

Written Testimony of Myron Hess to the Sunset Advisory Commission on the
Review of the Texas Commission on Environmental Quality, Submitted on Behalf
of the National Wildlife Federation and Me, individually
June 22, 2022

This testimony, regarding recommendations 3.1 and 3.3 and a new issue, is provided on behalf of the National Wildlife Federation and me personally. We strongly support recommendation 3.1 in the Staff Report and believe some further refinements are needed to make the recommendation more effective. The environmental flows process established in 2007 by Senate Bill 3 (SB 3) is incredibly important for the future well-being of all Texans. By providing for reasonable levels of environmental flow protection, we can protect our shared natural heritage, including the economically important recreational and commercial fishing, hunting, and tourism activities that depend on healthy aquatic systems. Providing reliable flow protection will also provide increased certainty about the availability of future water supplies for all uses and users.

I was actively involved in the negotiations that resulted in the development of SB 3 and in its implementation, including by serving as the vice-chair of the Bay and Basin Area Stakeholder Committee (BBASC) for the Colorado and Lavaca Rivers and Matagorda and Lavaca Bays. I have also closely followed the development of flow standards for all basins for which standards have been adopted, providing comments on proposed rules and providing input on the implementation of the adopted standards through permitting. The SB 3 process is not perfect, nor is its implementation, but SB 3 anticipated the need for continued fine-tuning by including a critically important adaptive management process. As acknowledged in the report, there is a strong need to refine the adaptive management process to make it work effectively.

Specific refinements needed, beyond those recommended by staff, include recognition that BBASCs and BBESTs should be continued in existence on an ongoing basis rather than being dissolved and re-established every 10 years. Certainly, the level of activity in the various basins will rise and fall in response to the timing of the standards revision process, but some reasonable level of continuity is essential. There was a steep learning curve for members as those groups were initially established and the benefits of that learning should be retained to the extent possible. Those groups should be involved in developing study recommendations that account for local considerations and realities on the ground, including experience gained as the flow standards are

applied in permit proceedings, to inform future revisions of flow standards. Those study recommendations could be considered for inclusion in the biennial work plans recommended to be developed for approval by the EFAG. Similarly, those local entities can provide essential insights, as opportunities arise, about potential affirmative flow-protection strategies that should be studied and considered for implementation to help meet flow needs.

The recommendation also should be expanded to provide a mechanism for assisting the Environmental Flows Advisory Group (EFAG) in undertaking the existing, and unfulfilled, statutory directive to evaluate improved approaches for administration and enforcement of water rights and for encouraging voluntary conversions of existing water rights to flow protection purposes.¹ Because perpetual water rights for most of the reliably available surface water were issued before flow protection was even considered, as reflected in the attached graphic, and because those older rights have the first claim to the water, approaches for moving some of that water to flow protection are critically important. However, it is not realistic to expect the members of the EFAG to devote the time and effort to develop those types of recommendations on their own. By directing the creation of an advisory panel of experts on environmental flows management, the EFAG would have access to the expertise needed for development of various options for the EFAG to evaluate.²

We support the aspects of the recommendation for having the EFAG prepare a biennial statewide work plan. As noted in the report, the biennial work plan would provide a mechanism for prioritizing and scheduling needed activities. However, the Science Advisory Committee (SAC), which is made up of technical experts on determining flow needs, would be the entity best situated to compile draft biennial work plans for consideration by the EFAG, rather than TCEQ. That role is consistent with the SAC's current directives to advise the EFAG and to provide recommendations for environmental flow programs at TCEQ, TWDB, and TPWD. TCEQ has limited scientific expertise regarding environmental flow studies, making it more appropriate for the agencies to submit proposed content to the SAC for consideration in developing draft work

¹ Tex. Water Code §11.0236 (i)(1) and (2).

² Senate Bill 1639 from the regular session of the 78th Legislature directed the creation of an advisory scientific committee to assist the Study Commission on Water for Environmental Flows, also created by that legislation, in its efforts, which led to the adoption of the environmental flows provisions included in Article 1 of SB 3 in 2007. The Science Advisory Committee also advises the EFAG but its efforts are focused on the science needed to assess flow needs rather than on the types of issues involved in assessing management approaches and market transactions.

plans. The SAC would receive input from the three agencies as well as from the BBASCs and BBESTs regarding activities to be considered for inclusion in the draft biennial work plan. Although the statewide work plan would not be a substitute for the required local work plans, some study and monitoring efforts would best be coordinated across two or more specific bay and basin areas, which could be accomplished through the statewide work plan. In addition, the statewide work plan could include a recommended prioritization of basin-specific efforts for available state funding.

With respect to recommendation 3.3, if the state moves forward with a cancellation effort, it will be critically important to incorporate approaches for moving some of the water locked up in the unused water rights to flow protection purposes. The Texas Water Trust exists for the express purpose of holding water rights issued for other uses that have been voluntarily dedicated, either for a defined term or permanently, to flow protection.³ Rights held in the Water Trust are protected from cancellation and can be managed to benefit the flow-protection use. During the last regular legislative session, HB 2225 was enacted directing TPWD to facilitate voluntary placement, and management, of water rights in the Water Trust so defining a role in any cancellation process for TPWD to work with water right holders to pursue dedication in lieu of cancellation would be appropriate.⁴ Similarly, water made available through cancellation should be considered for protection through the legislatively directed environmental flow set asides⁵ that TCEQ has so far declined to pursue in its implementation of SB 3.

New Issue:

State agency participation in TCEQ contested case hearings

In 2011, as part of the TCEQ Sunset bill, the Legislature adopted a House Floor Amendment that resulted in state agencies, including TPWD, being prohibited from contesting any proposed TCEQ permit by participating in a contested case hearing, except when the agency is the applicant. Until that time, TPWD had been an active participant in contested-case hearings on applications for significant water right permits and, less frequently, for waste discharge permits as necessary to protect the State's natural resources.

³ Tex. Water Code § 15.7031.

⁴ Those changes are codified at Tex. Parks and Wildlife Code § 12.028 and Tex. Water Code § 15.7031 (e).

⁵ Tex. Water Code § 11.1471 (a)(2) sets out the requirement for TCEQ to establish set asides.

The loss of the right to participate in hearings greatly reduced the ability of TPWD and other agencies to provide expertise and perspective on permitting decisions that could adversely affect water quality or quantity and adversely impact the State's natural resources, including public property like state parks and wildlife management areas. More broadly, this limitation has diminished the State's ability to protect and conserve its natural resources because the entities with the greatest knowledge of those resources and potential impacts are prevented from participating in the formal TCEQ decision process. When there is a contested-case hearing, only the parties are allowed to present evidence, engage in discovery, cross-examine witnesses, and provide legal argument about what is required to comply with applicable law. Because the TCEQ commissioners are required to base their decisions solely on the evidence in the record from the hearing, the commissioners do not have the benefit of the expertise of TPWD and other state agencies to inform the complex decisions the commissioners are required to make.

This shortcoming can be corrected without setting up the potential for other state agencies to contest final decisions made by TCEQ when the agency is not the applicant.⁶ Prior to TCEQ's final decision on an application, participation of other state agencies in the decision process is necessary to allow the TCEQ commissioners to make fully informed decisions. Opportunity for that participation can be ensured while maintaining the prohibition on other agencies contesting the decisions TCEQ makes, by amending Section 5.115 (b) of the Texas Water Code as follows:

A state agency that receives notice under this subsection may ~~submit comments to the commission in response to the notice but may not~~ contest the issuance of a permit or license by the commission by seeking judicial review of the decision, unless the state agency is the applicant.

⁶ As acknowledged in TCEQ's implementation of current law, a state agency that is the applicant for a permit from TCEQ must be allowed to contest the TCEQ decision on that application. See 30 TAC § 80.109 (b)(5).