

December 15, 2010

Commissioner Bryan Shaw  
Commissioner Buddy Garcia  
Commissioner Carlos Rubinstein

Re: Comments on Rules for Proposed Environmental Flows: Rule Project Number 2007-049-298-0W

Dear Sirs:

The Trinity River Authority (“Authority”), with exceptions discussed herein, supports the proposed rule additions to Chapter 298 of the Texas Administrative Code dealing with environmental flow standards for the Trinity and San Jacinto Rivers and Galveston Bay. The proposed rules incorporate components of both the environmentally-focused Expert Science Team and the more broadly-focused Trinity and San Jacinto Rivers and Galveston Bay Stakeholders Committee (“Stakeholders Committee”) in a balance of human and environmental needs. Although the Trinity and San Jacinto Rivers and Galveston Bay Expert Science Team did not reach a consensus and submitted two sets of recommendations, the proposed rules use elements of both sets. The proposed rules also consider input from the majority of representatives on the and Stakeholders Committee. Like the Expert Science Team, the Stakeholders Committee also submitted two sets of recommendations. Per Senate Bill 3 (SB 3), members of the Stakeholders Committee are charged with balancing the needs of the environment with other considerations. It is not clear that this legislatively-mandated balancing was attempted by the subset of stakeholders who offered the minority report. Rather, this report appears to be a straightforward rework of the Regime Group recommendation with no mention of how considerations for any use, other than environmental, factor into their recommendations. As has been discussed and acknowledged, the basis for the Regime Group recommendations is the HEFR stream flow model. This model, simply stated, parses historical flow data into a statistical flow regime that has no quantifiable relationship to ecological health. Because of this, and because no attempt was made to balance the water needs of the environment and Texas citizens, the minority report fails to meet the requirements of the SB 3 mandate.

The Authority agrees with proposed §298.10. The intent of SB 3 is that environmental flow standards and set asides be applicable only to new appropriations or amendments that increase the amount of water to be stored, taken or diverted. This fact is well-documented and has been repeatedly agreed upon by all parties involved in this process. We believe that the Texas Commission on Environmental Quality (“TCEQ”) is correct in stating that potential negative impacts from all other amendments can be addressed through existing authority delegated under Chapter 11 of the Texas Water Code.

The proposed §298.225, entitled Environmental Flow Standards, applies to more gages and flow components than recommended by the Conditional Group of expert scientists and the majority of stakeholders. The Authority therefore recommends that all instream flow requirements applicable to the Grand Prairie and Dallas gages be removed from the proposed standards. We further recommend that volumetric pulse-flow requirements at the remaining gages (Oakwood and Romayor) be removed from the proposed rules.

The Authority supports the Galveston Bay inflows based upon annual-flow frequency-targets, as described in proposed 30 TAC §298.225a. These recommendations are consistent with the Region H plan under Senate Bill 1 and represent a regime in that they cover a range of flows and allow for year-to-year variation. These proposed standards are implementable during both the technical review of a new application to determine if requested flow volumes are available, and during the permit drafting phase as a basis for special conditions to ensure those flow targets are met. The Authority further agrees with the Commission's decision to not propose environmental flow set asides for the Trinity and San Jacinto Rivers and that using existing authority will maximize water availability while protecting instream uses. As is stated in the proposed rules, "special conditions are a more effective method to maximize the use of water by allowing water to be used for dual purposes. Special conditions to protect environmental flows may allow water permitted to downstream senior water rights, as well as return flows and permitted but unused water, to satisfy the special conditions." We agree with this statement and that return flows which pass a control point should be used, in real time, to meet special conditions for environmental flows. However, return flows, historical or projected, should not be used in determining water availability for a third party in light of environmental flow standards or set asides. These return flows may not be under the control of the permittee and are subject to direct reuse along with myriad other factors that could affect future discharge volumes.

It is our understanding that flow volume and duration targets for pulses are defined as starting when the peak flow trigger is met, regardless of when a change in stage first occurred. This accounting method can significantly underestimate the actual amount of water that has passed a given location and/or the duration of a rise event. It is more appropriate to calculate pulse flow volumes and durations from the beginning of a rising hydrograph, provided the peak flow target is eventually met. We therefore suggest that the following language be deleted from proposed §298.22d(1): "The water right holder shall not divert or store water until either the volume amount has passed the measurement point or the duration time has passed since the peak flow trigger rate occurred." Similar language, including a process for determining the beginning and end of a pulse, can be included in permit special conditions.

The intent of SB3 is to establish an iterative process that allows standards implementation to be refined as more and better data are collected and as our understanding of the flow-ecology nexus increases. The Authority is concerned that the proposed rules make no allowances for the use of site-specific data and studies. Site specific studies represent a better understanding of the relationship between flows and the health of aquatic ecosystems at a given location or within a given reach and are therefore more appropriate than the hydrology-based statistical methods that have been used heretofore. The Authority believes language in the proposed rules should allow for the use of site-specific studies. We suggest that proposed §298.230a be amended as follows (inserted text underlined): "For water right permits with an authorization to store or divert more than 10,000 acre-feet per year in the Trinity and San Jacinto River basins, and to which the environmental flow standards apply, that are issued after the effective date of this subchapter, the water right permit or amendment shall contain flow restriction special conditions that are adequate to protect the environmental flow standards of this subchapter, to the maximum extent reasonable, considering other public interests, site specific studies, and other relevant factors."

The findings of the public benefit and costs analysis conducted in conjunction with these proposed rules found, in part, the following: "Overall, because the proposed standards are expected to function similarly to current streamflow restrictions for applications, the proposed standards are not expected to have significant fiscal implications..." This finding is likely inaccurate if the impacts upon water planning are considered. Specifically, the Commission has

evaluated projects that are likely to be implemented in the short term, while the SB 1 water planning process works with a fifty-year horizon. Because the water planning process must consider all relevant rules and regulations, it is very likely that numerous long-term projects, such as importing water across basin divides or developing new reservoirs – strategies that are paramount to meeting anticipated demands – will be made unviable. This would result in large water deficits with significant economic impacts. The Authority therefore urges the Commission to recognize the full measure of unintended consequences of environmental flow standards on the legislatively-mandated water planning process.

The Authority appreciates the opportunity to provide comments on the proposed rules for environmental flow standards. We look forward to continuing to work with the Commission, as well as other agencies and entities, to expand our knowledge of Texas's vital river, estuary, and bay systems.

The Authority will submit a detailed statement addressing more technical issues by the December 20 comment period closing.

Respectfully submitted,

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General Manager