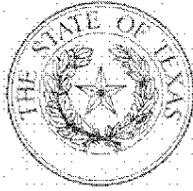


State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

September 23, 2015

Tucker Royall, General Counsel
Texas Commission on Environmental Quality
P.O. Box 13087
Austin Texas 78711-3087

**Re: SOAH Docket No. 582-10-4184; TCEQ Docket No.; 2005-1490-WR;
Concerning the Application by the Brazos River Authority for Water Use
Permit No. 5851 and Related Filings**

Dear Mr. Royall:

This letter constitutes our response to the exceptions and replies to exceptions that have been filed in response to our Proposal for Decision on Remand (PFDR) in this case.

**Reservoir Sedimentation and Its Impact on Total Appropriation Amounts and
Maximum Diversions by Reach**

In the PFDR, we concluded that the water availability analysis conducted by BRA and the ED incorrectly overstated the amount of water available for appropriation by BRA because the analysis was based, in part, on the permitted storage capacities in BRA's reservoirs, rather than the considerably smaller actual capacities of those reservoirs. In reliance upon evidence proffered by Dow, the ALJs recommended that the SysOp Permit's appropriation amounts in each of the four Demand Level Scenarios be reduced by 14% to account for reservoir storage capacity that has been lost to sedimentation.¹

In its exceptions, BRA and the ED complain that our recommendation on this point is based on "incomplete analysis" performed by Dow, and an "apples to oranges" application of that analysis by the ALJs. Specifically, BRA and the ED point out that: (1) Dow's analysis focused on the reduction that the loss of actual storage capacity would have on firm supply, as opposed to maximum annual use, under the SysOp Permit; and (2) Dow's analysis focused on

¹ PFDR at 53-66.

only two of the four Demand Level Scenarios set out in the permit. Thus, BRA and the ED contend there is insufficient evidence to support the 14% reductions proposed by the ALJs.²

BRA acknowledges that the loss of storage capacity due to sedimentation must be taken into account in determining the amount of water available under the SysOp Permit, but it claims it will do so when it determines how much SysOp Permit water it will make available to its customers.³ We continue to believe that BRA's approach puts the cart before the horse. That is, BRA would have the Commission issue it a permit for more water than it is entitled to, on the unenforceable assurance that BRA would sell to its customers only the water to which it is entitled.

We acknowledge that the recommendation to reduce, by 14%, the appropriation amounts under each of the four Demand Level scenarios was based upon the limited and imperfect evidence. However, it was the best and only evidence in the record that was on point. Moreover, the paucity of evidence on the issue is a problem of BRA's own making. BRA, the party with the burden of proof, chose not to conduct water availability modeling that took into account the actual storage capacity for its reservoirs. Thus, in the absence of better evidence, we recommended the 14% reductions, and we continue to stand by that recommendation. If the Commission believes the 14% reductions are insufficiently supported, then we suggest that the best alternative is to deny the SysOp Permit, on the ground that BRA failed to prove the appropriate amount of water available for the permit.

The Lake Granbury Coalition (LGC) agrees that, if the SysOp Permit is granted, the four Demand Level scenarios should each be reduced by 14%. LGC further argues that there should be corresponding reductions to the maximum authorized diversions from each of the 40 diversion reaches identified in the WMP. LGC points out that the maximum diversions by reach were developed using modeling based upon permitted reservoir capacities rather than actual capacities and they are, therefore, overstated in the same way that the overall appropriation amounts are overstated.⁴ The ED agrees, stating that if the appropriation amounts are changed, then "the maximum authorized diversions by reach would also need to be changed."⁵ In the absence of any other evidence in the record by which to measure the reductions by reach, we recommend that the maximum authorized diversions for each of the 40 diversion reaches identified in the WMP be reduced by 14%.

² ED Exceptions at 11-15; BRA Exceptions at 1-3.

³ BRA Exceptions at 1.

⁴ LCG Exceptions at 23-25.

⁵ ED Reply to Exceptions at 5.

Possible New Drought of Record

In the PFDR, we concluded that, in light of uncertainties created by the new drought of record (new DOR) in the area around Possum Kingdom Reservoir (PKR), the SysOp Permit should be issued with a special permit condition giving BRA nine months to study the effects of the new DOR and specifying that if the results of the BRA study indicate that the new DOR has decreased the amount of water available for the SysOp Permit, then the appropriation amounts specified in the permit shall be correspondingly decreased.⁶

BRA seeks a modification to this recommendation, explaining that its 9-month study will examine whether the amount of water available for the SysOp Permit has been reduced, but it will not provide the modeling needed to determine the specific amount of the reduction. Instead, in response to the findings of the 9-month BRA study, the ED would have to extend the WAM through the year 2015 and update the WAM with naturalized flows throughout the entire river basin. Accordingly, BRA suggests that the last sentence of the PFDR's proposed special condition 5.C.7 be revised as follows:

If the report concludes that the recently-ended drought decreases the amount of water available for appropriation under this permit, then the amount of that reduction shall be determined and the appropriation amounts specified in Paragraph 1.A of this permit shall be correspondingly reduced.⁷

We agree with this change and recommend that the Commission adopt it.

The National Wildlife Federation (NWF) is concerned that this revised language remains too open-ended, in that it does not specify a date certain by which the ED would have to determine the amount of the reduction.⁸ We agree, and believe it would be preferable to specify, in proposed special condition 5.C.7, the time frame within which the ED must make his determination of the amount of the reduction. However, we leave the appropriate time frame to the Commission's discretion.

Dow suggests that the parameters of the 9-month BRA study should be specified in much greater detail.⁹ Because the design of the study is beyond our area of expertise and the evidence in the record, we offer no opinion on Dow's suggestions.

⁶ PFDR at 265-66.

⁷ BRA Exceptions at 5. The ED agrees with this change. ED Exceptions at 23-24.

⁸ NWF Reply to Exceptions at 10-11.

⁹ Dow Exceptions at 28-30.

Rules: Directory v. Mandatory

In the PFDR, we concluded that the requirements of 30 Texas Administrative Code §§ 295.5, 295.6, and 295.7 are directory, not mandatory.¹⁰ All of the active opponents of the BRA application have filed lengthy exceptions to our conclusion. The ED also excepted to this conclusion, worrying that it could set a precedent that might be “misused in future applications.” The ED contends that the Commission need not find that the rules are directory because the application satisfies the requirements of the rules.¹¹

We continue to believe our conclusion that the rules are directory is the correct one. We agree with the ED, however, that the Commission need not construe the rules as directory in order to find that BRA has complied with them. Stated differently, even if the Commission concludes the rules are mandatory, we believe there is sufficient evidence in the record to support a finding that BRA met the rules' requirements.

Typographical Errors or Similar Revisions

We recommend the following corrections/changes to the PFDR and accompanying Proposed Order, which were pointed out by various parties:

The PFDR

- On p. 8, in the third unnumbered bullet point, “202,650” should be changed to “202,000”;
- On p. 32, in the last paragraph, “516,499” should be changed to “516,955”;
- On p. 61, near the end of the first full paragraph, the phrase “As explained by BRA” should be changed to “As explained by Dow”;
- On p. 176, in the last sentence of the third paragraph, “effective date” should be changed to “priority date”;
- On p. 214, in the second sentence of the first full paragraph, “NWF and BRA” should be changed to “NWF and FBR”;
- On p. 225, in the last sentence of the first full paragraph, “§ 11.046(c)” should be changed to “§ 11.042(c)”;
- On p. 228, on the last line of the first full paragraph, “direct” should be changed to “indirect”;
- On p. 253, in the first full paragraph, “202,650” should be changed to “202,000”;
- On p. 255, in the second full paragraph, the two references to “202,650” should be changed to “202,000”;

¹⁰ PFDR at 25-28.

¹¹ ED Exceptions at 22-23.

- On p. 272, on the first line of the third paragraph, “Dow, LGC, NWF, and BRA” should be changed to “Dow, LGC, NWF, and FBR”; and
- On p. 255, in the last paragraph, the two references to “516,499” should be changed to “516,955”.

The Proposed Order

- In Finding of Fact (FOF) 43, “2011” should be inserted immediately before “Region G”;
- In FOF 177.b
 - “of the WMP” should be added after the page reference; and
 - the phrase “with a reach” should be changed to “within a reach”;
- In FOF 184, the word “witness” should be changed to “witnesses”;
- The dollar amount in FOF 188 should be changed from “\$11,052” to “\$11,052.50”;
- The citation in Conclusion of Law (COL) 12 should be changed from “§ 2956.7” to “§ 295.7”;
- The citation in COL 24 should be changed from “§ 11.47(e-1)” to “§ 11.147(e-1)”;
- In Ordering Provision 2.b
 - “of the WMP” should be added after the page reference; and
 - the phrase “with a reach” should be changed to “within a reach”.

We recommend that all other exceptions be overruled.

Sincerely,



William G. Newchurch
Administrative Law Judge



Hunter Burkhalter
Administrative Law Judge

STATE OFFICE OF ADMINISTRATIVE HEARINGS

AUSTIN OFFICE

**300 West 15th Street Suite 502
Austin, Texas 78701
Phone: (512) 475-4993
Fax: (512) 322-2061**

SERVICE LIST

AGENCY: Environmental Quality, Texas Commission on (TCEQ)
STYLE/CASE: BRAZOS RIVER AUTHORITY
SOAH DOCKET NUMBER: 582-10-4184
REFERRING AGENCY CASE: 2005-1490-WR

**STATE OFFICE OF ADMINISTRATIVE
HEARINGS**

**ADMINISTRATIVE LAW JUDGE
ALJ HUNTER BURKHALTER**

REPRESENTATIVE / ADDRESS

PARTIES

MOLLY CAGLE
ATTORNEY
PARTNER, BAKER BOTTS, L.L.P.
1500 SAN JACINTO CENTER
98 SAN JACINTO BLVD.
AUSTIN, TX 78701
(512) 322-2532 (PH)
(512) 322-2501 (FAX)
molly.cagle@bakerbotts.com

GULF COAST WATER AUTHORITY (GCWA)

RICHARD LOWERRE
ATTORNEY
LOWERRE, FREDERICK, PERALES, ALLMON &
ROCKWELL
707 RIO GRANDE, SUITE 200
AUSTIN, TX 78701
(512) 469-6000 (PH)
(512) 482-9346 (FAX)
rl@LF-LawFirm.com

FRIENDS OF THE BRAZOS RIVER

BRAZOS RIVER ALLIANCE

FRED B WERKENTHIN, JR.
BOOTH, AHRENS & WERKENTHIN, P.C.
206 EAST 9TH ST., STE. 1501
AUSTIN, TX 7870
(512) 472-3263 (PH)
fbw@baw.com

DOW CHEMICAL COMPANY

KEN RAMIREZ
ATTORNEY AT LAW
LAW OFFICES OF KEN RAMIREZ, PLLC
BARTON OAKS PLAZA ONE
901 MOPAC EXPRESSWAY SOUTH, STE. 300
AUSTIN, TX 78746
(512) 329-2722 (PH)
(512) 329-2707 (FAX)
ken@kenramirezlaw.com

CITY OF GRANBURY

DOUG G. CAROOM
ATTORNEY
BICKERSTAFF HEATH DELGADO ACOSTA, LLP
3711 S. MOPAC EXPRESSWAY, BUILDING ONE, SUITE
300
AUSTIN, TX 78746
(512) 472-8021 (PH)
(512) 201-4515 (FAX)
dcaroom@bickerstaff.com

BRAZOS RIVER AUTHORITY

BRAD CASTLEBERRY
LLOYD GOSSELINK ROCHELLE & TOWNSEND, P.C.
816 CONGRESS AVENUE, SUITE 1900
AUSTIN, TX 78701-2478
(512) 322-5800 (PH)
(512) 472-0532 (FAX)
bcastleberry@lglawfirm.com

CITY OF LUBBOCK

TEXAS WESTMORELAND COAL COMPANY

MARISA PERALES
ATTORNEY AT LAW
LOWERRE, FREDERICK, PERALES, ALLMON &
ROCKWELL
707 RIO GRANDE, SUITE 200
AUSTIN, TX 78701
(512) 469-6000 (PH)
(512) 482-9346 (FAX)
marisa@lf-lawfirm.com

KEN HACKETT

BRAZOS RIVER ALLIANCE

FRIENDS OF THE BRAZOS RIVER

JOE FREELAND
ATTORNEY AT LAW
MATHEWS & FREELAND, L.L.P.
8140 N. MOPAC EXPWY., WESTPARK II, SUITE 260
AUSTIN, TX 78759-8884
(512) 404-7800 (PH)
(512) 703-2785 (FAX)
jfreeland@mandf.com

NRG TEXAS POWER LLC

SHANA HORTON
ATTORNEY
LAW OFFICES OF KEN RAMIREZ, PLLC
111 CONGRESS AVE., STE. 400
AUSTIN, TX 78701
(512) 573-3670 (PH)
(512) 394-7145 (FAX)
shana@kenramirezlaw.com

LAKE GRANBURY COALITION

GWENDOLYN HILL WEBB
WEBB & WEBB
P. O. BOX 1329
AUSTIN, TX 78767
(512) 472-9990 (PH)
(512) 472-3183 (FAX)
g.hill.webb@webbwebblaw.com

WILLIAM & GLADYS GAVAROVIC

COMANCHE COUNTY GROWERS (CCG)

MONICA JACOBS
KELLY, HART & HALLMAN, P.C.
303 COLORADO, SUITE 2000
AUSTIN, TX 78701-2944
(512) 495-6405 (PH)
(512) 495-6401 (FAX)
monica.jacobs@kellyhart.com

CHISHOLM TRAIL VENTURES, L.P.

COLETTE BARRON BRADSBY
TEXAS PARKS AND WILDLIFE DEPARTMENT
LEGAL DIVISION
4200 SMITH SCHOOL ROAD
AUSTIN, TX 78744
(512) 389-8899 (PH)
(512) 389-4482 (FAX)
colette.barron@tpwd.state.tx.us

TEXAS PARKS AND WILDLIFE DEPARTMENT

ELI MARTINEZ
PUBLIC INTEREST COUNSEL
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
12100 PARK 35 CIRCLE, MC-103, BUILDING F
AUSTIN, TX 78753
(512) 239-3974 (PH)
(512) 239-6377 (FAX)
elmartin@tceq.state.tx.us

OFFICE OF PUBLIC INTEREST COUNSEL

SUSAN M. MAXWELL
ATTORNEY AT LAW
BICKERSTAFF HEATH DELGADO ACOSTA, LLP
3711 S. MOPAC EXPRESSWAY, BUILDING ONE, SUITE
300
AUSTIN, TX 78746
(512) 472-8021 (PH)
(512) 201-4515 (FAX)
smaxwell@bickerstaff.com

BRAZOS RIVER AUTHORITY

ROBIN SMITH
STAFF ATTORNEY
TCEQ
LITIGATION DIVISION
P O BOX 13087, MC 173
AUSTIN, TX 78711
(512) 239-0463 (PH)
(512) 239-3434 (FAX)
rsmith@tceq.state.tx.us

EXECUTIVE DIRECTOR

JASON HILL
LLOYD, GOSSELINK, ROCHELLE & TOWNSEND, P.C.
816 CONGRESS AVENUE, SUITE 1900
AUSTIN, TX 78701
(512) 322-5855 (PH)
(512) 874-3955 (FAX)
jhill@lglawfirm.com

CITY OF LUBBOCK

CITY OF COLLEGE STATION

STEPHEN P. WEBB
WEBB & WEBB ATTORNEYS AT LAW
P.O. BOX 1329
AUSTIN, TX 78767
(512) 472-9990 (PH)
(512) 472-3183 (FAX)
s.p.webb@webbwebblaw.com

WILLIAM & GLADYS GAVAROVIC

COMANCHE COUNTY GROWERS (CCG)

BRADLEY B. WARE

RUTH TAKEDA
STAFF ATTORNEY
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
ENVIRONMENTAL LAW DIVISION
P.O. BOX 13087 P.O. BOX 13087
AUSTIN, TX 78711-3087
(512) 239-6635 (PH)
(512) 239-0606 (FAX)
ruth.takeda @tceq.texas.gov

TCEQ EXECUTIVE DIRECTOR

EMILY ROGERS
BICKERSTAFF HEATH DELGADO ACOSTA, LLP
3711 S. MOPAC EXPRESSWAY, BUILDING ONE, STE. 300
AUSTIN, TX 78746
(512) 472-8021 (PH)
(512) 320-5638 (FAX)
erogers@bickerstaff.com

BRAZOS RIVER AUTHORITY

JEFF CIVINS
ATTORNEY
HAYNES & BOONE, LLP
600 CONGRESS AVENUE, SUITE 1300
AUSTIN, TX 78701
(512) 867-8477 (PH)
(512) 867-8691 (FAX)
jeff.civins@haynesboone.com

LAKE GRANBURY COALITION

JIM MATHEWS
ATTORNEY AT LAW
MATHEWS & FREELAND, L.L.P.
P. O. BOX 1568
AUSTIN, TX 78767-1568
(512) 404-7800 (PH)
(512) 703-2785 (FAX)
jmathews@mandf.com

CITY OF BRYAN

MIKE BINGHAM
1251 C.R. 184
COMANCHE, TX 76442
(254) 842-5899 (PH)

MIKE BINGHAM

MYRON HESS
44 EAST AVENUE, SUITE 200
AUSTIN, TX 78701
(512) 610-7754 (PH)
(512) 476-9810 (FAX)
hess@nwf.org

NATIONAL WILDLIFE FEDERATION

RON FREEMAN
ATTORNEY
8500 BLUFFSTONE COVE, SUITE B.104
AUSTIN, TX 78759
(512) 451-6689 (PH)
(512) 453-0865 (FAX)
rfreeman@freemanandcorbett.com

GULF COAST WATER AUTHORITY

STEVE SHEETS
ATTORNEY
309 E. MAIN STREET
ROUND ROCK, TX 78664
(512) 255-8877 (PH)
(512) 255-8986 (FAX)
slsheets@sheets-crossfield.com

CITY OF ROUND ROCK

PAULINA WILLIAMS
BAKER BOTTS LLP
98 JACINTO BLVD, SUITE 1500
AUSTIN, TX 78701-4078
(512) 322-2543 (PH)
(512) 322-3643 (FAX)
paulina.williams@bakerbotts.com

GULF COAST WATER AUTHORITY (GCWA)

JOHN TURNER
HAYNES AND BOONE, L.L.P.
2323 VICTORY AVE.
DALLAS, TX 75202
(214) 651-5671 (PH)
(214) 200-0780 (FAX)
john.turner@haynesboone.com

LAKE GRANBURY COALITION

ED MCCARTHY
JACKSON, SJOBERG, MCCARTHY & TOWNSEND, LLP
711 W. 7TH STREET
AUSTIN, TX 78701
(512) 472-7600 (PH)
(512) 225-5565 (FAX)
emc@jacksonsjoberg.com

CITY OF HOUSTON

CHARLES PERRY
SENATOR
DISTRICT 28
CAPITOL STATION PO BOX 12068
AUSTIN, TX 78711
(512) 463-0128 (PH)
scott.hutchinson@senate.state.tx.us

COURTESY COPY

DIANA L. NICHOLS
KELLY HART & HALLMAN, LLP
303 COLORADO, SUITE 2000
AUSTIN, TX 78701
(512) 495-6400 (PH)
(512) 495-6401 (FAX)
diana.nichols@kellyhart.com

CHISHOLM TRAIL VENTURES, L.P.

JOHN J. VAY
ATTORNEY
ENOCH KEVER PLLC
ONE AMERICAN CENTER
600 CONGRESS AVENUE, SUITE 2800
AUSTIN, TX 78701
(512) 615-1231 (PH)
(512) 615-1198 (FAX)
jvay@enochkever.com

POSSUM KINGDOM LAKE ASSOCIATION

ANNIE E. KELLOUGH
ATTORNEY
NATIONAL WILDLIFE FEDERATION
44 EAST AVE, SUITE 200
AUSTIN, TX 78758
(512) 610-7751 (PH)
(512) 476-9810 (FAX)
kellougha@nwf.org

NATIONAL WILDLIFE FEDERATION
