

1 Consideration of the Proposal for Decision and Proposed Order concerning the Application by the City of Wichita Falls for Water Use Permit No. 13404 (Archer, Clay, and Wichita Counties) (TCB)

**Necessary Order Changes:**

- The Commission agrees with the ALJ’s proposed amendments to Finding of Fact 17 and the addition of Finding of Fact 17A. The changes are based on the ED’s Exceptions and are a more factually accurate summary of the parties that sought party status at the preliminary hearing and the ALJ’s subsequent alignment of aligned protestant parties that came to be known as the Landowner Protestants.

FOF 17. Following the preliminary hearing, the following parties were named in Order No. 1 as clarified by Order No. 2: 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) Wellborn and Wellborn 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.

FOF 17A. Order No. 4 memorialized the parties’ alignment as follows: William O’Malley represented aligned parties Umhaill Valley, LLC, Kildavnet Castle, LLC, and Rockfleet Castle, LLC; Deborah Clark represented aligned parties Emry Birdwell, Shane and Casey Cody, Diaz Murray (on behalf of Laura Del Murray), Mark Hill, Jason Obermier, Jimmy Dale Obermier, Johnny Shaw, Joe Staley, Phil Staley, Gil Staley, William (Chris) Wellborn (on behalf of Wellborn Ranch, Ltd.), Brent Durham, Dan Stansbury (on behalf of Lively Ranch Limited), Mark Hickman (on behalf of Rebecca Hickman), Robert and Courtney Wilson, and Texoma Stewardship Coalition.

- The Commission rejects the ALJ’s determination that the Application was insufficient to justify beneficial use specificity and should be denied based on improper statutory and regulatory interpretation. Under Tex. Water Code § 11.023(e) and 30 Tex. Admin. Code § 297.43(c), the Commission may issue a water use permit allocating water as one total maximum volume for multiple uses. The Commission has consistently considered the regulation (30 Tex. Admin. Code § 295.5) cited by the ALJ as a directory, rather than mandatory, requirement for application information. Therefore, the Commission amends the findings of fact and conclusions of law:

FOF 42. ~~The application does not state the amount of water to be used for each purpose. The application states the amount of water for each of the four proposed uses as up to 65,000 acre-feet.~~

COL 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, the Commission 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)~~

COL 12. ~~The application does not state or clearly set sufficiently sets forth the amount of water to be used for each purpose, as required by 30 Texas Administrative Code section 295.5, and the draft permit limits the total amount of water actually diverted for all of the authorized purposes to not exceed the total amount of water appropriated. 30 Tex. Admin. Code § 297.43(c)~~

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

COL 18. ~~Because the application 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 conform to 30 Texas Administrative Code chapter 295. 30 Tex. Admin. Code § 297.41.~~

- The Commission rejects the ALJ's definitive factual Habitat Evaluation Procedures Plan and mitigation plan findings based on the ALJ's improper statutory and regulatory interpretation. Tex. Water Code § 11.152 requires the Commission to assess the effects of the permit on fish and wildlife habitats and then authorizes the Commission to require an applicant to take reasonable steps to mitigate adverse impacts on such habitat. Tex. Water Code § 11.152 also authorizes the Commission to consider a habitat balancing test when considering whether to impose mitigation actions in the authorization and to offset any mitigation requirements imposed by Federal reviews if the Commission decides to impose mitigation conditions. The PFD and proposed order inappropriately impose the requirements of 30 Tex. Admin. Code § 297.53(f), which addresses mitigation for unavoidable wetland loss, on the more general statutory fish and wildlife review and discretionary authority to impose fish and wildlife conditions in the authorization. The details of the Habitat Evaluation Procedures Plan were sufficient to comply with Tex. Water Code §§ 11.147(e) and 11.152. Therefore, the Commission concludes that the Draft Permit contains sufficient habitat mitigation provisions, and proposes the following findings of fact and conclusions of law changes:

FOF 62. ~~The City's HEP failed to properly determine the functions and values of wetland habitats.~~

FOF 63. The City's stream assessment ~~only~~ identified stream lengths by type, i.e., perennial, intermittent, and ephemeral.

FOF 65. 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 beyond the area assessed in the HEP.

FOF 66. The application did not assess direct and indirect impacts to terrestrial and riparian habitats beyond the area assessed in the HEP.

FOF 68. ~~The City did not conduct a presence-absence survey for the State-listed threatened species, or assess whether the populations would be able to reestablish outside the footprint of the reservoir.~~

FOF 69. ~~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.~~

FOF 70. ~~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.~~

FOF 71. ~~The United States Army Corps of Engineers (USACE) 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.~~

FOF 72. The applicant ~~failed to meet~~ 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.

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

- The Commission agrees with its historic approach of analyzing whether the appropriation is consistent with State and Regional Water Plans to determine compliance with Tex. Water Code § 11.134(b)(3)(E) and proposes the following amendments to findings of fact and conclusions of law:

FOF 79. ~~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-foot diversion amount.~~

FOF 100. The 2021 Region B Plan is updated from the 2016 Region B Plan to take into account technological advances, changes in population, and water supply projections ~~and is, therefore, more reliable.~~

FOF 104. The Applicant's requested appropriation of 65,000 acre-feet per year is ~~significantly~~ more water than the 36,114 acre-feet per year in 2021 Region B Plan projections of potential shortage in all of Region B in 2070.

FOF 105. The application does ~~not~~ address a water supply need in a manner that is consistent with the Region B Plan and State Water Plan. 106. The applicant ~~failed to establish that~~ the application addresses a water supply need consistent with state and regional water plans.

COL 33. ~~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).~~

COL 34. ~~The applicant did not meet its burden of proof to show that the requested amount of appropriation is necessary and reasonable for the proposed use.~~

COL 36. The applicant met ~~failed to meet~~ 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.

- The Commission finds legal and policy reasons to determine that the ALJ's findings on reservoir size, reserve capacity, and population projections were not dispositive of the Commission's consistency determination under Tex. Water Code § 11.134(b)(3)(E), and proposes the following findings of fact changes:

FOF 73. ~~The application shows a projected need of 9,110 acre-feet per year in 2070.~~

FOF 74. ~~This projection is based primarily on projected population growth.~~

FOF 75. ~~The City's projected population growth does not support a need for 9,110 acre-feet per year in 2070.~~

FOF 76. ~~In calculating need,~~ the City added 20% both to the forecasted demand for retail customers and to its reserve supply.

FOF 78. ~~Adding 20% to the projected municipal and manufacturing demands was unsubstantiated and overstates the City's projected need by approximately 11%.~~

FOF 79. ~~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-foot diversion amount.~~

FOF 80. ~~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.~~

FOF 81. ~~The applicant failed to demonstrate the proposed appropriation of 65,000 acre-feet per year addresses a water supply need.~~

- The Commission makes the remaining modifications to implement the above changes to issue Water Use Permit No. 13404 to the City of Wichita Falls:

COL 40. The Applicant ~~did not meet~~ met its burden of proof to establish that the application satisfies each applicable statutory and regulatory requirement.

OP 1. The application for Water Use Permit No. 13404 is ~~denied~~ granted.