

2.02 Plaintiffs William and Gladys Gavranovic (“Gavranovics”), a married couple, are owners of Horizon Turf Grass, Inc. doing business at 5713 County Road 156, Wharton, Texas 77488. The Gavranovics are holders of Permit to Appropriate State Water No. 5752 and Applicants for Water Use Permit No. 5752A, which the Commission staff has stated should be denied for lack of water available for appropriation.

2.03 The Texas Commission on Environmental Quality is an agency of the State of Texas having statewide jurisdiction. Service of process may be had by serving its Chief Clerk, who is located at 12100 Park 35 Circle, P.O. Box 13087, Austin, Texas, 78753.

III. Jurisdiction and Venue

3.01 This Court has jurisdiction over this case under Tex. Gov’t Code, §2001.001, *et seq.*, and because no other court has exclusive jurisdiction and the amount in controversy exceeds the minimum jurisdictional limits of this court.

3.02 Venue is proper in Travis County, pursuant to the Texas Government Code §2001.176(b)(1).

IV. Factual Background

4.01 Plaintiffs protested Brazos River Authority’s Application for Systems Operation Water Use Permit No. 5851 with the Agency because Plaintiffs are agricultural users in the Brazos River Basin with water rights permits and applications for water rights permits regulated by the Agency. A true copy of a *AN ORDER Concerning the Application of Bradley B. Ware to amend water use Permit No. 5594; TCEQ Docket No. 2008-0181-WR; SOAH Docket No. 582-08-1698* in Mr. Ware’s application for Permit to Appropriate Water No. 5594A is attached as Exhibit A true copy of Gavranovic’s application No. 5752 is attached as Exhibit B, and fully incorporated into this pleading by reference; A true copy of the June 5, 2016 letter from TCEQ staff recommending that Application No. 5752 not be granted by the Commission is attached hereto as Exhibit C.

4.02 On May 13, 2010, the TCEQ Chief Clerk issued a Notice of Hearing, notifying the parties that Application 5851 had been referred to the State Office of Administrative Hearings (“SOAH”) for the contested case hearing.

4.03 On June 8, 2010, SOAH Administrative Law Judges (“ALJs”) William Newchurch and Hunter Burkhalter issued *SOAH Order No. 1 Memorializing Preliminary Hearing; and Setting Hearing Schedule*. The ALJs identified the parties as: Brazos River Authority (“BRA”); Executive Director of the Texas Commission on Environmental Quality; Commissions Office of Public Interest Council; Matthews Land and Cattle Company; Dow Chemical Company; Texas Westmoreland Coal Company; City of Lubbock; Ft Bend County Levee Improvement District No. 11; Ft Bend County Levee Improvement District No. 15; Sienna Plantation MUD No. 1; City of Bryan; City of College Station; Friends of the Brazos River; Helen Jane Vaughn; D. Wilson; Mary Lee Willey; National Wildlife Federation; Texas Parks and Wildlife Department; Gulf Coast Water Authority; City of Round Rock; Bradley B. Ware; George Bingham; Mike Bingham; William D. and Mary L. Carroll; Frasier Clark and Robert Starks.

4.04 On July 29, 2016, the undersigned entered a *Notice of Appearance of Counsel for Comanche County Growers* on behalf of George Bingham, Frasier Clark, and William D. and Mary L. Carroll, collectively referred to as the Comanche County Growers (“CCG”).

4.05 On November 12, 2010, the undersigned entered a *Notice of Appearance of Counsel for Robert Starks* on behalf of Robert Starks who joined as a member of the Comanche County Growers.

4.06 During the hearing at SOAH, George Bingham, William D. and Mary L. Carroll b/n/f Neil Carroll, Frasier Clark b/n/f Dusty and Donna Jones, and Robert Starks were collectively referred to as the Comanche County Growers. The Comanche County Growers and Ware were collectively referred to as the Brazos Family Farmers and Ranchers, or “BFFR.”

4.07 A hearing on the merits was conducted in two parts, the first from May 9-10, 2011, May 12-13, 2011; May 16-20, 2011; and June 2, 2011. That hearing was concluded without a final order, but with *AN INTERIM ORDER concerning the Administrative Law Judges' Proposal for Decision Regarding the Application of the Brazos River Authority for Water Use Permit 5851; TCEQ Docket No. 2005-1490-WR; SOAH Docket No. 582-10-4184* dated January 30, 2012, remanding Application No. 5851 to SOAH for further hearings on a Water Management Plan.

4.08 On October 17, 2011, the ALJs issued their *Proposal for Decision* ("PFD") recommending that the Commission either deny Application 5851, or alternatively, allow BRA time to prepare a Water Management Plan and remand Application 5851 back to SOAH for further hearings.

4.09 On January 30, 2012, after considering the PFD, the parties Exceptions and Replies to Exceptions, the Commission issued *AN INTERIM ORDER concerning the Administrative Law Judges' Proposal for Decision Regarding the Application of the Brazos River Authority for Water Use Permit 5851; TCEQ Docket No. 2005-1490-WR; SOAH Docket No. 582-10-4184* requiring BRA to submit a Water Management Plan and remanding Application 5851 back to SOAH for further hearings on BRA's Water Management Plan.

4.10 On August 27, 2013, the ALJs issued *SOAH Order No. 18 Memorializing Preliminary Hearing and Setting Hearing Schedule*. The ALJs identified the parties as: Brazos River Authority; Executive Director of the Texas Commission on Environmental Quality; Commissions Office of Public Interest Council; Dow Chemical Company; City of Lubbock; City of Bryan; City of College Station; Friends of the Brazos River; Helen Jane Vaughn; Lawrence Wilson; Mary Lee Lilley; Brazos River Alliance; Ken W. Hackett; Joe Williams; National Wildlife Federation; Texas Parks and Wildlife Department; Gulf Coast Water Authority; City of Round Rock; Chisholm Trail Ventures, L.P.; NRG Texas Power, LLC; Friends of Lake Limestone; City of Houston; City of Granbury; Hood County; Lake Cranbury Waterfront Owners Association; Possum Kingdom Lake Association; Mike Bingham; Bradley B. Ware;

William and Gladys Gavranovic; and Comanche County Growers identified as George Bingham, Robert Starks, Frasier, and William D. and Mary L. Carroll.

4.11 On October 21, 2013, the ALJs issued *SOAH Order No. 20 Granting Motions to Certify Questions and Abate* and *SOAH Order No. 21 Certify Questions to the Commission*. The ALJs ordered that the contested case hearing schedule be abated until the Commission ruled on the certified questions.

4.12 On December 17, 2013, the Commission issued an *Interim Order concerning the Administrative Law Judges' Request to Answer Certified Questions; the Application by the Brazos River Authority for Water Use Permit 5851; TCEQ Docket No. 2005-1490-WR; SOAH Docket No. 582-10-4184*.

4.13 Before the second hearing convened, all parties previously identified as the Comanche County Growers elected not to participate, and Ware and Gavranovics continued under the collective name of Brazos Family Farmers and Ranchers, or, again, "BFFR."

4.14 The second hearing on the BRA Water Management Plan was convened by SOAH from February 17, 2015 through February 26, 2015. TCEQ Docket No. 2005-1490-WR; SOAH Docket No. 582-010-4184. The Executive Director of the TCEQ appeared in as a party to the hearing, presenting evidence supporting the granting of BRA's Application 5851.

4.15 On July 17, 2015, the ALJs issued their *Proposal for Decision on Remand* ("PFD on Remand") recommending that the Commission grant Application 5851, in part, and issue a Permit 5851 with numerous terms and conditions.

4.16 On January 29, 2016, after consideration of the PFD on Remand, the parties' Exceptions, and Replies to Exceptions, the Commission issued *AN INTERIM ORDER concerning the Administrative Law Judges' Proposal for Decision on Remand and proposed Order for the Application of Application by the Brazos River Authority for Water Use Permit 5851; TCEQ Docket No. 2005-1490-WR; SOAH Docket No. 582-10-4184* remanding the issues

back to SOAH for further reconsideration, also directing that the record not be reopened for that consideration, stating:

- “1) The Commission determined the majority of the ALJs’ determinations were supportable; however, the Commission intended to implement two issues in a different manner.
- 2) The Commission remanded this matter to SOAH in the form of a limited remand for the purposes of clearing up the existing record and allowing the Parties and the ALJs to implement the Commission’s decisions on two issues regarding reservoir capacities and return flows in the Special Conditions and Water Management Plan portions of the SysOps Permit recommended by the ALJs.
- 3) The Commission instructed the ALJs to not reopen the evidentiary record and make any factual recommendations based on the existing record.
- 4) Regarding water availability based on reservoir storage capacity issues, the Commission agreed with the ALJs’ analysis regarding the 14% reduction in total available water availability under the four Demand Level scenarios. However, the Commission determined to implement the reduction via appropriate special condition limitations instead of lowering the Use Appropriation amounts in the four Demand Level scenarios. In order to implement the different implementation of the ALJs’ analysis, the Commission requested on remand that the ALJs and the Parties:
 - i) Recalculate the ALJs’ proposed four Demand Scenarios for the Use Appropriations by adding back the 14% reductions to each level in Provision 1.A.; and
 - ii) Redraft Special Condition(s) in 5.D. in a manner that:
 - 1) directs BRA’s WMP to immediately reduce the authorized diversion and use of the maximum annual authorized appropriation by the ALJs’ proposed 14% reduced appropriation levels under the four Demand Level scenarios due to sedimentation in the system reservoirs;
 - 2) authorizes BRA to submit a demonstration that it has additional sources of supply sufficient to offset the 14% initial reduction in its system reservoirs due to sedimentation; and
 - 3) should Permittee demonstrate that such supplies are available in the future demonstration, the amount of water authorized for diversion and use may increase up to the appropriated maximum annual amounts in Provision 1.A.
- 5) Regarding return flows issues, the Commission agreed with the ALJs that the TWC §§11.042 and 11.046 are reconcilable based on the plain language used in these statutes and that the two subsections address

mutually exclusive scenarios. The Commission agreed with the ALJs' determination that, as to the groundwater based effluent flows of others and surface water based surplus water return flows of others, BRA has carried its burden for those amounts. However, BRA can obtain an indirect reuse authorization of its own groundwater based effluent and its own surface water/developed water based effluent return flows only via a bed and banks authorization under TWC §11.042(b) & (c). Because the BRA return flow approach appears to treat all return flows the same, further investigation of the record is necessary in order to only include the amounts of the groundwater based effluent flows of others and surface water based surplus water return flows of others as a new appropriation. In order to implement the different implementation of the ALJs' analysis, the Commission requested on remand that the ALJs and the Parties:

- i) determine if the existing record includes persuasive evidence that BRA has requested and sought to obtain authorization of its own groundwater based effluent or its own surface water/developed water based effluent return flows in BRA's return flows approach; and
 - ii) if BRA did seek an authorization for its own return flows in its requested appropriation, then the ALJs should remove that portion of BRA's own return flows from the appropriation and determination if BRA demonstrated that the amount of BRA's own return flows meets all of the bed and banks application requirements. The ALJs should make a recommendation on whether the Commission can approve a bed and banks authorization for BRA's own return flows; but the Commission will not authorize this amount as a new appropriation in the SysOps Permit.
- 6) The Commission determined that BRA can obtain a new appropriation from other entities' surface water based surplus water return flows under TWC §11.046(c) and TWC §11.121 and other entities' ground water based effluent discharge flows under TWC §11.121. The ALJs should determine the amount of other entities' return flows that BRA proved as a new appropriation. Once the revised amount is determined, the ALJs should also recommend special condition(s) that:
- i) require sufficient accounting to protect BRA from diverting more than the other entities' return flows; and
 - ii) include redrafted Special Conditions in Section 5.A. that reduce or terminate BRA's appropriative rights in the return flows of others once another discharger directly reuses or obtains an indirect reuse

bed and banks authorization under TWC §11.042(b) or (c) that lessens the availability of the proportionate return flows of others.

- 7) The Commission agreed with the ALJs' analysis for all other contested issues addressed in the Proposal for Decision on Remand. The ALJs should recommend the most appropriate procedure to ensure that BRA's Water Management Plan incorporates the Commission's decisions."

4.17 On June 3, 2016, the ALJs issued their *Supplement to the Proposal for Decision on Remand* ("Supplemental PFD") recommending that the Commission partially grant Application 5851 and issue a revised System Operations Permit No. 5851. Certain parties filed Exceptions and Replies to Exceptions.

4.18 On September 16, 2016, after consideration of the matter at an August 24, 2016 Commission open meeting, the Agency rendered its decision in the form of *AN ORDER GRANTING IN PART THE AMENDED APPLICATION BY THE BRAZOS RIVER AUTHORITY FOR WATER USE PERMIT NO. 5851 AND APPROVING ITS WATER MANAGEMENT PLAN; TCEQ DOCKET NO. 2005-1490-WR; SOAH DOCKET NO. 582-10-4184* ("the September 16, 2016 Final Order"), attached hereto as Exhibit D. The September 16, 2016 Final Order granted BRA's Application No. 5851 authorizing the appropriation of up to 1,001,449 acre-feet per annum.

4.19 Plaintiffs and others timely filed Motions for Rehearing to the Agency's September 16, 2016 Final Order, and all Motions for Rehearing were overruled by operation of law by the Agency as of November 10, 2016 when the TCEQ failed to act on Plaintiffs' Motion. (See attached TCEQ notice of TCEQ Chief Clerk's determination attached as Exhibit E)

4.20 All conditions precedent having been performed or having occurred, the Plaintiffs are entitled to judicial review of the Agency's decision in accordance with Texas Water Code §11.134 and the Texas Government Code, §§2001.175 and 2001.176.

4.21 Throughout this hearing, a record was made consisting of all pleadings, evidence and orders of the parties, TCEQ and SOAH related to this BRA Application No. 5851. Demand is hereby made that the Agency transmit the original or a certified copy of the entire record of

such proceedings to the Court within the time permitted by law for the filing of an answer in this cause.

V. Agency Violations of Applicable Law

The Agency's handling of BRA's application for systems operations Water Use Permit No. 5851 has a long and complicated administrative history, coupled with many complex and multifaceted substantive issues of hydrology, water availability, and heretofore unannounced and untested legal theories related to the application of the Texas law of water rights as set forth in Texas Water Code Chapter 11. Brazos Family Farmers and Ranchers protested the procedure and the application of the law to the facts of this case throughout this unprecedented administrative hearing. Plaintiffs' request for judicial review in this case focuses on the Agency's findings, inferences, conclusions and decisions that are unlawful, improper, erroneous and voidable for one of the following reasons.

5.01 The Commission erred in issuing Permit No. 5851 to BRA in violation of the Texas APA. The Commission's September 16, 2016 Final Order issuing Water Use Permit No. 5851 to BRA should be reversed and remanded to the Commission for consideration in a proceeding which protects the constitutional and statutory rights of the parties, pursuant to Texas Administrative Procedure Act, §2001.174:

Sec. 2001.174. REVIEW UNDER SUBSTANTIAL EVIDENCE RULE OR UNDEFINED SCOPE OF REVIEW. If the law authorizes review of a decision in a contested case under the substantial evidence rule or if the law does not define the scope of judicial review, a court may not substitute its judgment for the judgment of the state agency on the weight of the evidence on questions committed to agency discretion but:

- (1) may affirm the agency decision in whole or in part; and
- (2) shall reverse or remand the case for further proceedings if substantial rights of the appellant 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.

5.02 The Agency's September 16, 2016 Final Order denies Plaintiffs due process of law and the right to equal protection of the law, as guaranteed by the Constitutions of the United States and the State of Texas and further violated the Texas APA, including Texas Government Code §2001.174. The Commission's September 16, 2016 Final Order violates fundamental principles of due process and the Texas APA by being "made through unlawful procedure." The Commission's consideration of return flows and water availability in BRA's Application No. 5851 was done without notice and hearing or any information regarding the applicable rules or policy which would govern the Commission's consideration. The Commission's September 16, 2016 Final Order establishes a system and methodology for considering and permitting the use of treated effluent wastewater return flows *after the fact* of two lengthy contested case hearings, during which neither the parties nor the Administrative Law Judges were advised of the legal standards to be applied by the Commission to the evidence presented. Therefore, Plaintiffs who had an administratively cognizable and judicial interest in BRA's application before the Agency and were denied the opportunity to participate in the matter that established the system and methodology for handling treated effluent wastewater return flows. Moreover, the Agency's determination of a system or methodology to be applied to similarly situated applicants should have been subject to formal notice and comment rulemaking procedures as required by the Texas APA at Tex. Gov't Code §2001.021, Subch. 13, *et seq.*

5.03 The Agency's September 16, 2016 Final Order is not reasonably supported by substantial evidence, in view of the reliable and probative evidence in the record as a whole, in violation of applicable law, including the Texas APA and the Texas Water Code. The Commission erred in issuing Permit No. 5851 to BRA, thereby granting a right to appropriate virtually all of the remaining state water available for appropriation in the Brazos River Basin, while at the same time failing to consider the rights of Brazos Family Farmers and Ranchers, existing authorized appropriators whose permits are senior in time priority to Permit No. 5851, in accordance with the orders of the Agency issuing those permits, and as stated on the face of the water rights Permits No. 5594 and 5752.

5.04 The Commission's September 16, 2016 Final Order is in excess of the agency's statutory authority because it violates the legislative mandates of Texas Water Code, Chapter 11. The Commission's September 16, 2016 Order completely fails and refuses consideration of the senior priority appropriators, Brazos Family Farmers and Ranchers, who are lawful appropriators for specific terms of years, whose priority dates were established by Commission order. The Commission's September 16, 2016 Order grants BRA's Application No. 5851 for the use of state water outside of the Legislative mandate of Texas Water Code §11.027:

"Sec. 11.027. RIGHTS BETWEEN APPROPRIATORS. As between appropriators, the first in time is the first in right."

At the same time, the Commission acted without requiring BRA to satisfy the requirements of Texas Water Code, §11.134(b) to show that water is available without impairment of existing water rights and is not detrimental to the public welfare.

5.05 The Agency's September 16, 2016 Final Order was made on unlawful procedure in that the Agency made no substantive underlying Findings of Fact relevant to the requirements set forth in Texas Water Code §11.134(b).

5.06 The Agency's September 16, 2016 Final Order was based on a plain error in the application of a Texas Water Code §§11.027 and 11.141 and Texas Government Code §2001.174(2)(A), and therefore, the order is arbitrary and capricious and in excess of the agency's statutory authority.

5.07 The Agency's September 16, 2016 Final Order is made upon unlawful procedure in that it implements an unpublished, unlawfully adopted policy regarding return flows, which is contrary to the statutory directives of the Tex. Water Code § 11.046(c). Therefore, the Agency's Order is unlawful, arbitrary, capricious, founded upon unlawful procedure and in excess of the Agency's statutory authority.

VI. Requested Relief

WHEREFORE, the Plaintiff requests that the agency be cited to appear and answer, and that on final trial, the Plaintiffs have judgment of the Court:

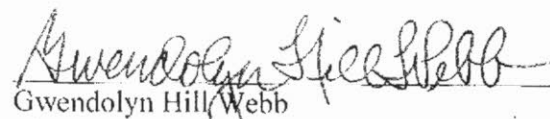
1. Reversing the decision of the Agency, or remanding the case to the Agency for further proceedings.

2. Awarding Plaintiffs costs incurred, together with all other relief to which the Plaintiff may be justly entitled.

Respectfully Submitted,

WEBB & WEBB
Attorneys at Law
2028 E. Ben White Boulevard, Suite 425
Austin, Texas 7870141
(512) 472-9990 Telephone
(512) 472-3183 Facsimile


Stephen P. Webb
s.p.webb@webbwebblaw.com
State Bar No. 21033800


Gwendolyn Hill Webb
g.hill.webb@webbwebblaw.com
State Bar No. 21026300

ATTORNEYS FOR PLAINTIFFS