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Carlos Rubinstein, *Commissioner*
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Zak Covar, *Executive Director*



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

October 28, 2013

Bridget Bohac
Chief Clerk
Texas Commission on
Environmental Quality
P.O. Box 13087
MC-105
Austin TX 78711-3087

Re: Certified Questions relating to the application of Brazos River Authority's application for Permit No. 5851. SOAH Docket No. 582-10-4184; TCEQ Docket No. 2005-1490-WR

Dear Ms. Bohac:

Attached is the Executive Director's Response to Certified Questions in the Brazos River Authority's application for Permit No. 5851, filed pursuant to 30 Tex. Admin. Code § 80.131 and the Administrative Law Judges' Order No. 20.

Sincerely,


Robin Smith, Attorney
Environmental Law Division

Enclosure

cc: Mailing List

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

APPLICATION OF	§	BEFORE THE
BRAZOS RIVER AUTHORITY	§	
FOR PERMIT NO. 5851	§	TEXAS COMMISSION ON
	§	
	§	ENVIRONMENTAL QUALITY

EXECUTIVE DIRECTOR’S RESPONSE TO CERTIFIED QUESTIONS

The Executive Director (ED) of the Texas Commission on Environmental Quality (TCEQ or Commission) files this response to the questions that the Administrative Law Judges have certified to the Commission. The ED requests that the Commission answer the questions as recommended below. The Texas Water Code § 11.147(e-3) requires the Commission to apply adopted environmental flow standards that are effective at the time it issues a permit for a new appropriation. Additionally, the Commission does not have authority to add a transition rule to the Senate Bill 3 environmental flow standard rules that allows BRA to meet the SB 3 requirements after it obtains the permit.

The Executive Director recommends that the Certified Questions be answered as follows:

1. 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 those provisions mandatory?

Answer: Yes.

2. Does Texas Water Code § 11.147(e-3) require that the newly adopted environmental flow standards be applied immediately, or may their implementation be addressed under a § 11.147(e-1) “reopener” provision?

Answer: The new environmental flow standards apply on the effective date of the rules, i.e., 20 days after filing with the Texas Register. Therefore, they must be included in a permit issued after the effective date. The “reopener” provision cannot be used to add SB 3 requirements if the permit for a new appropriation is issued after the effective date of the SB 3 rules.

3. Assuming that timing requirements are directory or that application of new environmental flow standards may be addressed through a “reopener” provision, which environmental flow standard should be applied to BRA’s pending application?

Answer: The provision is mandatory. And the “reopener” provision does not apply if SB 3 rules for the basin have been adopted and become effective while the permit application is pending.

4. 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(e-1)’s “reopener” provision?

Answer: No.

Senate Bill 3

Senate Bill 3 (Reg. Sess. 2007) (SB 3) changed how impacts to the environment from the issuance of a water right will be determined. Changes were made to Section 11.147, and Section 11.1471 of the Water Code was added. Also Section 11.0235 was amended, and Sections 11.0236, 11.02361, and 11.02362 were added to the Water Code. In general, the bill created a locally driven process to establish environmental flow standards for different river basins and bay systems. Based on these recommendations and other factors in the Water Code, the TCEQ enacts rules for environmental flow standards to be placed in new appropriations of surface water in those areas.

Texas Water Code § 11.147, effects of Permit on Bays and Estuaries and Instream Uses, contains Subsections (b) through (e), which describe the environmental review that was required for an application for a new appropriation prior to SB 3.

SB 3 added Section 11.147(e-3) which provides that:

Notwithstanding Subsections (b) – (e), for the purpose of determining the environmental flow conditions necessary to maintain freshwater inflows to an affected bay and estuary system, existing instream uses and water quality of a stream or river, or fish and aquatic wildlife habitats, the commission **shall apply** any applicable environmental flow standard, including any environmental flow set-aside, adopted under Section 11.1471 **instead of** considering the factors specified by those subsections. (Emphasis added)

Section 11.147(e-3) is clear that if environmental flow standards have been adopted and are effective for a basin under Section 11.1471, any issuance of permits for new appropriations of water shall comply with those standards. The statute requires that the standards be applied to the water right and contains no exception to this requirement if an environmental review was performed under subsections (b) – (e) based on the prior requirements.

SB 3 also added Section 11.1471 which provides that the Commission must adopt environmental flow standards “for each river basin and bay system” by rule based on a schedule in Tex. Water Code Section 11.02362. The Environmental Flows Advisory Group has subsequently amended and extended the schedules in the Water Code. The deadline for the TCEQ’s adoption of the environmental flow standards for the Brazos

River and Bay system is March 1, 2014. Currently, the proposed adoption agenda is February 12, 2014. The rules would be effective no later than 20 days after filing with the Texas Register.

BRA Application

This application requests a new appropriation, reuse of return flows, and an exempt interbasin transfer. The SOAH hearing was held in February and March, 2011. On January 30, 2012, the Commission issued an Interim Order remanding the application back to SOAH for consideration of a Water Management Plan (WMP) and any necessary changes to the draft permit. The Interim Order set a timeline for technical review and required the ALJs to have a Proposal for Decision 24 months from the date of the order, January 30, 2014. Under this timeline, the application would be through the contested case hearing process with a Proposal for Decision (PFD), and could have been issued, before the SB 3 rules are effective. However, the ALJs have twice extended the hearing schedule.

The ALJs extended the hearing schedule in Order No. 15 to change the hearing date to January, 2014, with the record to be closed by the end of February. The existing parties had discussed a schedule based on a January hearing, but the schedule was not adopted. With the extension of the hearing date in Order No. 18 to April and May, 2014, both the hearing, and Commission consideration of the application will be several months after the SB 3 rule adoption. The ED's position is that BRA's draft permit should include SB 3 environmental flow standards because the permit will not be issued until after the SB 3 rules are adopted and effective. Additionally, BRA will know what the SB 3 standards for the Brazos River are several months before the hearing on this application.

Reopener

BRA argues that the Commission can use Tex. Water Code § 11.147(e-1) to place a reopener provision in BRA's permit to allow BRA to amend the permit to add the environmental flow standards adopted under Section 11.1471. The existing draft permit contains a provision providing that BRA has three years to amend its permit to add the Senate Bill 3 environmental flow conditions. However, this provision in the draft permit was added during the technical review period in 2012, before the extensions of the hearing schedule.

Section 11.147(e-1) provides that any permit for a new appropriation of water issued after September 1, 2007 must include a provision "allowing the commission to adjust the conditions included in the permit or amended water right to provide for protection of instream flows or freshwater inflows." The ED has included a "reopener" provision in all permits issued after September 1, 2007 for an additional appropriation of water that contained environmental conditions, but where no environmental standards have been adopted.

This statute applies when a water right is issued before adoption of the SB 3 environmental flow standards and allows the permit to be reopened to adjust the existing pre-SB-3 environmental conditions to the SB 3 standards. The statute can also

apply to a water right that already contains SB-3 environmental flow standards to allow the SB 3 requirements to be adjusted. The adjustment, in combination with any prior adjustments, cannot be a pass through or release requirement that is more than 12.5% of annualized total of that requirement in the existing permit and, in an amended permit, is only applicable to any new appropriation.

Whether the Statute is Mandatory

BRA argues that Section 11.147(e-3) is not mandatory because there is no timeline in the subsection and it does not include a consequence for noncompliance.

The ED disagrees. “Shall,” when used in a statute “imposes a duty.” Tex. Code Construction Act § 311.016. A court generally construes the word “shall” as mandatory, unless legislative intent suggests otherwise. A statute specifying that an act be performed within a certain time without any words restraining the act's performance after that time is usually directory. *Helena Chemical Company v. Wilkins*, 47 S.W.3d 486, 494 (Tex. 2001). Generally, courts construe a statutory provision as mandatory when the power or duty to which it relates is for the public good. *Albertson's Inc. v. Sinclair*, 984 S.W.2d 958, 961 (Tex. 1999). The effect of holding a statute to be mandatory is to require at least substantial compliance with its provisions in order to uphold proceedings to which the statute is applicable.

In determining whether the legislature intended a statutory provision to be mandatory or directory, a court considers the plain meaning of the words used, as well as the entire act, its nature and object, and the consequences that would follow from each construction. *Helena Chemical Company v. Wilkins*, 47 S.W.3d 486, 494 (Tex. 2001).

Ordinarily, provisions that do not go to the essence of the act to be performed but that are, rather, included for the purpose of promoting the proper, orderly, and prompt conduct of business are not regarded as mandatory. *Lewis v. Jacksonville Bldg. and Loan Ass'n*, 540 S.W.2d 307 (Tex. 1976).

Using the factors listed in the statute and cases above, the ED believes that the statute is mandatory. Section 11.147(e-3) states “the commission **shall** apply any applicable environmental flow standard, including any environmental flow set-aside, adopted under Section 11.1471 instead of considering the factors specified by those subsections” for the purpose of determining the environmental flow conditions. (Emphasis added)

The use of the word “shall” is usually mandatory. The plain meaning of the words of Section 11.147(e-3) is that if there are adopted SB3 environmental standards for the basin, those standards apply to any new appropriation.

Certain provisions of SB 3 indicate that the intent of the statute supports inclusion of the SB 3 conditions. Tex. Water Code § 11.0235(d-2) provides:

The legislature finds that to provide certainty in water management and development and to provide adequate protection of the state's streams, rivers, and bays and estuaries, the state must have a process with specific timelines

for prompt action to address environmental flow issues in the state's major basin and bay systems, especially those systems in which unappropriated water is still available.

In this provision, the legislature expressed the importance of having specific timelines and the need for prompt action in developing environmental flow standards in the state. The requirement that the environmental flow standards be in the permit is also for the public good, providing certainty in water management and adequate protection of the environment. SB 3 also recognizes the need to start with SB 3 environmental flow conditions and through adaptive management, continue improving the process. Tex. Water Code § 11.0235 (d-5).

Section 11.147(e-3) does not specifically provide a consequence for not following the statute. This would support a finding that the rule is not mandatory. However, the parties to a hearing on the application could argue that the environmental conditions in the permit do not comply with the law and therefore should be stricken from the permit, requiring another technical review and possible hearing.

Transition Rule

For the reasons discussed above, the ED also believes that the SB 3 statutes do not support a transition rule allowing an applicant for an application reviewed under Section 11.147(b) – (e), but not issued until after the Senate Bill 3 rule environmental flow standards are adopted and effective, to be issued a draft permit with Section 11.147(b) – (e) special conditions and a reopener clause.

In comments to the proposed SB 3 rules for the Brazos River Basin, BRA has proposed the following transition rule:

For any water right permit application that is pending before the Commission on the effective date of this subchapter, or on the effective date of any amendment to this subchapter, and for which a draft permit has been prepared and noticed in accordance with the Commission rules, that pending draft permit may be issued in accordance with preexisting environmental flow requirements, without additional immediate review under this subchapter, so long as the permit issued requires the permittee, within three (3) years after the permit is effective and non-appealable, to prepare and submit to the executive director a report assessing the permit's consistency with the provisions of this subchapter, and if necessary, to submit an application to amend the permit to ensure consistency with this subchapter.

The ED's concerns are that this rule would very likely only apply to BRA, and other applicants for pending permits have been told they must comply with the SB 3 rules. For some applicants, staff completed its technical review prior to adoption of the SB 3 requirements but the permit had not been issued. In these cases staff amended its technical review to include the SB 3 environmental flow standards. Some of these applicants had previously approved accounting plans that they had to revise to include the standards.

When SB3 environmental flow standards were initially adopted in 2011, public comments were submitted requesting that applications that were declared

administratively complete prior to the effective date of SB 3 should either be grandfathered from the environmental flow standards or given the option to accept environmental flow conditions based on the rules in effect at the time of administrative completeness or the new standards. The Commission rejected the request based on the language in the statute. (36 Tex. Reg. 2935, May 6, 2011) Likewise, the Commission should also reject BRA's similar request for an SB3 transition rule that is the basis for the certified questions that BRA proposed.

Conclusion

In conclusion, the Executive Director requests that the Commission answer the certified questions as recommended above because the SB3 statute is mandatory and does not allow the adoption of a transition rule.

Respectfully Submitted,

TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

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CERTIFICATE OF SERVICE

I hereby certify that on October 28, 2013, "The Executive Director's Response to Certified Questions" was filed with the Office of the Chief Clerk, Texas Commission on Environmental Quality, Austin, Texas and sent via email to all the parties.

Robin Smith

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SOAH Docket No. 582-10-4184
TCEQ Docket No. 2005-1490-WR

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