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Larry R. Soward, *Commissioner*
Glenn Shankle, *Executive Director*



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

May 16, 2006

TO: Persons on the attached mailing list.

RE: Brazos River Authority
Water Right Permit No. 5851

Enclosed is a copy of the Executive Director's Response to Comments for the public meeting held in the above-referenced matter.

Should you have any questions, please contact Deanna Avalos of the Texas Commission on Environmental Quality's Office of the Chief Clerk (MC 105) at (512) 239-3327.

Sincerely,

A handwritten signature in cursive script, appearing to read "LaDonna Castañuela".

LaDonna Castañuela
Chief Clerk

LDC/da

Enclosure

MAILING LIST
for
Brazos River Authority
Water Right Permit No. 5851

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PROPOSED WATER RIGHT PERMIT NO. 5851

**APPLICATION OF BRAZOS
RIVER AUTHORITY FOR
PERMIT NO. 5851**

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§
§

**BEFORE THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY**

CHIEF CLERK'S OFFICE

2005 MAY -4 AM 10:29

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

EXECUTIVE DIRECTOR'S RESPONSE TO COMMENTS

The Executive Director files this Response to Comments made at the May 17, 2005 public meeting on Brazos River Authority's (BRA) application for a water right, Permit No. 5851 (the "application"), and the written comments received after that meeting. The Executive Director responds to the written and verbal comments made at the meeting and received after the public meeting until the deadline for comments on June 13, 2005.

BACKGROUND

BRA's filed an application with the TCEQ on June 25, 2004. The application was declared administratively complete on October 15, 2004 and mailed notice was issued on April 22, 2005. Published notice was provided in 27 newspapers on May 11-13, 2005. At the time of this Response to Comments, the TCEQ was beginning technical review of the application.

In its application, BRA requests the following:

- A new appropriation of state water in the amount of 421,449 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. The entire 421,449 acre-feet is available only if all of it is diverted at the mouth of the Brazos River, and can only be made available by the BRA through the system operation of its water rights.
- Diversion of the water to be authorized from:
 - existing diversion points authorized by BRA's existing water rights;
 - Brazos River at USGS gage No. 08091000 near Glen Rose, Texas;
 - Brazos River at USGS gage No. 08098290 near Highbank, Texas;
 - Brazos River at the Gulf of Mexico
 - diversion points identified and included in BRA's proposed Water Management Plan.
- Use of up to 90,000 acre-feet of water per year of its firm supply to produce and appropriate an interruptible water supply of 670,000 acre-feet per year.

- Exempt interbasin transfer, on a firm and interruptible basis, to the adjoining San Jacinto-Brazos Coastal Basin and the Brazos-Colorado Coastal Basin, service areas not within the Brazos River Basin.
- An appropriation of current and future return flows (treated sewage effluent and brine bypass/return). Specified discharge points and amounts of water will be accounted for on a monthly basis as part of BRA's Water Management Plan
- Operational flexibility to:
 - use any source of water available to the applicant to satisfy the diversion requirements of senior water rights
 - release, pump, and transport water from any of the applicant's reservoirs for subsequent storage, diversion and use throughout the applicant's service area.
- Recognition that the System Operation Permit 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 BRA reservoirs for conveyance, storage, and diversion of:
 - water appropriated by this application
 - water conveyed via pipelines and subsequently discharged into the Brazos River system
 - surface water imported from outside the Brazos River Basin for subsequent use
 - in-basin surface water and groundwater subject to the applicant's control
 - water developed from future applicant projects
 - current and future reuse of surface and groundwater-based effluent requested by this application.
- Bed and banks authorization to be subject to obtaining future authorizations; points to be identified and included in BRA's proposed Water Management Plan

COMMENTERS AT THE PUBLIC MEETING

Larry Wilson
 Daniel Meadows
 Environmental Services for Texas ("EST")
 Texas Westmoreland Coal Company ("TWCC")
 Texas Mining and Reclamation ("TMR")
 Jack Cathey
 Chocolate Bayou Water Company ("CBWC")
 Pat Kultgen
 Bridges Hague
 Friends of Brazos River ("Friends")

WRITTEN COMMENTERS

Flying "A" Ranch ("FAR"), c/o Perry and Margie Adams (the "Adams")
Fort Bend County Levee Improvement District No. 11, Fort Ben County Levee Improvement District No. 15, Fort Bend County Municipal Utility District No. 106, Pecan Grove Municipal Utility District, and Sienna Plantation Municipal Utility District (referred to jointly as "Fort Bend County Districts")
Chocolate Bayou Water Company ("CBWC")
Brazos Old Fields, c/o Lawrence Wilson
Jack Weldon Bridges III
George Bingham, Juanita Sue Bingham, Brian Bingham, Kellie Bingham, and Carey Bingham (the "Binghams")
Lowwater Bridge Canoe Rental ("LBCR"), c/o Jack Cathey, owner
Rick and Christie Clark
Rhino Ridge Outfitters ("RRO"), c/o Adam Eyres, President
Adam Eyres, individually
Dorothy Gibbs
John Graves
Friends of the Brazos River ("Friends")
Bob Huddleston
Jean F. King
James R. And Melodie Isham
Dow Chemical Company ("Dow")
Association of Electric Companies of Texas ("AECT")
Mary Lee Lilly
Bridges Hague
Walnut Creek Mining Company ("Walnut Creek")
City of Bryan and City of College Station ("Cities")
National Wildlife Federation ("NWF")
Palo Pinto County Municipal Water District No. 1 ("Palo Pinto District")
Jerry Swink
Texas Genco II, LP
Texas Westmoreland Coal Co. ("TWCC")
Texas Municipal Power Agency ("TMPA")
Texas Mining and Reclamation Association ("TMRA")
Scott and Linna Trees
TXU Power Company ("TXU")
Matthews Land & Cattle Company ("MLCC")
AEP Texas North Company ("AEP")
W.C. Walker
Nancy Stackhouse Wilson
City of Lubbock ("Lubbock")
H. Jane Vaughn

RESPONSE TO COMMENTS

APPLICATION:

COMMENT NO 1: The Fort Bend County Districts comment that the notice given for this application was inadequate because it did not provide the public the opportunity to obtain a copy of the permit application and related supporting documents, including, for example, BRA's Management Plan.

RESPONSE NO 1: The Executive Director disagrees that the notice was deficient. The notice provided the address of the TCEQ, and names and telephone numbers for anyone interested in obtaining more information about the application. BRA does not have an existing Management Plan for the public to review.

COMMENT NO. 2: The Fort Bend County Districts and Friends state that the notice mailed for this application was defective because the application was not administratively complete and because dischargers of the return flows should have been given notice of the application.

RESPONSE NO. 2: The Executive Director does not agree that the application was not administratively complete or that dischargers should have been given notice of this application. The application provided enough information to begin a technical review of the application. Further information may be requested from BRA as the technical review progresses. The TCEQ rules do not provide that dischargers should receive notice of a water rights application. There is no possibility that a discharger's permit can be harmed by this application. Under the Water Code, persons do not have a right to notice that someone else has requested water simply because they themselves may wish to appropriate that water.

COMMENT NO. 3: Dow, Friends, and CBWC state that the application is complicated and vague and there needs to be a contested case hearing on this matter so that water right holders can determine if their rights will be impacted. Friends specifically comments that the location of amounts and diversion points are not detailed, details of the system operation are not provided, timing of releases are not provided, environmental impacts are not analyzed or detailed. Bob Huddleston also comments that the application is broad and it is hard to understand the impact.

RESPONSE NO. 3: Friends and CBWC have requested a contested case hearing. Their request, along with the other requests for contested case hearing, will be considered by the Commission at a regular open meeting in the future.

The application requests specific maximum amounts of both firm and interruptible unappropriated water at or above three identified points. The location of amounts, rates, system operation and environmental flow constraints will be detailed in BRA's Management Plan once the specific amount of unappropriated water and return flows

available to the applicant under this application are determined. The Management Plan will be submitted to the Commission for approval at a later date as discussed more below under “Management Plan.”

COMMENT NO. 4: CBWC and Friends comment that the application needs to contain more information such as diversion points and diversion rates before the TCEQ reviews it. Friends states that the application should not have been declared administratively complete.

RESPONSE NO. 4: The Executive Director disagrees. At least three specific diversion points, as well as all of the BRA’s existing diversion points were included in the notice of the application. The additional water would be made available by the BRA through system operation of its existing water rights. The location of amounts and rates diverted from any additional points will be detailed in BRA’s Management Plan once the specific amount of unappropriated water and return flows available to the applicant at or above the points specified in the application are determined. The Management Plan will be submitted to the Commission for approval at a later date as discussed more below under “Management Plan.”

COMMENT NO. 5: Friends and Dow question whether BRA has shown beneficial uses for the new water. Friends asks whether other water suppliers can supply some of the future water needs of the basin.

RESPONSE NO. 5: The Executive Director responds that during technical review staff will look at whether the water can be beneficially used. BRA has requested water for municipal, industrial, and recreational use. Whether other water suppliers can meet the needs of the basin is generally not a factor that must be considered in determining whether a permit should be issued, unless the State or relevant Regional Water Plan states this. If there is a contested case hearing, parties can raise this issue.

COMMENT NO. 6: Friends states that BRA has not shown that it will conserve water as required by the Water Code. Specifically, BRA has not shown that it has reduced demand for water. A shortfall in the demand is not enough to indicate that BRA will conserve water.

RESPONSE NO. 6: The Executive Director’s staff will consider this comment under its rules in Chapter 288 when the Conservation Team conducts its technical review.

COMMENT NO. 7: The Fort Bend County Districts comment that the TCEQ lacks the statutory authority to grant the permit as requested, and BRA lacks the statutory authority to hold or implement the requested “System Order” permit.

RESPONSE NO. 7: The Executive Director disagrees that the TCEQ does not have the authority to review and consider issuance of this permit. The Executive Director’s staff is

still in technical review, and will consider BRA's authority to implement this system operation in its review of the application.

COMMENT NO. 8: The Fort Bend County Districts comment that the application is detrimental to the public welfare because BRA is asking for public entities' wastewater, which they have spent considerable capital designing and constructing. The Districts will have to construct more facilities to keep the wastewater out of the river if they wish to reuse their effluent, and they may be forced to buy effluent or other water sources to reduce groundwater dependence as required by the Fort Bend County Subsidence District. The taxpayers will pay for this.

RESPONSE NO. 8: If there is a contested case hearing, parties can raise these issues and the Administrative Law Judge and Commission will decide if these issues are relevant to whether the application is detrimental to the public welfare.

APPROPRIATION OF ALL WATER:

COMMENT NO. 9: Texas Genco comments that allowing such a large volume of unappropriated water and not requiring pass through of flows from its reservoirs, along with the appropriation of current and future return flows, would threaten its senior water right and have a critical adverse impact on Genco and its customers.

RESPONSE NO. 9: The Executive Director responds that these issues will be considered during the hydrology review of this application. BRA has requested unappropriated historic and future return flows in the Brazos Basin and that request will be reviewed under statutory law and the TCEQ rules.

COMMENT NO. 10: Dow, The City of Lubbock, National Wildlife Federation, TXU, TMPA, TWCC, TMRA, Friends, CBWC, and Bridges Hague comment that it appears that BRA wants to permit all of the remaining water in the river in this application and wants to own and control all of this water. BRA will be the manager of this water instead of TCEQ.

RESPONSE NO. 10: BRA is requesting a large amount of water. However, any permit that may be issued for this application will contain streamflow restrictions to protect environmental uses. Also, much of the water that BRA is requesting to use is water that is presently in storage. The TCEQ will regulate any permit issued to BRA and will require compliance with the Texas Water Code and TCEQ rules. The Executive Director's staff will review any Management Plan submitted by the BRA prior to BRA taking any new water. Any permit issued by the TCEQ will require BRA to prepare a Management Plan that contains certain specific elements and that will be subject to notice and an opportunity for a contested case hearing.

COMMENT NO. 11: Dow comments that although BRA used the TCEQ's Water Availability Model to support its assertion that its system operation will result in an increase in firm yield of

available water, BRA substantially modified that model in its calculations. BRA needs to prove that its modeling is correct.

RESPONSE NO. 11: The Executive Director's staff will do its own hydrology review of this application in order to determine if the Executive Director recommends issuance of a permit for the amount of water requested by BRA. Dow has requested a contested case hearing. If there is a hearing, BRA will likely produce its modeling results at that hearing.

COMMENT NO. 12: AECT and AEP comment that they are concerned about how much water is available for appropriation in the river, how accurate BRA's water availability models are, whether BRA can obtain interbasin transfers after it receives a permit for this water, and whether their water rights can be affected by this application.

RESPONSE NO. 12: The Executive Director responds that the amount of water available for appropriation will be determined when staff performs its hydrology review of this application. The request for an exempt Interbasin Transfer will also be reviewed by the Executive Director's staff. Staff consider impacts on existing water rights in their hydrology review. This issue can also be raised at a contested case hearing.

COMMENT NO.13: TXU comments that it will need permits in the future for its operations and this application would have a significant impact on it by eliminating the option of requesting a new appropriation of water from the TCEQ.

RESPONSE NO. 13: Depending on the size or the proposed use of these diversions, issuance of BRA's requested permit could impact the ability of persons or entities to obtain new permits in the river basin. The TCEQ cannot know for sure until it evaluates BRAs application and provides a recommendation. The impact on the ability of other applicants to request new appropriations of water in the Brazos Basin subsequent to any permit issued to the BRA cannot be determined until TCEQ receives an application and staff conducts a hydrological and environmental review of those applications.

BRA'S MANAGEMENT OF THE RIVER:

COMMENT NO. 14: W.C. Walker, Larry Wilson, TMPA, and Bridges Hague comment that BRA should have a Management Plan now. These people, Lawrence Wilson, and Flying "A" Ranch also comment that BRA has not shown competence in managing the Brazos River. H. Jane Vaughn comments that BRA will make decisions in managing the river that will hurt landowners downstream of Lake Granbury.

RESPONSE NO. 14: If BRA has violated its water rights or statutes within the TCEQ's jurisdiction or TCEQ rules, persons may contact the region office at 6801 Sanger Avenue, Suite 2500, Waco, Texas, or call (254) 751 0335. Any draft permit issued by the Executive

Director will require BRA to prepare a Management Plan that contains specific elements and that will be subject to notice and an opportunity for a contested case hearing.

ECONOMY OF AREA:

COMMENT NO. 15: Jean King, Jack Cathey, Jerry Swink, Mary Lee Lilly, Bridges Hague, RRO, Adam Eyres, LBCR, Rick Clark, and Christie Clark comment that the Glen Rose economy is based on the river. The area relies on tourism and recreation. This application could impact this economic base.

RESPONSE NO. 15: The Executive Director recognizes the importance of the river to the economy of the Glen Rose area. While the TCEQ considers impact on recreational use, the TCEQ cannot consider impact on the economy of the area in water rights permitting except as it may bear on the public welfare. The TCEQ's jurisdiction is limited to its statutory authority, which includes consideration of any detriment to the public welfare from the issuance of a permit.

FLOWS FOR THE ENVIRONMENT AND RECREATION:

COMMENT NO. 16: The Fort Bend County Districts request that the Commission consider the instream uses on the stream and the flows necessary to maintain those uses in the stream.

RESPONSE NO. 16: The Executive Director's staff will perform an environmental review of this application to determine the impact the application may have on the environment. In its review, the Executive Director's staff will also consider the impact on the environment of taking effluent out of the stream for effluent that has been historically discharged to the river under Tex. Water Code Section 11.042(c).

COMMENT NO. 17: Jerry Swink, Jack Cathey, and Lawrence Wilson comment that the sale of water has diminished the flow of water in the Brazos River, causing drying up of fishing holes and making boating and tubing impossible due to low water, algae and slime. The TCEQ should not grant this application without an environmental impact study.

RESPONSE NO. 17: The National Environmental Policy Act (NEPA) requires federal agencies to integrate environmental values into their decision making processes by considering the environmental impacts of their proposed actions and reasonable alternatives to those actions. To meet this requirement, federal agencies must, for certain federal actions, prepare detailed statements known as an Environmental Impact Statements (EIS). An EIS is not required for state actions such as this permit.

However, the Executive Director's staff will perform an environmental review of this application to determine the impact the application may have on the environment. Staff

reviews the application for environmental impacts on the river, including water quality, and recommends streamflow restrictions or other special conditions in the permit to mitigate adverse impacts, if any.

Research on instream flows is currently underway on the Brazos River as part of the legislative requirements of S.B. 2 (2001). The Brazos is one of the priority river basins. Review of previously collected biological, hydrological, geomorphological, and water quality is in progress. Biological, hydrological, and geomorphological studies in cooperation with BRA and other parties are underway to document baseline river conditions. In-depth instream flow studies will be developed with public input and executed over the next several years to support the development of instream flow criteria in the Brazos River Basin. This work is due to be completed by December 31, 2010. Data from these studies may be used for environmental protection for this application or the subsequent Management Plan.

COMMENT NO. 18: Jean King, Melodie Isham, Nancy Stackhouse Wilson, Larry Wilson, Jack Cathey, Mary Lee Lilly, and Bridges Hague, state that in the past few years water in the river has changed and is no longer clear. These people along with John Graves, Scott and Linna Trees, Dorothy Gibbs, RRO, Adam Eyres, Rick Clark, H. Jane Vaughn, Christie Clark, LBCR, Jack Bridges, III, Lawrence Wilson, and FAR further state that there are no fish, a diminished quality of water and life on the river, and a loss of wildlife. The water is stagnant and highly polluted and people cannot recreate as they did before.

RESPONSE NO. 18: The Executive Director's staff reviews the application for environmental impacts on the river, including water quality, and recommends streamflow restrictions or other special conditions in the permit to mitigate adverse impacts, if any. Existing impacts to the river can be addressed in an enforcement action if the problem is due to BRA violating its existing water rights or water quality permits, or TCEQ rules.

COMMENT NO. 19: CBWC comments that the quality of the river must be examined. In particular, the salt water intrusion at the mouth of the river should be studied. Dow is concerned that BRA's application does not fully and properly take into account the increasing salt water intrusion problem faced by Dow.

RESPONSE NO. 19: The Executive Director's staff reviews the application for environmental impacts on the river, including water quality, and recommends streamflow restrictions or other special conditions in the permit to mitigate adverse impacts. Saltwater intrusion will be examined and special conditions could be recommended if necessary.

COMMENT NO. 20: Pat Kultgen and Friends, FAR, Lawrence Wilson, LBCR, RRO, Adam Eyres, and John Graves comment that there must be adequate instream flows for the environment.

RESPONSE NO. 20: The Executive Director's staff will perform an instream flow and inflows to the bay and estuary analysis for this application to determine if the application could impair instream uses. If staff determines that there could be impact, staff will recommend streamflow restrictions or other permit provisions to mitigate that impact. At this time, prior to an environmental review, staff does not know if the 100,000 acre feet of interruptible water committed by BRA to the Water Trust is adequate to protect the environmental needs of the river in this application.

COMMENT NO. 21: Friends argues that BRA should be required to perform a full environmental impact analysis for this application.

RESPONSE NO. 21: The National Environmental Policy Act (NEPA) requires federal agencies to integrate environmental values into their decision making processes by considering the environmental impacts of their proposed actions and reasonable alternatives to those actions. To meet this requirement, federal agencies must, for certain federal actions, prepare detailed statements known as an Environmental Impact Statements (EIS). An EIS is not required for state actions such as this permit.

However, research on instream flows is currently underway on the Brazos as part of the legislative requirements of S.B. 2 (2001). The Brazos is one of the priority river basins. Review of previously collected biological, hydrological, geomorphological, and water quality is in progress. Biological, hydrological, and geomorphological studies in cooperation with BRA and other parties are underway to document baseline river conditions. In-depth instream flow studies will be developed with public input and executed over the next several years to support the development of instream flow criteria in the Brazos River Basin. This work is due to be completed by December 31, 2010. Data from these studies may be used for environmental protection for this application or the subsequent Management Plan.

COMMENT NO. 22: National Wildlife Federation comments that the new appropriation has a tremendous potential to significantly affect the fish and wildlife resources of the river and the ability of people to use and enjoy the river. Any water management plan must, at a minimum, establish definite and enforceable criteria adequate to ensure that any future version of such a plan will ensure adequate protection of the environment.

RESPONSE NO. 22: The Executive Director's staff will perform an instream flow and inflows to the bay and estuary analysis for this application to determine if the application could impair those uses. If staff determines that there could be impact, staff will recommend streamflow restrictions or other permit provisions to mitigate that impact. If there is a contested case hearing, National Wildlife Federation may be able to be a party and can present evidence on its recommended flows. Absent a hearing, staff would welcome any information the Federation wishes to provide. Also, the Executive Director may require that environmental impacts be addressed in a subsequent Management Plan, which will be

subject to notice, comment, and opportunity for a contested case hearing.

COMMENT NO. 23: Rick Clark, Christie Clark, Jack Bridges, III, state that there are times when the water of the Brazos River becomes a health hazard when used for recreational purposes.

RESPONSE NO. 23: The Executive Director's staff will perform an environmental review for this application to determine if the requested actions could cause these problems. This review will include impact on recreational uses. If staff determines that there could be an impact, staff will recommend special conditions to mitigate that impact. If there is a contested case hearing, these commenters may be able to be a party and can present evidence on the water quality of the river. Absent a hearing, staff would welcome any additional information the commenters wish to provide.

IMPACT ON WATER RIGHT HOLDERS:

COMMENT NO. 24: MLCC comments that domestic and livestock users will be impacted by this application.

RESPONSE NO. 24: The Executive Director responds that domestic and livestock owners are not specifically protected in the TCEQ's water availability analysis because they are not regulated and are mostly unknown. We believe that the fact that water rights are protected at their full authorized amount for a new appropriation may help mitigate impacts to domestic and livestock users.

COMMENT NO. 25: AEP and AECT are concerned that BRA's application will impact its power plants' water rights and contracts that member utilities have for water.

RESPONSE NO. 25: The Executive Director responds that staff will determine how much water is available for BRA to appropriate after protection of all existing water rights to the maximum extent of their authorizations.

COMMENT NO. 26: CBWC comments that its water rights may be impaired and that there must be adequate streamflow in the river for the other water right holders in the river. BRA must pass through inflows through its reservoirs. Where is BRA's compliance with that requirement documented?

RESPONSE NO. 26: The Executive Director does not know if BRA keeps a record of passing inflows downstream. BRA's permits do not require that BRA keep records, nor does the Water Code or TCEQ rules. If the commenter believes that BRA is not passing inflows downstream, as required by its water rights or the Water Code, it can contact the Regional Office in Waco at (254) 751 0335.

COMMENT NO. 27: The City of Lubbock comments that BRA's application will adversely impact the supply and availability of the water that is the subject of the City's water rights, permits, applications, strategic plan, and strategic objectives. The application will impede appropriate development and reuse of water supplies in the Lubbock area.

RESPONSE NO. 27: The Executive Director's staff will perform a water availability analysis on this application and only recommend issuance of a permit for water that has not been appropriated by others. Pending applications are not considered water rights and therefore are not protected in a water availability model. Any issued water rights will be subject to the priority system relating to who can get their water first. If there is a contested case hearing, the City can present evidence on impairment of its water rights and plans.

COMMENT NO. 28: W.C. Walker asks what safeguards will prevent massive withdrawals from Possum Kingdom Lake or from the river above Possum Kingdom Lake. The lake is already down so that Granbury and Whitney can be kept full.

RESPONSE NO. 28: The Executive Director's staff is reviewing the application and will consider this comment. However, the operation of the reservoirs is usually left to the river authority unless its water right provides otherwise or a particular operation impacts water right holders or the environment.

COMMENT NO. 29: The Bingham's hold Certificate of Adjudication No. 12-3580 and Permit No. 4264, and they state that the BRA's application may impact the reliability and continued availability of water for their water rights.

RESPONSE NO. 29: The Executive Director is reviewing the application and will consider this comment. Further, the Executive Director's staff will perform a water availability analysis on this application and only recommend issuance of a permit for water that has not been appropriated by others. Any issued water rights will be subject to the priority system relating to who can get their water first. If there is a contested case hearing, the Bingham's can present evidence on impairment of their water rights.

MANAGEMENT PLAN:

COMMENT NO. 30: Dow and AECT comment that they are concerned that BRA does not have a Management Plan at this point and that it will not be finalized until after the permit is issued to BRA. There will not be sufficient public participation on the Management Plan. The Management Plan should be part of a contested case hearing.

RESPONSE NO. 30: The Executive Director will require a Management Plan if any permit is issued for this application. Any permit will require this Management Plan prior to BRA taking any new water, and will require an amendment to the permit. Notice and an

opportunity for a contested case hearing will also be part of this application.

COMMENT NO. 31. CBWC asks whether BRA would support a watermaster to implement its Water Management Plan. Dow comments that the “self-policing” nature of a Water Management Plan, on its face, cannot be considered a reliable mechanism for assuring the protection of senior water rights.

RESPONSE NO. 31: The Executive Director does not know if BRA would support a watermaster. The Executive Director would not recommend that the Commission require BRA to have a watermaster to enforce any permit issued to BRA because under the Water Code the Executive Director does not appoint watermasters for only one water right holder. However, the water right holders in the area can petition for a watermaster for the Brazos River Basin under Chapter 11 Subchapter I of the Water Code.

COMMENT NO. 32: Friends states that BRA is trying to do what LCRA did on a management plan for the Colorado. However, LCRA negotiated for a long time on what provisions should be in the management plan. There is no real shareholder involvement for this application.

RESPONSE NO. 32: The Executive Director agrees that the process for the LCRA Management Plan, which was required as part of the adjudication of LCRA’s water rights, was a different process than the process for this application. However, for this application, water right holders in the Brazos River were notified of the application and given the opportunity to comment or file a request for a contested case hearing. A public meeting was held in Waco concerning this application. Also, prior to taking new water, the applicant will be required to prepare a Management Plan, which will require notice and an opportunity for a contested case hearing.

COMMENT NO. 33: Friends states that BRA has not shown that it will beneficially use the requested water and cannot indicate this without a Management Plan.

RESPONSE NO. 33: The Executive Director’s staff will look at beneficial use of this water when it conducts its Water Conservation Review. BRA may show beneficial use prior to finalizing a Management Plan by providing other documents and sharing information in the State or Regional water plan.

MINING INDUSTRY:

COMMENT NO. 34: Walnut Creek, TMPA and TWCC comment that the lignite mining industry has a present and future need for water from the Brazos River for mining and cooling ponds. In fact, a shortfall of water has been projected in Grimes County for mining needs.

RESPONSE NO. 34: The Executive Director’s staff will perform a water availability

analysis to determine if other water rights can be injured by this application. Depending on the results of that analysis, there could be special conditions in any permit or even denial of this application. The Executive Director's staff cannot consider any future applications when reviewing an application for a new water right – only the existing water rights will be senior to the new one.

COMMENT NO. 35: Walnut Creek, TMPA, TWCC, and TMRA state that the mining industries reclamation plans call for water rights to be obtained from the TCEQ. They are concerned that if the BRA permit is granted, their permits could be denied. This could impact their ability to comply with reclamation permits, and may force them to have to pump groundwater or buy water from BRA.

RESPONSE NO. 35: Depending on the size or the proposed use of these water impoundments, issuance of BRA's requested permit could impact the ability of persons or entities to obtain new permits in the river basin. The Executive Director cannot know for sure until it evaluates BRA's application and provides a recommendation. The impact on the ability of other applicants to request new appropriations of water in the Brazos Basin subsequent to any permit issued to the BRA cannot be determined until TCEQ receives an application and staff conducts a hydrological and environmental review of those applications.

COMMENT NO. 36: TMRA comments that the mining industry provides half of the tax base for several counties in the area and lots of dollars for the state. Their reclamation activities benefit the area in other ways by providing habitat, recreation, and environmental restoration. All of these activities could be impaired by this application.

RESPONSE NO. 36: The Executive Director understands the economic benefits the mining industry provides to the community. Concerning the mining industry's water rights, staff will review the application to determine the applications' impact on existing water rights. Concerning the mining industry's reclamation activities, depending on the size or the proposed use of these water impoundments, issuance of BRA's requested permit could impact the ability of persons or entities to obtain new permits in the river basin. The TCEQ cannot know for sure until it receives an application and conducts a hydrological and environmental review of those applications. The impact on the ability of other applicants to request new appropriations of water in the Brazos Basin subsequent to any permit issued to the BRA cannot be determined until TCEQ receives an application and conducts a hydrological and environmental review of those applications.

RETURN FLOWS:

COMMENT NO. 37: Pat Kultgen and Friends commented that the municipalities in the area should be issued permits for return flows, not BRA. BRA is asking to be first in line for these

return flows.

RESPONSE NO. 37: BRA has requested these return flows. Under law, the Commission must grant the application if it meets the requirements of our statutes and rules. Determination of whether BRA has met these requirements will be considered during technical review and in any contested case hearing on the application. Municipalities may also file applications for the return flows from their water rights or wastewater treatment plants. The Executive Director's staff will review all these applications, including BRA's, in the order in which they are declared administratively complete.

COMMENT NO. 38: Cities, the Fort Bend County Districts, and the City of Lubbock state that BRA's application requests to take their return flows that are valuable assets and that they also are requesting or will request to reuse.

RESPONSE NO. 38: Under law, the Commission must grant an application if it meets the requirements of our statutes and rules. Determination of whether BRA has met these requirements will be considered during technical review and in any contested case hearing on the application. The commenters may also file applications for the return flows from their water rights or wastewater treatment plants. The Executive Director's staff will review all these applications, including BRA's, in the order in which they are declared administratively complete.

COMMENT NO. 39: The Fort Bend County Districts state that if BRA is granted the District's return flows, it will have to construct off channel storage and transportation systems to keep the effluent out of the receiving streams. This would be an unnecessary waste of taxpayer money.

RESPONSE NO. 39: The Commission may consider this comment to the extent that it may bear on whether the application is detrimental to the public welfare. However, there is no specific provision in the TCEQ's authorization that allows the TCEQ to consider costs to existing water right holders in issuing a permit.

COMMENT NO. 40: Dow comments that appropriating return flows from treated effluent and brine bypass/returns to BRA would be detrimental to Dow because Dow has relied on those flows for meeting its own senior water right. BRA doesn't specify the amount of return flows it is requesting but leaves that to the Management Plan.

RESPONSE NO. 40: The Executive Director will consider other water right holder's reliance on historically discharged return flows if it issues a permit for these return flows. This application requests a total appropriation that includes 2060 return flows. The request includes both historically discharged and hypothetical future effluent. The Executive Director and the TCEQ will evaluate BRA's request for return flows in accordance with applicable laws and rules.

SYSTEM OPERATION:

COMMENT NO. 41: TMPA comments that the system-wide management that BRA has requested is unproven.

RESPONSE NO. 41: The Executive Director's will have to consider the effectiveness and feasibility of the system operation proposed by BRA in its review of this application. Special conditions in the permit to ensure the effectiveness of system-wide management could be required.

COMMENT NO. 42: Friends comments that BRA can have system operations under their existing system order.

RESPONSE NO. 42: The Executive Director agrees that BRA has an existing system order that allows it flexibility in when and where water is diverted. However, this application goes further than that order and also requests additional water.

COMMENT NO. 43: Friends and National Wildlife Federation assert that BRA needs to amend it underlying permits as well as just having a stand-alone system permit.

RESPONSE NO. 43: The Executive Director's staff will consider this comment when it conducts its technical review.

MISCELLANEOUS COMMENTS:

COMMENT NO. 44: TMRA comments that issuance of this permit will lead to more use of groundwater in the area. There is no guarantee that groundwater will be available in the future.

RESPONSE NO. 44: The Executive Director does not know if issuance of this permit would lead to more use of groundwater in the future. The Executive Director cannot base his recommendations to the Commission on this possibility because this is not a factor for consideration in the Water Code.

COMMENT NO. 45: Jack Cathey comments that power plants along the river pump out a lot of water and the water is hot as it comes into the river. Mr. Cathey states that this constitutes a health hazard.

RESPONSE NO. 45: These comments are factors to be considered for any application filed by a power plant but cannot be considered for this application. Also, if the commenter believes that any statutes or rules under the Commission's jurisdiction have been violated, he may file a complaint with the Commission's Region office in Waco (254-751-0335).

COMMENT NO. 46: CBWC asserts that the people in the area need to understand exactly what water rights the BRA has.

RESPONSE NO. 46: BRA has many water rights. BRA's water rights that will be considered as part of the system operation requested in the application are listed in the notice of the application that was mailed on April 22, 2005. BRA also owns additional water rights that are not included in the system operation request. According to the Commission's data base, BRA has three permits and fourteen certificates of adjudication. If CBWC would like a complete list of these permits, or would like to examine these permits, it may obtain copies of these permits from the TCEQ Central File Room, TCEQ, Building E, 12100 Park 35 Circle, Austin, Texas.

COMMENT NO. 47: Lawrence Wilson comments that the riverbed at his ranch contains footprints of dinosaurs, and that low water levels can lead to the deterioration and loss of these artifacts.

RESPONSE NO. 47: To the extent that it bears on environmental protection or public welfare, this impact may be considered by staff its consideration of whether the application is detrimental to the public welfare.

COMMENT NO. 48: Lawrence Wilson, Nancy Stackhouse Wilson, and FAR state that the application will cause continued damage to their riverfront properties, such as the loss of mature pecan trees due to increased low flows.

RESPONSE NO. 48: The Executive Director's staff cannot consider the economic impact of an application on property values in his review. However, his staff can and will consider impact to riparian habitat in its environmental review.

Respectfully Submitted,

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Representing the Executive Director of the
Texas Commission on Environmental
Quality

CERTIFICATE OF SERVICE

I certify that on May 4, 2006, the "Executive Director's Response to Public Comments" for Permit No. 5851 was filed with the Texas Commission on Environmental Quality's Office of the Chief Clerk.



David Klein, Attorney
Environmental Law Division
Texas Commission on Environmental
Quality

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