conditions Options A-C, detailed above, the evidentiary record supports adding both future notice and the opportunity for Protestants to contest amendments to Permit 13098 as conditions necessary to protect Protestants' Lower Basin Water Rights.

II. SAWS Must Correct its Accounting Plan

As Protestants proved and the ALJs credited, SAWS must supplement and correct its accounting plan to support Permit 13098, both to include the travel times and to incorporate the

missing miles of channel loss in the segment of SAWS's conveyance reach located below the Saltwater Barrier. Excluding carriage losses along any portion of SAWS's conveyance reach risks the very result TCEQ's predecessors predicted when it adopted rules to implement § 11.042(b): the diversion of state water to which SAWS has no right.¹⁴ Setting aside the clear impracticalities of San Antonio's water utility "reusing" effluent by flowing it over 200 miles¹⁵ to the coast before diverting, piping, pumping, and transporting that water back to Bexar County, at unknown costs to SAWS's rate payers, the ALJs recognized that SAWS's diversion must reflect channel losses along the entire conveyance reach. The ALJs' recommended revisions to SAWS's accounting plan will serve as guardrails on SAWS's excessive diversion of state water—in the guise of § 11.042(b) "reuse"—at the coast.

An accounting plan is a practical tool. Administered by the South Texas Watermaster, SAWS's accounting plan should describe the rules of the road that govern its diversion. *See* SAWS Ex. 1 (Eckhardt PFT) at 25:14-16. Not only must the plan reflect necessary special conditions to protect Protestants' water rights, as detailed in Section I above, SAWS's own evidence includes travel time calculations and the carriage loss rate that should be included in its accounting plan for the stretch of river between the USGS Goliad gage and the mouth of the Guadalupe River. SAWS Ex. 14 (Kennedy Memo) at SAWS 040083; SAWS Ex. 1 (Eckhardt PFT) at 29:1-7. Protestants agree with the ALJs that SAWS must include the calculations of SAWS Ex. 14 in its accounting

¹⁴ *See* Prot. Ex. 603 (24 Tex. Reg. 969, 973 (Feb. 12, 1999)) (noting that a diversion under a bed and banks permit "may potentially affect existing water rights...if more water is diverted than actually discharged, less carriage losses"); Prot. Ex. 300 (Vaugh PFT) at 43:3-5 ("Failing to account for all conveyance losses in SAWS's accounting plan results in SAWS calling for more water to be passed by GBRA/UCC and others than would be authorized by Draft Permit No. 13098."). Similarly, outlining the "only acceptable approach" to § 11.042(b), agency staff in 2001 determined that an 11.042(b) applicant must "be responsible for all carriage losses associated with the discharged water from the point of discharge the point of diversion." Prot. Ex. 312 (Chenoweth Memo) at GBRA_005316, GBRA_005320.

¹⁵ The ALJs found that SAWS's originally proposed diversion point, now a diversion reach extending downstream from that point, is approximately 214 to 247 river miles downstream of its points of discharge. PFD at FOF 10.

plan. With those corrections, SAWS's accounting plan appropriately handles the conveyance of effluent from Bexar County *to* the Saltwater Barrier. Tr. Vol 2 at 227:4-10 (Vaugh) (Protestants' expert witness generally agreeing with the addition of carriage losses below Goliad to the Saltwater Barrier in SAWS Ex. 14, calling these calculations "very close").

However, the ALJs determined, from the evidence before them, that SAWS's accounting plan should also calculate the channel losses (if any) *below* GBRA's saltwater barrier dam, downstream to SAWS's diversion reach. PFD at 59. Even in Mr. Kennedy's revised analysis, SAWS stopped short of carrying its calculations from the Saltwater Barrier to SAWS's diversion reach, as required. Tr. Vol 2 at 227:14-21, 229:20-23 (Vaugh); SAWS Ex. 14 (Kennedy Memo). Because "there are 2.7 to 7 river miles" between the Saltwater Barrier and SAWS's diversion reach "in which carriage losses would occur and statute and rule require that those carriage losses be accounted for," the ALJs agree with Protestants that SAWS's accounting plan must reflect these losses. Tr. Vol. 2 at 229:20-23 (Vaugh). SAWS's witness Mr. Kennedy suggested that there could be zero channel losses below the Saltwater Barrier. Tr. Vol. 3 at 171:23-172:3 (Kennedy). But SAWS's witness Mr. Eckhardt in fact prepared a "draft revised accounting plan" that included "a new subreach from Goliad to the mouth of the Guadalupe River and *that allows the application or determination of conveyance losses in that reach* that was not in the approved accounting plan." Tr. Vol. 3 at 145:5-6, 147:9-13 (Eckhardt). Mr. Eckhardt testified that "SAWS would be willing to make these changes." *Id.* at 148:16-17. Respectfully, Protestants ask that the Commission order SAWS to do so.

As all parties acknowledge, SAWS could correct its accounting plan defects. *See* SAWS Ex. 1 (Eckhardt PFT) at 30:7-11; ED Ex. 1 (Alexander PFT) at 28:28-29:7. SAWS has done the work and testified that it is willing to make the requisite changes. Protestants agree with the ALJs'

determination that such accounting plan corrections are both necessary and appropriate before Permit 13098 can issue.

III. Miscellaneous Corrections

Lastly, Protestants respectfully request four factual corrections to the Proposal for Decision. First, the following statements should be modified to correct SAWS's inaccurate characterization of CA 19-2162:

Some of SAWS's effluent is subject to existing bed and banks authorization. San Antonio City Public Service Energy has a bed and banks authorization (CA 19-2162) to divert effluent (50,000 [acre-feet]) discharged by SAWS. Additional authorizations to divert effluent for indirect reuse total 2,122 [acre-feet] per year.

PFD at 8. These statements adopt SAWS's mischaracterization of CA 19-2162, which is a 1967-priority water right held by CPS Energy that authorizes the appropriation of state water, including effluent released by the City of San Antonio, subject to various special conditions. *See* Prot. Ex. 316A (CA 19-2162). As shown both by CA 19-2162 and the underlying "Permit to Appropriate State Water" No. 2325, the CPS Energy water right is neither a "bed and banks" authorization like those issued under § 11.042 nor an authorization "to divert effluent." Prot. Ex. 316A (CA 19-2162); Prot. Ex. 617 (Permit No. 2325).¹⁶ For accuracy, Protestants request that the PFD be revised as follows:

¹⁶ Permit 2523 granted a "permit to use the public waters of the State of Texas...issued to the City of San Antonio, City Public Service Board," recognizing that "the application and the notice of hearing contemplate the discharge of sewage effluent by the City of San Antonio, Texas, into the San Antonio River" and "the Commission finds that sewage effluent, when discharged into a public stream assumes the character of unappropriated public waters," making clear that Permit 2523 authorized *the appropriation of state water* (including discharged effluent), subject to the prior appropriation system, *not* the mere transport and diversion of effluent discharged by San Antonio, as under § 11.042.

~~Some of SAWS's effluent is subject to existing bed and banks authorization. Additional Aauthorizations to divert effluent for indirect reuse total 2,122 [acre-feet] per year. San Antonio City Public Service Energy also has a bed and banks authorization certificate of adjudication (CA 19-2162) to divert effluent appropriate waters of the State of Texas in an amount not to exceed (\$60,000 [acre-feet]) per year of "the unappropriated waters of the San Antonio River, including the sewage effluent released upstream from the point of diversion," subject to a 1967 priority date and the special conditions of CA 19-2162 discharged by SAWS. Additional authorizations to divert effluent for indirect reuse total 2,122 [acre-feet] per year.~~

Second, the PFD incorrectly states, in one place, the volume CA 18-5177 authorizes Protestants to divert as "32,614 acre-feet." PFD at 13; PFD FOF 32. The evidence confirms the correct volume for CA 18-5177: **51,247 acre-feet**. Prot. Ex. 107 (CA 18-5177);¹⁷ see also PFD at 27 (chart of CA 18-5177 authorizations summing to 51,247 acre-feet).

Third, the PFD restates the testimony of Mr. Perkins that the firm supply for Protestants' Lower Basin rights is 8,870 acre-feet per year. PFD at 51. This figure should have been qualified that it was derived *without* return flows; the firm supply that *includes* recent levels of SAWS return flows is 39,952 acre-feet per year, as simulated by the model TCEQ used to evaluate SAWS's application. Prot. Ex. 318 (Lower Basin Yield – TCEQ Application WAM for SAWS B&B – with Return Flows and SAWS Sr. Diversion ("Daily Reliability Model")) at GBRA_007585 ("Daily Firm Yield with SAWS Return Flows" shown as 39,952 acre-feet per year).

Finally, Protestants suggest that the ALJs correct an inaccuracy from the ED's testimony that became embedded in the PFD. The PFD restates Dr. Alexander's testimony as follows:

¹⁷ CA 18-5177 permits diversion and use of 32,615 acre-feet (Section 1A), plus additional authorizations for 10,000 acre feet (Section 1B) and 8,632 acre-feet (Section 1C) for a total of 51,247 acre-feet. Prot. Ex. 107 (CA 18-5177) at GBRA_007912-13.

After performing the second step, Dr. Alexander testified that she had two reasons for concluding that Protestants' water rights were not based on the use or availability of San Antonio's return flows. The first reason is that **the volume of assumed return flows that were used in the model was much greater than the volume that would have been in the river when Protestants' rights were granted. Thus, in the first simulation, Protestants' water rights were taking more water than would have been available when their water rights were granted, even assuming their water rights were granted based on SAWS return flows. This makes the comparison artificially high.**

PFD at 27-28 (emphasis added). As the ALJs' found, Protestants' CAs were granted based on effluent during the Lookback Period of 1972-1982. *See* PFD at 42. SAWS's own discharge data establishes that in several years of the Lookback Period, SAWS's annual discharges exceeded the 93,291 acre-feet per year assumed return flows volume that TCEQ incorporated into its model. *See* SAWS Ex. 3 (Application) at SAWS 039964-66 (listing discharge data for Lookback Period); Tr. Vol. 3 at 26:11-17 (Alexander) (discussing return flows figure used by TCEQ). Thus, in simulating what flows Protestants would have had available, TCEQ's comparison was reasonable—if conservative—and not “artificially high.”

IV. Conclusion

For the forgoing reasons, Protestants respectfully ask that TCEQ grant the Proposed Order recommended by the ALJs, with the addition of a May 9, 2016 priority date (Option A), or one of the other record-supported Special Conditions described above, plus notice and an opportunity to contest any future amendments proposed to the Permit, to protect Protestants' Lower Basin Water Rights. Protestants also ask that the Commission order SAWS to make the necessary corrections it testified it was willing to make to its accounting plan. Finally, Protestants respectfully ask that the ALJs make the above-listed factual corrections to the PFD and Proposed Order.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Protestants' Exceptions to the Proposal For Decision has been e-filed and served on the following counsel/persons by electronic mail on this 22nd day of January, 2024.

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