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October 28, 2013

Via e-filing
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Re: SOAH DOCKET NO. 582-10-4184; TCEQ DOCKET NO. 2005-1490-WR
Application by the Brazos River Authority for Water Use Permit No. 5851

Dear Clerk:

Enclosed please find for filing *Chisholm Trail Ventures, L.P.'s Brief on Certified Questions* in the above-referenced case.

If you have any questions, please contact us at your convenience.

Thank you,



Monica Jacobs

Enclosure

cc: Service List

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

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

CHISHOLM TRAIL VENTURES, L.P.’S BRIEF ON CERTIFIED QUESTIONS

On Monday, October 21, 2013, the Administrative Law Judges (“ALJs”) submitted four certified questions regarding the application of proposed environmental flow standards for the Brazos River Basin to the application for Water Use Permit No. 5851 (“Application”) under consideration in this proceeding. Except for numbering, the certified questions submitted by the ALJs are identical to those proposed by the Brazos River Authority (“BRA”) in its Motion for Certified Questions. Chisholm Trail Ventures, LP (“Chisholm”) does not oppose the Commission’s consideration of the certified questions to the extent that doing so now will obviate further argument on this point by BRA.

Chisholm respectfully requests, for the reasons detailed below, that the Commission answer BRA’s certified questions in a manner that avoids the creation of an additional two-step process and allows for consideration of the new standards as part of the decision-making process on the pending Application. Further, because these questions were not fully briefed for the ALJs before their submission to the Commission, Chisholm respectfully requests that the General Counsel provide a briefing schedule allowing the parties additional time for these initial responses and an opportunity to file a reply in order to provide the Commission with a more comprehensive briefing on this important issue.

I. Current Procedural Status and BRA’s New Two-Step Proposal

A. All Parties, Including BRA, Acknowledge That Barring Further Action by the Commission, the Brazos Basin Environmental Flow Standards Will Apply to BRA’s Permit, If Issued.

According to the schedule set by the Texas Environmental Flows Advisory Group, environmental flow standards for the Brazos River Basin must be adopted by March 1, 2014. *See* Tex. Environmental Flows Advisory Group Report to the Governor, Lieutenant Governor, and Speaker of the House, p. 5 (June 2013). TCEQ anticipates adoption on February 12, 2014. *See* Memorandum from L’Oreal W. Stepney, Deputy Director, Office of Water to the TCEQ Commissioners, p. 4 (Aug. 16, 2013). At the earliest, the final Commission decision regarding the Application will be made a few months after the live hearing, which is currently scheduled for April 21 – May 2, 2014. Order No. 18.¹

¹ References to motions and orders refer to documents in this proceeding, TCEQ Docket No. 2005-1490-WR, SOAH Docket No. 582-10-4184, unless otherwise noted.

Consequently, as BRA acknowledges, barring action by the Commission, the new standards will apply to BRA's permit, if issued. BRA Comment Letter Regarding Rule Project No. 2013-009-298-OW, p. 2 ("BRA Comment Letter").

By these certified questions, BRA is requesting that one of two delaying mechanisms be employed by the Commission. In doing so, BRA is effectively requesting yet another two-step permitting process, which like BRA's previous two-step proposal, is flawed and should be rejected.

B. Like the WMP Two-Step Process, BRA's Proposed Environmental Flow Standards Two-Step Process Is Irreparably Flawed.

1. The Commission found the WMP two-step process to be fundamentally flawed.

BRA originally proposed a two-step process for the Commission's consideration of its Application ("WMP Two-Step Process"). See BRA Amended Post-Hearing Written Argument, pp. 25-30. Step 1 was to have included a full contested case hearing process, resulting in the issuance of BRA's permit, with an amount of water appropriated and a corresponding priority date, but no water management plan. BRA expected Step 1 to end on January 25, 2012 with the Commission consideration of its initial permit Application at the Commission agenda. After the issuance of BRA's permit, Step 2 would have commenced with the development of the Water Management Plan ("WMP"), which was expected to take another three to five years. See Comments of Douglas G. Caroom, TCEQ Commission Agenda Meeting re. SOAH Docket No. 582-10-4184 (Jan. 25, 2012). BRA's proposal provided that the WMP would then be subject to a full contested case hearing, resulting in a second decision many years following the conclusion of Step 1. See BRA Amended Post-Hearing Written Argument, pp. 25-30.

On January 25, 2012, however, the Commission correctly concluded that the WMP Two-Step Process failed because the Application presented in Step 1 did not provide much of the information required by law. See TCEQ Interim Order Concerning the Administrative Law Judges' Proposal for Decision Regarding the Application of the Brazos River Authority for Water Right Permit No. 5851, p. 1 (Jan. 30, 2012).

2. The proposed environmental flows two-step process is also fundamentally flawed.

Now, BRA proposes a second two-step process, this time asking the Commission to issue its requested permit, but delay incorporation of the Senate Bill 3 ("SB 3") environmental flow standards until a subsequent proceeding ("Environmental Flows Two-Step Process"). Again, the two-step process would entail a considerable delay between the two steps.

This time, BRA proposes two possible delaying mechanisms via its Motion to Certify Questions: delaying the effective date of the applicable SB 3 rules (under the theory that compliance with statutory and Environmental Flows Advisory Group deadlines is discretionary – see Question 1) or adding a rule that would provide that a pending application may be issued now and have

adopted standards applied through a reopener or other similar rule later (see Questions 2, 3, and 4).

As discussed in Part IV, below, there is a substantive and important difference between being able to consider applicable standards as a part of the question of whether the initial Application should be granted and in what form it should be issued versus having those standards incorporated after the permit has been issued. Any procedural mechanism that takes away that fundamental part of this contested case process should be rejected.

II. Response to Certified Question 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 these provisions mandatory?

Chisholm does not believe that there is any ambiguity in the statutory provisions related to the timing of the adoption and application of environmental flow standards. The applicability of the standards to the Application is clear, and BRA itself expresses no doubt that under the law, the Commission must apply environmental flow standards to its Application: “Without a transition rule, immediate application of the newly adopted standards will be required by existing rules.” BRA Comment Letter at p. 2.

In the BRA Comment Letter on the proposed environmental flow standards, however, BRA appears to be attempting to inject ambiguity by stating that “Texas Water Code § 11.147(e) omit(s) any deadline by which the Commission must apply ‘any applicable environmental flow standard.’” BRA Comment Letter, p. 2. There is no ambiguity regarding the appropriate timing of the application of the environmental standards, however, when legislative intent and context are considered as required by the rules of statutory construction. *See, e.g., TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 438-439 (Tex. 2011)(providing that the rules of statutory construction require consideration of what the legislature intended and that the statute be read in context with the entire statutory scheme).

In contrast, both the express legislative intent and context provided by other SB 3 provisions support an interpretation by the Commission that the timing requirements referenced in Question 1 are mandatory.

A. The Context Provided by Other Senate Bill 3 Provisions Supports the Conclusion That Existing Timing is Mandatory.

The context provided by the entire statutory scheme for the development and adoption of environmental flow standards shows that the Legislature did not intend for TCEQ to determine when the standards would apply. Under Water Code Section 11.02362(e), the Legislature specifically granted the authority to set and change deadlines for rule adoption to the Environmental Flows Advisory Group (“Advisory Group”). The procedure laid out in the statute specifies TCEQ’s limited involvement in the Advisory Group’s actions with respect to setting and changing schedules: The Advisory Group is required to consult the Commission in the development of the schedule and may make changes to the schedule upon request of the Commission (or others). Tex. Water Code § 11.02362(e). Additionally, since one of the nine

members of the Advisory Group must be a TCEQ Commissioner, TCEQ is afforded direct input into the setting of deadlines via that Commissioner's participation. Tex. Water Code § 11.0236(c)(1).

In other words, the legislatively-provided opportunity for the Commission's involvement in the schedule-making process has passed.

B. Legislative Intent for Senate Bill 3 Implementation Supports the Conclusion that Existing Timing is Mandatory.

The Legislature, stating its intent to address environmental needs as quickly as possible and on a rapid schedule, set up a complex series of activities to occur over a period of years to achieve its goal as quickly as reasonably possible. Water Code Section 11.0235(d-2) includes the express Legislative finding 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." Emphasis added. Each step in that process entails a deadline imposed or to be imposed by the Advisory Group. And each deadline is crucial to the steps in the series and the completion of the activities required under the statute. See, e.g., Tex. Water Code § 11.02362(a), (c)(1), (c)(2), (c)(3), (c)(4), (c)(5), (d), and (q).

Even if the Commission were to find, however, that the timing requirements are not mandatory, the Commission should refrain from changing the existing schedule for reasons discussed below.

III. Response to Certified Question 2. 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?

Again, for reasons discussed in Part II, it does not appear that the Legislature intended to delay the application of adopted environmental flow standards to pending applications; use of a reopener provision to delay the initial application of the new standards to BRA's Application is neither necessary nor appropriate.

Furthermore, delaying application of adopted environmental flow standards is not the intended use for the reopener provision. Rather, knowing that the prescribed process for developing the new standards was necessarily lengthy, the Legislature provided a way for the Commission to amend permits to incorporate new standards into *permits issued or amended between the effective date of Senate Bill 3 and the adoption of applicable standards*. In other words, reopener provisions are mechanisms to ensure some inclusion of environmental flow standards when those standards are not yet ready at the time when the Commission acts on an application. In this case, as BRA notes, the standards will in fact be ready in time.

IV. Response to Certified Question 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?

Chisholm understands this question to be asking the Commission whether the Commission will delay the application of the standards to BRA’s Application through a reopener provision or some other delaying mechanism. For the reasons discussed below, the new environmental flow standards should remain part of the contested case process.

A. The Process Afforded by Current Law Allows for Consideration of the New Standards in the Initial Decision-Making Process on BRA’s Application.

Under current law, BRA’s Application, *including provisions regarding environmental flows*, is currently being considered in a full contested case hearing—Application by the Brazos River Authority for Water Use Permit No. 5851; TCEQ Docket No. 2005-1490-WR; SOAH Docket No. 582-10-4184 (“BRA Permit Hearing”). In other words, the environmental flows requirements and how these requirements mesh with and affect the way BRA proposes to manage the Brazos Basin are being considered in the initial decision-making process on BRA’s Application as an integral part of BRA’s proposed basin management plan.

And the current process is consistent with legislative intent: According to the Author’s/Sponsor’s Statement of Intent for Senate Bill 3, “[s]uch (environmental flow) standards would be utilized in the decision-making process for new water right applications.” Bill Analysis, Tex. S.B. 3, 80th Leg., R.S., 1 (Aug. 16, 2007).

B. Environmental Flow Considerations Are Integral to the Application.

As is clear from the Application, environmental flow considerations are not a discrete issue that can be carved out and considered separately without affecting other parts of the Application. Environmental flow provisions are integral to the permit, including the Water Management Plan and its Technical Reports. BRA represents that a change to the environmental flow standards would require “considerably more time to reanalyze hydrologic issues” and that this analysis would take six to seven months (BRA Motion to Certify Questions, p. 2), suggesting that the issue is fundamental to its Application.

The details of the various documents support this conclusion. The Executive Director’s Draft Permit No. 5851 (dated June 28, 2013) includes four special conditions related to environmental flows. The text portion of the Water Management Plan includes thirteen pages of environmental flows-related material, including detailed tables of specific flow rates for specific gages, water quality protection points, exceptions to high flow pulse requirements, and run-of-river diversion rate trigger levels. *See* BRA Water Management Plan, pp. 27-40. The Water Management Plan Technical Report includes an additional 26 pages in the Water Supply Operations Section regarding environmental flows, environmental flows accounting plan provisions (the accounting plans themselves are not included in this page count), and an entire section on Adaptive Management. Indeed, environmental flow requirements factor into the analysis of the fundamental issue of the Application: how much water is available for BRA to appropriate.

C. Use of a Reopener Provision (or Other Delaying Mechanism) Would *Not* Allow for Consideration of the New Standards in the Initial Decision-Making Process on BRA's Application, Which Would Deprive Protestants of Essential Existing Process.

Due process at a minimum requires notice and an opportunity to be heard at a meaningful time and in a meaningful manner. *Texas Workers Comp. Comm'n v. Patient Advocates*, 136 S.W.3d 643, 658 (Tex. 2004). Because of the integral nature of the environmental flows requirements and the far-reaching scope and complexity of BRA's Application, the Environmental Flows Two-Step Process proposes a significantly lesser process than the one to which the protestants in the ongoing hearing are currently entitled by law – lesser in a way that substantially and negatively affects the protestants' ability to meaningfully participate in the consideration of the full Application. Even if the opportunity for a contested case hearing on how these standards are applied to BRA's permit is offered in the future, that opportunity will not be equivalent to the current hearing because the parties will have lost the chance to assess and comment on the merits of *the rest* of the proposed permit in the context of and *as affected by the standards*.

Further, consideration of environmental flow standards under a Water Code Section 11.147(e-1) "reopener" provision would not necessarily provide equivalent results. As noted in Part IV.B, above, although it is clear that environmental flow analyses and provisions based upon them are integral to and affect many other parts of the proposed permit, under a reopener provision, only the environmental flow conditions themselves are on the table. *See* 30 TAC § 298.25(h). In addition, the range of options that can be considered are limited essentially to within a 12.5% margin of the standards existing in the permit. *Id.*

V. Response to Certified Question 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?

A. As a Matter of Policy, a Reopener Provision or Other Delaying Mechanism Should Not Be Used for BRA's Application.

As discussed above, any option that provides for an add-in of the new environmental standards *after* the BRA Permit Hearing effectively deprives the current protestants of substantial existing process that is key to meaningful participation in this contested case. Even if the opportunity for a contested case hearing on how these standards are to be applied to BRA's permit is offered in the future—which seems doubtful given the available procedural avenues—that opportunity will not be equivalent to the current hearing because the parties will have lost the chance to assess and comment on the merits of *the rest* of the proposed permit in the context of and *as affected by the standards*. With an application as massive and far-reaching as BRA's application, the loss of this aspect of the ongoing hearing process is a significant detriment and harmful to the parties to the BRA Permit Hearing. Neither avoidance of delay nor cost warrants this result in this case.

B. Avoidance of Inconvenience and Expense Do Not Outweigh Contested Case Process Concerns.

In other contexts, BRA has argued that use of a delaying mechanism is appropriate in order to avoid potential “additional workload and delays for TCEQ staff already overloaded and backlogged with water right permit processing,” as well as delays and increased expenses for BRA and other parties to the permit hearing. BRA Comment Letter, pp. 1, 2. BRA also seems to suggest that the new standards would not have been applicable if the procedural schedule had not been delayed. This is simply not the case. Under the orders of the Commission and the ALJs, BRA has known since January of 2012 or at the latest, January 2013, that the final consideration of its permit would occur after the expected rule adoption. The protestant parties’ subsequent request to add a few more months to the schedule did not cause BRA’s timing concern.

And, other parties to the hearing, such as Chisholm, are also conscious of TCEQ staff’s workload and the time and expense associated with monitoring and participating in the processes surrounding BRA’s Application; many participants have other water right permit applications pending at TCEQ and no one is happy about the costs of litigation.

However, BRA’s concerns regarding delay do not square with its positions previously taken in this case. BRA has proposed delays twice. Under BRA’s WMP Two-Step Process, its Application would have been the subject of two separate contested case hearings, separated by a period of three to five years. Simply put, BRA’s current concerns about delay are inconsistent with its past proposals.

Additionally, there is no reason to believe that there would be significant savings of effort or cost by putting off consideration of environmental flow standards into a later proceeding rather than factoring them in during this proceeding. The analysis and WMP development would still be required; the work and cost are simply delayed, not avoided.

Most importantly, even if delaying application of the standards to a later proceeding would result in some savings of time or money, the need for an adequate and meaningful process outweighs any such savings. Parties such as Chisholm are concerned about additional cost, but Chisholm is *more* concerned that the protestants have an opportunity to critically review and explore the details of BRA’s entire, extremely complex Application, a large and integral part of which consists of the environmental flow provisions in the contested case hearing process, as the law allows and as BRA repeatedly assured would occur.

VI. Conclusion

By these certified questions, BRA is requesting that one of two delaying mechanisms be employed by the Commission. In doing so, BRA is effectively requesting yet another two-step permitting process, which like BRA’s previous two-step proposal, is fundamentally flawed and should be rejected.

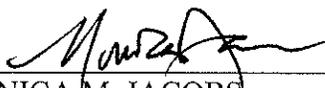
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hearing are currently entitled by law – lesser in a way that substantially and negatively affects the protestants’ ability to meaningfully participate in the consideration of the full Application.

For this reason, and the reasons discussed above, Chisholm respectfully requests that the Commission answer BRA’s certified questions in a manner that avoids the creation of an additional two-step process and allows for consideration of the new standards as part of the decision-making process on the pending Application.

Respectfully submitted,

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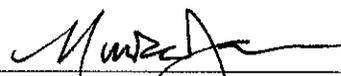
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CERTIFICATE OF SERVICE

I certify that on October 28, 2013, the foregoing *Chisholm Trail Ventures, L.P.’s Brief on Certified Questions* was filed with the Chief Clerk of the Texas Commission on Environmental Quality and sent by electronic mail to all persons on the attached service list, pursuant to the Administrative Law Judges’ Order No. 18.



Monica M. Jacobs

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SOAH DOCKET NO. 528-10-4184

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