

TCEQ DOCKET NO. 2005-1490-WR

**APPLICATION BY BRAZOS
RIVER AUTHORITY
PERMIT NO. 5251**

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**BEFORE THE
TEXAS COMMISSION
ON
ENVIRONMENTAL QUALITY**

**THE EXECUTIVE DIRECTOR'S RESPONSE
TO HEARING REQUESTS**

The Executive Director of the Texas Commission on Environmental Quality (TCEQ or Commission) files this response to the hearing requests filed on the Brazos River Authority's (BRA) application for Permit No. 5851. Thirty-six requests for a hearing were timely filed. One hearing request was filed late (City of Granbury). Seven requests were unconditionally withdrawn and 29 valid requests remain. The Executive Director recommends that three requests for hearing be denied, and that the remaining 26 be granted.

PROCEDURAL HISTORY

BRA filed an application with the TCEQ on June 25, 2004. The application was declared administratively complete on October 15, 2004 and notice was issued on May 13, 2005. The comment period and time to request a hearing ended on June 13, 2005. Technical review of the application was completed December 1, 2008. A draft permit was prepared on December 1, 2008 and filed with the Chief Clerk. Addenda to the technical memoranda were completed on February 9, 2010, and a revised draft permit was prepared on February 11, 2010. The length of time it has taken to process this application is primarily due to two reasons. First, this application is one of the most, if not the most, complicated applications that the Water Rights staff has worked on. It involved a new way of determining environmental flow requirements which added significant time to the processing of the application. Second, processing of the application included time to allow the applicant to negotiate with the parties on the draft permit.

CURRENT CERTIFICATES AND APPLICATION

BRA currently owns the water rights and reservoirs authorized by Certificate of Adjudication (Certificate) No. 12-5155 (Possum Kingdom Lake), Certificate No. 12-5156 (Lake Granbury), Certificate No. 12-5165 (Lake Limestone), and Water Use Permit No. 2925A (Allen's Creek Reservoir in conjunction with the Texas Water Development Board and the City of Houston), and owns the water rights and has contracts with the United States Army Corps of Engineers for storage authorized by Certificate No. 12-5157 (Lake Whitney), Certificate No. 12-5158 (Lake Aquilla), Certificate No. 12-5159 (Lake Proctor), Certificate No. 12-5160 (Lake Belton), Certificate No. 12-5161 (Lake Stillhouse

Hollow), Certificate No. 12-5162 (Lake Georgetown), Certificate No. 12-5163 (Lake Granger), Certificate No. 12-5164 (Lake Somerville), and the water rights authorized by Certificates Nos. 12-5166 and 12-5167, which authorize various uses of water within BRA's other certificates and permits. BRA is currently authorized, pursuant to the 1964 System Operation Order, as amended, to manage and operate its tributary reservoirs as elements of a system, coordinating releases and diversions from the tributary reservoirs with releases and diversions from the Applicant's mainstream reservoirs to minimize waste, and to conserve water in reservoirs in which the supply is short by making releases from tributary reservoirs in which the supply is more abundant.

Applicant has applied for a Water Use Permit to authorize:

- * A new appropriation of state water in the amount of 421,449 acre-feet per year for multiple uses, including domestic, municipal, agricultural, industrial, mining, and other beneficial uses on a firm basis in the Brazos River Basin. The amount of this new appropriation of water includes the current and future return flows requested in this application. Applicant indicates that the entire amount of 421,449 acre-feet of water per year is available only if all of it is diverted at the mouth of the Brazos River, and can only be made available by the Applicant through the system operation of its water rights. To the extent water is diverted upstream, the remaining unappropriated water downstream is reduced and will itself vary depending upon the location of its diversion and use. Out of the 421,449 acre-feet per year of unappropriated water being requested, the maximum amount of unappropriated water that will be available if such water is diverted upstream at USGS Gage No. 08091000 near Glen Rose, Texas is 150,538 acre-feet per year firm, and if such unappropriated water is diverted upstream at USGS Gage No. 08098290 near Highbank, Texas, the maximum amount of unappropriated water that will be available at that location is 144,306 acre-feet per year firm;
- * Diversion of the water authorized by this permit, if granted, from: (i) the existing diversion points authorized by Applicant's existing water rights; (ii) the Brazos River at the USGS Gage No. 08091000 near Glen Rose, Texas; (iii) the Brazos River at USGS Gage No. 08098290 near Highbank, Texas; (iv) the Brazos River at the Gulf of Mexico; and (v) at such other diversion points that may be identified and included in Applicant's proposed Water Management Plan which is subject to TCEQ's approval;
- * Use of up to 90,000 acre-feet of water per year of its firm supply (part of the 421,449 acre-feet of firm water requested above) to produce, along with other unappropriated flows, an interruptible water supply of 670,000 acre-feet per year and the appropriation of that interruptible water supply. Applicant indicates that the entire amount of 1,001,449 acre-feet of water (331,449 acre-feet of firm water and 670,000 acre-feet of interruptible water) is available only if all of it is diverted at the mouth of the Brazos

River, and can only be made available by the Applicant through the system operation of its water rights. To the extent water is diverted upstream, the remaining unappropriated water downstream is reduced and will itself vary depending on the location of its diversion and use. This new appropriation of water includes the current and future return flows requested in this application. Out of the 1,001,449 acre-feet of firm and interruptible water being requested, the maximum amount of firm and interruptible water that will be available if such water is diverted upstream at USGS Gage No. 08091000 near Glen Rose, Texas is 60,538 acre-feet of firm water per year and 157,000 acre-feet of interruptible water per year and if such water is diverted upstream at USGS Gage No. 08098290 near Highbank, Texas, the maximum amount of firm water is 54,306 acre-feet of water per year and 303,000 acre-feet of interruptible water per year;

- * An exempt interbasin transfer authorization to transfer and use, on a firm and interruptible basis, such water in the adjoining San Jacinto-Brazos Coastal Basin and the Brazos-Colorado Coastal Basin, and to transfer such water to any county or municipality or the municipality's retail service area that is partially within the Brazos River Basin for use, on a firm and interruptible basis, in that part of the county or municipality and the municipality's retail service area not within the Brazos River Basin;
- * An appropriation of current and future return flows (treated sewage effluent and brine bypass/return) to the extent that such return flows continue to be discharged or returned into the bed and banks of the Brazos River, its tributaries, and Applicant's reservoirs. Applicant indicates that such appropriation of return flows would be subject to interruption by direct reuse or indirect reuse within the discharging entity's city limits, extraterritorial jurisdiction, or contiguous water certificate of convenience and necessity boundary. Specified discharge points and amounts of water will be accounted for on a monthly basis as part of Applicant's Water Management Plan which is subject to TCEQ's approval;
- * Operational flexibility to (1) use any source of water available to the Applicant to satisfy the diversion requirements of senior water rights to the same extent that those water rights would have been satisfied by passing inflows through the Applicant's reservoirs on a priority basis; and (2) release, pump and transport water from any of the Applicant's reservoirs for subsequent storage, diversion and use throughout the Applicant's service area. (Applicant's "service area" includes all counties listed above);
- * Recognition that this System Operation Permit approved pursuant to this application will prevail over inconsistent provisions in the Applicant's existing water rights regarding system operation;

- * Use of the bed and banks of the Brazos River, its tributaries and the Applicant's reservoirs for the conveyance, storage, and subsequent diversion of (i) water that the Applicant seeks to appropriate under this application; (ii) waters that are being conveyed via pipelines and subsequently discharged into the Brazos River, its tributaries or stored in the Applicant's reservoirs; (iii) surface water imported from areas located outside the Brazos River Basin for subsequent use; (iv) in-basin surface water and groundwater subject to the Applicant's control; (v) waters developed from future Applicant projects; and (vi) current and future reuse of surface and groundwater based return flows requested by this application. This bed and banks authorization is subject to Applicant, after identifying specific points of discharge and diversion and conveyance and other losses, obtaining future authorizations to satisfy the requirements of TWC § 11.042. Such points of discharge and diversion and conveyance and other losses may also be identified and included in Applicant's proposed Water Management Plan which is subject to TCEQ's approval; and

Until the construction of Allens Creek Reservoir is completed, Applicant requests that the System Operation Permit include special conditions which authorize:

- * The Applicant to appropriate state water in the amount of 425,099 acre-feet per year for multiple use purposes, including domestic, municipal, agricultural, industrial, mining, and other beneficial uses on a firm basis in the Brazos River Basin. This amount includes the current and future return flows requested in this application. This amount is available if all of the water is diverted at the mouth of the Brazos River, and can only be made available by the Applicant through the system operation of its water rights. To the extent water is diverted upstream, the remaining unappropriated water downstream is reduced and will itself vary depending upon the location of its diversion and use. Out of the 425,099 acre-feet per year of unappropriated water being requested, the maximum amount of unappropriated water that will be available if such water is diverted upstream at USGS Gage No. 08091000 near Glen Rose, Texas is 150,538 acre-feet per year firm and if such unappropriated water is diverted upstream at USGS Gage No. 08098290 near Highbank, Texas the maximum amount of unappropriated water that will be available is, at that location, 175,306 acre-feet per year firm;
- * The Applicant to use up to 90,000 acre-feet of water per year of its firm supply to produce, along with other unappropriated flows an interruptible water supply of 869,000 acre-feet per year. This amount includes the current and future return flows requested in this application. Applicant indicates that the entire amount of 1,204,099 acre-feet of water (335,099 acre-feet of firm water and 869,000 acre-feet of interruptible water) is only available if all of it is diverted at the mouth of the Brazos River, and can

only be made available by the Applicant through the system operation of its water rights. To the extent water is diverted upstream, the remaining unappropriated water downstream is reduced and will itself vary depending upon the location of its diversion and use. Out of the 1,204,099 acre-feet of firm and interruptible water being requested, the maximum amount of firm and interruptible water that will be available if such water is diverted upstream at USGS Gage No. 08091000 near Glen Rose, Texas, will be 60,538 acre-feet of firm water per year and 190,000 acre-feet of interruptible water per year and if such water is diverted upstream at USGS Gage No. 08098290 near Highbank, Texas the maximum amount of firm water will be 85,306 acre-feet of water per year and 284,000 acre-feet of interruptible water per year;

- * Exempt interbasin transfer authorization to transfer and use, on a firm and interruptible basis, such water in the adjoining San Jacinto-Brazos Coastal Basin and the Brazos-Colorado Coastal Basin, and to transfer such water to any county or municipality or the municipality's retail service area that is partially within the Brazos River Basin for use, on a firm and interruptible basis, in that part of the county or municipality and the municipality's retail service area not within the Brazos River Basin;

LEGAL AUTHORITY

The application is subject to the procedures for evaluating hearing requests on applications declared administratively complete on or after September 1, 1999 in 30 Texas Administrative Code, Chapter 55, Subchapter G (Sections 55.250-55.256).

Title 30, Sections 55.251 (b) and (c) of the Texas Administrative Code specify that a hearing request must:

- (1) be in writing and be filed with the Office of the Chief Clerk during the public comment period;
- (2) give the name, address, and daytime telephone number of the person who files the request;
- (3) identify the person's personal justiciable interest affected by the application including a brief, but specific, written statement explaining in plain language the requestor's location and distance relative to the activity that is the subject of the application and how and why the requestor believes he or she will be affected by the activity in a manner not common to members of the general public; and
- (4) request a contested case hearing.

A hearing request must comply with requirement (1) above and must "substantially comply" with requirements (2) through (4). 30 TEX. ADMIN. CODE § 55.251(c).

A request for a contested case hearing must be granted if the request is made by an affected person and the request:

- (A) complies with the requirements of 30 TEX. ADMIN. CODE § 55.251;
- (B) is timely filed; and
- (C) is pursuant to a right to hearing authorized by law.

30 TEX. ADMIN. CODE § 55.255(b)(2).

An “affected person” is one who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application. An interest common to the general public does not constitute a justiciable interest. 30 TEX. ADMIN. CODE § 55.256(a).

For a group or an association, the hearing request may be granted if the group shows that one or more of the members would have standing to be a party in his or her own right, the interests the group seeks to protect are germane to the group’s purpose, and the claim asserted would not require the presence of the individual members. 30 TEX. ADMIN. CODE § 55.252(a).

To determine whether a person is an affected person, all relevant factors must be considered, including but not limited to:

- (1) whether the interest claimed is one protected by the law under which the application will be considered;
- (2) distance restrictions or other limitations imposed by law on the affected interest;
- (3) whether a reasonable relationship exists between the interest claimed and the activity regulated;
- (4) the likely impact of the regulated activity on the health, safety, and use of property of the person;
- (5) the likely impact of the regulated activity on the use of the impacted natural resource by the person; and
- (6) for governmental entities, their statutory authority over or interest in the issues relevant to the application.

30 TEX. ADMIN. CODE § 55.256(c).

HEARING REQUESTS

The following persons and entities have filed hearing requests and have not unconditionally withdrawn those requests:

- Margie and Perry Adams (the Adams)
- George E. Bingham, Juanita Sue Bingham, Brian Bingham, Kellie Bingham, Carrie Bingham (the Bingham)
- Jack Weldon Bridges (Mr. Bridges)
- Rick and Christie Clark (the Clarks)

Maurice and Ginger English (the Englishes)
Richard Giesecke (Mr. Giesecke)
Dorothy Gibbs (Ms. Gibbs)
John Graves (Mr. Graves)
Melodie and James Isham (the Ishams)
Jean King (Ms. King)
Debra & Raymond Pitts (the Pitts)
Jerry Swink (Mr. Swink)
Linna & Scott Trees (the Trees)
J. Jane Vaughn (Ms. Vaughn)
Lawrence A. Wilson (Mr. Wilson)

City of Bryan (Bryan) and City of College Station (College Station)
City of Lubbock (Lubbock)

The Dow Chemical Company (Dow)
Rhino Ridge Outfitters Inc. and Adam Eyres (Rhino Ridge)
Gulf Coast Water Authority (Gulf Coast)
Texas Westmoreland Coal Co. (Westmoreland)
Tres Rios Ltd. Campground (Tres Rios)
Matthews Land and Cattle (Matthews)
MW Farm and Ranch, Bridges Hague and Mary Lee Lilly (MW)
Texas Genco or NRG (Genco)

Fort Bend County Levee Improvement Districts No. 11 and 15, Fort Bend County MUD
No. 106, Pecan Grove MUD, Sienna Plantation MUD No. 1 (the Districts)

National Wildlife Federation (NWF)
Coastal Conservation Association (Coastal)
Friends of the Brazos River (Friends)

Withdrawn Requests:

The Association of Electric Companies of Texas, AEP Texas North Company, Palo Pinto
County Municipal Water District No. 1, Texas Municipal Power Company, Luminant
Generation Company, LLC, Don Clevenger, and Walnut Creek Mining withdrew their
requests unconditionally and will not be discussed further.

DISCUSSION OF HEARING REQUESTS

The Executive Director concludes that all water right holders in the Brazos River Basin,
including riparian domestic and livestock water right users, could be harmed by this
application because it is a request for new water, and the diversion points and reuse
requests cover a large area. Under Tex. Water Code § 11.303(l) and 30 Tex. Admin.
Code § 297.21(a), landowners along a river have the right to use the normal flow of the
river for domestic and livestock uses.

30 Tex. Admin. Code § 297.118 defines “domestic” use as:

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.

Individual Hearing Requestors:

1. The Adams complain of the BRA’s management of the river, stating that BRA’s intent is to keep water in Lake Granbury. They own land in the center of Cox Bend on the Brazos River. They believe that BRA is not releasing enough water from Lake Granbury to keep fish alive, to have recreation, to maintain the pecan trees. The eagles are gone. The Adams do not indicate whether they have a water rights or are domestic and livestock users.

Recommendation: Grant based on domestic use. The Adams have a right to recreate on the river. As such, they have a justiciable interest protected by the law under which the application is would be granted.

2. The Bingham’s own Certificate of Adjudication No. 12-3580, as amended, and Permit No. 4264 on unnamed and named tributaries of the Brazos River in Comanche County. They argue that BRA’s proposed amendments would adversely affect their property and their water rights.

Recommendation: Grant. The Bingham’s water rights could be impacted by the application.

3. Mr. Bridges state that he owns property on a tributary of the Brazos in Somervell County. He believes that the application will adversely affect his family’s enjoyment of the river.

Recommendation: Grant based on domestic use.

4. The Clark’s state that their property is half of the Brazos River up to County Road 312, and say that they swim, fish and visually enjoy the Brazos River. The river has become a health hazard to their family and others that are trying to recreate on the river. They have seen the death of a child due to the fact that the river was non-flowing and stagnant. They do not state whether they own water rights on the Brazos.

Recommendation: Grant based on domestic use.

5. The Englishes state that they live on the Brazos upstream from the confluence with the Paluxy River. They use the river for recreation, and it has become stagnant and unsafe for people to get in. Also, it is harming the fish and the birds. They ask for the Commission to increase the flow of the river. The Englishes do not say that they have a water right on the Brazos River.

Recommendation: Grant based on domestic use.

6. Ms. Gibbs states that she is a landowner on the Brazos River. The land has been in her family for four generations and it has provided a beautiful natural place for her children and grandchildren to enjoy. She wants to maintain a constant flow in the river to protect fish, riparian wildlife and plant life. She does not say that she has a water right on the Brazos River.

Recommendation: Grant based on domestic use.

7. Mr. Graves states that giving the BRA even more widespread authority would have still further adverse effect on the Brazos drainage basin in terms of river flow, as well as esthetic, ecological, historic, and recreational values. He states that it would ultimately affect the use of White Bluff Creek's water on his own land, but does not say where White Bluff Creek and his land are. Mr. Graves does not say he owns a water right on the river. Mr. Graves wrote the well received book, *Goodbye to a River*, about his canoe trip on the Brazos River in 1957.

Recommendation: Grant. Mr. Graves' land is on a tributary of the Brazos River and he is concerned about the flow of water for recreation and ecological conditions on his land.

8. Mr. Giesecke owns property approximately three miles down river from Glen Rose Texas. He has owned a 90 acre ranch for over 20 years. He is concerned about effect of the minimum water flows in the Brazos River in recent years, especially on the fish, wildlife, trees, erosion, water quality and quantity, and amebic meningoencephalitis and other disease. His recreational use of the river and his property is being affected adversely by the permit and its potential impact on water flow in the river. He does not say that he owns a water right on the river.

Recommendation: Grant based on domestic use.

9. The Isham's own property on the Brazos River in the Tres Rios Addition. Every year there is less water. They can no longer swim, tub, or canoe in the river. There are less fish every year partly because they cannot go upstream to spawn in stagnant mosquito larvae water. The Ishams do not say that they have a water right in the river.

Recommendation: Grant based on domestic use.

10. Ms. King owns property in Somerrvell County less than one quarter of a mile from the Paluxy River, which flows into the Brazos River about 5 miles downstream of her

home. The release of water from Lake Granbury into the lower Brazos has diminished enormously during the time she has lived there. Residents can no longer enjoy the pleasures fishing, swimming boating, etc. The economic impact of the lack of flow to property owners and the environment has yet to be calculated. Trees are dying, banks eroding and plants and animals are disappearing. The ecology of a once majestic River has been drastically altered and changed perhaps forever. A child died of meningitis after swimming in the river in 1998. Recreational activities on the river came to a virtual standstill. Ms. King does not say that she owns land on the river or that she has a water right on the river.

Recommendation: Deny. Ms. King does not say that her property is adjacent to the river and therefore does not show that she is a riparian domestic water user.

11. The Pitts are located on the river in Tres Rios Estates, upstream of the confluence with the Paluxy River. They state that the fish are non-existent in their section of the Brazos. They have seen no turtles, snakes, or other wildlife in and around the river. The stagnant river poses a health concern for their grandchildren, who enjoy recreating in the river. When there are flows in the river, seldom lately, the family kayaks and canoes in the river. They ask the TCEQ to provide studies and check out the flow and condition of the river before considering this application. The Pitts do not say that they have a water right on the river.

Recommendation: Grant based on domestic use.

12. The Trees own a home fronting the Brazos River. Reduced water releases have damaged the river, including pecan trees, ability to fish and utilize the recreational aspects of the river. Sometimes the water flow is virtually nonexistent and stagnant, creating hazardous environmental conditions to wildlife and humans. The Trees do not say that they own a water right on the river.

Recommendation: Grant based on domestic use.

13. Ms. Vaughn lives in Somervell County and owns acreage along the Brazos River in the Mitchell Bend. She likes to swim in the river. She is concerned about the continued decline of water flowing and the health of the water. BRA will make decisions that do not favor those downstream of Lake Granbury. BRA sells water that is not available, and the consequences are dire. She uses the river for crop irrigation, which makes the farm economically viable. The fish in the river are in steady decline, especially the last five years. The only fish that have adapted are non-game species like carp and gar. Ms. Vaughn does not say that she has a water right on the Brazos River.

Recommendation: Grant based on domestic use.

14. Mr. Wilson owns approximately three-quarters of a mile of frontage on the Brazos River in Somervell County. He is opposed to the expansion of BRA in the Brazos River watershed. BRA's management of the flow from the Lake Granbury dam is appalling.

They cannot maintain a reasonable flow in the river, damaging his property due to loss of mature pecan trees along the river, inability to enjoy recreation on the river due to low flows and stagnant polluted water, loss of a natural sough that held water for stock and bird and wildlife habitat, and increasing the bloom of golden algae which may be causing fish kills. Mr. Wilson has dinosaur tracts on his river bed. These tracks are being exposed for extended periods of time, leading to the deterioration an ultimate loss of these rare artifacts. Mr. Wilson does not say that he owns a water right on the river.

Recommendation: Grant based on domestic use.

Businesses and companies:

15. Mr. Swink and his wife own property that fronts Highway 67 and backs up on the Brazos River. They have campgrounds, cabins, RV sites, and many pecan trees along the river. They are concerned about the flows of the river between Granbury and Whitney. The low flows affect business and employment. The river is a place for people to get away and camp, swim, fish, boat, hunt, bird watch, or get close to nature. They believe that the sale of water upriver is affecting the environment and making recreation impossible due to low water and algae and slime. BRA should have to do an environmental impact study to take this water. The Swinks do not say that they have a water right on the river.

Recommendation: Grant. Mr. Swink owns land adjacent to the river, and has a right to use the river for domestic purposes.

16. Adam Eyres is President of Rhino Ridge, owns property on the Brazos River near Glen Rose and is an employee of fossil Rim Wildlife Center. He will harmed by BRA's application in all his capacities. He is concerned about the unregulated use of Brazos water by BRA. The entered into an agreement with Wolf Hollow Power Station without an Environmental Impact Statement to determine the effect on land and the river downstream of removing 10,000 acre feet from the river with an 80% evaporation loss. He believes that the health of the river is already compromised and that BRA must make its decisions on scientific information. The low flows the last decade have visibly affected the river and the riparian land. The river should be regulated for health in the best interests of the entire river. Also, his business is suffering because it depends on the flow of the river. The flow of the river is completely unreliable and based on the whims of the BRA. There must be minimum flow requirements placed on the BRA for businesses, tourist, and ecological health of the river. Mr. Eyres does not say that he owns a water right in his individual capacity or in the name of the business.

Recommendation: Grant. Mr. Eyres owns land adjacent to the river, and has a right to use the river for domestic purposes.

17. Genco (now NRG) is a limited partnership in Texas, and was formerly part of CenterPoint Energy, Reliant Energy, and Houston Lighting and Power. Genco is in the business of generating electric energy. Genco has to water rights for water supply

necessary for its continued operation. Certificate of Adjudication No. 12-5325 allows Genco to impound water on Dry Creek, Brazos River Basin, and use water for industrial purposes. Certificate of Adjudication No. 12-5320 authorizes Genco to divert and use water from a point approximately 98 river miles from the mouth of the Brazos River for industrial and agricultural use. Genco also has four contractual rights to water from BRA. Genco believes that the application may impact its permitted and contractual water right by reducing the amount of water available at Genco's diversion site and interfering with contractual deliveries. Allowing BRA such a large volume of appropriated water and not requiring pass through flows from its reservoirs, along with appropriation of current and future return flows, would threaten the reliability and availability of Genco's senior water rights. Any interruption in its water supply will have a critical adverse impact on Genco's business and customers. Granting BRA's application would impact Genco's legal rights, duties, privileges, power and economic interests.

Recommendation: Grant based on ownership of water rights on tributaries to the Brazos River and on the Brazos River that could be impacted by this application.

18. Tres Rios is a campground that relies heavily on tourism created by the flow of water from the Brazos River. Long time customers who come year after year will not be able to fish, swim, canoe, tube, or enjoy the aesthetic beauty of the river. Tres Rios is located at the junction of the Brazos, Paluxy, and Squaw Creek. As a business owner if he is damaged "he will immediately take legal action to demand reimbursement for damages." Tres Rios does not state that it owns a water right.

Recommendation: Grant. Tres Rios owns land adjacent to the river, and has a right to recreate on the river.

19. Gulf Coast (was Chocolate Bayou Water Company) owns Certificate of Adjudication No. 12-5322, which authorizes diversion of 155,000 acre feet of water per annum from the Brazos River at Juliff, Fort Bend County Texas. Gulf coast believes that if the application is granted it may impair these rights. BRA's proposed diversion points range from approximately 280 miles upstream to 67.5 miles downstream.

Recommendation. Grant. Gulf Coast's water right could be impaired by BRA's application.

20. Dow owns Certificate of Adjudication No. 12-5328 authorizing diversion of water from the Brazos River Basin at locations in and around Freeport Texas near the mouth of the Brazos River for use at its facility in Freeport. Dow is concerned that granting the permit will negatively impact the availability of water in the lower Brazos to the detriment of Dow's senior water right. Dow says it is clearly an affected person with a personal justiciable interest not shared by members of the general public, and the application could affect its legal rights, privileges, and economic interests. Dow questions BRA's modeling of its WAM to come up with additional water through system operations. The BRA Water Management Plan will give BRA broad discretion and Dow will have no input in the plan. Dow argues that granting the application can also further

increase saltwater intrusion at the mouth of the river. Dow also contended that BRA should have to come up with a Management Plan subject to public scrutiny prior to any issuance of a permit. Dow also is concerned that BRA has not identified actual diversion points and does not show beneficial use.

Recommendation: Grant. Dow is an affected person because its water right could be impaired by the issuance of this permit.

21. Matthews owns Lamshead Ranch, a 39,000 acre tract along the Clear Fork of the Brazos River 13 miles north of Albany, Texas, is a famous ranch known for its cattle production and protection of natural resources. Matthews states that if the application is granted it will jeopardize Lamshead's domestic and livestock rights to use water on the Clear Fork. The ranch uses water for irrigation of hay, wheat, and other cattle feed crops and to support its ranching operations. Also, the ranch may be affected by the construction of a reservoir on a portion of its land. In every version of the draft Region G plan, the reservoir has been on some portion of its land.

Recommendation: Grant. Matthews appears to have some legitimate domestic and livestock use (other than feed crops for its animals, which is not an exempt domestic and livestock use). He has an interest that is one protected by the law under which the application will be considered.

22. MW is a ranch on 650 acres in Somervell County, six miles east of Glen Rose on a three mile bend of the Brazos River. They have farmed and ranched there for 50 years or more. They rely on the quantity and quality of the water in the river to irrigate corn, commercial grass and nursery products. They water their cattle and horses with river water, and use the river as a natural boundary. The river is a source of water for several hundred mature pecan trees. BRA has not proven competent at managing the river, and the TCEQ should not give them further control of Texas water. Mr. Bridges Hague, who owns the ranch has recreated in the river for years and believes that Lake Granbury's dam caused great damage to the river down to Lake Whitney. The result of BRA management policies has resulted in loss of human life, fish and wildlife, a natural boundary, livestock, poor irrigation flows, health hazards for humans and livestock, risk to tourism, inability to recreate, silting of the river, introduction of fish killing algae, and erosion. MW does not say that it owns a water right.

Recommendation: Grant. MW has legitimate domestic and livestock use (other than feed crops for its animals, which is not an exempt domestic and livestock use). It has an interest that is one protected by the law under which the application will be considered.

23. Westmoreland states that it owns Permit No. 5319 that authorizes it to store water in various tributaries of the Navasota River in Leon County and to use the bed and banks of the Navasota River to convey groundwater. Westmoreland plans to reuse groundwater in the future and also believes that BRA's application could impact its water right on the Navasota River. Texas Westmoreland is also concerned that if its water rights are impacted, it will be impacted economically.

Recommendation: Grant based on Permit No. 5319 on the Navasota River, which is a tributary running into the Brazos River. Westmoreland's water right could be impacted because an impacted water right on the Brazos could call on their water right.

Municipalities

24. Bryan and College Station rely on groundwater for their retail water utility service to their customers, they discharge a great deal of "developed" groundwater into the watercourse. Both cities have applications for the reuse of existing and future groundwater based return flows at the TCEQ. BRA seeks in this application to appropriate Bryan's and College Station's return flows. They argue that their plan to reuse their return flows gives them a justiciable interest protected by the law under which the application will be considered. Since the hearing request, Bryan and College Station's applications for return flows have been granted and Permits Nos. 5912 and 5913 have been issued.

Recommendation: Grant. Although the draft permit does not grant Bryan's and College Station's return flows to BRA, Bryan and College Station's water rights could be impacted by this application.

25. Lubbock states that it exclusively uses "developed water" – water that would not be in the watercourse but for the efforts of Lubbock. The sources are surface water transported from other basins, and groundwater. Lubbock owns Certificate of Adjudication Nos. 12-3705 and 12-3705A, allowing it to impound water in and to discharge groundwater into, and to divert and use water from a series of reservoirs in the North Fork of the Brazos. It also owns Permit No. 4146, authorizing the City to impound water in and to divert, use, and reuse water from Lake Alan Henry on the South Fork of the Double Mountain Fork of the Brazos. At the time of the hearing request, Lubbock had assigned this right to BRA, but was to receive the right back once the city has fully discharged all bond obligations relating to the project. Lubbock also has an application pending to reuse its wastewater treatment effluent derived from "developed water" and to diver that water in Lubbock and Lynn Counties. It argues that if BRA's application is granted, it would threaten Lubbock's existing permits and rights, impede appropriate development and reuse of water supplies in the arid upper reaches of the Brazos, and jeopardize the City's ability to fully implement its strategic water Plan.

Recommendation: Grant. Lubbock has a justiciable interest protected by the law under which the application is granted because it has existing water rights on tributaries of the Brazos River that could be impaired by this application.

Districts

26. The Districts object to BRA's request for all return flows in the basin. The MUDs have Wastewater Treatment Plants that are located on the Brazos or tributaries, and they want to keep their return flows. If the permit is granted for these return flows, the MUDs

will have to spend much money building reservoirs to directly use these return flows. The districts argue that TCEQ should have given notice of the application to all users or owners of wastewater treatment plants. This application is contrary to the public welfare if it takes return flows that municipalities are relying on. TCEQ should also take into consideration their instream flow needs.

Recommendation: Grant. BRA is requesting all of the return flows in the basin, which could impact the Districts. Fort Bend County MUD No. 106 owns Permits Nos. 5110 and 5173, but the Districts do not claim any impact on those water rights.

Environmental Groups

27. Coastal is a nonprofit organization of sport fishing enthusiasts and conservationists working to save natural resources of Texas coastal waters. Some of the members fish in and around the mouth of the Brazos River and have a strong interest in maintaining natural marine breeding habitats in that area. Allen Williams is a member of Coastal who lives in Freeport, Texas and regularly fishes in and around the mouth of the Brazos. If granted, BRA's application could have a detrimental impact on the marine habitat and Mr. Williams' recreation opportunities. Coastal requests a hearing on whether the appropriation is intended for beneficial use, and the effect of issuance of the permit on fish and wildlife habitats and water quality.

Recommendation: Deny. Coastal has presented a member that recreates in an area of the Brazos that could be impacted by the application if granted. However, Coastal does not indicate that the member owns land riparian to coastal waters. A person that has a recreational interest on a river is not an affected person unless the person owns the land that is riparian. *Save Our Springs Alliance v. City of Dripping Springs* ___ S.W.3d ___, 2010 WL 521027 (Tex. App. – Austin, 2010).

28. NWF is a national, non-profit organization dedicated, among other things to protecting natural resources and the right of people to use and enjoy those resources. NWF has 38,000 members in Texas, many of whom use and enjoy the Brazos River. BRA is requesting a massive new appropriation and potentially major adjustments to existing water rights. This has a tremendous potential to significantly affect the fish and wildlife resources of the Brazos, and the ability of people to recreate. In particular, NWF seeks to participate in developing environmental flow conditions for this permit to protect fish and wildlife, water quality, commercial and recreational fisheries, and other recreational activities. It also wants to ensure conservation is part of this application, and that it is within the public welfare.

Recommendation: Deny. NWF does not indicate a member of the group that would have a personal justiciable interest.

29. Friends is a Texas non-profit corporation made up of members who own land on the Brazos River, downstream of Lake Granbury and upstream of Lake Whitney. It is organized to protect and restore that segment to what it once was, a stream with ample

flowing water to support recreation, fishing, swimming canoeing, and other more leisure recreation. It also desires to protect fish and wildlife on that segment and associated riparian habitat. Ed Lowe owns land on the Brazos River and conducts many canoeing trips on that segment of the river and is concerned about granting BRA more authority to manage an already diminished river due to BRA's management. Mary Lee Lilly owns three miles of land on the river and has a water right on the river. She has noticed dwindling flows which may impair her enjoyment of the river. Jane Vaughn is a landowner on the river and has similar concerns, and Jack and Kathy Cathey operate a commercial canoeing business on that segment of the river and are concerned that the increasing low flows will become worse if BRA is granted more control of the water. Other members are concerned about their riparian rights and fish and wildlife. The application is vague with no details. They are concerned about notice, conservation and consistency with public welfare. Friends believes that the TCEQ cannot grant this application without more detail.

Recommendation: Grant based on Ed Lowe's and Mary Lee Lilly's domestic rights in their property on the river.

CONCLUSION

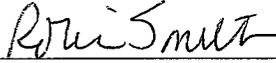
The Executive Director recommends that 26 of the 29 timely remaining hearing requests be granted, and that three, National Wildlife Fund, Jean King, Coastal Conservation Association, be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 5, 2010, the ED's Response to Hearing was filed with the Texas Commission on Environmental Quality's Office of the Chief Clerk and was served via hand delivery, facsimile transmission, email, or by first class mail to all the parties on the mailing list.



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