

Recommended Changes for SAWS's Water Use Permit No. 13098

The Lookback Period

The Water Rights Adjudication Act established a procedure to better manage riparian and permitted water rights through an adjudication process. Through that process, Certificates of Adjudication (CAs) were issued for both those with riparian rights and those with permitted rights. For permitted rights, the adjudication process determined what amounts had originally been appropriated and how much of that appropriation had been beneficially used during a lookback period. If a permittee was beneficially using less water than had been originally appropriated, their right would be reduced during the adjudication process.

The ALJs incorrectly based their determination on whether Protestants used SAWS's return flows during the certificate of adjudication's lookback period, rather than the period of time when the permits were originally granted. The adjudication process, which used approximately a ten-year lookback period to determine the validity of claims to existing water rights, did not result in the granting of new water rights, rather it recognized Protestants' various water rights, which were granted in the 1940s and 1950s. Protestants' witness Herman Settemeyer confirmed this on cross examination when he stated that the certificates of adjudication did not fundamentally change Protestants' water rights, nor did Protestants' certificates of adjudication grant them any rights that did not already exist in their underlying water rights permits. The original permits are not defunct; they are one of the bases for the CA. And the CAs are not solely based on a permittee's use; they are first based on the underlying permits.

Further, record evidence indicates that all of SAW's groundwater-based return flows were claimed by the 1951 Bancroft/Kelley permit (Permit No. 1554). Because the State would not have granted rights to Bancroft/Kelley that were already assigned to another party, the Bancroft/Kelley permit is evidence that the groundwater-based return flows were not already the basis of another permit.

Nor could SAWS's groundwater-based return flows have been the basis for any right granted after the issuance of the Bancroft/Kelley permit. For example, when UCC's Permit No. 1614 (which is the basis for CA 18-5178) was issued in 1952, it was based on evidence in the Lockwood & Andrews Report (Lockwood Report). The Lockwood Report, states that "[t]his study is based upon the assumption that all future effluent from the San Antonio plant will be fully used . . .," and further indicates that the effluent was tied up in another appropriation.

In short, I read the evidence to indicate that the protestants' rights, i.e., at the time they were granted, did not include rights to any of SAWS's groundwater-based return flows.

To correct these errors by the ALJs, I would delete Findings of Fact 40, 41, 42 and 47, because they are irrelevant to the Commission's inquiry or inaccurate as explained above. I would add new findings of fact 40a. and 40b. to accurately reflect the legal effect of Protestants' CAs.

40. ~~Once adjudicated, permits and other water rights underlying the CAs were superseded by them, becoming defunct.~~

- 40a. A CA recognizes an existing water right that has been adjudicated; it does not create a new right.
- 40b. Protestants CAs were based on the amounts of water permitted in their underlying water rights issued in the 1940s and 1950s.
- 41. ~~Adjudication was based on use—either actual use of the water or a diligent effort and intent to develop it—during an approximately ten-year lookback period.~~
- 42. ~~The final adjudication decree was conclusive as to all existing and prior rights in the adjudicated stream.~~
- ...
- 47. ~~At the 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.~~

I believe it's appropriate to include additional findings demonstrating that Protestants' water rights were not based on the use or availability of SAWS's groundwater-based effluent: that Permit No. 1554 was granted to G.B. Bancroft and R.F. Kelley for the right to use up to 40,000 AF per year of the City of San Antonio's effluent; and Union Carbide Corporation's (UCC) Water Right Permit No. 1614 (which is the basis for Protestants' CA No. 18-5178) assumed San Antonio's effluent was unavailable to UCC for Water Right Permit No. 1614.

Therefore, I would add five findings of fact after Finding of Fact No. 32 to that effect:

- 32a. Protestants' Lower Basin water rights were not granted based on the use or availability of SAWS's privately owned groundwater-based return flows that are the subject of this Application.
- 32b. In 1951, the Board of Water Engineers issued Permit No. 1554 to G.B. Bancroft and R.F. Kelley for the right to use up to 40,000 AF per year of the City of San Antonio's effluent.
- 32c. In 1951, the Lockwood and Andrews Report indicated that the City of San Antonio discharged less than 40,000 AF per year.
- 32d. Permit No. 1554 was cancelled in 1963.
- 32e. UCC's Permit No. 1614 (which is the basis for Protestants' CA No. 18-5178) was based on the Lockwood and Andrews Report, which assumes that all future effluent from San Antonio's plant will be fully used and unavailable for UCC's Water Right Permit No. 1614.

I would also recommend, based on these findings, deleting Finding of Fact No. 67 and revising Finding of Fact Nos. 66, 68, and 69; Conclusion of Law No. 6; and Ordering Provision No. 1 to state the following:

Findings of Fact

66. Protestants' CAs 18-5173, 18-5174, 18-5175, 18-5176, 18-5177, and 18-5178 were not granted based on the use or availability of the return flows SAWS seeks to divert. They were based on the amount permitted in their underlying water rights that were granted in the 1940s and 1950s.
67. ~~When analyzed monthly, or annually in a year matching the drought of record, even a 1% annual impact on volume reliability could have serious negative consequences for Protestants' ability to exercise their water rights.~~
68. The special conditions contained in the Draft Permit ~~do not~~ protect Protestants' water rights that were based on the use or availability of the return flows SAWS seeks to divert.
69. No additional special conditions in Permit No. 13098 are necessary to protect Protestants' water rights encompassed in CAs 18-5173, 18-5174, 18-5175, 18-5176, 18-5177, and 18-5178.

Conclusions of Law

6. Special conditions are ~~needed~~ not necessary to protect Protestant's' Lower Basin water rights because they were not granted ~~that were granted~~ based on the use or availability of the groundwater-based return flows that SAWS seeks to divert. Tex. Water Code § 11.042(b).

Ordering Provision

1. SAWS's Application is GRANTED, ~~but special conditions to protect Protestant's water rights encompassed in CAs 18-5173, 18-5174, 18-5175, 18-5176, 18-5177, and 18-5178 are to be added to the Draft Permit.~~ Additionally, but the ED is to require SAWS to amend its Accounting Plan to incorporate the Kennedy travel time memorandum and to account for losses, if any, for the distance between the saltwater barrier and the diversion reach.

Because the second step of the ED's two-step methodology is not relevant to the Commission's conclusion that Protestants' water rights were not based on the use or availability SAWS's groundwater-based return flows; I would also make the following changes to the proposed order:

51. ~~ED Staff follows a two-step process for determining whether water rights were granted based on the use or availability of an applicant's groundwater-based return flows.~~
52. ~~Dr. Kathy Alexander, the Senior Policy and Technical Analyst for TCEQ's Water Availability Division, followed that two-step process in reviewing the Application.~~
53. ~~In the first step,~~ Dr. Alexander checked to see whether any water rights were explicitly granted based on SAWS's return flows by reviewing every water right in the San Antonio

and Guadalupe River Basins to see if those return flows from the outfalls specified in the Application were previously permitted to another water right.

54. ~~Based on that first step, Dr. Alexander determined that three water rights were granted based on the use or availability of SAWS's return flows, all of which are owned by SAWS or based on contracts with SAWS.~~
55. ~~For the second step, Dr. Alexander performed two simulations. In the first, she entered SAWS's current level of return flows into the model and allowed all water rights to access the return flows. She then calculated the annual volume reliability of the water rights in the river basins. In the second simulation, she assumed that none of SAWS's return flows were available. She calculated the annual volume reliability under that simulation. She then determined the percent impact on the annual volume reliability between the two simulations.~~
56. ~~The percent impact on the annual volume reliability of Protestants' water rights that Dr. Alexander found ranged from 0% to 3.08%.~~
57. ~~Based on the ED's 5% rule of thumb, Dr. Alexander determined that the second step of the analysis showed no practical impact on Protestants' water rights and that further review of historical information was unnecessary.~~

Adverse impacts to Protestants' water rights

I also disagree with the ALJs' analysis that the preponderance of the evidence demonstrates that the Draft Permit would have adverse impacts on Protestants' water rights. First, there's no legal basis in TWC § 11.042(b) to reach the issue of whether special conditions are necessary unless there's a finding that Protestants' water rights were granted based on the use or availability of SAWS's groundwater-based effluent.

I believe that the ALJs' approach to process SAWS's TWC § 11.042(b) application under a no-impact analysis under 30 TAC § 297.45(d), a rule applicable to state water, is inconsistent with the Commission's findings as a matter of law in the Interim Order in the City of Bryan and City of College Station (TCEQ Docket Nos. 2006-1832-WR and 2006-1831-WR) and in *Edwards Aquifer Authority v. Day*, 369 S.W.3d 814, 823 (Tex. 2012) that a TWC § 11.042(b) authorization is not an appropriation of state water. As was discussed at the Commission's February 9, 2022, Agenda, groundwater is private property, and as *Edwards Aquifer Authority v. Day*, 369 S.W.3d 814, 823 (Tex. 2012) confirmed it retains that character when it is discharged into a state watercourse under TWC § 11.042(b). Therefore, I don't believe that a no impact analysis is required under TWC § 11.042.

To recognize that the Commission's decision in the *Cities of Bryan and College Station* Interim Order were determined by the Commission as a matter of law, I would replace "Commissioners stated" to "Commission determined as a matter of law" in Finding of Fact No. 50.

50. In the *City of Bryan* interim order, the ~~Commissioners stated~~ Commission determined as a matter of law that applications under Section 11.042(b) do not involve state water and required the cities' applications not to be processed under statutes and rules applicable to state water.

I would also add a Conclusion of Law after Conclusion of Law No. 5 to recognize that a Texas Water Code § 11.042(b) authorization is not an appropriation of state water.

- 5a. A Texas Water Code § 11.042(b) authorization is not an appropriation of state water.

Accounting Plan

I agree with the ALJs' findings regarding the accounting plan and their recommendation to direct the ED to review SAWS's Ex. 14 and confirm whether there are any unaccounted-for losses between the saltwater barrier and the diversion reach. If there are losses, I agree with the ALJs that the ED should include them; that change is reflected in the revised Ordering Provision No. 1 (as shown above). I also agree that the ED should incorporate the Kennedy Memo found at SAWS Ex. 14 into the accounting plan.

To be more consistent with the language in TWC § 11.042(b), I would revise Finding of Fact No. 61 to state "were granted" instead of "are expressly issued."

61. The Accounting Plan takes the authorized discharges of return flows from the outfalls and adjusts that amount downward to account for the surface-water-derived effluent that is not part of the Application; water diverted under the water rights that were granted ~~are expressly issued~~ based on the use or availability of the return flows (~~not including Protestants~~); and conveyance loss coefficients from the WAM.

To recognize that the Kennedy Memo in SAWS Ex. 14 contains channel losses from SAWS's discharge points to the Mouth of the Guadalupe River, I also agree with ALJs' recommendation to revise Finding of Fact No. 63 as follows:

63. Mr. Kennedy also recalculated channel losses from SAWS's discharge points to the Mouth of the Guadalupe River using the 2021 WAM.

Bed and Banks Application Requirements/EAA Act/Transcript Costs

Lastly, I agree with the ALJs findings that SAWS did not intentionally provide an incorrect date of initial discharge on the Application, that the Edwards Aquifer Authority Act does not create an impediment to the issuance of the Draft Permit, and the equal split of transcript costs between SAWS and Protestants.

ALJs' Proposed Changes

I agree with the majority of the ALJs' corrections to the Proposed Order, with the exception of the ALJs' recommended changes to a new finding of fact after Finding of Fact No. 40 to the extent

that it is inconsistent with the changes I already discussed. Therefore, I would make these other changes.

Findings of Fact

5. The Application seeks to convey and subsequently divert and reuse SAWS's privately owned groundwater-based return flows.

...

19. The Draft Permit would authorize SAWS to use the bed and banks of the Medina River, Salado Creek, Comanche Creek, Leon Creek, Medio Creek, and the San Antonio River, in the San Antonio River Basin, as well as the Guadalupe River, in the Guadalupe River Basin, to convey up to 260,991 AF of groundwater-based return flows per year, for subsequent diversion and reuse for municipal, agricultural, industrial, mining, and instream purposes in Bexar, Calhoun, Goliad, Karnes, Refugio, Victoria, and Wilson counties.

...

32. In the chart change the volume authorized by CA 18-5177 from 32,614 acre-feet to 51,247 acre-feet.

...

35. The EA is the source of some of the groundwater SAWS pumps, and thus the source of some of the groundwater-based effluent at issue.

...

37. In Texas, surface state water is permitted by a prior appropriation system, under which first in time is first in right.

...

44. TCEQ's current Water Availability Model (WAM) considers the San Antonio River and the Guadalupe River to be one basin.

...

49. This change was brought about in response to the Commission's December 2006 interim order regarding applications by the Cities of Bryan and College Station for bed and banks permits under Section 11.042(b). TCEQ Docket Nos. 2006-1832-WR and 2006-1831-WR.

...

56a. Protestants' water rights do not authorize a specific pattern of use, only an annual amount.

Conclusions of Law

7a. SAWS's intended use of 50,000 acre-feet of its currently surplus groundwater-based return flows for instream purposes is a beneficial use as defined in 30 TAC § 297.1(26).

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