

State Office of Administrative Hearings



Lesli G. Ginn
Chief Administrative Law Judge

August 4, 2016

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

VIA FACSIMILE NO. 512/239-5533

**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 Supplement to the Proposal for Decision on Remand (Supplement PFDR) in this case.

**Verbiage Protecting a Discharger's Ability to Obtain a Bed and Banks
Authorization in the Future**

In the Interim Order, the Commission directed the ALJs to recommend special conditions that would reduce or terminate BRA's appropriative rights in the return flows of others in the event a discharge decides, in the future, to directly reuse or obtain an indirect reuse bed and banks authorization for its discharges. In the permit as proposed in the Supplement PFDR, BRA will retain control over the return flows of another discharger until that discharger obtains a bed and banks authorization. In its exceptions, the City of Bryan (Bryan) requests permit verbiage that would prevent BRA from opposing a discharger's attempt to obtain such a bed and banks authorization on the grounds that the water has been permanently appropriated to BRA.¹ The Executive Director (ED) and Dow Chemical Company (Dow) support Bryan's request.²

¹ Bryan Exceptions at 2-5.

² Dow Reply at 4 - 5.

We agree that such verbiage would be appropriate and would implement the intent of the Commission, as evidenced by the Interim Order and the Commission's discussion of this issue during the open meeting on January 20, 2016. Accordingly, we recommend adding the following as the second sentence in section 5.A(3) of the Permit: "Permittee may not subsequently assert that this water right was granted based on the permanent use or availability of such return flows." As revised, section 5.A(3) would read as follows:

Permittee's storage, diversion and use of that portion of the appropriation based on return flows is dependent upon potentially interruptible return flows. Permittee may not subsequently assert that this water right was granted based on the permanent use or availability of such return flows. Permittee's storage, diversion and use of that portion of the appropriation based on surface water based return flows will be is interrupted by direct reuse or will be terminated by indirect reuse within the discharging entity's corporate limits, extraterritorial jurisdiction, or contiguous water certificate of convenience and necessity boundary, provided the discharging entity has applied for and been granted authorization to reuse the return flows and is terminated by indirect reuse upon the issuance of a bed and banks authorization pursuant to Texas Water Code § 11.042(c) by the Commission to the discharging entity.

The 14% Reductions for River Reaches

In the permit as proposed in the Supplement PFDR, the appropriation amount for each demand scenario is reduced by subtracting out the amount of BRA's own return flows. The permit then includes a special condition clarifying that BRA can generally only use 86% of the applicable appropriation amount (i.e., the 14% reduction to account for sedimentation in the relevant reservoirs). The permit includes a similar provision specifying that the maximum amount of water that BRA can use in each river reach is generally limited to 86% of the amounts shown in specified tables in the WMP Technical Report (again, to account for sedimentation).

Bryan points out, correctly, that the aggregate use of 86% in the reaches does not equal 86% of the overall appropriation amount, because the reach limitations are tied to tables in the WMP Technical Report that are no longer accurate. That is, none of the tables is modeled using only others' return flows and excluding BRA's return flows. Thus, for example, in Demand Scenario A, the permit would authorize BRA to:

- to use a maximum of 86% of 333,736 AFY;³ but
- when the maximum uses per reach are added up, they would total 86% of 381,474 AFY.⁴

³ Supplement PFDR at Finding of Fact 184(d), (k).

⁴ Bryan Exceptions at 7; BRA Ex. 113, WMP Technical Report at Table G.3.16.

Dow agrees with Bryan on this point.⁵ Both Dow and Bryan argue that the discrepancy can only be rectified by re-opening the record to conduct additional modeling or, presumably, the Commission can simply deny the permit.

The ED agrees that there is a discrepancy between the overall use amount and the aggregation of the use amounts by reach as referenced in the tables. However, the ED believes no additional modeling or changes to the permit are needed. As explained by Staff:

The ED agrees that BRA did not model only the return flows of others, but responds that, as part of its changes to the WMP, BRA will need to make adjustments to the appropriate tables in Appendix G to reflect the total amount of the appropriation authorized in its Permit 5851. The ED also responds that additional modeling is not necessary, nor is it contemplated under the Commission's Interim Order. The amounts in the reaches will be reduced by 14% and the total amount available for BRA's diversion and use will be limited by the total amount authorized in Permit 5851. Order Provision 1(g)(2) of the . . . proposed order would require BRA to modify its accounting plans to reflect the authorizations in its permit.⁶

We agree with the ED and do not believe that additional changes are needed to the Supplement PFDR on this point.

Miscellaneous Issues

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

- The revisions to Findings of Fact (FOFs) 60, 62, 67, 68, 88, and 170 proposed by the ED should be adopted;
- The revisions to FOFs 27 and 32 proposed by BRA should be adopted;
- The new FOF 163 proposed by BRA in its exceptions should be added, with modifications, as a new FOF 165:

165. BRA established through the evidentiary record that BRA's own return flows, of which diversion and use would be authorized under Permit No. 5851, total 47,332 acre-feet, and that the

⁵ Dow Reply at 13-14.

⁶ ED Reply at 5.

return flows of others, that BRA seeks to appropriate under Permit No. 5851, total 50,076 acre-feet.

The existing FOF 165 should be renumbered as 166, and the subsequent FOFs should be renumbered accordingly.

- The revisions to Conclusions of Law 1 and 19 proposed by the ED should be adopted; and
- In Ordering Provision 1.j., Special Condition 5.C.7 should be revised as follows: the phrase "the amount of that reduction shall be determined and" should be inserted before the ending phrase: "the appropriation amounts specified in Paragraph 1.A. of this permit shall be correspondingly reduced."

Because we consider them to be redundant of arguments already made and/or outside the scope of the limited remand in this case, 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

BRAZOS RIVER ALLIANCE

FRIENDS OF THE BRAZOS RIVER

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

FRIENDS OF THE BRAZOS RIVER

BRAZOS RIVER ALLIANCE

KEN HACKETT

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

JIM MATHEWS
ATTORNEY AT LAW
MATHEWS & FREELAND, L.L.P.
8140 NORTH MOPAC FRWY, STE 2-260
AUSTIN, TX 78759
(512) 404-7800 (PH)
(512) 703-2785 (FAX)

CITY OF BRYAN

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

COMANCHE COUNTY GROWERS (CCG)

WILLIAM & GLADYS GAVAROVIC

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 COLLEGE STATION

CITY OF LUBBOCK

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

BRADLEY B. WARE

COMANCHE COUNTY GROWERS (CCG)

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

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

CHAD RICHWINE
KELLY HART & HALLMAN, LLP
201 MAIN STREET, SUITE 2500
FORT WORTH, TX 76102
(817) 878-9366 (PH)
(817) 878-9871 (FAX)

CHISHOLM TRAIL VENTURES, L.P.

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

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

TUCKER ROYALL
GENERAL COUNSEL
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
P.O. BOX 13087
AUSTIN, TX 78711-3087

(512) 239-5533 (FAX)

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
