

No. D-1-GS-11-001298

**IN THE DISTRICT COURT OF TRAVIS COUNTY, TEXAS
98th JUDICIAL DISTRICT**

**CONCHO RIVER BASIN WATER CONSERVANCY ASSOCIATION, PLAINTIFF
V.
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, DEFENDANT**

On appeal from an Order by the Texas Commission on Environmental Quality Granting
Amendment 14-1318C, TCEQ Docket No. 2008-1617-WR

PLAINTIFF'S INITIAL BRIEF

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January 23, 2012

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GLOSSARY OF TERMS

Adjudication of water rights: The determination by a court of the extent that claims to water rights on a stream or water course or segment thereof have been perfected into vested water rights pursuant to the Water Rights Adjudication Act of 1967, Texas Water Code, Chapter 11, Subchapter G ("Adjudication Act").

Appropriations: "The process or series of operations by which an appropriative right is acquired. A completed appropriation thus results in an appropriative right; the water to which a completed appropriation in good standing relates is appropriated water." 30 TAC § 297.1(3).

Appropriative right: "The right to impound, divert, store, take, or use a specific quantity of state water acquired by law." 30 TAC § 297.1(4).

Baseflow: See definition of "Normal or Baseflow" below.

Call or making a call: The act of a senior water right having senior time priority asserting its prior rights to have water available against a junior water right under the Prior Appropriation Water Rights System.

Certificate of Adjudication ("COA"): "An instrument evidencing a water right issued to each person adjudicated a water right in conformity with the provisions of Texas Water Code, §11.323... " 30 TAC § 297.1(9).

Certified filings: "A declaration of appropriation or affidavit that was filed with the State Board of Water Engineers under the provisions of the 33rd Legislature, 1913, General Laws, Chapter 171, § 14, as amended." 30 TAC § 297.1(10).

Dam: "Any artificial structure, together with any appurtenant works, which impounds or stores water. All structures which are necessary to impound a single body of water shall be considered as one dam." 30 TAC § 297.1(15).

Diversion: The taking of water from a stream or watercourse by mechanical (pump) or by gravity through a cut in the streambed.

Final Determination: The legal document evidencing the State agency's final determination of water rights upon completion of the adjudication hearing of claims to water rights pursuant to the Water Rights Adjudication Act of 1967, Texas Water Code, Chapter 11, Subchapter G, and as specifically provided for in Texas Water Code, § 11.315 ("Final Determination").

Futile Call: When a downstream senior water right holder calls for water to be passed (not diverted or taken from the stream) by an upstream junior water right holder and the dry condition of the stream is such that the water passing the junior water right holders' diversion point would not reach the senior water right holder because of the intervening loss of water in a dry stream bed.

Impounded or stored water: Water which has been impounded in a reservoir pursuant to an impoundment water right.

Impoundment water right: The right to hold water in a reservoir by use of a dam or other structure that prevents the water from continuing to flow downstream in a stream or watercourse.

Inflows: Water flowing into a reservoir.

Interjacent water right: A water right or water rights holder located on a stream or watercourse between an upstream water right or water rights holder(s) and a downstream water right or water rights holder(s).

Keeping a stream wetted: Keeping necessary water in a stream so that additional water can be delivered downstream and not soak into the riverbed.

Lawful Diverter: One who is authorized by a water right to take (divert) water from a stream or watercourse.

Lower Appropriator: One who owns a water right on a stream or watercourse located below or downstream from another water right holder or a structure authorized under a water right, such as a dam.

Normal or Baseflow: “The portion of streamflow uninfluenced by recent rainfall or flood runoff and is comprised of springflow, seepage, discharge from artesian wells or other groundwater sources, and the delayed drainage of large lakes and swamps. (Accountable effluent discharges from municipal, industrial, agricultural, or other uses of ground or surface waters may be included at times.)” 30 TAC § 297.1(6). [Definition of "Baseflow or normal flow."]

Ordinary Flow: Another term defining normal or baseflow judicially defined by the Texas Supreme Court in *Motl v. Boyd*, 286 S.W. 458, 468-469 (Tex. 1926) as follows: “The line of highest ordinary flow” is the highest line of flow which the stream reaches and maintains for a sufficient length of time to become characteristic when its waters are in their ordinary, normal, and usual condition, uninfluenced by recent rainfall or surface run-off.”

Prior Appropriation Water Rights System: “[T]he water rights allocation doctrine that Texas first began implementing in the latter part of the 19th century, and later fully integrated into Texas surface water law through the Water Rights Adjudication Act of 1967. Under prior appropriation, the priority date of a water right determines where that water right holder stands in line during periods of shortage when there is not enough water to satisfy all of the water right demands in the basin. The water right with the oldest priority date in the basin—the first in time—stands at the front of the line when water in the basin is in limited supply—the first in right. As a consequence, having the junior-most priority in a basin or on a stream segment means that particular water right must yield to the calls of all other water rights in the basin or the segment, whichever the case may be.” AR Vol 8, 130 at 20:5 – 16 (Brandes PFT, Exh. SA-2).

Priority: “As between appropriators, the first in time is the first in right, Texas Water Code, §11.027, unless determined otherwise by an appropriate court or state law.” 30 TAC § 297.1(38).

Push Water- Water that is either in a stream so that the stream is “wetted” so that water can be delivered or, in the case of a dry stream, it is water that is needed in addition to water to be diverted and used so that water that is needed to be taken and used can be delivered downstream.

Riparian: “[R]elating to or living or located on the bank of a natural watercourse (as a river) or sometimes of a lake or a tidewater.” Merriam Webster’s Collegiate 1010 (10th ed. 1997).

Senior water right: A term used in the Prior Appropriation Water Rights System identifying the water right holder having the older priority date.

State Water (Water of the State): “The water of the ordinary flow, underflow, and tides of every flowing river, natural stream, and lake, and of every bay or arm of the Gulf of Mexico, and the storm water, floodwater, and rainwater of every river, natural stream, canyon, ravine, depression, and watershed in the state is the property of the state.” Texas Water Code § 11.021.

Storm and flood waters: Water flowing in a watercourse as the result of recent rainfall.

Superior water right: The riparian right for domestic and livestock use of water.

Domestic use: “Use of water by an individual or a household to support domestic activity. Such use may include water for drinking, washing, or culinary purposes; for irrigation of lawns, or of a family garden and/or orchard; for watering of domestic animals; and for water recreation including aquatic and wildlife enjoyment. If the water is diverted, it must be diverted solely through the efforts of the user. Domestic use does not include water used to support activities for which consideration is given or received or for which the product of the activity is sold.” 30 TAC § 297.1(18).

Livestock use: “The use of water for the open range watering of livestock, exotic livestock, game animals or fur-bearing animals. For purposes of this definition, the terms livestock and exotic livestock are to be used as defined in § 142.001 of the Agriculture Code, and the terms game animals and fur-bearing animals are to be used as defined in §63.001 and 71.001 respectively, of the Parks and Wildlife Code.” 30 TAC § 297.1(28).

Unappropriated water: “The amount of state water remaining in a watercourse or other source of supply after taking into account complete satisfaction of all existing water rights valued at their full authorized amounts and conditions.” 30 TAC § 297.1(54).

Use water right: The maximum amount or volume of water authorized to be diverted pursuant to a water right usually expressed in terms of acre feet (12” of water overlaying an acre of land or 325,853 gallons).

Water right: “A right or any amendment thereto acquired under the laws of this state to impound, divert, store, convey, take, or use state water.” 30 TAC § 297.1(60).

Water right permit: “The authorization by the commission to a person whose application for a permit has been granted. A permit also means any water right issued, amended, or otherwise administered by the commission unless the context clearly indicates that the water right being referenced is being limited to a certificate of adjudication, certified filing, or unadjudicated claim.” 30 TAC § 297.1(36).

CITATION TO THE RECORD

- A citation to the Plaintiff’s Motion for Rehearing appears at the end of each major heading as “MFR Point of Error No. ____.”
- Citations to the Administrative Record appear with the volume number and item (document) number. If a pinpoint cite within the document is helpful, it is also included. These citations appear as follows: AR Vol ____, ____ at ____.
- Citations to evidence as numbered during the TCEQ contested case hearing are in parentheses following the Administrative Record citation as follows: (Exh. Concho-8) or (COA 1318, Concho-8); (ED-8), which is TCEQ Executive Director Exhibit; or (SA-8), which is a City of San Angelo Exhibit. Pinpoint cites are provided as necessary.
- Documents included in the Appendix are cited as follows: Appendix ____: [followed by description]. If the Appendix includes an excerpt of a record, document or legal source, it will be so noted.

STATEMENT OF THE NATURE OF THE CASE

This is an appeal of the Order issued by the Texas Commission on Environmental Quality ("TCEQ" or "Commission") in a contested case, SOAH Docket No. 582-10-0294, TCEQ Docket No. 2008-1617-WR ("Commission Order").¹ The Order amended Certificate of Adjudication No. 14-1318 ("COA-1318") and issued Amendment to Certificate of Adjudication No. 14-1318C ("Amendment 1318C"),² which modifies Special Condition 5.C of COA-1318 and makes additional changes to the Certificate.

This appeal is brought by Concho River Basin Water Conservancy Association, the Protestant below, on behalf of Protestant water right holders in the Concho River Basin ("Concho River Association" or "Plaintiff").³ Plaintiff has exhausted all administrative remedies available before the TCEQ and been aggrieved by the final decision in the contested case referenced above. Tex. Gov't Code § 2001.171. This appeal raises issues of first impression having significant implications to water rights law and policy in the State.

This Court has jurisdiction of this appeal pursuant to Texas Government Code Chapter 2001, ("APA") Subchapter G ("APA"). Plaintiff has fulfilled all conditions precedent to this appeal, having timely filed a Motion for Rehearing before the Commission ("MFR"),⁴ which was overruled by operation of law on April 5, 2011.⁵ Tex. Gov't Code § 2001.146 and 30 Tex. Admin. Code § 80.272. The Petition was filed on May 2, 2011, which was within 30 days of the date the Motion for Rehearing was overruled, making the Commission decision final and appealable. Tex. Gov't Code § 2001.176(a); 30 Tex. Admin. Code §§ 80.273 and 80.275.

¹ The Commission Order is dated February 9, 2010, when it should be dated February 9, 2011. It was issued on February 14, 2011. See **Appendix 1: Administrative Record ("AR")** Vol. 6, 115 (Commission Order).

² See **Appendix 2: Excerpt of AR** Vol 6, 115 (Amendment 1318C).

³ City of Paint Rock; A.J. Jones, Jr.; Wilburn Bailey Estate; Carrol Blacklock; Lewis J. Buck; Lonnie L. Buck; Van W. Carson; W.G. and Wanda Dishroon; Thomas Evridge; Samie Ewald; Leonard Grantham, Jr.; Bill J. Helwig; Hudson Management, Ltd.; Douglas John; John C. Ketzler; Bernie and Lucy Mika; Kevin L. Noland; Darrell Rushing; Schneemann Investment Corporation; Kenneth Schwartz; Kent C. Schwartz; Todd Schwertner; Gordon Snodgrass; Vinson Ranch Ltd; Clyde Watkins; Edward E. Werner; Ben A. Willberg; Kenneth R. Windham; Stuart Seidel and South Concho Irrigation Company (which withdrew as a named party, but remained a party Protestant in the case through the Concho River Association. See Plaintiff's Original Petition at p. 1 fn. 2.

⁴ See **Appendix 3: AR** Vol 6, 117 (MFR).

⁵ **AR** Vol 6, 119 (MFR overruled by operation of law April 5, 2011).

Plaintiff seeks review under the substantial evidence rule as described in Plaintiff's Original Petition and as authorized by Tex. Gov't Code § 2001.174. Accordingly, this Court must reverse or remand the case for further proceedings if substantial rights of the Plaintiff have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (A) in violation of a constitutional or statutory provision;
- (B) in excess of the agency's statutory authority;
- (C) made through unlawful procedure;
- (D) affected by other error of law;
- (E) not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole; or
- (F) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Tex. Gov't Code § 2001.174(2). An agency decision is arbitrary if the agency does not consider a factor the Legislature directed it to consider, considers an irrelevant factor, or weighs relevant factors but reaches a completely unreasonable result. *City of El Paso v. Public Util. Comm'n*, 883 S.W.2d 179, 184 (Tex. 1994). An agency decision is also arbitrary if it denies the parties due process or fails to demonstrate a connection between the agency decision and the factors that are made relevant to the decision by the applicable statutes and regulations. *Occidental Permian, Ltd. v. Railroad Comm'n*, 47 S.W.3d 801, 806 (Tex. App.—Austin 2001, no pet.).

Furthermore, the Commission is required to follow its own rules and procedures. Tex. Water Code § 5.103(c); accord *City of Waco v. Texas Natural Res. Conservation Comm'n*, 83 S.W.3d 169, 179 (Tex. App.—Austin 2002, pet. denied) (“The commission shall follow its rules as adopted until it changes them in accordance with the [APA].”). An agency's failure to follow the clear and unambiguous language of its own rules is arbitrary and capricious. *Rodriguez v. Service Lloyds Ins. Co.*, 997 S.W.2d 248, 254-55 (Tex. 1999).

Both the APA and the principles of due process require that parties to an administrative proceeding be accorded a full and fair hearing on disputed fact issues. Tex. Gov't Code § 2001.051; *City of Corpus Christi v. Public Util. Comm'n*, 51 S.W.3d 231, 262 (Tex. 2001) (explaining that due process does not require the full procedural framework of a civil trial). An agency's findings inferences, conclusions or decisions are “not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole if:

The evidence as a whole is such that reasonable minds could have reached the conclusion the agency must have reached in order to take the disputed action. *Texas State Bd. Of Dental Examiners v. Sizemore* 759 S.W.2d 114, 116 (Tex.1988), cert. denied, 490 U.S. 1080, 109 S.Ct. 2100, 104 L.Ed.2d 662 (1989). The true test is not whether the agency reached the correct conclusion, but whether some reasonable basis exists in the record for the action taken by the agency. *Texas Health Facilities Comm'n v. Charter Medical-Dallas, Inc.*, 665 S.W.2d 446, 452 (Tex. 1984).

City of El Paso v. Public Util. Comm'n, 883 S.W.2d 179, 186 (Tex. 1994).

Because the Plaintiff has been prejudiced because of the administrative findings, inferences, conclusions, and decisions below, the Plaintiff requests the Court to reverse the Commission Order, or in the alternative, to remand the case for further proceedings.

STATEMENT OF FACTS

COA-1318⁶ authorizes the City, through the San Angelo Water Supply Corporation ("SAWSC"), to maintain a dam and a 170,000 acre-foot reservoir on the Middle Concho River, Spring Creek, and the South Concho River.⁷ Spring Creek is a tributary of the Middle Concho River, and both the Middle Concho and South Concho Rivers are tributaries to the Concho River, which is a tributary to the Colorado in the Colorado River Basin.⁸ The reservoir is known as the Twin Buttes Reservoir ("the Reservoir"). The dam is referred to as the Twin Buttes Dam ("the Dam"). Certificate of Adjudication 14-1318 also authorizes diversion and use of 25,000 acre-feet annually for irrigation and 29,000 acre-feet annually for municipal purposes. The City of San Angelo ("the City") has managed the Reservoir, Dam, and its water supplies since SAWSC was created. Thus the City was the Applicant for the amendment being considered in this appeal.⁹

The procedural history of the Application for Amendment 1318C is undisputed and is described in the Commission Order at Findings of Fact ("FOF") 23 - 39.¹⁰ Plaintiff here, Concho River Association,¹¹ was named as a party Protestant.¹²

⁶ See **Appendix 4: AR** Vol 8, 146 (COA-1318, Exh. Concho-8). The original Certificate of Adjudication 14-1318 is the water right relevant to this appeal and brief. Amendments 14-1318A and B have previously been approved by the Commission. Amendment 14-1318A deleted a provision in Certificate 1318 that required the City's unconsumed treated waste water effluent to be returned to the Concho River and increased the number of acres that could be irrigated from 10,000 acre to 15,000 acres. **AR** Vol 9, 153 (Exhibit ED-4, Amendment A). Amendment 14-1318B was the subject of a companion case before the Commission. It authorized the change in elevation of the conduit in the Dam from 1883.5 feet msl to 1885 feet msl based upon an Order of a predecessor of the Commission, approving the as-built elevation, which was overlooked in the Adjudication Case and in the preparation of Certificate 1318. See SOAH Docket No. 582-10-0293, TCEQ Docket No. 2008-1616-WR, Application No. 14-1318B by the City of San Angelo for Amendment to Certificate of Adjudication No. 14-1318. **AR** Vol 9, 150 at 3:21-31(Mikes Pre-Filed Testimony ("PFT"), Exhibit ED-1). An Order approving Amendment 1318B was signed March 24, 2011.

⁷ See **Appendix 1: AR** Vol 6, 115 at FOF 1 and 2 (Commission Order). It also authorized SAWSC to make diversions from the Reservoir, which are not at issue in this appeal. See **Appendix 1: AR** Vol 6, 115 at FOF 9 (Commission Order).

⁸ See **Appendix 5: AR** Vol 9, 154 at p. 3 (Map, Exh. ED-5).

⁹ See **Appendix 1: AR** Vol 6, 115 at FOF 3, 4, 5, 7, 8, 9, and 23 (Commission Order).

¹⁰ See **Appendix 1: AR** Vol 6, 115 at FOF 23 through 39 (Commission Order).

¹¹ See footnote 3, *supra*.

¹² See **Appendix 1: AR** Vol 6, 115 at FOF 36 (Commission Order).

Among other requested changes, the City sought to amend Special Condition 5.C. of COA-1318¹³, which states:

A conduit shall be constructed in the aforesaid dam [Twin Buttes Dam] with the inlet at elevation 1883.5 feet above mean sea level, having an opening of not less than five feet in diameter and equipped with a regulating gate *for the purpose of permitting the free passage of the normal flow through the dam at all times and the passage of those waters to which the [Agency]¹⁴ may determine lower appropriators are entitled.* [Emphasis added.]

The Commission Order being challenged in this appeal approved Amendment 1318C.¹⁵ Pertinent to Special Condition 5.C., Amendment 1318C replaces it with the following Special Condition 2.B.:

A conduit shall be constructed in the aforementioned dam with the inlet at elevation 1,885.0 feet above mean sea level, having an opening of not less than five feet in diameter and equipped with a regulating gate. *Owner shall permit the free passage of inflows through Twin Buttes Reservoir via the conduit as required by Special Condition 2.C. of Certificate of Adjudication No. 14-1318C, and in such amounts as determined by the Watermaster or the Executive Director¹⁶ for downstream water rights holders and livestock users.*¹⁷ [Emphasis added.]

Under Amendment 1318C, Special Condition 2.C, the owner shall only store water in accordance with the *City of San Angelo Water Rights Accounting Plan ("Accounting Plan")*.¹⁸

In an effort to explain the meaning and import of Special Condition 5.C of COA-1318C, Concho River Association sought to introduce into evidence its precursor provisions in Permit No. 1949, but the evidence was erroneously excluded.¹⁹ Permit No. 1949, which is before this

¹³ **Appendix 4: AR** Vol 8, 146 (COA-1318, Exh. Concho-8). See also, **Appendix 1: AR** Vol 6, 115 at FOF 11 and 12 (Commission Order).

¹⁴ References to state agencies that were predecessors to the Texas Commission on Environmental Quality, will be referred to as "Agency," unless the distinction between the agencies is necessary for clarity.

¹⁵ See **Appendix 2: Excerpt of AR** Vol 6, 115 (Amendment 1318C)

¹⁶ All references to the Executive Director ("ED") refer to the Executive Director of the TCEQ and all predecessor agencies, unless a distinction is needed for clarity.

¹⁷ See **Appendix 2: Excerpt of AR** Vol 6, 115 (Amendment 1318C). See also **Appendix 1: AR** Vol 6, 115 at FOF 78 (Commission Order).

¹⁸ See **Appendix 2: Excerpt of AR** Vol 6, 115 (Amendment 1318C). See also **Appendix 1: AR** Vol 6, 115 at FOF 81, 86, and 87. (Commission Order).

¹⁹ **AR** Vol 4, 86 at p. 8 (SOAH Order No. 7).

Court as an Offer of Proof,²⁰ is the original water right issued for Twin Buttes Reservoir. Permit 1949 granted the right to "appropriate, divert and use certain public waters of the State, to ***consist of the storm and flood waters*** of the Middle and South Concho Rivers, . . . " [Emphasis added.] It also included precursor requirements to COA-1318, including Special Condition 5.C. quoted above. Permit 1949 states, in pertinent parts:

The permittee ***shall store only storm and flood waters*** of said stream, subject to all the rights of prior appropriators and lawful diverters below. Whenever the [Agency] finds that the permittee is storing any water to which downstream appropriators and lawful diverters are entitled, the permittee shall release same to said appropriators or lawful diverters on the order of the [Agency]. . . [Emphasis added.]²¹

A conduit shall be constructed in said dam [Twin Buttes Dam] with the inlet at elevation 1883.50 feet above mean sea level, having an opening of not less than five feet in diameter and equipped with a regulating gate ***for the purpose of permitting the free passage of the normal flow through the dam at all times and the passage of those waters to which the [Agency] may determine lower appropriators are entitled.***²² [Emphasis added.]

Permit 1949 was adjudicated in the Final Judgment and Decree considered by the Tom Green County District Court in Cause No. 44,990-A *In the Matter of the Adjudication of the Concho River Segment and its Tributaries of the Colorado River Basin* ("Court Decree").²³ The Court Decree affirmed and incorporated by reference, with exceptions not pertinent here, the Modified Final Determination of the Texas Water Rights Commission, dated August 16, 1976 ("Final Determination").²⁴ The Final Determination confirmed that Permit 1949 authorized only the impoundment of storm and flood water:²⁵ "Permit No. 1949 authorizes the impoundment of 170,000 acre-feet of ***storm and flood*** water in a 600,000 acre-foot capacity on-channel reservoir on the South and Middle Concho Rivers (Twin Buttes Reservoir)." [Emphasis Added.]

²⁰ See **Appendix 6**: Excerpt of **AR** Vol 9, 149 (Permit 1949). See also **AR** Vol 9, 149 beginning at p. 153 (CRBWCA Offer of Proof).

²¹ See **Appendix 6**: Excerpt of **AR** Vol 9, 149 (Permit No. 1949) at p. 1 and ¶ 3.

²² See **Appendix 6**: Excerpt of **AR** Vol 9, 149 (Permit No. 1949) at ¶ 5.

²³ The Court Decree was originally denied admission into evidence. **AR** Vol 4, 86 at p. 7 (SOAH Order No. 7). Later, it was officially noticed. See Hearing on the Merits, transcript ("HOM Tr.") Vol 1 at p.48. See **Appendix 7**: **AR** Vol 8, 147 (Court Decree, Exh. Concho-9). See Discussion at Section I.D.

²⁴ The Final Determination was originally denied admission into evidence. **AR** Vol 4, 86 at p. 7 (SOAH Order No. 7). Later, it was officially noticed. See HOM Tr. Vol 2 at pp. 235-236. **AR** Vol 9, 148 (Final Determination, Exh. Concho-10). See Discussion at Section I.D.

²⁵ See **Appendix 8**: Excerpt of **AR** Vol 9, 148 at p. 42, Col. 1 (Final Determination, Exh. Concho -10).

The Court Decree also ordered the Agency to take action to implement the Decree, as required by the Texas Water Rights Adjudication Act.²⁶ As a result, the Agency prepared COA-1318, but in doing so, failed to reflect that the Court Decree, by affirming the Final Determination, authorized impoundment of only storm and flood waters in Twin Buttes Reservoir.²⁷ COA-1318 also failed to reflect the provision in Permit 1949 that restricted storage in the reservoir to storm and flood waters, subject to all the rights of prior appropriators and lawful diverters below the Dam.²⁸

²⁶ See **Appendix 7:** AR Vol 8, 147 at p. 7 (Court Decree, Exh. Concho-9). See **Appendix 9:** Texas Water Code, Chapter 11 Subchapter G.

²⁷ See **Appendix 8:** Excerpt of AR Vol 9, 148 (Final Determination, Exh. Concho -10). Compare to **Appendix 4:** AR Vol 8, 146 (COA-1318, Exh. Concho-8).

²⁸ See **Appendix 6:** Excerpt of AR Vol. 9, 149 (Permit 1949). Compare to **Appendix 8:** Excerpt of AR Vol 9, 148 (Final Determination).

POINTS OF ERROR AND ARGUMENT

I. IN EVALUATING WHETHER TO GRANT AMENDMENT 1318C UNDER TEXAS WATER CODE § 11.122(b), THE COMMISSION MUST BEGIN BY DETERMINING THE “TERMS AND CONDITIONS” OF THE EXISTING WATER RIGHT THAT THE CITY SEEKS TO AMEND. BECAUSE THE COMMISSION MISINTERPRETED AND MISCHARACTERIZED THAT WATER RIGHT, THE COMMISSION ORDER MUST BE REVERSED. (MFR POINT OF ERROR NO. 3)²⁹

The central issue in this case is the TCEQ's misapplication of Texas Water Code §11.122(b) by totally failing, at the outset of the proceedings below, to accurately describe the underlying water right held by the City.³⁰ This failure led to the erroneous and flawed findings of fact and conclusions of law reflected in the Commission Order approving Amendment 1318C, requiring that the Order be reversed.³¹ In the alternative only, it must be remanded with instructions consistent with this Court's judgment.

Amendments to water rights are governed by Texas Water Code Section 11.122(b).³² Section 11.122(b) requires a comparison between the existing water right and the amended water right. The comparison must be made between the amended right, and the existing right as if “fully exercised according to its terms and conditions.” The Texas Supreme Court has referred to this comparison as the “full use assumption” and also as the “four-corners doctrine.”³³ The amendment must be granted if it will not cause adverse impacts on other water right holders or the environment on the stream of greater magnitude than does the existing right, which is referred to as the “no injury” rule.³⁴ Texas Water Code § 11.122(b). Thus the Commission's

²⁹ **Appendix 3:** AR Vol 6, 117 at Point of Error 3 (Protestants' Motion for Rehearing).

³⁰ In 1954, SAWSC was created. Its purpose was to hold the water rights for the Twin Buttes Reservoir on behalf of the City of San Angelo. This was necessary in order to comply with federal requirements for Bureau of Reclamation funding and creation of the Twin Buttes Dam and Reservoir. The City has always managed the Reservoir and its water supplies for SAWSC. It acted on behalf of the SAWSC as the Applicant in the case below. AR Vol 8, 124 at 3:15-4:1 (Wilde PFT, Exh. SA-1). Throughout the proceedings below, parties and evidence refer to the City of San Angelo as the Applicant and that practice is continued in this appeal.

³¹ See **Appendix 1:** AR Vol 6, 115 (Commission Order).

³² See **Appendix 9:** Tex. Water Code § 11.122.

³³ See **Appendix 11:** *City of Marshall and TCEQ v. City of Uncertain, et al.*, 206 S.W.3d 97, 100 (Tex. 2006).

³⁴ *Id.* At 110

failure to accurately characterize the terms and provisions of the City's existing water right as required by Texas Water Code § 11.122(b) is arbitrary and capricious and affected by error of law.

In summary, as described further in this Point of Error No. 1, the Commission's fundamental error in failing to accurately characterize the terms and provisions of the City's existing water right violates Texas Water Code § 11.122(b). Because of this error, the Commission Order includes no Findings of Fact to support underlying Conclusions of Law 6, 8, 9, 10 and 11;³⁵ and ultimate Conclusions of Law 17 and 18,³⁶ or to support issuance of Amendment 1318C. As discussed below in Point of Error No. II, this critical error led to erroneous conclusions about whether the amendment would possibly adversely impact other water rights holders or the environment on the subject stream. It likewise led to a failure of the Commission to even analyze whether unappropriated water is available to support the requested amendment as discussed. Thus, the Commission Order must be reversed.

I.A. The Commission Failed to Accurately Acknowledge Three Critical Terms and Conditions of the City's Existing Water Right.

This dispute involves three aspects of the City's pre-amendment water right. First, *which* water is the City authorized to impound; in other words, what is the source and amount of water the City may use under its water right to fill up the Reservoir to its authorized maximum amount of 170,000 acre-feet? Second, *when* and *which* water must be passed through the Dam; in other words, when must the City allow "normal flow" water to pass through the Dam and be released downstream for use and the environment? Third, does the City ever have to release water *from storage* to satisfy downstream appropriators?

In order to obtain Amendment 1318C, the City had to convince the Commission that none of these questions need be answered. The City convinced the Commission instead, that the

³⁵ In summary, (6) the application does not request new or increased water or diversion rates, so City does not have to demonstrate that unappropriated water is available; (8) Amendment 1318C is not detrimental to public welfare; (9) Amendment 1318C will not cause adverse impacts; (10) Amendment 1318C is not detrimental to public welfare; and (11) Amendment 1318C will not adversely affect the environment on the stream or groundwater. **Appendix 1: AR Vol 6, 115 at COL 6, 8, 9, 10 and 11 (Commission Order).**

³⁶ In summary, (17) the application satisfies statutory and regulatory requirements and (18) the admitted evidence supports issuing the Amendment. **Appendix 1: AR Vol 6, 115 at COL 17 and 18 (Commission Order).**

Amendment 1318C involved a single issue: clarification of COA-1318 by replacing “normal flow” with “inflow.”³⁷ Because under the City’s definition, “inflow” is greater than “normal flow,” once the Commission agreed to the City’s characterization of the Amendment,³⁸ approval was practically a foregone conclusion. By this sleight of hand, the City moved the Commission away from the obvious starting point for any water right amendment: what is the existing water right that the applicant seeks to change?

A plain reading of COA-1318, focusing on Special Provision 5.C, shows that the City was authorized to store only “storm and flood water”; to pass “normal flows” through the Dam “at all times”; and to pass additional water from storage when ordered by the Agency to meet downstream calls.³⁹ The historical documents support this reading.

I.B A Plain Reading of COA-1318 Shows that the City was Authorized to Store Only “Storm and Flood Water”; to Pass “Normal Flows” Through the Dam “At All Times”; and to Pass Additional Water from Storage When Ordered by the Agency to Meet Downstream Calls.

As mentioned, COA-1318, Provision 1, authorizes the City to maintain the existing Dam and Reservoir on the Middle Concho River, Spring Creek, and the South Concho River, and to impound not to exceed “170,000 acre-feet of water.”⁴⁰ Special Provision 5.C. of COA-1318, which answers the three issues about the existing water right, has been quoted in The Statement of Facts, above at p. 5.

The first aspect of the City’s water right that was ignored by the Commission was: *which* water is the City authorized to impound? In other words, what is the source and amount of water the City may use under its water right to fill up the Reservoir to its authorized maximum amount of 170,000 acre-feet? The plain words of COA-1318 show that prior to the Commission’s erroneous approval of Amendment 1318C, the City was authorized to store only “storm and flood water” in the Reservoir, that is, it could use only storm and flood water to fill up the Reservoir.

³⁷ AR Vol 8, 130 at 13:15-19(Brandes PFT, Exh. SA-2).

³⁸ See **Appendix 1: AR** Vol 6, 115 at FOF 40 (Commission Order).

³⁹ See **Appendix 4: AR** Vol 8, 146 at p. 2 (COA-1318, Exh. Concho-8).

⁴⁰ See also, **Appendix 4: AR** Vol 8, 146 (COA-1318, Exh. Concho-8).

Provision 5.C tells the City that *at all times*, they must allow the “normal flows” from the Middle Concho River, Spring Creek, and South Concho River to freely pass through the Dam to flow downstream.⁴¹ Which water, then, may the City impound under COA-1318? Logic tells us that the City must fill up the Reservoir using only water over and above the “normal flow,” because all normal flow coming into the Reservoir from upstream must be passed through the Dam at all times. What water is over and above “normal flow”? According to Dr. Barney Austin, Concho River Association’s expert witness, the answer is “storm and flood water.”⁴² Therefore, even though the “storm and flood water” restriction on impoundment is not explicitly stated in COA-1318, the only logical interpretation of the requirement under Provision 5.C to pass all “normal flows” through the Dam “at all times,” supports the Concho River Association’s contention.

The second and third disputed issues in defining the City’s water right are: when must the City allow passage of normal flows through the Dam and whether the City must ever pass water from storage? The following words of COA-1318, Special Provision 5.C, dictate passage of flows through the Dam in two instances: “[1] free passage of the normal flow through the Dam at all times and [2] the passage of those waters to which the [Agency] may determine lower appropriators are entitled.” This provision tells the City that normal flow passes through the Dam at all times to satisfy downstream senior water rights, riparian, domestic and livestock rights and instream flows needed for fish and wildlife habitat, as well as, to keep the stream wetted and as push water.⁴³ This provision also tells the City that it must allow *additional* water, when needed, to flow through the Dam to meet the demands of senior and superior water right holders

⁴¹ See **Appendix 4: AR** Vol 8, 146 at p. 2 (COA-1318, Exh. Concho-8).

⁴² See **AR** Vol 8, 144 at 12:16-13:1(Austin PFT, Exh. Concho-7), concluding that the terms “normal flow” and “baseflow” refer to the same water and citing to the American Meteorological Society definition of “baseflow”: “that part of the stream discharge that is not attributable to direct runoff from precipitation or melting snow; it is usually sustained by ground water.” See also the TCEQ Water Availability Analysis from January 11, 2007 citing to 30 TAC § 297.1, which refers to normal flow as baseflow. Commission Staff, Stephen Densmore, cites to *Motl v. Boyd*, 116 Tex. 82, 286 S.W. 458, 468-469 (1926) to support his statement that normal flow includes waters “in their ordinary, normal and usual condition, uninfluenced by recent rainfall or surface run-off.” **AR** Vol 9, 163 at p. 2 (Exh. ED-14). Also note that groundwater that sustains part of streamflow includes springflow. See Gabriel Eckstein and Amy Hardberger, *Scientific, Legal, and Ethical Foundations for Texas Water Law, in Essentials of Texas Water Resources*, ch 1:5, 10 (Mary K. Sahs, ed. 2009 ed.).

⁴³ The City of Paint Rock water plant supervisor testified that sufficient flows are needed to push the water from the Reservoir downstream to the diversion point of the senior appropriator, Paint Rock. **AR** Vol 8, 141 at 3:13-27 (Spoonts PFT, Exh. Concho-4). This was also addressed in testimony erroneously excluded from evidence, which is before the Court in an Offer of Proof. **AR** Vol 8, 143 at 6:18-25 (Ahrens PFT, Exh. Concho-6). See also, **AR** Vol 8, 144 at 10:18-11:30 (Austin PFT, Exh. Concho-7). See Offer of Proof at **AR** Vol 9, 149 at pp. 2-3.

downstream. The use of the conjunction "and" denotes an additional requirement. Merriam Webster's Collegiate 43 (10th ed. 1997). The only water that could be released in addition to normal flows, is stored water.⁴⁴

The testimony of Concho River Association's expert witness, Barney Austin, PhD., P.E., is instructive in this regard:

[T]he existing language of the Certificate expresses 2 independent requirements. One being the free passage of flows at all times, and the other the passage of those waters determined by the Commission to be passed through the Dam. These are 2 independent requirements in the existing language of the Certificate. The second requirement dealing with "those waters" means other than the free passage of normal flows and refers to something other than "normal flows," which is stored water in the reservoir. This stored water is to be passed through or released through the conduit when the Commission of [sic] Watermaster would determine that they should be passed through or released.⁴⁵

The Commission's expert witness, Mr. John Botros acknowledged the importance of the 5.C language "passage of normal flow through the Dam at all times . . ." stating that the phrase "at all times" is significant for providing necessary flows.⁴⁶

Thus the plain reading of Provision 5.C shows that COA-1318 authorized the City to store only "storm and flood water"; and required the City to pass "normal flows" through the Twin Buttes Dam at all times and to pass additional water from storage when ordered by the Agency to meet downstream calls. In summary, the Commission erred in ignoring the plain meaning of COA-1318, Provision 5.C and such error permeates the entire case, requiring this Court to reverse the Commission Order.

⁴⁴ This interpretation is supported by erroneously excluded evidence, which is before this Court in an Offer of Proof. AR Vol 7, 135 at 31: 1-37 (Jones PFT, Exh. Concho-1) and AR Vol 9, 149 at p. 245 (Exh. Concho-1AA, Offer of Proof).

⁴⁵ AR Vol 8, 144 at 10:21-28 (Austin PFT, Exh. Concho-7).

⁴⁶ AR Vol 9, 159 at pp. 3-4 (Exh. ED-10).

I.C. The Commission Erred by Excluding Permit 1949, which was Probative and Relevant Evidence; Therefore, the Commission Order is not Supported by Substantial Evidence.⁴⁷ (MFR Point of Error No. 1).

Logic and the plain language of COA-1318, Special Provision 5.C, were not the only tools that were available to the Commission to ensure a correct interpretation of the City's existing water right. As discussed in this Section, Permit 1949 and related testimony erroneously excluded from evidence, explicitly states that the City was authorized to impound only "storm and flood water." It further supports Plaintiff's contentions regarding passage at all times and passage from storage. The related excluded testimony is Exhibit Concho-1, Jones Pre-Filed Testimony at 24:22-25:22.⁴⁸

During the contested case hearing, Concho River Association repeatedly asked the Administrative Law Judge ("ALJ") to admit into evidence Permit 1949 and related testimony through its "Motion to the ALJ for Ruling, Severance and/or Certified Questions on Threshold Legal Issues";⁴⁹ pre-filed testimony;⁵⁰ Responses to Objections;⁵¹ and Motion to Reconsider Rulings in Order No. 7 on Objections to Prefiled Testimony.⁵² The issue of exclusion of Permit 1949 was raised again post-hearing in its Closing Argument⁵³ and Exceptions to the Proposal for

⁴⁷ See **Appendix 3: AR** Vol 6, 117 at Point of Error 1 (Protestants' Motion for Rehearing).

⁴⁸ **AR** Vol 8, 135 at 24:22-25:22 (Jones PFT, Exh. Concho-1). See Offer of Proof at **AR** 149 at pp. 2-3.

⁴⁹ **AR** Vol 2, 61 pp. 1-2 (Motion to the ALJ for Ruling, Severance and/or Certified Questions on Threshold Legal Issues). Filed prior to the hearing, it requested that the legal issues pertaining to the existing water rights relating to Permit 1949, the adjudication case Final Determination and Court Decree, and COA-1318 be resolved prior to the contested case hearing. The ALJ ruled that (a) Permit 1949 was superseded by Certificate 1318; (b) Finding No. 1 in the Final Determination pertaining to Permit 1949, affirmed by the Court Decree, did not state that only storm and flood water is authorized to be stored and impounded; and (c) Finding No. 11 in the Final Determination (Introductory Portion) dealing with riparian water rights was an "apparent determination" to do away with the distinction between "storm and flood water" and "normal flow." She found that there were no threshold legal issues necessary to be determined prior to the hearing. Her denial of the Motion was made *without a hearing*. **AR** Vol 2, 70 (Order No. 3).

⁵⁰ **AR** Vol 8, 135 at 24:27 (Jones PFT, Exh. Concho-1).

⁵¹ Applicant's Objections to Certain Prefiled Testimony and Related Motion to Strike, Motion to Exclude Certain Prefiled Testimony and Motion in Limine). The City and the Executive Director objected to the portions of Concho River Association's pre-filed testimony that included these historical documents and related testimony on the basis of relevance. The objections were sustained and these documents and related testimony were excluded from evidence. See **AR** Vol 4, 86 at p. 8. The Court Decree and Final Determination were ultimately officially noticed. **AR** Vol 7, 121 at p. 48 (Exh. Concho -9); and **AR** Vol 7, 123 at p. 235-236 (Exh. Concho -10).

⁵² **AR** Vol 4, 88 (Motion to Reconsider Rulings in Order No. 7). This Motion was overruled without a hearing. See **AR** Vol 4, 93 at p. 3 (Order No. 8).

⁵³ **AR** Vol 5, 94 at p. 16 (Protestants' Closing Arguments).

Decision.⁵⁴ Statements made at the hearing before the Commission on February 9, 2011, show that the Commission did not consider this evidence.⁵⁵ Concho River Association raised the error in its Motion for Rehearing at Point of Error No. 1.⁵⁶

The City's original water right is the earliest historical document proving that the City has the right to impound only "storm and flood water." In 1960, the Texas Board of Water Engineers, a predecessor agency to the TCEQ, issued to SAWSC Permit 1949, authorizing Twin Buttes Dam and Reservoir. The Permit authorized SAWSC "to appropriate, divert and use certain public waters of the State, to consist of *the storm and flood waters* of the Middle and South Concho Rivers, tributaries of the Concho and Colorado Rivers . . ." [Emphasis added.] Further, the Permit stated: "The permittee shall store only storm and flood waters of said stream, subject to all the rights of prior appropriators and lawful diverters below. . ." Additionally, it contained the language that became Special Provision No. 5.C in COA-1318 which has been quoted in The Statement of Facts, above at p. 5.⁵⁷

A short summary of the adjudication process will show that Permit 1949 was relevant to the proceedings and to exclude it was an error. Permit 1949 was subject to adjudication under the Water Rights Adjudication Act of 1967, Texas Water Code, Chapter 11, Subchapter G.⁵⁸ In 1976, as part of the adjudication of the subject water basin, the Agency issued a Final Determination, including its determination on the water right held under Permit 1949.⁵⁹ Such final determinations were issued by the Agency after notice and an opportunity for hearing by the Agency. Texas Water Code §§ 11.314 and 11.315. After reviewing the sworn statements, investigation, and other evidence for each water basin, the Agency made a final determination of the claims to water rights under adjudication. *Id.* at § 11.315. The final determination was filed with the appropriate district court. *Id.* at § 11.317. Once the determination was filed with the court, water right holders could challenge the Agency's findings by filing exceptions. *Id.* at §§ 11.381 and 11.319. After a hearing, the court would issue a final decree either confirming or modifying the Agency's final determination. *Id.* at § 11.322. These are the steps that occurred

⁵⁴ AR Vol 5, 103 at pp. 9-15 (Protestants' Exception and Brief in Support of Exceptions to Proposal for Decisions).

⁵⁵ AR Vol 10, 171 (Audio Recording of Commissioners' Agenda of February 9, 2011).

⁵⁶ See **Appendix 3**: AR Vol 6, 117 at Point of Error 1 (Protestants' Motion for Rehearing).

⁵⁷ See **Appendix 6**: Excerpt of AR Vol 9, 149 (Permit 1949).

⁵⁸ See **Appendix 9**: Texas Water Code, Chapter 11, Subchapter G.

⁵⁹ See **Appendix 8**: Excerpt of AR Vol 9, 148 at p. 42 (Final Determination, Exh. Concho-10).

during adjudication of the water rights in the Concho River Segment and its Tributaries of the Colorado River Basin, including SAWSC's Permit 1949.

Under the Adjudication Act, the Final Determination was considered by the Tom Green County District Court in Cause No. 44,990-A *In the Matter of the Adjudication of the Concho River Segment and its Tributaries of the Colorado River Basin*.⁶⁰ The Court Decree was issued affirming the Final Determination, with the provisions summarized in The Statement of Facts, and directing the agency to take further action, as required by the Adjudication Act, to implement the Decree.⁶¹ Under the Adjudication Act, the implementing action by the Agency for the adjudication of Permit 1949 was to issue and record COA -1318, which it did.⁶²

As can be seen by this historical summary, Permit 1949 satisfied both requirements of relevancy under Texas Rules of Evidence, Rule 401.⁶³ Permit 1949 supports Concho River Association's three contentions about the terms and conditions of COA-1318, the City's existing water right (prior to approval of Amendment 1318C), as expressed in Section 1.B, above. Permit 1949 is probative of those facts. Those facts are material under Texas Water Code § 11.122(b) and Permit 1949 makes those facts more probable than what they would be without the evidence.

If further proof is needed to show that Permit 1949 was relevant and its exclusion was error, the Court need only consider the following fact. In the Amendment 1318B case, the companion case to Amendment 1318C, Permit 1949 was offered by the City and was admitted

⁶⁰ See **Appendix 7: AR Vol 8, 147 (Court Decree, Exh. Concho-9)**. The Court Decree changed parts of the Agency's Final Determination pertaining to other water rights whose owners challenged the Final Determination under Texas Water Code §§ 11.381 and 11.319. The Court Decree did not modify the Final Determination's findings with respect to the water right based on SAWSC's Permit No. 1949. See Court Decree at ¶¶ I and II for examples where the court modified the agency's Determination. See **Appendix 7: AR Vol 8, 147 pp. 1-7 (Court Decree, Exh. Concho-9)**.

⁶¹ See **Appendix 7: AR Vol 8, 147 p. 7 Section III (Court Decree, Exh. Concho-9)**. The further action to be taken by the Agency under the Adjudication Act § 11.323 was to issue and record certificates of adjudication reflecting the decision of the court on each of the adjudicated water rights covered by the Final Determination and the Court Decree.

⁶² Note that COA -1318, Special Condition 5.C, was not specifically mentioned in the Final Determination at p. 42, COL 1, adjudicated rights under Permit 1949. See **Appendix 8: Excerpt of AR Vol 9, 148 (Final Determination, Exh. Concho-10)**. It was included in the COA under Texas Water Code §11.323 (b) (4), which required the agency to include the certificate of adjudication "all other information in the decree relating to the adjudicated right." See **Appendix 3: AR Vol 6, 117 at p. 2 (Protestants' Motion for Rehearing)**.

⁶³ *Trans-State Pavers, Inc. V. Haynes*, 808 S.W.2d 727, 732-733 (Tex. App.-Beaumont 1991, writ denied)(probative, material); and *Can. In. Co. v. Scheffey*, 828 S.W.2d 785, 787-788 (Tex. App.-Texarkana 1992, writ denied)(relevancy).

for the same purpose as here, to prove terms and conditions of the City's water rights under COA-1318.⁶⁴

Due to this erroneous evidentiary ruling, the Commission failed to consider relevant and probative evidence supporting the Plaintiff's contentions about the City's existing water right. Thus, the Commission's approval of Amendment 1318C was arbitrary and capricious and not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole. This exclusion led to the Commission's failure to properly identify the terms and conditions of the City's existing water right in violation of Texas Water Code §11.122(b).

I.D. The Commission Erred by Misinterpreting and Disregarding the Terms of the Court Decree and Final Determination.

The previous section, I.C explained how the Commission's error in excluding historical evidence led to its arbitrary and capricious findings of fact and conclusions of law about the City's pre-Amendment 1318C water right. The Commission compounded this error by relying solely on the terms and conditions in COA-1318, even though they contradict the Court Decree and Final Determination. This led to a violation of Texas Water Code § 11.122(b).

In the contested case hearing on appeal here, COA-1318 was admitted into evidence and the Applicant's case and that of the TCEQ staff focused on Provision 5.C, which has previously been quoted in the Statement of Facts at p. 5, above. During the hearing on the merits, official notice was taken of the Court Decree and Final Determination. As officially noticed documents, they serve the same purpose as other evidence and the trier of fact must accept as conclusive any fact judicially noted.⁶⁵ The Commission erred in adopting no findings of fact or conclusions of law regarding these officially noticed documents, which was arbitrary and capricious.

⁶⁴ See footnote 6, *supra*. In addition, in the Amendment 1318B case the Commission accepted into evidence and considered another pre-Court Decree, pre-Final Determination, and pre-COA-1318 historical document. An historical Order of the Board of Water Engineers authorized a change in the elevation of the Dam outlet to 1885.0 msl. The Agency, for some reason, did not include in COA-1318 this authorized elevation. Thus when the City applied for Amendment 1318B to correct COA-1318, the historical document was admitted into evidence and was relied upon by the Commission in approving Amendment 1318B. This treatment is inconsistent with exclusion of Permit 1949 in the present case.

⁶⁵ Tex. R. Evid. 201. See footnotes 23 and 24, *supra*, regarding evidentiary treatment of these documents.

Throughout the hearing, the City and the ED took the position that the Court Decree and Final Determination were irrelevant; that once the Agency issued COA-1318, as required by Texas Water Code 11.323, those documents no longer defined the City's Permit 1949 water right; COA-1318 was the water right. They took this position to counter Concho River Association's contention that the City had rights to impound only storm and flood water in the Reservoir. The Commission erred by confining the City's water right to that reflected in COA-1318 and finding that COA-1318 did not limit impoundment to only storm and flood water. Such a decision by the Commission completely ignores the second to last paragraph of COA-1318: "This Certificate of Adjudication is issued subject to all terms, conditions and provisions provided for in the final decree . . . and supersedes all rights of the owner asserted in that cause."⁶⁶

Making the COA "subject to all terms, conditions and provisions provided for in the final decree" means that COA-1318 is subject to the Final Determination regarding adjudication of Permit No. 1949, because it was approved by and incorporated into the Court Decree. As is clear in the Final Determination, the adjudication confirmed that Permit No. 1949 authorized impoundment of only "storm and flood water".⁶⁷"Permit No. 1949 authorizes the impoundment of 170,000 acre-feet of *storm and flood water* in a 600,000 acre-feet capacity on-channel reservoir on the South and Middle Concho Rivers (Twin Buttes Reservoir) . . ." [Emphasis added.]

Recitation of the history of COA-1318 is not just an exercise designed to educate the court about Texas water rights. It is provided as proof that the Court Decree and the Final Determination, are essential parts of the record of this case. No method exists, other than reviewing those documents, for the Commission to understand the full scope of COA-1318 because by its terms, it is subject to all terms in the Court Decree, which in turn affirmed all terms in the Final Determination related to Permit 1949.⁶⁸ Because COA-1318 failed to reflect the term in the Determination limiting impoundment in the Reservoir to "storm and flood water," the Commission committed reversible error by relying exclusively on COA-1318 to define the

⁶⁶ See **Appendix 4: AR** Vol 8, 146 at p. 3 (COA-1318, Exh. Concho-8).

⁶⁷ See **Appendix 8: Excerpt of AR** Vol 9, 148 at p. 42 (Final Determination, Exh. Concho-10).

⁶⁸ See **Appendix 7: AR** Vol 8, 147 at p. 1, ¶ 1 (Court Decree, Exh. Concho-9).

terms and conditions of the City’s water right. Only by considering these documents could the Commission recognize the accurate water right authorized by COA-1318. Recognition of the accurate water right was essential to analysis, consideration, and decision on amendment COA-1318C as addressed in further detail below.

I.E. By Relying Solely on COA-1318 to Define the City’s Existing Water Right, the Commission Adopted Numerous Erroneous Findings and Conclusions Resulting in an Invalid Order.

The Commission's fundamental error in relying solely on COA-1318 to define the City’s existing water right invalidates its entire Order. By refusing to remove its blinders and acknowledge how COA-1318 did not accurately reflect the water rights, the Commission adopted erroneous findings and conclusions regarding which water the City is authorized to impound; when and which water must be passed downstream; and whether release from storage is ever required. This fundamental error permeates and undermines the entire Commission Order.

I.E.1 All historical documents and COA-1318 authorize the city to impound only storm and flood water.

Starting with the issue of which water the City is authorized to impound, all historical documents except COA-1318, explicitly say impoundment is restricted to storm and flood water. Provision 5.C of COA-1318 implies the same.

As discussed, Permit 1949 authorized the City “to appropriate, divert and use certain public waters of the State, to consist of *the storm and flood waters* of the Middle and South Concho Rivers, tributaries of the Concho and Colorado Rivers . . .” [Emphasis added.] Further, the Permit stated: “The permittee shall store only **storm and flood** waters of said stream. . . .”⁶⁹ As established above, the Court Decree affirmed and incorporated the Final Determination. The Final Determination not only listed and summarized each adjudicated water right it provided insight into the process and the Agency’s reasoning. On the issue of the City’s adjudicated Permit 1949 impoundment right, the Court Decree and Final Determination confirmed that the right was restricted to storm and flood water.⁷⁰ The Agency’s reasoning and explanatory

⁶⁹ See **Appendix 6**: Excerpt of AR Vol 9, 149 at p. 2 (Permit 1949).

⁷⁰ See **Appendix 8**: Excerpt of AR Vol 9, 148 at p. 42 (Final Determination, Exh. Concho-10).

discussion shows that when the adjudicated right said “storm and flood water,” that is what it meant. The right to impound storm and flood water is distinct from the right to impound “normal flows” or any other flows, regardless of the nomenclature used, *i.e.*, base or ordinary flows.

Adjudicating a water right involved determining whether the water authorized under the right had been put to beneficial use.⁷¹ As a result, some rights were adjudicated as rights to a lesser amount of water than authorized on the face of the permit or certified filing. In other words, if a claimant could not show beneficial use of the full water right being adjudicated, the right being adjudicated could be reduced in amount during the adjudication process.⁷²

The following discussion in the Final Determination about determining beneficial use for permits or certified filings authorizing reservoirs is enlightening to the present case because it illustrates that throughout the adjudication of the Concho River Segment and its tributaries to the Colorado River Basin, the Agency continued to recognize the State’s historical distinction between “normal flow” and “storm and flood water.”

. . . Where the permits or certified filings authorize diversion from the authorized reservoirs and do not authorize the diversion of *normal flow*, the appropriative rights therein recognized are limited to the maximum annual quantity of water diverted from the authorized reservoirs and beneficially used for the purposes authorized. If a permit or certified filing requires the construction and maintenance of a dam and limits the diversion and use of water to *storm and flood water*, the diversion of the *normal flow* of the watercourse is not in accordance with the terms and conditions of the water right and such use cannot be considered development of the water right . . .⁷³ [Emphasis added]

In other words, in order to prove beneficial use under a permit or certified filing that authorized the impoundment of only “storm and flood water,” the claimant had to prove up storage of “storm and flood water.” Proof of storage of “normal flow” and unauthorized use of the normal flows would not count toward beneficial use under the water right.

⁷¹ See **Appendix 9**: Texas Water Code Chapter 11 Subchapter G at § 11.302 and *City of Marshall and TCEQ v. City of Uncertain, et al.*, 206 S.W.3d 97, 102, 103 (Tex. 2006).

⁷² Glenn Jarvis, Historical Development of Texas Surface Water Law: Background of the Appropriation and Permitting System and Management of Surface Water Resources, in *Essentials of Texas Water Resources* ch. 3:65, 89 (Mary K. Sahs, ed. 2009 ed.).

⁷³ See **Appendix 12**: Excerpt of **AR** Vol 9, 148 at p. 6 (Final Determination, Exh. Concho-10).

This continued recognition of the distinction between “normal flow” and “storm and flood water” is addressed again in the Final Determination in its “Merger for Administration Purposes.” The Agency explains the decision to place recognized riparian claimants into the time priority system already in place for claimants under certified filings and permits, as follows:

The allocation of water between users during times of shortage has confronted and confounded every administrator of water resources. Continual division of a stream into normal flow and storm and flood flow is a difficult engineering problem. If the administrator is to deal with not only this division but also the problem of allocating water between holders of certificates with a time priority and those without a time priority [riparian claimants]. . . a wholly unworkable scheme will have been created. Therefore, the Commission has merged appropriative rights . . . and has placed all recognized riparian claimants on a time priority with statutory water rights.⁷⁴

Thus, the Agency decided it was too difficult (1) to divide a stream into “normal flow” and “storm and flood flow” and (2) to continue to recognize and give priority to existing riparian rights. Therefore, they chose to continue dividing a stream into “normal flow” and “storm and flood flow” but adjudicated vested riparian rights by defining their authorized diversion amount, and assigned them priority dates.⁷⁵ The distinction between flows was maintained in adjudicating Permit 1949, as is apparent from considering the Final Determination’s finding regarding the adjudication of Permit No. 1949: “Permit No. 1949 authorizes the impoundment of 170,000 acre-feet of *storm and flood water* in a 600,000 acre-feet capacity on-channel reservoir on the South and Middle Concho Rivers (Twin Buttes Reservoir) . . .” [Emphasis added.] See Appendix 8.

For some unknown reason, when the Agency issued COA-1318, which was required by law to reflect the terms and conditions of Permit 1949, including the adjudicated water amount, the Agency failed to include the specific limitation to storm and flood water. Interestingly, the Agency did include Special Provision 5.C, and 4 other special conditions the terms of which

⁷⁴ See **Appendix 12**: Excerpt of **AR** Vol 9, 148 at pp. 10-11 (Final Determination, Exh. Concho-10).

⁷⁵ In Order No. 3, the ALJ erroneously held that this provision was an “apparent determination” to do away with the distinction between “storm and flood water” and “normal flow.” **AR** Vol 2, 70 at p. 2. See discussion of riparian rights and the adjudication in Glenn Jarvis, *Historical Development of Texas Surface Water Law: Background of the Appropriation and Permitting System and Management of Surface Water Resources, in Essentials of Texas Water Resources* ch. 3:65, 82 (Mary K. Sahs, ed. 2009 ed.).

were included in Permit 1949 but not in the Final Determination.⁷⁶ Implicit in Provision 5.C is the restriction of impounding only storm and flood water. See discussion, above, at I.B.

In summary, the historical documents support Plaintiff's contention that the City's existing water rights (pre-Amendment 1318C) were restricted to impoundment of only storm and flood water.

I.E.2. All historical documents and COA-1318 require the City to pass normal flows downstream at all times.

Continuing with the issue of which water must the city pass downstream and when must it be passed, Plaintiff believes that COA-1318, Provision 5.C is clear on this point. See discussion under Section I.B, above, which will not be repeated here.⁷⁷ A consideration of the historical documents leaves no doubt that the City must allow free passage downstream of the normal flow at all times.

As mentioned in the Statement of Facts, Permit 1949 included an identical requirement, which is quoted in full on page 6, above. Because the adjudication process was intended to address the location, nature and volume of the claimed water right,⁷⁸ the Final Determination did not necessarily reflect all terms and conditions of the claimed water right. That is true in this case. The Final Determination made no mention of the 5th paragraph of Permit 1949.⁷⁹ Nevertheless, it was included in COA-1318 as Special Provision 5.C.

Thus on the issue of which water the City must pass downstream and when it must be passed, the dispute became the meaning of "normal flow," as discussed below in Section II.

⁷⁶ These Permit 1949 special conditions in COA-1318 are special conditions 5A (conservation level of the Dam), 5B (irrigation return flows), 5E (waste water return flows) and 5F (requiring metering devices). See further discussion at Point of Error No. II.

⁷⁷ See the Statement of Facts, at p. 5 which quotes COA-1318 Special Provision 5.C in full.

⁷⁸ See **Appendix 9**: Texas Water Code, Chapter 11, Subchapter G at § 11.303 et seq.

⁷⁹ See footnote 77, *supra*.

I.E.3. All historical documents and COA-1318 require the City to release water from storage for senior and superior water rights if the Agency determines that the normal flow is inadequate.

Plaintiff argues that Provision 5.C of COA-1318 clearly requires the City to release water from storage if the Agency determines it is needed to meet the demands of senior and superior water rights holders downstream. See discussion at Section I.B, beginning at page 10, which will not be repeated here.

Permit 1949, which is before this court in an Offer of Proof, confirms Petitioner’s reading of this requirement. Permit 1949 states that “[t]he permittee shall store only storm and flood waters of said stream, **subject to all the rights of prior appropriators and lawful diverters below. . .**” [Emphasis added]⁸⁰ When read in conjunction with Ordering Provision paragraph 5 of Permit 1949 (which is identical to COA-1318, 5.C), it supports Plaintiff’s reading of COA-1318 Special Provision 5.C.

Because the adjudication addressed only the location, nature and volume of the claimed water right, the Final Determination does not reflect the requirements of Ordering Provisions 3 or 5 of Permit 1949. For some unknown reason, the Agency included Ordering Provision 5 in COA-1318 as Special Provision 5.C, as well as four other special conditions of Permit 1949, but failed to include Ordering Provision 3 of Permit 1949 in COA-1318.⁸¹

In summary, Permit 1949 supports Plaintiff’s contention that the City must release water from storage when the Agency orders it to do so to fulfill downstream senior and superior rights.

I.F. The Commission’s Errors Related to Identification of the City’s Existing Water Right Render its Decision and Order Arbitrary and Capricious and Not Supported by Substantial Evidence.

In summary, the Commission misinterpreted and mischaracterized the City’s existing water right, As a result, the Commission made numerous substantive and procedural errors as described in this Point of Error No. I. These failures resulted in the Commission Order, which

⁸⁰ See **Appendix 6**: Excerpt of AR Vol 9, 149, Ordering Provision at p. 2 ¶3.

⁸¹ See footnote 77, *supra*.

adopted the erroneous Findings of Fact and Conclusions of Law cited throughout this Point of Error and its failure to adopt Findings of Fact and Conclusions of Law on the officially noticed Court Decree and Final Determination. As a result, the Commission's Order, adoption of the Findings of Fact and Conclusions of Law identified in this Point of Error No. I and issuance of Amendment 1318C were in violation of Texas Water Code § 11.122(b); in excess of TCEQ's statutory authority; made through unlawful procedure, affected by error of law, arbitrary and capricious, characterized by an abuse of discretion, and not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole.

II. THE COMMISSION ERRED IN FINDING NO ADVERSE IMPACTS ON OTHER WATER RIGHTS OR ON THE ON-STREAM ENVIRONMENT INCLUDING GROUNDWATER, WHICH RESULTED IN ERRONEOUS ULTIMATE CONCLUSIONS OF LAW 17 AND 18. (MFR POINT OF ERROR NO. 10 AND PAGES 3, 5, 6, 7)⁸²

By approving the Amendment, the Commission failed to honor the protections provided to water right holders by the State's Prior Appropriations Water Right System. The Amendment will adversely impact downstream senior water rights and domestic and livestock rights because under Amendment 1318C they no longer have any claim upon water flowing into the Reservoir once it is stored. It will also adversely impact junior rights upstream⁸³ and downstream. Under the Amendment, junior water right holders upstream are subject to more calls for water by downstream senior water rights. Under the Amendment, downstream junior water rights who had access to normal flows passing through the Dam at all times, will no longer have access to that water. It will also impair vested riparian rights.⁸⁴ On its face, Amendment 1318C causes adverse impacts to these water rights. At a minimum, it presents the possibility of adverse impacts, which the Commission must avoid under Commission rules, and which the Commission erroneously failed to consider. It also fails to protect the on-stream environment including

⁸² See **Appendix 3: AR Vol 6**, 117 (Protestants' Motion for Rehearing).

⁸³ This fact was in testimony erroneously partially excluded from evidence, but before this Court as an Offer of Proof. **AR Vol 8**, 142 3:30-35 and 4:7-24(Seidel PFT, Exh. Concho-5). See also **AR 149** (Offer of Proof), and Point of Error IIE, below.

⁸⁴ The statute refers to impairment of "vested riparian rights." After the adjudication, riparian rights were either authorized under a certificate of adjudication or permit. The remaining rights superior to all others are those riparian rights to water for domestic and livestock use. Thus the only "vested riparian rights" that still exist are domestic and livestock rights. *City of Marshall and TCEQ v. City of Uncertain, et al.*, 206 S.W.3d 97, 103, 104 (Tex. 2006). See also, Glenn Jarvis, *Historical Development of Texas Surface Water Law: Background of the Appropriation and Permitting System and Management of Surface Water Resources, in Essentials of Texas Water Resources* ch. 3:65, 89 (Mary K. Sahs, ed. 2009 ed.).

groundwater, as discussed below, particularly in Section II.C. The Commission erred in making Finding of Fact 61 and Conclusions of Law 9-11, 17, and 18.⁸⁵

Texas Water Code Section 11.122(b) states:

Subject to meeting all other applicable requirements of this chapter for the approval of an application for an amendment, except an amendment to a water right that increases the amount of water authorized to be diverted or the authorized rate of diversion, shall be authorized if the requested change will not cause adverse impact on other water right holders or the environment on the stream of greater magnitude than under circumstances in which the permit, certified filing, or certificate of adjudication that is sought to be amended was fully exercised according to its terms and conditions as they existed before the requested amendment.

See also 30 TAC 297.45(b)⁸⁶ and Conclusion of Law 5.⁸⁷ These requirements under section 11.122(b), which are reflected in section 11.134(b)(3)(B),⁸⁸ are referred to collectively as the “no injury” rule. *City of Marshall and TCEQ v. City of Uncertain, et al.*, 206 S.W.3d 97, 110 (Tex. 2006). Under the “no injury” rule, Amendment-1318C must be granted only if it will not cause adverse impacts on other water rights holders on the stream of greater magnitude than does the existing water right. To determine whether Amendment 1318C will adversely impact other water rights requires a comparison between the existing water right and the amended water right. The comparison must be made between the amended right and the existing right as if “fully exercised according to its terms and conditions.” The Supreme Court refers to this requirement as the “full use assumption” or “four corners doctrine.” *City of Marshall and TCEQ v. City of Uncertain, et al.*, 206 S.W.3d 97, 100 (Tex. 2006).

Texas Water Code § 11.122(b) makes applications for amendments “[s]ubject to meeting all other applicable requirements of [chapter 11] for the approval of an application . . .”⁸⁹ These include Texas Water Code § 11.134 (b)(3)(B) and 30 Texas Administrative Code § 297.41(a)(3)(B), which the Commission also applied to Amendment 1318C in Conclusion of

⁸⁵ See **Appendix 1: AR** Vol 6, 115 at FOF 61 and COL 9, 11, 17, and 18 (Commission Order).

⁸⁶ **Appendix 13:** 30 Tex. Admin. Code § 297.45. Section 297.45(a) defines “adverse impact to another appropriator” to include the “**possibility** of depriving an appropriator of the equivalent quantity or quality of water that was available with the full, legal exercise of the existing water right before the change;...” [Emphasis added.]

⁸⁷ See **Appendix 1: AR** Vol 6, 115 at COL 5 (Commission Order).

⁸⁸ See **Appendix 14:** Texas Water Code §11.134.

⁸⁹ See **Appendix 10,** Texas Water Code § 11.122.

Law 9.⁹⁰ Thus, the Commission is only authorized to grant Amendment-1318C if it “does not impair existing water rights or vested riparian rights.” Tex. Water Code § 11.134(b)(3)(B).

The Commission Order correctly acknowledged that to approve Amendment-1318C, it was required to find that the Amendment will not cause an adverse impact on the on-stream environment by comparing environmental impacts of the City’s current water right under the full use assumption of 11.122(b) with impacts once Amendment-1318C is granted. See Conclusion of Law 5. See also *City of Marshall and TCEQ v. City of Uncertain, et al.*, 206 S.W.3d 97, 107-109 (Tex. 2006). The Commission also acknowledged through its Conclusions of Law, that it must evaluate the Amendment’s potential effects on instream flows, water quality, fish and wildlife habitats, groundwater, and groundwater recharge and determine that Amendment 1318C will not adversely affect these uses. See Conclusions of Law 9 and 11. All of these analyses are to be done under the full use assumption, except the groundwater and groundwater recharge issues.⁹¹ See Conclusions of Law 9 and 11.⁹² See also *City of Marshall and TCEQ v. City of Uncertain, et al.*, 206 S.W.3d 97, 107-109 (Tex. 2006); Texas Water Code §§ 11.134(b)(3)(D), 11.1471, and 11.147(d) and (e) (environmental flow standards and in-stream uses); 11.150 (effects on water quality); and 11.152 (effects on fish and wildlife habitat); and 30 Tex. Admin. Code §§ 297.41, 297.45, 297.54, and 297.56.

The City presented its application to the Commission as a request to change COA-1318, Special Provision 5.C, because, they asserted, they were having difficulty knowing what was meant by “normal flow.” They proposed a solution: replace “normal flow” with “inflow.” Inflow, they argued, has a scientific meaning, and reliable methods of measuring or otherwise determining inflow exist.⁹³ Further, the ED claimed, inflow would be greater than normal flow, which would benefit downstream water right holders.⁹⁴ Thus was established the fiction that the sole purpose of the proposed Amendment was to replace an indefinable measurement with one

⁹⁰ *City of Marshall and TCEQ v. City of Uncertain, et al.*, 206 S.W.3d 97, 110 (Tex. 2006) See **Appendix 1: AR Vol 6**, 115 at COL 9 (Commission Order).

⁹¹ With regard to the list of considerations required under 11.134(b)(3)(d), the Marshall court held that only the effects on groundwater consideration did not have to use the full use assumption. See Texas Water Code § 11.151 and *City of Marshall and TCEQ v. City of Uncertain, et al.*, 206 S.W.3d 97, 108 (Tex. 2006). The effects on groundwater were a required consideration in this case, as will be discussed further below.

⁹² See **Appendix 1: AR Vol 6**, 115 at COL 9 and 11 (Commission Order).

⁹³ **AR Vol 9**, 161 3:20-4:23 (Densmore PFT, Exh. ED 12).

⁹⁴ **AR Vol 5**, 99 at p. 3 (ED’s Response to Protestant’s Closing Arguments to ALJ).

that could be defined. The City's case and the TCEQ's recommended draft amended COA-1318C flowed from this central fiction. Ultimately, embracing this central fiction, the Commission Order erroneously approved Amendment 1318C.

II.A Amendment 1318C made Substantial and Significant Changes to COA-1318. These Changes, on Their Face, Show Adverse Impacts to Other Water Rights on the Stream and Possible Impacts on the On-Stream Environment; Therefore, Conclusions of Law 9 and 11 are Arbitrary and Capricious.

As argued above, the Commission's failure to recognize and fully acknowledge the terms and provisions of the City's pre-amendment water right affects all aspects of the Commission Order approving Amendment 1318C, including an analysis under the "no injury" rule. Amendment 1318C made changes that are pertinent to whether the Amendment will impair other water rights on the stream or the on-stream environment. Special Condition 5.C of COA-1318 is replaced with Special Condition 2.B and 2.C, which are quoted in Statement of Facts, above, at p. 5.⁹⁵ Under the newly approved Special Condition 2.C, the owner must only store water in accordance with the *City of San Angelo Water Rights Accounting Plan*,⁹⁶ which can be modified at any time by the Watermaster or the Executive Director, without notice to or an opportunity for hearing for other water right holders on the stream.⁹⁷ Special Condition 2.H of Amendment 1318C specifies amounts of inflows that must be passed at the Lake Nasworthy Dam outlet if inflows are available.⁹⁸

Thus, Amendment 1318C made substantial and significant changes to COA-1318. These changes, on their face, show adverse impacts to other water rights on the stream and possible

⁹⁵ See **Appendix 1: AR Vol 6, 115 at FOF 78** (Commission Order) and See **Appendix 2: Excerpt of AR Vol 6, 115** (Amendment 1318C). Compare with **Appendix 4: AR Vol 8, 146** (COA 1318COA-1318, Exh. Concho-8) at Special Provision 5.C.

⁹⁶ See **Appendix 1: AR Vol 6, 115 at FOF 81, 86, 87** (Commission Order). Also see **Appendix 2: Excerpt of AR Vol 6, 115** (Amendment 1318C).

⁹⁷ See **Appendix 2: Excerpt of AR Vol 6, 115 at p. 3, Special Condition 2.D** (Amendment 1318C). The Accounting Plan controls what water can be stored and released from the Reservoir based upon Amendment 1318C, which is error for reasons stated herein. It can also be changed by the Agency with notice only to the City. This is also error because changes to the Plan could impact downstream water rights without notice and opportunity for hearing and protection accorded them by the rules and law governing amendments to water rights described herein. See **Appendix 3: AR Vol 6, 117, Pt. of Error 6** (Motion for Rehearing).

⁹⁸ See **Appendix 2: Excerpt of AR Vol 6, 115** (Amendment 1318C). See also **Appendix 1: AR Vol 6, 115 at FOF 60, 61, and 84** (Commission Order). The Nasworthy Reservoir & Dam are depicted in **Appendix 5, map of watershed**.

impacts on the on-stream environment. Under the Commission's "no injury" rule, the Commission lists possible adverse impacts to other appropriators:

[T]he **possibility** of depriving an appropriator of the equivalent quantity or quality of water that was available with the full, legal exercise of the existing water right before the change; increasing an appropriator's legal obligation to a senior water right holder; or otherwise substantially affecting the continuation of stream conditions . . . [Emphasis Added]

30 TAC § 297.45(a).⁹⁹ As discussed below at Section II.B.3, characterizing Amendment 1318C as a mere clarification and changing the “normal flows” of the pre-Amendment 5.C to “inflows” is used by the City and the Commission as a red herring on the issue of adverse impacts; a red herring that the Commission consumes as illustrated by the Commission Order. Likewise, the Accounting Plan and oversight by the Watermaster do not alleviate these adverse impacts.¹⁰⁰

In this watershed, this distinction between being authorized to impound storm and flood water and being authorized to impound normal flows is significant. Spring Creek and the South Concho River, two of the streams being dammed to form the Reservoir, are primarily spring-fed. Thus, the "normal flow" that must be passed through the Dam "at all times" is, at a minimum, all water flow from those springs that has not been diverted by interjacent senior and superior water right holders. In fact, the City of San Angelo Water Rights Accounting Plan states that “discharges from major springs located upstream of the gages on Spring Creek and the South Concho River [which are upstream of the Reservoir] sustain significant baseflows in these streams during non-rainfall periods . . .” See also, Austin Pre-filed Testimony, equating “normal flow” with “baseflow.”¹⁰¹ Also note that groundwater that sustains part of stream flow (normal flow) includes springflow.¹⁰²

The substantial changes showing adverse impacts, on their face, are as follows: First, the original COA-1318 authorized the City to impound only “storm and flood water.”¹⁰³ Amendment 1318C allows the City to impound inflows, which the Commission considers to

⁹⁹ See **Appendix 13**: 30 TAC § 297.45.

¹⁰⁰ See discussion below at Section II.B.4.

¹⁰¹ **AR** Vol 9, 170 at pp. 3-4 (Exh. ED-21) and **AR** Vol 8, 144 at 12:16-13:1 (Austin PFT, Exh. Concho-7).

¹⁰² Gabriel Eckstein and Amy Hardberger, *Scientific, Legal, and Ethical Foundations for Texas Water Law, in Essentials of Texas Water Resources*, ch 1:5, 10 (Mary K. Sahs, ed. 2009 ed.).

¹⁰³ See **Appendix 4**: **AR** Vol 8, 146 at p. 2 (COA-1318, Exh. Concho-8) and discussion at Section I.E.1, above.

include normal flow, baseflow, storm flow, and average flow.¹⁰⁴ Second, COA-1318 required passage of all normal flows through the Dam at all times.¹⁰⁵ Amendment 1318C authorizes (a) passage of inflows through the Dam only when required by the Watermaster utilizing the City's Water Rights Accounting Plan; and (b) passage of inflows based on a schedule designed to address environmental flows, but passage is not required unless inflows into the Reservoir do not equal or exceed those values.¹⁰⁶ Third, the original COA required passage of impounded water to fulfill calls made by lower appropriators when the normal flow through the Dam was insufficient to meet those demands.¹⁰⁷ Amendment 1318C allows passage of only inflows when required by the Watermaster using the Accounting Plan. No passage of stored water is required.¹⁰⁸

The impact of these changes is to significantly reduce flows available for downstream use and needs. There is a need for "push water" in the Concho River downstream, which will not be available with Amendment 1318C in place.¹⁰⁹ "Push water" or "continuous flows" is water that is either in a stream so that the stream is "wetted" so that water can be delivered; or, in the case of a dry stream, it is water that is needed to deliver water downstream to be diverted and used. It is necessary to keep the river "wetted" so that water can flow. This is similar to running water over a sponge; if the sponge is wet, water will run over the top of it, but if the sponge is dry, the water will be absorbed by the sponge.¹¹⁰ The free passage of "normal flows" through the Dam at all times would include push water. If the passage of the normal flow is not sufficient to provide push water, under COA-1318, the Agency could require water to be released from storage for that purpose.¹¹¹

Reduced flows downstream not only adversely impact the need for flows in the River to keep the River wetted and alive, but also to avoid "futile calls." A futile call is when a

¹⁰⁴ See **Appendix 1: AR** Vol 6, 115 at FOF 70 and 72 (Commission Order).

¹⁰⁵ See **Appendix 4: AR** Vol 8, 146 at p. 2 (COA-1318, Exh. Concho-8)

¹⁰⁶ See **Appendix 1: AR** Vol 6, 115 at FOF 61 (Commission Order). See also **Appendix 2: Excerpt of AR** Vol 6, 115 (Amendment 1318C).

¹⁰⁷ See discussion at Section I.E.3, above.

¹⁰⁸ See **Appendix 1: AR** Vol 6, 115 at FOF 72 (Commission Order). See also **Appendix 2: Excerpt of AR** Vol 6, 115 (Amendment 1318C).

¹⁰⁹ HOM Tr. at 120:13-121:13 (Jones); HOM Tr. 132:1-133:2, 136:16-137:17 (Carson); HOM Tr. 154:1-155:19 (Hoelscher); HOM Tr. 161:1-164:1 (Spoonts).

¹¹⁰ HOM Tr. 121:1-4 (Jones).

¹¹¹ HOM Tr. 209, 212:17-213:20, 224:16-225:2 (Austin).

downstream senior water right holder calls for water to be passed (not diverted or taken from the stream) by an upstream junior water right holder. If the dry condition of the stream is such that the water passing the junior water right holders' diversion point would not reach the senior water right holder because of the intervening loss of water in a dry stream bed, it is considered a "futile call."¹¹²

The omission in Amendment 1318C of the terms and conditions designed to protect downstream interests by requiring the free passage of flows at all times and release of those waters that downstream senior rights would otherwise need, is a substantial change. The omission, on its face, results in impairment of downstream water rights, domestic and livestock users, the environment, water quality, and is not in the public welfare.

II.B. The Required “No Injury” Analysis Regarding Water Rights on the Stream was Not Performed.

In fact there is no evidence that the Applicant, which has the burden of proof on this issue, performed any “no injury” analysis. There is no substantial evidence that the staff performed the analysis. In the absence of this analysis showing no “adverse impacts” (as that term is defined in 30 TAC § 297.45) to on-stream water rights on the stream, the Commission erred in approving the Amendment.

II.B.1 Because the Commission misconstrued COA-1318, a “no injury” analysis could not be done.

Texas Water Code § 11.122(b)¹¹³ says that there must be a showing of no adverse impact. In order to make this showing, one must compare pre-amendment and post-amendment effects on other water rights on the stream using the full use assumption. This cannot be done unless one knows what the pre-amendment water right is. The Applicant and the ED misconstrued the City's water right from the outset. They failed to acknowledge that under COA -1318, impoundment in the Reservoir is limited to storm and flood waters. They interpreted COA -1318 Special Provision 5.C to require passage of “normal flows” only when a call is made by

¹¹² HOM Tr. 89:1-10 (Brandes); HOM Tr. 132:1-133:2 (Carson).

¹¹³ See **Appendix 10**: Texas Water Code § 11.122.

downstream senior water rights and the agency requires passage of the normal flows.¹¹⁴ They did this by misreading Provision 5.C and excluding from consideration historical documents that show the storage and release rights and restrictions of the City’s water right for the Reservoir. See discussion under Point of Error No. I. Thus as a matter of law, the Commission did not and could not perform the no adverse impact to water rights analysis required under 11.122 (b).

II.B.2 By mischaracterizing the goal of Amendment 1318C, the Commission failed to require or perform the analysis under §11.122(b) as to adverse impacts to water rights.

Because they misinterpreted 5.C to require passage of “normal flows” only when a call is made, the City came to the Commission seeking “a clarification” of what flows they could store and never be required to release to downstream senior and superior water rights, and what flows they would be obliged to release under a call.¹¹⁵ The City’s rationale was that they could not quantify “normal flows” because that term has no scientific meaning.¹¹⁶

The City convinced the Commission that “inflows” should replace “normal flows” because “inflows” can be quantified.¹¹⁷ They convinced the Commission that “passage at all times” really meant passage only when there is a call.¹¹⁸ They convinced the Commission that since inflows includes more water than normal flows, Amendment 1318C would actually be making more water available for passage to meet a call.¹¹⁹ They misread Provision 5.C and said that it never required releases from storage to pass downstream.

The Commission was with them all the way until Commission staff said that if the phrase “passage of normal flows at all times” from Special Provision 5.C was deleted, no water will be passed through or released unless there is a call from a downstream senior water right. However, the law says Amendment 1318C cannot have a greater adverse impact on the on-stream

¹¹⁴ This sleight of hand was done unintentionally, perhaps. Mr. Will Wilde, the Director of Water Utilities for the City of San Angelo, testified that COA-1318 "required the City to pass the 'normal flow' of the Middle Concho River, South Concho River, and Spring Creek through the Twin Buttes Reservoir ***when downstream water rights entitled to the water need water . . .***" [emphasis added]. AR Vol 8, 124 at 7:1-6 (Wilde PFT, Exh. SA-1).

¹¹⁵ See Appendix 1: AR Vol 6, 115 at FOF 40 (Commission Order) and AR Vol 8, 124 at 13:15-19 (Brandes PFT, Exh. SA-2).

¹¹⁶ See Appendix 1: AR Vol 6, 115 at FOF 26 and 27 (Commission Order).

¹¹⁷ See Appendix 1: AR Vol 6, 115 at FOF 13 and 69 (Commission Order).

¹¹⁸ See Appendix 1: AR Vol 6, 115 at FOF 72 (Commission Order).

¹¹⁹ See Appendix 1: AR Vol 6, 115 at FOF 70 (Commission Order).

environment than does COA-1318. Changing COA-1318 from passage of flows “at all times,” to no flows unless a call is made, means the environment will suffer.¹²⁰ So a compromise was struck; the City must release a specified flow to meet the environmental needs downstream. Bowing to the City, which does not want to release any water from storage, the Commission conditioned the minimum instream flow releases required under the Amendment upon inflow of equal or greater magnitude.¹²¹ Then the City realized that if they have to release these flows through the Twin Buttes Dam as per Special Provision 5.C it would adversely affect the City's diversion of water for municipal purposes.

Originally, the Commission staff recommended measuring the minimum instream flow releases at the gage at Bell Street Dam,¹²² which was downstream of the City's main diversion point at its water treatment plant. If measured there, the water would not be available for the City's authorized diversion at its water treatment plant because the instream flow would have to remain in the River until it reached this downstream gage. So the concept that the measuring point should be closer to the “point of impact” and that the “point of impact” was the Twin Buttes Dam, was introduced. The TCEQ staff adopted this approach and changed the referenced measuring point to the Nasworthy Dam outlet above the City's water treatment plant diversion point. This gave the City the ability to divert the required instream flows, rather than allowing them to benefit the downstream on-stream environment. Coupled with the City's position that it does not have to release instream flows from storage, this results in a further reduction in, or elimination by diversion of, the minimum instream flow requirements.¹²³ The instream use issue is discussed further in Point of Error II.C, below.

¹²⁰ Interestingly, in the context of evaluating the second prong of the “no injury” rule, which addresses environmental impacts, Commission staff quoted FOF No. 1 from the Final Determination, as incorporated into the Final Decree. On page 3 of his environmental review and instream use memorandum, TCEQ's John Botros stated: “The final decree granting Certificate of Adjudication -1318 states, ‘the permittee shall store only storm and flood water of said stream [Middle Concho], subject to all of the rights of prior appropriators and lawful diverters below.’” The language he quotes is actually from Permit 1949, which language should have been included when the Agency prepared COA-1318. He further acknowledged the importance of the 5.C language “passage of normal flow through the Dam at all times . . .” stating that the phrase “at all times” is significant for providing necessary flows. **AR** Vol 9, 159 at pp. 3-4 (Exh. ED-10).

¹²¹ See **Appendix 1: AR** Vol 6, 115 at FOF 61 (Commission Order).

¹²² **AR** Vol 9, 159 at p. 4 (Exh. ED-5).

¹²³ Amendment-1318C reflects John Botros' concepts for maintaining instream uses, as significantly modified by TCEQ staff, Chris Loft. Mr. Botros' recommendation was changed in two significant regards. First, the passage of flows to maintain instream uses was restricted to apply only when there are inflows into the Reservoir equal to or greater than the instantaneous values. In other words, in no event must the City release water from storage.

The unspoken goal of Amendment 1318C is to allow the City to impound as much of the water coming into the Twin Buttes Reservoir as possible and to release through the Twin Buttes Dam as little water as possible. While this may be a legitimate goal of an amendment, it cannot be obfuscated in a manner that results in the failure to perform the required review and analysis. Amendment 1318C, purportedly meant “to clarify” what water can be stored and what water must be released downstream,¹²⁴ on its face adversely affects every water right holder on the stream except the City, and potentially adversely affects the environment as well.

II.B.3 Findings of Fact 40, 80, and 88 are erroneous in that they characterize Amendment 1318C as a “clarification” by replacing “normal flows” with “inflows,” when in fact it increases the flows to be impounded and decreases the flows to be passed downstream.

From the outset, the City characterized its application for amendment 1318C as a request to clarify what water the City is authorized to store in the Reservoir and what flows the City is obligated to pass to those downstream diverters who are legally entitled to them.¹²⁵ Like one of the characters in Mad Men,¹²⁶ the City effectively and successfully convinced the Commission that indeed, Amendment 1318C was merely a clarification. In fact, the Commission repeated this finding three times in its order.¹²⁷ Further, the City persuaded the Commission that because the Amendment was for clarification purposes, by definition, it would not enhance the City’s water rights in a way that would require a water availability analysis under TWC 11.134(b)(2) and 30 TAC 297.41(a)(2).¹²⁸

In reality, rather than clarifying the City’s water rights, Amendment 1318C creates ambiguities in those rights because COA-1318 continues to be subject to the Court Decree. As previously noted, the Court Decree only authorizes the impoundment of storm and flood waters and this condition still exists as a part and condition of the City’s water rights. This condition

Second, the reference location for these streamflow restrictions will not be the gage at Bell Street Dam, downstream of the water treatment plant, but will be the Lake Nasworthy Dam outlet upstream of the water treatment plant. Compare AR Vol 9, 159 (Exh. 5) with AR Vol 9, 160 (Exh. 6).

¹²⁴ See **Appendix 1: AR Vol 6, 115 at FOF 40** (Commission Order).

¹²⁵ **AR Vol 8, 130 at 13:15-19** (Brandes PFT, Exh. SA-2).

¹²⁶ Popular television show about an effective advertising agency on Madison Avenue; thus the play on words of the show’s title.

¹²⁷ See **Appendix 1: AR Vol 6, 115 at FOF 40, 80 and 88** (Commission Order).

¹²⁸ See **Appendix 1: AR Vol 6, 115 at COL 6** (Commission Order). See discussion at Point of Error No. III, below.

requires the City to continue to pass through the Dam all inflows that are not storm and flood waters. Otherwise, the City is in violation of the Court Decree and COA-1318. The record is clear that the TCEQ staff never considered this inconsistency in its evaluation of Amendment 1318C.

The Commission could only make these findings of fact and conclusions of law by following the “red herring” urged by the City: “normal flows” are not quantifiable, but “inflows” are. Thus the Commission ignored the fact that “normal flows” is still a criterion in managing water rights. For example, Commission Rules provide a definition of normal flow,¹²⁹ and the equivalent term of “baseflows” is a standard used in determining recent rules adopted by the Commission involving environmental flows criteria.¹³⁰

Acceptance of the characterization of Amendment 1318C as a clarification resulting in the need to replace “normal flows” with “inflows,” led to erroneous evidentiary rulings. In the end, the Commission could only make these Findings of Fact and Conclusions of Law by (1) excluding from evidence the historical document, Permit 1949; (2) by relying solely on COA-1318 and ignoring the Court Decree and Final Determination;¹³¹ and (3) by ignoring the change in water releases resulting from the Amendment. Therefore, the Commission erred in making Findings of Fact 40, 80, and 88.¹³²

II.B.4. Neither the Applicant nor the Commission performed a “no injury” analysis as to other water right holders; therefore, approval of the Amendment was arbitrary and capricious and contrary to law, and was not supported by substantial evidence.

According to 30 Texas Administrative Code section 297.45(d), the City had the burden of proving that no adverse impact to other water right holders will result from the approval of Amendment 1318C and must use the standard set out in Texas Water Code section 11.122(b) in that proof.¹³³ As a matter of law, the Commission can only grant Amendment 1318C if that analysis has been performed showing no “adverse impact” as that term is defined in 30 TAC

¹²⁹ See footnote 42, supra.

¹³⁰ See **Appendix 22**: 30 Tex. Admin. Code §§ 298.1(2), 298.210, 298.220.

¹³¹ See **Appendix 7**: **AR** Vol 8, 147 (Exh. Concho -9); **Appendix 8**: **AR** Vol 9, 148 (Final Determination. Exh. Concho -10) and **Appendix 6**: Excerpt from **AR** Vol 9, 149 at p. 2 (Permit 1949).

¹³² See **Appendix 1**: **AR** Vol 6, 115 at FOF 40, 80 and 88 (Commission Order).

¹³³ See **Appendix 13**: 30 Tex. Admin. Code § 297.45, which implements Texas Water Code § 11.122(b).

§297.45(a) to include the *possibility* of such an impact. This is closely related to the requirement in §11.134(b)(3)(B)¹³⁴ that the Commission must find that Amendment 1318C does not impair existing water rights or vested riparian rights. In this case, both standards are addressed in the Commission’s Conclusion of Law No. 9. As a matter of law, however, this conclusion is erroneous because there is no evidence that the required “no injury” analysis was performed by the Applicant or the staff.¹³⁵ The Applicant has the burden of proving no adverse impacts and there is no substantial evidence that the City did so. The Order contains no findings that the Applicant conducted a “no injury” analysis, despite the Applicant’s burden of proof under 30 Texas Administrative Code Section 297.45(d).¹³⁶ The Applicant’s only expert witness did not claim to have performed the analysis under § 11.122(b). He does provide the opinion that the Accounting Plan, the required instream flows, and the Watermaster will protect water rights on the stream. He states that:

[T]he City must co-ordinate with, and obtain approval from, the Concho Watermaster before the City could make any diversions under the certificate. This is a critical consideration because, under the Concho Watermaster’s regulatory charge, he cannot authorize a diversion if doing so would result in impairment to senior or superior water rights. This is the ultimate protection for other water rights and the environment, because the City literally cannot divert without the Watermaster’s approval.¹³⁷

This astonishing testimony implies that an analysis under § 11.122(b) is not required for amendments to water rights in watermaster areas. By extension, one would expect that no analysis under § 11.134(b)(3)(B) on impairment of water rights would be needed for new or increased appropriations in watermaster areas either. Moreover, it places the watermaster in a watermaster area in the position of making a no injury analysis every time a diversion of water is requested that he must authorize. The water rights in a watermaster area must be well defined in order to allow the proper administration of those rights under the watermaster’s charge.¹³⁸ Thus, Mr. Brandes’ testimony shows that there is no evidence that a “no injury” analysis as to water

¹³⁴ See **Appendix 14**, Texas Water Code § 11.134.

¹³⁵ See **Appendix 1: AR Vol 6**, 115 at COL 9 (Commission Order).

¹³⁶ See **Appendix 13**: 30 Tex. Admin. Code § 297.45. Finding of Fact 13 states that the City has difficulty quantifying “normal flows.” Finding of Fact 14 states that there is no scientifically-accepted meaning of “normal flows,” so the City has no way to quantify how much water to store and how much water to pass through the Dam. While these findings echo Findings 50 – 51, they do not support Conclusion of Law No. 9. See **Appendix 1, AR Vol 6**, 115 at FOF 13, 14, 50, 51, and COL 9 (Commission Order).

¹³⁷ **AR Vol 8**, 124 at 28:9-17 (Brandes PFT, Exh. SA-2).

¹³⁸ See Texas Water Code § 11.327.

rights was performed because his testimony provided as such, clearly does not fulfill the requirements of § 11.122(b) for a “no injury” analysis.

There is no evidence to support Finding of Fact No. 49¹³⁹ that the Commission staff performed a no injury to water rights analysis. Prior to recommending the approval of a water right amendment, generally the Commission staff performs a “no injury” to water rights analysis to address the requirements of §§ 11.122(b) and 11.134(b)(3)(B) and related Commission rules.¹⁴⁰ This analysis can be based on data provided in the application or on data available in the Commission’s files. This analysis is then presented in a staff memorandum. In this case, TCEQ’s Stephen Densmore testified that he was asked to determine whether there were “any hydrology issues or *impacts to other water rights* as a result of the requested amendment.” [Emphasis added.]¹⁴¹ Yet the memorandum describing his review of and conclusions about the application contains no discussion or conclusion regarding a “no injury” analysis or impacts to other water rights. The memorandum shows that he determined a method to compute the flows coming into Twin Buttes Reservoir; attempted to determine what “normal flow” would be; and concluded that the term “normal flows” does not have a clear technical or hydrological definition, but “inflows” could be determined.¹⁴² The record shows that despite the fact he was asked to determine whether there were impacts to other water rights, he provided no evidence that he did so.¹⁴³ He then offered the totally unsupported expert opinion that no other water rights will be harmed by the Amendment.¹⁴⁴

An unsupported expert opinion cannot be considered competent evidence, even if it has been admitted into the record. The Texas Supreme Court has established that:

[I]f no basis for the opinion is offered, or the basis offered provides no support, the opinion is merely a conclusory statement and cannot be considered probative evidence, regardless of whether there is no objection.¹⁴⁵

¹³⁹ See **Appendix 1: AR Vol 6**, 115 at FOF 49 (Commission Order).

¹⁴⁰ **Appendix 8: 30 Tex. Admin. Code § 297.45**. See Douglas G. Caroom and Susan M. Maxwell, *Surface Water Rights Permitting, in Essentials of Texas Water Resources*, ch 6:152, 154 (Mary K. Sahs, ed. 2009 ed.).

¹⁴¹ **AR Vol 9**, 161 at 2:22-27 (Densmore PFT, Exh. ED 12).

¹⁴² He also concluded that no water availability analysis was required. **AR Vol 9**, 163 (Exh. ED-14). See also, discussion below at Point of Error No. III.

¹⁴³ **AR Vol 9**, 161, 163, and 164 (Exh. ED 12, 14, and 15, respectively).

¹⁴⁴ **AR Vol 9**, 161 at 4:9-20 (Densmore PFT, Exh. ED 12).

¹⁴⁵ *City of San Antonio v. Pollock*, 284 S.W.3d 809, 818 (Tex. 2009).

Based on this non-evidence, the Commission erroneously found that the TCEQ staff conducted a “no injury” analysis; they attempted to determine what “normal flow” would be; they compared “normal flow” with “baseflow” and determined that quantifying such flows was difficult; and that the difficulty of quantifying “normal flows” was addressed in the adjudication process.¹⁴⁶ Based on Findings of Fact 49, 50, 51, and 52, the Commission erroneously adopted Conclusion of Law 9, that there would be no adverse impact on water rights in the stream, when comparing the City’s water right pre- and post-amendment, and Amendment 1318C would not impair existing water rights or vested riparian rights.¹⁴⁷

II.C. The Commission’s Analysis Regarding On-Stream Environmental Effects was Also Flawed. (MFR Point of Error Nos. 7 and 8)

Commission staff, Mr. Botros, did accurately characterize the terms and provisions of the City’s existing water right that authorizes storage of only storm and flood water. He attempted to consider this fact when determining whether the Amendment would have an adverse impact on the on-stream environment, including instream flows, water quality, and fish and wildlife habitats. Likewise, he acknowledged COA-1318’s requirement of passage of flows “at all times.”¹⁴⁸ Nevertheless, the Commission’s Findings of Fact 53, 55, 56, 58, 59, 60, and 61; Conclusions of Law 5, 9, and 11; and ultimate Conclusions of Law 17 and 18 are erroneous for the reasons discussed below.

II.C.1 While at least one of the Commission’s staff acknowledged the true parameters of the City’s pre-amendment water right, he ultimately failed to perform a true pre- and post-amendment comparison.

While at least one of the Commission’s staff, Mr. Botros, acknowledged the true parameters of the City’s pre-amendment water right, he ultimately failed to perform a true pre- and post-amendment comparison. By mentioning that he agreed with the City that there is no accepted definition of “normal flow,” he implicitly used this as an excuse to perform no true

¹⁴⁶ See **Appendix 1: AR** Vol 6, 115 at FOF 49, 50, 51, and-52, respectively (Commission Order). FOF 52 was apparently based on the erroneous reading of the Final Determination. See discussion above at Section I.E.1 discussing the Final Determination at p. 6, No. 6. See **Appendix 12: AR** Vol 9, 148 at p. 6 (Final Determination, Exh. Concho-10).

¹⁴⁷ See **Appendix 1: AR** Vol 6, 115 at COL 9 (Commission Order).

¹⁴⁸ **AR** Vol 9, 159 (Botros Memo, Exh. ED-10). See also footnote 123, *supra*.

comparison. Ultimately, however, he recommended streamflow restrictions to address both aquatic and riparian habitat needs and water quality. His reasoning is worth repeating here:

The applicant seeks to modify the language in the special condition in order to be required to release water from the reservoir only when required to do so by the Watermaster or the Commission. The final decree authorizing Certificate of Adjudication -1318 states, “the permittee shall store only storm and flood water of said stream [Middle Concho], subject to all the rights of prior appropriators and lawful diverters below.” Special Condition 5C also contains the language, “. . . passage of normal flow through the Dam *at all times*.” Although staff agrees with the applicant that there is no accepted scientific definition of “normal flow,” the phrase “at all times” is significant for providing the flows necessary for maintenance of instream uses of the Concho River that the applicant’s proposed language does not necessarily provide. Therefore, it is staff’s opinion that the applicant’s request constitutes a potential new environmental impact due to extended periods of a lack of or reductions in streamflow downstream of Twin Buttes Reservoir, and flow restrictions to maintain the instream uses of the Concho River downstream of the City of San Angelo’s diversion point are warranted for this amendment.¹⁴⁹

Mr. Botros prepared his memorandum based on Texas Water Code §§ 11.042, 11.147, 11.1491, 11.150, and 11.152 and 30 Texas Administrative Code §§ 297.53 through 297.56, which require the Commission to consider possible impacts of Amendment 1318C on fish and wildlife habitat, water quality, and instream uses. In summarizing the City’s existing water right and the scope of Amendment 1318C, he does not mention that the City is authorized to only store storm and flood water, although he mentions this fact elsewhere in his memorandum.¹⁵⁰ He does mention the change from the existing water right’s requirement of passage of normal flow at all times to Amendment 1318C requirement to pass only those volumes of inflows to which downstream appropriators are entitled, as determined by the Watermaster.¹⁵¹

His discussion of riparian and aquatic habitat under the analysis of instream uses, points out that “[m]aintaining the natural flow regime or variability plays a critical role in sustaining native biodiversity and ecosystem integrity in rivers.” He also mentions the threatened water snake species. He recommends that Amendment 1318C require the release of specific flows, which were calculated by using the TCEQ’s default methodology, which is the Lyon’s Method,

¹⁴⁹ AR Vol 9, 159 (Botros Memo, Exh. ED-10).

¹⁵⁰ See footnote 123, *supra*.

¹⁵¹ AR Vol 9, 159 (Botros Memo, Exh. ED-10).

to fulfill this need. He concludes that “[i]mplementation of the recommended flow restrictions as measured at [the downstream gage at Bell Street Dam] should provide sufficient maintenance flows to the aquatic and riparian habitats in the Concho River.”¹⁵² The Commission instead approved smaller volumes of releases for instream protection and moved the measuring point to the upstream gage at the Nasworthy Dam outlet, which results in a reduction in flows.¹⁵³

Kaci Myrick testified for the ED about doing a review of the environmental impact of the requested Amendment. She did not perform the review herself; she reviewed staff memoranda written by John Botros and Chris Loft,¹⁵⁴ neither of whom appeared at the hearing so they were unavailable for cross-examination by Concho River Association. Ms. Myrick testified that Mr. Botros recognized that because COA-1318 required normal flows to be passed through the Dam at all times and the amendment was to replace this with inflows, “there should be minimum streamflow kept in the river at the location of San Angelo’s diversion.”¹⁵⁵

In summary, the Commission approved Amendment 1318C without the analysis required by §11.122(b) with regard to possible adverse impacts on the on-stream environment. There is no evidence to support Finding of Fact 49 that the Commission staff completed a “no injury” analysis; there is no finding of fact that the Applicant conducted a “no injury” analysis; and there is no evidence or findings of fact to support Conclusion of Law 11¹⁵⁶ that under the standard of §11.122(b), the amendment would not adversely affect the on-stream environment. Therefore, the Commission Order must be overturned as a matter of law and is arbitrary and capricious and is not supported by substantial evidence considering the reliable and probative evidence in the record as a whole.

¹⁵² AR Vol 9, 159 (Botros Memo, Exh. ED-10).

¹⁵³ See **Appendix 1**: AR Vol 6, 155 at FOF 59-61 (Commission Order).

¹⁵⁴ AR Vol 9, 157 at 2:14-20 (Myrick PFT, Exh. ED-8).

¹⁵⁵ AR Vol 9, 157 at 3:19-24 (Myrick PFT, Exh. ED-8).

¹⁵⁶ See **Appendix 1**: AR Vol 6, 115 at FOF 49 and COL 11 (Commission Order).

II.C.2. There are no Findings of Fact and no evidence in the record to support Conclusion of Law No. 11 concluding that Amendment 1318C will cause no adverse impacts to groundwater.

The Commission erroneously adopted Conclusion of Law 11 that the Amendment 1318C will not adversely affect existing groundwater resources or groundwater recharge. First, the Commission made no Finding of Fact regarding the effect of Amendment 1318C on existing groundwater resources or groundwater recharge. Therefore, there are no Findings of Fact to support this Conclusion of Law with respect to groundwater. Second, the only “evidence” in the record regarding possible effects on groundwater, is the unsupported conclusory opinion testimony of the City’s expert witness, Dr. Brandes.¹⁵⁷ As noted above at p. 36, an unsupported expert’s opinion cannot be considered competent evidence.¹⁵⁸ Concho River Association attempted to introduce testimony showing adverse impacts, but the testimony was erroneously excluded. This evidence, which is before this Court in an Offer of Proof, shows that the lack of flows in the Concho River dried up domestic and livestock wells; and that water impounded in the Twin Buttes Reservoir that does not get passed through to the Dam, adversely impacts groundwater resources downstream.¹⁵⁹

II.C.3 The record contains no evidence to support a change of the reference point for measuring instream flows to the Nasworthy Dam outlet. (MFR Point of Error No. 7).¹⁶⁰

There is no evidence to support changing the instream flow point of reference from the gage below Bell Street Dam to the Nasworthy Dam outlet. As Ms. Myrick testified, Chris Loft modified Mr. Botros’ memorandum, changing the streamflow restriction reference location and recalculating the required streamflow restrictions.¹⁶¹ Mr. Loft gave no reason for changing the reference location other than a request by the City.¹⁶² Ms. Myrick agreed with both modifications to Amendment 1318C that Mr. Loft recommended, and disregarded Mr. Botros’ recommendations in this regard.¹⁶³

¹⁵⁷ AR Vol 8, 124 (Brandes PFT, Exh. SA-2).

¹⁵⁸ *City of San Antonio v. Pollock*, 284 S.W.3d 809, 818 (Tex. 2009).

¹⁵⁹ AR Vol 8, 135 at 13:11-16:7 (Jones PFT, Exh. Concho-1); AR Vol 8, 138 at 4:36-5:12(Carson PFT, Exh. Concho-2); See also, AR Vol 9, 149 (Offer of Proof).

¹⁶⁰ See **Appendix 3**: AR Vol 6, 117 at Point of Error 7 (Protestants’ Motion for Rehearing).

¹⁶¹ AR Vol 9, 157 at 5:10-14 (Myrick PFT, Exh. ED-8). AR Vol 9, 164 (Exh. ED--12).

¹⁶² AR Vol 9, 160 at p. 2 (Exh. ED-11).

¹⁶³ AR Vol 9, 157 at 5:15-17 (Myrick PFT, Exh. ED-8).

In Findings of Fact 53 – 61, and 84,¹⁶⁴ the Commission adopted findings approving environmental flows to be measured at Lake Nasworthy Dam outlet in order to protect instream flows in the *South Concho River*. These findings are against the preponderance of the evidence showing that the *South Concho River*, which the streamflow restrictions are purportedly designed to protect, is located above the City’s major diversion point at its water treatment plant. The water released from the Twin Buttes Reservoir under COA-1318 and other City water rights that allow the city to divert water to its water treatment plant, is sufficient to maintain streamflows in the *South Concho River* protective of the environment. To protect the on-stream environment of the downstream main stem of the Concho River, however, the appropriate measuring point is at the gage below Bell Street Dam, which is controlled by the City. This is the appropriate location of reference to protect the downstream main stem of the Concho River on-stream environment.¹⁶⁵

Commission staff, Mr. John Botros, recognized that if the changes to COA-1318 requested by the City were approved, there would be less flow downstream, which could impact downstream wildlife and the environment. He recommended a series of required inflows to be measured at the USGS Gage 08136000, which is located at the Bell Street Dam. He noted that segment 1421 (South Concho and Concho Rivers) is threatened because of elevated levels of sulfate chloride, nitrates and other chemicals, and needs protection. He concluded that the result of the requested changes to COA-1318 “constitute a potential new environmental impact due to extended periods of a lack of or a reduction in stream flow downstream of Twin Buttes Reservoir, and flow restrictions to maintain the in stream flows of the Concho River downstream of the City of San Angelo’s diversion point are warranted for this amendment.”¹⁶⁶ Commission staff, Mr. Chris Loft, based on the City’s request at a June 21, 2007 meeting, changed the reference location for stream flow requirements to the outlet of Lake Nasworthy Dam.¹⁶⁷ This change resulted in a reduced draining area ratio with less required flow. The change in location not only reduced the amount of required instream flows, but ignored the fact that the stream

¹⁶⁴ See **Appendix 1: AR** Vol 6, 115 at FOF 53-61, and 84 (Commission Order).

¹⁶⁵ **AR** Vol 8, 144 at 18:27-19:3 (Austin PFT, Exh. Concho-7).

¹⁶⁶ **AR** Vol 9, 159 at pp. 3-4 (Exh. ED-10). Other aspects of Mr. Botros’ analysis are discussed in Section II.C.1 above.

¹⁶⁷ **AR** Vol 9, 160 at p. 2 (Exh. ED-11).

segment to be protected includes the main stem of the Concho River as previously concluded by Mr. Botros, not the *South* Concho, as apparently considered by this later recommendation.

The only explanation provided by the Commission staff, other than the City's request, was that the point of impact is Twin Buttes and Lake Nasworthy; the measuring of the in stream flows at Lake Nasworthy is closer to the point of impact than Bell Street Dam; and that the North Concho contributes flows in this reach.¹⁶⁸ As summarized on the preceding page, Dr. Austin concluded that the environmental flow requirement, should be changed to that originally recommended by TCEQ staff and measured at Bell Street Dam.¹⁶⁹

Unless the environmental flows are measured at Bell Street Dam, there is no protection to the environment downstream on the Concho River. Measuring the flows at Lake Nasworthy provides no protection because those flows may be diverted by water right holders in that reach of the River system, including the City at its water treatment plant on Lone Wolf Reservoir.

Findings of Fact 53-61 and 84 are erroneous because in addition to the fact that there is no evidence in the record supporting the reference location at the Nasworthy Dam outlet, there is testimony in the record regarding the adverse impact of low flows in the main stem of the Concho River upon the Texas pimpleback mussel, which needs to be protected.¹⁷⁰ Amendment 1318C, as approved in the Commission Order, reduces flow in main stem of the Concho River, thereby threatening the existence of the Texas pimpleback mussel, other wildlife, and the river habitat.

¹⁶⁸ AR Vol 9, 158 at 275: 19-24 (Myrick PFT, Exh. ED-8).

¹⁶⁹ AR Vol 8, 144 at 16:1-19:3 (Austin PFT, Exh. Concho-7).

¹⁷⁰ AR Vol 8, 140 at 9:16-37 (Hoelscher PFT, Exh. Concho-3).

II.D Concho River Association’s Evidence Showing Injury to Water Rights on the Stream and Adverse Impacts to the Environment, Including Groundwater, was Erroneously Excluded; Therefore, the Matter Must be Reversed and Remanded to the Commission for Consideration of that Evidence.¹⁷¹ (MFR Point of Error No. 1 at p. 8)

Evidence offered by the Concho River Association showing the low flow conditions on the main stem of the Concho River downstream of Twin Buttes Dam and Reservoir was excluded.¹⁷² This evidence is clearly relevant to this proceeding and Protestant’s claims of adverse impact or possible adverse impact. The testimony of Mr. A.J. Jones about low flow conditions and the effect on flows downstream of the Dam was excluded.¹⁷³ His testimony about the adverse impacts of Amendment 1318C on water rights, junior and senior, was excluded.¹⁷⁴ A photograph evidencing low flows in 2000 and the related testimony were excluded.¹⁷⁵

Erroneously excluded evidence included the testimony of Mr. Van Carson about low flows downstream.¹⁷⁶ Also excluded was the testimony of Mr. Steven Hoelscher about failure of the City to pass flows through the Dam.¹⁷⁷ Mr. Stuart Seidel’s testimony about the adverse impact of Amendment 1318C on upstream junior water rights was partially excluded.¹⁷⁸

The above are only examples of the extent of the excluded testimony. A quick review of Concho River Association’s pre-filed testimony will illustrate to this Court the extent of the excluded testimony, which comprises nearly the entirety of Plaintiff’s case below. The excluded pre-filed testimony is indicated in Exhibits Concho-1, 2, 3, 4, 5, 6, and 7 by testimony that has

¹⁷¹ See **Appendix 3: AR** Vol 6, 117 at Point of Error 1 (Protestants’ Motion for Rehearing).

¹⁷² **AR** Vol 10, 171 (Audio Recording of Commissioners’ Agenda of February 9, 2011). pp. 4-5 of transcript of Audio Recording.

¹⁷³ **AR** Vol 8, 135 at 4:36-13:26 (Jones PFT, Exh. Concho-1). See also, **AR** Vol 9, 149 at pp. 2-3(CRBWCA Offer of Proof).

¹⁷⁴ **AR** Vol 8, 135 at 36:24 – 38:16; and 39:7 -32 (Jones PFT, Exh. Concho-1). See also, **AR** Vol 9, 149 at pp. 2-3(CRBWCA Offer of Proof).

¹⁷⁵ **AR** Vol 8, 135 40:5 – 41:14 (Jones PFT, Exh. Concho-1).and **AR** Vol 9, 149 at p. 244 (CRBWCA Offer of Proof, Exh. Concho-1-AC).

¹⁷⁶ **AR** Vol 8, 138 at 5:35-6:15 (Carson PFT, Exh. Concho-2). See also, **AR** Vol 9, 149 at pp. 2-3 (CRBWCA Offer of Proof).

¹⁷⁷ **AR** Vol 8, 140 at 7:6-9:13 (Hoelscher PFT, Exh. Concho-3). See also, **AR** Vol 9, 149 at pp. 2-3 (CRBWCA Offer of Proof).

¹⁷⁸ **AR** Vol 8, 142 at 3:30-35 and 4:7-24 (Seidel PFT, Exh. Concho-5). See also, **AR** Vol 9, 149 at pp. 2-3 (CRBWCA Offer of Proof).

been marked-through. The Plaintiff's Offer of Proof includes the excluded documentary evidence and incorporates by reference the excluded testimony.¹⁷⁹ The wholesale exclusion of Concho River Association's evidence, particularly that excluded on relevancy grounds, is a clear indication that the Commission accepted the City's minimalist rationale for Amendment 1318C - merely to clarify COA-1318- without question, and the outcome of the hearing was a foregone conclusion.

All of the testimony, with the exception of that of Mr. Jerry Ahrens, was from witnesses holding senior water rights; was based upon many years of experience and knowledge of the Concho River Watershed and impact of the Amendment; and was based upon facts within the witnesses' knowledge and experience. Objections were variously made to this testimony on the bases of hearsay, lack of personal knowledge, lay opinion, lack of authentication, or expert testimony. Nevertheless, all was admissible under Texas Government Code § 2001.081 because the evidence presented in this testimony was (1) necessary to ascertain facts not reasonably susceptible of proof under the Rules of Evidence, and (2) is of a type on which a reasonably prudent person commonly relies in the conduct of the person's affairs. The evidence was also based upon personal knowledge and admissible lay opinion of the witnesses. This was all urged and presented in the Concho River Association's Motion to Reconsider Rulings in Order No. 7 on Objections to Prefiled Testimony and Memorandum of Applicable Law, all supported by application of the Rules of Evidence.¹⁸⁰

II.E. The Commission's Errors Related to Identification of the City's Existing Water Right Render its Decision Arbitrary and Capricious and not Supported by Substantial Evidence.

In summary, the Commission erred in finding no adverse impacts on other water rights on the stream or on the on-stream environment, as discussed in detail in this Point of Error No. II. As discussed, the Commission made numerous substantive and procedural errors affecting the Commission Order, including its Findings of Fact and Conclusions of Law cited throughout this Point of Error. As a result, the Commission's adoption of the Findings of Fact and Conclusions of Law identified in Point of Error No. II and its issuance of Amendment 1318C

¹⁷⁹ This excluded testimony is before this Court in an Offer of Proof. AR Vol 6, 115 (CRBWA Offer of Proof).

¹⁸⁰ AR Vol 4, 88 (Motion to Reconsider Rulings in Order No. 7 on Objections to Prefiled Testimony and Memorandum of Applicable Law).

were in violation of the cited sections of the Texas Water Code; were made by failing to follow the Commission's own rules; were made through unlawful procedure, affected by error of law, arbitrary and capricious, characterized by an abuse of discretion; and were not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole. These errors resulted in the violation of the due process of the Concho River Association and the senior water rights holders it represents,¹⁸¹ which are rights guaranteed by the United States Constitution and the due course of law protections provided by the Texas Constitution

III. THE COMMISSION COMMITTED REVERSIBLE ERROR WHEN IT FOUND THAT THE AMENDMENT APPLICATION DID NOT REQUEST A NEW OR INCREASED APPROPRIATION OR AN INCREASE IN DIVERSION RATE AND THAT THE CITY WAS NOT REQUIRED TO DEMONSTRATE THAT UNAPPROPRIATED WATER IS AVAILABLE IN THE SOURCE OF SUPPLY UNDER TEXAS WATER CODE § 11.134 (b)(2).¹⁸² (MFR POINT OF ERROR NO. 3)

Texas Water Code § 11.134(b)(2)¹⁸³ states that “[t]he commission shall grant the application only if: . . . unappropriated water is available in the source of supply.” See also, the implementing regulations at 30 TAC § 297.41(a)(3)(B).¹⁸⁴ The Commission committed reversible error when it adopted Conclusion of Law 6 stating that no water availability analysis under § 11.134(b)(2) was required.¹⁸⁵ The Commission made this error based on the erroneous Findings of Fact 41, 42, and 43 that the Amendment application did not request a new or increased appropriation, an increase in diversion rate, or impoundment of additional volumes of water.¹⁸⁶

¹⁸¹ See footnote 1, *supra*.

¹⁸² See **Appendix 3: AR Vol 6**, 117 at Point of Error 3 (Protestants’ Motion for Rehearing); **Appendix 1: AR Vol 6**, 115 at FOF 41, 42 and 43 and COL 6 (Commission Order).

¹⁸³ See **Appendix 14: Texas Water Code § 11.134**.

¹⁸⁴ See **Appendix 15: 30 TAC § 297.41**.

¹⁸⁵ It is undisputed that no water availability analysis was performed. **AR Vol 9**, 163 (Exh. ED-14). While the Memorandum is entitled “Water Availability Analysis,” it is no more than a methodology for determining total flow at Twin Buttes Dam. **AR Vol 9**, 164 (Exh. ED-15).

¹⁸⁶ See **Appendix 1: AR Vol 6**, 115 at FOF 41, 42 and 43, and COL 6 (Commission Order).

In Conclusions of Law 5, 6, and 9,¹⁸⁷ the Commission found that the City was not required to demonstrate that unappropriated water is available; the amendment could be granted on the basis of a showing of no adverse impact.¹⁸⁸ Thus Amendment 1318C approved by the Commission is contrary to law because a water availability analysis was required, but was not performed.

III.A. The Amendment Allows Impoundment of Flows in Addition to the Authorized "Storm and Flood Water," Thereby Allowing the City to Enhance its Water Right. Approval of an Increase in the Flows to be Impounded Requires a Finding of Unappropriated Water Available in the Stream.

Apparently based on Texas Water Code § 11.122(b) and the implementing regulation at 30 Texas Administrative Code § 297.45, the Commission used the following standard: if Amendment 1318C did not increase the appropriative amount or diversion rate, then §11.134(b)(2) does not apply to the Application. If § 11.134(b)(2) does not apply to the Application, then no water availability analysis was required. Thus the first step in making the erroneous Conclusion of Law No. 6 stating that "the City is not required to demonstrate that unappropriated water is available in the source of supply before the Commission may grant [the] Application" was to make Findings of Fact 41 and 42 that the changes requested in the Amendment were not new or additional appropriations or changes in maximum diversion rates.¹⁸⁹

By misinterpreting COA-1318, the Commission erroneously adopted Finding of Fact 43 that Amendment 1318C did not "request the authority to impound any additional volumes of State water than are currently authorized by COA -1318." Certificate of Adjudication 1318 authorized the City to impound only storm and flood water, as discussed in Point of Error No. I above. Amendment 1318C allows the City to impound inflows. Thus Amendment 1318C allows impoundment of water in addition to storm and flood flow.¹⁹⁰ Contrary to Finding of Fact No. 43, by allowing the City to store flows in addition to the authorized storm and flood

¹⁸⁷ See **Appendix 1: AR Vol 6**, 115 at COL 5, 6 and 9 (Commission Order).

¹⁸⁸ This is the position taken by both the Commission staff and the City. **AR Vol 9**, 161 at 3:13-19 (Densmore PFT, Exh. ED 12); **AR Vol 9**, 163 (Exh. ED-14); and **AR Vol 8**, 130 at pp. 29:2-3 and 30:4-20. See Point of Error No. II for a discussion of the Commission's errors related to a finding of no adverse impact.

¹⁸⁹ See **Appendix 1: AR Vol 6**, 115 at FOF 41 and 42 (Commission Order).

¹⁹⁰ See **Appendix 1: AR Vol 6**, 115 at FOF 70 and 72 (Commission Order).

water, Amendment 1318C allows the City to impound volumes of State water in addition to those currently authorized by COA-1318. Effectively this change constitutes a new appropriation of water. Therefore, adoption of Finding of Fact 43 is erroneous and adoption of Conclusion of Law 6,¹⁹¹ which is based on that finding, is reversible error.

Amendment 1318C clearly enhances the impoundment and storage rights of the City. By allowing the City to use more water to fill up the Reservoir, even though the maximum authorized 170,000 acre-feet was not increased, the Commission has effectively increased the City's appropriation.¹⁹² Instructive on this issue, although not controlling, is 30 Texas Administrative Code § 297.45(a). In addressing the "no injury rule" for granting an application for a new water right or an amended water right, the regulation lists possible adverse impacts to other appropriators:

[T]he possibility of depriving an appropriator of the equivalent quantity or quality of water that was available with the full, legal exercise of the existing water right before the change; increasing an appropriator's legal obligation to a senior water right holder; or otherwise substantially affecting the continuation of stream conditions . . .

30 TAC § 297.45(a).¹⁹³ Looking at this list from the point of view of an applicant, one can see that in each case, the applicant's water right would be enhanced. By allowing the City to impound additional water and with the other changes to passage of flows downstream substantially affecting continuation of stream conditions, Amendment 1318C is clearly the type of change to a water right that requires a water availability analysis.

Thus, under Texas Water Code § 11.134(b)(2) and 30 TAC § 297.41(a)(2) the City was required to demonstrate that "unappropriated water is available in the source of supply."¹⁹⁴ By concluding that no such water availability analysis was required, the Commission committed reversible error. Of course, if the Commission had recognized the true nature of COA -1318, it

¹⁹¹ See **Appendix 1: AR Vol 6**, 115 at FOF 43 and COL 6 (Commission Order).

¹⁹² Interestingly, the City's expert witness, Dr. Robert Brandes, when asked whether the application for Amendment 1318C sought changes to the volume of water that the City was authorized to store or divert under COA-1318, answered that it did not "change the *maximum* volume of water" authorized to store or annually to divert. [Emphasis added.] **AR Vol 8**, 130 at pp. 13:20-14:3 (Brandes PFT, Exh. SA-2). Plaintiff agrees that Amendment 1318C does not increase the *maximum* volume the City is authorized to store, but asserts that that is not the issue.

¹⁹³ See **Appendix 13:30 TAC § 297.45**.

¹⁹⁴ See **Appendix 9**, Texas Water Code § 11.134 and **Appendix 10: 30 TAC § 297.41** (TCEQ rule implementing § 11.134).

would have recognized that Texas Water Code § 11.134(b)(2) and 30 TAC § 297.41(a)(2) applied. Because no water availability analysis was performed either by the Applicant or the ED,¹⁹⁵ the Commission would have been required to deny Amendment 1318C. These compound errors by the Commission constitute reversible error.

III.B. By Eliminating the Requirement to Pass Flows “At All Times” and Restricting Such Passage to Only Times when the Inflow Into the Reservoir Equals or Exceeds the Volume of the Release, the Amendment Decreases the Amount of Flows to be Released. A Decrease in the Flows to be Passed Downstream Requires a Finding of Unappropriated Water Available in the Stream.¹⁹⁶ (MFR Point of Error No. 3.)

Even if this Court finds that COA-1318 did not limit the City to using only “storm and flood water” to fill Twin Buttes Reservoir, the Commission nonetheless committed reversible error by failing to require a demonstration of unappropriated water in the source of supply under Texas Water Code 11.134(b)(2) and 30 TAC 297.41(a)(2). The pre-amendment COA-1318 required passage of *all normal* flows through the Dam *at all times*.¹⁹⁷ In contrast, Amendment 1318C authorizes (a) passage of *inflows* through the Dam to fulfill calls of downstream senior and superior water rights *only* when required by the Watermaster utilizing the City’s Water Rights Accounting Plan; and (b) passage of *inflows* based on a schedule designed to address environmental flows.¹⁹⁸

Of further significance when determining whether a water availability analysis was required, is the fact that under the COA-1318 the City was required to pass *impounded* water to fulfill calls made by downstream senior and superior water rights when the *normal* flow through the Dam was insufficient to meet those demands.¹⁹⁹ Under Amendment 1318C, no release from stored (impounded) water is required to fulfill downstream senior and superior water rights or to address environmental flows; that is, passage is required only to the extent that it is covered by

¹⁹⁵ AR Vol 9, 161 3:13-19 (Densmore PFT, Exh. ED 12) and AR Vol 8, 130 at 29:2 – 3 and 30:4 – 20 (Brandes PFT, Exhibit SA-2).

¹⁹⁶ See Appendix 3: AR Vol 6, 117 at Point of Error 3 (Protestants’ Motion for Rehearing).

¹⁹⁷ See Appendix 4: AR Vol 8, 146 (COA-1318, Exh. Concho-8).

¹⁹⁸ See Appendix 1: AR Vol 6, 115 at FOF 60, 61, 72 and 78 (Commission Order). See Appendix 2: Excerpt of AR Vol 6, 115 (Amendment 1318C).

¹⁹⁹ See Appendix 4: AR Vol 8, 146 at p. 2 (COA-1318, Exh. Concho-8) and discussion at Section II.B, above.

inflows.²⁰⁰ Thus, when there are insufficient inflows to cover the call, the call will remain unfulfilled even if Twin Buttes Reservoir is full. This is a further way in which the City's impoundment and storage rights are enhanced by the Amendment. Eliminating the requirement that the City fulfill downstream calls from storage has effectively increased the City's appropriation; therefore, a water availability analysis was required.

III.C. Under the Commission's Strict Interpretation of Water Code §11.134(b)(2), Amendments to "Impoundment" Water Rights and "Use" Water Rights would be Protected from Undergoing a Water Availability Analysis Regardless of the Overall Effects of the Amendment. This Interpretation is Contrary to Prevailing Law in the City of Marshall v. the City of Uncertain.

The bottom line is this: Amendment 1318C enhances the impoundment rights of the City in a way that requires a water availability analysis under § 11.134(b)(2). The Commission adopted Conclusion of Law 6 that § 11.122(b) means that an applicant for a water right amendment does not have to demonstrate that unappropriated water is available in the source of supply if that amendment does not “increase[] the amount of water authorized to be diverted or the authorized rate of diversion . . .”²⁰¹ This conclusion could only be reached in the present case by strictly interpreting § 11.122(b), ignoring the intent of the provision, and misapplying the *City of Marshall v. the City of Uncertain*, *City of Marshall and TCEQ v. City of Uncertain*, et al., 206 S.W.3d 97 (Tex. 2006). The Commission's strict interpretation says that a change in a diversion water right is the only change in a water right that would ever require an analysis under 11.134(b)(2). Under such a strict interpretation, however, an amendment to a right to impound or a right to use state water – other water rights acquired under State law²⁰² – would never require a water availability analysis. This is particularly troubling in a watershed that is already fully appropriated, such as the one in this case. This cannot be the intent of the statute, as the Texas Supreme Court has found.

Marshall stands for the proposition that while the "no injury" analysis of Texas Water Code § 11.122(b) is always required for a water right amendment, the scope and effect of the amendment will determine which other considerations under § 11.134 the Commission must

²⁰⁰ See **Appendix 1: AR** Vol 6, 115 at FOF 61 and 72 (Commission Order).

²⁰¹ See **Appendix 1: AR** Vol 6, 115 at COL 6 (Commission Order).

²⁰² Texas Water Code § 11.002(5) [definition of “water right”].

make. Dicta in the *Marshall* case states that § 11.134(b)(2) is one of the criteria “that §11.122(b) excludes or that clearly do not apply to amendments.” This dicta does not apply here because the Court based its statement on the fact that the amendment being reviewed sought no new appropriation. See *City of Marshall and TCEQ v. City of Uncertain, et al.*, 206 S.W.3d 97, 108 (Tex. 2006) (“the amendment here seeks no new appropriation, but would instead allow *Marshall* to use previously appropriated water for a different purpose.”) In *Marshall*, the Court was considering an amendment to change the type of use of a water right. Here, the Commission was being asked to change the very essence of the water right: which water the City is authorized to impound; when and which water must be passed through the Dam; and when water must be released from storage to satisfy downstream appropriators. So even though the City and the Commission characterized the application as merely seeking a “clarification” of the underlying water right, it was effectively seeking a new appropriation.

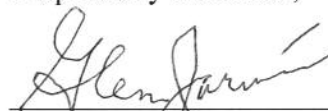
III.D. The Commission’s Errors Related to the Demonstration of Water Availability Render its Decision Arbitrary and Capricious and not Supported by Substantial Evidence.

In summary, the Commission erred in finding that the amendment application did not request a new or increased appropriation and that the City was not required to demonstrate that unappropriated water is available in the source of supply, as discussed in detail in this Point of Error No. III. The Commission made numerous substantive and procedural errors affecting the Commission Order, including its Findings of Fact and Conclusions of Law cited throughout this Point of Error. As a result, the Commission’s adoption of the Findings of Fact and Conclusions of Law identified in this Point of Error No. III and its issuance of Amendment 1318C were in violation of Texas Water Code § 11.134(b)(2); were made by failing to follow the Commission's own rules; were affected by error of law, arbitrary and capricious, and characterized by an abuse of discretion. Furthermore, as discussed in this Point of Error, they were not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole.

PRAYER FOR RELIEF

For the reasons described above, Concho River Basin Water Conservancy Association respectfully requests that the TCEQ's Order approving Amendment 1318C be reversed or in the alternative, to remand the case for further proceedings, and for such other and further relief to which it may be entitled.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Plaintiff's Initial Brief, has been hand-delivered on the 23rd day of January, 2012, to:

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