

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

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

NATIONAL WILDLIFE FEDERATION’S BRIEF IN RESPONSE  
TO CERTIFIED QUESTIONS

The National Wildlife Federation (NWF) generally opposes the acceptance by the Commission of the questions certified by the Administrative Law Judges, at the request of the Brazos River Authority, in Order number 21. Three of the four questions are broad policy questions that are not the proper subject of a certified question in the context of an individual contested case hearing. The three questions posed are not specific to the facts of this case, but, rather, are questions of general applicability that a broad spectrum of the public should have a chance to weigh in on. The remaining question—Question 3—is relevant only if the other questions are answered in a certain way and, accordingly, it also is not appropriate for consideration in this context.

**Certified Question 1:** *Commission interpretation of the deadlines established by the Environmental Flows Advisory Committee [sic] and Texas Water Code § 11.147 (e-3) is needed: Are the timing requirements of these provisions mandatory?*

Section 11.147 (e-3) doesn’t have any timing requirements that are ambiguous such that they are open to interpretation in this hearing. The plain language of the statute directs the commission to apply any applicable environmental flow standard in determining environmental flow special conditions. “Environmental flow standard” is defined in the Texas Water Code as “those requirements adopted by the commission under Section 11.1471.” TEX. WATER CODE § 11.002 (17); *see also* 30 TAC § 298.1 (4). TCEQ’s rules already establish when adopted environmental flow standards are applicable. Section 298.15 (b) indicates that, in determining environmental flow conditions, flow standards are to be applied to any application to which Chapter 298 applies. 30 TAC § 298.15 (b). Section 298.10 indicates that Chapter 298 applies when there is an adopted environmental flow standard applicable for a given location and applies to water appropriated under a new permit if the application was pending with the commission before September 1, 2007, or filed with the commission after that date. Because this application was pending before September 1, 2007, the only relevant inquiry under § 11.147 (e-3) is if there will be adopted environmental flow standards for relevant locations at the time that a permit is issued, if one is issued, pursuant to this application.

The second component of this question asks if the schedule established by the Environmental Flows Advisory Group—presumably the question, in referring to the Environmental Flows Advisory Committee, intends to refer to the Environmental Flows Advisory Group established pursuant to Section 11.0236 of the Water Code—can be considered to be more of a suggestion than a requirement. The process for development of environmental flow standards has an aggressive schedule that expert science teams, stakeholder committees, and the commission have been held to since the adoption of the legislation. When the Environmental Flows Advisory Group has determined that there was good cause to change a deadline it had established, the Advisory Group has been the entity to make such a decision. Furthermore, as discussed further below in addressing other certified questions, the requested delay in applying environmental flow standards would create serious practical inefficiencies and inequities.

**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?*

The Section 11.147 (e-1) reopener provision is not an appropriate instrument for circumventing the initial application of environmental flow standards, as suggested by this question. That reopener provision is designed to serve as an adaptive management instrument to allow environmental flow permit conditions to be adjusted upward in the future if environmental flow standards, as adopted or revised after the permit has been issued, call for a higher level of protection and the Commission determines an adjustment is “appropriate to achieve compliance with” those new or revised standards. It is designed to be used when there are no standards to apply and to provide for adaptive management. It is not designed to be used as an excuse to issue a permit without incorporating environmental flow standards in existence at the time of permit issuance.

In order to provide certainty for water rights holders, there is a quantitative upper limit of 12.5% on the amount of that 11.147 (e-1) adjustment. Tex. Water Code § 11.147 (e-1)(1). The 12.5% limit is calculated based on the permit conditions in the permit as initially issued. *Id.* Using that reopener provision as suggested by BRA’s question would limit the extent of future adjustments in permit conditions because some or all of the 12.5% adjustment could be used up in getting the permit back to the level of protectiveness that it would have been at if initially issued under the applicable environmental flow standards. That is an unacceptable outcome and inconsistent with the statutory structure. Even worse, the 12.5% limitation might preclude the ability ever to get to that level. That would be inconsistent with Section 11.147(e-1) and (e-3) and with TCEQ’s rules. It would also be inconsistent with BRA’s previous representations,

throughout the hearing process, of implementing a robust adaptive management process under its requested permit to achieve strong environmental flow protection.

This is a very complicated permit application with potential diversion sites, some real and some wholly hypothetical, located up and down most of the mainstem of the Brazos River and most tributaries. As a result, it is very difficult to quantify the specific impact of this proposed approach, particularly at this stage of the proceeding. However, by way of example, there is at least one location—Brazos River near Palo Pinto—at which BRA, in its proposed permit, has proposed only a single water-quality minimum flow and at which the proposed environmental flow standards call for a more complete flow regime, with a subsistence flow, base flows, and pulse flows. If the 12.5% limitation of the § 11.147 (e-1) reopener were applied on a site-specific basis, that likely would preclude implementation of the more complete regime at that location.

As described in Section 298.25 (h) of TCEQ's rules, the reopener will be applied, for a flow component other than a pulse or similar volume-based requirement, based on an annual total of flow quantities. It is highly unlikely that the annual total of a water quality flow will be great enough to support a subsistence flow plus three levels of base flows. Although only one base flow level would apply during a season, even the lowest of the proposed seasonal base flow levels is greater than the water quality protection level in the proposed permit. In addition, the proposed standards for that location include multiple seasonal pulse flow requirements. There are other locations at which the proposed rules would establish flow standards and for which BRA's proposed permit does not include any environmental flow protections. There are still other locations at which the draft permit may be more protective than the proposed standards, although that is a complex fact issue.

TCEQ's rules for implementing the reopener provision do not specifically address complex applications like this one with multiple diversion points and multiple locations for environmental flow conditions. It may be appropriate in the case of this type of application to apply the 12.5% adjustment on some cumulative basis, rather than considering each measurement point individually. However, that question is too complex to be addressed adequately through the mechanism of a certified question.

The Section 11.147(e-1) reopener provision is not designed to be used in the way suggested by this certified question because doing so could thwart the implementation of environmental flow standards in effect at the time of permit issuance. That result would be inconsistent with TCEQ's rules and with Article 1 of Senate Bill 3.

**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?*

As discussed above in response to the first two questions, those assumptions are not well-founded and should be rejected. In addition, absent the application of the new environmental flow standards scheduled to be adopted in February, there is no “environmental flow standard” to apply. If this question seeks commission determination of the specific flow conditions that should be included in a permit, in the event a permit is granted, that fact-specific issue is not appropriate for consideration as a certified question. Indeed, one of the reasons that the Commission directed BRA to develop an application with real diversion points was to ensure a meaningful assessment of the effect of diversions on river flows and existing water rights.

**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?*

It is unclear how an answer to this question can be provided in a way that will help inform the ongoing contested case hearing. A decision about the content of TCEQ’s rules can only come through the rulemaking process, which is scheduled for completion in February. The reference to “preexisting environmental flow standards” is unclear because, to NWF’s knowledge, there are no such preexisting standards. NWF has already explained, in response to earlier questions, its concerns about the use of the Section 11.147 (e-1) reopener provision in this manner.

If the Commission were to seek to accommodate BRA’s request for special treatment in the rules it adopts establishing environmental flow standards, that accommodation should not come at the cost of reasonable environmental flow protection. The only possible option NWF has conceived of for providing flexibility without unduly sacrificing environmental flow protection would involve creating an applicant option in the rules. Under that approach, the environmental flow standard rules could include an option for a permit applicant, under the circumstances set out in the question, to delay the date when the environmental flow standards were applicable to its application in exchange for agreeing to the inclusion of special procedural conditions in its permit. The applicant, in order to avail itself of this option, would agree to a more expansive reopener provision adequate to ensure that the environmental flow provisions in the final permit would be, in some instances, more-protective—by not allowing a relaxation in any of the flow conditions in the permit as issued—and, in any event, no less

protective—by not allowing the applicant to rely on the 12.5% limitation on the permit reopener—than the flow conditions prescribed by the adopted environmental flow standards.

NWF does not interpret the Water Code as authorizing the Commission to impose such a mandatory requirement. However, an applicant could be provided the option to make such a voluntary election and agree, in exchange, to accept those permit conditions. An applicant could accept the necessary delay to allow evaluation and application of the new flow standards or they could elect a more accelerated process incorporating a mechanism to ensure that the environment and subsequent applicants are not short-changed by the applicant's election.

BRA has put the commission and protesting parties to a great deal of effort and expense in dealing with its unprecedented application. All of the parties are already preparing for a second contested case hearing. Under BRA's preferred approach, as suggested by its request for certified questions, even this second hearing would resolve little unless the permit is denied. If a permit is issued without applying the new flow standards, all of the evaluations and assumptions about flow protections and resulting impacts would potentially be out the window when the flow standards are applied. In addition, because of the 12.5% reopener limitation, it may not be possible to apply the standards. That simply is not a fair or reasonable result. At least if BRA is required to make a choice, if a permit is going to be issued, to either wait for the flow standards to be applied or to agree to live with flow conditions no less protective than what BRA is currently proposing, the evaluations and the hearing will resolve something for the other parties in the hearing even if a permit is issued.

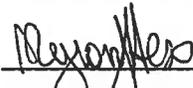
## **Conclusion**

For the reasons stated above, NWF urges the Commission not to accept the certified questions. If the Commission does choose to answer the questions, NWF requests that the Commission respond as follows:

1. The timing requirements are mandatory.
2. The Section 11.147(e-1) reopener provision is not an appropriate mechanism to allow for delayed application of adopted environmental flow standards and TCEQ rules provide that standards are to be applied immediately to pending applications.
3. The assumptions in this question are not well-founded and, absent the adoption of a rule providing a special applicant option that ensures any permit issued includes flow protections equal to or greater than the newly adopted flow standards, the new flow standards are to be applied to BRA's application.

4. The Commission does not have authority to adopt a "transition rule" as proposed in this question. If the Commission were to consider, as part of its rulemaking process, providing, for an applicant whose application has been fully processed through technical review or referred to SOAH for a contested case hearing at the time applicable flow standards are adopted, an option that would delay temporarily the applicability of the new standards to the application, that option should require the applicant to agree to accept flow protections equal to the more protective of the conditions in the permit as issued or conditions implementing the flow standards.

Respectfully submitted,

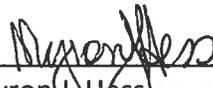


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#### CERTIFICATE OF SERVICE

I hereby certify by my signature below that on this 28<sup>th</sup> day October, 2013 a true and correct copy of the above National Wildlife Federation's Brief in Response to Certified Questions was served via email and/or First Class Mail, prepaid, to the parties on the attached Service List.



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