

**TCEQ DOCKET NO. 2005-1490-WR
SOAH DOCKET NO. 582-10-4184**

APPLICATION BY THE BRAZOS	§	BEFORE THE STATE OFFICE
	§	
RIVER AUTHORITY FOR WATER	§	OF
	§	
USE PERMIT NO. 5851	§	ADMINISTRATIVE HEARINGS

BRAZOS RIVER AUTHORITY’S BRIEF ON THE CERTIFIED QUESTIONS

The Brazos River Authority (BRA), Applicant, files this Brief on the Certified Questions presented by Order No. 21 in this proceeding and submitted to the Texas Commission on Environmental Quality (Commission or TCEQ) pursuant to 30 TEX. ADMIN. CODE § 80.131. BRA respectfully requests that the Commission determine that the deadlines established by the Environmental Flows Advisory Committee and Texas Water Code § 11.147(e-3) are directory; that, with respect to certain pending water right applications, the implementation of newly adopted environmental flow rules may be addressed through the § 11.147(e-1) reopener provision to be included in those draft permits; and that a transition rule addressing such pending applications should be considered by the Commission. In support thereof BRA would show the following:

I. Procedural Background

BRA’s System Operation Permit Application No. 5851 has been pending before the TCEQ since 2004, the longest of any of the pending applications in the Brazos River basin. After the initial contested case hearing in 2011, the Application was considered by the TCEQ Commissioners on January 25, 2012, and the Commission ordered: (a) BRA to prepare and submit a Water Management Plan to accompany its application within ten (10) months, or by

November 30, 2012; (b) the Executive Director to complete his review of the Water Management Plan within seven (7) months following that filing, or by June 30, 2013; and (c) the Administrative Law Judges (ALJs) to submit a revised proposal for decision (PFD) within twenty-four (24) months of the Commission's Interim Order, or by January 2014. To meet the requirements of the Commission's January 30, 2012 Interim Order, BRA has invested seventeen (17) months and almost \$2 million in developing the Water Management Plan within the time frame ordered. TCEQ staff likewise completed their review within the required seven-month period. The revised proposed System Operation Permit, which incorporates the Water Management Plan, was again noticed in July 2013, and the post-abatement preliminary hearing on the application was held on August 26, 2013.¹

Working on a schedule roughly parallel to that of the System Operation Permit initial contested case hearing schedule, the Brazos River and Associated Bay and Estuary System Basin and Bay Stakeholder Committee (BBASC) and the Expert Science Team (BBEST) developed environmental flow recommendations for the Brazos basin over a 12- to 18- month period, starting in 2011. The BBASC submitted those recommendations to the TCEQ on August 31, 2012, as directed by Senate Bill 3 (SB 3).² The TCEQ staff then worked to develop proposed rules based on those recommendations, which were considered for publication by the Commission on September 4, 2013.³ The comment period for the Brazos River basin environmental flow rules closed on October 21, 2013, and the anticipated adoption date for these

¹ For purposes of this brief, the term "proposed System Operation Permit" will mean the draft permit for which notice was mailed and published in July 2013, along with the Water Management Plan and Technical Report and Technical Appendices initially submitted to the TCEQ on November 28, 2012, and revised and refiled on June 12, 2013.

² Act of May 29, 2007, 80th Leg., R.S., ch. 1430, §§ 1.07, 1.13, 1.14, 2007 Tex. Gen. Laws 5848, 5850, 5856, and 5857.

³ See 38 Tex. Reg. 6190 (2013) (to be codified at 30 Tex. Admin. Code §§ 298.450 - .490 (proposed Sept. 4, 2013) (Tex. Comm'n on Env. Quality)). These rules will be referred to as the "SB 3 rules" or the "environmental flow rules" throughout this brief.

rules is February 12, 2014. Given the closely aligned schedules of the System Operation Permit contested case and consideration of the Brazos basin environmental flow rules, there was a bare possibility that the Commission could have ruled on the revised System Operation Permit PFD under the 24-month schedule outlined in the Commission's Interim Order prior to adopting the Brazos basin environmental flow rules, although not likely before any rulings on motions for rehearing. However, that window of possibility has closed, as the date for the System Operation Permit hearing on the merits has been delayed twice.

Pursuant to Order No. 15, the ALJs first delayed the further hearing on the merits of this case to January 2014, due to the overlapping schedules and many common parties also in the Brazos Basin watermaster hearing. The second delay came at the request of new parties admitted to the System Operation Permit case, who, at the August 26, 2013 preliminary hearing, requested an additional three (3) months for discovery and case preparation. Based on this request, the ALJs set the hearing on the merits to begin in late April 2014. *See* Order No. 18 (prehearing schedule). Neither BRA nor the Executive Director suggested or requested either of these hearing date extensions. Given the April 2014 date for the hearing on the merits, a reasonable estimate is that the revised PFD might be submitted to the Commission for consideration by late June 2014, with the Commission's consideration of the PFD in August or September of 2014.

II. The Need for a Transition Rule

This situation presents a dilemma. All of the Water Management Plan hydrologic analysis completed during the ten-month time period prescribed by the Commission's Interim Order and reviewed by the TCEQ staff is based on the environmental flow regime detailed in the originally proposed draft permit considered during the 2011 hearing. This is the same

environmental flow regime accepted as protective by the ALJs in their October 17, 2011 PFD, and supported by the Executive Director and the Texas Parks and Wildlife Department.⁴ See October 17, 2011 PFD at pp. 69-70. All of the work that was completed by BRA and the TCEQ staff under the timeframe directed by the Commission would have to be repeated using the TCEQ's adopted SB 3 rules if those rules are made immediately applicable to all pending water rights applications, if and when those environmental flow rules are adopted. This would require another abatement of this case as both BRA and the TCEQ staff will have to duplicate much of the effort made over the past twenty (20) months, which brought the proposed System Operation Permit and accompanying Water Management Plan to its current state.

To further delay matters, this re-review of the System Operation Permit application could not be started until the Commission actually adopts SB 3 rules for the Brazos basin, as no one can be certain that the adopted rules will be the same as the proposed rules. This could likely result in about a delay of a year or more from the date the SB 3 rules are adopted, and many thousands of dollars of wasted resources of both BRA and the TCEQ, with little or no benefit to the environment as a result.

BRA believes the System Operation Permit's environmental flow requirements (which are included in the Water Management Plan incorporated into the draft permit)⁵ are comparable

⁴ In fact, the flow regime was developed through a joint interagency cooperative effort among BRA, the Texas Parks and Wildlife Department, and TCEQ. See October 17, 2011 PFD at p. 86; BRA Ex. 33 – 8:1-7, 13:20 to 14:2, 20:9-19 (Test. of C. Loeffler). This flow regime served as the prototype, even, for the development of the HEFR method that is the basis for most of the Senate Bill 3 environmental flow standards adopted to date by the Commission. *Id.*

⁵ With the exception of a few minor changes not material for this purpose, the environmental flow requirements contained in BRA's proposed System Operation Permit are the same requirements that were originally proposed to be included in the draft permit prepared by the Executive Director and presented to the Commission for consideration with the October 17, 2011 PFD. The Executive Director's draft permit is attached to the October 17, 2011 PFD as Attachment A and is ED Exhibit K2. Because the environmental flow requirements in ED Exhibit K2 are the same as those contained in the proposed System Operation Permit, as re-noticed in July 2013, for purposes of this brief BRA will provide the citation to applicable provisions in ED Exhibit K2, rather than the new draft permit and accompanying Water Management Plan.

to, and maybe in some regards even more protective than, the standards in the proposed SB 3 rules. *See* October 17, 2011 PFD at p. 86. Nevertheless, the two sets of standards have differences. For example, under the proposed System Operation Permit there are four seasons of three months each. *See* ED Ex. K2 at Special Condition 6.E.2 (attached as Attachment A to the October 17, 2011 PFD). Under the proposed SB 3 rules, there are three seasons with four months each. *See* 38 Tex. Reg. 6190, 6191 (proposed 30 TEX. ADMIN. CODE § 298.455(8), (10), and (13)). The draft System Operation Permit has subsistence flow requirements that are not contained in the proposed SB 3 rules. *See* ED Ex. K2 at Special Condition 6.E.3. Also, not all of the proposed measurement points are the same. For example, in the proposed SB 3 rules, the Palo Pinto gage is a measurement point for the environmental flow standards, whereas under the proposed System Operation Permit, the Palo Pinto gage is one of eight (8) water quality measurement points, measuring whether there are subsistence flows at those points only for purposes of determining whether diversions and storage of water under the permit are permissible. *Compare* ED Ex. K2 at Special Condition 6.E.15 *with* 38 Tex. Reg. 6192 (proposed 30 TEX. ADMIN. CODE § 298.480(7)). The proposed System Operation Permit requires the eight (8) water quality gages to be periodically evaluated to assess whether any of those points should become environmental flow measurement points. *See* ED Ex. K2 at Special Condition 6.E.16.

These evaluations are part of the proposed System Operation Permit's adaptive management requirements, which require BRA to conduct instream flow studies and long-term monitoring to assess impacts on instream uses, fisheries, aquatic communities, and water quality. *See* ED Ex. K2 at Special Conditions 6.D.2, 6.D.4.k, 6.E.1, 6.E.16; *see also* Certified Copy of the June 28, 2013 Interoffice Memorandum from Kathy Alexander to Chris Kozlowski, at p. 8, a

copy of which is attached hereto as Exhibit 1. And, as required by Water Code § 11.147(e-1), the proposed System Operation Permit contains a reopener provision that sets out a time period by which the permit must be reviewed and potentially modified for consistency purposes after the adoption of, or an amendment to, the SB 3 rules for the Brazos basin. *See* ED Ex. K2 at Special Condition 6.E.19; Exhibit 1 (June 28, 2013 K. Alexander Interoffice Memorandum), at p. 8. Despite some differences between the SB 3 rules and the proposed System Operation Permit requirements, the System Operation Permit environmental flow requirements are protective, and there should not be any problems reconciling the draft permit requirements with the adopted SB 3 requirements within the timeframe required under the terms of the proposed System Operation Permit, especially given the adaptive management and reopener provisions in the draft permit. *See* October 17, 2011 PFD at p. 86; BRA Ex. 33 – 8:1-7, 13:20 to 14:2, and 20:9-19 (Test. of C. Loeffler); Exhibit 1 (June 28, 2013 K. Alexander Interoffice Memorandum), at p. 8.

The further delay in considering the proposed System Operation Permit matters to the Brazos basin as a whole, TCEQ, BRA, and others. For the TCEQ and other Brazos water rights holders, all other applications for new appropriations in the Brazos basin are on hold until the System Operation Permit application is decided, which means there will likely be at least another year's delay in processing those permits if the SB 3 standards must immediately be applied to the System Operation Permit. With the TCEQ water availability staff's resources stretched to address priority calls during the current drought, permit processing has already suffered. By allowing BRA's System Operation Permit to move forward without an immediate review under the SB 3 rules, but requiring such a review through a time-specific reopener provision, TCEQ staff will have time to address other permitting matters that have been delayed. For BRA, the

granting of the proposed System Operation Permit would make available to BRA run of the river flows that could be used to meet contractual demands (when those flows are available and all environmental flow requirements have been met), instead of making releases from storage as is required under BRA's existing water rights permits. This potentially could increase the availability of water supplies during drought.

III. Certified Questions

To address the dilemma created by the timing of the proposed adoption of the Brazos basin environmental flow rules as related to the post-abatement contested case hearing schedule for the proposed System Operation Permit, on BRA's motion, the ALJs certified four questions. BRA addresses the first two questions together, followed by the remaining two.

- A. Commission interpretation of the deadlines established by the Environmental Flows Advisory Committee and Texas Water Code § 11.147(e-3) is needed: Are the timing requirements of these provisions mandatory?**
- B. Does Texas Water Code § 11.147(e-3) require that newly adopted environmental flow standards be applied immediately, or may their implementation be addressed under a § 11.147(e-1) "reopener" provision?**

There are no mandatory deadlines to adopt or implement the SB 3 rules for the Brazos basin. As a general rule, statutory deadlines or similar requirements that "are included for the purpose of promoting the proper, orderly and prompt conduct of business" are not construed as mandatory, particularly if the statute provides no consequences for the failure to act within the time specified. See *Chisholm v. Bewley Mills*, 287 S.W.2d 943 (Tex. 1956); *TJFA, L.P. v. Texas Comm'n on Env. Quality*, 368 S.W.3d 727, 734 (Tex. App. – Austin 2012); *Tex. Dept. of Public Safety v. Sweeny*, 97 S.W.3d 597, 601 (Tex. App. – Austin 2002). These types of provisions are considered directory in nature.

For the adoption of SB 3 environmental flow standards, Water Code § 11.02362(d) applies and states that the Environmental Flow Advisory Committee is to establish a schedule for the development of the environmental flow standards that will result in adoption by the Commission “as soon as reasonably possible.” That scheduled date for the Brazos basin is currently March 1, 2014. However, this deadline is directory, as there are no consequences for failing to adopt the standards by that date. This is evidenced by the fact that the Commission did not adopt the environmental flow rules for the Trinity, San Jacinto, Sabine, and Neches river basins, and the Galveston Bay and Sabine Lake Bay, by the statutory deadline of September 1, 2010. Those rules were not adopted until May 11, 2011. For the Brazos basin, there is no mandatory statutory deadline.

Water Code § 11.147(e-3) applies once those standards are adopted. It simply says that the Commission “shall apply” the environmental flow standards to new permits instead of considering the factors specified in Water Code §§ 11.147(c) – (e). There are no specific directives regarding *when* the standards must be applied. Moreover, the “reopener” provision in § 11.147(e-1), which is required in permits to allow the Commission to adjust the permit conditions to achieve compliance with subsequently adopted environmental flow standards under § 11.1471, is also silent as to when the Commission must revisit permits after new environmental flow conditions are adopted. Reading § 11.147(e-3) together with § 11.147(e-1) makes it clear that there is no mandatory “deadline” for including newly adopted environmental flow standards in new water rights permits, so long as the permit includes the reopener provision. Based on this statutory language, the Commission has the discretion and authority regarding the timing of implementation of these standards, particularly when viewed from a policy perspective – no purpose is served or benefit achieved by derailing pending applications through an immediate

application of newly adopted standards, especially in cases where the application has been subjected to prior scrutiny to the extent already applied to BRA's pending System Operation Permit application. Using the flexibility provided to the TCEQ by the legislature under Water Code § 11.147 makes sense and results in more efficient government.

C. Assuming that timing requirements are directory or that application of new environmental flow standards may be addressed through a "reopener" provision, which environmental flow standards should be applied to BRA's pending application?

The environmental flow requirements in the proposed System Operation Permit should be applied in this case. As previously noted, the environmental flow provisions in the proposed System Operation Permit are comparable to those in the SB 3 rules; while there are some differences between the environmental flow requirements in the proposed System Operation Permit and those in the proposed SB 3 rules, the proposed System Operation Permit includes provisions designed to address those differences. For example, while the Palo Pinto gage is a water quality measurement point in the proposed System Operation Permit and not a full environmental flow measurement point as is recommended by the proposed SB 3 rules, the proposed System Operation Permit explicitly contemplates that water quality measurement points such as the Palo Pinto gage may become full environmental flow measurement points, if necessary, in the future after additional study. *See* October 17, 2011 PFD at p. 80; ED Ex. K2 at Special Condition 6.E.16. And, there are provisions in the proposed System Operation Permit that may actually be more protective than the proposed SB 3 rules, particularly during drought, as the proposed System Operation Permit contains a subsistence flow requirement that is absent from the standards in the proposed SB 3 rules.

Moreover, according to the October 17, 2011 PFD, the environmental flow requirements contained in the prior draft permit, and which are now incorporated into the proposed System

Operation Permit through the Water Management Plan, are protective of the environment. October 17, 2011 PFD at p. 70. The TCEQ staff reached a similar conclusion during their review of the environmental flow requirements in the proposed System Operation Permit and associated Water Management Plan, noting the requirements provide adequate protection for the environment. *See* Exhibit 1, June 28, 2013 Interoffice Memorandum from Kathy Alexander to Chris Kozlowski, at pg. 8. Given this, and the fact that the draft System Operation Permit has a “reopener” provision that sets out a time period by which the System Operation Permit environmental flow requirements must be reconciled with the adopted SB 3 standards, there does not appear to be much, if any, benefit to the environment from the immediate application of the proposed SB 3 standards, if and when they are adopted. *See* Exhibit 1 (June 28, 2013 K. Alexander Interoffice Memorandum), at p. 8.

- D. As a matter of policy, should the Commission consider establishing a “transition rule” for all applications that have been processed through technical review or referred to SOAH for contested case hearing, by which preexisting environmental flow standards might be applied to pending applications, with SB 3 standards subsequently implemented through Texas Water Code § 11.147(c-1)’s “reopener” provision?**

Adopting a transition rule makes sense. In the case of BRA’s System Operation Permit application, it avoids a challenge that the TCEQ has failed to follow its own rules by not immediately applying the newly adopted SB 3 standards to pending applications. While BRA believes such a challenge would be invalid, it will likely be made if the Commission does not adopt a transition rule. In the case of other permit applications, including those that might be pending when the SB 3 standards are amended in the future, a transition rule would provide guidelines for staff and applicants on how to comply with newly adopted standards, and could set out a timeframe by which compliance is required. It makes most sense to adopt a transition rule that would allow applications that are technically complete to move forward without additional

review under newly adopted or amended environmental flow rules. Those applications have already undergone extensive review by the TCEQ staff, draft permits has been prepared, and notices of the applications and draft permits have been mailed and published. Of course, such a transition rule could not be adopted as part of the Commission's consideration of these certified questions, but the Commission can indicate its intent to do so (comparable to inclusion of the provision in publication of the draft rule), so that the issue can be addressed by the public prior to consideration and formal action on adoption of the new standards.

IV. Conclusion

Based on the foregoing, BRA respectfully requests that the Commission find that the proposed SB 3 rules for the Brazos basin are not required to be immediately applicable to all pending water rights applications, including the BRA's System Operation Permit application; that those rules may be addressed through a reopener provision to be included in such draft permits; and that it is appropriate for the Commission to include a transition rule for all applications that have been processed through technical review or otherwise already referred to the State Office of Administrative Hearings.

Respectfully submitted,

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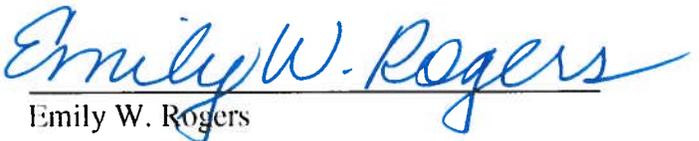
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CERTIFICATE OF SERVICE

I hereby certify by my signature below that on October 28, 2013, a true and correct copy of the above and foregoing document was forwarded via email or First Class Mail to the parties on the attached Service List.


Emily W. Rogers

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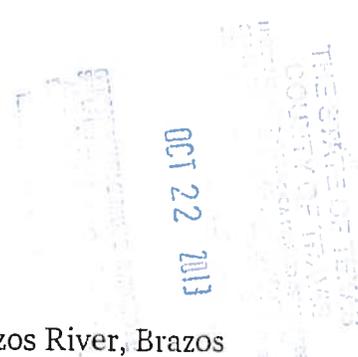
Texas Commission on Environmental Quality

INTEROFFICE MEMORANDUM

To: Chris Kozlowski, Project Manager Date: June 28, 2013
Water Rights Permitting Team
Water Rights Permitting & Availability Section

From:  Kathy Alexander, Ph.D.
Technical Specialist
Water Rights Permitting & Availability Section

Subject: Brazos River Authority
WRPERM 5851
CN600506794
RN104319736
Multiple Tributaries of the Brazos River and the Brazos River, Brazos
River Basin
Multiple Counties



WATER AVAILABILITY ANALYSIS ADDENDUM

Application Summary

The initial Water Availability memorandum was completed November 25, 2008. A Water Availability Analysis Addendum was completed on February 9, 2010. A draft permit was prepared on June 2, 2011. The application was heard at the State Office of Administrative Hearings (SOAH) from May 6 to June 2, 2011. The Commission considered the Proposal for Decision and remanded the application to SOAH with instructions to abate the hearing to allow the Applicant to submit additional information in the form of a Water Management Plan (WMP) within 10 months from the Commission Order dated January 30, 2012. Brazos River Authority (BRA) submitted the WMP and associated documents on November 28, 2012. Additional information was provided by BRA on May 1, 2013 and June 3, 2013. A revised version of the WMP was submitted on June 12, 2013.

BRA amended its application as follows:

- To include a Water Management Plan, including a *Technical Report in Support of the Water Management Plan* and *Technical Appendices*. The information in the technical report and technical appendices provides the basis and support for the regulatory requirements in the WMP.
- To include accounting plans for: (1) its reservoirs; (2) stream reaches of the Brazos River and its tributaries where water will be delivered and/or water



- authorized under Permit 5851 will be diverted; (3) application of environmental flow requirements; and (4) reference and summary information.
- To request a new appropriation of 1,001,449 acre-feet of water, which represents the total amount of water that could be appropriated if all of the water was taken at the Brazos River's outlet at the Gulf of Mexico. The new appropriation is a non-firm supply and the amount of water BRA may divert at upstream locations varies depending on demands.
 - To specify diversion points for the new appropriation as follows: (1) the diversion points authorized in BRA's existing water rights; (2) the Brazos River's outlet at the Gulf of Mexico; and (3) specific diversion points and reaches identified in BRA's WMP and associated technical documents, and accounting plans. Diversion rates at these diversion points are set out in BRA's WMP and associated technical documents and BRA's accounting plans.
 - To request an authorization under TWC §11.1381 for a term permit to use an additional 202,650 acre-feet of water per year for thirty years or until the ports are closed on the dam impounding Allens Creek Reservoir, whichever occurs earlier. The additional 202,650 acre-feet of water is not a new appropriation but represents an additional amount of water based on the amount of water previously appropriated under Water Use Permit 2925.
 - To request use of the bed and banks of the Brazos River and its tributaries to convey water as specified in BRA's WMP and accounting plans. BRA provided channel losses and estimated travel times for water deliveries under Permit 5851 and the WMP.
 - To remove the request in Application 5851 for recognition that Permit 5851 prevail over inconsistent provisions in BRA's existing water rights regarding system operation.

BRA's WMP is part of and incorporated into Permit 5851. The WMP governs BRA's operations and details how decisions are made for diversion, storage, and use of water under Permit 5851. The WMP includes diversion points and rates for BRA's water supply contract holders, a list of BRA's current contract holders, accounts for diversion of run-of-river water by these contract holders, and includes demands for these water users by river reach. The WMP explains how BRA will operate its reservoirs and deliver contract water, includes environmental flow requirements, and provides details on how these requirements will be calculated and applied to diversions and storage under Permit 5851. Finally, the WMP sets out how BRA will evaluate the environmental flow requirements in the WMP to conform to future adopted environmental flow standards.

Measurement Points and Environmental Flow Requirements

Staff previously recommended that diversions be limited by the environmental flow requirements at all downstream measurement points unless BRA submitted a hydrologic study demonstrating that diversions at upstream points would not prevent achievement of the environmental flow requirements at subsequent downstream points. BRA submitted a hydrologic study (Technical Appendix G-6 *Hydrologic Network Relationships, Low Flows and High Flow Pulses*) evaluating whether upstream diversions would affect achievement of subsequent downstream environmental flow

requirements. This study used historical gage data, which does not reflect the actual impacts of diversions under Permit 5851. Staff reviewed the study and, based solely on the historical information, it appears that run-of-river diversions under Permit 5851 would not prevent the occurrence of high flow pulses further downstream, which otherwise would have occurred. Staff does have concerns related to whether actual operations in the future could result in some impacts. However, BRA's adaptive management plan includes provisions for an evaluation of assumptions related to use of the nearest downstream measurement point to determine whether diversions under Permit 5851 would prevent the occurrence of a high flow pulse which otherwise would have occurred (WMP, p.57). Staff agrees that the nearest downstream measurement point applies to diversions under this WMP, subject to further evaluation after diversions under Permit 5851 are initiated.

The WMP includes combined maximum diversion rates for reaches where water will be diverted under Permit 5851 (WMP, Table 4.8). The WMP also includes criteria for determining how high flow pulses limit run-of-river diversions in specific reaches, based on actual diversion rates for individual diverters (WMP Figure 4.1 and Table 4.6). These limitations do not apply to stored water releases because any applicable environmental flow requirements would have been met when the water was stored. The diversion point trigger levels vary such that diversions at very small rates are not subject to pulse flow requirements and the number of applicable pulse requirements increases with increasing diversion rates. Staff reviewed the diversion rate trigger levels and finds them reasonable because very small diversion rates are unlikely to affect achievement of pulses.

The WMP includes a method to apply environmental flow requirements at locations downstream of USGS gage 08114000, Brazos River near Richmond. The application of requirements below the Richmond gage is included in the WMP (Section IV.D.4.). Staff reviewed the method and finds it acceptable. Staff notes that these requirements could be modified as part of adaptive management, as described in the WMP (Section VI.B.2. and 3.)

Water Availability Analysis

BRA submitted water availability models (WAM) in support of Permit 5851 and the WMP as described in the WMP, Technical Reports and Technical Appendices. In addition to the WAM datasets, BRA submitted accounting spreadsheets that apply water diverted under BRA's water rights, including Permit 5851 to the appropriate water right and priority date for purposes of determining the amount of water available for storage and diversion by BRA under all of its water rights. The accounting spreadsheets are not intended for use as the required accounting plans which are discussed further below. The models include various scenarios and different assumptions regarding return flows available for use by BRA under the WMP.

For purposes of this section, "BRA return flows" refers to the Executive Director's (ED) approach to permitting return flows to an applicant, where available return flows are limited to those originating from the applicant's water rights, discharged by the

applicant, or contracted by the applicant. "All return flows" refers to BRA's approach to permitting return flows to an applicant, where available return flows include all return flows regardless of source and all return flows are considered as a new appropriation of water.

The models submitted in support of Permit 5851 and the WMP are described as follows:

- a. Current conditions;
- b. 2025 conditions using BRA return flows and all return flows;
- c. 2025 conditions assuming Comanche Peak Nuclear Power Plant (CPNPP) expansion using BRA return flows and all return flows;
- d. 2060 conditions using BRA return flows and all return flows;
- e. 2060 conditions assuming the CPNPP expansion using BRA return flows and all return flows;
- f. Firm Use under the demand levels A-D with three return flow assumptions: no return flows; all return flows; and BRA return flows. Firm Use models calculate the firm yield of the BRA system using BRA system water rights and Permit 5851. In these models all BRA contracts are assumed to be fully exercised in each year; and
- g. Variable Demand under demand levels A-D with three return flow assumptions: no return flows; all return flows; and BRA return flows. Variable Demand models calculate the amount of water available using expected operations.

The firm use and variable demand level models assume four scenarios referred to in the WMP as: 1) Level A which assumes no expansion of CPNPP and does not include Allens Creek; 2) Level B which assumes CPNPP expansion and does not include Allens Creek; 3) Level C which does not include CPBPP expansion and does include Allens Creek; and 4) Level D which assumes CPNPP expansion and includes Allens Creek.

Technical Appendix G-2 *Modeling Appendix* describes various modifications to the TCEQ Full Authorization WAM for the models described above. These modifications include:

- Adding return flows as documented in Technical Appendix G-2
- Accounting for sedimentation
- Reservoir release requirements
- Diversions from the Brazos River for Allens Creek reservoir under BRA's Excess Flows Permit (Certificate of Adjudication 12-5166, as amended)
- Reservoir operational limits
- Modeling of Lake Whitney, including hydropower operations
- Removal of Certificate of Adjudication 12-2939
- Modeling of Lake Belton
- Modeling of Williamson County Regional raw water line

Additional modifications as described in Technical Appendix G-2 were made to specific WAMs for the Variable Demand scenarios to account for diversions by BRA's contractual customers where those customers are also authorized to divert water under their own water rights.

Staff reviewed the assumptions described above and the affected water rights and finds them acceptable because these assumptions are consistent with the water right authorizations. Staff previously had concerns regarding diversions from the Brazos River for Allens Creek under the Excess Flows Permit because that permit did not authorize use of the Allens Creek diversion point. BRA subsequently amended the Excess Flows Permit to add the Allens Creek diversion point; therefore, staff agrees that the modeling assumptions for this permit are acceptable. Regarding reservoir operational limits, the WMP (Section IV.C.) describes changes to operational limits in the existing System Operation Order for Lakes Proctor, Aquilla, Georgetown, and Whitney. Staff supports these changes contingent upon BRA amending its existing water rights for these reservoirs to reflect modifications to the 30% requirement, as required by the WMP. Staff supports BRA's assumptions regarding consideration of sedimentation in reservoirs, where the amount of water available for appropriation is based on the full authorized amount in the water right and different conditions can be considered in other modeling that supports the WMP. Staff also supports removal of Certificate of Adjudication 12-2939 from the WAMs because BRA abandoned this water right.

Staff reviewed the models described in items a. thru e. above. These models include projected demands rather than actual demands and are considered to be operational models demonstrating how BRA would operate under the WMP through 2025 and how BRA may operate under 2060 conditions. Although staff finds that the assumptions included in the models for items a. thru e. appear to be appropriate assumptions; staff's technical review addresses specifically the modeling in items f. and g., which support the determination of available water under the initial WMP.

Staff performed water availability analyses using only BRA return flows to determine the amount of water available for appropriation under Firm Use demand levels A – D and Variable Demands under demand levels A-D in the WMP as well as the amount of water available on a non-firm basis at the Brazos River's outlet at the Gulf of Mexico in Permit 5851. Staff found that 1,001,499 acre-feet of water is available on a non –firm basis and an additional 202,650 acre-feet of water is available on a 30-year term basis. However, staff recommends that Table 2.4 in the WMP be modified as follows:

Demand Level	Level A – Current Contracts		Level B – Current Contracts with CPNPP Expansion		Level C – Current Contracts with Allens Creek		Level D – Current Contracts with Allens Creek and CPNPP Expansion	
	No Return Flows	BRA Return Flows	No Return Flows	BRA Return Flows	No Return Flows	BRA Return Flows	No Return Flows	BRA Return Flows
Variable Demand Scenarios	337,717	356,254	325,992	337,405	414,883	432,496	370,562	384,112
Firm Use Scenarios	375,345	388,149	308,178	331,176	486,329	488,203	434,159	472,367

The average reduction in the amount of water available for the Firm Use and Variable Demand Scenarios is 4% for all demand levels and vary between 2% and 8%. In addition, the reliability of run-of-river diversions varies and any water in the stream during dry times is committed to downstream senior water rights. Allowing BRA to appropriate more water and to account for it as described in the discussion of accounting plans below would likely affect senior water rights.

Regarding Table 2.5 *Potential Non-Firm Supplies at USGS Rosharon Gage*, staff reviewed Section 2.4.4 of the Technical Report, Technical Appendix G-2, Section G.3.2, BRA's estimates of unassigned firm yield, and unappropriated flows at the Rosharon gage. Section 2.4.4 of the Technical Report states that BRA has not identified specific customers or developed policies for long term use of non-firm water that would be available under Permit 5851 and that specific uses of this water will be identified in future revisions to the WMP. BRA identifies Lake Granger conjunctive use and use of interruptible water for environmental purposes as potential future uses of non-firm water supply. WMP Section IV.D.5. also states that use of non-firm appropriations will be further addressed in subsequent revisions of the WMP. Based on this review, and taking into account that Permit 5851 would authorize the diversion and use of 1,001,449 acre-feet of water on a non-firm basis, staff agrees that additional non-firm water will be available for use under future WMPs.

Accounting Plans

BRA submitted accounting plans as part of its WMP. These accounting plans are described in Section V. of the WMP, Section V. of the Technical Report and Technical Appendix H. The accounting plans include customer water use, reservoir operations, diversions, compliance with environmental flow requirements, and summaries of water use. Specifically, the accounting plan consists of five excel workbooks:

- A Reference workbook that includes information used in other workbooks such as historical data, reservoir information, conversion factors, etc.;
- A workbook for calculating and demonstrating compliance with instream flow requirements;
- A Reservoir workbook for reservoir operations;
- A Reach workbook for tracking water supply releases and return flows; and
- A summary workbook for water rights reporting.

BRA submitted two versions of the accounting plans, one that accounted for all return flows and follows BRA's approach to permitting return flows (Section H-1 of the Technical Appendix), and one that includes only BRA return flows and follows the ED's approach to permitting return flows (Section H-2 of the Technical Appendix). Staff reviewed both versions of the accounting plans and found the calculations acceptable; however, staff notes that the accounting plans representing BRA's approach to permitting return flows contain very little actual accounting for these return flows as discussed further below.

Both accounting plans include the spreadsheets and detailed explanations of the information and calculations (Technical Appendix H). The Instream flow workbooks for the two versions account for compliance with instream flow requirements the same way. The difference between the two Reference workbooks is the specific return flows included in each, the BRA accounting includes all return flows and the ED accounting includes only BRA return flows. The difference in the summary workbooks is that the BRA accounting does not report use of return flows and the ED accounting includes reporting of return flow use. The most significant difference between the two versions of the accounting plan can be found in the Reservoir and Reach workbooks.

BRA's accounting only tracks return flows in the Reference workbook to report how much was actually discharged for purposes of potential future updates to water availability calculated in the WAMs. Although Appendix H-1 indicates that the BRA accounting includes provisions to assign diversions either to return flows or to local inflows or to releases (See for example the description of logical flags in the discussion for each reach), staff notes that columns to perform these calculations are not included in the reach or reservoir spreadsheets. Should the BRA accounting be determined to be the acceptable accounting method for the WMP, BRA would need to modify its descriptions of the accounting workbooks to be consistent with the actual calculations performed in the workbooks.

The ED accounting tracks BRA return flows by source, availability and diversion location. This accounting does include provisions to assign reach diversions either to return flows, local inflows, or releases and includes accounting for return flows used from BRA's reservoirs. Under the ED accounting, return flows entering the reservoir can be used by BRA's existing senior water rights subject to downstream more senior water rights. If BRA is storing and diverting water under those rights, then, under the prior appropriation doctrine, BRA's existing water rights would be able to divert or store any return flows first because BRA's existing water rights are senior to Permit 5851.

BRA's accounting does not provide for a timely response to changing conditions, for example when a discharger begins to directly reuse return flows. It merely provides the amounts used in the water availability analysis and compares the monthly amounts to the assumed amounts during the time period of the initial WMP (Technical Report, page 5-8), presumably during the WMP revision process. This method of accounting is not as protective of senior downstream water rights as the ED accounting, which can make adjustments in the amount of water available for run-of-river diversions by BRA's customers on a more real time basis because. Under the ED's accounting, water available from return flows would change through time if dischargers begin to directly reuse their return flows. Based on protection of senior water rights, staff supports use of the ED accounting in the initial WMP and recommends that BRA make any necessary conforming changes to the WMP to clarify that the ED accounting will be used for the interim WMP.

Senate Bill 3 Considerations

BRA submitted its amended application and WMP in November of 2012. Staff completed technical review in June of 2013, and the hearing on the merits is projected to occur in January of 2014. In 2007, the 80th Legislature passed House Bill 3 (HB 3), relating to the management of the water resources of the state, including the protection of instream flows and freshwater inflows; and Senate Bill 3 (SB 3), relating to the development, management, and preservation of the water resources of the state. Both of these bills amended Texas Water Code (TWC), §11.1471, which requires the commission to adopt rules related to environmental flow standards and set-asides. Senate Bill 3 provided that permits issued after the adoption of environmental flow standards in a river basin include provisions to protect the environmental flow standards. All new appropriations of water issued after September 1, 2007, but before the commission adopts environmental flow standards for a river basin include a provision that allows for adjustment of environmental flow conditions, if appropriate, to achieve compliance with adopted environmental flow standards.

The proposed environmental flow standards for the Brazos River Basin will be considered by the commission on September 4, 2013 and the standards will be adopted in March of 2014. TCEQ's rules in 30 TAC §298.25 provide that the ED can petition the commission to adjust environmental flow special conditions and include procedural requirements for these adjustments. The draft permit includes a provision allowing the commission to adjust the environmental flow conditions in Permit 5851 to achieve compliance with the adopted environmental flow standards (Paragraph 5.E.3). The draft permit also includes a provision requiring BRA to file an amendment to the WMP, if required, to ensure that the environmental flow requirements in the WMP are consistent with the adopted standards.

Staff agrees that, given both the schedule for adoption of environment flow standards in the Brazos Basin and the schedule for consideration of BRA's permit application and WMP, these provisions include a reasonable time frame for reconciling the environmental requirements in the WMP with the adopted standards. As determined in Resource Protection staff's memorandum and addendums, the environmental requirements in the WMP provide adequate protection for the environment.

Other Considerations

Amendments to the WMP

BRA's WMP includes provisions requiring that it be revised every ten years. In addition, BRA may submit applications to modify the WMP during that ten year period. Unless these amendments are considered minor modifications, TCEQ's notice and contested case hearing requirements would apply. Section 1.B.2. sets out amendments that could be considered to be minor amendments so long as they do not otherwise require notice and opportunity for a contested case hearing. The WMP also requires that any of these revisions and modifications require prior approval by the Executive Director. Updates to documents or information in the Technical Report and Technical Appendices may not

require prior approval. Staff finds this approach to amending and revising the WMP and associated documents to be acceptable.

Hydrologic Condition Triggers

BRA proposes system storage trigger levels for use in determining the applicable hydrologic conditions for environmental flow requirements. These system storage trigger levels are based on modeling performed by BRA for the WMP; however, these storage trigger levels would be applied to actual operations. Although the values calculated using different modeling based on different return flow assumptions could result in slightly different values, the WMP provides that the storage trigger levels are subject to further analysis and revision at least every five years. Based on this proposed schedule, staff's opinion is that the values in Table 4.2 are adequate for use in the initial WMP.

BRA's Proposed Draft Permit

BRA's proposed draft permit is modified from previous versions to reflect that BRA submitted a WMP. Staff reviewed BRA's draft permit and accepts this permit subject to any necessary typographical or formatting changes. Staff notes that the provisions in Permit 5851 are intended to be applicable regardless of which approach to return flows is ultimately approved by the Commission. Differences in the return flow approaches are confined to the WMP and accounting plans as discussed elsewhere in this memo.

Conclusion

The priority date of the new appropriation of water is junior to existing water rights in the Brazos River Basin. Therefore, use of junior water cannot affect senior water rights. In addition, BRA's accounting plans, which are part of the WMP and detail BRA's water use and operations, provide additional protections to senior water rights.

The different appropriations of water in Table 2.4 result from the different approaches to reuse of return flows by the ED and BRA. The ED does not consider the reuse authorization to be a new appropriation. Rather, consistent with current practice for permitting reuse of return flows, the ED limits the reuse of groundwater-based return flows to the discharger, and limits the reuse of surface water based return flows to those return flows derived from water supplied by BRA or from wastewater treatment plants owned or operated by BRA, in accordance with the ED's interpretation of TWC §§11.042(b) and (c) and TCEQ rules.

The water availability results demonstrate that there is not a significant difference between the amounts available under the WMP using either the ED's approach or BRA's approach. The differences in the approaches for accounting, specifically that the BRA accounting does not track return flows on a real time basis, demonstrate that use of BRA's accounting approach would not provide adequate protection of senior water rights because it does not allow BRA to adjust its operations to account for changing conditions. Therefore, staff recommends that the WMP be revised to incorporate staff's

recommended appropriation values in Table 2.4, as shown above and that the WMP be revised to require compliance with the ED's accounting.