State Office of Administrative Hearings

Kristofer S. Monson
Chief Administrative Law Judge

December 21, 2023

Mary Smith, General Counsel
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, TX 78711

VIA EFILE TEXAS

RE: Application by City of Wichita Falls for Water Use Permit No. 13404; SOAH Docket No. 582-22-2634; TCEQ Docket No. 2022-0125-WR

Dear Parties:

Please find attached a Proposal for Decision in this case. Any party may, within 20 days after the date of issuance of the PFD, file exceptions or briefs. Any replies to exceptions, briefs, or proposed findings of fact shall be filed within 30 days after the date of issuance on the PFD. 30 Tex. Admin. Code § 80.257.

All exceptions, briefs, and replies along with certification of service to the above parties and the ALJ shall be filed with the Chief Clerk of the TCEQ electronically at http://www14.tceq.texas.gov/epic/eFiling/ or by filing an original and seven copies with the Chief Clerk of the TCEQ. Failure to provide copies may be grounds for withholding consideration of the pleadings.

CC: Service List

SOAH Docket No. 582-22-2634 **Suffix: TCEQ**
TCEQ Docket No. 2022-0125-WR

BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS

APPLICATION BY CITY OF WICHITA FALLS FOR WATER USE PERMIT NO. 13404

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LIST OF ACRONYMS AND ABBREVIATIONS

ALJ	Administrative Law Judge
CWA	Clean Water Act
ED	Executive Director of the TCEQ
gpcd	gallons per capita per day
HEP	Habitat Evaluation Procedures
HSI	Habitat Suitability Index
MGD	million gallons per day
LCRA	Lower Colorado River Authority
OPIC	Office of Public Interest Counsel
SOAH	State Office of Administrative Hearings
TCA	Texas Conservation Alliance
TCEQ	Texas Commission on Environmental Quality
TWC	Texas Water Code
TRWD	Tarrant Regional Water District
TWDB	Texas Water Development Board
USACE	United States Army Corps of Engineers
USFWS	U.S. Fish and Wildlife Service
WAM	water availability model

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BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS

APPLICATION BY CITY OF WICHITA FALLS FOR WATER USE PERMIT NO. 13404

PROPOSAL FOR DECISION

The City of Wichita Falls seeks to construct Lake Ringgold, a reservoir with a capacity of 275,000 acre-feet and an approximate surface area of 15,500 acres on the Little Wichita River, Red River Basin, in Clay County, Texas.[1] Lake Ringgold would be located downstream from two other reservoirs owned and operated by the City: Lake Kickapoo and Lake Arrowhead.[2] The City seeks authorizations to divert and use up to 65,000 acre-feet of water per year from the perimeter of Lake Ringgold for use for municipal, industrial, mining, and agricultural purposes; use the bed and banks of Lake Arrowhead to convey the appropriation for subsequent diversion; and use and to convey the return flows generated from the diversion and use of water

[1] WF Ex. 1 at Bates 7696, 7708; WF Ex. 2J at Bates 7737.

[2] WF Ex. 2J at Bates 7740, 7742.

originating from Lake Ringgold for subsequent diversion and use pursuant to the authorization applicant holds to reuse return flows.[3]

The executive director (ED) of the Texas Commission on Environmental Quality (TCEQ or the Commission), the Office of Public Interest Counsel (OPIC), and the City argue that the application should be approved. Protesting parties argue that it should be denied. For the reasons set out below, the Administrative Law Judge (ALJ) recommends that the application be denied.

I. NOTICE, JURISDICTION, AND PROCEDURAL HISTORY

The City filed its application for Water Use Permit No. 13404 with the Commission on June 27, 2017.[4] The application was declared administratively complete on August 10, 2017,[5] and declared technically complete two years later, on August 8, 2019.[6] The ED prepared a Draft Permit on October 16, 2019.[7]

Notice of the application was mailed to water right holders in the Red River Basin on January 24, 2020, and published in the *Clay County Leader* on February 6, 2020,[8] in accordance with Texas Water Code section 11.132.

[3] WF Ex. 2J at Bates 7722; WF Ex. 4 (Albright Dir.) at 12-13.

[4] WF Ex. 1 at Bates 7673, 7677, 7686, 7696.

[5] WF Ex. 1 at Bates 7667.

[6] ED Ex. KA-3 (Response to Comments) at 1.

[7] WF Ex. 1 at Bates 7543-7548.

[8] WF Ex. 1 at Bates 7493, 7501; WF Ex. 2K at Bates 7492-95.

Because the application requests authorization to construct and maintain a reservoir and dam, notice of the application was also mailed to the 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 in the basin, and mailed to all navigation districts, holders of certified filings, permits, and claims of water rights in the Red River Basin,[9] in accordance with Texas Water Code section 11.124(f).

In post-hearing briefing, protesting parties argue that notice was improper because one landowner, Caleb Smith, whose homestead is within the inundation area, did not receive mailed notice.[10] They argue that the Commission has judged such persons to be affected by the application, thereby entitling them to notice under Water Code section 11.132.[11] The ALJ finds that this objection is untimely. This objection was raised for the first time in post-hearing briefing. No objection to the admission of the administrative record or jurisdiction was raised at the preliminary hearing. Smith's participation as a witness shows, both that he was nevertheless able to participate and that he had actual notice of the application, even if he "only recently learned about this permitting process."[12] Smith has shown no harm. Protesting parties do not cite to any rule or statute requiring mailed notice to all landowners in the reservoir's footprint. Finally, Landowner Protestants[13] do not

[9] WF Ex. 1 at Bates 7677-7684 (July 7, 2017 proof of notice); WF Ex. 2K at Bates 7475-7693.

[10] Hor. Ex. 200 (Smith Dir.) at 2.

[11] Landowner Protestants Br. at 69-70.

[12] Hor. Ex. 200 (Smith Dir.) at 2.

[13] "Landowner Protestants" is defined on page 6.

have standing to complain of Smith's lack of notice.[14] The ALJ concludes that notice complied with Water Code sections 11.124(f) and 11.132.

The comment and hearing request period ended on March 9, 2020,[15] but was re-opened due to significant public interest.[16] Notice of a public meeting was mailed on July 22, 2020.[17] A public meeting was held on August 25, 2020, at which time the final public comment period closed.[18]

On April 18, 2022, the Commission issued an interim order that referred the matter to the State Office of Administrative Hearings (SOAH) for a contested case hearing. [19]

Notice of the preliminary hearing was mailed to interested parties on June 9, 2022.[20] The administrative record, including the Draft Permit, was filed with SOAH on July 5, 2022.

A preliminary hearing convened on July 19, 2022. At the hearing, the ALJ found that notice was sufficient and established jurisdiction.[21] The following parties

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[14] *Tex. Comm'n on Envtl. Quality v. Denbury Onshore, LLC*, No. 03-11-00891-CV, 2014 WL 3055912, at *10 (Tex. App.—Austin July 3, 2014, no pet.); *see also McDaniel v. Tex. Nat. Res. Conservation Comm'n*, 982 S.W.2d 650, 654 (Tex. App.—Austin 1998, pet. denied).

[15] WF Ex. 2K at Bates 7475.

[16] ED Ex. KA-3 (Response to Comments) at 1.

[17] WF Ex. 1 at Bates 7476; ED Ex. KA-3 (Response to Comments) at 1.

[18] WF Ex. 2K at Bates 7476-7478); ED Ex. KA-3 (Response to Comments) at 1.

[19] WF Ex. 1 at Bates 8191 (Interim Order).

[20] WF Ex. 1 at Bates 8171 (Notice of Hearing).

[21] SOAH Order No. 1 (July 20,2022).

were named: the City of Wichita Falls; the ED; OPIC; Emry Birdwell; Deborah Clark; Shane and Casey Cody; Laura Del Murray; Mark Hill; Stan Horwood; Larry Horwood; Lonnie Horwood; Kildavnet Castle, LLC; Umhaill Valley, LLC; Rockfleet Castle, LLC; William O'Malley; Jason Obermier; Jimmy Dale Obermier; Johnnie Shaw; Joe Staley; Phil Staley; Gil Staley; William (Chris) Welborn and Welborn Ranch Ltd.; the City of Henrietta; Clay County; the Texas and Southwestern Cattle Raisers Association; the Texas Conservation Alliance (TCA); the Texas Wildlife Association; the Texoma Stewardship Coalition; Brent Durham; Dan Stansbury for Lively Ranch Limited; Rebecca Hickman; Robert and Courtney Wilson.[22]

Protestants William Justin O'Malley, Umhaill Valley LLC, Rockfleet Castle LLC, and Kildavnet Castle LLC were aligned as O'Malley.

At the preliminary hearing, Luke Halsell was denied party status.[23] This ruling was maintained on a motion to reconsider. In post-hearing briefing, the protesting parties argue that this was in error. They further argue in briefing that adverse discovery rulings harmed their ability to present their case. These issues were addressed in SOAH Order Nos. 6 and 7 and are not addressed again here.[24]

[22] SOAH Order No. 2 Granting Motion to Reconsider (Jul. 28, 2022).

[23] SOAH Order No. 4 (Aug. 24, 2022).

[24] SOAH Order No. 6 (April 28, 2023) (denying O'Malley's Motion to Compel); SOAH Order No. 7 (May 10, 2023) (denying O'Malley's Motion for Reconsideration).

The hearing on the merits was held on August 14-22, 2023, via videoconference before SOAH ALJ Christiaan Siano.[25] The following parties appeared: the City; the ED; OPIC; O'Malley; Stan, Larry, and Lonnie Horwood (the Horwoods); the Texoma Stewardship Coalition, aligned with Shane Cody, Deborah Clark, Brent Durham, Phil Staley, and Daniel Stansbury (collectively, TSC); the TCA; and Clay County. The record closed on October 23, 2023, with the filing of reply briefs.

Opposing the application, Protestants O'Malley, the Horwoods, and TSC (together, Landowner Protestants) filed joint briefs. TCA and Clay County filed separately but also adopted the Landowner Protestants' positions.

II. EXHIBITS

In support of the application, the City offered the administrative record, as well as the testimony of four witnesses: Russell J. Schreiber, P.E., public works director for the City;[26] and three consultants from Freese and Nichols, Inc.: Simone F. Kiel, P.E., Project Manager;[27] Jon S. Albright, Hydrologist;[28] and Michael P. Votaw, environmental scientist, Certified Wildlife Biologist and Professional Wetland Scientist.[29]

[25] SOAH Order No. 12 (Aug. 29, 2023).

[26] WF Ex. 2A (Schreiber Resume).

[27] WF Ex. 3A (Kiel Resume).

[28] WF Ex. 4A (Albright Resume).

[29] WF Ex 5A (Votaw Resume).

The ED offered the testimony of staff witnesses Jennifer Allis, Senior Water Conservation Specialist;[30] Johnny Cosgrove, P.E., Team Leader in the Dam Safety Section;[31] Kathy Alexander, Ph.D., Senior Policy and Technical Analyst;[32] and Kenneth Coonrod, Aquatic Scientist.[33]

O'Malley offered the testimony of four witnesses: Stephan Nelle, a range and wildlife management expert;[34] David Bradsby, aquatic science expert and Senior Environmental Planner with Blandon and Associates;[35] Nora Mullarkey, water conservation consultant;[36] and John Carron, Ph.D., Senior Water Resources Engineer with Hydros Consulting.[37] Additionally, O'Mally (OM) exhibits 1-7 were admitted at the hearing.[38]

Also testifying in opposition to application was Janice Bezanson, on behalf of TCA, and landowners Shane Cody, Deborah Clark, Brent Durham, Mark Hickman, Caleb Smith, and Lyle Horwood.

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[30] ED Ex. JA-2 (Allis Resume).

[31] ED Ex. JC-2 (Cosgrove Resume).

[32] ED Ex. KA-2 (Alexander Resume).

[33] ED Ex. KC-2 (Coonrod Resume).

[34] OM Ex. 101 (Nelle Resume).

[35] OM Ex. 201 (Bradsby Resume).

[36] OM Ex. 301 (Mullarkey Resume).

[37] OM Ex. 401 (Carron Resume).

[38] O'Malley Exhibits 4 and 5 appear to have been confused. O'Malley Exhibit 4 was admitted as a deposition testimony of Carlos Rubinstein. Tr. Vol. 2 at 95 (Kiel Cross). However, that deposition was listed by the court reporter (and submitted to SOAH and referenced by the parties) as O'Malley Exhibit 5. Conversely, O'Malley Exhibit 5 was admitted as an email message. Tr. Vol. 2 at 99 (Kiel Cross). However, that email was listed by the court reporter (and submitted to SOAH, and referenced by the parties), as O'Malley Exhibit 4. The PFD will use to numbering as submitted rather than as reflected in the record.

III. BACKGROUND

The drought of record for the City began over ten years ago.[39] Water Planning Group Region B,[40] in which the City lies, experienced extreme or exceptional drought.[41] The City's existing water supplies reached historic lows.[42] In response, the City curtailed water use, reducing reservoir demands by 75% during the summer peak; yet, decline continued.[43] Between 2011 and 2015, area lakes experienced record low inflows and high evaporation rates.[44] The City was forced to remove the Lake Kemp supply from its overall available water supply because the total dissolved solids concentrations in Lake Kemp water exceeded the City's water treatment plant design capacities.[45] In response, the City contracted with consultants, Freese and Nichols, Inc., to prepare a Long-Range Water Supply Plan.[46] The plan projected a need for 19.3 million gallons per day (MGD), or roughly 21,633 acre-feet per year, in 2070.[47]

[39] WF Ex. 3F (2021 Region B Plan) at 1-21 (Bates 16719).

[40] The State is divided into 16 regional water planning groups. The region B water planning group consists of ten whole counties and a portion of an eleventh: Archer, Baylor, Clay, Cottle, Foard, Hardeman, King, Montague, Wichita, Wilbarger, and the City of Olney in Young County. WF Ex. 3F (2021 Region B Water Plan) at Bates 16676.

[41] WF Ex. 3F (2021 Region B Plan) at 1-21 (Bates 16719).

[42] WF Ex. 2 (Schreiber Dir.) at 17.

[43] WF Ex. 2 (Schreiber Dir.) at 17.

[44] WF Ex. 3F (2021 Region B Plan) at 3-10-11 (Bates 16756-57).

[45] WF Ex. 2 (Schrieber Dir.) at 28.

[46] WF Ex. 2 (Schreiber Dir.) at 16-17; WF Ex. 3B (Long-Range Water Supply Plan).

[47] WF Ex. 3B at 4-2 (Bates 10175).

Despite having a population of only approximately 100,000, the City is a major water provider,[48] serving approximately 70 percent of the Region B population, in Archer, Clay, Wichita, and Young counties.[49] The 2016 Regional Water Plan identified an annual shortfall of 19,124 acre-feet of water by 2070.[50] To address the City's water supply needs, the Region B Water Plan identified various water management strategies as a solution to its extreme drought conditions, including Lake Ringgold.[51]

Lake Ringgold has been considered as a potential water supply source for the City since 1958, and is a recommended water management strategy for the City by the Regional Water Plan and State Water Plan.[52] According to City Director of Public Works, Russell Schreiber, Lake Ringgold is the only feasible option to meet the water supply quantity to meet the City's long-term water supply needs.[53]

On June 27, 2017, the City submitted its application for the water rights to build Lake Ringgold and incorporate it into its water supply system. The application included a Report in Support of the Application, addressing the City's alternatives

[48] WF Ex. 3F (2021 Region B Plan) at 5-31, 34 (Bates 16729, 16831); *see* 31 Texas Administrative Code (TAC) § 357.30(4).

[49] WF Ex. 3F (2021 Region B Plan) at 5-34 (Bates 16831).

[50] WF Ex. 3E (2016 Region B Plan) at 5-47 (Bates 15626)

[51] WF Ex. 3F (2021 Region B Plan) at 5-34 (Bates 16831), 5-46 (Bates 16843); WF Ex. 3E (2016 Region B Plan) at 5-47 (Bates 15626); *see* 31 TAC, Chapter 357. The City references 31 Texas Administrative Code section 357.7 in support of a 50 year planning period; however, that section was repealed in 2012. 37 Tex. Reg. 3357 (May 4, 2012).

[52] WF Ex. 3F (2021 Region B Plan) at 5-43 (Bates 16840); WF Ex. 3E (2016 Region B Plan); WF Ex. 3I (2017 State Water Plan); WF Ex. 3J (2022 State Water Plan).

[53] WF Ex. 2 (Schreiber Dir.) at 19, 26; WF Ex. 3 (Kiel Dir.) at 61.

analysis, hydrology studies, an environmental review, proposed mitigation,[54] and a draft accounting plan, designed to demonstrate compliance with the requested Lake Ringgold water right in addition to previous City of Wichita Falls' water right authorizations within the Little Wichita River Basin.[55]

IV. APPLICABLE LAW

To appropriate state water or construct any work designed to store, take, or divert water, a permit is required.[56] "[T]he right to use state water may be appropriated only as expressly authorized by law."[57] Texas Water Code section 11.134(a) authorizes the Commission to grant a water right permit, after a hearing, only if:

> (1) the application conforms to the requirements prescribed by this chapter and is accompanied by the prescribed fee;
>
> (2) unappropriated water is available in the source of supply;
>
> (3) the proposed appropriation:
>
> (A) is intended for a beneficial use;
>
> (B) does not impair existing water rights or vested riparian rights;
>
> (C) is not detrimental to the public welfare;
>
> (D) considers any applicable environmental flow standards established under Section 11.1471 and, if applicable, the assessments performed

[54] WF Ex. 3D (Report in Support of Application for Lake Ringgold).

[55] WF Ex. 4B (draft accounting plan).

[56] Tex. Water Code § 11.121(a).

[57] Tex. Water Code § 11.0235.

under Sections 11.147(d) and (e) and Sections 11.150, 11.151, and 11.152; and

(E) addresses a water supply need in a manner that is consistent with the state water plan and the relevant approved regional water plan for any area in which the proposed appropriation is located, unless the commission determines that conditions warrant waiver of this requirement; and

(4) the applicant has provided evidence that reasonable diligence will be used to avoid waste and achieve water conservation as defined by Section 11.002(8)(B).[58]

Additionally, an appropriator may apply to use the bank and bed of any flowing natural stream to convey the water from the place of storage to the place of use or to the diversion point.[59] Finally, under Commission rules, an applicant for a water rights permit involving a dam is required to submit information regarding the design of the dam for review.[60]

The applicant bears the burden of proof by a preponderance of the evidence.[61]

V. CONFORMANCE WITH REQUIREMENTS OF CHAPTER 11

This PFD will address each of the criteria in Water Code section 11.134, set out above, in turn and as they relate to other application requirements and the Commission's implementing rules. Because of the strong interrelation of issues,

[58] Tex. Water Code § 11.134(b); *see also* 30 TAC § 297.41(a)(1)-(4).

[59] Tex. Water Code § 11.042(a), (c).

[60] 30 TAC § 299.3(b)(1)-(2).

[61] 30 TAC § 80.17(a).

subsections (a)(3)(E) and (a)(4), both addressing need under the Commission rules, are discussed together.

A. WATER AVAILABILITY

Using the water availability model (WAM), the City and the ED determined that there is available unappropriated water in the source of supply.[62] The WAM dataset includes evaporation data.[63] While this application was pending, the naturalized flows in the Red River Basin WAM were updated, but continued to show that unappropriated water is available.[64] This issue is undisputed.

B. BENEFICIAL USE

The Commission shall grant a water permit application only if "the proposed appropriation is intended for a beneficial use."[65] Here, the applicant proposes to use up to 65,000 acre-feet of water per year from Lake Ringgold for municipal, industrial, agricultural, mining use.[66] Because these are beneficial uses, the City, the ED, and OPIC, concluded that the application complies with Water Code section 11.134(b)(3)(A).[67]

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[62] WF Ex. 4 (Albright Dir.) at 26-37; ED Ex. KA-4 (Water Availability Analysis).

[63] ED Ex. KA-1 (Alexander Dir.) at 11; Tr. Vol. 7 at 170 (Alexander Cross).

[64] ED Ex. KA-1 (Alexander Dir.) at 14.

[65] Tex. Water Code § 11.134(b)(3)(A).

[66] WF Ex. 2J at Bates 7703, 7724; WF Ex. 4 (Albright Dir.) at 18.

[67] ED Ex. KA-1 (Alexander Dir.) at 9.

Landowner Protestants argue that the City has failed to satisfy this criterion on grounds that it has not specified the amount it proposes for each use and the appropriation could lead to waste.

1. Requirement to Specify

A right to use state water is limited to the amount specifically appropriated.[68] Moreover, the water must be appropriated for a specific purpose.[69] A single amount or volume of water may be appropriated for more than one purpose of use; however, the total amount diverted for all purposes may not exceed the total amount appropriated.[70]

Accordingly, an application to appropriate state water must "state the nature and purposes of the proposed use or uses and the amount of water to be used for each purpose."[71] 30 Texas Administrative Code section (Rule) 295.5, one of the Commission's rules, in turn, requires an applicant to state in definite terms the amount of water to be used and the purpose of each use.[72] When use for multiple purposes is sought, "the application shall expressly state an annual amount of water to be used for the multiple purposes as well as for each purpose of use."[73]

[68] Tex. Water Code § 11.025.

[69] Tex. Water Code § 11.023(e).

[70] Tex. Water Code § 11.023(e).

[71] Tex. Water Code § 11.124(a)(4).

[72] 30 TAC § 295.5

[73] 30 TAC § 295.5.

Rule 294.43, the Commission rule on issuing the permit, tracks the Water Code,[74] providing as follows:

> 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.[75]

In its application, the City lists the proposed purposes for which the water will be used as "Municipal, Industrial, Agriculture, Mining," and indicates the acre-feet per year as "65,000." The City states "[t]he proposed appropriation is intended for municipal, industrial, agricultural, and mining use."[76]

Landowner Protestants argue that an applicant must specify *how much* water will be put to *each use*, not simply list beneficial uses. Landowner Protestants argue that the City failed to show how much of the 65,000 acre-feet per year will be put to each of the proposed beneficial uses.

The City responds that a single amount or volume—here, 65,000 acre-feet per year—is permissible for any of four stated purposes. Assigning a specific quantity to each use, it argues, is not required when more than one use is intended.[77] ED

[74] Tex. Water Code § 11.023(e).

[75] 30 TAC § 297.43(c).

[76] WF Ex. 2J at Bates 7703, 7724.

[77] Citing Tex. Water Code § 11.023(e), 30 TAC §§ 295.5, 297.43(c).

witness Kathy Alexander agreed, testifying that identification of the full amount to be used for any of the four purposes is consistent with Rule 297.43(c).[78]

In briefing, however, the ED does not dispute that an amount specification is *required*, but rather argues that the requirements of Rule 295.5 are directory rather than mandatory. In support of this position, the ED cites to the proposal for decision for the water right application of the Brazos River Authority.[79] There, the ALJs construed the Commission's chapter 295 rules in determining whether the applicant had provided sufficient information for the application to move forward. However, their analysis rested strongly on whether there was a consequence for noncompliance.[80] Here, the statute, which Commission rules mirror, requires the application to "state the nature and purposes of the proposed use or uses and the amount of water to be used *for each purpose*."[81] The Water Code further makes clear that it requires strict compliance to appropriate state water.[82] Therefore, the requirement to state the nature and purposes of the proposed use or uses and the amount of water to be used for each purpose is mandatory to appropriate state water. The consequence is also clear: "The commission shall grant the application *only if* . . . the application

[78] Tr. Vol. 7 at 143-144 (Alexander Cross).

[79] *Brazos River Authority for Water Use Permit No. 5851*, TCEQ Docket No. 2005-1490-WR, SOAH Docket No. 582-10-4184, Proposal for Decision at 25-28 (July 17, 2015).

[80] *Brazos River Authority for Water Use Permit No. 5851*, TCEQ Docket No. 2005-1490-WR, SOAH Docket No. 582-10-4184, Proposal for Decision at 26 (July 17, 2015) (citing *Tex. Dep't of Pub. Safety v. Pierce*, 238 S.W.3d 832, 836 (Tex. App.—El Paso 2007, no pet.)); *but see Helena Chem. Co. v. Wilkins*, 47 S.W.3d 486, 494 (Tex. 2001) ("To determine whether the Legislature intended a provision to be mandatory or directory, we consider the plain meaning of the words used, as well as the entire act, its nature and object, and the consequences that would follow from each construction.")

[81] Tex. Water Code § 11.124(a)(4).

[82] Tex. Water Code § 11.0235 ("[T]he right to use state water may be appropriated only as expressly authorized by law.").

conforms to the requirements prescribed by this chapter."[83] Therefore, the consequence of noncompliance is denial.

Thus, although Rule 295.5 may appear directory, such that an applicant may not need a perfect specification for its application to move forward, it clearly must meet a mandatory requirement of the Water Code: that the amount of water appropriated for each beneficial purpose be specifically appropriated for that purpose. Moreover, this information is necessary to evaluate whether the amount requested for each use is economically necessary for that purpose, which is part of the definition of beneficial use.[84] By failing to specify the amount to appropriate for each purpose, the application cannot support specifying that amount for each use.

Moreover, the City's suggestion that this requirement is avoided when multiple uses are intended is not persuasive. If the requirement could be avoided completely by simply adding more than one purpose, there would be no need to require that the *amount* appropriated for each use be "specifically appropriated for that purpose." Indeed, it would render all of Water Code section 11.124(a)(4) and Rule 295.5 surplusage. The authority to appropriate a single volume of water for more than one purpose does not do away with the requirement to specify, otherwise there would be no need to limit the amount of water "actually diverted for all of the authorized purposes" to the "total amount of water appropriated."[85] This language contemplates that each use of a multipurpose appropriation be specified.

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[83] Tex. Water Code § 11.134(b)(1) (emphasis added).

[84] Tex. Water Code § 11.002(4).

[85] Tex. Water Code 11.022(e).

The City appears to have been done exactly that for its Lake Kemp water rights, as reproduced below from the City's Long-Range Water Supply Plan:[86]

Table 5-4: Lake Kemp Water Rights

Type of Use	Authorized Diversion (acre-feet per year)	Annual Average (MGD)	% of Total
Municipal	25,150	22.4	13.0%
Industrial	40,000	35.7	20.7%
Mining	2,000	1.8	1.0%
Recreation	5,850	5.2	3.0%
Irrigation	120,000	107.0	62.2%
Total	*193,000*	*172.2*	*100.0%*

Conversely, here, the City listed four proposed uses for the total amount of 65,000 acre-feet annually. Therefore, the City failed to specify the amount of use for each purpose as required by Rule 295.5, and the water cannot be specifically appropriated as required by Water Code section 11.023(e). Accordingly, the ALJ concludes that the application fails to conform to the requirements of Chapter 11 of the Water Code regarding the need to specify the amount for each use.[87]

2. Whether the Intended Use is Beneficial

Landowner Protestants next argue, as a result of the foregoing omission, the City has not provided the requisite information to determine whether requested

[86] WF Ex. 3B (Long-Range Water Supply Plan) at Bates 10218.

[87] Tex. Water Code §§ 11.023(e), .124(a)(4); 30 TAC § 295.5.

annual diversion will address a realistic water supply need and be put to beneficial use. Arguments relating to need are the addressed below in Section V.F. of the PFD. Landowner Protestants' other argument relating to beneficial use are addressed here.

Landowner Protestants argue that, by authorizing the diversion of 65,000 acre-feet annually, the Draft Permit would authorize the City to overdraft the reservoir's firm yield of 27,060 acre-feet annually (or 17,700 acre-feet annually under the updated WAM).[88] Firm yield is that amount of water that the reservoir could have produced annually if it had been in place during the worst drought of record.[89] An overdraft would result in little to no water available during a drought of record, thereby defeating the purpose of the reservoir.[90]

TCA makes a similar argument, relying on the testimony of City witness Jon Albright, who testified that the 65,000 acre-feet annually is the combined firm yield of Lakes Kickapoo, Arrowhead, and Ringgold.[91] The way to use these three resources as efficiently as possible, Albright explained, "is to divert water from the most downstream reservoir, in this case Lake Ringgold, at a rate higher than the firm yield during wetter periods. During drier periods, the diversions would be cut back to less than the firm yield. This operation provides available storage during wetter times

[88] Tr. Vol. 7 at 178 (Alexander Cross); ED Ex. KA-4 (Water Availability Analysis) at 3; OM Ex. 400 (Carron Dir.) at 23 (testifying that the updated WAM shows a firm yield of 17,700 acre-feet); OM Ex. 405; ED Ex. JA-3 (Draft Permit).

[89] 30 TAC § 297.1(21).

[90] OM Ex. 400 (Carron Dir.) at 23–24; Tr. Vol. 7 at 146 (Alexander Cross).

[91] WF Ex. 4 (Albright Dir.) at 29.

that can capture higher flows and spills from the upstream reservoirs."[92] TCA points to this testimony to argue that the City will divert more water from Lake Ringgold than the City needs. Should that happen, water that would normally be used beneficially from Arrowhead and Kickapoo will be left sitting in those lakes, subject to evaporation, and not used beneficially.

Additionally, O'Malley witness John Carron opined that evaporative losses relative to overall need can constitute waste,[93] and, generally speaking, those losses will increase in reservoirs, as compared to a natural stream channels, and will additionally increase the larger or fuller a reservoir is.[94] On account of its size, Lake Ringgold "would evaporate far more water than would actually be needed from the reservoir."[95] In Carron's opinion, on average 36,000 acre-feet per year of water will evaporate from the Lake Ringgold reservoir, far exceeding the City's projected need of 9,110 acre-feet per year.[96] Similarly, former TCEQ commissioner Carlos Rubinstein testified that reservoirs lose a "tremendous amount of water" due to evaporation.[97]

The City responds that Landowner Protestants' arguments are not based on the definition of waste, which includes "the unreasonable loss of water through faulty design or negligent operation of a water delivery, distribution or application

[92] WF Ex. 4 (Albright Dir.) at 29.

[93] Tr. Vol. 6 at 172-173 (Carron Redir.).

[94] Tr. Vol. 6 at 167 (Carron Clarifying).

[95] Tr. Vol. 6 at 171 (Carron Redir.).

[96] *See* Tr. Vol. 6 at 173 (Carron Redir.); WF Ex. 3D (Report Supporting Application) at 1-14 (Bates 7751).

[97] OM Ex. 5 (Rubinstein Deposition) at 51, 106

system, or the diversion or use of water in any manner that causes or threatens to cause pollution of water."[98] Evaporation, the City notes, is already accounted for in the WAM.[99]

The City further notes that storage itself is a beneficial use.[100] Storage, even Carron agrees, serves a beneficial and important function: "Storage helps moderate the variability of hydrology and provide a reliable water supply."[101] As such, the City is not required to divert the full 65,000 acre-feet per year to meet the beneficial use requirements, as Carron admitted.[102] City witness Albright testified that storage provides the reliable supply of water during drought when water is not available.[103] The storage capacity in Lake Ringgold will allow the City to operate its reservoir system more efficiently because the reservoir will capture higher flows and spills during wetter periods from upstream reservoirs (Lakes Kickapoo and Arrowhead).[104] With the additional storage capacity, the City can optimize its water supplies from the Little Wichita River and provide its customers with a reliable water supply.[105] Thus, the City's requested diversion and use of storage will allow it to maximize its water supplies for beneficial purposes.[106]

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[98] 30 TAC § 297.1(58).

[99] Tr. Vol. 7 at 174-75 (Alexander Cross); WF Ex. 4E, Exh. III (Evaporation Calculation).

[100] Tex. Water Code § 11.023(a); 30 TAC § 297.43(a) ("state water may be appropriated, stored, or diverted" for beneficial uses).

[101] Tr. Vol. 6 at 111 (Carron Cross).

[102] Tr. Vol. 6 at 118 (Carron Cross).

[103] WF Ex. 4 (Albright Dir.) at 27.

[104] WF Ex. 4 (Albright Dir.) at 29-30.

[105] WF Ex. 4 (Albright Dir.) at 29-30.

[106] WF Ex. 4 (Albright Dir.) at 29-30.

Landowner Protestants' arguments regarding waste are not persuasive. Beneficial use is defined to include storage. The evidence shows that the water lost to evaporation is already accounted for in the WAM. In this context, evaporative losses cannot be regarded as waste, but rather an attendant impact of the beneficial use of storage.

The ALJ need not resolve whether the appropriation of 65,000 acre-feet annually from a lake with a firm yield of 27,060 acre-feet (or 17,700 acre-feet) annually would allow an overdraft,[107] because the relevant inquiry is whether the proposed appropriation is *intended* for a beneficial use.[108] State water may be appropriated, stored, or diverted for domestic and municipal uses; agricultural and industrial uses; and mining and recovery of minerals.[109] Although the applicant failed to specify the amount, discussed above, the applicant has demonstrated that the proposed appropriation is *intended* for a beneficial use.

C. IMPAIRMENT TO EXISTING WATER RIGHTS

Under the Commission's no injury rule, the Commission shall not grant a new water right application unless it determines that the appropriation will not cause an adverse impact to the uses of other appropriators.[110] An adverse impact to another

[107] It is axiomatic that the City cannot appropriate water that does not exist. Moreover, the appropriation would be subordinate to more senior water rights under the prior appropriation doctrine.

[108] Tex. Water Code § 11.134(b)(3)(A).

[109] Tex. Water Code § 11.023(a)(1)-(3); 30 TAC § 297.43(a)(1)-(4).

[110] 30 TAC § 297.45 (a).

appropriator includes the possibility of depriving the existing water right holder of the equivalent quantity or quality of water that would have been available to that water right; or otherwise substantially affecting the continuation of stream conditions as they would exist with the full exercise of the existing water right at the time the water right was granted.[111]

The City analyzed potential impacts to existing water rights, including vested riparian rights, and found that the Lake Ringgold project is not expected to injure such rights.[112] The City identified two existing water rights on the Little Wichita River and two additional water rights on the tributaries to Lake Ringgold.[113] Both the City and the ED analyzed the impact on existing water rights to determine that water was available to accommodate the requests made in the application.[114] The City contends that under the priority system, the requested appropriation will not negatively impact existing water rights or vested riparian rights.[115] The ED takes a similar position.[116]

Lyle Horwood testified on behalf of the Horwoods. For the first time at the hearing, he testified that the Horwoods have a water permit that will be affected by the appropriation. He testified that his family owns a water permit for 3,600 acre-

[111] 30 TAC § 297.45 (a).

[112] WF Ex. 4C; WF Ex. 4E, Exh. II (Existing Water Rights Within Lake Ringgold Footprint).

[113] WF Ex. 4E at Bates 7632.

[114] WF Ex. 1 at Bates 8195-8217 (Hydrology and WAM Modeling); WF Ex. 4E; ED Ex. KA-1 (Alexander Dir.) at 13; Tr. Vol 7 at 179 (Alexander Cross).

[115] ED Ex. JA-3 (Draft Permit) at 3.

[116] ED Ex. KA-1 (Alexander Dir.) at 14.

feet per year, for irrigation, on the Little Wichita River, that came with the purchase of his property.[117] Horwood testified that his family's water right would be adversely impacted by losing the water right they use for pivots for their hay and wheat fields through inundation.[118] He testified that he disclosed the water right permit in discovery.[119]

The City responds that the City and the ED considered impacts to existing and senior water rights holders in the Red River Basin and concluded they are protected by the Draft Permit.[120] The City provided a memorandum detailing the potential impacts to existing water rights and proposed strategies to mitigate for impacts to such rights that ED staff concluded were reasonable and sufficient.[121]

The preponderance of the evidence shows that the proposed appropriation would not injure or impair existing water rights. Horwood's alleged water right was not raised in prefiled testimony nor offered into evidence. Horwood's testimony does not establish a diversion point. Merely holding a water right permit of 3,600 acre-feet per year on the Little Wichita River does not show that the proposed appropriation would be detrimental to it. The evidence may establish that Horwoods' property will be inundated by the reservoir, but not that he will lose the water right as a result of the appropriation.

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[117] Tr. Vol. 4 at 181, 186.

[118] Tr. Vol. 4 at 181 (Horwood Cross) and 186-187 (Horwood Redir.).

[119] Tr. Vol. 4 at 187 (Horwood Redir.).

[120] WF Ex. 2H (Water Availability Analysis) at 3; WF Ex. 4E at Bates 7632-7633 (Existing Water Rights within Lake Ringgold Footprint).

[121] WF Ex. 4E at Bates 7632-7633 (Existing Water Rights within Lake Ringgold Footprint); WF Ex. 2H (Water Availability Analysis) at 3.

The credible evidence shows that the City analyzed potential impacts to existing water rights, including vested riparian rights, and found that the Lake Ringgold project is not expected to injure such rights. 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. The ALJ therefore concludes that the proposed appropriation does not impair or injure existing water rights or vested riparian rights.[122]

D. PUBLIC WELFARE

A new appropriation of state water must not be detrimental to the public welfare.[123] In determining whether an appropriation is detrimental to the public welfare, the Commission may consider only the factors that are within the jurisdiction and expertise of the Commission as established in Chapter 11 of the Water Code.[124] The parties agree that public welfare is not defined. The ED and OPIC agreed with the City that the proposed appropriation is not detrimental to the public welfare. Landowner Protestants contend it is.

The City's only witness to testify regarding public welfare, Simone Kiel, testified that the Lake Ringgold project will "enhance public welfare by providing a reliable water supply within the City's service area and encourage economic growth

[122] Tex. Water Code § 11.134(b)(3)(B) and 30 TAC §§ 297.44, .45.

[123] Tex. Water Code § 11.134(b)(3)(C); 30 TAC § 297.41(a)(3)(C).

[124] Tex. Water Code § 11.134(b-1); 30 TAC §§ 297.41(a)(3)(C), .46.

of the region."[125] She testified that "[t]he recent drought of record had negative effects on the public welfare as extreme drought measures and the uncertainty of water supply drove residents and businesses out of the area."[126] Finally, she testified that "the lake will provide ecological benefits through the creation of an aquatic environment for fish and wildlife by developing a water source that will persist during drought conditions and by maintaining aquatic and shoreline vegetation, providing beneficial habitat areas that would not exist but for the lake."[127]

However, on cross examination, Kiel admitted she does not know whether the recent drought or the drought contingency measures had any impact on the City's population or economic well-being.[128] Moreover, the ALJ finds that the ecological benefits to fish and wildlife are not within the ambit of public welfare, because those species are not members of the public.

Nevertheless, the evidence shows that the proposed appropriation would further the public welfare. The appropriation would be for beneficial uses, provide a reliable, long-term water supply and allow the City to optimize its existing water supplies.[129] The City is a major water provider, serving approximately 70 percent of the Region B population, in Archer, Clay, Wichita, and Young counties,[130] seeking to secure a reliable drinking water supply in times of drought. Additionally, the

[125] WF Ex. 3 (Kiel Dir.) at 82.

[126] WF Ex. 3 (Kiel Dir.) at 82.

[127] WF Ex. 3 (Kiel Dir.) at 82-83.

[128] *See, e.g.,* Tr. Vol. 1 at 185-187 (Kiel Cross); Tr. Vol. 2 at 110 (Kiel Cross).

[129] WF Ex. 1 at Bates 7724-7725.

[130] WF Ex. 3F (2021 Region B Plan) at 5-31, 34 (Bates 16729, 16831).

City's Water Conservation Plan includes measures to avoid waste, which will further ensure that the City's use of water is not detrimental to the public welfare.[131]

Landowner Protestants ask that their arguments made elsewhere in this proceeding be considered in the context of one another: Lake Ringgold is more water than the city needs (discussed more below in Section V.F.), is not economic, would only be needed in times of exceptional drought,[132] will impact cultural resources,[133] and, they emphasize, impact private land.[134]

While Landowner Protestants raise understandable concerns, the relevant inquiry is whether the proposed appropriation would be detrimental to the public welfare considering only factors within the Commission's jurisdiction and expertise. Issues of eminent domain, inundation, and cultural impacts are not within the scope of Chapter 11 or the Commission's expertise. The cost of the project, evaporation, and the frequency with which the resource will be used are not relevant to whether *the appropriation* affects the public welfare. The ALJ therefore finds that the City has met its burden of proof to show that the proposed appropriation is not detrimental to the public welfare.

[131] WF Ex. 2M at Bates 3051-3244.

[132] OM Ex. 4 (email).

[133] WF Ex. 3E (2016 Regional Plan) at 5-44 (Bates 15623); WF Ex. 3F (2021 Regional Plan) at 5-44-5-45 (Bates 16841-16842) (same); *see also* Hor. Exs. 102-105.

[134] Landowner Protestants Reply Br. at 43 citing OM Ex. 5 (Rubinstein Deposition) at 192-194.

E. ENVIRONMENTAL FLOWS AND ASSESSMENTS

The Commission may grant a water right permit only if the proposed appropriation "considers any applicable environmental flow standards established under [Texas Water Code] Section 11.1471 and, if applicable, the assessments performed under Sections 11.147(d) and (e) and Sections 11.150, 11.151, and 11.152."[135]

1. Environmental Flow Standards

Texas Water Code section 11.1471 requires the Commission to adopt environmental flow standards under certain circumstances.[136] The Commission has not adopted environmental flow standards for the Red River Basin, therefore, there are no applicable environmental flow standards established under Section 11.1471.[137]

2. Instream Uses and Water Quality

Section 11.147(e) is considered below in conjunction with Section 11.152, relating to habitat assessment. Section 11.147(d) addresses instream uses and water quality. In considering a water right application, the Commission shall include in the permit, to the extent practicable when considering all public interests, conditions considered necessary to maintain existing instream uses and water quality.[138] Section 11.150 requires the Commission to assess any effects of the permit on water quality.[139]

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[135] Tex. Water Code § 11.134(b)(3)(D).

[136] *See also* 30 TAC § 298.15.

[137] WF Ex. 4 (Albright Dir.) at 34-35.

[138] Tex. Water Code § 11.147(d).

[139] Tex. Water Code § 11.150.

The Lake Ringgold dam would be located on the Little Wichita River half a mile from the confluence with the Red River, and approximately 1,500 feet of channel downstream of the dam would be modified and/or improved to prevent erosion below the dam.[140] The channel downstream of the Lake Ringgold dam will be affected due to the modifications to prevent erosion downstream and the need to relocate a farm-to-market road.[141] This segment of the channel is considered fully impacted (considered a complete loss of the stream segment) by Lake Ringgold, and therefore, the stream length of this segment is part of the total stream length impacted by Lake Ringgold for which the City will provide mitigation.[142]

The City studied the project impact on regulated flows using the modified Red River Basin WAM at the Red River, near Terral, Oklahoma, U.S. Geological Survey stream gage with supplemented data due to WAM flows including only the portion of the flows originating in Texas.[143] The City conducted a stream assessment within the Lake Ringgold footprint to identify stream lengths by type and determine potential impacts, which included a desktop analysis and field investigation.[144] Albright testified that Lake Ringgold project will have little to no effect on the existing instream uses of the Red River.[145] With and without Lake Ringgold, the flows

[140] WF Ex. 1 at Bates 7775.

[141] WF Ex. 4 (Albright Dir.) at 36.

[142] WF Ex. 4 (Albright Dir.) at 36; WF Ex. 4G (Albright Reb.) at 23; WF Ex. 2F (Coonrod Memo) at 4.

[143] WF Ex. 4 (Albright Dir.) at 24.

[144] WF Ex. 5I (Conceptual Mitigation Plan) at Bates 8301; WF Ex. 1 at Bates 8285.

[145] WF Ex. 4 (Albright Dir.) at 25, 36; WF Ex. 4E at Bates 7628-30; WF Ex. 1 at Bates 7774-7778.

are expected to exceed 739 acre-feet per month 99% of the time.[146] the Draft Permit contains requirements for additional monitoring to ensure that aquatic life uses are maintained in the Red River downstream of the Little Wichita River confluence.[147]

Landowner Protestants argue that the City failed to provide sufficient information to properly assess instream uses and water quality. Landowner Protestants' arguments relate more properly to habitat assessment and mitigation,[148] and are therefore addressed under that heading below.

The preponderance of the evidence shows that the flows at the confluence of the Little Wichita River and the Red River are substantially the same with and without Lake Ringgold during critical low flow periods, and therefore no environmental flow requirement is necessary. The ALJ finds, based on the preponderance of the evidence, that the permit conditions will maintain existing instream uses and water quality. Landowner Protestants have not demonstrated that more is required of the applicant or the Draft Permit.

3. Groundwater

Section 11.151 addresses impacts on groundwater. In considering an application for a permit to store, take, or divert surface water, the commission shall

[146] WF Ex. 4E at Bates 7628-30; Tr. Vol. 5 at 199-200 (Bradsby Cross); WF Ex. 2F (Coonrod Memo) at 4.

[147] ED Ex. JA-3 (Draft Permit), Sections 7(D)-(E), Special Conditions.

[148] Landowner Protestants Initial Br. at 60-61; Landowner Reply Br. at 36-38.

consider the effects, if any, on groundwater or groundwater recharge.[149] There are no major or minor aquifers adjacent to or within the Lake Ringgold project site; therefore, the Lake Ringgold project is not expected to impact groundwater resources.[150]

4. Habitat Assessment

Texas Water Code section 11.152 requires the Commission, when considering an application for a water right in excess of 5,000 acre-feet per year, to "assess the effects, if any, on the issuance of the permit on fish and wildlife habitats." Furthermore, the Commission "may require the applicant to take reasonable actions to mitigate adverse impacts on such habitat."[151] This section also allows the Commission to consider any net benefit to habitat produced by the project, and to offset mitigation against any mitigation required by the U.S. Fish and Wildlife Service (USFWS).[152] The Commission has implemented this provision in Rule 297.53. The 5,000 acre-feet per year threshold for the habitat evaluation is not frequently triggered.[153] The parties differ significantly on what is required of these provisions.

[149] Tex. Water Code § 11.151; 30 TAC § 297.47.

[150] WF Ex. 1 at 5-18 (Bates 7791); WF Ex. 3 (Kiel Dir.) at 18; WF Ex. 3D (Report Supporting Application) at Bates 7791; ED Ex. KA-1 (Alexander Dir.) at 14-15; ED Ex. KA-4 (Water Availability Memo) at 2.

[151] Tex. Water Code § 11.152.

[152] Tex. Water Code § 11.152.

[153] Tr. Vol. 7 at 128 (Coonrod Clarifying). *see also* OM Ex. 7 (SOP) at 27 ("These recommendations will occur infrequently and only in very large complicated permits because we typically do not get many applications for new storage greater than 5,000 acre-feet in a non-SB3 basin.").

a) Background

The City assessed the effects of the project on instream uses; fish and wildlife habitats within the Lake Ringgold project site; and habitats adjoining, upstream and downstream.[154] City witness Michael Votaw prepared the Habitat Evaluation Procedures (HEP) report. He explained that HEP is a species-habitat-based assessment of the ecological value of a study area that quantifies the value of habitat available to a selected set of wildlife species.[155] He testified that the "species selection process is limited to those species with known ranges that occur within the study area and by the availability of [Habitat Suitability Index] HSI models for those species. Species selection is further limited to the cover type(s) for which HSI models are approved for use."[156] The HEP report provides the process for the assessment:

1. Determine the applicability of HEP and define the study area;
2. Delineate habitat or vegetation cover types;
3. Select the relevant evaluation species;
4. Determine each species' life requisites and measure habitat variables;
5. Determine baseline and future habitat units; and
6. Develop compensation/mitigation plans for the proposed project.[157]

[154] WF Ex. 1 at 5-1–5-19 (Bates 7774-7792).

[155] WF Ex. 5 (Votaw Dir.) at 17-18; WF Ex. 5A (Votaw Resume).

[156] WF Ex. 5 (Votaw Dir.) at 15.

[157] WF Ex. 5F (HEP report) at 3.

The study area was the project site of Lake Ringgold, which included area that will be inundated at the normal pool elevation of 844 ft mean sea level (msl), as well as the footprints of the dam, principal spillway, and emergency spillway.[158]

Next, the HEP report evaluated habitats and cover types within the footprint with a desktop analysis and site evaluations.[159] Specifically, the report identified eight cover types within the Lake Ringgold Project area: Emergent and Herbaceous Wetland, Grassland and Old Field, Riparian Woodland and Bottomland Hardwood (including forested wetland habitat).[160] The 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."[161]

The HEP report then selected the following species for evaluation: American Kestrel, Barred Owl, Brown Thrasher, Carolina Chickadee, Downy Woodpecker, Eastern Cottontail, Eastern Meadowlark, Field Sparrow, Great Blue Heron, Northern Bobwhite, Raccoon, Racer, and Scissor-tailed Flycatcher.[162]

ED staff participated in the site evaluations, including the habitat and stream evaluations.[163] Votaw concluded that the potentially impacted state-listed species are expected to relocate to areas outside the Lake Ringgold footprint and therefore the

[158] WF Ex. (HEP report) at 3.

[159] Tr. Vol. 3 at 163-164 (Votaw Cross).

[160] WF Ex. 5F (HEP report) at 4.

[161] WF Ex. 5F (HEP report) at 4.

[162] WF Ex. 5F (HEP report) at 4-9.

[163] WF Ex. 5 (Votaw Dir.) at 15

Lake Ringgold project would have low to no potential negative effect on those species.[164] Votaw considered potential effects on existing instream uses, including flows necessary to maintain recreational and navigational flows and to protect federally listed species or other "high interest" species.[165] The evaluation determined that Lake Ringgold is expected to have low to no potential negative impact on federally listed threatened or endangered species.[166] The City also submitted a conceptual mitigation plan for the proposed Lake Ringgold.[167]

ED witness Kenneth Coonrod reviewed the habitat assessment on behalf of the ED staff.[168] He concluded that the requested water right will not affect federally listed or high-interest aquatic or aquatic-dependent species and is not expected to adversely impact aquatic or riparian habitats in the area.[169]

Landowner Protestants challenge both the habitat assessment and the conceptual mitigation plan. They challenge the quality of the HEP generally and specifically. Generally, Landowner Protestants note that no one could testify to the capacity in which members of TCEQ or Freese and Nichols participated in developing the HEP report.[170] Field sampling occurred over a six-day period; however, Votaw could not say who from either Freese and Nichols or the TCEQ

[164] WF Ex. 5 (Votaw Dir.) at 22. Tr. Vol 7 at 104-105 (Votaw Cross).

[165] WF Ex. 5 (Votaw Dir.) at 15.

[166] WF Ex. 5 (Votaw Dir.) at 22.

[167] WF Ex. 5I (Conceptual Mitigation Plan).

[168] ED Ex. KC-1 (Coonrod Dir.) at 4-5; ED Ex. KC-3 (environmental analysis) at 1-4; ED Ex. KC-4 (environmental analysis) at 2.

[169] ED Ex. KC-1 (Coonrod Dir.) at 65

[170] Tr. Vol. 3 at 100–102 (Votaw Cross); Tr. Vol. 7 at 87 (Coonrod Cross).

actually conducted the field work on any given day.[171] With respect to the ED's review, no witness from the ED had any personal knowledge of the assessment. The HEP study was done before Coonrod, the ED's only witness on this issue, was assigned to this case and he did not participate "in any way," nor did he have knowledge or any documentation regarding what anyone else with TCEQ may have done.[172] Coonrod did not conduct any independent assessment as to whether the species or the cover type that were selected were reasonable, never questioned the City's basis for its species selection, and has no opinion as to whether the City chose the correct species.[173] Coonrod testified that the ED did not perform a substantive review of the HEP report or otherwise independently verify the contents of the report.[174] Coonrod testified that that he only assumed his predecessor approved the HEP study because "he didn't tell me he didn't approve it."[175] This evidence raises serious questions regarding the reliability of the assessment.

More specifically, Landowner Protestants argue that the City's assessment of fish and wildlife habitat is deficient in several ways, as discussed below.

b) Study Area

A habitat assessment "shall include the project site as well as potentially impacted habitat upstream, adjoining, and downstream of the project site."[176] Water

[171] Tr. Vol. 3 at 103-104 (Votaw Cross).

[172] Tr. Vol. 7 at 86-87 (Coonrod Cross).

[173] Tr. Vol. 7 at 88-91 (Coonrod Cross).

[174] Tr. Vol. 3 at 93 (Votaw Cross).

[175] Tr. Vol. 7 at 87 (Coonrod Cross).

[176] 30 TAC § 297.53(c).

right permit reviews "shall examine both direct and 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."[177]

As noted above, the study area was the project site for Lake Ringgold in the area that will be inundated at the normal pool elevation of 844 ft msl, as well as the footprints of the dam, principal spillway, and emergency spillway.[178] However, as Landowner Protestants point out, this elevation fails to account for 23,940 acres 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.[179]

Votaw admits that the adjacent property was not assessed as to impacts or habitat value.[180] Landowner Protestants argue that the City's habitat assessment was deficient.

Moreover, Landowner Protestants note that neither the HEP report or the Report Supporting the Application address "indirect impacts" to terrestrial and riparian habitats, or long or short-term effects to the watershed or ecoregion that may result from the reservoir.[181] Coonrod admits that the ED's review did not consider the direct and indirect impacts to terrestrial and riparian habitats, nor the long and

[177] 30 TAC § 297.53(f)(6).

[178] WF Ex. 5F (HEP report) at 3-4 (Bates 8239). Tr. Vol. 3 at 103 (Votaw Cross).

[179] WF Ex. 3D (Report Supporting Application) at Bates 7755-7757.

[180] Tr. Vol. 3 at 68-69 (Votaw Cross); Tr. Vol. 7 at 98, 100 (Coonrod Cross).

[181] *See* WF Ex. 3D (Report Supporting the Application) at 5-1 (Bates 7774); 30 TAC § 297.53(f)(6).

short-term effects to the watershed or ecoregion that may result from the permitted activity.[182]

Nevertheless, the application identified two State-threatened species that are likely present within the proposed project area: the Texas Kangaroo Rat and the Texas Horned Lizard. The application described them as having a "moderate potential of being impacted as a result of the analysis."[183] Yet, the application states that "no surveys have been conducted to determine if these species or their preferred habitats are present within the footprint of the proposed reservoir."[184] Votaw testified that he did not conduct a presence-absence survey or assess whether suitable habitat existed outside the project area that would sustain the populations of the Texas Kangaroo Rat or the Texas Horned Lizard that would be displaced.[185] Coonrod agreed that there has not been an assessment sufficient to conclude that the populations would likely survive relocation—assessment that would need to consider food supply, predation pressures, reproductive viability.[186] Instead, the application states that, once the reservoir begins to fill, "these species would likely relocate to areas outside of the reservoir's footprint."[187]

Votaw admitted that the City did not assess impacts to fish and wildlife habitat in the area of the Little Wichita upstream of or adjacent to the Lake Ringgold project

[182] Tr. Vol. 7 at 105, 124 (Coonrod Cross).

[183] Tr. Vol. 3 at 71-72 (Votaw Cross); WF Ex. 2J at Bates 7787-788 (Report Supporting Application).

[184] WF Ex. 2J at Bates 7789 (Report Supporting Application).

[185] Tr. Vol. 3 at 76, 79-80, 175-176 (Votaw Cross).

[186] Tr. Vol. 7 at 101-103 (Coonrod Cross).

[187] WF Ex. 2J at Bates 7788-789 (Report Supporting Application).

site.[188] The City argues that it did not assess upstream or adjacent impacts because the HEP report determined that there would be no impacts to habitats upstream or adjoining Lake Ringgold.[189] The City argues that this is adequate.

The ALJ finds that the City's habitat assessment failed to properly define the study area. By restricting the study area to the project site at normal pool elevation, the HEP failed to account for the 100 year flood elevation and road relocations, although these would be impacted. Moreover, the evidence shows that the HEP failed to properly assess potentially impacted habitat upstream, adjoining, and downstream of the project site.[190]

The City's contentions to the contrary are not convincing. Although Votaw testified that the HEP report determined that there would not be impacts to habitats upstream or adjoining Lake Ringgold, he admitted that the City made no such assessment. As Landowner Protestants point out, Votaw's stream evaluation was done only within the footprint of the proposed project, i.e., the normal elevation of the Lake Ringgold reservoir itself,[191] and simply estimated stream length, classified the steams, and then quantified them.[192] There was no habitat value assigned to the stream segments, nor was there any other attempt at using aquatic species to assess the habitat value of the streams.[193]

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[188] Tr. Vol. 3 at 66, 68 (Votaw Cross).

[189] Tr. Vol. 3 at 77 (Votaw Cross).

[190] 30 TAC § 297.53(c).

[191] WF Ex. 5 (Votaw Dir.) at 7.

[192] WF Ex. 1 at Bates 8285; Tr. Vol. 3 at 64-65 (Votaw Cross).

[193] Tr. Vol. 3 at 89-90 (Votaw Cross).

Commission rules, however, require a fish and wildlife assessment to "include the project site as well as *potentially* impacted habitat upstream, adjoining, and downstream of the project site."[194] The ALJ finds that the HEP improperly failed to assess fish and wildlife habitat of potentially impacted habitat upstream, adjoining, and downstream of the project site.

Finally, the evidence unequivocally establishes that there was no examination of direct and 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 Rule 297.53(f)(6).

c) Cover Type

The HEP report combined certain cover types. Landowner Protestants argue that Rule 297.53(f)(3) requires each cover type to be delineated.

The City argues that 297.53(f)(3) does not require that each cover type be delineated, and there is no bar against combining cover types, as Nelle and Bradsby acknowledged.[195] City witness Votaw testified that "the grassland and old field cover types were combined as part of the HEP assessment that was conducted for the Bois d'Arc Lake project, and such combined cover types were accepted for both the state and federal permitting processes."[196]

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[194] 30 TAC § 297.53(c) (emphasis added).

[195] Tr. Vol. 4 at 270-271 (Nelle Cross); Tr. Vol. 5 at 166 (Bradsby Cross).

[196] WF Ex. 5J (Votaw Reb.) at 10.

Rule 297.53(f)(3) states that "[t]otal habitat value for each habitat type shall be determined on an individual case basis for the area impacted by a project." While the ALJ agrees that this could be reasonably read to require a delineation of each cover type, Landowner Protestants do not explain how this language bars combining cover types. The ALJ cannot find that the HEP improperly combined cover types.

d) Species Selection and Baselines

Landowner Protestants argue that the HEP failed to adequately assess species and measure the habitat variables. For example, Bradsby testified that the beaver HSI would be appropriate, and that he had observed "quite a bit of evidence of beaver activity in the area" during his site visit.[197] Votaw testified that the beaver would not be an appropriate species for the HEP assessment of wetlands at the Lake Ringgold project site because the beaver requires more permanent supply of water, which is not provided by the ephemeral nature of the wetlands observed by the HEP team.[198] However, on cross examination, Votaw admitted that beavers have an HSI model, but could not recall looking at the beaver HSI model, or considering the beaver as a potential species.[199] Votaw admitted that the beaver's range extends into the area, but made no effort to determine if beavers actually occurred in this area.[200]

[197] Tr. Vol. 5 at 159 (Bradsby Cross), 222-223 (Bradsby Redir.).

[198] WF Ex. 5J (Votaw Reb.) at 13-14 (stating that beavers "require a more permanent supply of water, which is not provided by the ephemeral nature of the wetlands observed by the HEP team.").

[199] Tr. Vol. 3 at 90-91, 94 (Votaw Cross).

[200] Tr. Vol. 3 at 94 (Votaw Cross).

Votaw could give few details about how or why the beaver was not considered, noting that the study was done seven years ago.[201]

Bradsby and Nelle also faulted the HEP for failing to analyze aquatic species.[202] Nelle testified that "no aquatic species were chosen for evaluation even though the area is rich in aquatic and wetland habitat."[203] The City responds that the City did evaluate aquatic habitat, specifically wetland and stream habitat, which are aquatic resources.[204]

Based on this record, the ALJ finds that the HEP inappropriately failed to assess species and measure habitat variables. The City's evidence for its failure to assess the beaver or aquatic species is not persuasive.

Landowner Protestants further argue that as a result of limiting the study area to the project site (discussed above) and combining cover types, the baseline habitat units undervalue the existing habitat. Nelle testified that the City's sample sites used to value the combined grassland/old field habitat type were not representative of the area to be inundated.[205] He further testified that the City did not evaluate bobwhite quail habitat on the combined grassland/old field cover type, even though bobwhite quail are an important grassland bird.[206] Nelle testified that compared to other areas

[201] Tr. Vol. 3 at 91 (Votaw Cross).

[202] OM Ex. 100 (Nelle Dir.) at 8; OM Ex. 200 (Bradsby Dir.) at 19.

[203] OM Ex. 100 (Nelle Dir.) at 8.

[204] Tr. Vol. 3 at 86-87 (Votaw Cross).

[205] Tr. Vol. 5 at 68 (Nelle Redir.).

[206] OM Ex. 100 (Nelle Dir.) at 14.

he has evaluated, the area to be inundated has exceptional habitat value.[207] The City does not respond to these allegations.

Although the ALJ found no fault in combining cover types, the ALJs found that the study area was improperly limited. Therefore, the ALJ finds that the study failed to properly establish baseline habitat units.

e) Wetland Function and Value

The goal of mitigation of wetlands is to achieve "no net loss" of wetlands functions and values.[208] To that end, the specific functions and values for wetlands habitats shall be determined on an individual case basis.[209]

The applicant's classification of wetland types is based on USFWS's "Classification of Wetlands and Deepwater Habitats of the United States" (USFWS 1979) (also referred to as the Cowardin system) and included a wetland cover types map that identifies wetland areas within the Lake Ringgold footprint.[210]

Landowner Protestants contend that the City's assessment did not properly classify wetlands. Nelle testified that under the Cowardin system, any water that is less than 2.5 meters (approximately 8 feet) deep at the low water level is a riparian

[207] OM Ex. 100 (Nelle Dir.) at 25.

[208] 30 TAC § 297.53(e).

[209] 30 TAC § 297.53(f)(1).

[210] WF Ex. 5E; WF Ex. 1 at Bates 7782-7784 (Report Supporting Application for Lake Ringgold).

wetland, not open water.[211] The HEP report nevertheless classified about 250 acres of habitat cover type as open water (riverine), the majority of which should have been classified as a wetland cover type.[212] Nelle testified that some of this habitat appears near the river channel, sloughs and oxbows, and would almost certainly meet the Cowardin definition of a "palustrine" or wetland habitat, and not "lacustrine" or deep water habitat.[213] Specifically, Nelle bases this conclusion on the slope of the channel, the slope of the banks, and his experience observing similar channel types.[214] Nelle observed the habitat from the air in a helicopter as well as the ground, where he observed the entire Little Wichita River to be inundated, as well as numerous locations.[215]

The City responds that the City will address the classification and mitigation of wetlands through the Clean Water Act (CWA) Section 404 permitting process and mitigation sequencing. Furthermore, regarding properly assessing wetlands, the City notes that Landowner Protestants' witnesses did not visit the sampling locations used in the HEP assessment or do any ground observations.[216] By contrast, the City conducted field verifications in addition to the desktop analysis to obtain an accurate quantity of the wetland cover types in the Lake Ringgold project area, and followed HEP to evaluate habitat cover types, including wetlands.

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[211] Tr. Vol. 5 at 83 (Nelle Redir.).

[212] Tr. Vol. 5 at 83-84 (Nelle Redir.); WF Ex. 5F (HEP report) at 3-4.

[213] *See, e.g.*, Tr. Vol. 5 at 119 (Nelle Redir.).

[214] Tr. Vol. 5 at 111-112 (Nelle Cross).

[215] Tr. Vol. 5 at 109-110 (Nelle Cross).

[216] Tr. Vol. 4 at 268 (Nelle Cross); Tr. Vol. 5 at 22, 102-103 (Nelle Cross).

The preponderance of the evidence shows that the City failed to properly classify wetlands. Nelle credibly testified that the HEP report classified about 250 acres of habitat cover type as open water, the majority of which should have been classified as a wetland cover type. Although Bradsby and Nelle did not visit the sampling locations used in the HEP assessment, they observed the entire Little Wichita River. Moreover, their observations are more recent, whereas those of the HEP assessment are some seven years old. The City has not established that observations from the air made these observations unreliable.

Specific functions and values for wetlands habitats shall be determined on an individual case basis.[217] Whether this effort will be duplicated in the CWA section 404 permitting process is immaterial to what is required here. As the City states, "This case is also strictly within the confines of TCEQ's regulatory framework, not that of federal or other state agencies."[218] The City does not defend its failure to describe or value the various wetland functions present within the project site or upstream, adjoining, and downstream of the project site.[219] A determination of the specific functions and values, in those locations, is clearly required in this proceeding to achieve the goal of no net loss.[220] The City's HEP failed to do this.

[217] 30 TAC § 297.53(f)(1).

[218] City of Wichita Falls Initial Br. at 8.

[219] WF Ex. 5F (HEP report) at 3.

[220] 30 TAC § 297.53(e), (f)(1).

f) Methodology

Next, Landowner Protestants argue that the City's HEP assessment was defective because it did not include an interdisciplinary team. The City and the ED argue that none is required.

Commission rules to not require a particular evaluation methodology, only "the most appropriate methodology."[221] Commission rules reference USFWS's Habitat Evaluation Procedures as an appropriate methodology.[222] That procedure is in evidence and, under Conduct of Evaluations, it provides in part as follows:

> **B. Interdisciplinary Planning Teams**. Maximum effort will be made to conduct HEP evaluations using interdisciplinary planning teams consisting of biologists from the Service, the Federal action agency, the appropriate State fish and wildlife agency, and any other affected agency or party.[223]

O'Malley witnesses Nelle and Bradsby testified that interdisciplinary teams are necessary to offset the inherent statistical bias to which the HEP methodology is susceptible, due to sample size or type, habitat or cover types, species selection.[224] The HEP conducted for another major reservoir project—the Bois d'Arc reservoir—included an interdisciplinary team, with participation from the USFWS, TCEQ, and Texas Parks and Wildlife Department.[225] The City notes, however, that

[221] 30 TAC § 297.53(f)(1), (3).

[222] 30 TAC § 297.53(f)(1), (3); Tr. Vol. 7 at 129 (Coonrod Clarifying).

[223] OM Ex. 206 (Habitat Evaluation Procedures) at 5; *see also* WF Ex. 10 (identical).

[224] OM Ex. 100 (Nelle Dir.) at 8-9; OM Ex. 200 (Bradsby Dir.) at 23; Tr. Vol. 5 at 220–221 (Bradsby Redir.).

[225] Tr. Vol. 5 at 175-176 (Bradsby Cross).

the Bois d'Arc HEP was also performed to comply with the CWA Section 404 permitting then-underway, whereas here, no federal permit application has been filed yet.[226]

The City also argues that Bradsby and Nelle are not qualified to opine on the appropriate methodology because their most recent use of HEP was in trainings almost 30 years ago,[227] and neither conducted a habitat assessment using HEP.[228] The ALJ will weigh these experiential gaps against the resumes of both witnesses showing extensive experience in wildlife management,[229] and the weight of countervailing evidence.

Substantively, the City argues this USFWS guidance applies only to federal projects and an interdisciplinary team, as Votaw testified, is only recommended—not required—for the federal CWA section 404 permitting process.[230] The City argues that Commission rules do not require an interdisciplinary team. The ALJ agrees.

The USFWS guidance itself states that it applies to federal assessments.[231] This is supported by the language Landowner Protestants use to support their argument: namely, that the interdisciplinary teams should consist of biologists from

[226] Tr. Vol. 4 at 270-271 (Nelle Cross).

[227] Tr. Vol. 4 at 206, 208 (Nelle Voir Dire); Tr. Vol. 5 at 131-132 (Bradsby Cross).

[228] Tr. Vol. 4 at 229-230, 231 (Nelle Cross); Tr. Vol. 5 at 129, 136 (Bradsby Cross).

[229] OM Exs. 101 (Nelle resume), 201 (Bradsby resume).

[230] WF Ex 5J (Votaw Reb.) at 6.

[231] WF Ex. 10 (Habitat Evaluation Procedures) at 1 (noting that the guidance document applies to federal projects).

two federal agencies.[232] Bradsby does not explain how the applicant is to enlist the participation of the USFWS and "the Federal action agency" in the state water right permitting process.

g) Conceptual Mitigation Plan

As a part of the HEP report, the City submitted a fifteen-page document entitled conceptual mitigation plan, which sets out goals and objectives to mitigate the unavoidable impacts from the reservoir project, with on-site and near-site mitigation strategies, and proposes strategies to offset potential impacts to aquatic and terrestrial resources and commits to short- and long-term management, monitoring, and providing site protection for the mitigation site(s).[233] Votaw testified that "[d]uring the Clean Water Act Section 404 permitting process, the Conceptual Mitigation Plan will be further developed in conjunction with USACE."[234]

ED witness Coonrod reviewed the conceptual mitigation plan and concluded that it "met the requirements in TCEQ's rules."[235] Under Coonrod's evaluation of the plan, the applicant will provide compensatory mitigation through in-kind mitigation that will occur through on-site or near-site mitigation strategies, and recommended that all mitigation plans and monitoring be addressed in a special condition in the permit requiring compliance with the USACE Section 404 permit

[232] WF Ex. 10 at 4 ("interdisciplinary planning teams consisting of biologists from the Service, the Federal action agency, the appropriate State fish and wildlife agency, and any other affected agency or party").

[233] WF Ex. 5I (Conceptual Mitigation Plan) at K-3, K-11 (Bates 8303, 8311).

[234] WF Ex. 5 (Votaw Dir.) at 25; WF Ex. 5J (Votaw Reb.) at 24-25.

[235] ED Ex. KC-1 (Coonrod Dir.) 5. ED Ex. KC-3 (Coonrod memo) at 5-6.

requirements.[236] Coonrod testified that the ED does not independently verify the extent or the classification of wetlands or terrestrial assessment in the water permit process, as that will come in the CWA section 404 process.[237]

The Draft Permit in turn includes several special conditions addressing mitigation. First, all mitigation plans and monitoring must comply with federal CWA section 404.[238] Second, the permit is contingent upon timely implementation of the approved conceptual mitigation plan; any changes or modifications to the plan must be approved by the ED; and if the modifications would result in a change to a permit term, the permit must be amended.[239]

Landowner Protestants argue that the mitigation plan is deficient for numerous reasons. They argue that the plan is so conceptual, it is incapable of determining that mitigation will or *can* be achieved.

First, Landowner Protestants argue that the conceptual mitigation plan does not assess the ecological value of the streams that would be inundated, it only measured the length of the three categories of streams.[240] Nelle testified that "merely identifying an equal length of stream on some mitigation land does not

[236] ED Ex. KC-3 (environmental analysis memo) at 8-9.

[237] Tr. Vol. 7 at 110 (Coonrod Cross).

[238] ED Ex. JA-3 (Draft Permit) at 3, Special Condition 7.A.

[239] ED Ex. JA-3 (Draft Permit) at 4, Special Condition 7.B.

[240] WF Ex. 1 at Bates 8285; Tr. Vol. 3 at 64-65 (Votaw Cross).

compensate for the loss" of streams of different size, hydrology, and ecological value.[241]

The City responds that the City performed a stream study with ED staff to assess stream types and lengths, and addressed stream mitigation in the conceptual mitigation plan.[242] The stream mitigation section of the conceptual mitigation plan states that "mitigation for streams would be accomplished based on length," but that stream mitigation is difficult because unlike terrestrial habitats, "streams cannot be created where the landscape does not afford a watershed to provide hydrology sufficient to support fluvial processes."[243]

Second, Landowner Protestants argue that the conceptual mitigation plan fails to achieve "no net loss" of wetland functions and values[244] because it improperly assumes that that lost emergent herbaceous and shrub wetlands could be mitigated by littoral wetlands on the shoreline edges of Lake Ringgold and Lake Kickapoo.[245] The conceptual mitigation plan recognizes that the condition of existing habitat around Lake Kickapoo has not been determined but that "agricultural production has likely resulted in reduced habitat quality (i.e., lower HSI values)."[246] Nelle testified the edges of these reservoirs do not provide the same soils or hydrologic

[241] *See* OM Ex. 100 (Nelle Dir.) at 18.

[242] WF Ex. 1 at Bates 7781-7782 (Report Supporting Application). WF Ex. 5I (Conceptual Mitigation Plan) at K-8 (Bates 8303).

[243] WF Ex. 5I (Conceptual Mitigation Plan) at K-8 (Bates 8303).

[244] 30 TAC § 297.53(e).

[245] See WF Ex. 5I (Conceptual Mitigation Plan) at K-5 (Bates 8305).

[246] WF Ex. 5I (Conceptual Mitigation Plan) at K-4 (Bates 8304).

conditions for wetlands to develop, and those that could develop would be very minimal and with function and value not equivalent to those naturally-occurring depressional lowland areas.[247] Nelle personally verified that the exposed shoreline acreage is deficient of vegetation or includes vegetation not indicative of high value wetlands.[248]

The City responds that the conceptual mitigation plan appropriately identifies potential areas for wetlands mitigation and includes adaptive management protocols in the event that such mitigation is insufficient: "Mitigation for open water, emergent wetlands, and shrub wetlands are expected to occur at the reservoir site following construction."[249] And: "If fluctuating water levels or other causes prevent this expected wetland development, then actions would be taken to facilitate wetland plant establishment and development as part of the adaptive management plan."[250] The City argues that Landowner Protestants' witness testimony is unreliable because those witnesses have not performed any analyses of the Lake Ringgold project area.[251]

Finally, Landowner Protestants argue that the conceptual mitigation plan does not identify suitable mitigation habitat available to compensate for the lost wetlands, the woodland and forested habitat types and the rare, high-value grassland habitats. Landowner Protestants argue that the conceptual mitigation plan is based almost

[247] OM Ex. 100 (Nelle Dir.) at 19.

[248] OM Ex. 100 (Nelle Dir.) at 20.

[249] WF Ex. 5I (Conceptual Mitigation Plan) at K-6 (Bates 8306).

[250] WF Ex. 5I (Conceptual Mitigation Plan) at K-6 (Bates 8306).

[251] Tr. Vol. 5 at 18-19 (Nelle Cross), 207-208 (Bradsby Cross).

entirely on the assumption that soil type, hydrology, and other important factors will not prevent the lost habitat types from establishing in mesquite scrub surrounding Lake Kickapoo.[252] The City proposes to mitigate for the loss of 5,215 acres of riparian woodland, bottomland hardwood, and upland deciduous forest by planting enough trees on enough acres surrounding Lake Kickapoo to compensate.[253] Yet, there has been no assessment of whether the soil would support this habitat, and Nelle concluded that it would not, no matter how much it is managed.[254]

Votaw agreed that the conceptual mitigation plan does not determine that the land around Lake Kickapoo will support a grassland habitat or an upland deciduous forest habitat.[255] Votaw opined that the studies to determine the suitability of the mitigation land would need to happen during the CWA section 404 process.[256] However, Votaw, like Coonrod, agreed that USACE does not have jurisdiction over terrestrial habitat.[257] Votaw could not explain how the USACE would assess suitability of terrestrial mitigation land or impose mitigation for terrestrial impacts when terrestrial habitat is not within its jurisdiction; Votaw could only say that the terrestrial mitigation that was proposed for Bois d'Arc made it into the mitigation plan adopted by the USACE.[258]

[252] Tr. Vol. 5 at 215 (Bradsby Cross); OM Ex. 200 (Bradsby Dir.) at 26.

[253] WF Ex. 5I (Conceptual Mitigation Plan) at K-7 (Bates 831).

[254] OM Ex. 100 (Nelle Dir.) at 20-21.

[255] Tr. Vol. 3 at 189-190 (Votaw Cross).

[256] Tr. Vol. 3 at 190 (Votaw Cross).

[257] Tr. Vol. 3 at 200 (Votaw Cross).

[258] Tr. Vol. 3 at 200-201 (Votaw Cross).

The City argues that Landowner Protestants' assertions regarding the suitability of the mitigation habitat is unreliable because it is based on a visual assessment from a helicopter visit of the proposed mitigation site.[259] By contrast, Votaw "performed a desktop analysis and then field verified 42% of the streams within the Lake Ringgold project site."[260] Votaw testified that he expects that littoral wetlands will develop at the Lake Ringgold project site and if not, as noted above, "the conceptual mitigation plan dictates that actions would be taken to facilitate wetland plant establishment and development as a part of the adaptive management plan, a component of the conceptual mitigation plan."[261]

The parties differ on what is required in the water right permitting process, and its interplay with the federal CWA permit process. The City and the ED contend that much of the habitat mitigation requirements can be left to the federal CWA section 404 permitting process, while the Landowner Protestants argue that the requirements of Rule 297.53 must be addressed here.

ED staff witness Alexander testified that "[u]nder 30 TAC Section 297.53, a final approved mitigation plan is not required to process a water right application. ED staff's policy related to mitigation is that TCEQ does not hold applications while reviews are being conducted by other state or federal programs."[262] The relevant ED staff policy states as follows:

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[259] Tr. Vol. 5 at 22 (Nelle Cross).

[260] WF Ex. 5 (Votaw Dir.) at 15.

[261] WF Ex. 5J (Votaw Reb.) at 22-24.

[262] ED Ex. KA-1 (Alexander Dir.) at 21.

> You do not need final versions of these documents to complete your review. This is because we do not hold applications while reviews are being conducted by other state or federal programs. So long as the information submitted meets the minimum requirements in TCEQ's Chapter 297 rules, you will need to proceed with your review.[263]

The policy is found in Appendix E to a guidance document titled "Standard Operating Procedures (SOP) for Environmental Assessments of Water Right Application," which was updated in 2018. The SOP states: "This document intended for internal use only and the WAD Director or WRPA Section Manager may modify this process as needed."[264]

The City argues that the ED's internal policy is consistent with performing the more detailed functional assessment of impacts to aquatic resources and mitigation impacts required by the federal CWA section 404 permitting process. Moreover, compliance with CWA Section 404 is required by the special conditions of the Draft Permit.

Landowner Protestants argue that this policy is wrong for two reasons: first, essentially, because the water right application process specifically contemplates habitat mitigation in conjunction with the U.S. Fish and Wildlife Service;[265] second,

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[263] WF Ex. 5K (SOP, Appendix E) at 1.

[264] OM Ex. 7 (Resource Protection Team – Instream Uses; Standard Operating Procedures for Environmental Assessments of Water Right Applications) at 1. Repeated on every page is "INTERNAL USE ONLY."

[265] *See* Tex. Water Code § 11.152 ("The commission shall offset against any mitigation required by the U.S. Fish and Wildlife Service pursuant to 33 C.F.R. Parts 320-330 any mitigation authorized by this section."); 30 TAC § 297.53(d)("The commission shall offset any mitigation it requires by any mitigation required by the United States Fish and Wildlife Service pursuant to 33 Code of Federal Regulations §§320-330.").

because the USACE's jurisdiction is limited to aquatic resources and will not cover terrestrial habitat, as TCEQ rules do.[266]

Landowner Protestants further note that Alexander explained that this internal policy was adopted after the last two major reservoir permits— Lake Ralph Hall and Lake Bois d'Arc[267]—and after Lake Ringgold was declared administratively complete, but before technical review was complete.[268] Notably, technical review of those two applications took seven years; Lake Ringgold's technical review took two.[269]

Neither the ED nor the City cite to any authority for the proposition that mitigation is considered only on the federal level, outside the context of a water right application proceeding, or that a conceptual mitigation plan at this stage is acceptable to move forward. Indeed, Chapter 11 of the Texas Water Code and Commission rules strongly suggest otherwise. 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."[270] 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."[271] Nothing about this language suggests

[266] Tr. Vol. 3 at 200-201 (Votaw); Tr. Vol. 7 at 111 (Coonrod Cross).

[267] ED Ex. KA-1 (Alexander Dir.) at 20.

[268] ED Ex. KA-1 (Alexander Dir.) at 20.

[269] ED Ex. KA-1 (Alexander Dir.) at 20.

[270] Tex. Water Code § 11.152 (emphasis added).

[271] 30 TAC § 297.53(b) (emphasis added).

that mitigation will be addressed only after a permit is issued. Tellingly, the rules further provide that "*Water right permit reviews* shall examine both direct and 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."[272]

Other clues strongly suggest that the Commission's habitat assessment and mitigation framework should not be deferred until the federal CWA section 404 processing. Where the Commission intends to bifurcate processes, it has said so, as will be seen in the dam safety discussion below.[273] The ED's internal policy, evidence shows, is a departure from prior practice and may have significantly truncated the ED's technical review process. Why the applicant has avoided a concurrent process, as was done with Bois d'Arc project, is not in evidence.[274] There is no evidence that the federal CWA section 404 process offers the same protections as state rules. Commission rules specifically require mitigation for terrestrial habitats,[275] whereas the CWA section 404 process does not, thereby leaving terrestrial species in significant regulatory uncertainty. It is reasonable to infer that the Bois d'Arc Lake mitigation plan (approved by USACE) addressed terrestrial mitigation because the federal and state assessment was done concurrently with the state water right application.

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[272] 30 TAC § 297.53(f)(6) (emphasis added).

[273] 30 TAC § 299.22(a)(2) ("The executive director shall not issue approval of final construction plans and specifications for construction of a proposed dam . . . until a water rights permit . . . is issued.") (emphasis added).

[274] *But see* OM Ex. 4 (stating that the City would likely need a partner to demonstrate a need for the 27,00 acre-feet of firm yield the WAM shows for Lake Ringgold "in order to be eligible for the 404 permit.")

[275] 30 TAC § 297.53(f)(4)-(6).

Based on the foregoing, the ALJ concludes that the most reasonable reading of the Commission's rules on habitat mitigation is that they are intended to take place as a part of the water right application and not deferred until the federal CWA section 404 process. While it may makes sense to "not hold applications while reviews are being conducted by other state or federal programs," that does not mean that reviews in this process are deferred.

Regardless, the Commission rules clearly require the applicant to establish (1) that habitat impacts are unavoidable and (2) there is suitable mitigation habitat available for complete compensation for the lost habitat *before* considering habitat mitigation.[276] Although the parties may differ on whether the habitat impacts are unavoidable, there is no dispute that there has been no assessment of whether suitable mitigation habitat available for complete compensation for the lost habitat.

Conceivably, the special conditions in the Draft Permit constitute the Commission requiring an applicant "to take reasonable actions to mitigate adverse impacts on such habitat."[277] However, requiring an applicant to simply follow federal law and to comply with a mitigation plan that is yet to be finalized[278] simply kicks the can down the road. Nothing about those conditions indicate how the permittee, or the final mitigation plan, will comply with Rule 297.53 or how the quality of the plan is to be tested. Had the Commission intended merely to have applicants follow

[276] 30 TAC § 297.53(f)(4).

[277] *See* 30 TAC § 297.53(f)(7)("Habitat mitigation plans and agreements shall be ensured through binding legal contracts, permit provisions, and detailed management plans and shall include goals and schedules of completion of those goals.").

[278] *See* ED Ex. JA-3 (Draft Permit) at 3-4.

federal law, it might have simply said so. Instead, Rule 297.53 provides a detailed process for assessing and mitigating habitats.

The ALJ therefore concludes that habitat mitigation as set out in Rule 297.53 should occur in the course of a water right application and not, as the ED and the City propose, only during the CWA Section 404 process.

Regarding Landowner Protestants' substantive challenges, the ALJ agrees that the conceptual mitigation plan does little more than conceive of how habitat loss might be mitigated. The most glaring omission is the applicant's failure to establish that "there is suitable mitigation habitat available for complete compensation for the lost habitat," a prerequisite to considering habitat mitigation.[279]

The City has not shown how it has met this requirement by simply assessing stream types and lengths within the footprint of the proposed project and discussing in general terms stream mitigation, as the City did,[280] without assessing the ecological value of the streams that would be inundated, including emergency level elevation, compensates for the loss of streams of different size, hydrology, and ecological value. Though the conceptual mitigation plan concedes that doing so is difficult, that does not establish that suitable habitat is available.

[279] 30 TAC § 297.53(f)(4).

[280] WF Ex. 1 at Bates 7781, 8285 (Report Supporting Application). WF Ex. 5I (Conceptual Mitigation Plan) at K-8 (Bates 8303); Tr. Vol. 3 at 64-65 (Votaw Cross). WF Ex. 5 (Votaw Dir.) at 7.

Similarly, the conceptual mitigation 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 the lost emergent herbaceous and shrub wetlands. The preponderance of the evidence shows that the edges of these reservoirs do not provide the same soils or hydrologic conditions for wetlands to develop, and those that could develop would be very minimal and with function and value not equivalent to those naturally-occurring depressional lowland areas.[281] Nor has the City established that planting trees around Lake Kickapoo will compensate for the 5,215 acres of lost riparian woodland, bottomland hardwood, and upland deciduous.[282] Nelle credibly opined that they would not.[283]

Although the City argues that this evidence is not reliable because Nelle did not perform any analyses of the Lake Ringgold project area,[284] his observations are supported by photographs showing the lack of wetland development along the shores of Kickapoo,[285] and in any event, are more current than Votaw's or the ED's observations. The City failed to rebut this contention with evidence showing that wetlands have developed along the shores of Kickapoo or studies showing that the soil would support this habitat. The conceptual mitigation plan itself concedes that "agricultural production [around Lake Kickapoo] has likely resulted in reduced habitat quality (i.e., lower HSI values)."[286] The conceptual mitigation plan's

[281] OM Ex. 100 (Nelle Dir.) at 19.

[282] WF Ex. 5I (Conceptual Mitigation Plan) at K-7 (Bates 831).

[283] OM Ex. 100 (Nelle Dir.) at 20-21.

[284] Tr. Vol. 5 at 18-19 (Nelle Cross), 207-208 (Bradsby Cross).

[285] OM Ex. 106; *see also* OM Ex. 100 (Nelle Dir.) at 22.

[286] WF Ex. 5I (Conceptual Mitigation Plan) at K-4 (Bates 8304).

reference to an adaptive management plan if mitigation fails[287] does not establish an on-site, in-kind replacement, to achieve no net loss.[288]

For the reasons discussed above, the ALJ finds that the conceptual mitigation plan fails to comply with Texas Water Code section 11.153 and Rule 297.53.

F. NEED

The Commission may grant an application only if the proposed appropriation "addresses a water supply need in a manner that is consistent with the state water plan and the relevant approved regional water plan for any area in which the proposed appropriation is located, unless the commission determines that conditions warrant waiver of this requirement."[289]

For the ED, this determination was made by senior water conservation specialist, Jennifer Allis, as memorialized in an interoffice memorandum. Although the applicant addresses need in its Long-Range Water Supply Plan and its application, Allis did not make any independent determination of need, but rather relied on the regional water plans for that determination.[290] Allis testified to the scope of her review: "when we look at consistency with a regional water plan, if that project is listed as a water management strategy in the regional water plan, we would

[287] WF Ex. 5I (Conceptual Mitigation Plan) at K-6 (Bates 8306).

[288] 30 TAC §§ 297.53(e), (f)(2).

[289] Tex. Water Code § 11.134(b)(3)(E); 30 TAC § 297.41.

[290] Tr. Vol. 6 at 238-239 (Allis Clarifying).

determine it to be consistent with that plan."[291] Specifically, she looked at the 2016 Regional water plan which included Lake Ringgold as a water management strategy.[292] With that, her consistency review ended.[293]

The City, OPIC, and the ED assert that the application satisfies this requirement because Lake Ringgold is listed as a water management strategy in the 2016 Region B Water Plan and the 2017 State Water Plan.[294]

Landowner Protestants argue Water Code section 11.134(b)(3)(E) requires more than simply identifying that the project name is listed in the state and regional plans. The ALJ agrees. The City and ED cite to no authority for their position that the inquiry under this section ends with showing that a proposed projections appears on the state and regional water plans. Although an agency's reasonable interpretation is entitled to serious consideration,[295] the construction of a statute is a question of law that courts review de novo.[296] The legislature's intent must, if possible, be discovered within the language the legislature enacted.[297]

Texas Water Code section 11.134(b)(3)(E) provides that the Commission shall grant a water right application "only if" "the proposed appropriation" "addresses

[291] Tr. Vol. 7 at 16 (Allis Cross).

[292] Tr. Vol. 7 at 17 (Allis Cross).

[293] Tr. Vol. 7 at 17 (Allis Cross).

[294] ED Ex. JA-1 (Allis Dir.) at 8; Tr. Vol. 7 at 16 (Allis Cross); ED Ex. JA-4 (interoffice memo) at Bates 29. ED Ex. KA-1 (Alexander Dir.) at 9, 32-33); ED Ex. JA-1 (Allis Dir.) at 3, 8.

[295] *Davis v. Morath*, 624 S.W.3d 215, 221 (Tex. 2021).

[296] *Texas Lottery Comm'n v. First State Bank of DeQueen*, 325 S.W.3d 628, 635 (Tex. 2010).

[297] *Texas Health Presbyterian Hosp. of Denton v. D.A.*, 569 S.W.3d 126, 135-36 (Tex. 2018).

a water supply need in a manner that is consistent with the state water plan and the relevant approved regional water plan for any area in which the proposed appropriation is located, unless the commission determines that conditions warrant waiver of this requirement." Both the City and the ED focus on the "consistent with" language,[298] often overlooking the requirement to show that the *proposed appropriation* addresses a water supply *need*. The requirement to show need is found elsewhere: Both Rules 288.7 and 297.50 require the applicant to demonstrate that "the requested amount of appropriation is necessary and reasonable for the proposed use." Reading these rules in harmony with section 11.134(b)(3)(E) makes clear that showing need is integral to the review process.[299]

This is further supported by ED witness Alexander testimony that the Commission can waive the consistency review.[300] Thus, if the "consistent with" requirement is waived—because, for example, "new, changed, or unaccounted for conditions warrant waiver,"[301]—the appropriation must nevertheless "address water supply need." This need must be demonstrated by credible evidence as an initial inquiry before addressing whether it has done so "in a manner that is consistent with" the state and regional water plan.

Because Rules 288.7 and 297.50 require proof that the requested appropriation is necessary and alternatives have been evaluated as a part of the

[298] Tr. Vol. 2 at 8 (Kiel Cross); Tr. Vol. 7 at 206-207 (Alexander Clarifying).

[299] See also OM Ex. 5 (Rubinstein Deposition) at 61-62 (explaining the process for reviewing water right applications takes for granted that the applicant must demonstrate need for the proposed water supply project).

[300] Tr. Vol. 7 at 207 (Alexander Clarifying).

[301] 30 TAC § 297.41(a)(3)(E); *see also* Tr. Vol. 7 at 206 (Alexander Clarifying)

inquiry under section 11.134(b)(4) (relating to using reasonable diligence to avoid waste and achieve water conservation), these sections are addressed together with Section 11.134(b)(3)(E).

Landowner Protestants' arguments regarding need were raised primarily in the context of whether the requested appropriation is intended for a beneficial use and alternatives. Those arguments are addressed here instead.

1. Alternatives

As noted above, the water conservation plan submitted with an application for new appropriation must evaluate conservation as an alternative to the proposed appropriation.[302] As such, the water conservation plan must include information that "evaluates other feasible alternatives 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."[303] In turn, the Commission considers "whether any practicable alternative to the requested appropriation exists."[304]

a) The City's Alternatives Analysis

The City analyzed alternatives in its Long-Range Water Supply Plan.[305] The plan projected a need for 19.3 MGD, or roughly 21,633 acre-feet per year, in 2070,

[302] 30 TAC § 288.7(a)(2).

[303] 30 TAC § 297.50(b)(3).

[304] 30 TAC § 297.50(a).

[305] WF Ex. 3B (Long-Range Water Supply Plan).

and evaluated 22 potential water supply strategies.[306] Based on factors such as water quantity and quality, reliability, supply independence, and environmental impacts, the City selected ten strategies for further evaluation.[307]

The City then analyzed the remaining strategies for feasibility.[308] The evaluation ranked reuse, additional water conservation, and Lake Ringgold based on their scores on water quantity and quality, reliability, cost, time to implement, environmental impacts, competition for supplies, and other potential hurdles.[309] The application also evaluated alternative water supply strategies that were comparable to Lake Ringgold based on quantity and years of supply.[310] Other strategies, such as modifications to the Lake Kemp operation and/or water rights permit, diversion from the Wichita River, or conjunctive use of surface water and local groundwater, were considered not feasible due to the low quantity of water, lack of reliability during a drought, water quality, and high cost relative to amount of supply.[311] The City asserts that it analyzed all potential feasible water supply strategies before determining that Lake Ringgold was its only feasible option.[312]

[306] WF Ex. 3B (Long-Range Water Supply Plan) at ES-1, 4-2 (Bates 10139, 10175).

[307] WF Ex. 3B (Long-Range Water Supply Plan) at 5-1–5-4 (Bates 10176-10179).

[308] WF Ex. 3B (Long-Range Water Supply Plan) at 5-21 (Bates 10196).

[309] WF Ex. 3B (Long-Range Water Supply Plan) at 5-4 (Bates 10179).

[310] WF Ex. 3B (Long-Range Water Supply Plan) at 3-1 (Bates 7760).

[311] WF Ex. 3 (Kiel Dir.) at 55-57.

[312] WF Ex. 3 (Kiel Dir.) at 68; WF Ex. 3B (Long-Range Water Supply Plan) at 3-1-3-11 (Bates 7760-7770).

During and following the drought of record, the City implemented a major indirect reuse project and additional water conservation measures.[313] With conservation and reuse in the City's water supply portfolio, the Long Range Water Supply Plan projected a need for 9,110 acre-feet per year in 2070.[314]

Although the City's application includes this information, the City and the ED refence the Regional Water Plan for evidence of alternatives. However, the evidence of alternatives must unequivocally come from the information submitted *with the application*.[315] Accordingly, the ALJ reviews the evidence of alternatives within the application before turning to the Regional Water Plan for the consistency review.

b) Challenges to the City's Alternatives Analysis

Landowner Protestants challenge the City's alternatives analysis on several grounds. First, they argue that the City arbitrarily weighted the evaluation factors. Next, they argue that the alternatives analysis failed to properly consider cost.

(i) Evaluation Factors

In its Long-Range Water Supply plan, the City considered ten factors, including water quality, quantity, reliability, and cost, and assigned them different weights.[316] The factors and weights are reproduced below:

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[313] Tr. Vol. 1 at 65 (Schreiber Cross); WF Ex. 3D (Report in Support of Application) 1-14 (Bates 7751) (showing 2020 Conservation and Indirect Reuse Project reducing need from 11,618 to 408 acre-feet per year).

[314] WF Ex. 3D (Report in Support of Application) 1-14 (Bates 7751) (showing Conservation and Indirect Reuse Project reducing 2070 need from 20,320 to 9,110 acre-feet per year).

[315] Tex. Water Code § 11.134(b)(4); 30 TAC §§ 297.50, 288.7.

[316] WF Ex. 3B at 5-4, Table 5-2 (Bates 10179) (showing weighting of factors).

Table 5-2: Weighting Factors for Initial Strategy Evaluation

Criteria	Weighting Factor
Water Quantity	2
Water Quality	1
Reliability	2
Regulatory Requirements	1
Environmental Impacts	1
Potential Cost	5
Time to Implement	1
Development Obstacles	1
Supply Independence	1
Competition for Water Supply	1

As can be seen, cost was given 5 times the weight of seven other factors, and quantity (and reliability) were given twice the weight of seven other factors. Landowner Protestants argue that this weighting arbitrarily favored projects with larger quantities of water.

The City responds that it evaluated all potential feasible water strategies based on the same set of factors and criteria and thus did not skew the analysis in favor of any potential strategy.[317] The City conducted a neutral analysis of potentially feasible strategies based on TWDB's Guidelines for regional water planning.[318]

Based on this record, the ALJ cannot find that the City improperly weighted its selection factors.

[317] WF Ex. 3 (Kiel Dir.) at 50-51, 57.

[318] WF Ex. 3 (Kiel Dir.) at 50-51.

(ii) Cost

Landowner Protestants next argue that the City's alternatives analysis improperly evaluated cost.

ED witness Alexander testified that "cost of the project is not a factor [] that can be considered in ED staff's review of the application under [Texas Water Code] Chapter 11 and TCEQ's water rights rules."[319] She also testified that cost is addressed in the regional planning process.[320] Similarly, the City asserts that "TCEQ does not have the authority to consider costs for a water rights application."[321] Landowner Protestants argue that the ED erred in failing to consider cost.

The ALJ finds no support for a bar to considering cost as it relates to evaluation of practicable and feasible alternatives. The preamble to the 1999 rulemaking for Rule 297.50(b)(3) indicates that costs are a part of feasibility considerations.[322] Moreover, Commission rules establish that the applicant is expected to provide a robust showing that the appropriation sought is necessary and unavoidable: "It shall be the burden of proof of the applicant to demonstrate that *no feasible alternative* to the proposed appropriation exists and that the requested amount of appropriation is necessary and reasonable for the proposed use."[323]

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[319] ED Ex. KA-1 (Alexander Dir.) at 19.

[320] ED KA-1 (Alexander Dir.) at 19.

[321] Wichita Falls Reply Br. at 29.

[322] *See* 24 Tex. Reg. 1177 (Feb. 19, 1999) ("the applicant bears the burden to demonstrate that the applicant has examined practical alternatives to the proposed project to determine whether there exists practical alternatives that are less impacting to the available supply of water and the environment and that are also cost effective to the applicant.").

[323] 30 TAC § 288.7(b) (emphasis added); *see also* 30 TAC §§ 297.50(a), (b).

The City itself considered cost in arriving at its conclusion that Lake Ringgold is the only feasible alternative.[324] Kiel testified that the Long-Range Supply Plan evaluated cost in comparison to other strategies, on a conceptual level, including capital and unit costs.[325] Schreiber testified that cost is an important factor in its feasibility analysis: "The City's obligated to provide the most effective—cost-effective strategy, most feasible strategy for their long-range water supply."[326] The ALJ concludes that consideration of cost is inherently within the scope of reviewing alternatives under Rules 288.7(a) and 297.50(a), (b).

The question next moves to whether cost was appropriately considered. Landowner Protestants argue that the City's alternatives analysis was skewed toward projects that provide more water because it assumed the water supply of 21,633 acre-feet per year shown in the Long-Range Supply Plan,[327] not the 9,110 acre-feet per year need shown in the application, while comparing cost on a per-unit basis.[328]

Additionally, Landowner Protestants suggest that the cost estimates are unreliable because they do not reflect cost increases since the initial estimates were made in 2015. The application reflects an estimated capital cost for Lake Ringgold of

[324] WF Ex. 3B (Long-Range Water Supply Plan) at 5-4 (Bates 10179).

[325] WF Ex. 3 (Kiel Dir.) at 57-58; WF Ex. 3H (summary of strategies).

[326] Tr. Vol. 1 at 106 (Schreiber Cross); see also id. at 108 (cost effective means "minimize the cost per acre-foot, minimize the cost per million gallons.").

[327] WF Ex. 3B (Long-Range Water Supply Plan) at 4-1-4-2 (Bates 10174-10175) (shown as 19.3 MGD).

[328] WF Ex. 3 (Kiel Dir.) at 57; WF Ex. 3H (summary of strategies).

$322 million,[329] which is some $25 million more than the cost in the Long-Range Water Supply Plan of $298 million,[330] on which the City's alternatives analysis was based. Moreover, these projections are based on 2014 dollars, when the 2021 Region B Plan shows a capital cost of $443 million.[331]

The City responds that neither the use of September 2014 costs, or projected supply, skews the cost comparison because, as Kiel testified, the alternatives were compared using the same scale.[332] Moreover, the City has already implemented indirect reuse and water conservation strategies that were less costly than Lake Ringgold and still has a demonstrated need for the project.[333] The City argues that Landowner Protestants have not recommended other feasible alternatives that would prove less costly.[334] Finally, the City notes that an alternatives analysis considers factors other than cost and total quantities of water.[335]

TCA argues that the applicant's alternatives analysis improperly compares alternatives based on assumptions that 100% of the water is used.[336] Instead, the calculation should be made based on the water actually used.[337] The City does not respond to this assertion.

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[329] WF Ex. 2J (Report Supporting Application for Lake Ringgold) at 2-6 (Bates 7758).

[330] WF Ex. 3B (Long-Range Water Supply Plan) at 5-24 (Bates 10199).

[331] WF Ex. 3F (2021 Region B Plan) at ES-15, ES-20 (Bates 16691, 16695).

[332] WF Ex. 3K (Kiel Reb.) at 34-35.

[333] WF Ex. 3 (Kiel Dir.) at 58-59.

[334] Tr. Vol. 6 at 147, 155-156 (Carron Cross).

[335] WF Ex. 3 (Kiel Dir.) at 50-51, 57.

[336] Tr. Vol. 2 at 81 (Kiel Cross).

[337] TCA Initial Br. at 12-13.

The evidence shows that the City considered alternatives based on a projected need for 21,633 acre-feet per year in its Long-Range Water Supply Plan,[338] not the 9,110 acre-feet per year in its application, which may have produced a different result. The evidence further shows that the City analyzed alternatives based on 100% usage assumption even though the City does not expect to use 100% of Lake Ringgold water.[339] Cost and quantity are directly related because the cost was evaluated based on the quantity of water each project would yield.[340] Thus, projects with more quantity will appear less costly on a per unit basis. Finally, the evidence shows that the projected costs are rising, and yet no updated analyses of alternatives was submitted. These factors reflect that the projected costs could be significantly understated, thereby favoring of the Lake Ringgold project as the most feasible and practical alternative. Nevertheless, Landowner Protestants have not identified an alternative would have been selected had these inputs been updated. In short, Landowner Protestants have not shown that these shortcomings would have made a material difference.

c) Conservation

As a part of establishing need for the new appropriation, an applicant is required to demonstrate that "reasonable diligence will be used to avoid waste and achieve water conservation."[341] As such, an applicant is required to submit a water

[338] WF Ex. 3B (Long-Range Water Supply Plan) at 4-1-4-2 (Bates 10174-10175) (shown as 19.3 MGD).

[339] WF Ex. 3K (Kiel Reb.) at 35.

[340] Tr. Vol. 1 at 109-110 (Schreiber Cross)(agreeing that the overall cost of a project was not as important as the unit cost of the water).

[341] Tex. Water Code § 11.134(b)(4).

conservation plan and adopt reasonable water conservation measures.[342] By rule, such conservation plans must, *inter alia*, "evaluate[] conservation as an alternative to the proposed appropriation," and the applicant must demonstrate that no feasible alternative to the proposed appropriation exists and that the requested amount of appropriation is necessary and reasonable for the proposed use.[343] With this, the Commission reviews the water conservation plan to determine: whether any practicable alternative to the requested appropriation exists; whether the requested amount of appropriation is reasonable and necessary for the proposed use; the term and other conditions of the water right; and to ensure that reasonable diligence will be used to avoid waste and achieve water conservation.[344] Based on this information, the Commission shall determine whether to deny or grant, in whole or in part, the requested appropriation.[345]

In support of these requirements, the City submitted its water conservation and drought contingency plans.[346] The City has taken additional measures to conserve water: the City requires 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;[347] the City installed advanced metering infrastructure to

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[342] Tex. Water Code § 11.1271(a). "Conservation" is defined as "the development of water resources," and "those practices, techniques, and technologies that will reduce the consumption of water, reduce the loss or waste of water, improve the efficiency in the use of water, or increase the recycling and reuse of water so that a water supply is made available for future or alternative uses." Tex. Water Code § 11.002(8)(B).

[343] 30 TAC § 288.7(a)(2), (b).

[344] 30 TAC § 297.50(a).

[345] 30 TAC § 297.50(a).

[346] WF Ex. 1 at Bates 7559, 8325-8521 (Water Conservation and Drought Contingency Plans); WF Ex. 2M (2018 Water Conservation and Drought Contingency Plans).

[347] WF Ex. 2R (Potable Water Purchase Contract) at 4, Section 4.1.

better account for water use and potential water loss;[348] the City maintains a comprehensive public education and outreach program to encourage water conservation;[349] the City enacted an ordinance mandating water conservation measures such as time-of-day outdoor watering restrictions, limitations on car washing, and other measures to reduce water consumption, as well as enforcement mechanisms.[350] The water conservation plan includes measures beyond the minimum requirements, as O'Malley witness Nora Mullarkey acknowledged,[351] such as an increasing block rate residential structure, additional restrictions on commercial operations, and an extensive reuse program.[352] The drought contingency plan also addresses applicable requirements for retail and wholesale water suppliers.[353] Kiel testified that such measures are effective.[354] The ED concluded that these plans met TCEQ requirements.[355]

(iii) Conservation Goals

The water conservation plans submitted with the application must include information that supports the applicant's proposed use of water with consideration of the water conservation goals of the water conservation plan.[356]

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[348] WF Ex. 3 (Kiel Dir.) at 73.

[349] WF Ex. 3 (Kiel Dir.) at 73.

[350] WF Ex. 2M (2018 Water Conservation and Drought Contingency Plans) at 161-162 (Bates 3217-3218), 178 (Bates 3234); 30 TAC §§ 288.2(a)(1)(J), .5(H).

[351] Tr. Vol. 5 at 261 (Mullarkey Cross).

[352] WF Ex. 3 (Kiel Dir.) at 73-74.

[353] WF Ex. 2M (2018 Water Conservation and Drought Contingency Plans) at 57-102 (Bates 3113-3158); ED Ex. JA-1 (Allis Dir.) at 8.

[354] Tr. Vol. 1 at 112 (Kiel Cross).

[355] ED Ex. JA-1 (Allis Dir.) at 5-8; ED Ex. JA-4 (Allis memo).

[356] 30 TAC §§ 297.50(b)(1), 288.7(a)(1).

The City's 2018 water conservation plan establishes goals for total per capita usage and residential per capita usage representing a 3.5 percent reduction in total per capita water use and a 4.35 percent reduction in residential per capita water use by 2029:

- The 5-year goal for total per capita consumption is 160 gallons per capita per day (gpcd) by 2024, and the 10-year goal is 155 gpcd by 2029.
- The 5-year goal for residential per capita consumption is 69 gpcd by 2024, and the 10-year goal is 66 gpcd by 2029.[357]

Independently, water providers are required to submit implementation reports, reflecting whether conservation targets have been met and providing an explanation if not and indicating the actual amount of water saved.[358]

Landowner Protestants argue that the City's 2018-2022 implementation reports lack sufficient information to establish that conservation is not an alternative to the proposed appropriation. O'Malley witness Mullarkey testified that deficiencies in these report are such that City has failed to show whether targets are being met or a reliable estimate of actual water saved, as required by Rule 288.30(2).[359] Moreover, she testified that these reports demonstrate that the City is

[357] WF Ex. 1 at 7559; *see also* WF Ex. 2M at 20-22 (Bates 3075-3077) (discussing per capita conservation goals).

[358] 30 TAC § 288.30.

[359] OM Ex. 300 (Mullarkey Dir.) at 10.

not actually implementing its water conservation plan according to the Chapter 288 Rules and that the City's estimate of conservation savings is not reliable.[360]

These arguments are not persuasive. Mullarkey acknowledged that an applicant for new appropriation is not required to submit implementation reports.[361] Under Rule 288.7, evidence of whether conservation is an alternative to the proposed appropriation must come from the conservation plan,[362] not the implementation reports. Moreover, an applicant is not required to show that it is implementing a water conservation plan, only that it has adopted one.[363]

Implementation of a water conservation plan "shall be evidenced by a copy of the ordinance, rule, resolution, or tariff, indicating official adoption of the water conservation plan by the water supplier."[364] Here, the City has adopted its water conservation and drought contingency plans and related ordinance.[365] Furthermore, the Draft Permit contains a condition requiring the City to comply with water conservation plan requirements.[366] The ALJ does not address here whether the information in the conservation plans supports the applicant's proposed use of

[360] OM Ex. 300 (Mullarkey Dir.) at 12.

[361] Tr. Vol. 6 at 15 (Mullarkey Cross).

[362] 30 TAC § 288.7(a)(2).

[363] *See Upper Trinity Reg'l Water Dist. v. Nat'l Wildlife Fed'n*, 514 S.W.3d 855, 869 (Tex. App.—Houston [1st Dist.] 2017)(no pet.) ("[The statute] requires that the applicant have 'implemented a water conservation plan that *will* result in the highest practicable levels of water conservation . . .' The Legislature could have used the term 'is resulting'—but it did not.") (emphasis in original; internal citations omitted).

[364] 30 TAC § 288.5(1)(H).

[365] WF Ex. 2M (2018 Water Conservation and Drought Contingency Plans) at 188 (Bates 3244) (Resolution No. 86-2018).

[366] ED Ex. JA-3 (Draft Permit), Section 6.

water, as that relates whether the proposed appropriation is reasonable and necessary. The ALJ concludes that the City has met its burden of proof that it has formulated and submitted a water conservation plan and adopted reasonable water conservation measures.

d) Conservation as an Alternative

Landowner Protestants argue that the application fails to consider conservation as a water supply strategy. The City's projected annual demand increases from 408 acre-feet per year in 2020 to 9,110 acre-feet per year in 2070, while holding a total water conservation savings of 2,242 acre-feet constant over the same period.[367] The City claims that its conservation efforts have resulted in 108 gpcd consumption.[368] The City claims it has maximized its conservation efforts and cannot further drive down demand.[369] Nevertheless, the City calculated its 2070 demand based on a projected population of 120,838 using 161 gpcd (apparently based on its 2010 per capita usage).[370]

O'Malley witness Mullarkey asserts that a more reliable analysis shows conservation savings increasing over time, rising to between 7,336 and 9,578 acre-feet per year, reducing the City's projected shortage to between 1,774 to 4,016 acre-feet per year in 2070.[371] Mullarkey testified to various best management practices,

[367] WF Ex. 3D at 1-14 (Bates 7751), Table 1.5.

[368] WF Ex. 2O (Schreiber Reb.) at 8.

[369] WF Ex. (Schreiber Dir.) at 28; Tr. Vo. 1 at 111-113 (Schreiber Cross).

[370] WF Ex. 2M (Water Conservation and Drought Contingency Plan) at 22 (Bates 3078); WF Ex. 3D at 1-11, 1-13 (Bates 7748, 7750).

[371] OM Ex. 300 (Mullarkey Dir.) at 23; Tr. Vol. 6 at 53–54 (Mullarkey Redir.).

such as twice-a-week watering, that the City could adopt to improve conservation.[372] She further testified that the application failed to consider, among other savings, an additional annual 2,242 acre-feet savings associated with replacing a transmission line from Lake Kickapoo, or 298 acre-feet per year of savings for wholesale customers.[373] In sum, Landowner Protestants contend, the City failed to consider alternatives that could provide to 1,774 to 4,016 acre-feet per year in 2070.[374]

The City responds that it evaluated and implemented additional water conservation measures and reuse, such as measures for commercial and industrial users (e.g., direct industrial reuse, specified flow rates at car washes and commercial facilities, limits on water served at restaurants, and prohibitions on single-pass, water cooled ice machines).[375] Mullarkey acknowledged that Rule 288.7 does not state that an applicant must evaluate all forms of conservation or direct how applicants evaluate conservation as an alternative.[376]

The City further argues that Landowner Protestants' calculations of water conservation savings are incorrect and do not account for diminishing returns and the potential unreliability of water conservation savings estimates.[377] Kiel testified that Mullarkey's calculations are incorrect, mixing savings estimates from multiple

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[372] O'Malley Ex. 300 (Mullarkey Dir.) at 16-17.

[373] O'Mally Ex. 300 (Mullarkey Dir.) at 20.

[374] WF Ex. 3B (Long-Range Water Supply Plan) at 46-47 (Bates 10176-10177).

[375] WF Ex. 3K (Kiel Reb.) at 6-7; WF Ex. 2M ()2018 Water Conservation and Drought Contingency Plan) at 48-49 (Bates 3104).

[376] Tr. Vol. 6 at 50-52 (Mullarkey Cross).

[377] Tr. Vol. 5 at 255 (Mullarkey Cross) (noting that customer behavior can influence the effectiveness of water conservation measures); OM Ex. 5 (Rubinstein Deposition) at 138 (acknowledging that there is an upper limit to what conservation can yield by way of acre-feet).

sources that are not additive[378] and duplicating saving already accounted for in projected demands.[379] Mullarkey's calculations also include water savings estimated for repair of a line that ultimately did not need repair, so she includes another 2,242 acre-feet annual water conservation savings that cannot be realized.[380] Mullarkey also included wholesale water conservation savings that the City cannot rely on given its contractual obligations.[381] Thus, Landowner Protestants' contention that the "conservation savings could be between 7,336 and 9,578 acre-feet in 2070" overstates that amount of water conservation the City can actually rely on—2,242 acre-feet.[382]

The evidence shows that the City evaluated conservation as an alternative to the requested appropriation. An applicant for a new water right is required to submit a water conservation plan and to adopt "reasonable conservation measures."[383] Pursuant thereto, the applicant is required to evaluate conservation as an alternative to the proposed appropriation.[384] The evidence shows that the applicant submitted a water conservation plan and adopted reasonable conservation measures. There is no credible evidence that Mullarkey's proposed alternatives would yield additional savings. Although some per capita conservation savings beyond the 2,242 acre-feet per year may be reasonably be expected, the Landowner Protestants have not shown

[378] WF Ex. 3K (Kiel Reb.) at 27-29.

[379] WF Ex. 3K (Kiel Reb.) at 27-29.

[380] WF Ex. 3K (Kiel Reb.) at 28.

[381] WF Ex. 3K (Kiel Reb.) at 28.

[382] WF Ex. 3K (Kiel Reb.) at 29.

[383] Tex. Water Code § 11.1271.

[384] 30 TAC § 288.7(a)(2).

that this would be a material amount. The City is required to evaluate conservation as an alternative to the proposed appropriation. The City has done so.

2. Diligence to Avoid Waste and Achieve Water Conservation

The applicant must provide "evidence that reasonable diligence will be used to avoid waste and achieve water conservation."[385] The City argues its water conservation and drought contingency plans establish appropriate measures to avoid waste and achieve water conservation.[386] The City's use of water appropriated under the Draft Permit would be subject to the City's water conservation and drought contingency plans as approved by TCEQ.[387] The City's water reuse program, water loss efforts, time-of-day watering restrictions for outdoor lawn irrigation, and public education program, combined with the other water conservation measures, the City argues, show reasonable diligence to achieve water conservation and to avoid water waste.[388] Kiel concluded that the City's 2018 Water Conservation Plan will result in reasonable levels of water conservation and efficiency achievable within the City's jurisdiction as a retail and wholesale water supplier.[389]

The ED staff determined the City's water conservation and drought contingency plans established that the City will use reasonable diligence to avoid

[385] 30 TAC § 297.50(a).

[386] WF Ex. 2M (2018 Water Conservation and Drought Contingency Plans).

[387] WF Ex. 2M (2018 Water Conservation and Drought Contingency Plans); ED Ex. JA-3 (Draft Permit); WF Ex. 2G (Allis memo); WF Ex. 2P.

[388] WF Ex. 2M (2018 Water Conservation and Drought Contingency Plans).

[389] WF Ex. 3 (Kiel Dir.) at 79-80.

waste and achieve water conservation.[390] The City further argues that the requested authorization to use the proposed appropriation for beneficial uses thus do not constitute waste.[391]

Landowner Protestants argue that the City's conservation plan does not meaningfully measure water conservation goals for its wholesale customers, which amount to 26 percent of the City's current water use.[392] Mullarkey testified that by failing to include a *wholesale* water conservation plan, "the City has not set goals or developed strategies for water savings for" "more than one quarter of its total water supply."[393]

Landowner Protestants argue in reply brief that the application does not provide evidence that reasonable diligence will be used to avoid waste and achieve water conservation because of the mismatch between the application's projected demand (21,831 acre-feet per year in 2027),[394] the goals in the 2018 Water Conservation Plan,[395] and the City's Annual Water Reports to the TWDB, which indicate a conservation goal of less than one-quarter of a percent per year. The ED's witness Allis testified that, generally, anything less than one-half of a percent reduction or greater annually would not constitute diligent conservation planning.[396]

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[390] ED Ex. JA-1 (Allis Dir.) at 6; ED Ex. JA-4 (Water Conservation Review) at 2.

[391] Tex. Water Code § 11.002(4); 30 TAC § 297.43(a).

[392] OM Ex. 300 (Mullarkey Dir.) at 9.

[393] OM Ex. 300 (Mullarkey Dir.) at 8.

[394] WF Ex. 3D (Report Supporting Application) at 1-11 (Bates 7748), 1-13 (Bates 7750).

[395] *See* ED Ex. JA-4 (Allis memo) at 2 (discussing 5- and 10-year goals).

[396] Tr. Vol. 6 at 259-260 (Allis Cross).

The City responds that the application includes a wholesale water conservation plan in the same document as its retail water conservation and drought contingency plans.[397] The City water conservation and drought contingency plans thus satisfy the requirements for wholesale and retail water suppliers, as the ED also concluded.[398] Moreover, the City argues that it is not required to prove that waste has been avoided, only that it will be avoided.[399] The ALJ agrees. The relevant test is not whether an applicant has avoided waste and achieved conservation goals, but whether reasonable diligence *will be* used to avoid waste and achieve water conservation.[400] The City has done this. The water conservation plan submitted by the applicant addresses conservation measures for both retail and wholesale customers. Landowner Protestants have not shown how the City's conservation plans for wholesale customers is inadequate or how a mismatch between the 50-year goals and the 5- and 10-year goals has any bearing on this issue.

The ALJ finds that the City has met its burden of proof to show that its water conservation plan will "ensure that reasonable diligence will be used to avoid waste and achieve water conservation," under Rule 297.50(a).

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[397] WF Ex. 3 (Kiel Dir.) at 71-73; WF Ex. 3K (Kiel Reb.) at 11-12; WF Ex. 2M (2018 Water Conservation and Drought Continency Plan); WF Ex. 2G (Allis Memo); ED Ex. JA-1 (Allis Dir.) at 6; 30 TAC § 288.1(6) & (24) (a drought contingency plan and a water conservation plan "may be contained within another water management document(s).").

[398] WF Ex. 2G (Allis memo); WF Ex. 2M (2018 Water Conservation and Drought Continency Plan).

[399] TAC § 295.9.

[400] Tex. Water Code § 11.134(b)(4); 30 TAC §§ 297.41(a)(4), .50(a), 295.9, 288.7(a)(3).

3. Necessary and Reasonable Appropriation

The City seeks to appropriate up to 65,000 acre-feet per year to meet a projected annual need in 2070 of 9,110 acre-feet.[401] The estimated firm yield of the Lake Ringgold reservoir is 27,060 acre-feet per year.[402]

The City asserts that the requested appropriation is tied to the projected demands of its customers as well as operational efficiencies for its system, as Albright testified.[403] Kiel testified that "[t]he State does not require an Applicant to demonstrate a need for the full amount requested; only that the water be put to beneficial use."[404] ED witness Alexander testified that Lake Ringgold "would supply additional water supply during drought times since there's a new reservoir with some storage."[405] Alexander opined that the proposed Lake Ringgold project is viable for the intended purposes.[406] According to the City, Lake Ringgold water will be used to serve the City's wholesale and retail customers, and such use is necessary to address those customer demands.[407]

[401] WF Ex. 1 at Bates 7721-7722; WF Ex. 3 (Kiel Dir.) at 36, 40, 42, 54; WF Ex. 3D (Report Supporting Application) at 1-12 (Bates 7749), 1-14 (Bates 7751),

[402] WF Ex. 4 (Albright Dir.) at 28 (suggesting it may be as low as 23,450 when accounting for drafts after 1998).

[403] WF Ex. 4 (Albright Dir.) at 29-30.

[404] WF Ex. 3K (Kiel Reb.) at 26; *see also* Vol. 2 at 8, 31 (Kiel Cross).

[405] Tr. Vol. 7 at 170 (Alexander Cross).

[406] Tr. Vol 7 at 148 (Alexander Cross).

[407] WF Ex. 2 at (Schneider Dir.) 16-17.

Landowner Protestants challenge the City's projected water supply need on grounds that it improperly includes a 20% reserve supply, its population projections are unreliable, and the reservoir size is too large.

(iv) Reserve

In calculating its long-term water supply need, the City subtracted its projected demand from its projected supply. The City added 20% both to the forecasted demand for retail customers and to its reserve supply.[408] Kiel explained that the "safe supply" demand was determined by adding 20% to the projected municipal and manufacturing demands.[409] The 20% added to retail demand results in a total increase in demand for the City of approximately 11%.[410] This is to account for a potential new drought of record, unexpected growth, new customers, or unforeseen events that may affect water availability.[411]

Landowner Protestants do not dispute the 20% safe supply demand. Rather they argue that the 20% added to the reserve supply is arbitrary and unsubstantiated. The Long-Range Water Supply Plan explains this assumption as follows: "With City staff input, it was decided to use the calculated safe supplies assuming a 20 percent reserve. (Note: This assumes there is at least 20 percent of the reservoir capacity remaining in the lake at the end of the critical drought.)."[412] Thus, the reserve supply

[408] WF Ex. 3B at 4-1 (Bates 10174); WF Ex. 3K (Kiel Reb.) at 18; OM Ex. 400 (Carron Dir.) at 14.

[409] WF Ex. 3 (Kiel Dir.) at 36.

[410] WF Ex. 3K (Kiel Reb.) at 17.

[411] WF Ex. 3K (Kiel Reb.) at 18.

[412] WF Ex. 3B at 7-1 (Bates 10235).

assumes 20% of the storage in its existing water supplies (Lakes Kickapoo, Arrowhead, and Kemp) remains at the end of the worst drought of record.[413]

The City's report stated, "The policy of reserving a minimum of 20% storage in the City's reservoirs creates a buffer that would be needed if a drought worse than the most recent drought were to occur, if evaporation were to increase due to climate change or demand increases more than anticipated."[414] City witness Albright provided similar testimony, but could not identify any analysis or calculation to support it.[415] Kiel also conceded that there was no analysis to support 20 percent being the appropriate amount, and that the operational issues experienced by the City could not be quantified to support the 20% reserve capacity.[416]

Landowner Protestants argue that the 20% reserve is without basis and artificially inflates the City's projected need. Landowner Protestants further argue that the City gave inconsistent justifications for the purpose of the 20% reserve. While attributable to operational considerations by Kiel, elsewhere the 20% reserve is referred to as a safe supply factor that is "is more conservative than a two-year safe yield calculation and reflects the reality Wichita Falls faced during the drought from 2010-2015."[417]

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[413] WF Ex. 4 (Albright Dir.) at 27; *see also* WF Ex. 3 (Kiel Dir.) at 36, note 4; WF Ex. 3D (Report Supporting Application for Water Right, Appendix C) at Bates 7819, note a. ("All supplies assume a 20% minimum in the reservoir.").

[414] WF Ex. 3D (Report Supporting Application) at 91 (Bates 7819); WF Ex 3K (Kiel Reb.) at 4 (similar testimony).

[415] Tr. Vol. 2 at 192-196 (Albright Cross).

[416] Tr. Vol. 2 at 57-60, 64-66 (Kiel Cross).

[417] WF Ex. 3K (Kiel Reb.) at 36; WF Ex. 3D (Report Supporting Application) at Bates 7818.

City witness Albright defended the 20% reserve by reference to other water suppliers that use a reserve for their reservoirs, including the Tarrant Regional Water District (TRWD) for Cedar Creek Reservoir (150,400 acre-feet), Lake Arlington (164,00 acre-feet), and Richland-Chambers Reservoir (7,200 acre feet)—all between 18-26%; Lower Colorado River Authority's minimum reserve for Lakes Buchanan and Travis of 600,000 acre-feet—averaging 30%.[418] Carron testified that it is reasonable to have reserve storage and water suppliers commonly set aside two years of storage as a drought response buffer.[419] However, he testified that the 20% is arbitrary because it is not tied to a volume of water in the reservoir that represents the demand of water users.[420] The 600 acre-feet level, or 30%, for LCRA is the trigger to curtail uses from firm water supplies and tied to ten months of supply.[421]

Similarly, TCA argues that the reserve for the TRWD reservoirs represents a volume equal to one year of "safe yield,"[422] which Albright improperly calculated as a percentage of storage.[423] With respect to the LCRA reservoirs, TCA distinguishes these lakes as operated as a system under a complicated Water Management Plan to supply "firm water" and "interruptible water."[424]

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[418] WF Ex. 4G (Albright Reb.) at 17-18.

[419] Tr. Vol. 6 at 180 (Carron Redir.).

[420] *See* Tr. Vol. 6 at 181-182 (Carron Redir.).

[421] Tr. Vol. 6 at 181-182 (Carron Redir.).

[422] WF Ex. 3B (Long-Range Water Supply Plan) at 2-15 (Bates 10161)

[423] WF Ex. 4G (Albright Reb.) at 18.

[424] WF Ex. 13 (Lakes Buchanan and Travis Water Management and Drought Contingency Plan) at ES-1 ("The Water Management Plan (WMP), which is subject to review and approval by TCEQ, is LCRA's required reservoir operations plan and provides the framework by which LCRA implements this requirement and sets forth the procedures by which LCRA makes water available from these lakes to help meet "firm" water customer needs, downstream "interruptible" agricultural demands, and environmental flow needs of the lower Colorado River and Matagorda Bay within LCRA's service area."). *See also Id.* at ES-4 (defining interruptible stored water).

The City responds that TRWD uses a 23.4% reserve for Cedar Creek reservoir,[425] the LCRA, a client of Carron's, uses a safety factor of 600,000 acre-feet, or about 30% of its collective capacity in Lakes Buchanan and Travis.[426] Albright also gave examples of inactive storage at or above 20%, intended for diversion only during emergency drought.[427] Carron agreed that LCRA's 600,000 acre-feet of storage is an appropriate amount given that LCRA's total annual demands are between 7- and 800,000 acre feet per year.[428] Carron also agreed that safety factors are prudent water planning and could not name a single client that he has ever recommended not using a reserve.[429] Carron further agreed that the TCEQ does not mandate a safe yield in the operation of reservoirs and that TCEQ does not consider operation in reviewing water right applications.[430]

Thus, the City argues, its 20% reserve is consistent with precedent, and the amount of a reserve supply, or even the existence of operational reserve, is not considered by TCEQ in evaluating a water rights application.[431]

Although a reserve is consistent with prudent water planning, the 20% added to safe supply demand already addresses a buffer against a drought worse than the

[425] Tr. Vol. 4 at 53-55 (Bezanson Cross).

[426] Tr. Vol. 6 at 134-137 (Carron Cross); *see* WF Ex. 13 at ES-6 (.pdf page 14).

[427] WF Ex. 4G (Albright Reb.) at 17-18; WF 4 (Albright Dir.) at 27.

[428] Tr. Vol. 6 at 135 (Carron Cross).

[429] Tr. Vol. 6 at 125, 139 (Carron Cross).

[430] Tr. Vol. 6 at 139-140 (Carron Cross).

[431] Tr. Vol. 7 at 186 (Alexander Cross).

drought of record. The additional 20% to the reserve supply is not supported by analysis, not tied to a volume of water that represents the demand of water users, or operational issues. Accordingly, the ALJ finds that the 20% reserve is unsupported and inflated the City's projected need.

(v) Population Projections

One driver to the City's projected demand is population growth.[432] The applicant based its projected population growth on the 2016 Region B Plan—the most recent population projections at the time of the application.[433]

Since 1960, the City's population has hovered right around 100,000.[434] Beginning in 2011, the City experienced a population decline, when the population fell from approximately 104,000 in 2010 to a low of 100,599 in 2020, and has not yet recovered.[435] Nevertheless, in the Report Supporting the Application, the City projected a population rising to 120,000 in 2070.[436] In June 2023, the Region B water planning group revised the population projections to address a 2% undercount in the census data from the U.S. Census, correcting what appeared to be a continued population decline.[437] However, Kiel admitted that the City was experiencing a decline in population before the City imposed its drought contingency measures and

[432] WF Ex. 3G (population projections).

[433] WF Ex. 3 (Kiel Dir.) at 26-28; WF Ex. 3G (population projections).

[434] WF Ex. 3D (Report Supporting Application) at 1-11 (Bates 7748).

[435] WF Ex. 3K (Kiel Reb.) at 23.

[436] WF Ex. 3D (Report Supporting Application) at 1-12 (Bates 7747).

[437] Tr. Vol. 6 at 194-97 (Carron Redir.); WF Ex. 14 (Regional Water Planning Group, May 15, 2023, Technical Advisory Committee Meeting); Tr. Vol. 2 at 23 (Kiel Cross). WF Ex. 3K (Kiel Reb.) at 21-22.

that the Texas Demographic Center shows a decline in population in Region B, but attributed this to defects in the 2020 Census.[438]

Landowner Protestants argue that the City's population has been stagnant for decades and the City's population projections inflate its projected need. O'Malley witness Carron testified that census data show a continued decline in population for the Wichita Falls service area.[439] Kiel testified that Carron's population data were not approved by Region B Planning Group; she provided the approved updated numbers.[440]

The corrected population figure provided by Kiel shows that the population of Wichita Falls will increase by 2,000 every decade until reaching 108,280 in 2070.[441] Therefore, the evidence shows an increase in population, but that increase is not robust. Importantly, the City did not update its proposed demand calculations in light of the more recent population projections. Given that the updated population projection is far closer to the City's pre-2011 population of approximately 104,000 than the original projected 120,000, the ALJ finds the difference material. As noted elsewhere, Kiel testified that the main driver of the projected demand is municipal uses, which depend on population growth. The ALJ concludes that the population projections do not support the projected need of 9,110 acre-feet per year.

[438] Tr. Vol. 2 at 16 (Kiel Cross); WF Ex. 3K (Kiel Reb.) at 22.

[439] OM Ex. 400 (Carron Dir.) at 11-12; OM Ex. 403 at 1.

[440] WF Ex. 3K (Kiel Reb.) at 20-21; WF Ex. 3N; *see also* OM Ex. 3 (identical).

[441] WF Ex. 3N.

(vi) Reservoir Size

The Lake Ringgold reservoir has been considered as a water supply strategy for the City since the 1950s,[442] and its size was determined in the 1980s or earlier and has not changed since that time.[443]

Kiel testified that the City has not demonstrated a need for the full appropriation amount because the TCEQ does not require it to.[444] She further admitted that need does not inform the size of the proposed reservoir,[445] and that neither the project size nor the request to divert 65,000 acre-feet per year would change if need were reduced by, say, 4,000 acre-feet per year.[446] Similarly, the ED did not consider whether a smaller reservoir would meet the City's needs.[447]

The City contends that Commission rules expressly allow an appropriation above the firm yield to optimize a water supply system, such as Lake Kickapoo and Arrowhead in the Little Wichita watershed.[448] Alexander testified that the City requested an amount above the firm yield, so that "when water is spilling from Kickapoo and Arrowhead, that [] water can be captured by the City downstream,

[442] OM Ex. 5 (Rubinstein Deposition) at 114; WF Ex. 3F (Region B 2021 Final Plan, Ch. 2) at 5-43 (Bates 16840).

[443] Tr. Vol. 2 at 158 (Albright Cross); *see also* WF Ex. 3F (Region B 2021 Final Plan, Ch. 2) at 5-42 (Bates 16839); Tr. Vol. 1 at 159, 171-172 (Kiel Cross).

[444] Tr. Vol. 2 at 31-32, 97 (Kiel Cross).

[445] Tr. Vol. 1 at 195 (Kiel Cross).

[446] Tr. Vol. 1 at 195-196 (Kiel Cross).

[447] Tr. Vol. 6 at 262 (Allis Cross); Tr. Vol. 7 at 150-152 (Alexander Cross).

[448] Tr. Vol. 7 at 148 (Alexander Cross); 30 TAC § 297.42(d).

which is, you know, another aspect to the viability determination."[449] The City further contends that its request is to appropriate *up to* 65,000 acre-feet per year from Lake Ringgold to allow it to operate its system and maximize the use of the watershed (an operational benefit), because 65,000 acre-feet of water is not available every single year.

O'Malley witness Carron testified that the proposed Lake Ringgold reservoir is significantly oversized when weighed against the City's 2070 projected needs.[450] Landowner Protestants also challenge the City's alleged operational efficiencies.

The City argues that it is not required to demonstrate that it needs a full 65,000 acre-feet per year at the time of the application. The estimated firm yield of Lake Ringgold is close to the deficit of 19,124 acre-feet per year identified in the 2016 Region B Water Plan,[451] which the City argues should be used rather than the 10,864 acre-foot shortage from the 2021 Region B Regional Water Plan. Albright testified that "[s]izing the reservoir just to meet a specific projected demand is contrary to established water supply planning approaches."[452]

As noted elsewhere, Kiel testified that "there will be times when the full supply (or capacity) is not used."[453] However, because the City has not yet

[449] Tr. Vol 7 at 148-149 (Alexander Cross).

[450] OM Ex. 401 (Carron Dir.) at 6; OM Ex. 404.

[451] WF Ex. 3 (Kiel Dir.) at 34; WF Ex. 3E (2016 Region B Plan) at 5-47 (Bates at 15626) (2016 Region B Regional Water Plan); WF Ex. 3F (2021 Region B Plan) at 5-46 (Bates 16843).

[452] Tr. Vol. 2 at 157 (Albright Cross); WF. Ex. 4G (Albright Reb.) at 4 (same).

[453] WF Ex. 3K (Kiel Reb.) at 35; Tr. Vol. 2 at 81 (Kiel Cross).

developed an operational plan, Kiel could not say whether there will be times when the Ringgold project is not used at all.[454]

It is undisputed that the City has failed to demonstrate a need for the firm yield of 27,060 acre-feet. Kiel admitted that the City has not demonstrated a need for the firm yield.[455] Moreover, in a 2019 email titled Water Supply Strategy, the City Manager, Darron Leiker,[456] made a striking admission that the firm yield of Lake Ringgold was "obviously more water than is needed by the City."[457] Indeed, this amount of firm yield posed an obstacle to the federal CWA section 404 processing. The email states as follows:

- The current Regional Water Plan for the City of WF indicates the city *could* have a deficit of approximately 11,000 acft by the year 2030, based on the previous drought of record. It is important to note at this point, this deficit would only come into play if the city and the region were to experience another drought of record. If there are normal climatic conditions, or if a drought of less severity were to occur, the city could experience varying degrees of water shortages, most of which would be offset through conservation methods.

- The yield of Ringgold is estimated, based on the Water Availability Model (WAM), to yield about 27,000 acft per year. This is about the size of Lake Arrowhead. This is obviously more water than is needed by the City, and therefore it is likely the City would need a partner that can demonstrate additional demand, in order to be eligible for the 404 permit.[458]

[454] Tr. Vol. 2 at 81 (Kiel Cross).

[455] Vol. 2 at 97 (Kiel Cross).

[456] WF Ex. 2 (Schreiber Dir.) at 10.

[457] OM Ex. 4 (2019 email).

[458] OM Ex. 4 (emphasis original).

The ALJ finds that Lake Ringgold is oversized and would result in a firm yield that far exceeds the City's projected demand of 9,110 acre-feet per year. The record shows that the size and plan of Lake Ringgold project was not narrowly tailored to meet the City's projected need but rather a project conceived during the Eisenhower administration resurrected to address a potential shortage during a drought of record. A general permission to appropriate above firm yield,[459] does not establish that the size of the proposed Lake Ringgold is appropriate.

(vii) Analysis of Need

Although Commission rules allow an appropriation above the firm yield for special projects,[460] nothing relieves an applicant of the clear requirement that applicant show need: The Commission "shall grant the application only if" "*the proposed appropriation*" "addresses water supply need."[461] "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."[462] This requirement cannot be overlooked.[463] "[T]he right to use state water may be appropriated only as expressly authorized by law."[464]

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[459] 30 TAC § 297.42(d).

[460] 30 TAC § 297.42(d).

[461] Tex. Water Code § 11.134(b)(3)(E) (emphasis added).

[462] 30 TAC §§ 297.50(b)(3), 288.7(b) (similar) (emphasis added).

[463] *Rodriguez v. Serv. Lloyds Ins. Co.*, 997 S.W.2d 248, 255 (Tex. 1999) ("If the Commission does not follow the clear, unambiguous language of its own regulation, we reverse its action as arbitrary and capricious.").

[464] Tex. Water Code § 11.0235(a).

The ALJ found the 20% reserve unreasonable and that the projected population growth does not support the City's projected demand of 9,110 acre-feet per year. However, even if the City's projected need of 9,110 acre-feet per year were reliable, there is no evidence that the requested amount of appropriation—65,000 acre-feet per year—is necessary and reasonable. The City has not shown it needs the 55,000 acre-feet per year—the difference between the projected need and the requested amount of appropriation—for operational efficiencies alone. The ALJ finds that the requested amount of the proposed appropriation does not address a water supply need, and therefore is neither necessary nor reasonable.

4. Consistency

Having addressed the water supply need based on the application, the question next turns to whether the City did so in a manner that is consistent with state and regional water plans.

As noted above, ED witness Allis performed this review and determined that "the application is consistent with the 2016 Region B Water Plan and the 2017 State Water Plan."[465] Allis observed the projected population growth and need for an additional annual 9,977 acre-feet of safe supply by 2060, as reflected in the City's water conservation plan.[466] The memo then makes the following statement regarding consistency with state and regional water plans:

> The construction of Lake Ringgold is included as a water management strategy for the City in the 2016 Region B Water Plan. This strategy will

[465] ED-JA Ex. 4 (Allis Memo); Tr. Vol. 7 at 16 (Allis Cross).

[466] ED Ex. JA-4 (Allis interoffice memo) at 3-4.

> increase surface water supplies available for cities, industry, and agriculture in Region B with an additional 18,600 acre-feet per year of supply, in 2040 when Lake Ringgold is completed.
>
> As such, the application is consistent with the 2016 Region B Water Plan and the 2017 State Water Plan.[467]

ED witness Allis testified that she determined that Lake Ringgold is consistent with the state and regional water plans because "[t]he Lake Ringgold project in the application is listed as a water management strategy in the 2016 Region B Water Plan and the 2017 State Water Plan."[468]

City witness Kiel testified that 2016 Region B Water Plan shows a projected firm demand need of 15,045 acre-feet per year, and a corresponding safe supply need of 19,124 acre-feet per year, by 2070.[469] However, since the application was filed and the ED's review, Region B's 2021 Regional Water Plan was developed, where these projections drop to a firm demand need of 6,961 acre-feet per year and a safe supply need of 10,864 acre-feet per year by 2070.[470] The City's Report Supporting the Application projects safe supply need of 20,320 acre-feet per year in 2070, which drops to 9,110 acre-feet per year after the indirect reuse project and water conservation are implemented.[471]

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[467] ED Ex. JA-4 (Allis interoffice memo) at 4.

[468] ED Ex. JA-1 (Allis Dir.) at 8; Tr. Vol. 7 at 16 (Allis Cross); *see also* Tr. Vol. 7 (Alexander Cross) at 16-17.

[469] WF Ex. 3 (Kiel Dir.) at 34.

[470] WF Ex. 3 (Kiel Dir.) at 34.

[471] WF Ex. 3 (Kiel Dir.) at 34.

No party disputes that the Lake Ringgold reservoir appears in the 2016 and 2021 Region B Water Plans and the 2017 and 2022 State Water Plans as one of the water supply strategies for the City of Wichita Falls.[472] Lake Ringgold appears in the 2016 regional plan as follows:[473]

Table ES-9

Recommended Water Management Strategies for Wichita Falls

-Values in Acre-Feet per Year-

Recommended Strategies	Capital Cost	2020	2030	2040	2050	2060	2070
Water Conservation	$36,656,000	4,484	4,484	4,484	4,484	4,484	4,484
Indirect Reuse	$36,400,000	11,210	11,210	11,210	11,210	11,210	11,210
Local Seymour Aquifer	$19,674,000	2,242	2,242	2,242	2,242	2,242	2,242
Wichita River Supply	$11,230,000	2,242	2,242	2,242	2,242	2,242	2,242
Lake Ringgold	$330,500,000			18,600	18,600	18,600	18,600
Precipitation Enhancement		1,000	1,000	1,000	1,000	1,000	1,000
Total	**$434,460,000**	**21,178**	**21,178**	**39,778**	**39,778**	**39,778**	**39,778**

In the 2017 state water plan, Lake Ringgold appears as a dot on a map of Texas.[474]

Since declaring the application technically complete, a new regional plan was approved in 2021 and a new state plan approved in 2022.[475] The City argues that it has met the requirement under section 11.134(b)(3)(E) because Lake Ringgold was included in the 2016 Region B Water Plan and the 2017 State Water Plan and has remained included in the current 2021 Region B Water Plan and the 2022 State

[472] WF Ex. 3E (2016 Region B Water Plan) at ES-15 (Bates 15476, pdf page 38), 5-47 (Bates 15626; pdf page 188); WF Ex. 3F (2021 Region B Water Plan) at ES-16 (Bates 16691), 5-46 (Bates 16843); WF Ex. 3I (2017 State Water Plan) at 95 (Bates 39747); WF Ex. 3J (2022 State Water Plan) at 108 (Bates 39913).

[473] WF Ex. 3E (2016 Region B Water Plan) at ES-15 (Bates 15476), 5-47 (Bates 15626).

[474] WF Ex. 3I (2017 State Water Plan) at 95 (Bates 39747).

[475] WR Ex. 3F (2021 Regional Plan); WF Ex. 3J (2022 State Water Plan).

Water Plan.[476] Lake Ringgold has been an identified water supply strategy for the City since the 1950s.[477] The City argues that under a plain language reading of "consistent with,"[478] it has met its burden of proof.

The City and the ED argue that review of the application is limited to information available at the time the application was filed. Landowner Protestants argue that more recent plans should be used. They argue that the statute is silent on the matter and that precedent favors using more current regional plans over outdated plans in place at the time the application was filed.[479] Landowner Protestants argue that the 2021 regional plan should be considered. The ALJ agrees.

Neither the ED nor the City cite to any authority for limiting a review of the application to information available at the time of filing. While it makes sense for the ED to conduct its review based on information available at the time, the procedural history shows that it may take years before that information can be challenged in a contested case hearing. The 2021 Region B Plan accounts for technological advances (such as the City's the implementation of its indirect potable reuse project, discussed above), changes in population projections, and water supply projections.[480] These

[476] WF Ex. 3F (2021 Region B Plan) at 5-46 (Bates 16843); WF Ex. 3E (2016 Region B Plan) at 5-47 (Bates 15626); WF Ex. 3I (2017 State Water Plan) at 95 (Bates 39747); WF Ex. 3J (2022 State Water Plan) at 108 (Bates 39913).

[477] WF Ex. 2 (Schreiber Dir.) at 23.

[478] Citing *Black's Law Dictionary* at 381 (Revised, 4th ed. 1968). *See also* Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/consistent (last visited Sept. 27, 2023) (defining "consistent" as: "1: a: marked by harmony, regularity, or steady continuity: free from variation or contradiction").

[479] *Application of Upper Trinity Regional Water District for Water Use Permit No. 5821*, TCEQ Docket No. 2012-0065-WR, Proposal for Decision at 62 (June 25, 2013) (available at 2013 WL 3367180).

[480] WF Ex. 3F (2021 Region B Plan); *see also* WF Ex. 3 (Kiel Dir.) at 36 (summarizing differences between 2016 and 2021 regional water plans).

differences are material. The City's projected need has fallen by nearly half—from 19,124 acre-feet per year to 10,864 acre-feet per year—between the 2016 and the 2021 regional plans.[481] There is no basis to assume that information available when the application was filed is more reliable.

Landowner Protestants argue that the application does not address a water supply need in a manner consistent with those plans because there is not a water need that approaches 65,000 acre-feet per year for the City of Wichita Falls or even all of Region B, and the application is inconsistent with environmental protections in the Region B Plans. The ALJ does not further address arguments regarding environmental protections, because the relevant inquiry here relates to water supply need.

Landowner Protestants argue that a consistency review requires more than determining whether a water management strategy is listed under the plans. The ALJ agrees. Unlike section 11.134(c), which requires only the Commission to determine whether a regional water plan was submitted, section 11.134(b)(3)(E) requires the proposed appropriation to "addresses a water supply need in a manner that is consistent with the state water plan and the relevant approved regional water plan for any area in which the proposed appropriation is located." As such, the ED's review would have satisfied the requirements of section 11.134(c) but not section 11.134(b)(3)(E). That section necessarily requires an examination of the need for the proposed appropriation relative to the need shown in the state and regional water plans.

[481] WF Ex. 3E (2016 Region B Plan) at 5-47 (Bates 15626); WF Ex. 3F (2021 Region B Plan) at 5-46 (Bates 16843).

Landowner Protestants argue that, irrespective of which year's plan is used, the Region B Water Plans do not show a need for 65,000 acre-feet of water per year in the City's service area of Archer, Clay, and Wichita counties.[482] The 2021 Region B Plan shows that these three counties will need 35,906 acre-feet per year in 2070,[483] a decrease from the 41,530 acre-feet per year of estimated shortage in the 2016 Plan,[484] and even adding Young County's need to account for the very small portion of Young County in the City's service area,[485] would bring the 2070 need to between 35,962 and 41,535 acre-feet per year,[486] nearly 30,000 acre-feet per year less than what the City requests. The estimated shortage in the entire Region B is only 36,114 acre-feet per year in 2070.[487] Even these projections, Landowner Protestants argue, are inflated due to the 20% safe supply factor.[488]

The ALJ agrees. As noted above, the City has failed to demonstrate a need for requested amount of appropriation—namely, 65,000 acre-feet per year—and therefore, the requested amount is not consistent with the state and regional water plans, which show a need for 10,864 acre-feet per year in the 2021 regional plan.[489]

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[482] WF Ex. 2J at Bates 8322; ED Ex. JA-3 (Draft Permit) at 2; WF Ex. 2 (Schreiber Dir.) at 8.

[483] WF Ex. 3F (2021 Region B Plan) at 31 (Table ES-7).

[484] WF Ex. 3E (2016 Region B Plan) at 32 (Table ES-5).

[485] Tr. Vol. 1 at 29 (Schreiber Cross).

[486] WF Ex. 3E (2016 Region B Plan) at 32 (Table ES-5); WF Ex. 3F (2021 Region B Plan) at 31, Table ES-7.

[487] WF Ex. 3F (2021 Region B Plan) atES-9 (Bates 16684), Table ES-6.

[488] WF Ex. 3F (2021 Region B Plan) at ES-11 (Bates 16686); see also ED-JA-1 (Allis Dir.) at 10 ("Both the 2016 and 2021 Region B Water Plans evaluate future needs based on safe supply, which is identified as the projected demands plus 20% of the projected demands.").

[489] WF Ex. 3E (2016 Region B Plan) at 5-47 (Bates at 15626); WF Ex. 3F (2021 Region B Plan) at 5-46 (Bates 16843).

Although this amount is arguably consistent with the 9,110 acre feet shown in the Report Supporting the Application, that is not the amount the applicant is requesting. Accordingly, the ALJ finds that the applicant has failed to meet its burden of proof under Water Code section 11.134(b)(3)(E).

G. DAM SAFETY

An applicant for a water rights permit involving a dam is required to submit: (1) a conceptual design of the construction for a proposed dam and appurtenant structures; and (2) the geotechnical, hydrologic, and hydraulic reports for the proposed site, if the reports have been completed.[490] The ED "shall provide a technical review of these documents."[491] The ED is then to classify all proposed dams based on size (small, intermediate, or large) and downstream hazard (low, significant, or high).[492] The ED "shall not issue approval of final construction plans and specifications" of the dam "until a water rights permit . . . is issued."[493]

Additionally, an application to appropriate state water must state the time within which the proposed construction is to begin.[494] If the applicant is unable to commence construction within the timeframe required, the applicant may apply for

[490] 30 TAC § 299.3(b)(1)-(2) (requiring an "owner" of the dam to submit the information with the application).

[491] 30 TAC § 299.3(b)(4).

[492] 30 TAC §§ 299.12, .13, .14.

[493] 30 TAC § 299.22(a)(2).

[494] Tex. Water Code § 11.124(a)(6); 30 TAC § 297.51.

an extension.[495] Here, the Draft Permit requires the City to begin construction of the dam and reservoir within two years after the permit is issued.[496]

Landowner Protestants do not dispute that the applicant provided the required information but argue that the ED staff's review is incomplete. Specifically, they argue that the ED failed to review the proposed dam or engineering documents,[497] improperly concluded that the "structure will be adequate to meet dam safety rules,"[498] and failed to classify the proposed Lake Ringgold reservoir dam, though the dam is likely a high-hazard dam.[499] Landowner Protestants further argue that there is no basis to include a special condition that the dam be constructed within two years when that timeline is not realistic.[500] Clay County makes similar arguments.

The evidence shows that the City submitted all required documentation. The Commission rules do not specify the nature and extent of the ED's required review. The evidence shows that the ED reviewed the documentation with sufficient care to acknowledge that the dam is high hazard, conclude that the conceptual plan showed that the structure will be adequate to meet dam safety rules, and recommend time limitations. Because the ED accepted that the dam is high hazard, it is reasonable to

[495] 30 TAC § 295.72.

[496] WF Ex. 1 at Bate 7548; ED-JA-3 (Draft Permit) at 5.

[497] ED Ex. JC-3 (Dam Safety Memo) at 1.

[498] *See* ED Ex. JC-3 (Dam Safety Memo) at 1.

[499] Tr. Vol. 1 at 141 (Schreiber Cross); Tr. Vol. 7 at 73 (Cosgrove Cross).

[500] ED Ex. JC-3 (Dam Safety Memo) at 2.

infer that the ED "provide[d] a technical review of these documents."[501] As the final approval will not occur until after the water right is approved, it is also reasonable that the ED's review at this stage may be cursory. The ALJ concludes that the applicant has met its burden of proof with respect to dam safety.

H. ADMINISTRATIVE REQUIREMENTS

Landowner Protestants argue that the application fails to meet certain administrative requirements under Rules 295.6 and 295.8. They also argue that the Draft Permit fails to include a realistic deadline to begin construction under Texas Water Code section 11.135(b)(7).

1. Method of Diversion

Landowner Protestants argue that the application is administratively deficient because it fails to describe the method of diversion in terms of portable pump, stationary pump, or gravity flow, as required by Rule 295.6.[502]

The City responds that it has stated whether the water would be diverted using a "portable pump, stationary pump, or gravity flow," as required by Rule 295.6. The application states, "[t]he proposed project would include construction of the Lake Ringgold dam, intake pump station and a transmission system to move the water to the City. The location of the pump station and pipeline

[501] 30 TAC § 299.3(b)(4).

[502] WF Ex. 1 at Bates 7704 (Ringgold diversion), Bates 7710-7711 (Arrowhead existing diversion and proposed diversion).

has not been determined."[503] The evidence shows that the application complies with the requirement to state the method of diversion, as required by Rule 295.6.

2. Location of Diversion Points

Landowner Protestants further argue that the application fails to state the location of point(s) of diversion or show these locations on the application maps with reference to a corner of an original land survey and/or other survey point of record, giving both course and distance, as required by Rule 295.7. The application only provides that the point of diversion from Lake Ringgold will be "on the perimeter of the proposed Lake Ringgold."[504] Landowner Protestants argue that this is not a harmless error because the pipeline(s) and other necessary infrastructure have the potential to cause adverse impacts to private properties and the natural environment. Without identification of the locations of the diversion(s), the potential for those adverse impacts have not been assessed and potential affected persons.

The City responds that it provided the diversion location on a map as required by Rule 295.7. The application contains a request to divert from the perimeter of Lake Ringgold at one or more points at a maximum combined diversion rate of 62,770 gallons per minute, and a map of the diversion point.[505]

On this record, the ALJ concludes that the applicant has satisfied the requirements listed in Rules 295.7.

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[503] WF Ex. 1 at Bates 7753.

[504] WF Ex. 1 at Bates 7704 (Ringgold diversion).

[505] WF Ex. 1 at Bates 7704, 7753, 7756.

3. Time Within Which Construction Must Begin

Texas Water Code section 11.135(b)(7) requires that water right permits must contain "the time within which construction or work must begin and the time within which it must be completed."

Landowner Protestants argue that the Draft Permit's requirement that construction commence within two years of issuance of this permit and be completed within seven years of issuance of this permit, is unrealistic given the length of time to complete the CWA section 404 permitting process.[506]

Both the City and the ED note that including the time within which construction must begin meets the requirements of Texas Water Code section 11.135(b)(7). The City further notes that the deadline to commence construction is commonly extended under Rule 295.72 and does not render an application or Draft Permit deficient. The ALJ agrees. Whether the two-year deadline is realistic or not, the Draft Permit includes a deadline to begin construction and when it must be completed, and therefore meets the requirements of Texas Water Code section 11.135(b)(7).

I. REQUIREMENTS FOR BED AND BANKS AUTHORIZATION

The City requests the right to transfer 65,000 acre-feet of water per year from the Ringgold Reservoir to Lake Arrowhead under a bed and banks authorization

[506] Tr. Vol. 1 at 165-167 (Kiel); Tr. Vol. 2 at 33:2-15 (Kiel Cross); Tr. Vol. 3 at 202–205 (Votaw Cross); Tr. Vol. 7 at 114 (Coonrod Cross).

under Texas Water Code section 11.042.[507] Such an authorization allows for the diversion of "only the amount of water put into a watercourse or stream, less carriage losses."[508] The application states that "[t]he water would be diverted from Lake Arrowhead within days of discharge, with little to no residence time in the lake."[509] "[B]ecause of short residence time in Lake Arrowhead, carriage losses are expected to be minimal."[510] The City assumes no carriage losses.[511]

Landowner Protestants argue that without any restriction on how long or how much water from Lake Ringgold would reside in Lake Arrowhead, evaporation losses could result. They argue that those evaporation losses should be characterized as carriage losses and so must be subtracted from the available supply.[512] This evaporation, they argue, would be waste.

The City argues that carriage losses and evaporation are evaluated in the WAM analysis, addressed in the firm yield, and tracked in the Accounting Plan,[513] and not evaluated separately. Moreover, evaporative losses occur in all reservoirs and are addressed in the WAM, as Carron admits,[514] and are therefore not waste.

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[507] WF Ex. 2J at Bates 7795; WF Ex. 1 at Bates 7795 (same).

[508] Tex. Water Code § 11.042(c).

[509] WF Ex. 2J at 101 (Report Supporting the Application for Lake Ringgold, Section Information Required for Authorizations to Use Bed and Banks).

[510] WF Ex. 2J at Bates 7726.

[511] WF Ex. 2J at Bates 7795.

[512] *See* 30 TAC § 297.16(a)-(b).

[513] Tr. Vol. 7 at 174-175 (Alexander Cross); WF Ex. 4E.

[514] Tr. Vol. 6 at 202-203 (Carron Cross).

There is no dispute that that evaporative losses will occur.[515] However, Landowner Protestants have not shown how the applicant has failed to properly account for those losses in its bed and banks authorization request. The ALJ therefore finds that the City met its burden of proof under Water Code section 11.042 and Rule 295.113.

VI. TRANSCRIPT COSTS

The Commission may assess reporting and transcription costs to one or more of the parties participating in the proceeding, except the ED or OPIC.[516] The ALJ shall recommend an assessment.[517]

When assessing transcript costs for contested case hearings, the Commission shall consider several factors, including: the financial ability of the party to pay the costs; the extent to which the party participated in the hearing; the benefits to various parties of having a transcript; and any other factor which is relevant to a just and reasonable assessment of costs.[518]

Here, the total costs for the transcription and reporting services amounted to $19,302.30.[519] The City argues that this cost should be split evenly between the City and O'Malley, the most active protestant. The City emphasizes that O'Malley took

[515] WF Ex. 4D (Evaporation Memorandum); Tr. Vol. 7 at 170 (Alexander Cross).

[516] 30 TAC § 80.23(d)(2).

[517] 30 TAC § 80.23(d)(3).

[518] 30 TAC § 80.23(d).

[519] City of Wichita Falls Initial Br., Attachment B.

the majority of the time during the hearing, and by hiring counsel and four witnesses, has demonstrated a financial ability to pay.

The ED, OPIC, and Clay County make no recommendation regarding allocation. Landowner Protestants and TCA argue that the City should bear the entire cost of the transcript. Landowner Protestants emphasize the City's financial ability to pay and other factors that they consider relevant to a just a reasonable assessment, which largely mirror their overall opposition to the project.

The Landowner Protestants, and O'Malley in particular, by having secured counsel and expert witnesses, have demonstrated an ability to pay the costs. The City has demonstrated a superior ability to pay, by having prosecuted this application for seven years now, with the assistance of counsel and consultants. O'Malley participated extensively in the hearing and post-hearing briefing, making extensive use of the transcript, as did the City. However, as Landowner Protestants point out, the City is the party seeking affirmative relief, whereas they seek merely to maintain the status quo. Based on the foregoing, the ALJ finds it would be just and reasonable for the O'Malley to share in the cost of the transcript; however, the factors favor the City bearing the greater cost.

Accordingly, the ALJ recommends the transcript costs be apportioned as follows: the City –70%; O'Malley—30%.

The City	$13,511.61
O'Malley	$5,790.69
Total	$19,302.30

VII. CONCLUSION

The evidence shows that the City faced an existential threat to its water supply during the recent drought of record. The City prudently endeavored to establish a hedge against future drought and landed on Lake Ringgold to provide that supply. The City's conservation and reuse efforts are commendable. With those two measures alone, the City cut in half its projected need. Nevertheless, as discussed above, the City has failed to meet its burden of proof on several critical criteria. Most notably, the City failed to establish a need for an appropriation of the requested amount. For the reasons set out above, the ALJ finds that the City has not carried its burden of proof to appropriate state water under Texas Water Code section 11.134. The ALJ therefore recommends that the application be denied.

In the alternative, the City should be granted a permit for the appropriation of 9,110 acre feet per year shown in its application, which is consistent with the 10,864 acre-feet per year in the 2021 Regional Water Plan.[520]

Signed December 21, 2023

Christiaan Siano
Presiding Administrative Law Judge

[520] WF Ex. 3E (2016 Region B Plan) at 5-47 (Bates at 15626); WF Ex. 3F (2021 Region B Plan) at 5-46 (Bates 16843).

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

AN ORDER DENYING 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, 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 10, and August 7, 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 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 notice of the public meeting to be held via videoconference on August 25, 2020, for the purpose of receiving comments on the application.

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. On August 25, 2020, a public meeting was held via videoconference, at the conclusion of which the final public comment period closed.

14. On April 13, 2022, the Commission referred the application to SOAH for a contested case hearing.

15. Notice of the preliminary hearing at SOAH was mailed on June 9, 2022, to all persons who had requested a hearing.

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

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

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

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

Background

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

23. 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.

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

26. 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. In 2011, the City experienced what would become the new drought of record.

28. In response to the extreme drought conditions, the City curtailed water use, reducing reservoir demands by 75% during the summer peak.

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

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

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

32. 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. 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. 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. The application includes a request 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. 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. 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. 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.

39. The application states that the point of diversion will be on the perimeter of the proposed Lake Ringgold and included a map of the diversion location.

Available Water

40. Unappropriated water is available in the Little Wichita River, Red River Basin.

Beneficial Use

41. The application states that the appropriation of 65,000 acre-feet per year will be used for municipal, industrial, agricultural, and mining purposes.

42. The application does not state the amount of water to be used for each purpose.

Existing Water Rights

43. The City analyzed potential impacts to existing water rights, including vested riparian rights.

44. 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.

45. Granting the application will not cause an adverse impact to an existing water right.

Public Welfare

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

Environmental Flows and Assessments

Environmental Flow Standards

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

Water Quality and Instream Uses

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

50. 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.

51. The appropriation and impoundment requested in the application will not impair water quality standards for any other surface waters in Texas.

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

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

Groundwater

54. 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.

55. 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.

Habitat Assessment and Mitigation

56. 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.

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

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

59. In performing the HEP assessment, the City developed an acreage inventory of each land cover type within the project area.

60. 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.

61. 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.

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

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

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

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.

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

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

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 re-establish outside the footprint of the reservoir.

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.

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.

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.

72. The applicant failed to meet 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

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

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

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

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

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

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

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-feet diversion amount.

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.

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

Conservation

82. The City has formulated and submitted a water conservation plan and adopted reasonable water conservation measures.

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

84. 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.

85. 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.

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

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

88. 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.

89. 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.

90. 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.

91. 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.

92. 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.

93. The City is already implementing indirect reuse and water conservation.

Alternatives

94. The Applicant evaluated 22 potential new water supply strategies, including Lake Ringgold.

95. 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.

96. 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.

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

Consistency with State and Regional Water Plans

98. 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.

99. 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.

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.

101. 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.

102. 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.

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

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.

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 the application addresses a water supply need consistent with state and regional water plans.

Dam Safety

107. 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.

108. The ED provided a technical review of these documents.

109. 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.

110. 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

111. The total costs for the transcription and reporting services amounted to $19,302.30.

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

113. By retaining counsel, O'Malley has demonstrated an ability to pay.

114. The City, by having prosecuted this application for seven years, hired counsel and consultants, has demonstrated a superior ability to pay.

115. 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. The application was accompanied by all required fees. Tex. Water Code § 11.134(b)(1).

6. The application was properly noticed. Tex. Water Code § 11.132, 30 Tex. Admin. Code § 295.151.

7. 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. 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. 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.

12. The application does not state or clearly set forth the amount of water to be used for each purpose, as required by 30 Texas Administrative Code section 295.5.

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, the location of the dam, and a map showing those location. 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. 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).

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.

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), 11.150, and 11.151 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 did not meet its burden of proof to establish that the Draft Permit contains conditions, or 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); 30 Tex. Admin. Code § 297.53.

27. 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.

28. 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).

29. 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).

30. 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.

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

32. It is appropriate to consider cost in reviewing alternatives. 30 Tex. Admin. Code §§ 288.7(a), 297.50(a), (b).

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).

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.

35. 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).

36. The applicant 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.

37. 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).

38. 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).

39. The transcript cost should be shared by both the applicant and O'Malley as follows: the City bears 70 percent ($13,511.61); O'Malley bears 30 percent ($5,790.69). 30 Tex. Admin. Code § 80.23.

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

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.

2. The transcript costs are allocated 70 percent to the City and 30 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

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Jon Niermann, Chairman for the Commission