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

APPLICATION BY	**§**	**BEFORE THE STATE OFFICE**
CITY OF WICHITA FALLS	**§**	
FOR WATER USE	**§**	**OF**
PERMIT NO. 13404	**§**	
	§	**ADMINISTRATIVE HEARINGS**

PROTESTANTS' REPLY TO EXCEPTIONS TO THE PROPOSAL FOR DECISION

February 7, 2024

TABLE OF CONTENTS

I. Summary of the Argument in Response 1

II. The PFD's Alternative Recommendation 3

III. Burden of Proof by a Preponderance of the Evidence 5

IV. Conformance with Requirements of Chapter 11 8

A. Beneficial Use.....8

i. Neither the City nor the ED has presented any new arguments for the ALJ to consider regarding the requirement that the City specify how much water will be put to each identified use. 8

ii. The City misunderstands its obligation to comply with the unambiguous statutory requirements applicable to water right permit applicants. 9

iii. The City's argument that Rule 297.43 should control because it is more specific than Rule 295.5 is inapposite here. 12

iv. Neither the ED's nor the City's arguments are supported by the legislative history. 13

v. TCEQ policy and the ED's historic practices are not relevant here. 16

vi. The Commission's decision in the BRA SysOp case does not support the City's or the ED's arguments here. 17

vii. The City misunderstood its statutory obligations regarding beneficial use, resulting in a deficient permit application. 20

B. Habitat Assessment.....22

i. The City and the ED misapply the evidentiary standard for weighing opinion testimony of expert witnesses. 22

ii. Allowing the CWA 404 permitting process to supplant the State water rights permitting process would lead to absurd results. 25

iii. The City argues for the first time that mitigation is not required. 28

iv. The City advances no new or helpful arguments as to the failure to assess wetland functions and values. 29

v. The City advances no new arguments as to the failure to adequately define the study area or assess impacts of the Application on fish and wildlife habitat. ..30

vi. The City offers no new arguments as to the HEP's deficient selection of species and baseline valuation of habitat. 31

C. Need.....32

i. Need is an essential requirement for a water right. 34

ii. The undisputed evidence in the record establishes that the City did not consider need in developing its water right application and requested appropriation. 35

iii. The City's "20% reserve" supply is arbitrary and inflated. 36

iv. The City's proposed reservoir is oversized. 37

v. The PFD correctly found that the City failed to demonstrate that 65,000 acre-feet is consistent with the state and regional water plans. 38

V. Transcript Costs.....39

VI. Revisions to the Proposed Order.....41

VII. Conclusion.....42

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

APPLICATION BY	**§**	**BEFORE THE STATE OFFICE**
CITY OF WICHITA FALLS	**§**	
FOR WATER USE	**§**	**OF**
PERMIT NO. 13404	**§**	
	§	**ADMINISTRATIVE HEARINGS**

PROTESTANTS' REPLY TO APPLICANT'S AND ED'S EXCEPTIONS TO THE PROPOSAL FOR DECISION

TO THE HONORABLE CHAIRMAN NIERMANN AND COMMISSIONERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

Protestants William Justin O'Malley, Umhaill Valley LLC, Rockfleet Castle LLC, and Kildavnet Castle LLC ("O'Malley"), Stan, Larry, and Lonnie Horwood ("Horwoods"), Texoma Stewardship Coalition and Aligned Protestants ("TSC"), and Texas Conservation Alliance ("TCA") (herein, "Protestants") file this Reply to Applicant City of Wichita Falls's Exceptions and Executive Director's Exceptions to the Proposal for Decision and urge the Commission to deny the City of Wichita Falls' (the "City" or "Applicant") Application for Water Use Permit No. 13404 (the "Application"). For support, Protestants offer the following:

I. SUMMARY OF THE ARGUMENT IN RESPONSE

Neither the City nor the ED raise any new or helpful arguments in their exceptions to the PFD that were not already raised either in their closing arguments or replies to closing arguments, or that explain how the outcome under these new arguments would be different. As such, the City and the ED have presented no good, justifiable, legal reason for having the ALJ reexamine the same arguments already considered and addressed in the PFD.

Furthermore, the City's exceptions reveal its fundamental misunderstanding of its burden of proof as well as the law. The City repeatedly misapplies the burden of proof or applicable evidentiary standard and then focuses its argument on the wrong statutory or regulatory provision, thus misapplying the law in at least two ways related to each of its primary arguments (beneficial use, habitat assessment and mitigation, need, and consistency). The ED reprises only conclusory arguments, but offers the ALJ no new useful argument that would aid in deciding the case, let alone in reconsidering the issues. Neither the City nor the ED will concede that mere conclusory opinions of an ED witness do not automatically resolve the matter, particularly when those ED witnesses cannot explain their reasons for deviating from the plain statutory and regulatory language.

The City also continues its *modus operandi* of assigning support where there is none and assigning meaning to evidence that is not relevant. For example, whether Lake Ringgold was designated as a unique reservoir site or has been listed in the state and regional water plans are not relevant facts to any issue in dispute.[1] Neither do these actions constitute a recommendation by the Texas Legislature or the TWDB to grant the Application that is the subject of this proceeding, as the City suggests. Both steps are merely aspects of state water planning under Chapter 16, but do not constitute endorsement of this particular Application under Chapter 11.[2]

[1] *See* WF Exceptions at 5.

[2] *See* Tex. Water Code § 16.051(g) ("A state agency or political subdivision of the state may not obtain a fee title or an easement that would significantly prevent the construction of a reservoir on a site designated by the legislature under this subsection."); *see also* Tex. Water Code §§ 16.051 & 16.053 (requiring the preparation of a state and regional water plans that include "all potentially feasible water management strategies."

For all these reasons, and those more specifically described below, the City's and the ED's exceptions to the PFD should be rejected.

Protestants will address, here, the arguments offered by both the ED and the City regarding beneficial use, even though the City's Exceptions were not timely. In doing so, Protestants do not intend to waive their objection to the City's untimely filed Exceptions. These arguments are presented *subject to* Protestants' objection to the City's untimely Exceptions.

II. THE PFD'S ALTERNATIVE RECOMMENDATION

The City makes a somewhat passing statement that deserves attention. The City asserts that the PFD "offers an in-the-alternative recommendation that TCEQ authorize a 9,110 acre-feet reservoir."[3] What the PFD actually offers in the alternative is "a permit for the appropriation of 9,110 acre feet per year."[4] The ALJ has distinguished between the request to construct a reservoir and the request to divert 65,000 acre-feet (the appropriation), which is made clear in the PFD's analysis of public welfare (as excepted to by Protestants).

In the PFD's analysis of the public welfare analysis, the ALJ appears to disregard the impacts of constructing the proposed reservoir at the proposed location, even though the Applicant's request to construct the reservoir and divert 65,000 acre-feet go hand-in-hand. Though Protestants maintain that Chapter 11 does not limit the definition of an "appropriation" to only the "diversionary" right under any application or permit, the ALJ's

[3] WF Exceptions at 5.
[4] PFD at 104.

analysis provides important context for understanding the meaning of the alternative recommendation—whereby recommending the *appropriation* of 9,110 acre-feet, the PFD was simply recommending in the alternative, a permit *to divert* 9,110 acre-feet, *without* the authorization to construct a reservoir. The context of the entire PFD further supports this conclusion.

Not only did the ALJ find that there is no evidence that the requested amount of appropriation—65,000 acre-feet per year—is necessary and reasonable,[5] but even assuming the City's projected demand of 9,110 acre-feet per year is reliable, that Lake Ringgold is oversized and would result in a firm yield that far exceeds 9,110 acre-feet per year.[6] Furthermore, the ALJ found the habitat assessment and mitigation plan to be fatally deficient.

Specifically, the ALJ found that the City's habitat assessment failed to properly define the study area and to properly assess potentially impacted habitat upstream, adjoining, and downstream of the project site.[7] The ALJ also found that there was no examination of direct and indirect impacts to terrestrial and riparian habitats or long and short-term effects to the watershed or ecoregion that may result from the permitted activity, as required by Rule 297.53.[8] The City's assessment failed in other ways to properly and accurately assess the value of the existing habitat and demonstrate that suitable habitat is

[5] PFD at 90.
[6] PFD at 89.
[7] PFD at 37.
[8] PFD at 38.

available for mitigation.[9] These deficiencies are not the type that would be cured simply by shrinking the reservoir footprint. Thus, to be read consistently with them, the ALJ's alternative recommendation is only that that a permit be granted authorization the diversion of 9,110 acre-feet alone, and without the authorization to construct a reservoir.

Protestants believe this distinction was made clear in the PFD, but in light of the City's apparent confusion, request the ALJ to clarify that the alternative recommendation did *not* involve authorization to construct a reservoir.

III. BURDEN OF PROOF BY A PREPONDERANCE OF THE EVIDENCE

Off the bat, the City misstates the preponderance of the evidence standard. To be clear, the Commission's rules require the applicant to prove compliance with the applicable requirements by a preponderance of the evidence, 30 Tex. Admin. Code § 80.17(a). The particular meaning of "preponderance of the evidence" means the greater weight and degree of credible evidence that would create a reasonable belief in the truth of the claim. *Herrera v. Stahl*, 441 S.W.3d 739, 741 (Tex. App.—San Antonio 2014, no pet.); *State v. Addington*, 588 S.W.2d 569, 570 (Tex. 1979). Therefore, the applicant bears the burden to show by the greater weight and degree of credible evidence that the application complies with each of the applicable requirements under Chapter 11 of the Texas Water Code and accompanying TCEQ rules.

[9] PFD at 41 (the HEP failed to establish baseline habitat units), 43 (the assessment failed to properly classify wetlands), and 56 (the assessment fails to establish that there is suitable mitigation habitat available for complete compensation to lost habitat).

The preponderance of the evidence standard is not, as the City suggests, a directive that the ALJ consider *only* the applicant's evidence and accept it as true, regardless of whether the witnesses appeared credible or adequately and reasonably explained the basis of their opinions. Neither is the preponderance of the evidence standard a directive that the ALJ ignore credible evidence offered by any opposing party. Finally, the preponderance of the evidence standard is also not a prohibition on the ALJ examining the factual evidence upon which the opinions of any expert are predicated (City's, ED's, or Protestant's) to determine the value or weight to attribute that opinion.

Though the City argues that the PFD elevates the burden of proof, the City makes no effort to explain how the string cites to the PFD constitute the ALJ applying an evidentiary burden higher than the preponderance of the evidence standard.[10] This is because the City has confused the ALJ's weighing of the evidence with the applicable burden proof. Said another way, the City's primary complaint is that because the ALJ determined the City did not meet its burden of proof, that must be because the ALJ elevated the burden of proof. But the City's cites to the PFD do not support this contention.

The following are places in the PFD the City suggests are indicative of where the ALJ elevates the burden of proof to "beyond a reasonable doubt" or "clear and convincing evidence," though the City makes no attempt to explain which, and the City regularly mischaracterizes the scope of the PFD's analysis:

- **PFD at 34:** The PFD indicates consideration of the testimony by both the City and ED's witnesses as to personal knowledge of the capacity in which the HEP report was prepared, not simply who attended the site visits, as the

[10] *See* WF Exceptions at 6, n. 8.

City suggests. Consideration of these facts and testing of these opinions, so as to assign them a weight, is clearly within the purview of the trier of fact in weighing the opinion testimony. *See Gossett v. State*, 417 S.W.2d 730, 736-37 (Tex. App.—Eastland 1967, writ ref'd n.r.e.).

- **PFD at 36:** The PFD indicates consideration of Mr. Votaw's testimony that he did not assess whether suitable habitat existed outside the project area that would sustain the populations of two State-threatened species that would be displaced, and thus the discussion of the presence-absence survey itself was not decisive, but indicated a lack of factual information upon which Mr. Votaw's opinions could not have been based. This is clearly within the purview of the trier of fact in weighing the opinion testimony. *See id.*

- **PFD at 58:** The PFD indicates consideration of Ms. Allis's testimony that she did not make an independent determination of need but relied on the regional water plans for that determination. Consideration of these facts on which Ms. Allis's testimony is predicated is clearly within the purview of the trier of fact in weighing the opinion testimony. *See id.*

- **PFD at 79** (though the ALJ's finding that the City's 20% reserve is "unsupported and inflated the City's projected need"[11] is found on page 84: The PFD spends more than four pages analyzing the evidence relevant to the City's reserve supply, including testimony from the City's witnesses Mr. Kiel and Mr. Albright. The City's chief complaint is not that the ALJ applied an elevated evidentiary burden to whether the City's reserve artificially and unreasonably inflated the City's projected need, but that the City does not believe the ALJ or the Commission should evaluate the City's reserve *at all*. However, in these four pages, the ALJ is considering the facts on which the City's testimony calculating its long-term water supply need is based and determining that the reserve supply is one of those facts. It is therefore, well within the purview of the trier of fact in applying the preponderance of the evidence standard. *See id*.

- **PFD at 85:** For many of the same reasons explained in the prior cite, the City's complaint is not that the ALJ applied an elevated evidentiary burden to whether the City's population projections were reliable, but rather, that the City does not believe the ALJ or the Commission should evaluate the City's population projections *at all*. The ALJ is considering the facts on which the City's testimony calculating its long-term water supply need is based. It is

[11] It is worth clarifying that the ALJ's determination was that the 20% reserve was not itself inflated, but served to inflate the City's projected need. This distinction illustrates how the City is attempting to mischaracterizing the ALJ's searching review of the facts upon which the City's opinion testimony is based, as somehow elevating the burden of proof.

therefore, well within the purview of the trier of fact in applying the preponderance of the evidence standard. *See id*.

- **PFD at 95:** The City is disguising as an objection to the evidentiary standard its chief disagreement that Chapter 11 does not require a showing of "need." The PFD spends considerable time examining the plain language of Chapter 11 and the evidence, and determined that Chapter 11 does required a showing of need for the requested amount of appropriation. The City's objection is a disagreement over the law, not an evidentiary standard. Had the ALJ applied any other evidentiary burden of proof, it would have made no difference if the City's contention is that a showing of need is simply not required.

Because the City cannot point to one example in the PFD where the ALJ applied a heightened burden of proof, the City provides no justifiable reason to reconsider the ALJ's denial of the Application based on the evidentiary standard. Therefore, the City's arguments to this point should be rejected.

IV. CONFORMANCE WITH REQUIREMENTS OF CHAPTER 11

A. Beneficial Use

i. Neither the City nor the ED has presented any new arguments for the ALJ to consider regarding the requirement that the City specify how much water will be put to each identified use.

Both the City's and the ED's Exceptions recycle the same arguments that were urged in their Closing Arguments and Response to Closing Arguments. Indeed, the ED acknowledges this in her Exceptions, maintaining that it remains the ED's position that the City provided all the information that was required—irrespective of the unambiguous language in the statute.[12] The ALJ has analyzed and addressed the arguments presented by the City and the ED in the PFD. Neither party presents any new argument or any reasoned

[12] ED Exceptions at 2.

justification for requesting the ALJ to revisit this issue. And so, Protestants urge the ALJ to reject the City's and the ED's arguments regarding this issue.

Below, in an abundance of caution, Protestants address each of the ED's and the City's arguments, again, but will attempt to avoid repetition of their Closing Arguments and Response to Closing Arguments.

ii. The City misunderstands its obligation to comply with the unambiguous statutory requirements applicable to water right permit applicants.

In its Exceptions (as with its Closing Arguments and Response to Closing Arguments), the City continues to focus on Water Code Section 11.023(e) and TCEQ Rule 297.43(c)—both of which address permit terms—while ignoring the statutory requirements that dictate what an applicant must include in its water right permit application. More specifically, the City ignores the unambiguous requirement that an applicant must include in its water right application the "nature and purposes of the proposed use or uses and the *amount of water to be used for each purpose*." Tex. Water Code § 11.124(a)(4); *see also* 30 Tex. Admin. Code § 295.5. The City does not even attempt to claim that this statutory language is ambiguous; that's because it isn't. Accordingly, the statutory requirement must be enforced as written. *Sunstate Equip. Co. v. Hegar*, 601 S.W.3d 685, 689-90 (Tex. 2020) ("to distill the meaning of a statute, we start with its text and the plain meaning of its words construed within the statute as a whole"); *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 437 (Tex. 2009) ("Where text is clear, text is determinative of that intent."); *State v. Shumake*, 199 S.W.3d 279, 284 (Tex. 2006) ("If the statute is clear and unambiguous, we must apply its words according to their common meaning[.]").

Even assuming, for the sake of argument only, that Section 11.124(a)(4) were subject to agency interpretation, that interpretation is reflected in TCEQ's implementing rule—Rule 295.5. *See Fiess v. State Farm Lloyds*, 202 S.W.3d 744, 747 (Tex. 2006) (acknowledging that courts give some deference to agency regulation containing reasonable interpretation of an ambiguous statute) (citing *Christensen v. Harris County*, 529 U.S. 576, 587 (2000)). And that rule provides: "The purpose or purposes of each use shall be stated in definite terms. *If the water is to be used for more than one purpose, the specific amount to be used annually for each purpose shall be clearly set forth. If the application requests authorization to use water for multiple purposes, 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.*" 30 Tex. Admin. Code § 295.5 (emphasis added).

Both the relevant statute and the implementing rule provide that although the Commission may grant a water right authorizing a single amount or volume of water for more than one purpose of use, a water right permit applicant must identify, in its application, the specific amount of water that will be used for each identified purpose. Only if the applicant complies with this unambiguous statutory requirement may the Commission then grant the requested appropriation authorizing a single amount of water for the multiple identified purposes, so long as the permit "contain[s] a special condition limiting the total amount of water that may actually be diverted for all of the purposes to the amount of water appropriated." Tex. Water Code § 11.135(b)(5).

The City cites examples of water rights appropriating a single amount of water for multiple purposes,[13] but these examples are not relevant here; they do not justify the City's failure to comply with Chapter 11's unambiguous statutory requirements. *See Rodriguez v. Serv. Lloyds Ins. Co.*, 997 S.W.2d 248, 255 (Tex. 1999) (disfavoring broad policymaking via administrative adjudication rather than through the APA rulemaking procedure). That's because the City continues to conflate (1) what a permit applicant is obligated to do when requesting a water right for multiple purposes of use (*i.e.*, specify the amount of water to be used for each identified purpose) with (2) what the Commission is allowed to do when issuing a water right for multiple purposes of use (*i.e.*, appropriate a single amount of water for the various identified purposes). Here, the City failed to satisfy its statutory obligation, and so, the Commission may not grant the City a water right authorizing an appropriation for a single amount of water.

The City criticizes the PFD's citation to the Lake Kemp water right as an example of a water right that includes specific amounts of water to be used for each identified purpose.[14] (The ED joins in this critique, in its Exceptions.)[15] But both the City and the ED miss the point of the PFD's reference to the Lake Kemp water right.

The PFD does not reference the Lake Kemp water right to suggest that the permit itself must specify how much water will be used for each identified purpose. Rather, the PFD references the Lake Kemp water right to illustrate that the *City* has engaged in this

[13] WF Exceptions at 9 ("The ALJ selectively references the water right for Lake Kemp (COA No. 02-5123) as evidence that a water right must specify exact amounts for each use").

[14] WF Exceptions at 9.

[15] ED Exceptions at 3.

statutorily-required exercise before, as reflected in its Long-Range Water Supply Plan.[16] In short, the City knows how to properly apply the statutory requirement in Water Code Section 11.124(a)(4) and TCEQ Rule 295.5.

iii. The City's argument that Rule 297.43 should control because it is more specific than Rule 295.5 is inapposite here.

The City argues that TCEQ rules 297.43 and 295.5 are in conflict and cannot be reconciled. And so, the more specific regulatory requirement (in the City's view, Rule 297.43) should control over the more general requirement (in the City's view, Rule 295.5).[17] But there are several flaws with the City's argument.

First, the statutory language controls here, and absent any ambiguity in the statutory language, that statutory language must be enforced as written; it is not subject to agency interpretation. Neither the City nor the ED argue that the language in Water Code Section 11.124(a)(4) is ambiguous. So, that language must be enforced. TCEQ's rules cannot be interpreted in a manner that would excuse compliance with the statutory requirement or would otherwise render it meaningless. *See Fiess*, 202 S.W.3d at 747 (holding that the language at issue must be ambiguous; an agency's opinion cannot create a contradiction with the plain language of the statute by its interpretation).

Second, there is no irreconcilable conflict between Rules 297.43 and 295.5. The two rules can be harmonized. *See* Tex. Gov't Code § 311.026(a) ("If a general provision conflicts with a special or local provision, the provisions shall be construed, if possible, so

[16] PFD at 17.
[17] WF Exceptions at 8, FN 13.

that effect is given to both.").[18] As discussed above, Rule 297.43 addresses how an appropriation amount may be reflected in the terms of the permit issued by the Commission. Rule 295.5, on the other hand, addresses the permit applicant's obligation to specify the amount of water that will be used for each identified purpose of use in its application. There is no irreconcilable conflict between these two rules.

And finally, even if there were an irreconcilable conflict between the two rules here, it is not clear that Rule 297.43 is more specific than Rule 295.5. To the contrary, TCEQ Rule 295.5 imposes more specific permit application requirements than Rule 297.43; Rule 297.43(c) addresses only the terms of a permit, not a permit applicant's specific obligations.

iv. Neither the ED's nor the City's arguments are supported by the legislative history.

Both the City and the ED present two variations of a similar argument. The City suggests that because Rule 297.43 is more recent than Rule 295.5, it should control in the event of a conflict between the two rules.[19] The ED notes that Water Code Section 11.023(e) was amended in 1997, authorizing the Commission to appropriate a single amount of water for multiple purposes of use; the ED suggests that this amendment relieved

[18] The City appears to be referencing the legal doctrine of in pari materia, which was codified in the Code Construction Act, and provides: "If the conflict between the general provision and the special or local provision is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later enactment and the manifest intent is that the general provision prevail." Tex. Gov't Code Ann. § 311.026(b); *see Texas State Bd. of Chiropractic Exam'rs v. Abbott*, 391 S.W.3d 343, 348 (Tex. App.—Austin 2013, no pet.).

[19] WF Exceptions at 8, FN 13.

a permit applicant of its obligation to comply with Water Code Section 11.124(a)(4).[20] Both arguments miss the mark.

Section 11.124(a)(4) has been in place since 1977, without any substantive change. In 1997, via Senate Bill 1, the Legislature added the language that authorized a single appropriation amount for multiple purposes or uses, but the Legislature did not repeal 11.124(a)(4)—or make any other substantive revision to this provision—when it adopted Senate Bill 1. That the Legislature elected to retain Section 11.124(a)(4) indicates that it intended to maintain this permit application requirement, even though the Commission may issue a permit authorizing a single appropriation amount for multiple purposes—contrary to the ED's argument.

And contrary to the City's argument, when the Commission adopted its Rule 295.5, it made clear that it understood the requirements of Section 11.124(a)(4) remained applicable and enforceable, and it drafted its rule to ensure compliance with the statutory requirement. In 1998, TCEQ proposed an amendment to Rule 295.5, as part of its rule package implementing Senate Bill 1. 23 Tex. Reg. 10301 (Oct. 9, 1998) (proposed); 24 Tex. Reg. 969 (Feb. 12, 1999) (adopted). Senate Bill 1 added the provision that allowed the Commission to authorize an appropriation for a single amount of water for multiple purposes. As it was initially proposed, TCEQ's Rule 295.5 allowed an applicant to list multiple beneficial uses and propose one total, annual diversion amount: "the application

[20] ED Exceptions at 3.

shall expressly state an annual amount of water to be used for the multiple purposes." 23 Tex. Reg. 10301.

In response to the proposed rule language, a commenter recommended that the rule "should be clarified that even when an applicant seeks authorization for multiple uses, the applicant should be required to specify the amount for each separate use so that there is a reasonable basis for assessing the need for the requested amount of water and consistency with the state or applicable regional water management plans." 24 Tex. Reg. 971. The Commission agreed. *Id*. And so the rule was revised accordingly, so that it clearly requires an applicant to specify the amount to be used for each stated purpose. *Id*. The Commission understood the Legislature's unambiguous statutory requirement found in Section 11.124(a)(4), and it drafted and adopted its amended Rule 295.5 to ensure compliance with the statutory requirement, even after the passage of Senate Bill 1. This rule remains in effect; it has not been repealed—not even by the adoption of the amendment to Rule 297.43. *See* 24 Tex. Reg. 1162 (Feb. 19, 1999).

In sum, the Legislature's adoption of Senate Bill 1—and more specifically, the amendment to Section 11.023(e) of the Water Code—did not repeal or otherwise relieve an applicant from complying with 11.124(b)(4), nor did it relieve the Commission from enforcing this statutory requirement. The Commission may not now interpret Rule 295.5 in a manner that would render both the rule and the statute it implements superfluous and inconsequential. *See Fleming Foods of Tex. v. Rylander*, 6 S.W.3d 278, 284 (Tex. 1999) (courts should not adopt a construction of a statute that renders the statutory provisions meaningless).

v. TCEQ policy and the ED's historic practices are not relevant here.

The City frames the issue here as a debate between the ED's interpretation of its rules and statutes versus Protestants' interpretation of those rules and statutes. The City argues that requiring compliance with Section 11.124(a)(4) "would undermine longstanding TCEQ policy"[21] and neglect "historic practices by ED staff."[22] The City further argues that the ALJ has adopted Protestants' "interpretation" of the relevant rules with support from "an out-of-state witness with limited experience with Texas water rights permitting, rather than the City's expert witness, Simone Kiel, with over 30 years of experience with Texas water rights permitting and the ED's expert witness, Dr. Kathy Alexander, with almost 25 years of experience at TCEQ."[23] But the City mischaracterizes the nature of the dispute here and the applicable law.

First, the PFD does not rely on Protestants' interpretation of the law; nor does it rely on the interpretation offered by an out-of-state witness.[24] Rather, the PFD's analysis focused on the statutory language in Chapter 11 of the Water Code and on TCEQ's rules.[25]

For the reasons explained above and in Protestants' Closing Arguments and Responses to Closing Arguments, the ED staff's past practices are irrelevant here, as is Ms. Kiel's understanding of those practices. The City offers no evidence of "longstanding TCEQ policy." Even if the City had offered such evidence, it would not be relevant here

[21] WF Exceptions at 7.
[22] WF Exceptions at 8.
[23] WF Exceptions at 8, FN 12.
[24] The PFD does not even cite to any testimony by Dr. Carron in the discussion of the "requirement to specify."
[25] PFD at 15-16.

for purposes of undermining the unambiguous statutory requirements. *Texas Dep't of Ins. v. Reconveyance Serv., Inc.*, 240 S.W.3d 418, 434 (Tex. App.—Austin 2007), *rev'd on other grounds*, 306 S.W.3d 256 (Tex. 2010) (holding agencies do not have general authority to misapply the law when asserting their regulatory powers) (citing *Cobb v. Harrington*, 190 S.W.2d 709, 713 (Tex. 1945)); *see also City of El Paso v. Public Util. Comm'n,* 883 S.W.2d 179, 184 (Tex. 1994) (an agency abuses its discretion if it does not consider a factor the Legislature directed it to consider).

To the extent the City and the ED rely on the decision in the BRA SysOp case as evidence of a longstanding policy, those arguments are addressed in more detail below.

vi. The Commission's decision in the BRA SysOp case does not support the City's or the ED's arguments here.

Both the ED and the City cite to the BRA SysOp PFD in support of their arguments that the City need not specify how much water will be applied to each identified purpose of use. Each urges different arguments based on the PFD in the BRA SysOp matter. But neither argument is persuasive here.

The ED argues that its Rule 295.5 is directory rather than mandatory, and it cites to the PFD in the BRA SysOp permitting case for support.[26] The City does not join the ED in this argument.

The ED fails to acknowledge, however, that the Commission's decision in the BRA SysOp matter does not actually include any findings or conclusions that support the ED's

[26] ED Exceptions at 2.

argument that Rule 295.5 is merely directory, not mandatory. The Commission has not adopted this interpretation of its rule, via ad hoc decision-making, as the ED suggests.

Further, because Rule 295.5 implements a statutory requirement, the PFD in the BRA SysOp case cannot support an interpretation of the statute that conflicts with or limits the applicability of the regulatory and statutory requirement—as explained in the ALJ's analysis in the PFD for this case.[27] *Sw. Royalties, Inc. v. Hegar*, 500 S.W.3d 400, 406 (Tex. 2016) (holding that agency's interpretation of a statute or a statutory term is valid only insofar as it is consistent with the statute and will not be effective to expand or to contract the language of the statute) (citing *Firestone Tire & Rubber Co. v. Bullock*, 573 S.W.2d 498, 500 n.3 (Tex. 1978)).

The City also quotes from the PFD in the BRA SysOp case, in support of its argument that because it requires operational flexibility, it need not specify how much water will be put to each purpose of use. But the City misses the mark here for a number of reasons.

First, the PFD in the BRA SysOp case is not Commission precedent. Second, the Commission's Order in the BRA SysOp matter is not relevant to the beneficial use issue presented here, because the facts of that case are completely different from the ones presented here.[28] BRA sought a system operations permit; it did not seek an authorization to construct any new water works. BRA's requested appropriation was based on coordinated operation of existing water rights and facilities (which had already been

[27] PFD at 15-16.

[28] *See, e.g.*, Tr. Vol. 7 at 183:20-25 through 184:13 (Dr. Alexander explaining that the City's application is not like the BRA SysOp permit; it is a "completely different animal").

permitted and used for beneficial purposes).[29] That is, BRA already had a number of water rights—authorizing storage in reservoirs and diversions—and it had a system operation order. The SysOp Permit it sought was intended to allow for additional diversion amounts at different locations, based on its operation of its existing facilities. This is completely distinct from the appropriation requested by the City of Wichita Falls.

Regarding the proposed uses for the water, BRA's authorized appropriation must be used consistently with BRA's approved Water Management Plan.[30] This provision limits BRA's appropriation to those uses that are approved in the Plan. Further, BRA presented evidence demonstrating that 99% of the water that is currently appropriated to BRA is already under contract.[31] And it provided evidence of requests for water from 28 entities, indicating an immediate need for the requested appropriation.[32]

By contrast, evidence presented in this matter demonstrated that the City, itself, recognized that its requested appropriation 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."[33] This is an important distinction, worth highlighting. The City's own projections predicted a need of just over 9,100 acre-feet by 2070; yet, it has requested an appropriation of 65,000 acre-feet. Assuming for the sake of argument that the City's

[29] BRA Final Order at 6, FOF 37.a. & 8, FOF 40. The Final Order from the BRA SysOp permitting matter is attached to Landowner Protestants' Response to Closing Arguments as "Attachment A." Protestants are not reproducing the document as an attachment to this Reply to Exceptions, but instead will cite to the "BRA Final Order," along with the appropriate page number.

[30] BRA Final Order at 8, FOF 39.

[31] BRA Final Order at 14, FOF 99.

[32] BRA Final Order at 15, FOF 102, 103 & 20, FOF 140.

[33] OM Ex. 4.

projected need were reliable (though Protestants dispute this), the City's own projected water supply needs for 2070 are far less than the 65,000 acre-feet it has requested.

In essence, the City is not only arguing that it need not specify how much water will be used for each of its four identified purposes of use. It is arguing that it need not identify *any* use for the remaining 55,900 acre-feet of its requested appropriation for which it has not demonstrated a need. That's because its own application projects a need of just over 9,100 acre-feet by 2070, but the City does not explain how the rest of its requested appropriation—55,900 acre-feet—will be beneficially used, since there appears to be no need for that water through at least 2070. This presents a stark distinction between the City's application and BRA's request for a system operations permit.

vii. The City misunderstood its statutory obligations regarding beneficial use, resulting in a deficient permit application.

The City argues that it "has already established that it will use the water for beneficial uses listed in the Application—municipal, agricultural, mining, or industrial."[34] And it quotes Mr. Schreiber's testimony for support, wherein he stated that "we requested a multipurpose [permit]."[35] This argument and the reliance on Mr. Schreiber's testimony perhaps best explain the City's confusion regarding its statutory obligations.

The City appears to interpret the applicable statutes as requiring an applicant to simply check its intended uses from a list of acceptable beneficial uses as set out in Water Code Section 11.023. And separately, the City contemplates that so long as it asserts that

[34] WF Exceptions at 8.
[35] WF Exceptions at 8, FN 15.

its permit is intended for multiple purposes, the amount of the requested appropriation is not relevant to a showing of beneficial use.

But Chapter 11 requires more than simply checking off a list of possible uses of a water right, along with a request for an appropriation for a total, arbitrary amount of water untethered to any of the particular proposed use or uses. Were that all that were required, this would incentivize permit applicants to always request a multi-use permit, so as to avoid having to demonstrate with specificity how much of the requested appropriation will be applied to each of the stated purposes of use. In other words, permit applicants would be incentivized to avoid the requirements of Section 11.124(a)(4). But this is not what the Legislature intended, and it is not supported by the clear language of the relevant statutes.

Although Water Code Section 11.023 lists various uses for which water *may* be appropriated, this statute must be read in conjunction with the definition of "beneficial use." "Beneficial Use" is defined as the amount of water that is economically necessary for a purpose authorized by Chapter 11, when reasonable intelligence and reasonable diligence are used in applying the water to that purpose, and it shall include conserved water. Tex. Water Code § 11.002(4). In other words, to demonstrate "beneficial use," an applicant must not only identify an authorized purpose (among those listed in Section 11.023), but *also* demonstrate that the *amount of water* to be appropriated is economically necessary for those identified purposes, when reasonable intelligence and diligence are used in applying the water to that purpose.[36] A permit applicant cannot make this demonstration when it

[36] *See also* Tex. Water Code § 11.023(e) (instructing how to determine the appropriate *amount of water* to authorize for appropriation: "The amount of water appropriated for each purpose mentioned in this section shall be specifically appropriated for that purpose, subject to the preferences prescribed in Section 11.024 of this code."); *id.*

seeks an authorization to appropriate 65,000 acre-feet, projects a need of only 9,100 acre-feet through 2070, and merely lists a multitude of possible purposes of use untethered to the projected need or the requested appropriation.

And there is nothing in the Commission's BRA SysOp permitting decision that supports this interpretation of the statutory requirements or justifies relieving the City of its statutory obligations. Beneficial use is an essential component of a water right, and the City simply failed to satisfy its burden on this issue.

B. Habitat Assessment

i. The City and the ED misapply the evidentiary standard for weighing opinion testimony of expert witnesses.

As an initial matter, both the City and the ED misapply the evidentiary standards that govern the ALJ's consideration of expert opinion testimony.

The City argues that the ALJ "ignores" the City's expert witness testimony, simply because the ALJ finds O'Malley's witnesses' opinions to be more credible.[37] The City suggests that because its own expert witness, Mr. Votaw, has decades of experience in fish and wildlife habitat assessment, that his opinions should not be ignored. But his opinions were not ignored. The ALJ, as the fact-finder, analyzed Mr. Votaw's opinions—just as he did Mr. Coonrod's, Mr. Bradsby's, and Mr. Nelle's—and determined the weight to be accorded to them.

§ 11.025 (emphasizing the requirement that a "right to use state water under a permit or a certified filing is limited not only to the amount specifically appropriated but also to the amount which is being or can be beneficially used for the purposes specified in the appropriation, and all water not so used is considered not appropriated").

[37] WF Exceptions at 12.

The City cites to *Gossett v. State*, 417 S.W.2d 730, 737 (Tex. App.—Eastland 1967, writ ref'd n.r.e.), to support its argument that Mr. Votaw's opinion should be accorded more value than was given by the ALJ. But the court in *Gossett* (a condemnation proceeding) did not limit the ALJ's consideration of an expert opinion, as the City suggests. Instead, the court applied the weight of evidence rule as to opinion testimony found in 24 Tex.Jur.2d 42 and 46:

> Opinion testimony does not establish any material fact as a matter of law. It is not conclusive, but merely raises an issue of fact to be submitted to the jury, who, in determining the facts, are not bound by the opinions of the witnesses. It is, in fact, the duty of the jury to analyze the opinion and determine the weight to be accorded it. And the weight to be given even expert testimony is for the jury to determine. The jury may accept or reject all or any part of the testimony of experts, at their option. And since the testimony of lay witnesses is usually admissible for purposes of rebutting the testimony of experts, the trier of fact may believe lay testimony that is in conflict with expert testimony, rather than the expert testimony.
>
> The value of opinion testimony will depend on a number of considerations, including the existence of the facts on which it is predicated, the degree of learning or experience possessed by the witness, the positiveness with which the testimony was given, and whether the witness was interested in the proceeding. Testimony that merely embodies an opinion may also be tested, as to weight, by the other circumstances of the case.

Id.

Not only does the City misapply the general rule for weighing expert testimony, the City also attempts to frame the substantive area of expertise in question as "the use of HEP." The ALJ previously rejected this characterization following the *voir dire* of Mr. Nelle, which was granted at the City's request. Texas Water Code section 11.152 requiring the commission to assess any effects on the issuance of the permit on fish and wildlife habitats is silent as to HEP, and though HEP is mentioned in TCEQ Rule 297.53, it is only

as one example of a possible appropriate methodology to assess fish and wildlife habitat. 30 Tex. Admin. Code § 297.53(f)(1)-(3).[38] Thus, the relevant learning or experience of the witness to be weighed is not limited to HEP, but to fish and wildlife habitat assessment more broadly. Nevertheless, the ALJ extensively considered the HEP report, prepared by Mr. Votaw, Mr. Votaw's direct testimony, and his testimony on cross-examination.[39] The ALJ, as the fact-finder, analyzed Mr. Votaw's opinion and determined the weight to be accorded to it. The City has provided no basis for the ALJ to re-weigh the testimony.

In a similar fashion, the ED incorrectly employs Texas Rule of Evidence 703 to argue that Mr. Coonrod need *only be made aware of* the facts and data that underly the City's HEP report,[40] and then attempts to frame the agency's responsibility under Chapter 11 as non-substantive and non-independent.[41] Though TRE 703 allows an expert to "base an opinion on facts or data in the case that the expert has been made aware of," it does not excuse the expert testimony from also meeting TRE 702's reliability requirement. See *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 557 (Tex. 1995).

Expert testimony is unreliable if it is not grounded "'in the methods and procedures of science'" and is no more than "'subjective belief or unsupported speculation.'" *Id.* (quoting *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 90 (1993)).[42] Expert

[38] The City argues that Mr. Votaw is an expert in HEP and, thus, his opinions should be accorded more weight, but then later argues that TCEQ Rule 297.53(f), which contains the HEP examples, is moot and unnecessary.

[39] PFD at 31-40, 45-47, 50-51, 53, & 56.

[40] ED Exceptions at 4.

[41] *Id.*

[42] An expert's testimony is unreliable, even if the underlying data is sound, when the expert draws conclusions from that data based on a flawed methodology. *Havner*, 953 S.W.2d at 714. Experts' conclusions based on unreliable principles or methodologies are "no more than subjective belief or unsupported speculation and [are] inadmissible." *Wiggs v. All Saints Health Sys.*, 124 S.W.3d 407, 410 (Tex. App.—Fort Worth 2003, pet. denied).

testimony is also unreliable if there is too great an analytical gap between the data the expert relies upon and the opinion offered. *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 727 (Tex. 1998).

TRE 703 also does not excuse an expert from meeting TRE 705 and ensuring the facts and data upon which he relied provide a sufficient basis for the opinion. Tex. R. Evid. 705(c) ("An expert's opinion is inadmissible if the underlying facts or data do not provide a sufficient basis for the opinion."); *Merrell Dow Pharms. v. Havner*, 953 S.W.2d 706, 714 (Tex. 1997) ("The underlying data [upon which the expert relied in forming her opinions] needs to be independently evaluated in determining if the opinion itself is reliable."). Thus, an expert cannot base their opinion on unverified or unreliable information.

In fact, the ED's argument rests on the unfounded assertion already put forth in her reply to closing arguments: that the staff's job is not, at any point, to verify the contents of the habitat assessment, but only to determine whether information on the topic was included.[43] With this as the ED's stated methodology, the question becomes whether the testimony the ED's witnesses is of any value to the trier-of-fact in determining if the City's HEP and mitigation plan met the statutory and regulatory requirements. The PFD weighed the testimony accordingly and the ED's offers no reason for the ALJ to reconsider.

ii. Allowing the CWA 404 permitting process to supplant the State water rights permitting process would lead to absurd results.

[43] ED Exceptions at 4; ED Response to Closing Args. at 8.

The City and the ED again advances the argument that mitigation must be deferred to the federal CWA 404 permitting process, citing to language in Section 11.152 requiring that the commission offset its mitigation against any mitigation required during the 404 process. The City and ED fails to explain how the commission would offset its required mitigation against mitigation by another agency, when that agency has not yet proposed any mitigation. And in practice, this interpretation of the language in Section 11.152 would lead to absurd results.

In fact, the City is not simply proposing to defer wetland mitigation to the 404 process, but also upland terrestrial mitigation. The City cites to the Bois d'Arc Lake, Water Use Permit No. 12151 as evidence that terrestrial mitigation "is enforceable in federally required compensatory mitigation for a CWA Section 404 permit," though it is not entirely clear what the City means. It is true that terrestrial mitigation is in the Bois d'Arc Lake mitigation plan, but the record has established that mitigation in Bois d'Arc Lake was handled concurrently between the state and federal regulatory entities, meaning Bois d'Arc is not evidence of what would happen with a later-in-time federal process, as the City proposes for Ringgold. What the City proposes is the absurd result wherein terrestrial mitigation requirements would not be ensured by the regulatory agency with jurisdiction, but, apparently by the voluntary actions of the regulated community *after* the regulatory agency has relinquished jurisdiction. The City's exceptions depend also on one other absurd result of its erroneous logic.

The City argues that Section 297.53(f) applies only to wetland habitat and since wetland mitigation is deferred to a later-in-time federal process, Section 297.53(f) is moot

and unnecessary. The City's interpretation would mean that the Commission adopted regulations regarding wetlands, with the understanding that the Commission would never apply them, because wetlands are the sole purview of the U.S. Army Corps of Engineers. But this flies in the face of basic the basic principle of statutory interpretation that the language should be construed so as to avoid rendering any language as superfluous. The City's interpretation would require the Commission to conclude that, at the time it adopted 30 Tex. Admin. Code § 297.53, the Commission was ignorant of the meaning of "wetlands," the jurisdiction of the U.S. Army Corps of Engineers over wetlands, and the directive from the Texas Legislature to offset mitigation required by the federal permitting process. But this is not supported by the context of the rules themselves which provide a definition of "wetlands" (*see* 30 Tex. Admin. Code § 297.1(65)) and specifically track the language from the Texas Legislature requiring any mitigation be offset by the federal permitting process (*see* 30 Tex. Admin. Code § 297.53(d)).

Furthermore, the City's interpretation would require that the Commission determine the definition of "offset" as used in this context means to replace any of the Commission's mitigation entirely, as opposed to retaining only the balance of the mitigation not otherwise required by the federal permitting process.[44] Had the Texas Legislature intended to completely supplant the State process with the federal one, it could have simply said so, but instead it chose to have the Commission "offset" any mitigation it required by that mitigation also required during the federal permitting process. The only logical way to read

[44] *See* Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/offset (last visited Feb. 7, 2024) (defining "offset" as: "1: something that serves to counterbalance or to compensate for something else").

these provisions together is to conclude that there could be mitigation that is not required by the federal permitting process but that is required by the State permitting process.

Because there is no support for the City's and the ED's arguments that the State mitigation requirements are supplanted entirely by the federal process, this argument must be rejected.

iii. The City argues for the first time that mitigation is not required.

The City abruptly argues for the first time in its exceptions that mitigation is not required, but discretionary.[45] Though the City takes this position, it fails to explain its significance or how it would justify a re-examination of the PFD. Notably, the ED maintains that, as a condition of the Draft Permit, the City is required to mitigate for impacted fish and wildlife habitat. Thus, the City seems to be suggesting that because mitigation is not *always* required of an applicant, that somehow justifies a less thorough or less diligent assessment of the Application's effects on fish and wildlife habitat. But there is no support for that contention, and in fact, it logically does not follow, since the assessment itself, presumably serves—at least partially—to inform the Commission's decision to require mitigation. Further, for all the City's arguments that the staff's historic practices are relevant to informing the ALJ's analysis, neither the City nor the ED offered any evidence of a reservoir project for which mitigation was not required for the habitat impacted by the reservoir footprint (uplands, riparian, or aquatic). In fact, each of the prior examples cited by parties in the case—Bois d'Arc Lake, Lake Ralph Hall, and others—

[45] WF Exceptions at 16.

contained a comprehensive mitigation requirement. Because the record reflects that the Draft Permit and the ED staff require mitigation, and the City provides no reason to re-analyze this requirement, the City's arguments as to this point should be rejected.

iv. The City advances no new or helpful arguments as to the failure to assess wetland functions and values.

The City again attempts to side-step its responsibilities by arguing wetland mitigation is not required by the Commission, because it will be required pursuant to the CWA 404 permitting process. As an initial, this does not excuse the City from its obligation to determine the specific functions and values for wetlands habitats on an individual case basis using the most technically appropriate habitat evaluation methodology, pursuant to 30 Tex. Admin. Code § 297.53(f)(1). The City goes to great lengths to frame this as a "guideline" but fails to acknowledge that, like the overall statutory scheme handed down by the Texas Legislature, the complete and reliable assessment is mandatory so that the Commission can determine the requisite mitigation. Thus, the City is obligated to assess the wetlands functions and values; however, the City acknowledges it deferred this valuation to the CWA 404 stage.[46] Therefore, its arguments to this point should be rejected.

The City also (again) confuses the distinction between what federal rules impart and what the federal agencies have actually required of the City. For example, the City attempts to mischaracterizes the testimony of O'Malley expert, Mr. Bradsby, but in doing so, highlights this distinction. Mr. Bradsby speaks to the "no net loss of wetland function and value" set at both the state and federal level; but Mr. Bradsby clearly acknowledges that

[46] See WF Exceptions at 26.

the Corps has not reviewed the Application yet.[47] Protestants did not and cannot speculate to what the Corps will required, and that is precisely the point—neither can the City or the ED. Because this speculation is unfounded and the City has offered no new justification for it, its arguments as to the Application's deficient assessment of wetland function and value should be rejected.

v. The City advances no new arguments as to the failure to adequately define the study area or assess impacts of the Application on fish and wildlife habitat.

The City argues that, with the exception of wetland habitat, no assessment methodology is required to assess effects on fish and wildlife habitat. 30 Tex. Admin. Code § 297.53(f)(1) & (3).[48] However, the City *chose* to use HEP to assess upland terrestrial habitat and wetlands—though it did not use HEP to assess the specific functions and values for wetlands habitats. Both the City and ED argue that Rule 297.53(c) does not require the City to assess the "potentially impacted habitat upstream, adjoining, and downstream of the project site" where a determination was made that the habitat upstream, adjoining, and downstream are not potentially impacted. This argument suffers from two signficant flaws.

First, there is nothing in the record to support that a determination was actually made that the upstream and adjoining habitat would not be "potentially" impacted. The City cites only to large sections of the Supplemental Application (WF Ex.1 at WF00007774-89) and the HEP Report (WF Ex. 5 at WF00008237-82),[49] but ignores that the ALJ relied on

[47] WF Exceptions at 24 (The City also cites to Mr. Bradsby's testimony to support a conclusion it asserts Mr. Nelle drew (which he did not)).

[48] WF Exceptions at 16.

[49] WF Exceptions at 20.

testimony from Mr. Votaw himself admitting that the adjacent property was not assessed as to impacts or habitat value.[50] Likewise, the ED maintains that the City considered and concluded that there would be no impacts to habitats upstream or adjoining proposed Lake Ringgold, but cites to no support for this assertion other than the PFD itself.[51] In short, there is nothing in the record to support these arguments by the City and ED.

Even if there was evidence to support the City's position that it considered potentially impacted habitat upstream and adjacent to the footprint, the City's (albeit, *post hoc*) arguments remain illogical. The City argues that the construction of a road and the transformation of an upland into a floodplain do not constitute "potential impacts."[52] Its only reasoning for this perplexing position is that for it to constitute a potential impact, it would have had to be the type of activity that mitigation could be required for. But in making this circular argument, the City returns to the very crux of the problem. In order to assess impacts—so that the Commission may consider mitigation—the applicant is required by Rule 297.53 to assess impacts not only to the project footprint, but to potentially impacted habitat upstream and adjacent. Withi this argument, the City acknowledges once and for all that its assessment did not meet this requirement, and for this reason, the City and the ED's arguments to this point should be rejected.

vi. The City offers no new arguments as to the HEP's deficient selection of species and baseline valuation of habitat.

[50] PFD at 35.

[51] ED Exceptions at 5 (*citing* PFD at 37, however, a review of PFD, n. 77 reveals the testimony of Mr. Votaw does not support the proposition that the upstream and adjacent habitat was assessed and would not be potentially impacted).

[52] WF Exceptions at 20.

The City's argument as to species selection and baseline habitat valuation is largely a repeat of arguments made before. For example, the City argues (inaccurately) that the PFD relies *solely* on the testimony of Landowner Protestants to determine that the HEP failed to assess species and thus, accurately measure the habitat value.[53] However, the PFD indicates that the ALJ considered extensively the testimony of Mr. Votaw, and found the lack of reasoning or analysis provided little support for Mr. Votaw's ultimate opinion.[54] This erroneous characterization of the ALJ's role in weighing opinion testimony has been thoroughly discussed in at least two previous sections and will not be discussed again here. In short, the City would have the ALJ consider *only* the City's evidence and accept it as true, regardless of whether its witnesses appeared credible or adequately and reasonably explained the basis of their opinions. This is not the evidentiary standard nor is it the role of the fact-finder in assigning weight to opinion testimony. Therefore, the City's arguments to this point should be rejected.

C. Need

With regard to need, as with other issues addressed by the City's Exceptions, the City misunderstands its burden of proof here. While the City acknowledges that it bears the burden of proof by a preponderance of the evidence, in its arguments, it cites repeatedly to the ED's review and acceptance of its application representations. This is particularly

[53] WF Exceptions at 22.

[54] PFD at 39 (Mr. Votaw testified that the beaver would not be an appropriate species for the HEP but on cross examination, could not recall looking at the beaver HSI model, or considering the beaver as a potential species, and though the beaver's range extends into the area, Mr. Votaw made no effort to determine if beavers actually occurred there.).

true in the discussion of the City's failure to address the "need" for its requested appropriation.

Under TCEQ Rule 80.17, the City bears the burden of proof at the hearing. And the City must attempt to satisfy its burden via admissible evidence consistent with the Texas Rule of Evidence. 30 Tex. Admin. Code § 80.127. Although the ED's staff's analysis is admissible during the contested case hearing, it is inadequate for purposes of satisfying the applicant's evidentiary burden. This makes sense, because when the ED's staff is reviewing an application for technical completeness, the staff is not employing the evidentiary rules or common-law evidentiary standards in assessing the information in the application. This was made abundantly clear throughout the hearing process in this case.

Further, the ED does not have the authority to waive applicable, unambiguous statutory and regulatory requirements. That is, even if the ED did not require of the City strict compliance with all statutory and regulatory requirements, the City is not excused from presenting admissible evidence, at the SOAH hearing, to demonstrate that it complied with *all* applicable statutory and regulatory requirements.

Accordingly, the City is mistaken in arguing that because the ED's staff accepted the information in the City's application materials and determined that the application was technically complete, this somehow suggests that the City should not be required to do anything more at the contested-case hearing. The City was required to present sufficient admissible evidence, at the contested case hearing, to demonstrate by a preponderance of the evidence that it has complied with each statutory and regulatory requirement applicable to its requested water right. This the City failed to do.

The ALJ, acting as an independent fact-finder, has considered the evidence, as reflected in the PFD, considered the credibility of the various witnesses, and made proposed findings of fact that address and resolve the disputed factual issues in this case. This is the ALJ's proper role. *Flores v. Employees Ret. Sys.*, 74 S.W.3d 532, 539-40 (Tex. App.–Austin 2002, pet. denied).

Most of the City's arguments regarding the issue of "need" are repetitive of the arguments presented in the City's Closing Arguments and Response to Closing Arguments, as are the ED's. By its Exceptions, the City simply summarizes its evidence and argues that it provided the minimum information necessary for issuance of a water right. The City has offered no legal basis or reasoned justification for inviting the ALJ to re-examine the evidence in this matter.

Protestants will not repeat arguments presented in their Closing Arguments or Response to Closing Arguments, but instead offers the following brief responses to the City's arguments in its Exceptions. To the extent the ED offers arguments that diverge from the City's, Protestants will briefly address those as well.

i. Need is an essential requirement for a water right.

The City argues that in analyzing whether the requested appropriation is reasonable and necessary, the PFD cherry-picks certain regulatory and statutory phrases and takes them out of context, in order to justify holding the City to a heightened burden. But the City is mistaken. That a permit applicant must demonstrate a need for the requested appropriation is evident throughout the applicable statutory and regulatory scheme. Indeed, it is contemplated by the very definition of "beneficial use." Tex. Water Code § 11.002(4).

Waters of the state are held in trust for the public and may not be appropriated without a showing of strict compliance with every provision required by the Legislature, including a demonstrated need for the requested appropriation. *See* Tex. Water Code § 11.0235 ("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.").

ii. The undisputed evidence in the record establishes that the City did not consider need in developing its water right application and requested appropriation.

As acknowledged by the City in its Exceptions, it failed to demonstrate a need for the full requested appropriation. Its own witnesses acknowledged this during the hearing. The City's expert witness, Ms. Kiel, testified that need was not a factor that informed the size of the proposed reservoir.[55] She further testified that the City was not required to demonstrate a need or beneficial use for the full appropriation amount.[56] And she testified that the City has not yet developed an operational plan; so, it remains unclear how the City will achieve its proclaimed operational efficiencies.[57]

An email exchange among City staff further acknowledges the absence of a need for the requested appropriation. According to the email, "[t]he yield of Ringgold is estimated, based on the Water Availability Model (WAM), to yield about 27,000 acft per year. . . . This is obviously more water than is needed by the City, and therefore it is likely

[55] *See, e.g.*, Tr. Vol. 1 at 195-196 (Kiel testifying that need does not inform the proposed size of the requested reservoir or the amount of the proposed diversion).

[56] Vol. 2 at 31:10-25 through 32:1-5 (Kiel testifying that Applicant has not demonstrated a need for total requested appropriation amount); Vol. 2 at 97:12-17 (Kiel testifying that Applicant has not demonstrated a need for firm yield amount).

[57] Tr. Vol. 2 at 81:9-27 (Kiel testifying that "The City hasn't made an operations plan with regards to how it intends to operate its reservoirs").

the City would need a partner that can demonstrate additional demand."[58] This document itself acknowledges that the City does not need the water it has requested.

There is no question that the City failed to consider whether there is a need for its requested appropriation; its own witnesses acknowledged this. And there is no question that its own application demonstrates a need for only a little over 9,100 acre-feet through the year 2070. The inquiry should thus end here.

iii. The City's "20% reserve" supply is arbitrary and inflated.

The City's argument regarding its 20% reserve is essentially that the Commission (and the ALJ) has no authority to question its analysis or the basis for its 20% reserve supply. But the City, itself, presented evidence and testimony regarding its 20% reserve figure. Now that the ALJ has correctly determined that this evidence was not reliable, the City argues that the ALJ should not have examined this evidence and should have instead simply accepted whatever representations the City offered in support of its requested appropriation, without question.

In short, the City could not offer any reliable, reasoned justification for its assumption that 20% capacity at the end of the drought of record was necessary. While the City's witnesses discussed some of the operational issues that it had to address (and did address) during the recent exceptional drought, none of the City's witnesses could tie those issues to the assumption that 20% reservoir capacity was necessary.[59] The general,

[58] OM Ex. 4.

[59] *See, e.g.*, Tr. Vol. 2 at 57-60 (Kiel testifying that the 20% water in storage does not equate to it being available as supply; rather it's for operational issues but could not specify how much was needed; she also flip-flops on whether it would be used for supply purposes if there were another drought worse than drought of record); *also* Tr. Vol. 2 at 64 & 66 (Kiel admitting that the operational issues could not be quantified).

anecdotal descriptions of the operational issues experienced by the City could not be quantified in such a manner to support the 20% reserve capacity figure that the City concocted.

In fact, the City appeared to be uncertain of the purpose of the 20% reserve storage. Ms. Kiel described it as necessary for operational considerations. But the report in support of the application describes the 20% reserve storage as a safe supply factor—one that is more conservative than a 2-year safe yield calculation. In fact, the City is unclear on the basis for its assumed need for 20% reserve capacity in its reservoirs. That's because there is no demonstrated need for the 20% reserve capacity; it's an arbitrary figure. The City simply failed to demonstrate that a 2-year storage supply is reasonable, rational, or based on sound data and methodologies and it failed to support its 20% reserve capacity figure.

iv. The City's proposed reservoir is oversized.

Here, again, the City argues that the ALJ should simply ignore the fact that the proposed reservoir is vastly oversized for the amount of water the City needs. The City relies heavily on the BRA SysOp PFD, again, in support of its arguments. It's unclear what portions of the PFD the City is relying on, exactly, because the citations to the PFD do not appear to match the quoted statements in the City's Exceptions.

In any event, for the reasons already discussed above, the BRA SysOp PFD is not relevant here. BRA's requested permit did not contemplate a new reservoir. And BRA presented ample evidence of existing contracts and at least 28 requests for additional water. A more relevant PFD for the Commission's consideration is the one attached to the Landowner Protestants' Response to Closing Arguments, as Attachment C. In that matter,

the ALJ indeed considered whether the proposed reservoir was oversized, and concluded that it was. The same is true in this case, for the reasons described in the PFD.

v. The PFD correctly found that the City failed to demonstrate that 65,000 acre-feet is consistent with the state and regional water plans.

The City attempts to undermine the PFD's analysis by accusing the ALJ of assigning the burden of proof to the ED staff rather than to the City, and then obfuscating the analysis actually performed by the ALJ to conceal that the ALJ's analysis turned on statutory construction. These attempts flagrantly mischaracterize the PFD's actual analysis and warrant no merit.

The City first argues that ALJ assigned the burden for demonstrating the application's consistency with state and regional water plan to the ED staff, rather than to the City, as is required.[60] Though the City essentially argues that the ALJ spends too much time scrutinizing the nature of ED staff review, the City fails to see the irony that, in support of its position, it cites entirely to testimony of the ED's witnesses Dr. Alexander and Ms. Allis. Nonetheless, the ALJ expressly acknowledged he was addressing the crux of both the City's main argument and its burden: "The City argues that under a plain language reading of "consistent with," it has met its burden of proof." [61]

In an effort to mischaracterize and overcomplicate what is really a very straightforward question of statutory interpretation, the City asserts that the PFD would require the TCEQ to invade the regulatory purview of the TWDB. But nowhere does the

[60] WF Exceptions at 43.
[61] PFD at 92-93.

PFD require or even suggest the reopening of any water supply planning. In fact, the PFD thoroughly and clearly explains that the analysis under Texas Water Code, Section 11.134(b)(3)(E), "necessarily requires an examination of the need for the proposed appropriation *relative to the need shown in the state and regional water plans*."[62] As such, the PFD actually defers to the State and Regional Water plans (in which the City has a need for only 10,864 acre-feet per year), while it is the City that is asking the Commission to allow the City's Application to override those plans and grant it 65,000 acre-feet per year.

As to consistency, the PFD is well-reasoned, whereas the City's and the ED's positions are not. The City's and the ED's exceptions should be rejected.

V. TRANSCRIPT COSTS

The City maintains that the ALJ's allocation of the transcript costs—70% to the Applicant and 30% to the O'Malley Protestants—is erroneous for two reasons: (1) because the PFD based this conclusion on *only* the fact that the City has been prosecuting this application for seven years;[63] and that consideration of the financial ability of a party to pay the costs is somehow limited in scope to the hearing itself.[64] The City is wrong on both accounts.

The ALJ specifically outlines the four factors found in 30 Tex. Admin. Code § 80.23(d) relevant to the determination that it would be just and reasonable for the O'Malley

[62] PFD at 94 (emphasis added) (This is in contrast to the analysis under Section 11.134(c), which requires only the Commission to determine whether a regional water plan was submitted.).

[63] WF Exceptions at 46 ("The PFD's basis, however, for a greater City share is that the City has prosecuted the Application over several years.").

[64] *Id*. ("The applicable rule and cost allocation factors focus upon the hearing itself, as opposed to a separate application process. 30 Tex. Admin. Code § 80.23(d)(1)(B).").

Protestants to share in the cost of the transcript, but that the factors favor the City bearing the greater cost.[65] It does not reach this conclusion, as the City alleges, based only on the fact that the City has been pursuing this water rights application for seven years. In fact, the PFD specifically considers that "Landowner Protestants, and O'Malley in particular, by having secured counsel and expert witnesses, have demonstrated the ability to pay costs," but in weighing protestants' ability with the applicant's, that "[t]he City has demonstrated a superior ability to pay, by having prosecuted this application for seven years now, with the assistance of counsel and consultants."[66] The PFD also considers and weighs against one another the extent to which protestants and the City participated in the hearing and the extent each party made use of the transcript: "O'Malley participated extensively in the hearing and post-hearing briefing, making extensive use of the transcript, as did the City."[67] Finally, the ALJ considered that the City is the party seeking affirmative relief, whereas the protestants are merely seeking to maintain the status quo.[68] Thus, it was based on consideration of numerous factors—and the weighing of the factors with regard to each party—that the PFD determined the factors favor the City bearing the greater cost.

The City also argues, without citing to any legal precedent or providing any basis for its position, that consideration of "the financial ability of the party to pay the costs" is somehow limited to the hearing itself, as opposed to a separate application process.[69] *See*

[65] PFD at 102 ((1) the financial ability of the party to pay the costs; (2) the extent to which the party participated in the hearing; (3) the benefits to various parties of having a transcript; and (4) any other factor which is relevant to a just and reasonable assessment of costs).

[66] PFD at 103.

[67] *Id.*

[68] *Id.*

[69] WF Exceptions at 46.

30 Tex. Admin. Code § 80.23(d)(1)(B). However, in this case, the City's argument is revealing, suggesting that the application process is somehow separate from the contested case hearing, when it should be clear to the City by this point in time that the permit application is *precisely* the subject of this contested case hearing. The PFD acknowledges the reality that, in considering whether the City's permit application filed with the TCEQ meets all statutory and regulatory requirements, it would be absurd to consider only what occurred since the hearing requests were granted. Though Protestants maintain that the City should bear the full cost of the transcript for the reasons described in Landowner Protestants' Closing Arguments and Response to Closing Arguments,[70] nothing in the PFD or the record would support the conclusion the City now asks the Commission to draw.

For these reasons, the City's exceptions to transcript costs and its associated proposed edits to the Proposed Order[71] should be rejected.

VI. REVISIONS TO THE PROPOSED ORDER

Many of the City's and the ED's proposed findings of fact and conclusions of law are simply unnecessary because they do not resolve or inform any factual dispute raised by the parties. Several others should be denied because they contain factual or legal errors, as previously described. In lieu of identifying each and every objection to the unnecessary or erroneous findings and conclusions, Protestants instead indicate no objection to the ED's proposed edits to the ALJ's proposed finding of fact 17, naming the parties. Protestants

[70] Because Protestants did not request an expedited transcript, did not benefit from the expedited transcript that the City received, and obtained their copy of the transcript from the TCEQ Chief Clerk's office at their own expense. Landowner Protestants' Response to Closing Args. at 47-48.

[71] FOF 168 (PFD's FOF 112): unnecessary; FOF 169 (PFD's FOF 113) and deletion of PFD's FOF 114: erroneous; COL 40 (PFD's COL 38): erroneous.

oppose all other proposed findings, proposed conclusions, and other revisions to the proposed order offered by the City and the ED as either unnecessary or erroneous.

VII. CONCLUSION

For all these reasons, Protestants respectfully request that the Commission deny the City of Wichita Falls' Application, because the City has not met its burden and has not demonstrated that its Application meets the applicable statutory and regulatory requirements. Protestants further request such other and further relieve to which they may be justly entitled.

Respectfully submitted,

/s/ Lauren Ice
Marisa Perales
State Bar No. 24002750
marisa@txenvirolaw.com
Lauren Ice
State Bar No. 24092560
lauren@txenvirolaw.com
PERALES, ALLMON & ICE, P.C.
1206 San Antonio St.
Austin, Texas 78701
512-469-6000 (t) | 512-482-9346 (f)

Counsel for William Justin O'Malley, Umhaill Valley LLC, Kildavnet Castle LLC, and Rockfleet Castle LLC

/s/ William P. Lane
William P. Lane
blane@mhbg.com
Adam N. Holmes
aholmes@mhbg.com
McCleskey Harriger Brazill & Graf LLP
5010 University Ave., 5th Floor
Lubbock, Texas 79413
(806) 796-7332

(806) 796-7365 (fax)

Counsel for Stan, Larry, and Lonnie Horwood

/s/ Deborah Clark
Deborah Clark
P.O. Box 90
Henrietta, Texas 76365
(940) 328-5542
deborah@birdwellandclarkranch.com

For Texoma Stewardship Coalition & Aligned Protestants

/s/ Janice Bezanson
Janice Bezanson
TCA Senior Policy Director
745 County Road 1537
Avinger, Texas 75630
P.O. Box 822554
Dallas, Texas 75382
janice@tcatexas.org
(512) 327-4119

For Texas Conservation Alliance

CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the above and foregoing document has been served via electronic service to the parties of record below, on February 7, 2024.

/s/ Lauren Ice
Lauren Ice

FOR THE APPLICANT:
Nathan E. Vassar
nvassar@lglawfirm.com
Sara R. Thornton
sthornton@lglawfirm.com
Jessie S. Powell
jpowell@lglawfirm.com
Lloyd Gosselink Rochelle & Townsend, P.C.
816 Congress Ave, Suite 1900
Austin, Texas 78701
(512) 322-5800
(512) 472-0532 (fax)

FOR THE EXECUTIVE DIRECTOR:
Ruth Takeda
Aubrey Pawelka
TCEQ Environmental Law Division
P.O. Box 13087, MC-173
Austin, Texas 78711
(512) 239-6635
(512) 239-0606 (fax)
Ruth.takeda@tceq.texas.gov
Aubrey.pawelka@tceq.texas.gov

FOR THE OFFICE OF PUBLIC INTEREST COUNSEL:
Eli Martinez
TCEQ Office of Public Interest Counsel
P.O. Box 13087, MC-103
Austin, Texas 78711
(512) 239-3974
(512) 239-6377 (fax)
Eli.martinez@tceq.texas.gov

FOR CLAY COUNTY:
Frank J. Douthitt
102 South Fannin Street
Henrietta, Texas 76365
(940) 704-8274
frank@douthittLaw.com