

STATE OFFICE OF ADMINISTRATIVE HEARINGS

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REGARDING: EXCEPTIONS LETTER (BY ALJ)
DOCKET NUMBER: 582-10-4184

JUDGE HUNTER BURKHALTER

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State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

December 19, 2011

Les Trobman, 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; In Re:
Concerning the Application by the Brazos River Authority for Water Use
Permit No. 5851 and Related Filings**

Dear Mr. Trobman:

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

We agree, in part, with the exceptions filed by the Texas Parks and Wildlife Department (TPWD). On pages 149-150 of the PFD, we discussed how Sections 11.042(c) and 11.046(c) of the Water Code can be reconciled with one another. We set forth two basic principles derived from our interpretation of the Water Code:

- Water Code Section 11.042(c) does not create an independent right to appropriate water, but only entitles a person “convey and subsequently divert” water for which he must otherwise hold an appropriative right; and
- Section 11.042(c) creates an appropriative right that may be obtained by “others” as to return flows that have been returned to a watercourse, however, the discharger of the return flows is not among those who can seek to appropriate the return flows pursuant to Section 11.046(c).

We continue to believe that the above principles correctly interpret the relevant law. However, having carefully reviewed TPWD’s exceptions, we believe one clarifying change to the PFD is warranted. In the PFD, we concluded:

[W]hen BRA seeks to reuse its own surface water-based return flows, it need only obtain a bed and banks authorization pursuant to Section 11.042(c), and need not obtain an appropriative right pursuant to Section 11.046(c). . . . Instead, if a discharger wishes to retain the right to divert its return flows after they have been discharged back into a watercourse, the only mechanism available to the discharger is through Section 11.042(c).¹

Upon reflection, we now believe the above quotation is misleading. We suggest that it be rewritten as follows:

When BRA seeks to reuse its own surface water-based return flows, then it must obtain a bed and banks authorization pursuant to Section 11.042(c) *and* it must have an appropriative right to the return flows. If BRA's existing water rights expressly authorize it to indirectly reuse water (i.e., to reuse return flows after they have been discharged into a watercourse), then BRA has the necessary appropriative right to the return flows. If BRA's existing water rights do not expressly authorize indirect reuse, then BRA must obtain a permit amendment to authorize indirect reuse.

Several Protestants contended that, if the Commission decides to deny the BRA Application, then it could issue a narrow order which discusses only the issues that led to the denial, and avoids analysis of the myriad issues that are extraneous to the reasons for denial. We agree.

We recommend that all other exceptions be overruled.

Sincerely,

William G. Newchurch
Administrative Law Judge

Sincerely,

Hunter Burkhalter
Administrative Law Judge

WGN; HB/sc
cc: Mailing List

¹ PFD at 150 (footnotes omitted).

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STYLE/CASE: BRAZOS RIVER AUTHORITY
SOAH DOCKET NUMBER: 582-10-4184
REFERRING AGENCY CASE: 2005-1490-WR

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HEARINGS**

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