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' REPLY TO APPLICANT'S AND EXECUTIVE DIRECTOR'S EXCEPTIONS TO THE PROPOSAL FOR DECISION

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

The ALJs got this case right. After considering hundreds of exhibits, hours of testimony, and stacks of briefing on all sides, they determined that SAWS's indirect-reuse application could be granted—but only if subject to the addition of special conditions and a corrected accounting plan. All that remains now, in the words of SAWS's CEO, are the "details"[1] of memorializing protections for Protestants' rights and fixing SAWS's accounting plan defects. In crafting those details, the only remaining issue is what mechanism properly and best protects Protestants' water rights.

Contradicting SAWS's CEO's public proclamation, SAWS, along with the ED, claim in exceptions briefing that the ALJs somehow failed to consider and evaluate their evidence and arguments. Not so. The ALJs did, and thoroughly; they simply rejected those arguments and found that evidence wanting. At the ALJs' request, all parties prepared demonstrative timelines before the merits hearing. Protestants' timeline, which was presented at hearing and is attached to this reply, answers the key questions in this proceeding by detailing the legal and factual history,

[1] Lindsey Carnett, "State judges support approval of SAWS' treated wastewater permit — with stipulations," SAN ANTONIO EXPRESS NEWS (December 14, 2023), https://sanantonioreport.org/saws-bed-and-banks-permit-treated-wastewater-san-antonio-river-administrative-judges-ruling/ ("'We're very happy that there's been a proposal for it to be granted,' Puente said. 'That was the big issue that we had to overcome. Now we have to work out the details.'").

as supported by evidence, that guided the ALJs' correct conclusions. *See* Attachment A—Protestants' Timeline. The ALJs accepted Protestants' chronology and evidence as more credible than either the ED's backward-looking and tortured methodology or SAWS's pure legal argument and selective recounting of history. The ALJs properly determined, after considering all the evidence, that (1) SAWS's effluent was in the watercourse, (2) the effluent was state water, available for appropriation or use by Protestants, and (3) during the Adjudication, Protestants' CAs ***were*** granted based on use. Whatever modeling the ED may have done in the 2010s, and however vigorously SAWS defends it now, nothing can alter those historical truths, and the ALJs thus reached the correct result.

Because, at the very least, Protestants' existing water rights—their CAs—were granted based on the use of state water that included groundwater-based effluent discharged by SAWS, Draft Permit 13098 must contain special conditions necessary to protect Protestants' water rights.

I. ARGUMENT

A. The ALJs correctly placed the burden of proof on the applicant, SAWS.

TCEQ's rules are clear: in a contested case hearing, "the burden of proof is on the moving party by a preponderance of the evidence." 30 TAC § 80.17(a). In a contested case hearing on a permit application, the "movant" is the applicant—in this case, SAWS. 40 Tex. Reg. 9680, 9688 (Dec. 25, 2015) ("In a CCH regarding a permit application, the moving party is the applicant."). The rules thus dictate that SAWS "present evidence to meet its burden of proof on the application, followed by the protesting parties, the public interest counsel, and the executive director," followed by SAWS's rebuttal. 30 TAC § 80.117(b). To be sure, SAWS presented its case first and was the sole party with the benefit of a rebuttal (which it took full advantage of). Nevertheless, SAWS complains about this straightforward burden allocation.

From the beginning, SAWS made clear that it never intended to prove how Draft Permit 13098 protects existing water rights. It went as far as to ask the Executive Director to ***limit*** special-condition protection to a handful of SAWS-owned or -controlled water rights. SAWS Ex. 3 (Application) at SAWS 039893 (mischaracterizing the special condition protection as discretionary, then stating: "SAWS requests that such a special condition be included only in the event that the TCEQ identifies specific existing water rights that ***expressly*** provide that the right was issued based on the use or availability of SAWS' return flows"). Throughout this proceeding, SAWS's complaints about the burden of proof have sounded suspiciously like attempts to avoid compliance with the plain statutory requirements of § 11.042(b) while insisting that Protestants prove an affirmative case.

SAWS now argues that its evidentiary burden is limited to providing information, whether or not accurate,[2] adequate to fill in the blanks on its application, as specified in 30 TAC § 295.112. *See* SAWS Exceptions Br. at 5. SAWS believes, since that rule does not direct an applicant to prove that its authorization protects existing water rights, such proof may not be required or, if required, must be someone else's responsibility. SAWS's position conveniently ignores the statute, which requires that any § 11.042(b) authorization "shall be subject to special conditions if necessary to protect an existing water right that was granted based on the use or availability" of the return flows that are the subject of the application. TEX. WATER CODE § 11.042(b). SAWS cannot avoid this express statutory directive. Coupled with the clear regulations giving the applicant the burden of proof in a permit hearing before SOAH and TCEQ, SAWS must be (and was) held to the evidentiary obligations levied by the Legislature's enacted provision.

[2] As the ALJs acknowledged, it is undisputed that SAWS provided TCEQ with false information in its application about the date of initial discharge; this information was required pursuant to 30 TAC § 295.112(b)(5). PFD at 7 n.16. It was only after Protestants sent written discovery to SAWS and searched SAWS's archived records in 2022 that SAWS finally provided some information of its 1940s effluent discharges.

SAWS's task was simple: as applicant, SAWS was required to (1) provide correct information about its discharges and (2) affirmatively prove that Draft Permit 13098 includes all necessary special conditions to "protect an existing water right that was granted based on the use or availability" of SAWS's return flows. TEX. WATER CODE § 11.042(b). This burden could have come as no surprise to SAWS. Even in 1997, the agency acknowledged that "[t]he burden of demonstrating that the diversion [pursuant to a bed and banks authorization] will not impair existing water rights is on the applicant." Prot. Ex. 403 (Feb. 1997 Mark Jordan Memo to Reuse Committee) at GBRA_005329. As the ALJs found, SAWS failed to carry its burden. *See* PFD at FOF 66-69.

Moreover, as a practical matter, SAWS has always been in the best position to show how the Draft Permit's special conditions protect the statutorily specified existing water rights. SAWS—not Protestants or any other entity—has possession of its historical effluent discharge records and prepared the accounting plan.[3] SAWS could easily have crafted an application and accounting plan that set aside the portion of historically discharged effluent that was available to or used by downstream surface water rights during the adjudication of the relevant stream segments. With a special condition protecting those water rights—such as a priority date corresponding to when the Executive Director declared SAWS's application administratively complete—SAWS could have obtained an authorization years ago and spared itself, the Executive Director, SOAH, and Protestants the time and expense of a hearing.

[3] Even after the ALJs flatly rejected SAWS's argument, noting that "the accounting plan likewise offers Protestants cold comfort—because Staff did not find Protestant's water rights to have been granted based on the use or availability of the return flows SAWS seeks to divert, it fails to account for them," PFD at 56, SAWS and the ED continue to insist that an accounting plan that fails to recognize Protestants' rights somehow protects them. *See* SAWS Exceptions Br. at 5; ED Exceptions Br. at 2.

As the PFD acknowledged, TCEQ has full discretion to grant or deny a § 11.042(b) authorization. *See* PFD at 31. That SAWS applied for an indirect reuse permit is not enough. That it embraced the Executive Director's methodology is also insufficient. Instead, SAWS was required to prove that its requested permit fully meets Texas law. SAWS failed to do so. The ALJs did not err in holding SAWS to that burden of proof.[4]

B. SAWS ignores the statutory mandate to protect "existing water rights."

Section 11.042(b) requires that any indirect reuse authorization contain protections for "existing water right[s]" that were "granted based on the use or availability" of the return flows at issue. TEX. WATER CODE § 11.042(b). SAWS argues that Protestants' CAs were not granted based on the use or availability of SAWS's return flows because the Adjudication implemented under the Water Rights Adjudication Act "did not result in the granting of new appropriative rights" and merely "recognized existing water rights" held as permits. SAWS Exceptions Br. at 2; *see id.* at 7 (asserting that the Water Rights Adjudication Act cannot be the "basis for the granting of Protestants' water rights"). In other words, because, during the Adjudication, water rights holders had to demonstrate actual beneficial use (*i.e.*, perfection) of some amount of their water right, SAWS claims Protestants' CAs are not "existing water right[s]…granted based on the use or availability" of SAWS's return flows. TEX. WATER CODE § 11.042(b). In addition to being a non-sequitur, SAWS's argument also fails to address either the nature or origin of Protestants' CAs.

[4] Even if the burden of proof did fall on Protestants, Protestants' evidence overwhelmingly supports the ALJs' conclusions. *See* PFD at 45 ("The preponderant evidence indicates that San Antonio's effluent discharged during the Lookback Period became available, unappropriated water upon entering the watercourse. The same finding can also be made based on the Final Determination of the Lower Guadalupe itself."); *id.* at 46 ("[T]he ALJs find that Protestants' CAs were granted based on the actual use of flows with origins as SAWS effluent."); *id.* at 52 (noting that even if the ED's two-step analysis were sufficient for *initial* analysis of the application, "Protestants successfully rebutted Staff's impact analysis" and therefore "[t]he preponderant evidence demonstrates the Draft Permit would have adverse impacts on Protestants' water rights").

As Protestants demonstrated exhaustively through hearing, the CAs are "existing water rights" within the meaning of § 11.042(b). First, the CAs are "water rights," as defined by the Water Code. *See* TEX. WATER CODE § 11.002(5) (defining "water right" as "a right acquired under the laws of this state to impound, divert, or use state water"); Prot. Ex. 103 (CA 18-5173) at GBRA_007836 (stating that the holder is "authorized to divert and use" a specific quantity of state water from a specified river). Second, the "existing" water rights Protestants held in the Lower Basin when SAWS filed its Application in December 2013 were the Lower Basin CAs. *See* Prot. Ex. 400 (Settemeyer PFT) 7:31-32 ("Following the adjudication, a person who was issued a CA would look only to that CA. The CA superseded and supplanted all prior permits."); *City of Marshall v. City of Uncertain*, 206 S.W.3d 97, 99 n.2 (Tex. 2006) ("With limited exceptions, water rights in Texas are currently recognized in certificates of adjudication or permits."); Prot. Ex. 108 (CA 18-5178) at GBRA_007935 ("This certificate of adjudication….supersedes all rights of the owners asserted in" the adjudication proceeding for the Lower Guadalupe River segment). There is no other way to interpret § 11.042(b)'s protection of "***existing*** water rights" than to recognize that, in 1997, the Legislature mandated the protection of water rights ***in existence when an applicant requests a § 11.042(b) authorization***, not permits superseded by CAs and extinguished decades prior. Indeed, SAWS itself acknowledged that current CAs are subject to § 11.042(b) protection when it asserted in its Application that its own and CPS Energy's CAs were existing water rights warranting special conditions under § 11.042(b). SAWS Ex. 3 (Application) at SAWS 039893; *see also, e.g.*, SAWS Ex. 21 (Brandes PFT) 6:1-5 (confirming the identified CAs were "water rights meeting [the] criterion" and were "granted based on the use or availability of [SAWS's] return flows").

In arguing that "the basis for granting Protestants' appropriative water rights" was determined "when the permits granting those rights were issued in the 1940s and '50s," SAWS Exceptions Br. at 8, SAWS ignores the Legislature's decision to specifically include the word "existing" in § 11.042(b). As Protestants explained in closing briefing,[5] using the word "existing" in the statute might initially seem odd—how could a statute protect ***non***-existing rights?—but, when considered within the context of the Adjudication, it is clear that the Legislature's language is intended to distinguish between CAs, which, in most cases, represent the currently "existing" water rights, and those previously granted permits that were extinguished during the Adjudication. *See* Prot. Ex. 103 (CA No. 18-5173) at GBRA_007837 ("This certificate of adjudication…supersedes all rights of the owners asserted in [the adjudication proceeding]."); PFD at 41. SAWS has never even attempted to rebut that common-sense interpretation of § 11.042(b).

The ALJs properly determined that Protestants' CAs ***are*** "existing water rights" that were granted based on the "use or availability" of the subject return flows, and therefore require protection under the terms of the statute. *See* PFD at FOF 66-69.[6] As the ALJs recognized,

[5] *See* Prot. Closing Br. at 9-10.

[6] Because the ALJs correctly decided that the CAs themselves must be protected under § 11.042(b), the ALJs found no need to reach the question of protecting the ancestral permits underlying the CAs. PFD at 46 n.196 ("Because the ALJs find that Protestants' CAs were granted based on the use or availability of the return flows in question, further analysis of the underlying permits that the CAs superseded is not necessary."). Protestants agree with the ALJs that it is unnecessary to examine the basis for granting Protestants' historic, now-superseded water permits. However, as Protestants have explained in prior briefing, the permits underlying Protestants' CAs were *also* "granted based on the use or availability" of return flows discharged by San Antonio. Prot. Closing Br. at 12-18. Because effluent discharges from San Antonio were among the origins of state water in the Lower Guadalupe River—Protestants' source of supply for their Lower Basin water rights permits—this effluent was among the state water that was available to, appropriated by, and used by Protestants under their Lower Basin water rights. Prot. Ex. 300 (Vaugh PFT) at 19:3-21, 23:2-7 (Protestants' permits "were granted based on the availability of state water in the Guadalupe River at the time of granting, and that available state water included San Antonio's effluent discharges"); *see Edwards Aquifer Auth. v. Day*, 369 S.W.3d 814, 823 (Tex. 2012) ("[W]hen the water owner has not obtained the required authorization for such transportation [of groundwater discharged to a watercourse], the water in the natural watercourse becomes state water."); *City of San Marcos v. Tex. Comm'n on Env't Quality*, 128 S.W.3d 264, 274 (Tex. App.—Austin 2004, pet. denied) ("[T]he municipality's discharged effluent, partly derived from captured groundwater, became state water upon entering the watercourse."); Prot. Ex. 617 (Permit 2325) (discussing sewage effluent discharged by the City of San Antonio into the San Antonio River and reciting: "Whereas the Commission finds that sewage effluent, when discharged into a public stream assumes the character of unappropriated public waters"). SAWS's own evidence confirms these facts. *See* SAWS Ex. 1 (Eckhardt PFT) at 17:10-11 ("The Monthly Summary Report Records indicate

§ 11.042(b) requires an analysis of what happened, *i.e.*, whether Protestants "actually use[d] SAWS's return flows" such that their "existing water rights"—Protestants' CAs—were granted based on that use or availability. PFD at 42. On this point, SAWS again falters, mistaking its own legal arguments about the force and effect of the Adjudication as evidence of what happened.

C. SAWS failed to rebut the conclusive evidence that Protestants' CAs were granted based on—at least—the use of effluent discharged by SAWS.

SAWS bore an affirmative burden of proof but presented no evidence contravening the ALJs' correct conclusion that "Protestants' CAs were granted based on the actual use of flows with origins as SAWS effluent." PFD at 46. Instead, SAWS now argues that the granting of Protestants' CAs is irrelevant as to whether special conditions are necessary because—SAWS argues—the Adjudication did not grant "new" water rights. *See* SAWS Exceptions Br. at 14-16.[7] While creative, SAWS's argument not only lacks basis in statute—whether Protestants' existing CAs were granted based on the use of return flows is highly relevant under § 11.042(b)—but also lacks evidentiary foundation. The record evidence conclusively supports the ALJs' determination: at a minimum, Protestants' CAs were granted based on the use of state water that included San Antonio effluent discharges.

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discharges to the San Antonio River [from the Rilling Road plant] commenced in 1940."); Prot. Ex. 507 (Op-ed by SAWS CEO Robert Puente) ("[U]nder state law, SAWS loses ownership of that water . . . as soon as it leaves our water recycling plant and is discharged into the San Antonio River."); Prot. Ex. 500 (Puente Depo. Excerpts) at 129:6-11 ("A: If your question is does GBRA have rights that were granted to it based on downstream flows, I would say yes. The answer is yes. Q: And those downstream flows would include historically returned flows of effluent, correct? A: Yes, sir."). Indeed, the ED's exceptions brief also confirms that effluent, along with runoff, spring flows, and rainfall, was in the stream and state water when Protestants' historic water permits were granted. ED Exceptions Br. at 8. Because Protestants established that both their current CAs and the underlying, ancestral water permits were granted based on either the availability, or the use, of return flows discharged by SAWS, Draft Permit 13098 must contain special conditions to protect Protestants' water rights on one or both of these bases. Accordingly, the course of action proposed by SAWS and the ED in their exceptions—issuance of the Draft Permit as it stands—is not legally available.

[7] Despite its earlier arguments to the contrary, SAWS has apparently conceded that CAs are a type of water right protected by § 11.042(b). *See* PFD at 41 (noting SAWS's inclusion of CAs held by it and CPS Energy in SAWS's application and accounting plan).

Primary source documents from the Adjudication establish that, when adjudicating claims and issuing CAs, "[t]he commission recognized the maximum quantity of water beneficially used." Prot. Ex. 122 (Final Determination—Lower Guadalupe River Segment) at 3; *see id.* at 2 (noting the "beneficial use" of state water under the pre-existing permits "is an essential element" for any claimant in the Adjudication); *City of Marshall*, 206 S.W.3d at 103 (noting that "the rights recognized" via the adjudication process "were based on historic use"). Protestants' witness Mr. Settemeyer, who participated in adjudications throughout Texas, confirmed that the agency's inquiry examined a claimant's "perfected" volumes during a relevant "lookback period," *i.e.*, the "maximum annual historical use in the previous 10+ years." Prot. Ex. 400 (Settemeyer PFT) 6:27-7:7. SAWS produced no countervailing evidence: no documents, no testimony, nothing to rebut either the historic files or the first-hand account of a witness who actually performed adjudications. As Protestants proved as a matter of historical fact, the Commission granted CAs based on both proof of diligent development and volumes of state water ***actually used*** by water rights holders. PFD at FOF 41, 66.

Protestants' evidence confirms that SAWS's effluent discharges were among the commingled origins of state water available to and used by Protestants in diverting state water from their authorized source of supply in the Lower Guadalupe River during the Lookback Period.[8]

[8] Record evidence plainly contradicts the ED's litigation stance in this proceeding that water rights on the Lower Guadalupe River, which appropriate state water flowing downstream from both the San Antonio and Guadalupe watersheds, cannot exercise priority calls up the San Antonio River. As demonstrated by Protestants' record evidence, not only does this stance contravene basic principles of hydrology, *see* Prot. Ex. 100 (Perkins PFT) at 5:3-5; Prot. Ex. 300 (Vaugh PFT) at 7:6-10, and the series of water availability models created to support Texas surface water rights permitting over the course of decades, *see* Prot. Ex. 300 (Vaugh PFT) at 19:35-20:1-3; Prot. Ex. 309 (Legacy WAM Appendix Two, March 1983—San Antonio), this also has not been ED Staff's position historically. *See* Prot. Ex. 316 (Emails with CPS Energy) at GBRA_007740 (explaining TCEQ staff's confirmation that CA 19-2162 has "an associated priority date" with diversions "subject to senior water rights"); Prot. Ex. 316C at 4-7, 4-8 (discussing "effluent discharge from the City of San Antonio wastewater treatment plants" and noting that "[u]nder direction from the TNRCC, these return flows are considered 'state water,' and ***the availability of return flows for diversion into Calaveras Lake is subject to upstream and downstream senior water rights.***") (emphasis added). The plain language

The Final Determination of the Adjudication made clear that the "state waters subject to [the] adjudication" comprise "all flows of the various streams in the Lower Guadalupe River Segment." Prot. Ex. 122 (Final Determination—Lower Guadalupe River Segment) at 2. SAWS's discharge records establish that discharges began, at the latest, in 1940, continued through the Lookback Period, and still continue today. SAWS Ex. 1 (Eckhardt PFT) 17:10-11 ("The Monthly Summary Report Records indicate discharges to the San Antonio River [from the Rilling Road plant] commenced in 1940."); SAWS Ex. 3 (Application) at SAWS 039964-66 (SAWS discharge records during 1972-1982 lookback period); *see* ED Exceptions Br. at 8.

At all times, effluent discharges from San Antonio into the San Antonio River became state water subject to appropriation by holders of downstream surface water rights. *See City of San Marcos v. Tex. Comm'n on Env't Quality*, 128 S.W.3d 264, 275 (Tex. App.—Austin 2004, pet. denied) ("Once return flows are given back to a watercourse, they become part of the normal flow." (quoting *Domel v. City of Georgetown*, 6 S.W.3d 349, 360 (Tex. App.—Austin 1999, pet. denied)). Thus, the San Antonio effluent "that flowed to GBRA and UCC's diversion locations could be diverted and was used in accordance with GBRA and UCC's permit terms during the look-back period of the adjudication," and during the Adjudication, "the effluent from San Antonio was part of the state water used to perfect [Protestants'] water rights." Prot. Ex. 400 (Settemeyer PFT) at 15:6-12. This conclusion is supported by historical agency documents analyzing the Adjudication and return flows both before and after the passage of SB1. *See* Prot. Ex. 625 (Dec. 1996 Mark Jordan TNRCC Interoffice Memo) at GBRA_005322 ("Most water rights in the state were granted through the adjudication process which was based upon historical claims of use which undoubtedly

of the water rights within the San Antonio Watershed neither precludes downstream senior water rights, including those held in the lower Guadalupe River, from exercising priority calls nor supplants Texas Water Code § 11.027.

included the use of return flows."); Prot. Ex. 312 (2001 Chenoweth Memo) at SAWS 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.").

SAWS tries to support its argument with Mr. Settemeyer's testimony that the Adjudications "could not grant *additional new water rights*." SAWS Exceptions Br. at 16 (citing Tr. Vol. 2 (Settemeyer) at 163:23-24 (emphasis added)).[9] But that testimony proves Protestants' point: while an Adjudication could not, and did not, grant "***additional new*** water rights," each adjudication could, and many did, result in the reduction or extinction of water rights. Prot. Ex. 400 (Settemeyer PFT) at 7:4-7 ("Q: If a water right was not perfected as part of the adjudication, what happened to it? A: If a water right was not perfected (no water was beneficially used), and there was no evidence that the water would be put to use in the future, then ***no CA was issued***." (emphasis added)); *id.* at 7:22-24 ("Q: And what if a permittee proved it had only historically used and only needed half the amount that its permit allowed? A: Then the adjudicated water right would be for half of what the permit originally authorized."). Thus, while an Adjudication did not grant "additional" water rights or allow to be appropriated "new" volumes of state water in excess of those previously authorized, a water right holder that failed to prove up its authorized appropriation through use or diligent development would find itself, after adjudication, with a lower-volume water right or no water right at all. The extensive, unrebutted evidence discussed above establishes that it was the proven *use of state water* during the Lookback Period

[9] SAWS also blatantly mischaracterizes Mr. Settemeyer's testimony by claiming that his testimony supports SAWS's incorrect assertion that "no water was appropriated pursuant to the [Water Rights Adjudication] Act." SAWS Exceptions at 8 (citing Tr. Vol. 2 (Settemeyer) at 153:20-24). Mr. Settemeyer did not testify that "no water was appropriated" and instead stated only that "the adjudication could not grant ***additional*** new water rights." Tr. Vol. 2 (Settemeyer) at 153:20-24 (emphasis added).

that formed the basis for issuing the CAs, not the mere fact that a water use permit existed. That is, "had [Protestants] not proven the use of state water—which included effluent—[Protestants] would not have received CAs." Prot. Ex. 400 (Settemeyer PFT) at 15:25-26. It is for this reason that Mr. Settemeyer equates the Adjudication to an effective re-granting of Texas water rights. *See id.* at 2:3-5 (explaining how Protestants' Lower Basin water rights "were effectively granted twice: once at the time the original permits were issued and once when the adjudication occurred").

D. The ALJs appropriately considered, then rejected, SAWS's and the Executive Director's arguments.

Lacking evidentiary and legal support for its arguments, SAWS resorts to alleging that the ALJs somehow violated its "substantial rights" in weighing the evidence.[10] The ALJs' measured analysis and detailed PFD belie any such accusation. The PFD faithfully lays out arguments presented by SAWS, the ED, and Protestants. Setting those side-by-side, the ALJs found SAWS failed to carry its burden of proof as to special conditions and that Protestant' arguments and evidence were more persuasive.

For example, while SAWS complains the ALJs reached their conclusion regarding Protestants' water rights "without any consideration of SAWS's arguments that the Act was not the basis for granting Protestants' water rights," SAWS Exceptions Br. at 7-8, the ALJs acknowledged that "SAWS argues that Protestants' CAs cannot have granted them any rights that

[10] Protestants cannot conceive of what "substantial rights" SAWS could claim the ALJs prejudiced. SAWS's application underwent a decade of processing at TCEQ before SAWS participated in a full contested case hearing with robust discovery, witness testimony, documentary evidence, and wide-ranging briefing opportunities. SAWS's evidence was offered and admitted. The ALJs heard every one of SAWS's witnesses and admitted the full panoply of evidence SAWS chose to offer—with the exception of the belated accounting plan SAWS attempted to wedge into evidence, without prior disclosure, within the last few hours of hearing. Tr. Vol. 3 (Eckhardt) at 148:7-154:22. SOAH provided SAWS with all due, and vastly sufficient, process. By contrast, SAWS's repeated attempts to deprive Protestants of the full value of their water rights without even the right to a hearing would have, if successful, impinged upon ***Protestants'*** substantial rights: their vested surface water rights granted by the State of Texas. *See, e.g.*, SAWS's Resp. to GBRA's Plea to the Jurisdiction and Third-Party Requests for Contested Case Hearing (Jan. 14, 2022) at 13-18 (claiming no person had a right to a contested case hearing on an application filed under § 11.042(b)).

did not already exist in their underlying water rights, therefore, the CAs similarly fail as bases for claiming the Draft Permit should include protective special conditions under Section 11.042(b)." PFD at 39. In the PFD, the ALJs methodically listed the relevant evidence, including Mr. Settemeyer's testimony and documents from the Adjudication, PFD at 40-46, referenced the relevant law, then concluded, based on these facts, that the CAs ***were*** "granted based on the actual use of flows with origin as SAWS effluent." PFD at 46.

SAWS's complaint that the ALJs failed to consider the ED's two-step methodology is similarly baseless. Even setting aside the contortion that the ALJs' supposed failure to credit *another party*'s evidence somehow prejudices SAWS's "substantial rights," the PFD again deflates SAWS's argument. SAWS asserts that the PFD "glosses over the Executive Director's evidence in favor of Protestants' position," while ignoring the six pages of the PFD (at 34-40) where the ALJs discussed how the ED reviewed the Application's hydrology, including the ED's "two-step" methodology. SAWS Exceptions Br. at 20.

SAWS apparently believes the ALJs did not "decid[e] Protestants had the more convincing experts and more appropriate methodology" when the ALJs determined that Protestants' water rights were based on the use or availability of effluent discharged by SAWS. *Id.* at 19. On the contrary, the ALJs examined the "existing water rights" held by Protestants—the CAs—and considered the historical and legal bases for their granting. PFD at 42 ("Therefore, the relevant question, raised by Protestants, is did Protestants *actually use* SAWS's return flows during the Lookback Period?"); *see id.* at FOF 41 (finding "Adjudication was based on use"), FOF 66 (finding Protestants CAs were granted based on use of SAWS return flows). What else, besides relying on Protestants' more convincing witnesses and Protestants' more appropriate methodology, would SAWS have had the ALJs do?

The ALJs showed their work. Nothing requires the PFD to eviscerate one side's illogical theories or nonexistent evidence before crediting another's evidence and legal citations. Given the ALJs' thorough and thoughtful treatment of this legally and factually intensive case, SAWS's position is akin to a semantic gripe over a lack of vehement rejection rather than a coherent due process argument.[11] Even without delineating the specific basis for rejecting each position advanced by SAWS or the Executive Director, the ALJs made both their decision and their rationale perfectly clear.

E. The ALJs properly rejected the "two-step" method for identifying water rights granted based on the use or availability of return flows.

SAWS correctly identifies the "central issue in this case": that Protestants' Lower Basin Water Rights were granted based on the use or availability of the return flows SAWS now seeks to divert. SAWS Exceptions Br. at 19. But, no matter how often it lambastes the ALJs' fact-finding as "unconscionable," *e.g., id.* at 3, 17, 20, SAWS cannot avoid the simple reality that the ED's "two-step" methodology amounts to nothing more than an arbitrary test that fails to achieve its stated objective.[12]

SAWS and the ED make two interrelated and incorrect claims regarding the ED's methodology for determining whether Protestants' water rights were "granted based on the use or availability of return flows." First, they claim that the two-step methodology has been consistently

[11] SAWS also fails to find support for its argument regarding the form of the PFD in its cited caselaw. For example, SAWS cites to *Railroad Commission v. Shell Oil Co.*, where the Texas Supreme Court stated that a reviewing court is not unconditionally bound by an agency's factual findings and evidentiary rulings, observing "[i]t would indeed be a sorry trial if an agency could thus **reject** the material evidence of one side and **admit** and consider the evidence offered by the other." 161 S.W.2d 1022, 1028 (Tex. 1942) (emphasis added). But this proceeding has no issues regarding admission or exclusion of evidence: *all* of SAWS's and ED's evidence was admitted, with the sole exception of SAWS's late-filed accounting plan that it sought to introduce as rebuttal evidence. The ALJs admitted and considered the entire body of evidence; SAWS just dislikes the result.

[12] As Protestants have extensively briefed, the ED's two-step methodology lacks basis in statute or rule, and, if applied proscriptively as SAWS and the ED advocate, it amounts to an illegal ad hoc rule. Prot. Cl. Br. at 36-40; Prot. Reply Cl. Br. at 14-17.

applied. Second, they assert that, merely because the methodology has been consistently applied, it is binding. Even if ED's two-step methodology had been consistently applied, which the evidence refutes, consistent application of an invented methodology does not mean it has been adopted or ratified by either the Commission or a reviewing court as a valid method for identifying existing water rights that must be protected by special conditions under § 11.042(b). As the evidence demonstrates, the ED began applying its two-step methodology in the wake of the uncontested 2006 *City of Bryan* interim order, which addressed only whether an § 11.042(b) applicant was required to prepare a water conservation plan. Both the *City of Bryan* interim order and the subsequent § 11.042(b) authorization granted in that case were issued outside the rigors of a contested case hearing.[13] No water rights holder was given the opportunity to develop an evidentiary record or probe the validity of the ED's new two-step relative to Bryan's application for an § 11.042(b) authorization. *See* Prot. Closing Br. at 40-41. The current evidentiary record contains *no support*—and SAWS and the ED offer none—for the argument that Staff's creation and use of a methodology in the wake of that 2006 interim order either imbues that methodology with controlling precedential effect or shields it from scrutiny.

Further, while SAWS and the ED attach great importance to their assertions of consistent agency practice, *see* SAWS Exceptions Br. at 17; ED Exceptions Br. at 2, those claims are not true. As an initial matter, before 2006, each § 11.042(b) authorization received a priority date in order to protect senior water rights holders. *See* ED Ex. 1 (Alexander PFT) at 10:5 ("The authorizations issued prior to 2006 include priority dates…."). But even after the *City of Bryan* interim order in 2006, the ED did not shift entirely to using the two-step methodology in evaluating

[13] In their closing brief, Protestants detail the procedural posture of the 2006 *City of Bryan* interim order—issued before the agency had even determined the City's application administratively complete—and will not repeat that analysis here. Prot. Cl. Br. at 40-44.

§ 11.042(b) authorizations. In the 2008 hydrology memo analyzing the City of Bryan's § 11.042(b) application, ED Staff discussed only step one of the "two-step"—*i.e.*, whether any water right explicitly references the subject return flows—as the basis for identifying water rights granted based on use or availability. *See* SAWS Resp. to Prot. Motion to Align at Exhibit 5 (July 21, 2008 TCEQ Water Availability Review Addendum—City of Bryan WRPERM5912). While Staff conducted a WAM-based analysis of the City's application—the "second step" of the two-step methodology—it then used the WAM analysis to "assess any potential ***impacts*** of the conveyance and diversion of [the City of Bryan] return flows on existing water rights," not as a proxy for which water rights were granted based on use or availability of return flows. *Id.* at 2. Thus, even if consistent application determined the ED's methodology's validity, which it does not, the ED has not consistently applied it.

Most crucially, SAWS and the ED fail to offer a single argument explaining how the ED's two-step methodology aligns with the statutory mandate to protect each "existing water right that was granted based on the use or availability" of return flows. TEX. WATER CODE § 11.042(b). The correct approach, advanced by Protestants and accepted by the ALJs, considers the plain language of § 11.042(b), the legal and historical facts surrounding SAWS's post-1940 discharges, how the effluent became state water upon discharge to the watercourse and flowed downstream into Protestants' source of supply in the Lower Guadalupe River, and the mechanics of adjudicating Protestants' water rights based on evidence of beneficial use of state water. *See* PFD at FOF 37-47 (findings regarding historical process of water rights Adjudication as related to San Antonio effluent discharges); Attachment A—Protestants' Timeline. In response to the well-reasoned arguments and historical, factual evidence offered by Protestants and credited by the ALJs, SAWS

and the ED only double down, relying ever more extensively on the ED's "two-step" methodology. As the ALJs recognized, however, that methodology is fatally flawed.

The ED's arguments reveal that its purported two-step essentially reduces to step one: protecting only those water rights that explicitly reference the return flows at issue. During the hearing, the ED's witness returned repeatedly to the fact that no "document" affirmatively states that Protestants' CAs were granted based on the availability, or the use, of effluent from San Antonio. Tr. Vol. 3 (Alexander) at 35:7-14 ("A: [T]hat information would be found in the documents supporting the granting of that water right. Q: In this case, have you received any documentation that Protestants' water rights were granted based on the use or availability of the Applicant's return flows? A: No."). The ED's exceptions brief—despite acknowledging that discharged effluent "cannot be segregated from other origins of state water" available for appropriation and use—directly challenges the idea that Protestants' water rights could require protection "without holding ***explicit*** authorization for [the effluent's] use or reuse." ED Exceptions Br. at 7-8 (emphasis added). The ED misses the obvious point, correctly summarized by the ALJs: "None of the Protestants' CAs contain language explicitly indicating that they were issued based on the use or availability of effluent; however, that does not mean that they *were not* granted based on it." PFD at 41-42.[14] SAWS's and the ED's dogged insistence on returning, over and over, to a test that refuses to acknowledge that reality underscores that they simply have no answer to the ALJs' cogent criticism.

[14] As Protestants thoroughly demonstrated in prior briefing, the ED's insistence that § 11.042(b) only protects water rights "explicitly" granted based on specific effluent discharges impermissibly rewrites the statute. *See* Prot. Closing Br. at 24-31. Dr. Alexander acknowledged that "[t]here's no language in [§11.042(b)] that requires the use or availability . . . to be explicitly referenced in a water right. 'Explicit' is not in the statute." Tr. Vol. 3 (Alexander) at 117:3-12. The addition of words to a statute violates a core principle of statutory interpretation; the ED should not be allowed to rewrite the statute or override the Legislature's intention and compromise by implementing a test that defies the statutory directive. *See Cavin v. Abbott*, 545 S.W.3d 47, 63 (Tex. App.—Austin 2017, pet. denied) ("[W]e are not to read language into the statute that is not there.").

The ED's "explicitly" position conflicts with SAWS's and the agency's admissions that wastewater discharged to the watercourse becomes state water, available for appropriation.[15] At least historically, the Executive Director understood that this meant water rights ***were*** granted based on the use or availability of historically discharged effluent ***and thus required protection***. *See, e.g.*, ED Ex. 4 (Feb. 2005 Work Session Staff Memo) at 0047 ("[T]here can be both downstream and upstream impacts from reuse of historically discharged return flows, both groundwater and surface water, to existing water right holders. One of the requirements for bed and banks permits is protection of existing water right holders."); *id.* at 0048 (discussing the "Preferred Options" of the Executive Director: "Once return flows are released to the stream they become state water.…Groundwater is not private water when it is released to the watercourse. Therefore, ***all reuse permits for historically discharged water*** (surface and groundwater) ***should be given a new priority date*** based on the date of filing the reuse application ***to protect other water rights***.") (emphasis added).

SAWS and the ED posit—without proof—that the WAM-based impact analysis in step two identifies any other water right that does not explicitly reference effluent but that still must be protected. Yet the second step's analysis ignores the events that occurred in the hydrologically connected Guadalupe-San Antonio Basin—including San Antonio's decades of over-pumping of and discharging effluent from the Edwards Aquifer and the resulting lawsuit brought by GBRA and others that led to springflow protections for the Guadalupe River baseflow—that ultimately led to TCEQ's early water availability model's preferred run *including* San Antonio's effluent.

[15] SAWS's own former Senior Water Resources Counsel admitted "Groundwater based wastewater effluent is owned by the developer of the treated wastewater[;] Ownership passes to State when effluent is discharged into river." Prot. Ex. 600 (SAWS 2015 Presentation) at SAWS_006123. Likewise, during the BRA SysOps Permit 5851 contested case hearing, the agency found that "[r]eturn flows, once returned to a state watercourse, are unappropriated flows available for appropriation." Prot. Ex. 303 (BRA SysOps Permit 5851) at FOF 164.

Prot. Ex. 300 (Vaugh PFT) at 19:35-20:5 ("[T]he water modeler was directed to use 'Run I.' Run I is defined as 'all rights before June 1982 are included and return flows from the sewage effluent discharges by the City of San Antonio are included.'"); Prot. Ex. 309 (Legacy WAM Appendix Two, March 1983 – San Antonio).

Most problematically, the ED adopts an arbitrary "rule of thumb" in its second step, assuming that, absent a 5% impact on *annual* volume reliability, the right necessarily was not granted based on the discharges. Conversely, even if such an impact were shown, the methodology requires only that the ED review further (again utilizing the invalid "explicitly" metric) to see whether the right was granted based on the use or availability of return flows.[16] As Mr. Vaugh explained, the ED's rule of thumb "relies on overly simplistic measures of impacts based on simulated changes in long-term average volume reliability…to see if a water right might have been granted based on the availability of return flows." Prot. 300 (Vaugh PFT) at 35:4-9. While the ED's approach might reasonably approximate ***how*** SAWS's application will impact surface water rights in the GSA Basin, the ED's methodology wholly fails to identify ***which*** water rights were granted based on the availability, or the use, of historically discharged effluent, as Protestants' were.[17] In fact, the methodology does not even identify the step-one water rights that SAWS and the ED found were explicitly based on SAWS return flows.

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[16] As Protestants explained, the ED's two-step methodology is actually a *three*-step, under which the third step is effectively indistinguishable from the first. *See* Prot. Closing Br. 35-36. That circularity demonstrates that the methodology inevitably reduces to the invalid step one analysis: whether effluent discharges are "explicitly" referenced as the basis for granting those water rights.

[17] Indeed, in applying the 5% rule of thumb, the ED did not consider Protestants' water rights as worthy of even additional ***review***. In light of Protestants' evidence of harm, this should be enough to call into question the ED's second step. As Mr. Vaugh explained in testimony, the municipal components of CAs 18-5176 and 18-5177 are currently 100% firm, but Permit 13098, as drafted, would ***reduce these municipal water rights by 25%-35%*** on an annual volume basis. *See* Prot. Ex. 300 (Vaugh PFT) at 39:8-40:3; Prot. Ex. 317 (TCEQ WAM Reliability). Further, as Protestants explained in their closing brief, applying Staff's second-step test uniformly identifies no protectible rights, not even ones singled out as "explicitly" based on use or availability. *See* ED Ex. 1 (Alexander PFT) at 19:15-20:22. Staff's annualized-basis modeling comparison did not identify CPS Energy's Calaveras certificate of adjudication, CA 19-2162, as granted based on use or availability of San Antonio discharges, notwithstanding that

The 5% "rule of thumb" lacks any basis in statute or rule and ignores the historical, factual evidence related to how Texas granted certificates of adjudication based on use. When considered in the context of a drought, even a 1% reduction in reliability can cause substantial harm to water suppliers like GBRA and water users like UCC. Prot. Ex. 300 (Vaugh PFT) at 35:26-33 (discussing how analysis based on replication of TCEQ Hydrology Memo indicated "minimum year reductions in volume rang[ing] from 18% to 35%" that "meant that some GBRA/UCC water rights that were 100% reliable without Draft Permit No. 13098 became interruptible with SAWS's permit in place"); *id.* at 39:10-13 (summarizing analysis based on TCEQ monthly modeling results finding that "[a]ll municipal components of the water rights shown to be firm prior to potential granting of Draft Permit No. 13098 were reduced to zero, a 100% reduction"). This reality further underscores the arbitrary nature of the ED's 5% threshold.

As the ALJs acknowledge, consideration of "impact in its determination of whether water rights were issued based on the use or availability of the return flows at issue," including a 5% rule of thumb, "***may*** be reasonable for Staff's ***initial*** analysis of the Application." PFD at 52 (emphasis added). But that "initial" analysis, without more, may not be sufficient—and it was not here. *See id.* (noting Protestants' successful rebuttal of that analysis). As the evidence demonstrates, identifying existing water rights granted based on the use or availability of effluent requires an accurate understanding of relevant facts, not blind application of a model. The ALJs properly adduced these facts in the PFD, confirmed Protestants' existing water rights were granted based

CA's express language tying its volume limitation to San Antonio's return flows. *See id.* Nor did the second step of the ED's methodology pick out SAWS's own Permit No. 5705 or the permits based on contracts with SAWS. *See id.* In fact, as far as the record reveals, Staff's methodology does not appear to ever have generated a positive result. *See, e.g.*, Tr. Vol. 3 (Alexander) at 29:2-30:19, 34:6-14 (identifying the sole water right protected in *City of Bryan* proceeding on the basis of express permit language, not as a result of WAM analysis).

on use or availability of effluent discharged by San Antonio, and properly rejected the ED's methodology.[18]

II. CONCLUSION

Protestants respectfully ask that the Commission credit the ALJs for properly weighing the evidence, allocating the burden, and finding the true facts in this case. The record evidence conclusively establishes that (1) Protestants' existing water rights—their CAs—were, at a minimum, granted based on demonstrated use of state water that included effluent discharged by San Antonio, and (2) that Permit 13098, as drafted, fails to include the necessary special conditions to protect Protestants' water rights.

Protestants respectfully ask that the ALJs, and the Commission, reject each of SAWS's and the ED's exceptions to the PFD. Protestants further request that the Commission grant the relief requested in Protestants' Exceptions Brief.

[18] Nor will the faithful consideration of historic fact in evaluating this and other § 11.042(b) authorizations open a Pandora's box in Texas water rights administration, as posited by the Executive Director. ED Exceptions Br. at 8. Most authorizations sought under § 11.042(b) request substantially less volume, discharged over substantially less time, and moved over substantially less distance than SAWS's request. While each § 11.042(b) application must be considered under its own facts and relative to the water rights issued during the applicant's historic effluent discharge period, the universe of potentially impacted water rights in this matter is directly related to the uniquely expansive request made by SAWS in the first instance. Regardless, the ED's concerns about administrative difficulty do not excuse noncompliance with § 11.042(b).

Respectfully submitted,

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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 12th day of February, 2024.

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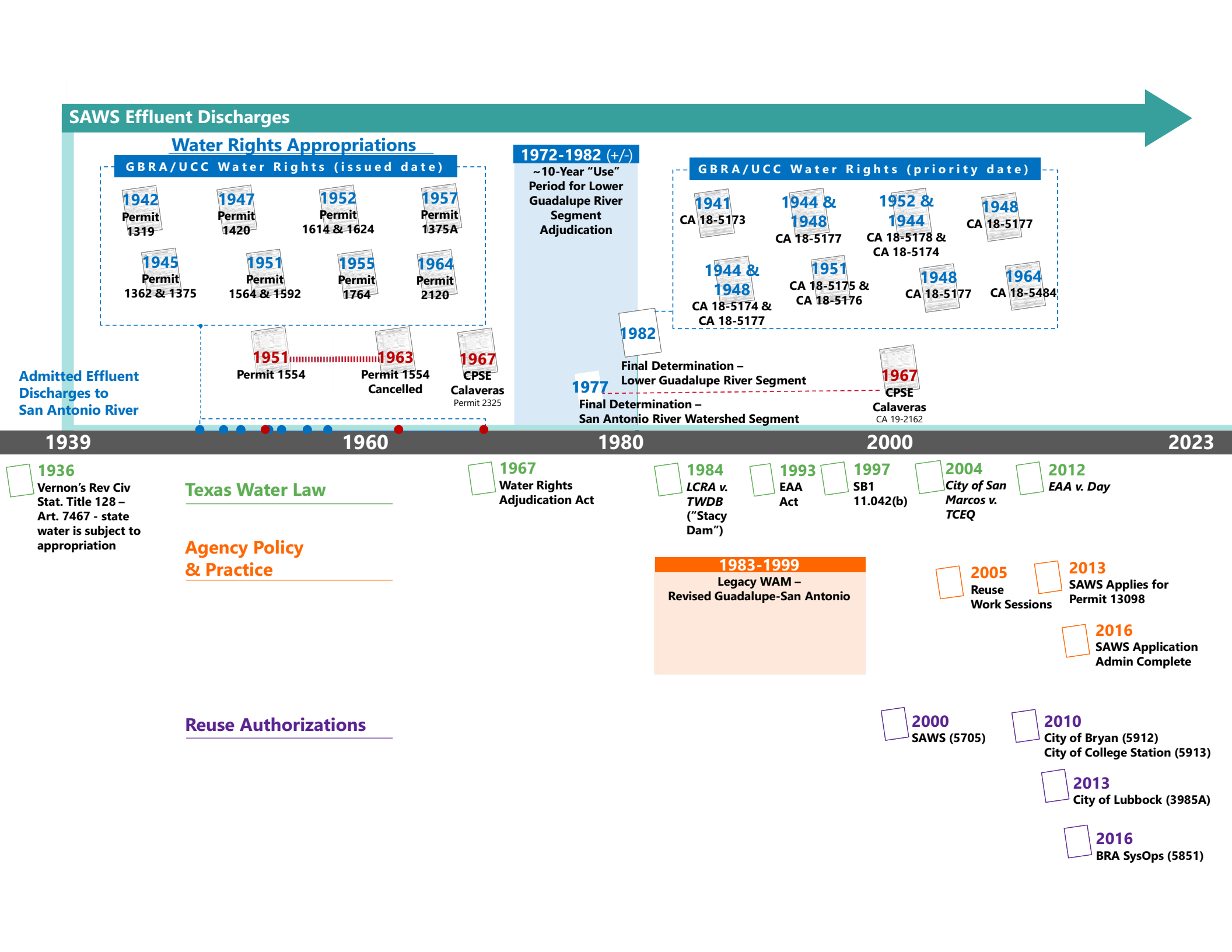
ATTACHMENT A

Protestants' Timeline


SAWS Effluent Discharges
Water Rights Appropriations
GBRA/UCC Water Rights (issued date)
1942 Permit 1319
1947 Permit 1420
1952 Permit 1614 & 1624
1957 Permit 1375A
1945 Permit 1362 & 1375
1951 Permit 1564 & 1592
1955 Permit 1764
1964 Permit 2120
1972-1982 (+/-)
~10-Year "Use" Period for Lower Guadalupe River Segment Adjudication
GBRA/UCC Water Rights (priority date)
1941 CA 18-5173
1944 & 1948 CA 18-5177
1952 & 1944 CA 18-5178 & CA 18-5174
1948 CA 18-5177
1944 & 1948 CA 18-5174 & CA 18-5177
1951 CA 18-5175 & CA 18-5176
1948 CA 18-5177
1964 CA 18-5484
1982
Final Determination – Lower Guadalupe River Segment
1967 CPSE Calaveras CA 19-2162
1977
Final Determination – San Antonio River Watershed Segment
Admitted Effluent Discharges to San Antonio River
1951 Permit 1554
1963 Permit 1554 Cancelled
1967 CPSE Calaveras Permit 2325
1939
1960
1980
2000
2023
1936 Vernon's Rev Civ Stat. Title 128 – Art. 7467 - state water is subject to appropriation
Texas Water Law
1967 Water Rights Adjudication Act
1984 LCRA v. TWDB ("Stacy Dam")
1993 EAA Act
1997 SB1 11.042(b)
2004 City of San Marcos v. TCEQ
2012 EAA v. Day
Agency Policy & Practice
1983-1999
Legacy WAM – Revised Guadalupe-San Antonio
2005 Reuse Work Sessions
2013 SAWS Applies for Permit 13098
2016 SAWS Application Admin Complete
Reuse Authorizations
2000 SAWS (5705)
2010 City of Bryan (5912) City of College Station (5913)
2013 City of Lubbock (3985A)
2016 BRA SysOps (5851)