

SOAH DOCKET NO. 582-22-2634
TCEQ DOCKET NO. 2022-0125-WR

APPLICATION BY THE CITY OF § **BEFORE THE TEXAS COMMISSION**
WICHITA FALLS, TEXAS FOR § **ON**
WATER USE PERMIT NO. 13404 § **ENVIRONMENTAL QUALITY**

APPLICANT CITY OF WICHITA FALLS'S
EXCEPTIONS TO PROPOSAL FOR DECISION

January 19, 2024

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

The City of Wichita Falls (the “City” or “Applicant”) files these Exceptions to the Proposal for Decision (“PFD”) published by Administrative Law Judge Christiaan Siano (the “ALJ”) for consideration by the Texas Commission on Environmental Quality (“TCEQ” or the “Commission”). The City respectfully asks the ALJ to reconsider his PFD and recommend issuance of Water Use Permit No. 13404 (the “Draft Permit”). In the alternative, the City asks the Commission to reject the ALJ’s December 21, 2023 proposed PFD, issue the Draft Permit, and adopt the revised Proposed Order attached as Exhibit A (redline) and Exhibit B (clean).

I. NOTICE, JURISDICTION, AND PROCEDURAL HISTORY

The City agrees with the ALJ on the notice, jurisdiction, and procedural history but disagrees with the parties listed.¹ At the preliminary hearing, the following parties were named: the City of Wichita Falls; TCEQ’s Executive Director (the “ED”); the Office of Public Interest Counsel; Emry Birdwell; Deborah Clark; Shane and Casey Cody; Laura Del Murray; Mark Hill; Stan Horwood, Larry Horwood, Lonnie Horwood (the “Horwoods”); Umhaill Valley, LLC Kildavnet Castle, LLC, Rockfleet Castle, LLC, William O’Malley (“O’Malley”); Joe Staley; Phil Staley; Gil Staley; Jason Obermier; Jimmy Dale Obermier; Johnnie Shaw; William (Chris) Welborn and Welborn Ranch Ltd.; the City of

¹ PFD at 5.

Henrietta; Clay County; the Texas and Southwestern Cattle Raisers Association; the Texas Conservation Alliance (“TCA”); the Texas Wildlife Association; the Texoma Stewardship Coalition (“TSC”); Brent Durham; Dan Stansbury for Lively Ranch Limited; Rebecca Hickman; Robert and Courtney Wilson.² The following parties listed in the PFD were not Parties pursuant to SOAH Order No. 2: Joshua Don Ferguson, Carol Staley Morrow (executor of the Staley Family Trust and Melva Jo Staley Estate), and the National Wildlife Federation,³ and thus, the PFD should be revised to remove them.

II. EXHIBITS

The City agrees with the ALJ on the exhibits admitted in the record, as the PFD identified certain witness exhibits offered and admitted. However, the City requests that the PFD include a statement acknowledging that WF Exhibits 6-14 were also admitted during the hearing on the merits for purposes of completeness and consistency (O’Malley Exhibits 1-7 are referenced,⁴ whereas the City’s full slate of exhibits are not).

III. BACKGROUND AND SUMMARY OF THE ARGUMENT

The ALJ incorrectly determined that the Applicant failed to meet its burden based on a discreet set of issues. Moreover, the PFD often misstates regulatory requirements and extrapolates requirements from regulatory text, doing so when such novel textual interpretations contradict the rules and TCEQ practice/policy. On several issues where the ALJ concluded the City did not meet its burden, the PFD adopts what is in effect a higher burden than what is required of the Applicant, which is supposed to be a preponderance of the evidence standard. At other times, the PFD appears to place burdens on ED staff, determining that its reviews of the City’s application to Appropriate State Water for the Proposed Lake Ringgold (the “Application”) were insufficient—despite the fact that the burden is the Applicant’s alone. In addition, with respect to habitat

² SOAH Order No. 2 (July 28, 2022).

³ SOAH Order No. 2 (July 28, 2022).

⁴ PFD at 7.

assessment and mitigation issues, the ALJ grafts what is in reality a federal process onto the TCEQ water rights process in a way that would ask the Commission to contradict state law.

The Applicant met the long-existing burdens required in the Texas Water Code and implementing TCEQ regulations. The City did so in a manner consistent with decisions of both the Texas Legislature and the Texas Water Development Board (“TWDB”). To that effect, Lake Ringgold was twice designated by the state legislature as a unique reservoir site and has been a recommended strategy in the State and Regional Water Plans for the City since 2006.⁵ Denying permit issuance would not only undermine a core water supply project that has already been recommended by these deliberative bodies, but also risks the water future for the City’s customers across the region in light of the regionwide emergency during the worst years of the drought of record (2011-2015). A denial would also effectively preclude the future growth of the City with far-reaching impacts to the region, its economy, and citizens’ livelihood.

The PFD ultimately acknowledges that the City has a need and offers an in-the-alternative recommendation that TCEQ authorize a 9,110 acre-feet reservoir.⁶ However, even the ALJ notes that this reservoir amount (9,110 acre-feet) is less than the City’s shortage projected in the 2021 Regional Water Plan (10,864 acre-feet).⁷ The City satisfied the statutory and regulatory requirements as they apply equally regardless of the reservoir size requested. Moreover, the City’s requested appropriation is consistent with prudent water supply planning because the firm yield of Lake Ringgold will fully meet its projected water supply needs.

⁵ WF Ex. 3 at 39 (WF00011014).

⁶ PFD at 104.

⁷ PFD at 91.

IV. APPLICABLE LAW

A. Preponderance of the Evidence

In several instances, the PFD appears to elevate the burden of proof applied to the City beyond the established preponderance of evidence requirement.⁸ The burden of proof at a contested case hearing is on the Applicant to show that it met TCEQ requirements for a water rights application by a “preponderance of the evidence.” 30 Tex. Admin. Code § 80.17; *see also* Tex. Gov’t Code § 2003.047. To meet the preponderance-of-the-evidence standard, a fact-finder must determine that “the [Applicant’s] version of the events is more likely than not true.” *In re Lipsky*, 460 S.W.3d 579, 589 (Tex. 2015). Preponderance of the evidence is a “degree of credible evidence that would create a **reasonable** belief in the truth of the claim.” *Herrera v. Stahl*, 441 S.W.3d 739, 741 (Tex. App.—San Antonio 2014) (emphasis added). The standard is *not* heightened to prove compliance beyond a reasonable doubt or even clear and convincing evidence, which instead “requires that the strength of the plaintiff’s proof produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations.” *In re Lipsky*, 460 S.W.3d 579, 589 (Tex. 2015). Thus, the City had to prove that it was “more likely than not” that the Application complied with applicable statutes and TCEQ rules, which the record supports, as detailed herein. Instead, on the issues upon which the ALJ deemed the Application insufficient, the PFD asks more of the City than underlying regulations require, while simultaneously scrutinizing the method and extent of ED staff review. In effect, the PFD inappropriately raises the bar for water right applicants and would expand

⁸ *See* PFD at 34 (stating that failure to provide evidence of who attended site visits “raises serious questions about the reliability of the assessment”); *see* PFD at 36 (suggesting that the Applicant should have conducted a presence-absence survey even though no such requirement exists in TCEQ rules); *see* PFD at 58 (emphasizing that ED staff did not conduct an independent determination of need or the consistency with state and regional water plans despite the clear legislative directive to the contrary); *see* PFD at 79 (finding that the City’s operation reserve, which is not mandated by any TCEQ regulation, is “unsupported and inflated”); *see* PFD at 85 (evaluating the sufficiency of population projections set forth by a separate agency); *see* PFD at 95 (heightening the standard to require a showing of need apart from the state and regional water plans).

ED staff's scope of review for applications beyond the Legislature's directives. The City addresses each instance of elevated burden in the applicable sections herein.

The City thus requests the ALJ to reconsider the denial of the Draft Permit because the standard applied was improper, or alternatively, requests that the Commission reject the ALJ's PFD for failure to consider the evidence under the appropriate burden of proof. As demonstrated in the record and discussed further herein, the City met its burden by providing credible evidence to create a reasonable belief that the Application complies with applicable TCEQ rules.

V. Conformance with Requirements of Chapter 11

A. Water Availability

The City agrees with the ALJ's conclusion that unappropriated water is available for the requests made in the Application.⁹

B. Beneficial Use

1. Requirement to Specify

By demanding a division-of-use allocation, the ALJ proposes to mandate a new requirement that would undermine longstanding TCEQ policy when an application seeks multiple purposes of use. The ALJ contends that the City failed to comply with Title 30, Section 295.5 of the Texas Administrative Code because the City did not assign a specific quantity to each purpose of use.¹⁰ However, this interpretation conflicts with the ED's recommendation and agency precedent allowing for flexibility when approving water rights for multiple uses.¹¹ To accept such reading of the rules—interpreting Section 295.5 to require the identification of specific water volumes for each purpose *even for multi-*

⁹ PFD at 12.

¹⁰ PFD at 16-17.

¹¹ WF Ex. 2D at WF00007667-69; see ED Closing Arguments at 5 and 11.

use permits—would neglect the more specific requirements of Title 30, Section 297.43(c) of the Texas Administrative Code and historic practices of ED staff.¹² When read in totality, the statute and rules are clear—TCEQ may grant a permit for multiple uses, and the more specific requirement of Section 297.43(c) should govern:¹³

The amount of water appropriated for each purpose listed under this section shall be specifically appropriated for that purpose. **The commission may authorize the appropriation of a single amount or volume of water for more than one purpose of use.** In the event that a single amount or volume of water is appropriated for more than one purpose of use, the total amount of water actually diverted for all of the authorized purposes may not exceed the total amount of water appropriated.

30 Tex. Admin. Code § 297.43(c) (emphasis added).¹⁴ The purpose behind TCEQ rules on this issue is to ensure that the water diverted will be **beneficially used**—not that the Applicant give an accounting of every single purpose tied to every single acre-foot well into the future. The City has already established that it will use the water for beneficial uses listed in the Application—municipal, agricultural, mining, or industrial.¹⁵

Such approach is backed up by multiple TCEQ decisions. As provided below, the Commission has consistently permitted water rights applications that authorize multiple purposes of use for a single volume, and it is common practice to authorize permittees to

¹² Notably, the ALJ relies on the Protestants' interpretation of TCEQ rules, which is supported by an out-of-state witness with limited experience with Texas water rights permitting, rather than the City's expert witness, Simone Kiel, with over 30 years of experience with Texas water rights permitting and the ED's expert witness, Dr. Kathy Alexander, with almost 25 years of experience at TCEQ. WF Ex. 3 at 1:5-6 (Kiel Direct); ED Ex. KA-1 at 2:17 (Alexander Direct).

¹³ Courts are to interpret administrative rules, like statutes, under traditional principles of statutory construction. *Tex. Comm'n Env't Quality v. Maverick Co.*, 642 S.W.3d 537, 544 (Tex. 2022). Under traditional principles of statutory construction, when there is conflict between a general and specific statutory provision and the literal terms of the two provisions cannot both be true, the terms of the specific provision will ordinarily prevail. *In re Mem'l Hermann Hosp. Sys.*, 464 S.W.3d 686, 716 (Tex. 2015). The general provision will be construed as controlling only when the regulatory intent is that the general provision would prevail, and the general provision is the later-enacted statute. *Id.* Title 30, Section 297.43(c) of the Texas Administrative Code is not only the more specific regulation on use designation in a water right application, it also was enacted 13 years after Section 295.5. As such, the Section 297.43(c) provision allowing the granting of a permit for multiple uses should control.

¹⁴ Texas Water Code § 11.023(e) states: "**The commission may authorize appropriation of a single amount or volume of water for more than one purpose of use.** In the event that a single amount or volume of water is appropriated for more than one purpose of use, the total amount of water actually diverted for all of the authorized purposes may not exceed the total amount of water appropriated." (emphasis added).

¹⁵ WF Ex. 1 at WF00007703 and WF00007724; Tr. Vol. 1 at 199:16-17 (Schrieber Cross) (stating that "we requested a multipurpose [permit].").

use water from reservoirs for multiple purposes without specifying the exact quantity per purpose of use. The City, along with many other water rights holders, holds water rights (Certificate of Adjudication (“COA”) Nos. 02-5150 and 02-5144) that allow for multiple uses without specifying the amount of water per use.¹⁶ *See* WF Ex. 7 (COA 08-4976) (authorizing Tarrant Regional Water District to use water from Cedar Creek Reservoir for any of the four purposes listed); *see* COA No. 14-5478 and COA No. 14-5482 (authorizing Lower Colorado River Authority to use water from Lakes Travis and Buchanan for multiple purposes);¹⁷ *see* COA No. 5821 (authorizing Upper Trinity Regional Water District to divert and use water from Lake Ralph Hall for multiple uses).¹⁸ In addition, as referenced in the PFD and the ED’s Closing Brief, the Brazos River Authority’s Water Use Permit No. 5851 authorizes it to divert water based on a single volume amount for “multiple uses, including domestic, municipal, agricultural, industrial, mining, and other beneficial uses.” The ALJ selectively references the water right for Lake Kemp (COA No. 02-5123) as evidence that a water right must specify exact amounts for each use;¹⁹ however, the PFD does not consider why the water right specifies the amounts per use—COA No. 02-5123 is shared between two owners—which follows the agency’s common practice.²⁰

As water demands shift from year to year, the City needs operational flexibility to meet its customers’ demands, which is why granting a water use permit for multiple uses is necessary, and such flexibility is crucial, as highlighted by Administrative Law Judges in one of the more recent major water rights cases:

[A] large-scale water supplier seeking to construct a new reservoir to meet the anticipated but diverse needs of a growing region over a 50-year time horizon might have difficulty knowing, “in definite terms,” exactly where every diversion point will be placed in or downstream of the reservoir, exactly how much water will be used for each purpose of use, and so on.

¹⁶ *See* WF Ex. 1 at WF00007771 (referencing COA Nos. 02-5150 and 02-5144, authorizing Lakes Arrowhead and Kickapoo respectively).

¹⁷ *See* WF Ex. No. 13 (referencing COA No. 14-5478 and COA No. 14-5482).

¹⁸ *See* Tr. Vol. 7 at 193 (Alexander Cross) (referencing the water right for Lake Ralph [Hall]).

¹⁹ PFD at 17.

²⁰ WF Ex. 1 at WF00007743.

Application of Brazos River Authority for Water Use Permit No. 5851, TCEQ Docket No. 2005-1490-WR, SOAH Docket No. 582-10-4184 at 24 (July 17, 2015) [hereinafter *BRA SysOps Case*]. Similarly, Lake Ringgold requires such operational flexibility rather than forcing the City to allocate uses of a future water supply at this stage.

The City's approach is consistent with the water supply planning practices and TCEQ rules in Chapter 295 and 297 for multiple uses, which ED witness Dr. Alexander confirmed.²¹ Dr. Alexander, who has reviewed numerous water rights applications, including reservoir permit applications, testified that the Application provided the information required by TCEQ's rules and stated that the ED staff found the City's proposed uses of water were beneficial uses in compliance with Texas Water Code Sections 11.023 and 11.134(b)(3)(A).²² Therefore, the City's request complies with TCEQ rules as it requests authorization to use the full volume for beneficial purposes.

Moreover, it is undisputable that the City's requested purposes of use are beneficial uses,²³ and TCEQ rules allow authorizations for multi-use permits. 30 Tex. Admin. Code § 297.43(c). As past Commission decisions make clear, "the rules need not be complied with perfectly, so long as they are complied with sufficiently to provide the ED with the information [the ED] needs to adequately analyze an application." *BRA SysOps Case* at 24 (July 17, 2015). The City provided sufficient information on the purposes of use for the ED to review the Application,²⁴ as the ED and OPIC affirmed.²⁵ Therefore, the City met its burden and thus complied with Texas Water Code Sections 11.124(a) and 11.134(b)(3)(A) and related TCEQ rules.

²¹ Tr. Vol. 7 at 143:15-145:8 (Alexander Cross) (Dr. Alexander testifying that the full 65,000 acre-feet could be beneficially used for any of the identified purposes as set forth in the Application).

²² ED Ex. KA-1 at 0078:21-24 and 0079:23-25.

²³ 30 Tex. Admin. Code § 297.43 (listing beneficial uses as "(1) domestic and municipal; (2) industrial; (3) agriculture; (4) mining and the recovery of minerals"); see Tex. Water Code § 11.023 (stating that state water may be used for "(1) domestic and municipal; (2) industrial; (3) agriculture; (4) mining and the recovery of minerals purposes . . .").

²⁴ WF Ex. 1 at WF00007703 and WF00007724.

²⁵ ED Closing Brief at 11-12; OPIC Closing Brief at 8-9.

2. Whether the Intended Use is Beneficial

The City agrees with the ALJ's conclusion that the proposed appropriation is intended for beneficial use and is not waste.²⁶ Such determination included discussion of the value of storage as a beneficial use,²⁷ which has implications to the PFD's analysis as to whether the appropriation is "necessary and reasonable" as discussed *infra*.

C. Impairment to Existing Water Rights

The City agrees with the ALJ's conclusion that the City analyzed potential impacts to existing water rights, and the proposed appropriation will not impair existing water rights, including vested riparian rights.²⁸

D. Public Welfare

The City agrees with the ALJ's conclusion that the proposed appropriation is not detrimental to the public welfare.²⁹

E. Environmental Flows and Assessments

1. Environmental Flow Standards

The City agrees with the ALJ's conclusion that there are no environmental standards for the Red River Basin, and thus, under Section 11.1471 of the Texas Water Code, there are no environmental standards applicable to the Application and the Draft Permit.³⁰

²⁶ PFD at 21.

²⁷ PFD at 20 ("Storage, even Carron agrees, serves a beneficial and important function: 'Storage helps moderate the variability of hydrology and provide a reliable water supply.'").

²⁸ PFD at 24.

²⁹ PFD at 26.

³⁰ PFD at 27.

2. Instream Uses and Water Quality

The City agrees with the ALJ's conclusion that the Draft Permit will maintain existing instream uses and water quality.³¹

3. Groundwater

The City agrees with the ALJ's conclusion that the proposed appropriation will not impact groundwater resources.³²

4. Habitat Assessment

Before addressing the PFD's conclusions on the Applicant's habitat assessment and mitigation components, the City must address the PFD's weighing of evidence and expert opinions in light of the relative experience and testimony from such witnesses. The value of an expert witness's opinion depends on "the degree of learning or experience possessed by the witness" and "whether the witness was interested in the proceeding." *See Gossett v. State*, 417 S.W.2d 730, 737 (Tex. App.—Eastland 1967, writ ref'd n.r.e). Thus, the ALJ should give appropriate weight to the witness testimony based on the experience and qualifications of each witness. However, the ALJ seemingly ignores the City's expert witness testimony by relying exclusively on the O'Malley witnesses' opinions even though the City's expert witness (Michael Votaw) has decades of experience in fish and wildlife habitat assessment.³³ The PFD gives substantial weight and credibility to the testimony provided by the O'Malley witnesses despite their lack of qualifications.³⁴ The ALJ relies on opinions that are not based on any scientific methods (for example, observations from a short helicopter flyover) over opinions based on extensive data and

³¹ PFD at 29.

³² PFD at 30.

³³ WF Ex. 5A (demonstrating Votaw's 20 years of experience).

³⁴ PFD at 45.

field work (the City's habitat evaluation procedures ("HEP") report).³⁵ Further, in many instances, the O'Malley witnesses' "expertise" was developed solely for this hearing.³⁶

The Applicant exposed such deficiencies, particularly their complete lack of any experience in the use of HEP.³⁷ O'Malley witness Stephan Nelle, by his own admission, has never conducted a HEP assessment and only participated in two HEP training sessions about 29 years ago.³⁸ Nelle had so little knowledge of HEP and how it is used that he resorted to emailing the U.S. Fish and Wildlife Service ("USFWS") questions on HEP and generally searching the internet for information on HEP.³⁹ Nelle admitted in email correspondence that his experience with HEP is limited to some training received back in the '90s.⁴⁰ Nor does Nelle have recent experience as a private consultant in wetland assessments.⁴¹ O'Malley witness David Bradsby likewise admits to limited experience in the use of HEP, acknowledging his HEP training was over 25 years ago and that he himself has never done a HEP study.⁴² Bradsby also acknowledges not having done any wetland assessments for state water rights permitting.⁴³ The Applicant's expert, Michael Votaw, as a Certified Wildlife Biologist and Professional Wetland Scientist, in contrast has a resume replete with experience not only in the use of HEP but also assessments of wetlands.⁴⁴ Notably, Votaw was a Project Manager and Environmental Resources Specialist with USACE, has extensive training in Clean Water Act ("CWA") Section 404 permitting and environmental mitigation, and worked on the habitat assessment and mitigation for Bois d'Arc Lake, Water Right Permit No. 12151.⁴⁵ Tellingly, Protestants⁴⁶ raise no issues questioning Votaw's expertise nor challenging his

³⁵ Tr. Vol. 3 at 169:4-9 (Votaw Cross) (stating that "for HEP, I don't think you can as a scientist or biologist or as a professional compare the results that you would get from making observations out of a helicopter to the assessment that was done on the ground collecting field data. Those aren't comparable."); Tr. Vol. 4 at 229:20-25, 230:1-4, 231:12-17 (Nelle Cross); Tr. Vol. 5 at 129:17-21, 132:2-6, 136:5-8 (Bradsby Cross).

³⁶ Tr. Vol. 4 at 205:20-25 (Nelle *voir dire*) (discussing emails Nelle sent to USFWS regarding how HEP is done); Tr. Vol. 4 at 214:25-215:2 (Nelle *voir dire*) (stating that he was only asked to review what the City had done); Tr. Vol. 4 at 229:20-25, 230:1-4, 231:12-17 (Nelle Cross); Tr. Vol. 5 at 129:17-21, 132:2-6, 136:5-8 (Bradsby Cross).

³⁷ PFD at 45.

³⁸ Tr. Vol. 4, 225:1-12 (Nelle Cross).

³⁹ *Id.* at 225:20-25 (Nelle Cross).

⁴⁰ *Id.* at 226:1-7 (Nelle Cross).

⁴¹ *Id.* at 228:5-8 (Nelle Cross).

⁴² Tr. Vol. 5 at 129: 19-25, 130: 1-15, 132: 2-8 (Bradsby Cross).

⁴³ *Id.* at 134: 20-24 (Bradsby Cross).

⁴⁴ WF Ex. 5 at 2 (WF00010868).

⁴⁵ *Id.* at 2-3 (WF00010868-69).

⁴⁶ O'Malley, the Horwoods, TCA, TSC (as aligned), and Clay County, collectively (the "Protestants").

credibility⁴⁷—and yet the ALJ, without any evidence to support his disregard for the opinion of Votaw, relies solely on the opinions of Nelle and Bradsby. Had appropriate weight been afforded to the evidence and expertise, the ALJ would have determined that the fish and wildlife habitat assessments conducted by the Applicant fulfilled the requirement of Texas Water Code Section 11.152 and Title 30, Section 297.53 of the Texas Administrative Code by a preponderance of the evidence for the reasons set forth below.

a. Habitat Assessment

Although the ALJ appropriately quotes the applicable TCEQ-related statutory and regulatory provisions regarding habitat assessment for the Application, the PFD ultimately either misinterprets or misapplies such provisions. In its place, the PFD supplants an independent opinion for what is required, relying on uncited “clues”⁴⁸ and ignoring not only the plain language of Texas Water Code Section 11.152 and Title 30, Section 297.53 of the Texas Administrative Code, but TCEQ’s policy and precedent for implementing this statute and regulation, which does, in fact, consider the federal overlay on such issues. Texas Water Code Section 11.152 is clear that the Commission must offset mitigation it requires, *if it does require mitigation*, with mitigation required in federal CWA Section 404 permitting. And importantly, because federal regulations *already require full mitigation* for impacts to wetlands (as detailed below), TCEQ’s regulation setting forth guidelines for mitigating wetland habits is thus moot and unnecessary. This is precisely the logic of the Texas Legislature when it required such offsetting of mitigation—to ensure water right applicants do not have to undertake *duplicative* wetland assessments and mitigation. This is also precisely why TCEQ defers the preparation of a final, detailed mitigation plan until the CWA Section 404 permitting process is completed.⁴⁹

Moreover, if the legal standard of preponderance of the evidence had been applied and due weight given to Applicant’s and ED’s expert witnesses, along with appropriate interpretation and application of Texas Water Code Section 11.152 and Title 30, Section

⁴⁷ Tr. Vol. 4 at 253:2-18 (Nelle Cross); Tr. Vol. 5 at 153:20-25, 154:1 (Bradsby Cross).

⁴⁸ PFD at 54.

⁴⁹ See ED Ex. JC-1 at 6: 21-23 (noting that eventual federal requirements for reservoirs include federal mitigation requirements at such separate stage).

297.53 of the Texas Administrative Code, the PFD would have determined that the habitat assessment and Conceptual Mitigation Plan in the Application did in fact comply with these applicable statutory and regulatory requirements for the reasons provided below. A review of the applicable statutory and regulatory language is first necessary to identify what is, and what is not, mandated under state law.

b. Texas Water Code 11.152

For the Application, Texas Water Code Section 11.152 requires the Commission to “assess the effects, if any, on the issuance of the permit on fish and wildlife habitats.” Tex. Water Code § 11.152. Based on this assessment, the Commission “may require the applicant to take reasonable actions to mitigate adverse impact on such habitat.” *Id.* As part of its determination as to whether mitigation is required for an application, the Commission may consider any net environmental benefit to the habitat produced by such application. *Id.* Texas Water Code Section 11.152 also mandates the Commission to offset any mitigation it requires by any mitigation required by USFWS pursuant to 33 CFR §§ 320-330.⁵⁰

c. Title 30, Section 297.53 of the Texas Administrative Code

To implement Texas Water Code Section 11.152, TCEQ promulgated Title 30, Section 297.53 of the Texas Administrative Code. Given the PFD’s misinterpretation and misapplication of Section 297.53, an analysis of this regulation subsection by subsection is necessary to understand how the Application has fulfilled the requirements of this

⁵⁰ *Id.* The reference to USFWS in this statute is erroneous and it should instead refer to the U.S. Army Corps of Engineers (“USACE”) because the referenced regulations, 33 CFR §§ 320-330, are USACE’s regulations associated with permitting under Section 401 and 404 of CWA. There are no provisions in 33 CFR §§ 320-330 authorizing USFWS to require mitigation. Consequently, this provision only has meaning regarding offsetting mitigation when referring to mitigation required by USACE. The City can only presume that this error has never been addressed because so few water right applications require mitigation, and other applications have rightly offset TCEQ mitigation with USACE mitigation, like in the cases of Water Use Permit No. 5921, Lake Ralph Hall, and Water Use Permit No. 12151, Bois d’Arc Lake.

provision and should be granted. Importantly, pursuant to Texas Water Code Section 11.152, the only requirements of the Commission are: (1) to undertake an assessment of the Application’s effects on fish and wildlife habitat; and (2) to offset any TCEQ mitigation required by mitigation required pursuant to 33 CFR §§ 320-330. Notably, the Commission has no statutory obligation to *require* mitigation—it simply has discretion to do so.⁵¹

As an initial matter, Section 297.53, Subsection (a) restates the requirement of Texas Water Code Section 11.152 that the Commission assess the effects, if any, on fish and wildlife habitat. 30 Tex. Admin. Code § 297.53(a). It also provides that the Commission must assess any effects of the Application on rivers or stream segments of unique ecological value. *Id.* As it relates to the Application, there is no relevant river or stream segment of unique ecological value relevant for which effects must be evaluated.⁵² With the exception of wetland habitat, no assessment methodology is required to assess effects on fish and wildlife habitat. 30 Tex. Admin. Code § 297.53(f)(1)&(3).

Section 297.53’s Subsection (b) of Title 30 of the Texas Administrative Code also reiterates the discretion granted TCEQ in Texas Water Code Section 11.152, providing that the “commission ***may require*** the applicant to take reasonable actions to mitigate adverse impacts, if any, on fish and wildlife habitat.”

In Section 297.53, Subsection (c), the regulation provides more information regarding the assessment required by Subsection (a). This Subsection requires that the assessment include the project site, and include “potentially impacted habitat upstream, adjoining, and downstream of the project site.” 30 Tex. Admin. Code § 297.53(c). So, only for these areas ***potentially*** impacted is an assessment required. Simply because the areas are upstream, adjoining or downstream doesn’t make them potentially impacted in a way that may require mitigation. The Commission determines whether these areas are potentially impacted, and if so, conducts an assessment of such areas.

Section 297.53, Subsection (d) also includes a reiteration of Texas Water Code Section 11.152 regarding offsetting of TCEQ mitigation by mitigation required by 33 CFR §§ 320-330. 30 Tex. Admin. Code § 297.53(d).

⁵¹ See 30 Tex. Admin. Code § 297.53(b).

⁵² ED Ex. KC-3 at 4 (0048).

Subsection (e) includes no definitive regulatory requirement, but only notes the goal of “no net loss” of wetland function and valuation and identifies wetland functions. 30 Tex. Admin. Code § 297.53(e). Importantly, this goal is a federal regulatory requirement with which the project will have to comply during the federal CWA Section 404 permitting process.⁵³

And finally, Subsection (f) provides that **if** there is unavoidable wetlands loss, impacts to wetland habitat are mitigated in accordance with the **guidelines** included in Subsections (1)-(7) of 297.53(f). It seems necessary to state what should seem obvious—but Subsections (1)-(7) of 297.53(f) only apply to mitigate impacts to *wetland habitat*, not all fish and wildlife habitat. Reading this Subsection with the above Subsections 297.53(a)-(e), Subsection (f) is only triggered if the Commission in its discretion decides that there should be wetland mitigation. And wetland mitigation can only be required to the extent that mitigation required by 33 CFR §§ 320-330 is insufficient. The PFD makes clear that it does not agree with TCEQ deferring mitigation to the federal permitting process and mitigation developed by such process.⁵⁴ However, that’s precisely what Section 297.53 allows TCEQ to do, given the robust requirements of the federal government in its own permitting. Simply put, the regulations included in 33 CFR §§ 320-330 require full mitigation for impacts to wetlands which will happen at the federal review level.⁵⁵ As such, the *guidelines* included in Section 297.53(f) for mitigating wetland habits are moot and unnecessary.

Without regard to Section 297.53(f) remaining unnecessary due to TCEQ discretion on such guideline provision, the Application does address the guidelines set forth therein for mitigation of wetland habitat and included a Conceptual Mitigation Plan that will be finalized during the CWA Section 404 permitting process.⁵⁶

d. Background

By the ALJ’s own admission, “the City assessed the effects of the project on instream uses; fish and wildlife habitats within the Lake Ringgold project site; and

⁵³ WF Ex. 1 at WF00007546 (Draft Permit, Special Conditions 7(A) and 7(B)).

⁵⁴ PFD at 55.

⁵⁵ See ED Ex. KC-4 at 0056, ED Ex. KA-1 at 0091:5-8. See also ED Closing Argument at 7.

⁵⁶ *Id.*

habitats adjoining, upstream and downstream.”⁵⁷ No one disputes that the HEP assessment and the stream assessment evaluated the effects of the Application on fish and wildlife habitat, including wetland habitat—the Landowner Protestants⁵⁸ only argue that it should have been done differently or that more detailed work was required—with which the ALJ appears to agree.⁵⁹ But contrary to the PFD’s conclusion, the statute, regulation, TCEQ policy, and TCEQ precedent do not require any more than what was done by the City for compliance with Texas Water Code Section 11.152 and Title 30, Section 297.53 of the Texas Administrative Code.

For example, the PFD states that “[t]he HEP report acknowledges Cropland, Lacustrine and Riverine cover types within the project area; however, they were not assessed ‘due to a lack of ecological need for mitigation of these habitats.’”⁶⁰ The statement reflects a regulatory misunderstanding as to what an assessment of effects on fish and wildlife habitat looks like. The City, through the use of HEP, assessed the fish and wildlife habitats within the project site, identifying cover types, and at least with respect to the Cropland, Lacustrine and Riverine cover types, this is where the assessment was completed with a determination that no valuation of these habitats for mitigation was needed.⁶¹ The ALJ also agrees with questions raised by Landowner Protestants on wanting to know who exactly from Freese and Nichols and ED staff participated in the field sampling for the HEP assessment.⁶² The PFD casts doubt on ED staff participating in such fieldwork.⁶³ Nonetheless, there is clear evidence in the Application,⁶⁴ ED staff’s technical memorandum,⁶⁵ and the testimony of both the Applicant⁶⁶ and ED staff⁶⁷ to the contrary, demonstrating ED staff’s engagement in such analysis. But as discussed herein, appropriate weight should consider the *Applicant’s* burden, not that of ED staff. The fact

⁵⁷ PFD at 31.

⁵⁸ Landowner Protestants include O’Malley, the Horwoods, and TSC, as defined in the Landowner Protestants’ Closing Arguments Brief.

⁵⁹ PFD at 37, 40.

⁶⁰ PFD at 32.

⁶¹ *See generally* WF Exhibit 5F (WF00008237-82).

⁶² PFD at 33-34.

⁶³ *Id.* at 34.

⁶⁴ WF Ex. 5F at 3 (WF00008239).

⁶⁵ ED Ex. KC-3 at 2 (0046).

⁶⁶ WF Ex. 5 at 7:1-11 (WF00010873).

⁶⁷ *See* ED Ex. KC-3 (0044-53).

that the ED witness, Kenneth Coonrod, due to simple turnover at the agency,⁶⁸ is not the ED staff person that participated in the HEP assessment and the stream study assessment, does not negate that the required assessment was completed.⁶⁹

e. Study Area

As set forth above, Title 30, Section 297.53 of the Texas Administrative Code requires an assessment of effects on fish and wildlife habitat to include the project site. It does not require that it include an assessment of habitat upstream, adjoining, or downstream of the project site. One of those additional areas must only be included in the assessment if one of those areas is potentially impacted by the Application in a way that may require mitigation. 30 Tex. Admin. Code § 287.53(c). And, in the case of the Application, a determination was made to only include the area downstream of the project site because it was potentially impacted—and does require mitigation.⁷⁰ Even so, the Application did assess the relocation of terrestrial species to surrounding areas that are not inundated, meaning adjoining property.⁷¹ The PFD is correct that a HEP assessment was not conducted on the adjoining property⁷²—but Section 297.53 does not require a HEP assessment for such property, just an assessment, and only if the property is potentially impacted. The apparent confusion in review of Section 297.53(f) has led to an incorrect belief that a habitat evaluation methodology like HEP is *required* for the assessment of effects on all fish and wildlife habitat. But that is not the case—a methodology like HEP is only identified for use for wetland habitats that will be fully impacted by the project resulting in unavoidable wetland loss that is not offset by mitigation required by 33 CFR §§ 320-330 or the environmental benefit of the project. 30 Tex. Admin. Code §§ 297.53(d) and 297.53(f)(1)&(3). In fact, such basis—a misreading of Section 297.53(f)—is one of the primary reasons the PFD concludes that the

⁶⁸ Tr. Vol. 7 at 82:17-83-12 (Coonrod Cross).

⁶⁹ See ED Ex. KC-3 (0044-53).

⁷⁰ WF Ex. 5F at 3 (WF00008239).

⁷¹ WF Ex. 5 at 21:1-5 (WF00010887).

⁷² PFD at 83.

Application does not comply with Texas Water Code Section 11.152 and Title 30, Section 297.53 of the Texas Administrative Code.⁷³

In support of its conclusion that the City's assessment area is deficient, the PFD relies on the Landowner Protestants' point that the assessment area does not include the area "that would be affected by a 100-year flood, or the re-routing of Farm to Market Road 2332, or other local roads, around the 100-year floodplain."⁷⁴ In compliance with applicable USFWS HEP manuals, these areas were not included in the study area for the HEP assessment because the fish and wildlife habitat in these areas are not potentially impacted in a way that would necessitate mitigation—which is the basis for the assessment in Section 297.53—to determine whether the Commission may require mitigation.⁷⁵ The HEP assessment included an initial assessment of what areas are potentially impacted by the project in a way that may require mitigation by defining the study area.⁷⁶ As provided in the HEP Report, the HEP Team, comprised of ED staff and Freese and Nichols staff, had oversight in "defining the study area"—meaning the project site and other potentially impacted areas.⁷⁷ Protestants did not and cannot offer evidence confirming impacts to these areas. As such, the PFD should have determined based on a preponderance of the evidence—the evidence being the defining of the study area in the HEP assessment and the expert opinion of Votaw, whose expertise is unquestioned⁷⁸—that the habitat assessment complied with Section 297.53(c).

In addition, the PFD also states that the Applicant and ED staff failed to "examine indirect impacts to terrestrial and riparian habitats, as well as long and short-term effects to the watershed or ecoregion that may result from the permitted activity" as required by Section 297.53(f)(6).⁷⁹ Section 297.53(f)(6) **only applies** in the event TCEQ mitigates against unavoidable wetland loss—and TCEQ is not authorized to mitigate for such loss because this is mitigation required by 33 CFR §§ 320-330. Consequently, the examination of indirect impacts and long and short-term effects is not required. The language of Section 297.53(f) further supports this as it refers to Subsection (f)(6) as a

⁷³ PFD at 54.

⁷⁴ PFD at 35.

⁷⁵ See USFWS, 1980b, HEP, Ecological Services Manual at 3-1 (1980). .

⁷⁶ WF Ex. 1 at WF00007774-89; WF Ex. 5F at WF00008237-82.

⁷⁷ WF Ex. 5F at 2 (WF00008238).

⁷⁸ Tr. Vol. 4 at 253:2-18 (Nelle Cross); Tr. Vol. 5 at 153:20-25, 154:1 (Bradsby Cross).

⁷⁹ PFD at 35.

“guideline,” not a requirement. Even so, the analysis undertaken by the Applicant and the assessment conducted by the ED was comprehensive, taking into consideration indirect impacts to wetlands habitats, if any, and short-term and long-term effects within the watershed and ecoregion of the project.⁸⁰ It is this examination and assessment that resulted in the preparation of the Conceptual Mitigation Plan.⁸¹ The proposed mitigation in the plan, as well as the project itself, will ensure that any indirect impacts and effects are offset.⁸² Texas Water Code Section 11.152 and Title 30, Section 297.53(d) of the Texas Administrative Code provide that the Commission can consider the environmental benefit of the project itself in determining whether to require mitigation—and the record reflects those benefits of the Lake Ringgold project.⁸³

The PFD also discusses the Landowner Protestants’ concerns that no presence-absence survey of the Texas Kangaroo Rat and the Texas Horned Lizard was conducted.⁸⁴ It is unclear exactly why the ALJ focused on this issue without making any determination of sufficiency. But there is no need to address these species in particular because Section 297.53 requires an assessment of the effects of the project on fish and wildlife *habitat*—it does not require individual species counts nor assessment of individual species survival.⁸⁵ The Application simply went beyond the requirements of Section 297.53 to address potential impacts to state listed species without any requirement to do so as it also did with federal listed species.

f. Cover Type

The City agrees with the ALJ’s finding that the City properly combined cover types in the HEP assessment.⁸⁶

⁸⁰ WF Ex. 5F at WF00008237-82; WF Ex. 2F at WF00007534-98.

⁸¹ WF Ex. 5I at WF00008301-15.

⁸² WF Ex. 5 at 25: 6-21 (WF00010891).

⁸³ Tr. Vol. 5 at 178:21-25, 179:1-3.

⁸⁴ PFD at 36.

⁸⁵ Tr. Vol. 5 at 42:22-25, 43:1-4.

⁸⁶ PFD at 39.

g. Species Selection and Baselines

The PFD, relying solely on testimony of the Landowner Protestants, also stated that the “HEP inappropriately failed to assess species and measure habitat variable” and noted the City’s failure to assess the beaver or aquatic species.⁸⁷ Once again, the requirement of Section 297.53(a) is to assess the effects on fish and wildlife **habitat**, not individual species like the beaver and bobwhite quail.⁸⁸ The record reflects that the HEP study did assess effects on fish and wildlife habitat in the project area by determining the habitat types impacted and the value of these habitats.⁸⁹ This is done through the selection of certain species—and contrary to the PFD, the HEP study did use aquatic species, including green heron, the great blue heron, and the racoon.⁹⁰ Two of these species were also used as aquatic species in the Bois d’Arc Lake HEP.⁹¹ The PFD seems to completely ignore that these species were used and instead chooses to rely solely on Nelle’s statement that “no aquatic species were chosen for evaluation”⁹²—a statement that is incorrect because of his total lack of experience in species selection for HEP and how non-aquatic dependent species are used to value aquatic habitat. Bradsby’s preference for use of the beaver in the HEP study does not mean the HEP study is invalid. Bradsby himself acknowledges that selection of species models is based on best professional judgment.⁹³ Further, in relying on Bradsby and Nelle’s testimony, the PFD also fails to recognize the limited experience of Bradsby and Nelle in the use of HEP—to which they both admit, as stated in the record.⁹⁴ No evidence was presented by the Landowners Protestants to raise any questions regarding Votaw’s expertise—the record is devoid of any such evidence. Giving Votaw’s expertise the appropriate weight, the HEP study was appropriately scoped for the study area, an appropriate species selection was used to value

⁸⁷ PFD at 40.

⁸⁸ PFD at 39-40.

⁸⁹ See WF Ex. 5F; ED Ex. KC-3 (0044-53).

⁹⁰ WF Ex. 5F at 4. (WFO0008240).

⁹¹ WF Ex. 9 at 5. Tr. Vol. 5 at 163:13-19, 165:24-166:8 (Bradsby Cross).

⁹² OM Ex. 100 at 8.

⁹³ Tr. Vol. 5 at 152:2-8.

⁹⁴ PFD at 30-58. Tr. Vol. 4 at 205:20-25 (Nelle *voir dire*) (discussing emails Nelle sent to USFWS regarding how HEP is done); Tr. Vol. 4 at 214:25-215:2 (Nelle *voir dire*) (stating that he was only asked to review what the City had done); Tr. Vol. 4 at 229:20-25, 230:1-4, 231:12-17 (Nelle Cross) Tr. Vol. 5 at 129:17-21, 132:2-6, 136:5-8 (Bradsby Cross).

habitats, and as a result, the effects on fish and wildlife was assessed in compliance with Section 297.53.

h. Wetland Functions and Values

Title 30, Section 297.53(e), of the Texas Administrative Code recognizes that the goal of mitigation is to achieve “no net loss” of wetlands functions and values. The PFD references this goal in the regulation,⁹⁵ but fails to read it in proper context with other Subsections of the regulation and Texas Water Code Section 11.152. Importantly, the Commission is not required to mitigate impacts to wetlands and the Commission must offset mitigation by mitigation required pursuant to 33 CFR §§ 320-330. As discussed, 33 CFR §§ 320-330 includes mitigation requirements for CWA Section 404 permitting. At the federal level, there is also a policy of “no net loss” of wetlands.⁹⁶ To achieve this “no net loss,” 33 CFR § 320.4(r) provides that “[c]onsideration of mitigation will occur throughout the permit application review process and includes avoiding, minimizing, rectifying, reducing, or compensating for resource losses.” Federal Section 404 compensatory mitigation rules require that mitigation be:

. . . sufficient to replace lost aquatic resource functions. In cases where appropriate functional or condition assessment methods or other suitable metrics are available, these methods should be used where practicable to determine how much compensatory mitigation is required. If a functional or condition assessment or other suitable metric is not used, a minimum one-to-one acreage or linear foot compensation ratio must be used.

33 CFR 332.3(f)(1). Thus, federal compensatory mitigation rules mandate the City to fully compensate for impacts to all lost aquatic resource functions. O’Malley witness Bradsby fully agrees with this as demonstrated by the following questions during his cross-examination:

⁹⁵ PFD at 41, n. 208.

⁹⁶ EPA, Memorandum of Agreement regarding Mitigation under CWA Section 404(b)(1) Guidelines, <https://www.epa.gov/cwa-404/memorandum-agreement-regarding-mitigation-under-cwa-section-404b1-guidelines-text>

Q. And you know, in light of the fact that is (sic) a conceptual mitigation plan, you do recognize that it will be fully replaced with the Corps 404 permit mitigation plan?

A. Yeah, I mean, the Corps has not even – has not looked at this at all.”

...

Q. – the permit conditions that are included require that. Right?

A. That’s my understanding.

Q. And assuming that does happen and the Corps issues a permit that includes a final mitigation plan, this will – this plan, to be in compliance with Section 404 of the Clean Water Act, will result in no net loss of wetland functions and values. Right?

A. I think that’s the standard set by both the state and – state and federal level.⁹⁷

The O’Malley witnesses not only agreed upon the applicable standards, but they acknowledged such standards would result in eventual requirements for the City. To that end, Nelle agreed that the City would be required by USACE to fully mitigate for impacts to aquatic resources that are waters of the United States.⁹⁸ And Texas Water Code Section 11.152 mandates that the Commission offset its required mitigation by this federal mitigation. Given the full mitigation required at the federal level, TCEQ’s compliance with Title 30, Section 297.53(f) of the Texas Administrative Code becomes moot and unnecessary. Moreover, Section 297.53(f) only provides guidelines for how impacts to wetland habitat are mitigated and contrary to the PFD’s analysis, the City complied with these guidelines. The City did classify wetlands consistent with the Cowardin system, providing in the Application that “[t]he classification of wetland type, e.g., forested, shrub, or emergent wetland, is based on Cowardin’s (1979) Classification of Wetlands and Deepwater Habitats of the United States” and the “functional value of the wetlands was assessed using the USFWS HEP protocol.”⁹⁹ The ALJ’s reliance on Nelle’s testimony that this was not done correctly for riverine wetlands is absolutely misplaced. Nelle’s opinion

⁹⁷ Tr. Vol. 5 at 217:19-25, 218:1-11 (Bradsby Cross).

⁹⁸ *Id.* at 214: 18-21 (Bradsby Cross).

⁹⁹ WF Ex. 2J at 5-9 (WF00007782).

is based on observations from a limited flyover of the Little Wichita River and his claims that he went to numerous locations along the river.¹⁰⁰

Interestingly, Nelle's direct testimony is devoid of any mention of his "numerous"¹⁰¹ on-the-ground observations of the river where he determined that habitat should be classified as "palustrine" instead of "lacustrine." Curious too is the fact that, unlike with other observations made by Nelle, he introduces no photos in his direct testimony reflecting his observations at numerous locations along the river to support his claims of palustrine wetlands existing rather than a lacustrine habitat. And Nelle presents no support for his testimony during cross-examination on this issue. Moreover, in weighing Nelle's testimony, the ALJ should have considered Nelle's recent experience as it relates to wetlands classifications. Nelle, by his own testimony, has not performed any wetlands delineations since 2012 when he began private consulting.¹⁰² Weighing Nelle's limited wetlands expertise against that of Votaw, who previously worked at USACE in CWA Section 404 permitting and is a Professional Wetland Scientist,¹⁰³ Votaw's opinion and classification of wetlands, specifically deeming areas along the Little Wichita River to be lacustrine rather than palustrine wetlands, should have been deemed more credible than Nelle's.

The PFD's conclusion that the City failed to determine specific functions and values of wetland habitats misreads Section 297.53, particularly in the statement that "whether this effort will be duplicated in the CWA section 404 permitting process is immaterial to what is required here."¹⁰⁴ As discussed, it is absolutely material because the Commission shall offset any mitigation for the water right application by mitigation required for the CWA Section 404 permitting process. Further, Section 297.53(f)(1) is simply a guideline—not a requirement—a guideline the City followed. The City classified wetlands based on type and inherent in this classification is a determination of function and value of wetland habitats, as evidenced by Nelle's description of the differences between types of wetlands classified by the City and the habitats they provide.¹⁰⁵

¹⁰⁰ Tr. Vol. 4 at 268: 3-8 (Nelle Cross).

¹⁰¹ PFD at 42.

¹⁰² Tr. Vol. 4 at 228:5-8 (Nelle Cross).

¹⁰³ See WF Ex. 5 at 2 (WF00010868).

¹⁰⁴ PFD at 43.

¹⁰⁵ Tr. Vol. 5 at 2-5 (Nelle Cross).

If the review had properly analyzed Texas Water Code Section 11.152 and Section 297.53(f), Title 30, of the Texas Administrative Code the findings would conclude that the City appropriately assessed effects of the project on wetland habitat and correctly deferred final assessment of wetland mitigation to the CWA Section 404 permitting process.

i. Methodology

The City agrees with the ALJ's finding that no interdisciplinary team is required for the HEP assessment.¹⁰⁶

j. Conceptual Mitigation Plan

The final deficiency for habitat assessment found by the ALJ is that the Conceptual Mitigation Plan fails to comply with Section 11.152 and Section 297.53. In light of the above-referenced misreading of this statute and regulation on habitat mitigation, such finding is consistent with such misreading. The ALJ focuses on the words “applicant” and “application” to argue against mitigation being addressed after a permit is issued:

The Water Code states, “*In its consideration of an application*” for a water right permit “the commission . . . may require the *applicant* to take reasonable actions to mitigate adverse impacts on such habitat.” Similarly, Commission rules provide that “[f]or an *application*” for a water right permit “the commission may require the *applicant* to take reasonable actions to mitigate adverse impacts, if any, on fish and wildlife habitat.”¹⁰⁷

This is an interpretation by the ALJ without any basis except for what the PFD refers to as “clues” that “strongly suggest” the ED staff review should not wait for the federal process.¹⁰⁸ As previously discussed, the language the analysis should have focused on is that the Commission has discretion as to whether to require mitigation, but the Commission *has no discretion* regarding offsetting any mitigation it proposed with mitigation required by CWA Section 404 permitting—the critical reason why mitigation must be deferred to such federal permitting. If the Commission does not offset

¹⁰⁶ PFD at 45.

¹⁰⁷ PFD at 53.

¹⁰⁸ PFD at 54.

mitigation, it is in violation of Section 11.152. Thus, the failure to acknowledge such deferral to the CWA Section 404 permitting process leads to incorrect conclusions regarding federal mitigation requirements. Federal mitigation requirements explicitly address relationships to state programs like the Texas Water Rights Permitting Program:

Compensatory mitigation projects...may also be used to satisfy the environmental requirements of other programs, such as tribal, state, or local wetlands regulatory programs... consistent with the terms and requirements of these programs and subject to the following considerations: (i) The compensatory mitigation project must include appropriate compensation required by the DA permit for unavoidable impacts to aquatic resources authorized by that permit. (ii) ...where appropriate, compensatory mitigation projects...may be designed to holistically address requirements under multiple programs and authorities for the same activity.

33 CFR § 332.1(j)(i)-(ii). Section 320.4(r)(2) of 33 CFR also provides that “[a]dditional mitigation may be added at the applicant’s request.” These provisions make clear that compensatory mitigation for the Application can be included, including terrestrial mitigation, and is enforceable in federally required compensatory mitigation for a CWA Section 404 permit. The record reflects that this is exactly what occurred for Bois d’Arc Lake, Water Use Permit No. 12151.¹⁰⁹

The ALJ also alleges that “there has been no assessment of whether suitable mitigation habitat [is] available for complete compensation for the lost habitat.”¹¹⁰ The PFD does not recognize that this provision, Section 297.53(f), by its very language, only applies to “wetland habitat” and is only a “guideline,” not a requirement. And again, this is now a moot provision because complete mitigation for wetland habitat, including an assessment of whether suitable mitigation exists, will be required by the CWA Section 404 permitting process as explicitly provided in federal regulations and recognized by Bradsby and Nelle.¹¹¹ The City identified potential habitat mitigation in the Conceptual Mitigation Plan that will ultimately be further reviewed, analyzed, and refined in federal permitting.¹¹² The Draft Permit, recognizing this federal permitting process and deferring to it, includes Special Conditions 7.A. and 7.B.—and by doing so the Application has complied with Section 297.53.

¹⁰⁹ Tr. Vol. 5 at 186:7-13 (Bradsby Cross).

¹¹⁰ PFD at 55.

¹¹¹ Tr. Vol. 5 at 217:19-25, 218:1-11 (Bradsby Cross).

¹¹² WF Ex. 5 at 25:6-21 (WF00010891).

In the findings regarding the Conceptual Mitigation Plan, the PFD also addresses the City's stream study, alleging such study as being insufficient for failing to assess the ecological value of streams tied in part to the what the PFD notes as being "the most glaring omission" that the applicant did not establish that "there is suitable mitigation habitat available for complete compensation for the lost habitat."¹¹³ This requirement in Section 297.53(f)(4) that is cited has no application to stream assessment and mitigation. As previously stated, Section 297.53(f) only applies to mitigation of impacts to wetland habitat—so it is not applicable to all habitat. Moreover, the entire provision in Section 297.53(f)(7) on "habitat mitigation plans and agreements" is also only applicable to mitigation for wetland habitat.

Section 297.53 requires an assessment of the effects of the project on fish and wildlife habitat. 30 Tex. Admin. Code § 297.53(a). Notably, there are no specific regulations regarding streams in TCEQ's regulation on broader habitat assessment. Because streams include fish habitat, the City conducted an assessment of the stream type and length of streams that would be impacted by construction and inundation of the reservoir from September 2016 through March 2017 with participation of ED staff.¹¹⁴ This is an assessment of effects on fish and wildlife habitat that ED staff accepted.¹¹⁵ The statute and regulations do not require anything more.

The PFD closes the treatment of the Conceptual Mitigation Plan by again relying solely on Nelle's testimony to find that the plan "fails to establish how littoral wetlands on the shoreline edges of Lake Ringgold and Lake Kickapoo will achieve no net loss of wetland functions and values for lost emergent herbaceous and shrub wetlands."¹¹⁶ As was established in Nelle's cross-examination, Nelle provides no evidence to support his position except for a helicopter flyover and by reviewing a soil survey map.¹¹⁷ Importantly, his own photos show that wetlands have developed along the shoreline of Lake Arrowhead, supporting the City's position regarding littoral wetland development, particularly when the City would implement the development of mitigation through a final USACE-approved mitigation plan as opposed to just allowing natural

¹¹³ PFD at 56.

¹¹⁴ See WF Ex. 3D (WF00007781).

¹¹⁵ WF Ex. 2F at WF00007534-98.

¹¹⁶ PFD at 57.

¹¹⁷ Tr. Vol. 5 at 28:9-12 (Nelle Cross).

development.¹¹⁸ *But ultimately, this discussion and testimony is moot.* During the CWA federal Section 404 permitting process, a final mitigation plan will be prepared and approved of by USACE that will require complete mitigation of impacts to waters of the United States, including wetlands, resulting in “no net loss of wetlands.”¹¹⁹ Bradsby and Nelle agree that this is the case.¹²⁰ And as such, the Commission legally cannot require any mitigation for wetlands or other aquatic resources that will already be mitigated pursuant to 33 CFR §§ 320-330. That is why Section 297.53(f) includes only guidelines and strict adherence with these provisions is not required.

k. The City’s Compliance with Texas Water Code Section 11.152 and Title 30, Section 297.53 of the Texas Administrative Code

Contrary to the weight of the evidence and Votaw’s credible testimony, the analysis relied solely on the opinions of Bradsby and Nelle, even though they lacked expertise in certain areas and provided no evidence to support their opinions and claims. Applicant has complied with TCEQ’s rules and requirements for a habitat assessment and mitigation.¹²¹ The City conducted an assessment of the effects of the Application on unique streams within the Lake Ringgold project site, of which there are none, fish and wildlife habitats within the Lake Ringgold project site, and potentially affected habitats adjoining, upstream and downstream as demonstrated in the Application and the HEP Report.¹²² The City conducted numerous desktop analyses to evaluate habitats and cover types within the footprint and verified this data with site evaluations.¹²³ Additionally, the City evaluated whether Lake Ringgold would have any impacts on state and federally listed species even though it is not required to do so.¹²⁴ The evaluation concluded that the state listed species potentially impacted are expected to relocate to areas outside the Lake Ringgold footprint and thus the Lake Ringgold project would have low to no potential

¹¹⁸ WF Ex. 11 and 12; Tr. Vol. 5 at 21:16-22:3 (Nelle admitting that littoral wetlands developed along the shoreline of Lake Arrowhead).

¹¹⁹ WF Ex. 5 at 24: 11-14.

¹²⁰ Tr. Vol. 5 at 217:19-25, 218:1-11 (Bradsby Cross).

¹²¹ Tr. Vol 7 at 148: 5-11 (Alexander Cross).

¹²² WF Ex. 1 at 5-1—5-19 (WF00007774-92).

¹²³ Tr. Vol 3 at 163:25—164:7.

¹²⁴ WF Ex. 5 at 22:16-23 (WF00010888).

negative effect on those species.¹²⁵ Further, the evaluation determined that Lake Ringgold is expected to have low to no potential negative impact on federally listed threatened or endangered species.¹²⁶ The ED concurred that the Lake Ringgold project would have low to no effect on state or federally listed species.¹²⁷

Further, the Applicant has provided a ED staff-approved conceptual mitigation plan which acknowledges the unavoidable impacts from a large reservoir project and establishes goals and objectives to mitigate for such impacts.¹²⁸ This plan will be updated and refined through the separate federal CWA Section 404 permitting process which will ensure the plan meets all federal mitigation requirements.¹²⁹ As such, the City's Application, specifically its included HEP Report and Conceptual Mitigation Plan, should have been found to be in compliance with the requirements for a state water rights application under the Texas Water Code Section 11.152 and Title 30, Section 297.53 of the Texas Administrative Code.

F. Need

1. Alternatives

The City agrees with the ALJ's conclusion that the City adequately evaluated alternatives to Lake Ringgold and concluded that the no other feasible alternative existed or was proposed by Protestants.¹³⁰

¹²⁵ Tr. Vol 7 at 104:17-20, 105:1-6 (Coonrod Cross) ("... these two species, these two threatened species, we've made the assumption or the – I would say we've made the determination that they have a reasonable opportunity to relocate and adapt to changing conditions.").

¹²⁶ WF Ex. 5 at 22:15-23 (WF00010888).

¹²⁷ ED Ex. KC-1 at 5:10-3 (0036).

¹²⁸ WF Ex. 5I at K-3 (WF00008303).

¹²⁹ WF Ex. 5 at 25:12-21 (WF00010891).

¹³⁰ PFD at 68.

2. Diligence to Avoid Waste and Achieve Water Conservation

The City agrees with the ALJ's conclusion that the City will use diligence to avoid waste and achieve water conservation through the use of its Water Conservation and Drought Contingency Plans.¹³¹

3. Necessary and Reasonable Appropriation

The PFD reaches a conclusion that Lake Ringgold is effectively too much water for appropriation, dismissing the importance of reserve storage and the testimony of ED staff witnesses,¹³² and ignoring the actual language of the applicable statute and rules. As detailed below, the record includes a clear demonstration that the City met applicable requirements on this issue; however, there is no stand-alone TCEQ requirement, nor has there ever been, for a framework where a water rights applicant must connect the dots between demands for every acre foot of water and the requested appropriation before satisfying its burden under such requirements.

a. The actual TCEQ standards do not contain a stand-alone assessment of “need,” nor do they require a determination of appropriate reserve, reservoir size, or population numbers.

A review of the actual statutory/regulatory standards against the PFD's conclusion is necessary to make clear TCEQ does not include a stand-alone “needs” assessment. Instead, in the context of alternative analyses, the question is whether the appropriation is *necessary and reasonable* in light of other water supply alternatives, and in the context of the statute, the question is whether this water supply need is consistent with the state and regional water plan. The PFD concluded that “the proposed appropriation does not address a water supply need, and therefore is neither necessary nor reasonable,”¹³³ however neither the statute nor the regulations mandate a perfect alignment of projected demands tied to certain quantities of water. In short, all language about “need” is fully

¹³¹ PFD at 78.

¹³² Tr. Vol. 7 at 170:6-8 (Alexander Cross) (stating that storage affords available water supply during drought).

¹³³ PFD at 90.

within the context of two scenarios: (1) whether the amount of water requested is consistent with the state and regional water plan (the subject of a separate briefing issue, discussed *infra*); and (2) if *alternatives analysis* examining options other than the appropriation compare independent alternatives to the requested appropriation in light of a “necessary **and reasonable**” “proposed use.” Table 1 highlights the statutory and regulatory contexts of the “necessary and reasonable” and “water supply need” language and demonstrates that there is not an independent test of whether an applicant needs a specific quantity of water.

Table 1: TCEQ Requirements Tied to Appropriation “Water Need”/ “Necessary and Reasonable” Appropriation

Citation	Statutory/Regulatory Text	City Comments
Tex. Water Code § 11.134(b)(3)(A)-(E)	(b) The commission shall grant the application only if . . . (3) the proposed application . . . (E) <i>addresses a water supply need in a manner that is consistent with the state water plan and the relevant approved regional water plan</i> for any area in which the proposed appropriation is located, unless the commission determines that conditions warrant waiver of this requirement. (emphasis added)	This is the only statutory provision tied to any concept of “need,” and importantly, it is not a stand-alone requirement, but says that the application must “address[]” a water supply need “in a manner that is consistent” with the state/regional water plans, showing a nexus between the application and the state/regional water plans.
30 Tex. Admin. Code § 297.50(b)(3) (Water Conservation Plan requirements)	(b) A <i>water conservation plan</i> submitted with an application requesting an appropriation for new or additional state water must include data and information which: . . . (3) <i>evaluates other feasible alternatives</i> to new water development, including but not limited to, waste prevention, recycling and reuse, water transfer and marketing, reservoir system operations, and optimum water management practices and procedures. It shall be the burden of proof of the applicant to demonstrate that the requested amount of appropriation is necessary and reasonable for the proposed use. (emphasis added)	The “necessary and reasonable” language is within the regulatory requirements tied to whether a conservation plan has adequately evaluated other feasible alternatives. Again, it is not a stand-alone “need” analysis, but the plain language ties an Applicant’s burden to using a new appropriation in lieu of other supplies.

Citation	Statutory/Regulatory Text	City Comments
30 Tex. Admin. Code § 288.7(b)	(b) It shall be the burden of proof of the applicant to <i>demonstrate that no feasible alternative</i> to the proposed appropriation exists and that the requested amount of appropriation is necessary and reasonable for the proposed use.	In the separate Chapter 288 requirement, again the “necessary and reasonable” language is tied to the feasible alternatives analysis, rather than asking whether an appropriation quantity is justified by a contract for every acre-foot of water requested.

Importantly, the PFD’s conclusion on these statutory and regulatory requirements follows examination of three standalone topics without any nexus whatsoever to the above-referenced statute and regulations. And while the PFD states “this requirement cannot be overlooked,”¹³⁴ the City is not asking to ignore TCEQ requirements, but instead requesting that the PFD avoid cherry picking a few words from the statute and regulations and creating from such extractions entirely new regulatory requirements that have no meaning when viewed in their full context. The PFD scrutinizes the City’s reserve supply,¹³⁵ population projections,¹³⁶ and reservoir size,¹³⁷ before then presenting a two-paragraph conclusion under “analysis of need” that contains the ALJ’s conclusion that the Lake Ringgold proposed appropriation amount is “neither necessary nor reasonable.”¹³⁸ Of critical note, none of the PFD’s treatment under these three sub-topics—reserve, population, and reservoir size—reference any of the above regulations or statutes.¹³⁹ The City addresses these topics below, but for purposes of satisfying its burden by a preponderance of the evidence standard, it is entirely unnecessary to do so, as the record itself meets the requirements of the one statute and two regulations with connections to “necessary and reasonable appropriations.”

¹³⁴ PFD at 89.

¹³⁵ PFD at 80-84.

¹³⁶ PFD at 84-85.

¹³⁷ PFD at 86-89.

¹³⁸ PFD at 89-90.

¹³⁹ Instead, the PFD creates a new standard altogether, stating that the “size and plan” was not narrowly tailored to meet the City’s projected need.” PFD at 89. There is no “narrowly tailored” requirement, and such a requirement would make no sense in the context of beneficial use and conservation requirements that reward storage and non-use to conserve supplies.

b. Three topics of reserve, reservoir size, and population are not rooted in applicable requirements for a water rights application.

As stated above, the PFD's basis to deem the appropriation not "necessary and reasonable" were three independent grounds not rooted in statute or regulation. Each of these is addressed below.

(iv) Reserve

The PFD contains no citation to a TCEQ requirement for an appropriate level or percentage of a reserve supply, and no such requirement exists. The PFD concludes that while "a reserve is consistent with prudent water planning . . . the ALJ finds that the 20% reserve [used by the City] is unsupported and inflated the City's projected need."¹⁴⁰ No water right applicant is required to defend or justify its reserve. A reserve is strictly an operational approach used in water supply planning to anticipate and plan for uncertain future conditions, including a drought worse than the drought of record. ED witnesses further made clear that the existence of a 20% reserve is entirely ancillary to their own determinations, which is instead to examine whether the requested appropriation is available.¹⁴¹

The amount of a particular reservoir's reserve is determined by the water supplier independent of TCEQ oversight and is not a predicate for determining whether a *full appropriation* itself is necessary and reasonable *in the context of a water right application*. O'Malley witness John Carron even testified to this clear distinction between TCEQ requirements versus operational considerations in extensive questioning on the subject:

Q: Does TCEQ mandate water suppliers use a safe yield in the operation of their reservoirs?

¹⁴⁰ PFD at 83-84.

¹⁴¹ Tr. Vol. 7 at 156:18-157:2 (Alexander Cross) (" . . . Q: And is [the 20% reserve supply] something that you considered during your analysis of the permit application? A: "Not for purposes of determine - - of making a water availability determination, no.").

A: Does it mandate that they use a safe yield in the operation of their reservoirs? I don't believe so. ***I think the only requirement is that they stay within the bounds of their water rights permit.***

Q: Exactly. And so operation is not a consideration that TCEQ reviews in analyzing water right applications, is it?

A: No.

...

Q: I think you testified a few minutes ago that TCEQ certainly doesn't mandate some sort of an operation as it relates to a safety factor, does it?

A: As it relates to safety factor, I don't think they mandate something, no.¹⁴²

Such distinction is also backed up by ED witness Dr. Kathy Alexander who testified that "[t]here's no TCEQ rule related to whether it's 20 percent or 30 percent or 10 percent,"¹⁴³ making clear that reservoir storage is strictly a construct of operational planning and is not a regulatory obligation.

Although the requirement of a reserve is found nowhere in water rights rules or applicable statutes, there is logic behind the use of reserves, and that logic is intended to avoid a scenario where a reservoir becomes completely dry.¹⁴⁴ As such, reserves can vary from water supplier to water supplier, and that variability also is supported by certain factors, including variable rainfall patterns and unique considerations such as diminishing water quality when water supplies reach certain low levels.¹⁴⁵ These reserves are often appropriately conservative as the reservoir operator never intends to divert water below a certain elevation, as O'Malley conceded in the context of the Lower Colorado River Authority ("LCRA") (which sets aside a full 30% of its capacity in Lakes Buchanan and Travis): "Q: And if [LCRA is] successful - - and we all hope they are - - if they're successful in that, Dr. Carron, LCRA is not diverting the 600,000 acre-feet. Correct? A: "Yes, although they do have contingency plans to do so if they need to."¹⁴⁶ Of course, LCRA's 600,000-acre-foot reserve is not contracted for use, and it is not intended for diversion; instead it is an operational floor in place as a safeguard to get through

¹⁴² Tr. Vol. 6 at 139: 19-141:3 (Carron Cross) (emphasis added).

¹⁴³ Tr. Vol. 7 at 169: 13-16 (Alexander Cross).

¹⁴⁴ WF Ex. 4 at 27:6-13; WF Ex. 4G at 15:22-17:2.

¹⁴⁵ WF Ex. 17:9-18:33.

¹⁴⁶ Tr. Vol. 6 at 133:20-25 (Carron Cross).

drought conditions, which are well-documented, but also unpredictable as to drought duration, intensity, and recurrence.¹⁴⁷

The PFD's dismissal of the City's 20% reserve as "unsupported and inflated,"¹⁴⁸ wrongly presumes that a reserve percentage is the lynchpin upon whether the appropriation itself is "necessary and reasonable" and also ignores abundant record evidence as to its basis. The City need not speculate about what water levels trigger availability and water quality limitations, as 20% was the combined available capacity of its total water supplies during the last drought of record (with the worst years occurring between 2011 and 2015), impacting treatment capabilities with higher salt content, flow, and access limitations.¹⁴⁹ Thus, the 20% figure reflects real world water supply challenges at such levels, and despite Protestants' hypothetical beliefs that surely the City could get by with less, the City's first-hand drought experience is sufficient proof that such reserve is necessary when facing a similar or worse drought in the future.¹⁵⁰ Furthermore, to limit one's drought preparation to the existing drought of record is to ignore the reality that droughts are getting worse, as even O'Malley witness John Carron admitted when asked about whether drier hydrology in southwestern United States over the last 30 years might be the "new normal."¹⁵¹ The increasing frequency of major droughts is also well documented, as three of the last eight major droughts since 1930 occurred since 2020.¹⁵²

In summary, a reserve supply strategy is strictly an operational consideration that is not part of a rubric for determining whether *the total appropriation* is necessary and reasonable for the proposed use. That reality notwithstanding, the City has made clear that its use of a 20% reserve is associated with real world limitations when its combined water levels reach such levels. Furthermore, a reserve supply becomes critically necessary when planning for a drought that may be worse than the drought of record, making

¹⁴⁷ WF Ex. 4G at 5: 19-22.

¹⁴⁸ PFD at 84.

¹⁴⁹ WF Ex. 4G at 12:13-13:9.

¹⁵⁰ WF Ex. 2 at 17:19-18:11.

¹⁵¹ Tr. Vol. 6 at 96: 6-98:6 (Carron Cross) ("...It could be [the new normal]. And I think that for planning purposes, that was one of the reasons we wanted to look at it [last 30 years of hydrology] because we wanted to understand what -- what -- you know, it doesn't make sense to plan -- I mean, when we're talking about drought and water supply, you don't really need to worry about the wet period so much. You want to worry about the dry periods.").

¹⁵² WF Exhibit 3F at 1-21.

reserve supply strategies essential to ensuring water supplies are resilient enough to endure future droughts that may be equal to or worse than historic events.

(v) Population Projections

The PFD next evaluates population projections as a “driver” to the City’s projected demand, even though TCEQ’s water rights process neither requires a certain population figure to merit an appropriation of water nor does any statute or regulation direct ED staff to re-do work performed by TWDB, an entirely separate state agency.¹⁵³ Although the PFD acknowledges that the population increases each decade up until 2070, it then concludes “that increase is not robust,”¹⁵⁴ even though there is no regulatory litmus test to determine what population trends merit approval of a water rights application.

Once again, the applicable standards set forth by the Texas Water Code and the two TCEQ rules relevant to whether the application is “necessary and reasonable” fail to marry the Applicant’s burden to any threshold population growth. As ED witness Jennifer Allis testified, her Application review included future population numbers included in the Regional Water Plan.¹⁵⁵ The PFD, as written, would place a burden on applicants and on ED staff to examine snapshot population predictions outside of the only places the regulatory requirements reference: the approved applicable state and regional water plans.¹⁵⁶ To use such a moving target based on interim assumptions—when the planning period of the regional plans spans 50 years—would impose a never-ending duty to update population numbers after applications have already been submitted and evaluated. Allis pointed out that it is not a “part of the process” to “go back and revisit” analyses already concluded on information available at the time of review.¹⁵⁷ However, even though a subsequent review of new data following ED staff analysis is unnecessary, Allis stated that she *did review the current plans* (the 2021 Region B Water Plan and 2022 State Water Plan) that included current TWDB-adopted population numbers and still

¹⁵³ PFD at 84-85.

¹⁵⁴ PFD at 85.

¹⁵⁵ Tr. Vol. 7 at 26:16-20 (Allis Cross).

¹⁵⁶ The PFD gives weight to the ever-evolving “more recent population projections” (PFD at 85) but includes no citation to a rule requiring analysis of changed data and views 2020 in a vacuum without considering the 50-year span of time used by TWDB.

¹⁵⁷ Tr. Vol. 7 at 33: 18-20 (Allis Cross).

concluded the Application satisfies Texas Water Code Section 11.134.¹⁵⁸ Accordingly, the record makes clear that while ED staff did not undertake a purely academic analysis to review census or preliminary projection numbers, they did look to the data sources applicable to ED staff review: the state and regional water plans.

Furthermore, the PFD's implication that only "robust" increases in population¹⁵⁹ can justify Lake Ringgold ignores the reality that the City nearly ran out of water with its population more than a decade ago with existing reservoirs.¹⁶⁰ The record reflects such context, as current reservoir supplies are not sufficient to weather a repeat of the drought of record, as testified by City's Director of Public Works, Russell Schreiber.¹⁶¹ Simply put, real world impacts of a drought of record on *existing* populations matter in water supply planning, and the lack of subjectively-defined "robust" population growth, should not hamper a regional water supplier such as the City from meeting the needs of its existing and future customers.¹⁶²

(vi) Reservoir Size

The City has no obligation to demonstrate that Lake Ringgold is a perfect size, or that its demands line up with mathematical precision to the appropriation requested. It has no duty, contrary to the PFD's position, to ensure Lake Ringgold is "narrowly tailored to meet the City's projected need."¹⁶³ In other major water rights applications, SOAH and TCEQ have acknowledged that there is not a duty to detail how every molecule of water will be allocated into the future. In reviewing the application in the *BRA SysOps Case*, the PFD in that case stated in no uncertain terms that "[h]aving this water available is beneficial, even if it is not immediately fully utilized, because it allows the customers to plan and rely on having the supply in the future."¹⁶⁴ In that case, the very same statute

¹⁵⁸ WF Ex. 4G at 10:18-24.

¹⁵⁹ PFD at 85.

¹⁶⁰ WF Ex. 2 at 24: 9-12.

¹⁶¹ WF Ex. 2 at 16: 11-24.

¹⁶² It also stands to reason that the City should not be *precluded* from experiencing future economic growth by the lack of available water supplies for new industries and the residents they attract. City witness Russell Schreiber testified to such growth limitations when lacking water based on the City's experience between 2011-2015 when the City "was not able to attract new business or industry" and when Sheppard Air Force Base put in place plans to relocate missions due to water supply limitations. WF Ex. 2 at 18:3-8.

¹⁶³ PFD at 89.

¹⁶⁴ *BRA SysOps Case* at *39.

was at issue—Texas Water Code Section 11.134(b)(3)—and that statute and the underlying application were subjected to the exact arguments Landowner Protestants in the present case are making: that an applicant must have “in hand executed contracts to sell all the water to be appropriated” under the permit.¹⁶⁵ In the BRA SysOps case, the ALJs concluded after review of the statutory language, decades-old case law,¹⁶⁶ and a separate permitting decision (where a still-unconstructed Allens Creek Reservoir was permitted in 1973) and stated “an applicant need not have water contracts in place and imminent water needs before a water right may be issued.”¹⁶⁷ The present PFD is contrary to such decision (requiring Lake Ringgold’s size to be “narrowly tailored” to a future demand), and should be revised for consistency with SOAH-established and TCEQ-approved precedent.

The “reservoir is too big” argument should be seen for what it is: Landowner Protestants’ back-door attempt to introduce otherwise impermissible arguments to protect private property from a water rights permitting decision. By its logic, a smaller reservoir footprint with less inundation would have a smaller impact on property owners, even though such property inundation issues are not ripe for SOAH or TCEQ consideration in a water rights case.¹⁶⁸ The PFD expressly includes such acknowledgement, stating that “[i]ssues of eminent domain, *inundation*, and cultural impacts are not within the scope of Chapter 11 or the Commission’s expertise.”¹⁶⁹ Because Protestants cannot point to a single case where TCEQ has deemed a reservoir too large, they contend that *this appropriation* is not needed because, in their view, the City seeks too much water (a concept foreign to a region plagued by historic drought less than a decade ago).¹⁷⁰ There is no regulation or TCEQ practice that specifically examines an

¹⁶⁵ *Id.*

¹⁶⁶ *City of San Antonio v. Texas Water Comm’n*, 407 S.W.2d 752 (Tex. 1966).

¹⁶⁷ *BRA SysOps Case* at *40-41.

¹⁶⁸ PFD at 26. Toward the end of the hearing on the merits, the ALJ made clear that certain land inundation topics would exceed the scope of appropriate review: “[F]or those landowners out there who are at risk of having - - being impacted by the inundation, I understand your concerns. Clearly you have close attachments to this land, it’s very meaningful to you. I may be limited in what I can consider . . .”). Tr. Vol. 7 at 214: 8-12.

¹⁶⁹ PFD at 26.

¹⁷⁰ OM Ex. 400 at 19:13-20:10.

appropriate reservoir size, as made clear in the record.¹⁷¹ As such, ED staff's analysis is squarely within the confines of the legislature's directive.¹⁷²

Assuming, *arguendo*, that a reservoir size may be considered in reviewing a water rights application (which, as established above, is not a TCEQ water rights analysis), the function of that reservoir relative to other supplies cannot be ignored. The PFD inappropriately analyzes Lake Ringgold's firm yield in a vacuum, independent from the City's proposed system operations of Lake Ringgold with Lakes Kickapoo and Arrowhead.¹⁷³ Yet after acknowledging the existence of such system operations testimony, the PFD gives no further treatment of how Lake Ringgold could be used in conjunction with the other two Little Wichita River watershed reservoirs, instead shifting to a stand-alone question of whether the City could "demonstrate a need for the firm yield of 27,060 acre-feet."¹⁷⁴ Testimony and exhibits underscore the importance of Lake Ringgold to the overall reservoir system. ED witness Dr. Kathy Alexander underscored as much, testifying that "one of the other items as part of the City's system as described in the application was the idea that when water is spilling from Kickapoo and Arrowhead, that that water can be captured by the City downstream, which is, you know, another aspect to the viability determination."¹⁷⁵ And the logic of such approach makes sense, as "the City's water rights in that watershed could be operated together to maximize the use of the water in the watershed."¹⁷⁶ Thus, Lake Ringgold's ability to maximize use of the watershed and water available to appropriate, as testified by City witness Jon Albright, serves a purpose clearly in conjunction with other reservoirs to improve efficiency of the system.¹⁷⁷ That benefit should have been considered as part of the ALJ's analysis, and such a commonly-used system operations approach helps explain how the reservoir will function in a manner relative to firm yield.

¹⁷¹ Tr. Vol. 7 at 158:8-12 (Alexander Cross) (Q: "Is it also true that you don't look at the proposed size of the reservoir other than to see whether it's consistent with what the regional and state water plans say?" A: "Yes.").

¹⁷² Tr. Vol. 7 at 159:12-16 (Alexander Cross).

¹⁷³ PFD at 86 (acknowledging record evidence and testimony that the City is permitted to "optimize its water supply system").

¹⁷⁴ PFD at 88.

¹⁷⁵ Tr. Vol. 7 at 148: 23-149:3 (Alexander Cross).

¹⁷⁶ *Id.* at 149: 12-14 (Alexander Cross).

¹⁷⁷ WF Ex. 4 at 29: 17-30:3.

Finally, the PFD makes a passing reference as a project “conceived during the Eisenhower administration,”¹⁷⁸ while ignoring the fact that it has been designated as a “unique reservoir site” by the Texas Legislature, and has been included as a recommended water management strategy in every Region B water plan since 2006.¹⁷⁹ The fact that Lake Ringgold has remained a recommended water management strategy for decades speaks to its importance as a cornerstone of water supply planning for the region. It also reflects the reality, as testified by City witness Russell Schreiber, that the City has already implemented the low-hanging fruit alternatives of additional water conservation and indirect potable reuse, demonstrating the City’s diligence in pursuing more immediately available water supply strategies, now leaving Lake Ringgold as the major strategy requiring implementation.¹⁸⁰ It is not an antiquated project that appropriates more water than needed; rather, it is a well-established critical reservoir needed to provide drought-resistant water supply in full anticipation of future droughts equal to or worse than the drought of record.¹⁸¹

c. The Record shows by a preponderance of the evidence the City has met its burden to satisfy requirements of Texas Water Code Section 11.134(b)(3)(A)-(E), and Title 30 Sections 288.7(b) and 297.50(b)(3) of the Texas Administrative Code.

The City’s evidence shows that it satisfied the requirements of the three rules listed above, as it has: (1) shown Lake Ringgold addresses a water supply need consistent with the state and regional water plans (discussed separately in the subsequent section); (2) submitted a water conservation plan with alternatives that are “necessary and reasonable for the proposed use”; and (3) conducted alternatives analysis that concluded Lake Ringgold is also “necessary and reasonable for the proposed use.” The ALJ need not look beyond his own conclusions in the PFD to see that the value of storage is reasonable and necessary, particularly during drought periods. The implication tied to the PFD conclusion that the City did not need the full 65,000 acre-feet¹⁸² is that amounts over and

¹⁷⁸ PFD at 89.

¹⁷⁹ WF Ex. 3 at 39:1-4.

¹⁸⁰ WF Ex. 2 at 21:17-18.

¹⁸¹ WF Ex. 3 at 41:21-42:7.

¹⁸² PFD at 90.

above diverted quantities are wasted. The ALJ already rejected such contention in light of the benefits of stored water, stating that “[s]torage, even [O’Malley witness] Carron agrees, serves a beneficial and important function,” and then concluding that the City’s “requested diversion and use of storage will allow it to maximize its water supplies for beneficial purposes.”¹⁸³ The PFD then agrees that “[b]eneficial use is defined to include storage” before deeming the City’s appropriation is intended for a beneficial use.”¹⁸⁴ Accordingly, when the question arises whether the appropriation is “necessary and reasonable” for that proposed use, the ALJ has already made a determination that the appropriation is intended for beneficial use – including stored water – and thus, is not wasted.¹⁸⁵ To require a contract *for diversion* of every amount of the appropriation ignores the benefits of storage that is reasonable and needed, particularly during times of drought.

Separately, both Sections 288.7(b) and 297.50(b)(3) of Title 30 of the Texas Administrative Code are expressly tied to *alternatives analyses*, which the ALJ agrees the City satisfied in the context of both Chapters 288¹⁸⁶ and 297.¹⁸⁷ Thus, in the two instances where “water supply *need*” and “necessary and reasonable” arise in the applicable TCEQ rules, they arise only as *sub-parts* to alternatives requirements and consistency with state and regional water planning; and for those issues, the PFD deemed the City’s efforts appropriate. Thus, only by focusing on selective language from the alternatives and consistency sections, does the PFD reach a conclusion that the City does not need the appropriation. Such extraction is not necessary, and the context of the statute and rules should govern. For the reasons set forth above, there is no stand-alone TCEQ requirement for an applicant to demonstrate “need,” and the City has satisfied the actual requirements of the rules.

¹⁸³ PFD at 20.

¹⁸⁴ PFD at 21.

¹⁸⁵ PFD at 20-21.

¹⁸⁶ PFD at 68.

¹⁸⁷ PFD at 75-76 (the City is required to evaluate conservation as an alternative to the proposed appropriation. The City has done so).

4. Consistency

The Application's requirement for consistency with the applicable state and regional water plan is not a burden for TCEQ; it is an obligation of the City, which the City has satisfied. The PFD, as written, both overstates the burden of an Applicant in showing an appropriation is consistent with already-developed state and regional water plans, and also focuses the burden on the ED staff, rather than the Applicant itself.

The record reflects the long-established approach TCEQ uses, by considering the work of its sister agency, TWDB. And the TCEQ process is straightforward: it is looking for an application's *consistency* with state and regional water plans that already reflect the laborious work to identify water supply strategies for the applicable regions and the entire state based on projected need over time. ED witness Jennifer Allis acknowledged this reality: "TCEQ determines consistency by checking the [State and Regional Water] plans."¹⁸⁸ Furthermore, ED witness Dr. Kathy Alexander testified that ED staff "do what the statute tells us to do, which is look at consistency with the state and regional water plans."¹⁸⁹ Although the ALJ criticizes the ED staff review (without even addressing whether the *Applicant* met its burden on this point, which is the requisite question) for looking at the plans to see if the water management strategy is *listed* in the water plans, consistency review is the full extent of required analysis and nothing more. Even OPIC agreed with such conclusion, stating that "if the project or appropriation in the application under TCEQ review *is listed* as a water management strategy in the approved state and/or regional water plans, it is reasonable to assume that the proposed project or appropriation addresses a water supply need in a manner consistent with the Plans."¹⁹⁰ The identical statute and regulation require *consistency* with a specific process with a specific set of requirements. As the ALJ is certainly aware, while the current TCEQ and TWDB are separate administrative agencies, their separate responsibilities are a product of history, where the current TCEQ and the current TWDB were split off from the Texas Water Commission.¹⁹¹ As a result, not only does the rule itself require mere consistency

¹⁸⁸ ED Ex. JA-1 at 8: 26-31.

¹⁸⁹ Tr. Vol. 7 at 191: 10-12 (Alexander Cross).

¹⁹⁰ OPIC Closing Arguments at 11 (emphasis added).

¹⁹¹History of TCEQ and Its Predecessor Agencies, <https://www.tceq.texas.gov/agency/organization/tceqhistory.html> (last visited January 18, 2024)(1985

with TWDB-driven plans, the PFD, as written, would require TCEQ to invade the regulatory purview expressly charged to TWDB for water supply planning in Texas.

The PFD demands a more searching inquiry by ED staff on the consistency question.¹⁹² However, ED staff's reliance on the state and regional water plans is not reflective of some shortcut in an Application review by ED staff; instead, it is the ED staff doing what it is charged to do – find the “best source of information on certain aspects [of the technical review],” which is the state and regional plans, as testified by ED staff witness Dr. Kathy Alexander.¹⁹³ It is no secret that this process has been in place for years, as the same witness testified that the consistency review follow exactly the course that ED staff followed in reviewing the Application, as that review is “based on 25 years of experience, including two major reservoir projects, plus our reading of our statutes as well as Chapter 16 of the Water Code that addresses how the water development – parts to the Water Development Board under the state and the regional water planning process.”¹⁹⁴ The PFD does not state what such additional evaluation would require, nor does it explain why a TCEQ analysis of original source information from the state and regional water plans is somehow insufficient. The record is clear that ED staff did no less and no more than is required by the statute, as demonstrated in the technical memo that examined the Application's request against the state and regional water plans, and backed up by ED witness Jennifer Allis's “approximately 150 reviews of applications for consistency with the State and Regional Plans.”¹⁹⁵ The only way to require more than what is ordered by Texas Water Code Section 11.134 is to ignore the statute's mere charge that the application is “consistent with” such plans, and then to read into the words “addresses a water supply need” as a searching requirement that goes beyond ED staff's long-established consistency review of any water rights application.

entry detailing the dissolution of the Texas Department of Water Resources and the split of responsibilities between the Texas Water Commission, a TCEQ predecessor agency, and TWDB. Following the split, the Texas Water Commission was tasked with regulatory enforcement duties, while TWDB was tasked with planning and finance responsibilities.).

¹⁹² PFD at 94.

¹⁹³ Tr. Vol. 7 at 198:7-10 (Alexander Cross).

¹⁹⁴ Tr. Vol. 7 at 205: 18-206:7 (Alexander Clarifying Examination).

¹⁹⁵ WF Ex. 2G at WF00007586-WF00007589; ED Ex. JA-1 at 2:18-19.

There is no question that Lake Ringgold has been included in the regional and state water plans for several cycles, where TWDB and Region B have deemed the project a critical strategy to address the water supply needs of the City and its customers.¹⁹⁶ The PFD does not identify what the ***City's burden***—not TCEQ's—should be over and above what the City provided: evidence that Lake Ringgold is a strategy vetted and included in the regional and state water plans.¹⁹⁷ The PFD's requirements thus go to obligations performed by entities *other than the City*: claiming TWDB or Region B should have evaluated different need numbers,¹⁹⁸ and contending that the ED staff consistency review should require more than is currently done.¹⁹⁹ In neither instance can the PFD demonstrate that the City itself—the entity with the burden—failed to meet the requisite burden, which ED witness Dr. Kathy Alexander testified requires a mere consistency with state and regional plans.²⁰⁰ Accordingly, the City has done its duty to meet its obligations under the applicable consistency rule.

G. Dam Safety

The City agrees with the ALJ's conclusion that the City submitted the documentation required under TCEQ's dam safety rules.²⁰¹

H. Administrative Requirements

1. Method of Diversion

The City agrees with the ALJ's conclusion that the Application provided the method of diversion to satisfy Title 30, Section 295.6 of the Texas Administrative Code.²⁰²

¹⁹⁶ WF Ex. 3F at 5-46 (FNI00016843); WF Ex. 3E at 5-47 (FNI00015626); WF Ex. 3I at 95 (FNI00039747); WF Ex. 3J at 108 (FNI00039913).

¹⁹⁷ WF Ex. 1 at WF00007707 and WF00007725.

¹⁹⁸ PFD at 91-92.

¹⁹⁹ PFD at 94-95.

²⁰⁰ Tr. Vol. 7 at 167:7-16, 205:9-206:7 (Alexander Cross).

²⁰¹ PFD at 97-98.

²⁰² PFD at 98-99.

2. Location of Diversion Points

The City agrees with the ALJ's conclusion that Application provides the location of the diversion points, at a point along the perimeter of Lake Ringgold, to meet the requirement in Title 30, Section 295.7 of the Texas Administrative Code.²⁰³

3. Time Within Which Construction Must Begin

The City agrees with the ALJ's conclusion that the Draft Permit meets the requirement in Texas Water Code Section 11.135(b)(7) to provide a time within which construction must begin or be completed.²⁰⁴

I. Requirements for Bed and Banks Authorization

The City agrees with the ALJ's conclusion that the Application meets the requirements for a bed and banks authorization pursuant to Texas Water Code Section 11.042 and appropriately accounts for evaporation losses.²⁰⁵

VI. TRANSCRIPT COSTS

The PFD proposed a 70/30 split of transcript costs, acknowledging the City's and O'Malley's ability to pay certain costs. The PFD's basis, however, for a greater City share is that the City has prosecuted the Application over several years.²⁰⁶ The applicable rule and cost allocation factors focus upon the hearing itself, as opposed to a separate application process. 30 Tex. Admin. Code § 80.23(d)(1)(B). As made clear in the transcripts from the hearing on the merits, O'Malley utilized a disproportionate share of time during the seven-day setting, and as a result an even 50/50 split is not unreasonable. Furthermore, Title 30, Section 80.23(d)(1)(D) of the Texas Administrative Code includes

²⁰³ PFD at 99.

²⁰⁴ PFD at 100.

²⁰⁵ PFD at 102.

²⁰⁶ PFD at 103.

as a factor “the relative benefits to the various parties of having a transcript,” and the relative benefits between the City and Protestants were equal in order to prepare closing briefs. Therefore, the City respectfully renews its request for a more equitable even split of transcript costs between the City and O’Malley.

VII. CONCLUSION

For the reasons above, the City respectfully requests that the ALJ reconsider his PFD and recommend issuance of the Draft Permit, and that the Commission grant its Exceptions to the PFD as proposed in Exhibit A (redline) and Exhibit B (clean), attached herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Nathan E. Vassar, hereby certify that on this 19th day of January 2024, a true and correct copy of the City of Wichita Falls's Exceptions to the Proposal for Decision has been sent via electronic mail to the following parties and counsel of record:



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Exhibit A



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

**AN ORDER ~~DENYING-GRANTING~~ APPLICATION BY THE CITY OF
WICHITA FALLS FOR WATER USE PERMIT NO. 13404
TCEQ DOCKET NO. 2022-0125-WR
SOAH DOCKET NO. 582-22-2634**

On _____, the Texas Commission on Environmental Quality (TCEQ) considered the Application by the City of Wichita Falls for Water Use Permit No. 13404. State Office of Administrative Hearings (SOAH) Administrative Law Judge (ALJ) Christiaan Siano conducted an evidentiary hearing by videoconference on August 14-22, 2023.

After considering the proposal for decision and the exceptions of parties filed thereto, the Commission adopts the following findings of fact and conclusions of law.

I. FINDINGS OF FACT

Procedural History

1. The City of Wichita Falls submitted its application for Water Use Permit No. 13404 on June 27, 2017.
2. The application seeks authorization to construct a dam and reservoir (Lake Ringgold) on the Little Wichita River in the Red River Basin; to divert and use 65,000 acre-feet of water per year for municipal, industrial, mining, and agricultural purposes within its service area in Archer, Clay, and Wichita Counties; and to authorize use of the bed and banks of the Little Wichita River (Lake Arrowhead), Red River Basin.
3. The City submitted additional information on July 7, July ~~27~~⁴⁷, and August 47, 2017.
4. The City has paid application and administrative fees totaling \$31,130.28, which represent all fees due at this time.
5. On August 10, 2017, the Executive Director (ED) of the TCEQ declared the application administratively complete.
6. During the technical review, the City provided additional information in response to ED staff's requests for information.
7. On August 8, 2019, the ED declared the application technically complete.
8. On October 16, 2019, ED staff prepared a Draft Permit, and on January 24, 2020, the TCEQ's Chief Clerk mailed the Notice of an Application for a Water Use Permit for Water Use Permit No. 13404 to the following entities located in the Red River Basin:
 - a. all navigation districts;
 - b. all holders of certified filings, permits, and claim of water rights; and
 - c. all county judges, each mayor of a city with a population of 1,000 or more, all groundwater conservation districts, state legislators, and the presiding officer of each affected regional water planning group.

9. The Notice of Application for a Water Use Permit was issued on January 24, 2020, and published in the Clay County Leader, a newspaper of general circulation within Clay County, on February 6, 2020.
10. The City provided notice of the application to each member of the governing body of each county and municipality in which the reservoir, or any part of the reservoir, will be located.
11. Each mailed and published notice of the application ~~also included information about TCEQ's permitting process and public participation in that process~~notice of the public meeting to be held via videoconference on August 25, 2020, for the purpose of receiving comments on the application.
- ~~12.~~13. The formal public comment and hearing request period closed on March 9, 2020. Due to significant public interest, the comment period was re-opened.
- ~~12.~~13.~~Notice was issued by TCEQ's Chief Clerk on July 22, 2020, of the public meeting to be held via videoconference on August 25, 2020, for the purpose of receiving comments on the application.~~
- ~~13.~~14. On August 25, 2020, a public meeting was held via videoconference, at the conclusion of which the final public comment period closed.
- ~~14.~~15. On April 13, 2022, the Commission referred the application to SOAH for a contested case hearing.
- ~~15.~~16. Notice of the preliminary hearing at SOAH was mailed on June 9, 2022, to all persons who had requested a hearing or filed public comment.
- ~~16.~~17. On July 19, 2022, SOAH ALJ Christiaan Siano convened a preliminary hearing via videoconference, during which jurisdiction was established and the Administrative Record was admitted.
- ~~17.~~18. Following the preliminary hearing, the following parties were named: the City of Wichita Falls; the ED; the Office of Public Interest Counsel; Emry Birdwell; Deborah Clark; Shane and Casey Cody; Laura Del Murray; ~~Joshua Don Ferguson~~; Mark Hill; Stan Horwood; Larry Horwood; Lonnie Horwood; Umhaill Valley, LLC; Kildavnet Castle, LLC; Rockfleet Castle, LLC; William O'Malley; ~~Carol Staley Morrow, executor of the Staley Family Trust and Melva Jo Staley Estate~~; Joe Staley; Phil Staley; Gil Staley; Jason Obermier; Jimmy Dale Obermier; Johnnie Shaw; William (Chris) Welborn and Welborn Ranch Ltd.; the City of Henrietta; Clay County; ~~the National~~

~~Wildlife Federation~~; the Texas and Southwestern Cattle Raisers Association; the Texas Conservation Alliance; the Texas Wildlife Association; the Texoma Stewardship Coalition; Brent Durham; Dan Stansbury for Lively Ranch Limited; Rebecca Hickman; Robert and Courtney Wilson.

~~18,19.~~ The Texas Wildlife Association filed a motion to withdraw as a party, which was granted on November 9, 2022.

~~19,20.~~ The City of Henrietta and Laura Del Murray each filed motions to withdraw as parties, which were granted on August 1, 2023.

~~20,21.~~ The hearing on the merits was held before ALJ Christiaan Siano via videoconference on August 14 through August 22, 2023.

~~21,22.~~ The record closed on October 23, 2023, after the parties submitted written closing arguments and replies.

Background

~~23.~~ The City is a home-rule city and a political subdivision of the State of Texas.

~~24.~~ The City's boundaries are established by its City Charter as set out in the official map in the official minutes of the City.

~~22,25.~~ The City is located within the Region B Regional Water Planning Area, as defined by the Texas Water Development Board (TWDB).

~~26.~~ The Region B Regional Water Planning Area covers all or part of 11 counties in North Central Texas—Archer, Baylor, Clay, Cottle, Foard, Hardeman, King, Montague, Wichita, Wilbarger, and Young Counties.

~~23,27.~~ The City's water service area is approximately 70 percent of the entire Region B population, and the municipal water demand on the City's system accounts for approximately 82 percent of the total Region B municipal demand, as documented in the applicable state and regional water plans.

~~24,28.~~ The Region B Regional Water Plan recognizes that the City is a Major Water Provider that provides water to water user groups on a wholesale and retail basis.

~~25,29.~~ The City's water service area includes all or portions of Archer, Clay, Wichita, and Young Counties.

~~26:30~~. The City holds all or a portion of the following water rights permits, as have been amended from time to time: Certificate of Adjudication (COA) No. 02-5123 (Lake Kemp-Diversion system), COA No. 02-5144 (Lake Kickapoo), and COA No. 02-5150 (Lake Arrowhead).

~~27:31~~. ~~Beginning i~~n 2011, the City experienced what would become the new drought of record.

~~28:32~~. In response to the extreme drought conditions, the City implemented water use restrictions to curtailed water use, reducing reservoir demands by up to 75% during the summer peak.

~~29:33~~. Between 2011 and 2015, Lakes Arrowhead, Kickapoo, and Kemp experienced record low inflows and high evaporation rates.

~~30:34~~. During the drought, the City was forced to take Lake Kemp offline due to water quality concerns.

~~31:35~~. By June 2015, Lakes Arrowhead and Kickapoo returned to pre-drought levels.

~~32:36~~. The City implemented an indirect potable reuse project, which provides an additional 8,968 acre-feet of water supplies annually and reduced the water supply deficit.

The Application

~~33:37~~. The application requests a water use permit authorizing construction and maintenance of a dam and reservoir (Lake Ringgold) with a maximum capacity of 275,000 acre-feet of water and a surface area at the conservation pool of 15,500 acres, on the Little Wichita River in Clay County, Texas.

~~34:38~~. The application requests to divert and use up to 65,000 acre-feet of water per year from the perimeter of Lake Ringgold for municipal, industrial, mining, and agricultural purposes within the City's service area of Archer, Clay, and Wichita Counties.

~~35:39~~. The application ~~includes a request~~s for authorization to use the bed and banks of the Little Wichita River (Lake Arrowhead) in the Red River Basin to convey up to 65,000 acre-feet of water per year for subsequent diversion and use for municipal, industrial, mining, and agricultural purposes.

~~36-40~~. The application requests authorization to use the bed and banks of Lake Arrowhead to convey return flows generated from the diversion and use of water originating from Lake Ringgold and return flows authorized by Texas Pollutant Discharge Elimination System Permit No. WQ0010509001 under COA 02-5150C.

~~37-41~~. The application states that the water would be diverted from Lake Arrowhead within days of discharge, with little to no residence time in Lake Arrowhead, therefore carriage losses are expected to be minimal.

~~38-42~~. The application states that the City proposes to divert at a maximum combined diversion rate of 62,770 gallons per minute by intake pump station and a transmission system to move the water to the City.

~~43~~. The application states that the point of diversion will be on the perimeter of the proposed Lake Ringgold and includes ~~s~~d a map of the diversion location.

~~39-44~~. The application describes the proposed location of Lake Ringgold to be approximately 13 miles in a northeasterly direction from Henrietta, Texas, with Station 50+00 on the centerline of the proposed Lake Ringgold dam to be S 63° East, 924.879 feet from the northeast corner of Bass, A Original Survey No. 11, Abstract No. 11, in Clay County, Texas, at 33.896° North Latitude, 97.992° West Longitude.

Available Water

~~45~~. In support of the requests made in the application, the City submitted its Red River Water Availability Model Run 3, as supplemented in October 2017 (the City's WAM) and modified to show extended hydrology through 2015.

~~46~~. The City's WAM was developed to determine, among other things, whether unappropriated water was available to satisfy the requests made in the application.

~~47~~. The City conducted an evaluation of hydrologic and hydraulic conditions within the Red River Basin as part of the application.

~~48~~. As part of its water availability analysis, ED staff employed its Water Rights Availability Package (WRAP) to evaluate whether the requests made in the application can be authorized while protecting existing water rights in the Red River Basin using the prior appropriation doctrine.

49. The WRAP is a generalized simulation model that requires the development of input data sets for the particular basin that is the subject of the review.
50. TCEQ developed basin-specific data for the river basins in Texas to incorporate into the WRAP simulation model that include geographical information, water rights information, naturalized flows, evaporation rates, and specific management assumptions.
51. TCEQ's standard water availability model used for the application is commonly referred to as WAM Run 3.
52. WAM Run 3 is significant in terms of identifying water that is available without impacting senior permanent water rights. WAM Run 3 models the hydrologic impacts of a proposed appropriation by first assuming all existing permanent water rights in the basin are being exercised at their authorized maximum impoundment capacities, maximum annual diversion amounts, and types of use. WAM Run 3 also models the hydrologic impacts of a proposed appropriation by assuming that all of the water appropriated by others is fully used. This is accomplished by assuming that there are no return flows in the basin (except those required by water right permits) available to satisfy modeled existing surface water appropriations.
53. WAM Run 3 is the best hydrologic model relied upon by TCEQ today to assess available water for proposed new appropriations of state water and potential impacts of proposed new appropriations such as the appropriation requested in the application.
54. ED staff employed WAM Run 3 to evaluate the availability of the requested 65,000 acre-feet annual firm yield diversions for Lake Ringgold (the ED's WAM).
55. The ED WAM demonstrates that the requested 65,000 acre-feet annual firm yield diversions for Lake Ringgold would be available 63 percent of the time.
56. The ED WAM shows that the firm annual yield of Lake Ringgold is 27,060 acre-feet per year.
57. The City also developed a spreadsheet model of the Little Wichita System (Lakes Kickapoo, Arrowhead, and Ringgold) based on the ED WAM with hydrology extended to include recent droughts that were not included in the ED WAM.

58. The City determined a firm-yield assessment of the Lake Ringgold project using the spreadsheet model in order to determine the impact of recent droughts that were not included in the ED WAM.
59. The City can divert up to 65,000 acre-feet each year on a non-firm basis when the City operates Lake Ringgold on a system-wide basis.
60. By managing its other available water rights and other water supplies, including available diversions from Lakes Kemp, Arrowhead, and Kickapoo, on a system-wide basis, the City could satisfy its water needs during drought periods when the normal supply capabilities of proposed Lake Ringgold would be exceeded.
61. ED staff determined that the availability of the requested 65,000 acre-feet annual diversions that are to be made on a less-than-firm basis is viable for the purposes identified, and under the conditions described in the application.
- 40;62. Unappropriated water is available in the Little Wichita River, Red River Basin for the amount requested in the application.

Beneficial Use

63. In the application, the City provided a statement of each general category of proposed use of the appropriation requested for diversion and a detailed description of the proposed uses and users under each category.
64. The application states that the appropriation of 65,000 acre-feet per year will be used for municipal, industrial, agricultural, and mining purposes, which are identified as beneficial uses of water under Texas Water Code Section 11.023.
- ~~41. The application does not state the amount of water to be used for each purpose.~~

Existing Water Rights

- 42;65. The City analyzed potential impacts to existing water rights, including vested riparian rights.
66. The impact on existing water rights was analyzed using a ~~Water Availability Model (WAM)~~ analysis by both the City and the ED, to determine that water was available to accommodate the requests made in the application.

67. The City determined, as reflected in the application, that 65,000 acre-feet per year of water could be diverted from the proposed Lake Ringgold at a maximum combined diversion rate of 139.79 cfs (62,770 gpm) without adversely impacting downstream senior and superior water rights within the Red River Basin.
68. In support of the application, the City submitted the City of Wichita Falls Water Rights Accounting Plan, as revised May 30, 2019 (Accounting Plan).
69. The Accounting Plan provides the City with a process for determining the daily quantities of water that it may divert pursuant to the terms of the appropriation requested in the application.
70. The Accounting Plan developed by the City establishes a reliable, consistent methodology for calculating specific quantities of water that the City may divert pursuant to the terms and conditions contained in the Draft Permit.
- 43;71. The Accounting Plan is a required tool that can be used by the City and by TCEQ for determining the City's compliance with the terms and conditions of the Draft Permit.
- 44;72. ED staff concluded that the Accounting Plan will adequately track diversions of water pursuant to the Draft Permit.
73. The application requests a new appropriation of state water, rendering the priority date of the proposed new appropriation junior to any other water right in the Red River Basin that existed at the time the application was deemed administratively complete.
- 45;74. Granting the application will not cause an adverse impact to an existing water right.

Public Welfare

- 46;75. The proposed appropriation would not be detrimental to the public welfare.

Environmental Flows and Assessments

Environmental Flow Standards

~~47.76.~~ No environmental flow standards have been developed for the Red River Basin.

Water Quality and Instream Uses

~~48.77.~~ The Lake Ringgold dam would be located on the Little Wichita River a half mile from the confluence with the Red River. This segment of the channel is considered fully impacted by Lake Ringgold.

~~49.78.~~ The City evaluated whether the appropriation and impoundment requested in the application would impair water quality in Texas.

~~79.~~ In assessing impacts to water quality, the City considered impacts to the area of impoundment and to the reach of the Red River downstream of the Proposed Dam.

~~50.80.~~ ED staff evaluated water quality downstream of the Proposed Dam and included a special condition in the Draft Permit requiring the City to conduct monitoring to ensure that water quality is protected after the Proposed Dam is constructed.

~~51.81.~~ The appropriation and impoundment requested in the application will not impair water quality standards for any other surface waters in Texas, including any bays or estuaries.

~~52.82.~~ With and without Lake Ringgold, the flows are expected to exceed 739 acre-feet per month 99% of the time.

~~53.83.~~ The Draft Permit conditions will maintain existing instream uses and water quality.

Groundwater

~~54.84.~~ The City conducted an assessment of the hydrologic conditions of areas within the Red River Basin watershed to determine the extent to which the requests proposed in the application would impact groundwater availability, use, quality, or recharge.

~~85.~~ There are not any major or minor aquifers that underlie the Project Area within, downstream, or upstream of Clay County, within the Red River Basin.

55.86. The appropriation requested will not impair existing uses of groundwater, groundwater quality, recharge, or spring flow.

Habitat Assessment and Mitigation

87. The Lake Ringgold project area consists of the area of land that will be inundated by Lake Ringgold up to the 844 feet mean sea level elevation, the dam, and the spillway (Project Area).

88. As part of its environmental investigation, the City conducted assessments of the potential impacts the appropriation requested in the application will have on habitats within the Project Area as well as upstream, adjoining, and downstream of the Project Area.

89. The City used the United States Fish and Wildlife Service's Habitat Evaluation Procedures (HEP) to assess the potential impacts the appropriation requested in the application will have on terrestrial habitats, which includes wetlands.

90. HEP is identified by TCEQ rules as a technically appropriate habitat evaluation methodology.

91. In support of the requests made in the application, the City submitted to TCEQ the HEP report dated May 2017.

92. In performing the HEP assessment, the City's consultants evaluated both potential short-term and long-term impacts of the appropriation requested in the application.

93. As part of its HEP assessment, the City evaluated the specific functions and values of wetland habitats in the Project Area that could potentially be impacted by the appropriation requested in the application.

94. The appropriation and impoundment requested in the application will have low to no potential impact on wildlife habitat that would be considered critical habitat for federally listed endangered or threatened species.

95. The appropriation and impoundment requested in the application will have low to no potential negative effect on wildlife habitat that would be considered critical habitat for state listed endangered or threatened species.

96. Using its HEP assessment, the City was able to calculate a Habitat Suitability Index (HSI) value for wildlife habitat that would be impacted by the appropriation requested in the application.

97. HSI was multiplied by the acreage of each cover type to calculate Habitat Units (HUs).

98. HUs are used to describe the current or baseline wildlife habitat value by cover type and can be used to describe the wildlife habitat value that will exist after mitigation activities are complete.

56.99. The City's HEP assessed the terrestrial and wetland fish and wildlife habitat in the ~~project~~ Project site Area—the footprint of the proposed reservoir at the conservation pool level—as well as the dam site and the spillway.

~~57. The City's HEP assessment did not assess terrestrial and wetland fish and wildlife habitats at the 100-year flood plain level.~~

58.100. In performing the HEP assessment, the City developed an acreage inventory of each land cover type within the ~~P~~project Area.

59.101. The land cover types identified in the Project Area include cropland, emergent/herbaceous wetland, grassland/old field, riparian woodland/bottomland hardwood, shrubland, shrub savanna, shrub wetland, tree savanna, and upland deciduous forest.

~~60.102.~~ The City's consultants, along with TCEQ representatives, conducted various site visits between 2016-2017 to evaluate land cover types at sites within the Project Area using HEP.

~~61.103.~~ The City's HEP ~~failed to~~ properly determined the functions and values of wetland habitats.

~~62.104.~~ The City's stream assessment ~~only~~ identified stream lengths by type, i.e., perennial, intermittent, and ephemeral.

~~63. The City's stream assessment did not involve any biological sampling or numerical valuing of existing habitat.~~

105. The City did not conduct an assessment of the effects of the proposed reservoir on habitats adjoining, upstream, and downstream of the Lake Ringgold project site.
106. In support of the requests made in the application, the City submitted to TCEQ the Conceptual Mitigation Plan dated April 2017 (the Conceptual Mitigation Plan).
107. Pursuant to the conditions of the Draft Permit, the City is required to mitigate for impacts to fish and wildlife habitat as provided for in its Conceptual Mitigation Plan and as such plan is ultimately finalized pursuant to federal law.
108. The City will also be required to develop a final mitigation plan during the federal permitting process that must be submitted to TCEQ for approval pursuant to a condition of the Draft Permit that requires compensatory mitigation for impacts to waters of the United States, including wetlands.
109. The City will mitigate for wildlife habitat within the Project Area as a condition in the proposed Draft Permit.
110. The City will mitigate for the loss of river or stream segments that will be impacted by the appropriation requested in the application.
111. To offset adverse impacts to fish and wildlife habitat and to wetlands, the City proposed mitigation measures to TCEQ through the Conceptual Mitigation Plan.
112. Before proposing any mitigation, the City considered the extent to which adverse impacts to fish and wildlife habitat could be avoided, minimized, or modified.
113. The City determined that the construction of Lake Ringgold and its associated habitat impacts could not be avoided altogether.
114. The City minimized the impacts of the appropriation requested in the application to the fullest extent possible by choosing a dam location that will result in the least possible impacts while still providing an adequate, affordable supply of water for the City's customers.
115. The mitigation measures proposed by the City will be completed onsite within the Project Area or near-site on property owned by the City through a

watershed approach to mitigation that will benefit upstream and downstream areas.

116. The mitigation proposed by the City will compensate for each of the types of habitats that will be impacted, including wetlands.

117. Impacts to streams will be mitigated through implementation of the Conceptual Mitigation Plan.

118. Impacts to impoundments and other open waters will be mitigated by creation of the reservoir.

119. Based on the goals, objectives, and strategies of the Conceptual Mitigation Plan, the requests made in the application will result in the offset of lost functions and values within the Red River Basin watershed such that, at a minimum, there will be no net loss of functions and values, and a potential net gain of functions and values in both fish, wildlife, and wetland habitat is anticipated.

120. The City developed detailed, long-term maintenance and management plans that include goals for mitigation and a general schedule for completion of those goals as a part of the federal permitting process.

121. The requests made in the application will not impair the existing aquatic life use, ecosystem, or habitat in the Little Wichita River and the Red River.

64.122. The mitigation measures proposed by the City in the Conceptual Mitigation Plan will create aquatic habitat and a viable and sustainable aquatic community, which will compensate for any potential impacts to instream uses.

65.123. The application ~~did not assess~~ direct and indirect impacts to terrestrial and riparian habitats.

~~66. The Texas Kangaroo Rat and the Texas Horned Lizard are State-listed threatened species that are likely present within the proposed project area.~~

~~67. The City did not conduct a presence-absence survey for the State-listed threatened species, or assess whether the populations would be able to re-establish outside the footprint of the reservoir.~~

~~68. The Conceptual Mitigation Plan does not establish unavoidable impacts to habitat on the Little Wichita River and confluence of the Red River because the City did not assess the aquatic habitat.~~

~~69. The City's Conceptual Mitigation Plan does not establish that there is suitable mitigation habitat available for complete compensation for the lost habitat of grasslands or upland deciduous forest habitat.~~

~~70.124. The United States Army Corps of Engineers (USACE) regulations authorize the inclusion of state mitigation requirements, including TCEQ mitigation for fish and wildlife habitat, does not have jurisdiction to assess terrestrial habitat other than wetlands, nor does the USACE have jurisdiction to impose mitigation requirements to offset impacts to terrestrial habitats.~~

~~71.125. The applicant failed to meetmet its burden of proof in showing that its habitat assessment and proposed mitigation were sufficient in assessing the effects of the proposed authorization on fish and wildlife habitats and offsetting those effects appropriately.~~

Need

~~72. The application shows a projected need of 9,110 acre feet per year in 2070.~~

~~73.126. This projection is based primarily on projected population growth.~~

~~74. The City's projected population growth does not support a need for 9,110 acre feet per year in 2070.~~

~~75. In calculating need, the City added 20% both to the forecasted demand for retail customers and to its reserve supply.~~

~~76. Adding 20% to the retail demand to determine "safe supply" demand was reasonable to calculate projected need.~~

~~77. Adding 20% to the projected municipal and manufacturing demands was unsubstantiated and overstates the City's projected need by approximately 11%.~~

~~78.127. The applicant failed to demonstrate a need for the requested appropriation. Neither applicable regional water plans nor the City's Application demonstrated a need for the requested 65,000 acre feet diversion amount.~~

Commented [A1]: There are no standalone statutory or regulatory "need" requirements, and as such this section is unnecessary.

~~79. Projected water supply needs did not factor into the City's design or sizing of the proposed Ringgold reservoir, and so, the proposed reservoir is oversized for the City's projected water supply needs.~~

~~80. The applicant failed to demonstrate the proposed appropriation of 65,000 acre feet per year addresses a water supply need.~~

Conservation

~~81.~~128. The City has formulated and submitted a water conservation plan and adopted reasonable water conservation measures.

~~82.~~129. The City's 2018 Water Conservation Plan adopts conservation goals and strategies for the City's wholesale and retail water supply distribution system.

~~83.~~130. In addition to its own conservation goals and strategies, the City also supports and encourages the conservation efforts of its customers by public education efforts, and requiring in its contracts for wholesale purchase of water that its customers adopt water conservation plans that are at least as stringent as the City's Water Conservation Plan.

~~84.~~131. In the 2018 Water Conservation Plan, the City also addressed conservation through reducing unaccounted-for water in its system through installation of advanced metering systems.

~~85.~~132. The City established multiple water conservation goals for itself and its customers in its 2018 Water Conservation Plan.

~~86.~~133. The City identified several strategies for achieving the goals established in its 2018 Water Conservation Plan.

~~87.~~134. The City's 2018 Water Conservation Plan meets and goes beyond TCEQ's minimum requirements for water conservation plans for wholesale and retail water suppliers.

~~88.~~135. The City's 2018 Water Conservation Plan incorporates an aggressive water reuse program; includes procedures and practices that have led to, and maintain, a low rate of lost and unaccounted-for water; and includes time of day restrictions on lawn irrigation and a public education program, among other water conservation measures.

~~89,136.~~ The City intends to use reasonable diligence to avoid waste and achieve water conservation through the implementation of its 2018 Water Conservation and Drought Contingency Plans, including the goals and strategies adopted therein.

~~90,137.~~ The City's Drought Contingency Plan incorporates several strategies and required actions to ensure compliance with TCEQ rules and reliable provisions of water for its customers during periods of drought-induced reductions in supply.

~~91,138.~~ The City has prepared a drought contingency plan that, along with the implementation of its 2018 Water Conservation Plan, will result in the avoidance of waste and achieve reasonable levels of water conservation within the City's jurisdiction.

~~92,139.~~ The City is already implementing indirect reuse and water conservation.

Alternatives

140. As part of its responsibilities to its customers through the water planning process, the City considered multiple water supply development strategies that could address its anticipated 50-year water demand projections.

141. While the City is implementing water conservation and reuse to meet part of its projected demands, the applicable Region B and State Water Plans confirm that those strategies alone cannot meet all the City's projected future demands.

142. After careful consideration, the City determined that Lake Ringgold—a new water supply reservoir on the Little Wichita River in Clay County—could provide a safe, reliable, long-term water source for the City's customers for potable and nonpotable water service.

~~93,143.~~ The Applicant evaluated 22 potential new water supply strategies, including Lake Ringgold.

~~94,144.~~ The City based its alternatives analysis on a projected demand for 21,633 acre-feet per year in 2070, shown in its 2016 Long-Range Water Supply Plan.

~~95. The City did not perform an alternatives analysis based on a demand for 9,110 acre feet per year 2070, as shown in the application.~~

145. The City evaluated conservation as an alternative to the proposed appropriation to the requested appropriation for Lake Ringgold.

146. Based on the alternatives analysis, the City demonstrated that no feasible alternative to the proposed appropriation exists.

96,147. The applicant demonstrated that the requested amount of appropriation is necessary and reasonable for the proposed use.

Consistency with State and Regional Water Plans

97,148. Lake Ringgold is listed as one of the recommended water management strategies in the 2016 Region B Water Plan and the 2017 State Water Plan and is one of the major water management strategies proposed by the Region B Regional Water Planning Group. It is also recommended in the current State Water Plan.

98,149. The 2016 Region B Water Plan projects a regional shortage of 44,946 acre-feet in 2070, and the 2021 Region B Water Plan projects a regional shortage of 36,114 acre-feet in 2070.

150. The subsequent 2021 Region B Water Plan reaffirms the evaluations and recommendations for the City's water management strategies in the 2016 Region B Water Plan.

151. The 2016 and 2021 Region B Water Plans identify Lake Ringgold as a recommended water management strategy for the City.

152. The 2016 and 2021 Region B Water Plans identify that water developed pursuant to the requests made in the application will be needed and used to meet demands in the Red River Basin in Region B.

153. The 2016 and 2021 Region B Water Plans also identify the methods for transmission, treatment, and delivery of the water by the City for its customers.

154. The 2016 and 2021 Region B Water Plans show that if no additional water supplies are developed, Region B will face shortages in water supply over the next several decades.

155. The 2016 and 2021 Region B Water Plans include a planning-level analysis of economic and environmental factors that was part of the regional planning

group's evaluation and selection of recommended water management strategies.

~~99,156.~~ The 2016 and 2021 Region B Water Plans include factors related to the quantity of supply made available, unit cost, impacts on agricultural and other rural areas, and impacts on natural resources.

~~100,157.~~ The 2021 Region B Water Plan shows that the City needs to develop an additional 10,864 acre-feet per year of raw water supplies by 2070 to meet its projected demands.

~~101,158.~~ The City's strategy for accommodating the water demands within the next 50 years includes efforts to increase water conservation and efficiency efforts by its residents and customers.

~~102,159.~~ The City's strategy for accommodating water demands within the next 50 years also includes reuse of its existing water supplies.

~~103,160.~~ The Applicant's requested appropriation has a firm yield of 27,060 acre-feet per year and thus is expected to satisfy of 65,000 acre-feet per year is significantly more water than the 36,114 acre-feet per year in 2021 Region B Planthe 2070 projecteditions of potential shortage in all of the Region B Water Plan in 2070.

~~104,161.~~ The application ~~does not~~ addresses a water supply need in a manner that is consistent with the Region B Plan and State Water Plan.

~~105.~~ The applicant failed to establish the application addresses a water supply need consistent with state and regional water plans.

Dam Safety

~~106,162.~~ The Applicant submitted a conceptual design of the construction for a proposed dam and appurtenant structures, or proposed reconstruction, modification, enlargement, rehabilitation, alteration, or repair of an existing dam; the geotechnical, hydrologic, and hydraulic reports for the proposed site, if the reports have been completed; and other pertinent information on an existing dam using a form provided by the ED.

~~107,163.~~ The ED provided a technical review of these documents.

~~108,164.~~ The Draft Permit requires the construction of the Lake Ringgold dam and reservoir to be performed in accordance with plans approved by the ED, and it makes clear that construction of the dam without final approval of the plans is a violation of the authorization.

~~109,165.~~ Under the Draft Permit, construction of the Lake Ringgold dam and reservoir is to begin within two years of permit issuance and be completed within ten years of permit issuance, unless the City applies for and is subsequently granted an extension of time before the expiration of these time limitations.

Transcript Costs

~~110,166.~~ The total costs for the transcription and reporting services amounted to \$19,302.30.

~~111,167.~~ O'Malley participated extensively in the hearing and post-hearing briefing, making extensive use of the transcript, as did the City.

~~112,168.~~ By retaining counsel and consultants, O'Malley has demonstrated an ability to pay.

~~113,169.~~ The City, by ~~having prosecuted this application for seven years,~~ hiring counsel and consultants, has demonstrated an ~~superior~~ ability to pay.

~~114. City is the party seeking affirmative relief, whereas O'Malley seeks to maintain the status quo.~~

II. CONCLUSIONS OF LAW

1. TCEQ has subject matter jurisdiction over this proceeding pursuant to sections 5.013(a)(1), 11.122, and 11.134 of the Texas Water Code.
2. SOAH has jurisdiction to conduct a hearing and to prepare a Proposal for Decision on contested cases referred to it by TCEQ pursuant to section 2003.047 of the Texas Government Code and section 5.311 of the Texas Water Code.

3. The State of Texas owns all water in every river, natural stream, and lake in the state, which includes the Little Wichita River, Red River Basin. Tex. Water Code § 11.021.
4. The waters of the state are held in trust for the public, and the right to use state water may be appropriated only as expressly authorized by law. Tex. Water Code § 11.0235.
- ~~5.~~ Eminent domain, inundation, and cultural impacts are not within the scope of Chapter 11 of the Texas Water Code or the Commission's jurisdiction.
- ~~5-6.~~ The application was accompanied by all required fees. Tex. Water Code § 11.134(b)(1).
- ~~6-7.~~ The application was properly noticed. Tex. Water Code § 11.132, 30 Tex. Admin. Code § 295.151.
- ~~7-8.~~ Unappropriated water is available in the Red River Basin. Tex. Water Code § 11.134(b)(2), 30 Tex. Admin. Code § 297.41(a)(2).
- ~~8-9.~~ The applicant properly accounted for carriage losses in its bed and banks authorization request. Tex. Water Code § 11.042, 30 Tex. Admin. Code § 295.113.
- ~~9-10.~~ Municipal, industrial, agricultural, and mining purposes are beneficial uses. Tex. Water Code § 11.023.
- ~~10.~~ An application to appropriate unappropriated state water must state the amount of water to be used for each purpose. Tex. Water Code § 11.124(a)(4).
- ~~11.~~ If a water right applicant seeks to use water for more than one purpose, the specific amount to be used annually for each purpose shall be clearly set forth. 30 Tex. Admin. Code § 295.5. TCEQ may authorize the appropriation of a single amount or volume of water for more than one purpose of use. 30 Tex. Admin. Code § 297.43(c).
- ~~11-12.~~ The application does not state or clearly set forth that the amount of water requested for appropriation will to be used for each municipal, industrial, agricultural, and mining purposes, which are beneficial uses as required by 30 Texas Administrative Code section 295.5297.43.

~~12.~~13. The application properly states the rate and method. 30 Tex. Admin. Code § 295.6.

~~13.~~14. The application properly stated the location of the point of diversion and, the location of the dam, and it included a map showing those locations. 30 Tex. Admin. Code § 295.7.

~~14.~~15. The Applicant submitted the documents required by 30 Texas Administrative Code section 299.3(b).

~~15.~~16. The ED provided a technical review of the documents required by 30 Texas Administrative Code section 299.3(b).

~~16.~~17. ~~Because the application did not comply with Texas Water Code section 11.124(a)(4), t~~The application ~~does not~~ conforms to the requirements of Chapter 11. Tex. Water Code § 11.134(b)(1).

~~17.~~18. Because the application requests authorization for multiple purposes, ~~did not clearly set forth the specific amount to be used annually for each purpose as required by 30 Texas Administrative Code, section 295.5,~~ the application ~~does not~~ conforms to 30 Texas Administrative Code chapter 295. 30 Tex. Admin. Code § 297.41.

~~18.~~19. The proposed appropriation is intended for beneficial uses. Tex. Water Code § 11.134(b)(3)(A); 30 Tex. Admin. Code § 297.41(a)(3)(A).

~~19.~~20. The appropriation and authorizations requested in the ~~A~~application, and proposed in the Draft Permit, do not impair existing water rights or vested riparian rights. Tex. Water Code § 11.134(b)(3)(B); 30 Tex. Admin. Code § 297.41(a)(3)(B).

~~20.~~21. The applicant met its burden of proof that the proposed appropriation is not detrimental to the public welfare. Tex. Water Code § 11.134(b)(3)(C); 30 Tex. Admin. Code § 297.41(a)(3)(C).

~~21.~~22. There are no applicable environmental flow standards established under Section 11.1471 of the Texas Water Code to consider in determining whether to grant the authorizations requested in the application. Tex. Water Code § 11.134(b)(3)(D).

~~22.~~23. The proposed appropriation must consider the assessments performed under Sections 11.147(d) and (e), 11.150, 11.151, and 11.152 of the Texas Water

Code. Tex. Water Code § 11.134(b)(3)(D); 30 Tex. Admin. Code § 297.41(a)(2)(D).

~~23.~~24. The applicant has met its burden of proof that the required assessments were performed under Sections 11.147(d) ~~and (e)~~, 11.150, ~~and 11.151, and 11.152~~ of the Texas Water Code in considering whether to grant the authorizations requested in the application.

~~24.~~25. The Draft Permit contains conditions that, after having considered all factors required under Section 11.147(d) of the Texas Water Code, are necessary and sufficient to maintain existing instream uses and water quality in the Red River Basin. Tex. Water Code § 11.147(d); 30 Tex. Admin. Code § 297.54.

~~26.~~ The Applicant ~~did not meet~~ its burden of proof to establish that the Draft Permit contains conditions, ~~or~~ ~~and~~ that it considered all factors required under Section 11.147(e) of the Texas Water Code, that are necessary and sufficient to maintain fish and wildlife habitats. Tex. Water Code §§ 11.147(e), 11.152; 30 Tex. Admin. Code § 297.53.

~~25.~~27. The authorizations requested in the application and proposed in the Draft Permit will not adversely affect instream uses, fish and wildlife habitat, water quality, or existing groundwater resources or groundwater recharge. Tex. Water Code §§ 11.134(b)(3)(D), 11.152; 30 Tex. Admin. Code §§ 297.41(a)(3)(D), 297.53.

~~26.~~28. The City submitted a water conservation plan and drought contingency plan with the application that complies with applicable requirements of 30 Texas Administrative Code chapter 288. Tex. Water Code §§ 11.1271, 11.1272; 30 Tex. Admin. Code § 297.50.

~~27.~~29. The City will use reasonable diligence to avoid waste and encourage the use of practices, techniques, and technologies designed to reduce the consumption of water, reduce the loss or waste of water, and improve the efficiency in the use of water. Tex. Water Code § 11.134(b)(4); 30 Tex. Admin. Code § 297.41(a)(4).

~~28.~~30. The City's Water Conservation and Drought Contingency Plans demonstrate that the water would be beneficially used without waste pursuant to Texas Water Code section 11.134(b)(4).

~~29.~~31. The Applicant has met its burden of proof to evaluate whether conservation is a feasible alternative to the proposed appropriation. 30 Tex. Admin. Code §§ 288.7, 297.50.

~~30.~~32. The Applicant has burden of proof to evaluate any feasible alternatives to the proposed appropriation. 30 Tex. Admin. Code § 288.7(b).

~~31.~~33. It is appropriate to consider cost in reviewing alternatives, along with other factors in order to review alternatives to a proposed appropriation. 30 Tex. Admin. Code §§ 288.7(a), 297.50(a), (b).

~~32.~~34. The Applicant has the burden of proof to demonstrate that the requested amount of appropriation is necessary and reasonable for the proposed use. 30 Tex. Admin. Code §§ 297.50(b)(3), 288.7(b).

~~33.~~35. The applicant ~~did not meet~~met its burden of proof to show that the requested amount of appropriation is necessary and reasonable for the proposed use.

~~34.~~36. The applicant has the burden of proof to establish that the proposed appropriation addresses a water supply need in a manner that is consistent with the State Water Plan and the Region B Water Plan. Tex. Water Code § 11.134(b)(3)(E) and 30 Tex. Admin. Code § 297.41(a)(2)(E).

~~35.~~37. The applicant ~~failed to meet~~met its burden of proof to establish that the proposed appropriation addresses a water supply need in a manner that is consistent with the State Water Plan and the Region B Water Plan.

~~36.~~38. All regional water planning group regions relevant to the application have a regional water plan that has been approved pursuant to Section 16.053(i) of the Texas Water Code. Tex. Water Code § 11.134(c); 30 Tex. Admin. Code § 297.41(b).

~~37.~~39. The Draft Permit states the time within which construction or work must begin and the time within which it must be completed. Texas Water Code § 11.135(b)(7).

~~38.~~40. The transcript cost should be shared by both the applicant and O'Malley as follows: the City bears ~~70-50~~ percent (~~\$13,511,619,651.15~~); O'Malley bears ~~30-50~~ percent (~~\$5,790,699,651.15~~). 30 Tex. Admin. Code § 80.23.

41. The Applicant ~~did not meet~~met its burden of proof to establish that the application satisfies each applicable statutory and regulatory requirement.

39-42. The evidence admitted in this case supports granting the application and issuing the Draft Permit.

NOW, THEREFORE, BE IT ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, IN ACCORDANCE WITH THESE FINDINGS OF FACT AND CONCLUSIONS OF LAW, THAT:

1. The application for Water Use Permit No. 13404 is ~~denied~~issued.
2. The transcript costs are allocated ~~70-50~~ percent to the City and ~~30-50~~ percent to O'Malley.
3. All other motions, requests for entry of specific Findings of Fact or Conclusions of Law, and any other requests for general or specific relief, if not expressly granted, are denied.
4. The effective date of this Order is the date the Order is final as provided by 30 Texas Administrative Code section 80.273 and Texas Government Code section 2001.144.
5. The TCEQ's Chief Clerk shall forward a copy of this Order to all parties.
6. If any provision, sentence, clause, or phrase of this Order is for any reason held to be invalid, the invalidity of any provision shall not affect the validity of the remaining portions of this Order.

ISSUED:

**TEXAS COMMISSION ON ENVIRONMENTAL
QUALITY**

Jon Niermann, Chairman for the Commission

Exhibit B



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

**AN ORDER GRANTING APPLICATION BY THE CITY OF WICHITA
FALLS FOR WATER USE PERMIT NO. 13404
TCEQ DOCKET NO. 2022-0125-WR
SOAH DOCKET NO. 582-22-2634**

On _____, the Texas Commission on Environmental Quality (TCEQ) considered the Application by the City of Wichita Falls for Water Use Permit No. 13404. State Office of Administrative Hearings (SOAH) Administrative Law Judge (ALJ) Christiaan Siano conducted an evidentiary hearing by videoconference on August 14-22, 2023.

After considering the proposal for decision and the exceptions of parties filed thereto, the Commission adopts the following findings of fact and conclusions of law.

I. FINDINGS OF FACT

Procedural History

1. The City of Wichita Falls submitted its application for Water Use Permit No. 13404 on June 27, 2017.
2. The application seeks authorization to construct a dam and reservoir (Lake Ringgold) on the Little Wichita River in the Red River Basin; to divert and use 65,000 acre-feet of water per year for municipal, industrial, mining, and agricultural purposes within its service area in Archer, Clay, and Wichita Counties; and to authorize use of the bed and banks of the Little Wichita River (Lake Arrowhead), Red River Basin.
3. The City submitted additional information on July 7, July 27, and August 4, 2017.
4. The City has paid application and administrative fees totaling \$31,130.28, which represent all fees due at this time.
5. On August 10, 2017, the Executive Director (ED) of the TCEQ declared the application administratively complete.
6. During the technical review, the City provided additional information in response to ED staff's requests for information.
7. On August 8, 2019, the ED declared the application technically complete.
8. On October 16, 2019, ED staff prepared a Draft Permit, and on January 24, 2020, the TCEQ's Chief Clerk mailed the Notice of an Application for a Water Use Permit for Water Use Permit No. 13404 to the following entities located in the Red River Basin:
 - a. all navigation districts;
 - b. all holders of certified filings, permits, and claim of water rights; and
 - c. all county judges, each mayor of a city with a population of 1,000 or more, all groundwater conservation districts, state legislators, and the presiding officer of each affected regional water planning group.

9. The Notice of Application for a Water Use Permit was issued on January 24, 2020, and published in the Clay County Leader, a newspaper of general circulation within Clay County, on February 6, 2020.
10. The City provided notice of the application to each member of the governing body of each county and municipality in which the reservoir, or any part of the reservoir, will be located.
11. Each mailed and published notice of the application included information about TCEQ's permitting process and public participation in that process.
12. The formal public comment and hearing request period closed on March 9, 2020. Due to significant public interest, the comment period was re-opened.
13. Notice was issued by TCEQ's Chief Clerk on July 22, 2020, of the public meeting to be held via videoconference on August 25, 2020, for the purpose of receiving comments on the application.
14. On August 25, 2020, a public meeting was held via videoconference, at the conclusion of which the final public comment period closed.
15. On April 13, 2022, the Commission referred the application to SOAH for a contested case hearing.
16. Notice of the preliminary hearing at SOAH was mailed on June 9, 2022, to all persons who had requested a hearing or filed public comment.
17. On July 19, 2022, SOAH ALJ Christiaan Siano convened a preliminary hearing via videoconference, during which jurisdiction was established and the Administrative Record was admitted.
18. Following the preliminary hearing, the following parties were named: the City of Wichita Falls; the ED; the Office of Public Interest Counsel; Emry Birdwell; Deborah Clark; Shane and Casey Cody; Laura Del Murray; Mark Hill; Stan Horwood; Larry Horwood; Lonnie Horwood; Umhail Valley, LLC; Kildavnet Castle, LLC; Rockfleet Castle, LLC; William O'Malley; Joe Staley; Phil Staley; Gil Staley; Jason Obermier; Jimmy Dale Obermier; Johnnie Shaw; William (Chris) Welborn and Welborn Ranch Ltd.; the City of Henrietta; Clay County; the Texas and Southwestern Cattle Raisers Association; the Texas Conservation Alliance; the Texas Wildlife Association; the Texoma Stewardship Coalition; Brent Durham; Dan

Stansbury for Lively Ranch Limited; Rebecca Hickman; Robert and Courtney Wilson.

19. The Texas Wildlife Association filed a motion to withdraw as a party, which was granted on November 9, 2022.
20. The City of Henrietta and Laura Del Murray each filed motions to withdraw as parties, which were granted on August 1, 2023.
21. The hearing on the merits was held before ALJ Christiaan Siano via videoconference on August 14 through August 22, 2023.
22. The record closed on October 23, 2023, after the parties submitted written closing arguments and replies.

Background

23. The City is a home-rule city and a political subdivision of the State of Texas.
24. The City's boundaries are established by its City Charter as set out in the official map in the official minutes of the City.
25. The City is located within the Region B Regional Water Planning Area, as defined by the Texas Water Development Board (TWDB).
26. The Region B Regional Water Planning Area covers all or part of 11 counties in North Central Texas—Archer, Baylor, Clay, Cottle, Foard, Hardeman, King, Montague, Wichita, Wilbarger, and Young Counties.
27. The City's water service area is approximately 70 percent of the entire Region B population, and the municipal water demand on the City's system accounts for approximately 82 percent of the total Region B municipal demand, as documented in the applicable state and regional water plans.
28. The Region B Regional Water Plan recognizes that the City is a Major Water Provider that provides water to water user groups on a wholesale and retail basis.
29. The City's water service area includes all or portions of Archer, Clay, Wichita, and Young Counties.

30. The City holds all or a portion of the following water rights permits, as have been amended from time to time: Certificate of Adjudication (COA) No. 02-5123 (Lake Kemp-Diversion system), COA No. 02-5144 (Lake Kickapoo), and COA No. 02-5150 (Lake Arrowhead).
31. Beginning in 2011, the City experienced what would become the new drought of record.
32. In response to the extreme drought conditions, the City implemented water use restrictions to curtail water use, reducing reservoir demands by up to 75% during the summer peak.
33. Between 2011 and 2015, Lakes Arrowhead, Kickapoo, and Kemp experienced record low inflows and high evaporation rates.
34. During the drought, the City was forced to take Lake Kemp offline due to water quality concerns.
35. By June 2015, Lakes Arrowhead and Kickapoo returned to pre-drought levels.
36. The City implemented an indirect potable reuse project, which provides an additional 8,968 acre-feet of water supplies annually and reduced the water supply deficit.

The Application

37. The application requests a water use permit authorizing construction and maintenance of a dam and reservoir (Lake Ringgold) with a maximum capacity of 275,000 acre-feet of water and a surface area at the conservation pool of 15,500 acres, on the Little Wichita River in Clay County, Texas.
38. The application requests to divert and use up to 65,000 acre-feet of water per year from the perimeter of Lake Ringgold for municipal, industrial, mining, and agricultural purposes within the City's service area of Archer, Clay, and Wichita Counties.
39. The application requests for authorization to use the bed and banks of the Little Wichita River (Lake Arrowhead) in the Red River Basin to convey up to 65,000 acre-feet of water per year for subsequent diversion and use for municipal, industrial, mining, and agricultural purposes.

40. The application requests authorization to use the bed and banks of Lake Arrowhead to convey return flows generated from the diversion and use of water originating from Lake Ringgold and return flows authorized by Texas Pollutant Discharge Elimination System Permit No. WQ0010509001 under COA 02-5150C.
41. The application states that the water would be diverted from Lake Arrowhead within days of discharge, with little to no residence time in Lake Arrowhead, therefore carriage losses are expected to be minimal.
42. The application states that the City proposes to divert at a maximum combined diversion rate of 62,770 gallons per minute by intake pump station and a transmission system to move the water to the City.
43. The application states that the point of diversion will be on the perimeter of the proposed Lake Ringgold and includes a map of the diversion location.
44. The application describes the proposed location of Lake Ringgold to be approximately 13 miles in a northeasterly direction from Henrietta, Texas, with Station 50+00 on the centerline of the proposed Lake Ringgold dam to be S 63° East, 924.879 feet from the northeast corner of Bass, A Original Survey No. 11, Abstract No. 11, in Clay County, Texas, at 33.896° North Latitude, 97.992° West Longitude.

Available Water

45. In support of the requests made in the application, the City submitted its Red River Water Availability Model Run 3, as supplemented in October 2017 (the City's WAM) and modified to show extended hydrology through 2015.
46. The City's WAM was developed to determine, among other things, whether unappropriated water was available to satisfy the requests made in the application.
47. The City conducted an evaluation of hydrologic and hydraulic conditions within the Red River Basin as part of the application.
48. As part of its water availability analysis, ED staff employed its Water Rights Availability Package (WRAP) to evaluate whether the requests made in the application can be authorized while protecting existing water rights in the Red River Basin using the prior appropriation doctrine.

49. The WRAP is a generalized simulation model that requires the development of input data sets for the particular basin that is the subject of the review.
50. TCEQ developed basin-specific data for the river basins in Texas to incorporate into the WRAP simulation model that include geographical information, water rights information, naturalized flows, evaporation rates, and specific management assumptions.
51. TCEQ's standard water availability model used for the application is commonly referred to as WAM Run 3.
52. WAM Run 3 is significant in terms of identifying water that is available without impacting senior permanent water rights. WAM Run 3 models the hydrologic impacts of a proposed appropriation by first assuming all existing permanent water rights in the basin are being exercised at their authorized maximum impoundment capacities, maximum annual diversion amounts, and types of use. WAM Run 3 also models the hydrologic impacts of a proposed appropriation by assuming that all of the water appropriated by others is fully used. This is accomplished by assuming that there are no return flows in the basin (except those required by water right permits) available to satisfy modeled existing surface water appropriations.
53. WAM Run 3 is the best hydrologic model relied upon by TCEQ today to assess available water for proposed new appropriations of state water and potential impacts of proposed new appropriations such as the appropriation requested in the application.
54. ED staff employed WAM Run 3 to evaluate the availability of the requested 65,000 acre-feet annual firm yield diversions for Lake Ringgold (the ED's WAM).
55. The ED WAM demonstrates that the requested 65,000 acre-feet annual firm yield diversions for Lake Ringgold would be available 63 percent of the time.
56. The ED WAM shows that the firm annual yield of Lake Ringgold is 27,060 acre-feet per year.
57. The City also developed a spreadsheet model of the Little Wichita System (Lakes Kickapoo, Arrowhead, and Ringgold) based on the ED WAM with hydrology extended to include recent droughts that were not included in the ED WAM.

58. The City determined a firm-yield assessment of the Lake Ringgold project using the spreadsheet model in order to determine the impact of recent droughts that were not included in the ED WAM.
59. The City can divert up to 65,000 acre-feet each year on a non-firm basis when the City operates Lake Ringgold on a system-wide basis.
60. By managing its other available water rights and other water supplies, including available diversions from Lakes Kemp, Arrowhead, and Kickapoo, on a system-wide basis, the City could satisfy its water needs during drought periods when the normal supply capabilities of proposed Lake Ringgold would be exceeded.
61. ED staff determined that the availability of the requested 65,000 acre-feet annual diversions that are to be made on a less-than-firm basis is viable for the purposes identified, and under the conditions described in the application.
62. Unappropriated water is available in the Little Wichita River, Red River Basin for the amount requested in the application.

Beneficial Use

63. In the application, the City provided a statement of each general category of proposed use of the appropriation requested for diversion and a detailed description of the proposed uses and users under each category.
64. The application states that the appropriation of 65,000 acre-feet per year will be used for municipal, industrial, agricultural, and mining purposes, which are identified as beneficial uses of water under Texas Water Code Section 11.023.

Existing Water Rights

65. The City analyzed potential impacts to existing water rights, including vested riparian rights.
66. The impact on existing water rights was analyzed using a WAM analysis by both the City and the ED, to determine that water was available to accommodate the requests made in the application.
67. The City determined, as reflected in the application, that 65,000 acre-feet per year of water could be diverted from the proposed Lake Ringgold at a maximum combined diversion rate of 139.79 cfs (62,770 gpm) without

adversely impacting downstream senior and superior water rights within the Red River Basin.

68. In support of the application, the City submitted the City of Wichita Falls Water Rights Accounting Plan, as revised May 30, 2019 (Accounting Plan).
69. The Accounting Plan provides the City with a process for determining the daily quantities of water that it may divert pursuant to the terms of the appropriation requested in the application.
70. The Accounting Plan developed by the City establishes a reliable, consistent methodology for calculating specific quantities of water that the City may divert pursuant to the terms and conditions contained in the Draft Permit.
71. The Accounting Plan is a required tool that can be used by the City and by TCEQ for determining the City's compliance with the terms and conditions of the Draft Permit.
72. ED staff concluded that the Accounting Plan will adequately track diversions of water pursuant to the Draft Permit.
73. The application requests a new appropriation of state water, rendering the priority date of the proposed new appropriation junior to any other water right in the Red River Basin that existed at the time the application was deemed administratively complete.
74. Granting the application will not cause an adverse impact to an existing water right.

Public Welfare

75. The proposed appropriation would not be detrimental to the public welfare.

Environmental Flows and Assessments

Environmental Flow Standards

76. No environmental flow standards have been developed for the Red River Basin.

Water Quality and Instream Uses

77. The Lake Ringgold dam would be located on the Little Wichita River a half mile from the confluence with the Red River. This segment of the channel is considered fully impacted by Lake Ringgold.
78. The City evaluated whether the appropriation and impoundment requested in the application would impair water quality in Texas.
79. In assessing impacts to water quality, the City considered impacts to the area of impoundment and to the reach of the Red River downstream of the Proposed Dam.
80. ED staff evaluated water quality downstream of the Proposed Dam and included a special condition in the Draft Permit requiring the City to conduct monitoring to ensure that water quality is protected after the Proposed Dam is constructed.
81. The appropriation and impoundment requested in the application will not impair water quality standards for any other surface waters in Texas, including any bays or estuaries.
82. With and without Lake Ringgold, the flows are expected to exceed 739 acre-feet per month 99% of the time.
83. The Draft Permit conditions will maintain existing instream uses and water quality.

Groundwater

84. The City conducted an assessment of the hydrologic conditions of areas within the Red River Basin watershed to determine the extent to which the requests proposed in the application would impact groundwater availability, use, quality, or recharge.
85. There are not any major or minor aquifers that underlie the Project Area within, downstream, or upstream of Clay County, within the Red River Basin.
86. The appropriation requested will not impair existing uses of groundwater, groundwater quality, recharge, or spring flow.

Habitat Assessment and Mitigation

87. The Lake Ringgold project area consists of the area of land that will be inundated by Lake Ringgold up to the 844 feet mean sea level elevation, the dam, and the spillway (Project Area).
88. As part of its environmental investigation, the City conducted assessments of the potential impacts the appropriation requested in the application will have on habitats within the Project Area as well as upstream, adjoining, and downstream of the Project Area.
89. The City used the United States Fish and Wildlife Service's Habitat Evaluation Procedures (HEP) to assess the potential impacts the appropriation requested in the application will have on terrestrial habitats, which includes wetlands.
90. HEP is identified by TCEQ rules as a technically appropriate habitat evaluation methodology.
91. In support of the requests made in the application, the City submitted to TCEQ the HEP report dated May 2017.
92. In performing the HEP assessment, the City's consultants evaluated both potential short-term and long-term impacts of the appropriation requested in the application.
93. As part of its HEP assessment, the City evaluated the specific functions and values of wetland habitats in the Project Area that could potentially be impacted by the appropriation requested in the application.
94. The appropriation and impoundment requested in the application will have low to no potential impact on wildlife habitat that would be considered critical habitat for federally listed endangered or threatened species.
95. The appropriation and impoundment requested in the application will have low to no potential negative effect on wildlife habitat that would be considered critical habitat for state listed endangered or threatened species.
96. Using its HEP assessment, the City was able to calculate a Habitat Suitability Index (HSI) value for wildlife habitat that would be impacted by the appropriation requested in the application.

97. HSI was multiplied by the acreage of each cover type to calculate Habitat Units (HUs).
98. HUs are used to describe the current or baseline wildlife habitat value by cover type and can be used to describe the wildlife habitat value that will exist after mitigation activities are complete.
99. The City's HEP assessed the terrestrial and wetland fish and wildlife habitat in the Project Area—the footprint of the proposed reservoir at the conservation pool level—as well as the dam site and the spillway.
100. In performing the HEP assessment, the City developed an acreage inventory of each land cover type within the Project Area.
101. The land cover types identified in the Project Area include cropland, emergent/herbaceous wetland, grassland/old field, riparian woodland/bottomland hardwood, shrubland, shrub savanna, shrub wetland, tree savanna, and upland deciduous forest.
102. The City's consultants, along with TCEQ representatives, conducted various site visits between 2016-2017 to evaluate land cover types at sites within the Project Area using HEP.
103. The City's HEP properly determined the functions and values of wetland habitats.
104. The City's stream assessment identified stream lengths by type, i.e., perennial, intermittent, and ephemeral.
105. In support of the requests made in the application, the City submitted to TCEQ the Conceptual Mitigation Plan dated April 2017 (the Conceptual Mitigation Plan).
106. Pursuant to the conditions of the Draft Permit, the City is required to mitigate for impacts to fish and wildlife habitat as provided for in its Conceptual Mitigation Plan and as such plan is ultimately finalized pursuant to federal law.
107. The City will also be required to develop a final mitigation plan during the federal permitting process that must be submitted to TCEQ for approval pursuant to a condition of the Draft Permit that requires compensatory mitigation for impacts to waters of the United States, including wetlands.

108. The City will mitigate for wildlife habitat within the Project Area as a condition in the proposed Draft Permit.
109. The City will mitigate for the loss of river or stream segments that will be impacted by the appropriation requested in the application.
110. To offset adverse impacts to fish and wildlife habitat and to wetlands, the City proposed mitigation measures to TCEQ through the Conceptual Mitigation Plan.
111. Before proposing any mitigation, the City considered the extent to which adverse impacts to fish and wildlife habitat could be avoided, minimized, or modified.
112. The City determined that the construction of Lake Ringgold and its associated habitat impacts could not be avoided altogether.
113. The City minimized the impacts of the appropriation requested in the application to the fullest extent possible by choosing a dam location that will result in the least possible impacts while still providing an adequate, affordable supply of water for the City's customers.
114. The mitigation measures proposed by the City will be completed onsite within the Project Area or near-site on property owned by the City through a watershed approach to mitigation that will benefit upstream and downstream areas.
115. The mitigation proposed by the City will compensate for each of the types of habitats that will be impacted, including wetlands.
116. Impacts to streams will be mitigated through implementation of the Conceptual Mitigation Plan.
117. Impacts to impoundments and other open waters will be mitigated by creation of the reservoir.
118. Based on the goals, objectives, and strategies of the Conceptual Mitigation Plan, the requests made in the application will result in the offset of lost functions and values within the Red River Basin watershed such that, at a minimum, there will be no net loss of functions and values, and a potential net gain of functions and values in both fish, wildlife, and wetland habitat is anticipated.

119. The City developed detailed, long-term maintenance and management plans that include goals for mitigation and a general schedule for completion of those goals as a part of the federal permitting process.
120. The requests made in the application will not impair the existing aquatic life use, ecosystem, or habitat in the Little Wichita River and the Red River.
121. The mitigation measures proposed by the City in the Conceptual Mitigation Plan will create aquatic habitat and a viable and sustainable aquatic community, which will compensate for any potential impacts to instream uses.
122. The application assessed impacts to terrestrial and riparian habitats.
123. The United States Army Corps of Engineers (USACE) regulations authorize the inclusion of state mitigation requirements, including TCEQ mitigation for fish and wildlife habitat.
124. The applicant met its burden of proof in showing that its habitat assessment and proposed mitigation were sufficient in assessing the effects of the proposed authorization on fish and wildlife habitats and offsetting those effects appropriately.

Conservation

125. The City has formulated and submitted a water conservation plan and adopted reasonable water conservation measures.
126. The City's 2018 Water Conservation Plan adopts conservation goals and strategies for the City's wholesale and retail water supply distribution system.
127. In addition to its own conservation goals and strategies, the City also supports and encourages the conservation efforts of its customers by public education efforts, and requiring in its contracts for wholesale purchase of water that its customers adopt water conservation plans that are at least as stringent as the City's Water Conservation Plan.
128. In the 2018 Water Conservation Plan, the City also addressed conservation through reducing unaccounted-for water in its system through installation of advanced metering systems.
129. The City established multiple water conservation goals for itself and its customers in its 2018 Water Conservation Plan.

130. The City identified several strategies for achieving the goals established in its 2018 Water Conservation Plan.
131. The City's 2018 Water Conservation Plan meets and goes beyond TCEQ's minimum requirements for water conservation plans for wholesale and retail water suppliers.
132. The City's 2018 Water Conservation Plan incorporates an aggressive water reuse program; includes procedures and practices that have led to, and maintain, a low rate of lost and unaccounted-for water; and includes time of day restrictions on lawn irrigation and a public education program, among other water conservation measures.
133. The City intends to use reasonable diligence to avoid waste and achieve water conservation through the implementation of its 2018 Water Conservation and Drought Contingency Plans, including the goals and strategies adopted therein.
134. The City's Drought Contingency Plan incorporates several strategies and required actions to ensure compliance with TCEQ rules and reliable provisions of water for its customers during periods of drought-induced reductions in supply.
135. The City has prepared a drought contingency plan that, along with the implementation of its 2018 Water Conservation Plan, will result in the avoidance of waste and achieve reasonable levels of water conservation within the City's jurisdiction.
136. The City is already implementing indirect reuse and water conservation.

Alternatives

137. As part of its responsibilities to its customers through the water planning process, the City considered multiple water supply development strategies that could address its anticipated 50-year water demand projections.
138. While the City is implementing water conservation and reuse to meet part of its projected demands, the applicable Region B and State Water Plans confirm that those strategies alone cannot meet all the City's projected future demands.
139. After careful consideration, the City determined that Lake Ringgold—a new water supply reservoir on the Little Wichita River in Clay County—could

provide a safe, reliable, long-term water source for the City's customers for potable and nonpotable water service.

140. The Applicant evaluated 22 potential new water supply strategies, including Lake Ringgold.
141. The City based its alternatives analysis on a projected demand for 21,633 acre-feet per year in 2070, shown in its 2016 Long-Range Water Supply Plan.
142. The City evaluated conservation as an alternative to the proposed appropriation to the requested appropriation for Lake Ringgold.
143. Based on the alternatives analysis, the City demonstrated that no feasible alternative to the proposed appropriation exists.
144. The applicant demonstrated that the requested amount of appropriation is necessary and reasonable for the proposed use.

Consistency with State and Regional Water Plans

145. Lake Ringgold is listed as one of the recommended water management strategies in the 2016 Region B Water Plan and the 2017 State Water Plan and is one of the major water management strategies proposed by the Region B Regional Water Planning Group. It is also recommended in the current State Water Plan.
146. The 2016 Region B Water Plan projects a regional shortage of 44,946 acre-feet in 2070, and the 2021 Region B Water Plan projects a regional shortage of 36,114 acre-feet in 2070.
147. The subsequent 2021 Region B Water Plan reaffirms the evaluations and recommendations for the City's water management strategies in the 2016 Region B Water Plan.
148. The 2016 and 2021 Region B Water Plans identify Lake Ringgold as a recommended water management strategy for the City.
149. The 2016 and 2021 Region B Water Plans identify that water developed pursuant to the requests made in the application will be needed and used to meet demands in the Red River Basin in Region B.

150. The 2016 and 2021 Region B Water Plans also identify the methods for transmission, treatment, and delivery of the water by the City for its customers.
151. The 2016 and 2021 Region B Water Plans show that if no additional water supplies are developed, Region B will face shortages in water supply over the next several decades.
152. The 2016 and 2021 Region B Water Plans include a planning-level analysis of economic and environmental factors that was part of the regional planning group's evaluation and selection of recommended water management strategies.
153. The 2016 and 2021 Region B Water Plans include factors related to the quantity of supply made available, unit cost, impacts on agricultural and other rural areas, and impacts on natural resources.
154. The 2021 Region B Water Plan shows that the City needs to develop an additional 10,864 acre-feet per year of raw water supplies by 2070 to meet its projected demands.
155. The City's strategy for accommodating the water demands within the next 50 years includes efforts to increase water conservation and efficiency efforts by its residents and customers.
156. The City's strategy for accommodating water demands within the next 50 years also includes reuse of its existing water supplies.
157. The Applicant's requested appropriation has a firm yield of 27,060 acre-feet per year and thus is expected to satisfy the 2070 projected shortage in the Region B Water Plan.
158. The application addresses a water supply need in a manner that is consistent with the Region B Plan and State Water Plan.

Dam Safety

159. The Applicant submitted a conceptual design of the construction for a proposed dam and appurtenant structures, or proposed reconstruction, modification, enlargement, rehabilitation, alteration, or repair of an existing dam; the geotechnical, hydrologic, and hydraulic reports for the proposed site,

if the reports have been completed; and other pertinent information on an existing dam using a form provided by the ED.

160. The ED provided a technical review of these documents.
161. The Draft Permit requires the construction of the Lake Ringgold dam and reservoir to be performed in accordance with plans approved by the ED, and it makes clear that construction of the dam without final approval of the plans is a violation of the authorization.
162. Under the Draft Permit, construction of the Lake Ringgold dam and reservoir is to begin within two years of permit issuance and be completed within ten years of permit issuance, unless the City applies for and is subsequently granted an extension of time before the expiration of these time limitations.

Transcript Costs

163. The total costs for the transcription and reporting services amounted to \$19,302.30.
164. O'Malley participated extensively in the hearing and post-hearing briefing, making extensive use of the transcript, as did the City.
165. By retaining counsel and consultants, O'Malley has demonstrated an ability to pay.
166. The City, by hiring counsel and consultants, has demonstrated an ability to pay.

II. CONCLUSIONS OF LAW

1. TCEQ has subject matter jurisdiction over this proceeding pursuant to sections 5.013(a)(1), 11.122, and 11.134 of the Texas Water Code.
2. SOAH has jurisdiction to conduct a hearing and to prepare a Proposal for Decision on contested cases referred to it by TCEQ pursuant to section 2003.047 of the Texas Government Code and section 5.311 of the Texas Water Code.
3. The State of Texas owns all water in every river, natural stream, and lake in the state, which includes the Little Wichita River, Red River Basin. Tex. Water Code § 11.021.
4. The waters of the state are held in trust for the public, and the right to use state water may be appropriated only as expressly authorized by law. Tex. Water Code § 11.0235.
5. Eminent domain, inundation, and cultural impacts are not within the scope of Chapter 11 of the Texas Water Code or the Commission's jurisdiction.
6. The application was accompanied by all required fees. Tex. Water Code § 11.134(b)(1).
7. The application was properly noticed. Tex. Water Code § 11.132, 30 Tex. Admin. Code § 295.151.
8. Unappropriated water is available in the Red River Basin. Tex. Water Code § 11.134(b)(2), 30 Tex. Admin. Code § 297.41(a)(2).
9. The applicant properly accounted for carriage losses in its bed and banks authorization request. Tex. Water Code § 11.042, 30 Tex. Admin. Code § 295.113.
10. Municipal, industrial, agricultural, and mining purposes are beneficial uses. Tex. Water Code § 11.023.
11. TCEQ may authorize the appropriation of a single amount or volume of water for more than one purpose of use. 30 Tex. Admin. Code § 297.43(c).
12. The application states that the amount of water requested for appropriation will be used for municipal, industrial, agricultural, and mining purposes,

which are beneficial uses as required by 30 Texas Administrative Code section 297.43.

13. The application properly states the rate and method. 30 Tex. Admin. Code § 295.6.
14. The application properly stated the location of the point of diversion and the location of the dam, and it included a map showing those locations. 30 Tex. Admin. Code § 295.7.
15. The Applicant submitted the documents required by 30 Texas Administrative Code section 299.3(b).
16. The ED provided a technical review of the documents required by 30 Texas Administrative Code section 299.3(b).
17. The application conforms to the requirements of Chapter 11. Tex. Water Code § 11.134(b)(1).
18. Because the application requests authorization for multiple purposes, the application conforms to 30 Texas Administrative Code chapter 295. 30 Tex. Admin. Code § 297.41.
19. The proposed appropriation is intended for beneficial uses. Tex. Water Code § 11.134(b)(3)(A); 30 Tex. Admin. Code § 297.41(a)(3)(A).
20. The appropriation and authorizations requested in the application, and proposed in the Draft Permit, do not impair existing water rights or vested riparian rights. Tex. Water Code § 11.134(b)(3)(B); 30 Tex. Admin. Code § 297.41(a)(3)(B).
21. The applicant met its burden of proof that the proposed appropriation is not detrimental to the public welfare. Tex. Water Code § 11.134(b)(3)(C); 30 Tex. Admin. Code § 297.41(a)(3)(C).
22. There are no applicable environmental flow standards established under Section 11.1471 of the Texas Water Code to consider in determining whether to grant the authorizations requested in the application. Tex. Water Code § 11.134(b)(3)(D).
23. The proposed appropriation must consider the assessments performed under Sections 11.147(d) and (e), 11.150, 11.151, and 11.152 of the Texas Water

Code. Tex. Water Code § 11.134(b)(3)(D); 30 Tex. Admin. Code § 297.41(a)(2)(D).

24. The applicant has met its burden of proof that the required assessments were performed under Sections 11.147(d) and (e), 11.150, 11.151, and 11.152 of the Texas Water Code in considering whether to grant the authorizations requested in the application.
25. The Draft Permit contains conditions that, after having considered all factors required under Section 11.147(d) of the Texas Water Code, are necessary and sufficient to maintain existing instream uses and water quality in the Red River Basin. Tex. Water Code § 11.147(d); 30 Tex. Admin. Code § 297.54.
26. The Applicant met its burden of proof to establish that the Draft Permit contains conditions, and that it considered all factors required under Section 11.147(e) of the Texas Water Code, that are necessary and sufficient to maintain fish and wildlife habitats. Tex. Water Code §§ 11.147(e), 11.152; 30 Tex. Admin. Code § 297.53.
27. The authorizations requested in the application and proposed in the Draft Permit will not adversely affect instream uses, fish and wildlife habitat, water quality, or existing groundwater resources or groundwater recharge. Tex. Water Code §§ 11.134(b)(3)(D), 11.152; 30 Tex. Admin. Code §§ 297.41(a)(3)(D), 297.53.
28. The City submitted a water conservation plan and drought contingency plan with the application that complies with applicable requirements of 30 Texas Administrative Code chapter 288. Tex. Water Code §§ 11.1271, 11.1272; 30 Tex. Admin. Code § 297.50.
29. The City will use reasonable diligence to avoid waste and encourage the use of practices, techniques, and technologies designed to reduce the consumption of water, reduce the loss or waste of water, and improve the efficiency in the use of water. Tex. Water Code § 11.134(b)(4); 30 Tex. Admin. Code § 297.41(a)(4).
30. The City's Water Conservation and Drought Contingency Plans demonstrate that the water would be beneficially used without waste pursuant to Texas Water Code section 11.134(b)(4).

31. The Applicant has met its burden of proof to evaluate whether conservation is a feasible alternative to the proposed appropriation. 30 Tex. Admin. Code §§ 288.7, 297.50.
32. The Applicant has burden of proof to evaluate any feasible alternatives to the proposed appropriation. 30 Tex. Admin. Code § 288.7(b).
33. It is appropriate to consider cost in reviewing alternatives, along with other factors in order to review alternatives to a proposed appropriation. 30 Tex. Admin. Code §§ 288.7(a), 297.50(a), (b).
34. The Applicant has the burden of proof to demonstrate that the requested amount of appropriation is necessary and reasonable for the proposed use. 30 Tex. Admin. Code §§ 297.50(b)(3), 288.7(b).
35. The applicant met its burden of proof to show that the requested amount of appropriation is necessary and reasonable for the proposed use.
36. The applicant has the burden of proof to establish that the proposed appropriation addresses a water supply need in a manner that is consistent with the State Water Plan and the Region B Water Plan. Tex. Water Code § 11.134(b)(3)(E) and 30 Tex. Admin. Code § 297.41(a)(2)(E).
37. The applicant met its burden of proof to establish that the proposed appropriation addresses a water supply need in a manner that is consistent with the State Water Plan and the Region B Water Plan.
38. All regional water planning group regions relevant to the application have a regional water plan that has been approved pursuant to Section 16.053(i) of the Texas Water Code. Tex. Water Code § 11.134(c); 30 Tex. Admin. Code § 297.41(b).
39. The Draft Permit states the time within which construction or work must begin and the time within which it must be completed. Texas Water Code § 11.135(b)(7).
40. The transcript cost should be shared by both the applicant and O'Malley as follows: the City bears 50 percent (\$9,651.15); O'Malley bears 50 percent (\$9,651.15). 30 Tex. Admin. Code § 80.23.
41. The Applicant met its burden of proof to establish that the application satisfies each applicable statutory and regulatory requirement.

42. The evidence admitted in this case supports granting the application and issuing the Draft Permit.

NOW, THEREFORE, BE IT ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, IN ACCORDANCE WITH THESE FINDINGS OF FACT AND CONCLUSIONS OF LAW, THAT:

1. The application for Water Use Permit No. 13404 is issued.
2. The transcript costs are allocated 50 percent to the City and 50 percent to O'Malley.
3. All other motions, requests for entry of specific Findings of Fact or Conclusions of Law, and any other requests for general or specific relief, if not expressly granted, are denied.
4. The effective date of this Order is the date the Order is final as provided by 30 Texas Administrative Code section 80.273 and Texas Government Code section 2001.144.
5. The TCEQ's Chief Clerk shall forward a copy of this Order to all parties.
6. If any provision, sentence, clause, or phrase of this Order is for any reason held to be invalid, the invalidity of any provision shall not affect the validity of the remaining portions of this Order.

ISSUED:

**TEXAS COMMISSION ON ENVIRONMENTAL
QUALITY**

Jon Niermann, Chairman for the Commission