

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

**APPLICATION BY THE BRAZOS § BEFORE THE
RIVER AUTHORITY FOR WATER § TEXAS COMMISSION ON
USE PERMIT NO. 5851 § ENVIRONMENTAL QUALITY**

**BRAZOS RIVER AUTHORITY'S REPLY TO EXCEPTIONS
TO THE PROPOSAL FOR DECISION**

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I. INTRODUCTION

The Administrative Law Judges (“ALJs”) seem to have given everyone something to disagree with. All parties, with the exception of the Office of Public Interest Counsel (“OPIC”), have filed exceptions to the Proposal for Decision (“PFD”).

From the Brazos River Authority’s (“BRA”) perspective the most significant issue, and the issue upon which the parties diverge most widely, is the PFD’s Recommendation. Should BRA’s Application No. 5851 be denied, remanded for further proceedings, or granted in a limited fashion? The Protestants generally urge outright denial. The Executive Director (“ED”) prefers issuance of the draft permit or, alternatively, resolution of disputed issues and remand for further proceedings on BRA’s Water Management Plan (“WMP”).¹ BRA agrees with the ED’s alternative recommendation, and has proposed issuance of an interim order, defining at least the appropriation at the downstream Richmond gage prior to remanding for hearings on the WMP.

The ED’s other exceptions focus primarily upon the legal issue of whether return flows should be available for appropriation as state water, and the hydrology issues involved in determination of the amount of water available for appropriation. These issues, along with differences raised by the draft permits of BRA and the ED, will be addressed separately from the Protestants’ remaining exceptions.

The Protestants’ remaining exceptions can be grouped into three categories: (a) issues related to environmental flow requirements proposed by the draft permits and the PFD; (b) issues concerning the public welfare inquiry, beneficial use, and state and regional water plan consistency; and (c) other issues. These are addressed in Sections II.C-G below.

¹ Neither the Texas Parks and Wildlife Department (“TPWD”) nor OPIC have yet addressed the issue.

II. ARGUMENT AND AUTHORITIES

A. **Recommended Action**

Of the three alternatives identified by the PFD, both BRA and the ED generally support the second alternative (remand for further hearings on the WMP) after entry of an order resolving some or all issues presented by the PFD. This course of action has the advantages of: (a) making the initial appropriation to BRA and providing the information needed for development of the WMP; (b) taking advantage of the extensive factual and legal record already developed on these issues; (c) conserving the resources of the parties by engaging in a single contested hearing; (d) avoiding the potential delay and expense of an appeal of any permit issued by the Commission prior to approval of the WMP; and (e) making water available to meet existing and anticipated needs much sooner than is possible with other alternatives.

The Protestants – Dow, the National Wildlife Federation (“NWF”), Friends of the Brazos River (“FBR”), and the Comanche County Growers and Mr. Ware (collectively, “CCG”) – urge complete denial of BRA’s Application No. 5851. All Protestants object to the third alternative (issuance of a limited permit) because they claim that it does not adequately address the alleged shortcomings of the two-step process identified by the PFD. If the Commission affirms the validity of the two-step process, as urged by the ED and BRA, this would effectively dispose of Protestants’ exceptions to the third alternative.² Even without affirmation of the two-step process, however, Protestants’ objections pose no obstacle to an interim order and remand for further hearings on the WMP.

² Significantly, affirming the validity of the two-step process does not prevent issuance of an interim order followed by a remand and hearings on the WMP. Even if the two-step process is a legitimate option, the Commission could choose to adopt the interim order alternative simply for the sake of efficiency.

FBR, NWF, and Dow advance arguments against remanding for further hearings on the WMP, many of which actually support entry of an interim order as suggested by BRA. Dow objects based upon the beneficial use issue;³ however, a Commission order confirming the PFD's conclusions on beneficial use would certainly resolve Dow's objection to remand in this regard. Similarly, FBR objects that the scope of the remand is undefined and that remand is pointless without resolution of key issues identified by BRA as critical.⁴ BRA agrees; these are issues that need to be addressed by an order of the Commission, such as the interim order proposed by BRA, in order to allow for a meaningful proceeding on remand. FBR also argues that abatement for development of the WMP will cause unjustified delay;⁵ again, BRA concurs that this is a concern and urges that current drought conditions justify imposition of a compressed schedule, such as the one recommended by BRA, to avoid any unnecessary delay.

Finally, FBR points to the inefficiency of requiring a new notice, allowing new parties to intervene, and possible re-litigation of issues already addressed by the PFD.⁶ In the same vein, NWF requests that the parties be allowed to propose orders "with appropriate procedures . . . for subsequent notice and for the accompanying remand for a SOAH hearing. . . ."⁷ BRA agrees that these are legitimate concerns, but believes that they can easily be addressed by the Commission in an interim order.

BRA agrees that a new notice will be required following its development of the WMP because the WMP will address issues that were not included within the original notice of its System Operation Permit application. BRA also agrees that new parties may qualify to intervene in the proceeding in response to the WMP notice. However, the inefficiencies feared by FBR

³ Dow Exceptions at 23.

⁴ FBR Exceptions at 3-4, 9-10.

⁵ FBR Exceptions at 4, 8-9.

⁶ FBR Exceptions at 3-4, 8.

⁷ NWF Exceptions at 1.

need not occur. Two fundamental principles assure this. First, “[a]n intervenor takes the suit as he finds it.” *Corzelius v. Cosby Producing & Royalty Co.*, 52 S.W.2d 270 (Tex.Civ.App.—Fort Worth 1932, no writ). Intervening parties are not entitled to re-litigate issues that have been decided or object to evidence already admitted. Second, rulings by the Commission in the interim order will be the “law of the case.” The “law of the case” doctrine affirms that questions of law determined by a court will govern the case throughout subsequent proceedings so that the issues in subsequent stages of the litigation can be narrowed, thus achieving judicial economy and efficiency as well as uniformity of decision. *Hudson v. Wakefield*, 711 S.W.2d 628, 630 (Tex. 1986). Thus, while NWF and FBR will undoubtedly disagree, it appears that most of their objections to a remand for subsequent WMP hearing either support the interim order alternative that BRA proposes, or can be dealt with by the Commission’s interim order.

B. Exceptions of the Executive Director

1. Return Flows

The ED’s Exceptions re-urge the position, rejected by the PFD,⁸ that return flows discharges should not be considered state water generally available for appropriation, but should instead be reserved for the discharger of the treated effluent, the holder of the underlying water right, or one contractually authorized by the discharger or water right holder.⁹ The ED further argues that appropriation of future discharges should be limited to the current TPDES authorization.¹⁰

The ED’s Exceptions regarding return flows merit careful examination, both for what they say and what they do not say. Significantly, the ED is no longer arguing:

⁸ PFD at 148-149, 152-154.

⁹ ED Exceptions at 4-6.

¹⁰ *Id.*

- That the Commission’s practice prior to Senate Bill 1 did not regularly involve inclusion of return flows in its determination of water available for appropriation, both in *ad hoc* hydrologic analyses prior to development of water availability models and in the legacy water availability models that preceded the current Water Availability Model (“WAM”).¹¹ *Clearly, return flows have been part of the water considered available for appropriation in the past.*
- That the Commission in its August 2005 work session directed that return flows be reserved for water right holders or dischargers as is the ED’s current practice.¹² *No Commission precedent has been established requiring reservation of return flows.*

Instead, the ED’s return flows exceptions now focus primarily upon statutory construction arguments and perceived consequences in the administration of state water rights. Regarding statutory construction, BRA would suggest that TPWD’s Exceptions provide a significantly better explanation of the statutes than the ED proposes. TPWD, addressing Texas Water Code § 11.042(c), states that the provision provides a way to transport any sort of water (other than stored water or groundwater-based return flows, which are addressed by subsections (a) and (b)) for which the applicant has an appropriation or ownership right. Discharges unsupported by a preexisting appropriation or ownership right are subject to § 11.046(c) and become state water upon discharge.¹³

By contrast, the ED discounts the fact that § 11.042(b) uses the term “reuse” for groundwater-based return flows, while § 11.042(c) does not. Instead, the ED simply says “what else could this [§ 11.042(c)] be than a reuse statute?”¹⁴ The short answer is that it could be exactly what it purports to be: A bed and banks authorization statute that does not itself address ownership of the water sought to be transported.

The ED further attempts to distinguish § 11.046(c) by saying that it “is merely a statement, not an authorization, and it is certainly not an authorization allowing someone else to

¹¹ See PFD at 141, BRA Ex. 71.

¹² PFD at 145.

¹³ TPWD Exceptions at 4-5.

¹⁴ ED Exceptions at 5.

reuse other people's return flows.”¹⁵ The ED provides no explanation for how the return flows can belong to the discharger in the face of § 11.046(c)'s statement that they are available for appropriation by others. In fact, the ED seems to admit the problem, because the next sentence in the ED's Exceptions reads:

Under Section 11.046(c), water will become available for appropriation (which of course would be by anyone) unless someone asks to reuse return flows, which would be handled under Section 11.042(b) or (c).¹⁶

BRA agrees that return flows become available for appropriation. The issue left following the ED's admission is whether § 11.042(c) implies some right of continuing or vestigial ownership right following discharge – a right certainly not present on the face of the statute. The ED goes on to argue that this position, recognizing an implied ownership right, was what he argued in the Lake Grapevine accounting case and that the Commission's Grapevine decision does not support BRA's approach to reuse.¹⁷ To the contrary, in the Lake Grapevine case, the City of Grapevine's return flows were subject to a pending bed and banks application, but the Commission recognized that “Grapevine's return flows are available for other uses and are to be treated as inflows to Lake Grapevine available to the water right holders based on the prior appropriation doctrine.”¹⁸

The second thrust of the ED's Exceptions regarding return flows is the importance of being able to track return flows in the administration of water rights. The ED's Exceptions state:

¹⁵ *Id.*

¹⁶ ED Exceptions at 5. To the extent the ED is now admitting that the term “others” in 11.046(c) could be “anyone,” this marks yet another shift in the ED's construction of these statutes. Mr. Chenoweth, providing a deposition as the Executive Director's designated witness on the issue, stated that the term “others” in § 11.046(c) was limited to the discharger, water right holder or one with legal rights derived from them. *See* PFD at 144-145; *see also* TPWD Ex. 1, 35-36 (transcript and exhibits from T. Chenoweth deposition, Mar. 15, 2011).

¹⁷ ED Exceptions at 5.

¹⁸ BRA Ex. 74 at 19, Conclusion of Law No. 10. At best, the Commission's Order and ED's Exceptions in that case recognize that an unresolved issue exists due to Grapevine's pending application; neither can be stretched into recognition of a right that Grapevine had not yet exercised.

Knowing how and when a water right holder is diverting return flows is necessary for the efficient administration of water rights.

* * *

The most important issue for the ED is that, because return flows are interruptible (depending on their being discharged into the river) there must be an accounting for return flows that are reused in order to protect other water rights.¹⁹

The ED seems to imply that BRA would not perform such an accounting under its approach to return flows (and possibly under the ALJs' approach). This is incorrect. BRA's draft permit expressly provides that "Permittee's use of additional water supply attributable to return flows is limited to the amount shown to be available, based upon amounts discharged, by the return flows accounting plan."²⁰ Significantly, the return flows accounting plan must be approved by the ED. The draft permit further requires measurement of return flows discharges and prohibits consideration of any return flows discharges that are not measured.²¹

The ED's proposed accounting for return flows discharges would individually track each return flow from its point of discharge to its point of diversion.²² Anything else, such as BRA's evaluation of the cumulative impact of return flows on water availability, is apparently considered inadequate by the ED. The argument simply makes no sense to BRA. If return flows contribute to water availability because they become state water upon discharge, why should it be necessary to track individual discharges to the point of diversion? Such an accounting is not required, or even attempted, for other sources of state water. Admittedly, because return flows are interruptible by direct reuse, it is appropriate to account for their discharge so as not to

¹⁹ ED Exceptions at 5, 2nd and 4th complete paragraphs.

²⁰ BRA Draft Permit at 8; PFD Attachment B.

²¹ *Id.* at 8-9.

²² ED Draft Permit at 12; PFD Attachment A.

overstate water availability,²³ but no reason has been given to justify tracking each return flow source from its point of discharge to its point of diversion if return flows are considered state water available for appropriation. Even if authorization of return flows use is via a bed and banks permit (as proposed by the ALJs), tracking the 37 points of discharge identified in the ED's draft permit to the point of diversion of each one serves no legitimate purpose when it is possible to determine the cumulative impact on water availability without doing so.

The ED advances essentially the same argument against consideration of future return flows in determination of the amount of water available for appropriation, arguing "If BRA is given water rights that are based on speculative return flows that never come to fruition and is unable to account for actual return flows in the future, then other water rights holders will be adversely affected."²⁴ The objection, however, is baseless. BRA is proposing to account for actual return flows in determining what water it will actually divert or store. Moreover, BRA is the one who stands to be harmed if those discharges never come to fruition, not the senior water right holders. The only purpose served by the ED's proposed limitation to existing TPDES permit volumes is requiring multiple amendments of the System Operation Permit each time a TPDES permit is amended in the future.

In prior water availability models and prior appropriations, future return flows were considered in determining the amount of water available for appropriation. It was assumed that a given percentage of municipal or industrial water rights would be returned to the river in the future, whether the entire base water right was actually being put to use at the time or not.²⁵

What BRA proposes, accounting for discharges and their effect on water availability, is more

²³ However, BRA does not agree with the ED that such interruption will hurt existing senior water rights. It is the junior appropriator, depending on the availability of return flows to satisfy his junior right, who will be hurt under the prior appropriation system if those flows are not available.

²⁴ ED Exceptions at 6.

²⁵ Tr. 1042-43, BRA Ex. 71.

than adequate to address the ED's concern and avoid repeated and unnecessary amendments of the System Operation Permit in the future.

2. Hydrology

a. Reservoir capacity

BRA supports the ED's exceptions on this issue. As a practical matter, modeling water availability using the original authorized capacity of reservoirs is not only reasonable, but may be the only possible means of doing so without requiring reservoir sediment surveys before any amendment of the reservoir permit.

In this case, however, BRA submits that the issue is moot. As part of the WMP, BRA intends not only to model all existing diversion points, but to utilize current (or the most current available) reservoir capacities. BRA will not knowingly contract to supply water on a firm basis if it is not available on a firm basis.²⁶ Use of current reservoir capacities assures that this does not happen. If the Commission approves an interim order authorizing BRA's appropriation with return flows included, the amount of water appropriated will be stated as a total interruptible amount and the distinction between firm and interruptible supply will be made subsequently during the development of the WMP.²⁷ Only if the interim order's appropriation is stated in terms of firm and interruptible supply, as reflected in the ED Draft Permit, does this issue arise and, even then, that interim number will be adjusted through the WMP process.

²⁶ Moreover, BRA addresses reductions (even long-term reductions) in its water supply so that it does not contractually obligate itself to supply more water than is available on a firm basis. *See, e.g.*, BRA Ex. 87 and 88; Tr. 2270-2272.

²⁷ *See* BRA Draft Permit at 11; PFD Attachment B.

b. Allens Creek – preconstruction authorization

BRA concurs with the ED's exception regarding the pre-construction treatment of Allens Creek.²⁸ The approach taken by BRA's application and the ED's water availability analysis is practical and reasonable: Prior to construction of Allens Creek Reservoir, a short term appropriation is made, which avoids requiring reservation of water that the applicant is already entitled to and that cannot be used prior to construction of the reservoir. As noted by BRA's Exceptions,²⁹ if it is helpful to use the word "term" and identify a maximum number of years duration, BRA believes that is also reasonable.

c. Allens Creek diversion authorization

This issue, upon which BRA agrees with the PFD and disagrees with the ED, *does* amount to real water and a significant long-term water supply. As modeled by the ED, with diversions into Allens Creek Reservoir under the System Operation Permit being limited by terms of the Allens Creek Permit, the firm supply at Richmond is reduced by almost 70,000 af/yr.³⁰ Under the System Operation Permit, other BRA reservoirs are allowed to impound additional water at the junior 2004 priority of the System Operation Permit; the PFD would allow Allens Creek Reservoir to do the same thing. The ED complains that such additional diversions from the Brazos River to Allens Creek Reservoir are not currently authorized by the Allens Creek Permit. However, as noted by the ALJs,³¹ diversion of additional amounts into Allens Creek is authorized by BRA's existing Excess Flows Permit.³² BRA believes that the ALJs have correctly analyzed the issue.

²⁸ ED's Exceptions at 8.

²⁹ BRA Exceptions at 10.

³⁰ BRA Ex. 105.

³¹ PFD at 173-174.

³² Tr. 2400-02 (Gooch).

The ED does not dispute the availability of the unappropriated water. However, in order to allow the additional diversion and appropriation, the ED would have BRA amend its Allens Creek Permit to remove the 202,000 af/yr limitation on diversions under that permit from the Brazos River.³³ So far as BRA can ascertain, this is a needless bureaucratic exercise. It can be undertaken, possibly even while the WMP is being developed, but it is unnecessary and will simply result in additional delay and expense.

d. Glen Rose scenario

BRA concurs with the ED's exceptions regarding the appropriation at the Glen Rose control point. This, however, is a tempest in a tea pot. For purposes of development of the WMP, all that is needed is the downstream appropriation. The amount of water available for appropriation at the Glen Rose control point need not be part of the interim order or any permit issued by the Commission.

e. Differences in draft permits

The draft permits attached to the PFD address many issues that are not specifically discussed in the PFD. Provisions addressing the nature and scope of the WMP are a primary example. BRA submits that an interim order by the Commission should generally affirm the guidance provided by the draft permits (BRA's or the ED's), subject to the Commission's rulings on other contested issues. Such direction will be needed, at a minimum, to define the scope of the WMP that BRA must develop and submit for TCEQ consideration and approval.

With the exception of return flows/reuse provisions, the ED Draft Permit and the BRA Draft Permit do not have major differences. Some differences in hydrology exist, but these may be largely deferred to the WMP development if the interim order defines the Richmond gage

³³ Tr. 1960-63.

appropriation only in terms of the interruptible supply and leaves the maximum firm and interruptible distinction for development during the WMP.

To the extent the PFD considers and makes recommendations upon special provisions proposed by the Protestants, BRA has no objection to the PFD's recommendations; however, neither would BRA object to the omission of those provisions.

C. Environmental Flows Issues and Water Quality

As a threshold matter, BRA does not concede that the PFD is correct, as a matter of general law, in stating that the Commission is required to consider (for purposes of evaluating water quality and non-impairment issues under Texas Water Code § 11.134(b)) whether the proposed System Operation Permit “would [lead] to an increase in salinity.”³⁴ However, because the ALJs have appropriately framed this consideration of salinity effects in limited terms of whether TCEQ's segment-specific water quality standards (“WQS”) are satisfied, as is the practice of TCEQ staff on water quality analysis for water rights permitting, BRA can agree that this salinity inquiry is reasonably included within the scope of water quality considerations.³⁵ Similarly, the PFD correctly bases its other conclusions regarding water quality issues on the evidence that, if the proposed System Operation Permit is issued, a) the Commission's applicable WQS will be maintained,³⁶ and b) use of the subsistence (“7Q2”) flows values “would not deprive the streams of the minimum amount of flow needed for water quality purposes.”³⁷

In their exceptions to the PFD, Dow and FBR each contend that the ALJs have applied an incorrect standard of proof to BRA's required showings on water quality issues (differently defined issues, for each Protestant), and that BRA has failed its proper burden of proof on water

³⁴ See PFD at 88.

³⁵ See PFD at 90-91.

³⁶ PFD at 80.

³⁷ PFD at 85.

quality. Dow's second issue on exceptions is grounded in its belief that it is legally entitled to divert water of a certain quality (*i.e.*, salinity level), and therefore that the System Operation Permit cannot be granted unless conditioned to assure that level of quality for Dow at all times. As discussed below, many of these arguments were previously briefed by Dow and FBR, and already rejected in the PFD. None of these exceptions provides a basis to reject the ALJs' analysis and conclusions in the PFD regarding the proposed System Operation Permit and applicable water quality standards.

1. BRA's burden of proof and the standard of proof

The PFD, with an extensive separate section (at pp. 87-102) addressing the salinity aspects of water quality in relation to the System Operation Permit, finds that BRA has shown that "its proposed diversions will not adversely impact salinity," and therefore concludes that approval of the proposed Permit "would not alter salinity in the Brazos River Basin to an extent that impaired water quality, was detrimental to the public welfare, or impaired senior water rights, including Dow's."³⁸ Notwithstanding the ALJs' discussion of the parties' arguments and weighing of the expert evidence on these issues, both Dow and FBR except to the PFD on the basis that BRA has not met its burden of proof. BRA has already addressed these Dow and FBR arguments in its post-hearing briefing³⁹ and the ALJs have considered and rejected these arguments, both implicitly and expressly. *See, e.g.*, PFD at 85-86 (specifically rejecting FBR's criticisms of BRA's and the ED's analysis of environmental water quality issues and arguments that BRA and/or the ED were required to perform other, more specific studies or analyses to address FBR's particular concerns for certain portions of the Brazos River Basin).

³⁸ PFD at 88; *see also* PFD at 92, 98, 102.

³⁹ *See* BRA Post-Hearing Reply Argument at 28-29, 33.

Dow persists in arguing that BRA has not met its burden of proof on non-impairment – *i.e.*, to show that the System Operation Permit will not impair Dow’s existing senior water rights, under the standards of Water Code § 11.134(b)(3)(B) and TCEQ’s “No Injury Rule,” 30 TAC § 297.45.⁴⁰ Dow’s burden of proof argument fails for several reasons. First, Dow’s apparent theory (again, already argued in its post-hearing briefing), that BRA’s substantial *rebuttal* evidence presented to address Dow’s specific salinity issues raised in Dow’s (originally filed) prefiled testimony is not properly considered as part of BRA’s satisfaction of its burden of proof, is simply legally incorrect. BRA’s burden is not evaluated only in terms of its direct case presented in prefiled testimony, but rather on the entirety of the evidence developed throughout the hearing. BRA alone is entitled to a presentation of rebuttal evidence precisely because it has the burden of proof.⁴¹

Second, and relatedly, the PFD reflects that the ALJs considered and weighed all of the competing expert analysis and testimony on salinity issues, including the Executive Director’s independently developed expert opinion (which Dow’s Exceptions completely ignore), the analysis of salinity impacts by Dow’s expert (to which the ALJs assigned “little evidentiary weight . . . because it makes unrealistic assumptions”), and the analysis of BRA’s expert, who demonstrated the flaws in Dow’s expert analysis.⁴² The ALJs outlined BRA’s evidence regarding the naturally occurring (and other operational) conditions affecting salinity in the Brazos River Basin that are outside the control of BRA operations.⁴³ Further, the ALJs found that there was sufficient record evidence to assess the impact of BRA’s System Operation Permit on salinity in the Brazos River Basin, “and it shows that the [applicable TCEQ standards] for

⁴⁰ Dow Exceptions at 5-8.

⁴¹ See 30 TEX. ADMIN. CODE § 80.117(b).

⁴² PFD at 75-78, 92-98.

⁴³ PFD at 92-93.

salinity, including TDS and chlorides, will not be violated due to BRA's operation under either Proposed Permit."⁴⁴

FBR takes a somewhat different approach in challenging the PFD's conclusions on environmental water quality issues. FBR had, in its post-hearing briefing, urged the ALJs to conclude that BRA had failed to meet its burden of proof (and that TCEQ staff had failed their regulatory responsibility) on a handful of environmental issues relating to water quality, including Upper Basin salinity, golden algae, and wetlands.⁴⁵ BRA addressed those arguments, including its actual burden of proof regarding Protestants' specific issues, in its own post-hearing briefing,⁴⁶ and the ALJs expressly rejected the higher burden of proof (and different level or type of TCEQ staff analysis) urged by FBR.⁴⁷ In light of a PFD concluding that BRA has satisfied the applicable statutory and regulatory requirements designed to protect instream uses, water quality, and fish and wildlife habitat, among other things,⁴⁸ FBR takes a very different tack by including "instream flows for the environment and recreation" among the numerous "policy issues" that FBR now conveniently believes should not be decided in this contested case at all, but rather through Commission rulemaking.⁴⁹ FBR's attempt to backtrack and eliminate these environmental water quality issues from the Commission's consideration in this case should be rejected.

BRA emphasized, in its post-hearing briefing, exactly the point that the ALJs made regarding environmental flows and instream use requirements in current water rights permitting – that the various statutory and regulatory provisions on these issues require the Commission to

⁴⁴ PFD at 98.

⁴⁵ FBR Written Argument at 37-42.

⁴⁶ BRA Post-Hearing Reply Argument at 28-29, 33-35.

⁴⁷ PFD at 85.

⁴⁸ See PFD at 70, 78, 86-87.

⁴⁹ FBR Exceptions at 5, 23-28.

“assess” and “consider” certain effects, studies, standards and assessments concerning environmental issues, but give the Commission “broad discretion, consistent with what the Commission finds to be in the public interest, to determine what restrictions [if any] should be included in BRA’s permit to protect environmental flows and instream uses.”⁵⁰ Not satisfied with the ALJs’ synthesis of the applicable standards, including the ALJs’ acceptance of established TCEQ staff practice of utilizing the subsistence flow (7Q2) standards as the measure for instream flow requirements to protect water quality,⁵¹ FBR excepts to these conclusions within the PFD by re-urging its previously articulated concerns regarding the adequacy of the System Operation Permit’s provisions to protect instream uses, most especially recreation in the Brazos River segment known as the John Graves Scenic Riverway.

FBR’s standard and burden of proof arguments, now couched as a “policy issue,” fail for several reasons. First, FBR cites to no legal authority supporting the higher standard of proof for which it argues.⁵² Second, FBR cites to no record evidence on these issues other than one of its own exhibits, and ignores nearly all of the substantial record evidence supporting BRA’s, the ED’s, and TPWD’s analysis and conclusions regarding the environmental flows provisions in the proposed System Operation Permit. The ALJs obviously weighed and credited that evidence.⁵³ Without evidence, FBR’s argument reflects nothing more than its distrust, bordering on dismissiveness, of the fact that the experts for these three agencies, through extensive study and

⁵⁰ PFD at 74; *see* BRA Post-Hearing Reply Argument. at 2.

⁵¹ *See* PFD at 82, 86; *see also* Tr. 1939:9 to 1940:1 (Alexander).

⁵² As a corollary to this point, it is not even clear how FBR defines the parameters of this policy issue. While its obvious goal here is to achieve Commission denial of the System Operation Permit without any risk of Commission affirmation of the ALJs’ analysis on portions of BRA’s Application, FBR simply “encourage[s] the Commissioners to avoid defining the test for the burden of proof for the environmental and recreational flow requirements *for permit applications for large appropriations*,” with no explanation of the scope of that term. FBR Exceptions at 28 (emphasis added).

⁵³ *See, e.g.*, PFD at 70, 75-78, 81-83; *see also* PFD at 94 (expressly rejecting FBR’s challenge to the reliability of Mr. Geeslin’s testimony on salinity and water quality).

negotiation over the course of several years, reached agreement on a protective and forward-thinking approach to environmental flow provisions for the System Operation Permit.⁵⁴ However, that agreement reflects collective effort and compromise toward achieving unprecedented environmental flows protection in water rights permitting, and developing a methodology that has actually already been utilized by the Commission in the Senate Bill 3 (“SB 3”)⁵⁵ rulemaking process for at least two other basins within the state.⁵⁶

Third, FBR’s characterization of the provisions of the proposed System Operation Permit ignores the many terms and special conditions included to protect instream uses, water quality, fish and wildlife habitat, and other environmental considerations. The PFD summarizes these provisions aptly from the record on the Proposed Permit,⁵⁷ with emphasis on the interim special conditions and adaptive management provisions designed to be reevaluated based upon evolving science, and the “reopener” provision that subjects the permit’s interim flow conditions to adjustment to comply with the environmental flow standards that the Commission eventually will adopt for the Brazos River Basin.⁵⁸ Simply put, the weight of the evidence in this case demonstrates that BRA’s System Operation Permit is drafted not to be minimally protective of the environment, but rather to take the lead, consistent with the intent and future direction of SB 3, in incorporating comprehensive environmental flow conditions in water rights permitting.

⁵⁴ Even regarding a permit condition designed to protect environmental flows in the John Graves Scenic Riverway (which FBR professes to be the primary river segment of concern to its membership), on which FBR sought and obtained a concession from BRA for the maintenance of “FERC releases” in that segment (*see* Tr. 2242:20 to 2243:19, 2292:13 to 2293:8 (Brunett); BRA Post-Hearing Reply Argument at 57-58), FBR attempts to argue that this condition is not sufficiently protective, and to question BRA’s good faith in agreeing to the permit condition. FBR Exceptions at 24-25, 27-28. As this example demonstrates, at the end of the day there is really no way to satisfy FBR short of a complete rejection of BRA’s System Operation Permit.

⁵⁵ Acts 2007, 80th Leg., ch. 1430.

⁵⁶ *See* BRA 29 – 22:23 to 23:5, 23:11-19, 42:7-9, 44:20 to 45:7; BRA 33 – 8:1-7, 13:20 to 14:2 (Test. C. Loeffler); BRA 39 ¶¶ 5, 6 (BRA – TPWD MOU); Tr. 855:20-24 (Loeffler); Tr. 1814:22 to 1815:19 (Geeslin)); *see* BRA Post-Hearing Reply Argument at 31-32.

⁵⁷ PFD at 78-80.

⁵⁸ PFD at 80, 86.

2. Reliance on TCEQ Water Quality Standards for evaluation of salinity concerns

Aside from challenging whether BRA has met its burden of proof on salinity impacts in the Lower Basin, Dow also excepts to the ALJs' reliance on TCEQ's segment-specific WQS for their conclusion that BRA's operation under the proposed System Operation Permit "will not impact water quality, including salinity," and their related conclusion that "Dow's senior water rights do not entitle it to water with a quality better than the WQS."⁵⁹ Dow continues to assert such an entitlement, but both its old and its new arguments are unavailing.⁶⁰ First, Dow continues to ignore the record evidence that the ED's staff performed its water quality analysis of the application under its standard practices and procedures under TCEQ's rules, including reliance on the WQS.⁶¹ Second, the ALJs have already weighed the case law which Dow again argues in its exceptions to the PFD⁶² and noted that none of Dow's cases held that a water right holder has a right to a specific quality of water.⁶³

Third, and perhaps most tellingly, Dow's non-impairment argument against TCEQ staff's utilization of the WQS in their water quality/salinity analysis is substantially undercut by record evidence regarding a) Dow's assessment of the strength of its legal argument for a right to water of a certain quality, and b) Dow's acquisition of its own senior water rights. Dow takes the position in this contested case that any incident in which the TDS or chloride levels at its two

⁵⁹ PFD at 88, 94, 101; Dow Exceptions at 9-17.

⁶⁰ The ALJs have reasonably interpreted TCEQ's "No Injury Rule" to reflect the Commission's recognition "that a senior appropriator has a right to some quality of water," and thus that "the Commission clearly concluded that the WQS were protective of a wide range of uses, interests, rights, concerns, and the public welfare." PFD at 99, 100-101. Dow cites to no legal authority, beyond what the ALJs have already considered, for its alternative theory of the "clear intent of the WQS," and this theory of additional required protection should be rejected. Dow Exceptions at 13-15.

⁶¹ See ED-DG-3A; Tr. 1939:9 to 1940:1, 2189:2-7 (Alexander); Tr. 1876:22 to 1877:21 (Geeslin); see also ED's Written Argument at 21-22, 23; see also PFD at 82.

⁶² Dow Exceptions at 11-12.

⁶³ PFD at 100.

authorized diversion points exceed 750 mg/L for TDS, and 300 mg/L for chlorides,⁶⁴ even for a brief period of time, constitutes impairment of Dow’s senior water rights.⁶⁵ Dow argues that the ALJs are “obviously incorrect” on the appropriateness of using the WQS; however, Dow’s own fact/expert witness (Mr. Finley) has acknowledged that “[t]he question regarding Dow’s right to the frequency of good quality water at that location is, in my mind, a legal question that still has not been answered.”⁶⁶

Moreover, even assuming *arguendo* that Dow correctly interprets the non-impairment statute and TCEQ’s “No Injury Rule” to entitle Dow, at all times, to water quality “equivalent” to the rights it was authorized at the time of its senior appropriation, there is abundant record evidence that contravenes Dow’s insistence that it must be protected by threshold TDS and chloride levels lower than the Segment 1202 WQS. Evidence from the historical record of Dow’s water rights, sponsored by BRA and presented through the cross-examination of Mr. Finley at hearing, clearly shows that Dow knew there were problems with the variability of water quality at its proposed diversion points at the time it secured its own water rights.

A Dow-created and maintained document chronicling the history of Dow’s development of its senior water rights contains repeated references to Dow’s recognition, upon obtaining its Brazoria diversion point water right in 1952, that water quality was unreliable at that location. *See* BRA Ex. 47 at 29 (referencing 1949 water supply analysis that “Brazos River water could be used during only limited periods of each year due to the extreme variability of dissolved mineral content”); *id.* at 42 (describing Dow’s proposed method of operation, “to, by selective pumping, pump good water at Brazoria Reservoir and, by pumping more or less constantly, pump a poor

⁶⁴ TCEQ’s Water Quality Standards for Segment 1202 for TDS and chlorides (750 mg/L for TDS and 300 mg/L for chlorides) are maximum annual averages. *See* 30 TEX. ADMIN. CODE Chapter 307, App. A.

⁶⁵ Dow Exceptions at 10-11.

⁶⁶ Tr. 1340:24 to 1341:23, 1361:24 to 1362:2 (Finley); BRA – 48, pp. 1-2.

quality water at Harris Reservoir and then mix the two waters together to obtain the quality and quantity which Dow needed”); *id.* at 48 (summarizing a report regarding these conditions, describing the variable quality that “the chloride content was considerably in excess of the allowable for more than 15 days at a time”). When questioned regarding this history, Mr. Finley was forced to concede:

Dow would acknowledge that at the time that this permit was issued, the folks who obtained the permit were aware that there wasn’t “good water” at Brazoria 100 percent of the time.⁶⁷

It is apparent that salinity was a recognized problem when Dow obtained its water rights. Dow should not now be heard to argue that it is entitled to protection against the inherent water quality variability of the rights it obtained in 1952, yet that is precisely what Dow hopes to achieve by the conditions it would impose on BRA’s System Operation Permit – conditions for TDS and chloride standards that are even more restrictive than the Commission’s WQS for this stream segment.⁶⁸

Because there is no established legal basis for Dow’s claimed entitlement to be able to divert water of consistently high quality, then necessarily the ALJs also correctly rejected Dow’s required water quality permit condition,⁶⁹ which would place on BRA’s System Operation Permit the burden of guaranteeing that consistent quality for Dow. There is no apparent

⁶⁷ Tr. 1356:2-5 (Finley); *see also* Tr. 1360:19-25, 1361:19-23 (Finley).

⁶⁸ Particularly in light of this historical record on the recognized variable quality (salinity) of Dow’s own water rights, Dow’s suggestion that use of TCEQ’s WQS for water quality protection in the System Operation Permit would somehow “reduce” or “diminish” Dow’s vested property rights, and thus subject the State to takings claims (by Dow and “approximately 1,200” other water rights holders), is a somewhat desperate argument, utterly lacking in legal foundation. Dow Exceptions at 12-13. TCEQ’s WQS do not diminish Dow’s rights at all – implicitly or explicitly. If Dow suffers damage due to water quality impacts of the actions of other water right holders, Dow’s cause of action would be against those water right holders, not TCEQ. Moreover, in light of both historic and current water quality evidence introduced in this hearing, Dow’s likelihood of success fully pursuing such a claim would be very slight, at best.

⁶⁹ *Cf.* PFD at 98, 101.

Commission precedent for imposing such a permit condition,⁷⁰ certainly not where it would purport to apply also to BRA's existing water rights permits. Dow's proposed water quality restriction is not factually justified and cannot be legally imposed as part of the System Operation Permit, due to its effects on other existing water rights and their operation. Further, such conditions would potentially have a large adverse impact on BRA's operations and tributary reservoirs' water supply.⁷¹

D. Beneficial Use

Dow, FBR, and NWF each argue that the ALJs' standard for evaluating whether an appropriation is intended for beneficial use is incorrect and that BRA has not met its burden of proof. Dow's argument is based on the two-step permitting process proposed by BRA. FBR and NWF contend that the ALJs have relied on a "different" and "outdated" test by relying on the *City of San Antonio v. Texas Water Commission* case.⁷² Without support for their legal theories, FBR and NWF claim that, with Senate Bill 1 ("SB 1"),⁷³ the Legislature announced a new standard, and now, a new appropriation must "more clearly and directly" be intended for a beneficial use.⁷⁴ FBR further suggests that the Commission should not rule on beneficial use in this case to avoid "reaching a potentially far-reaching policy decision."⁷⁵

Contrary to the Protestants' assertions, SB 1 did not substantively change how the Commission evaluates whether a proposed appropriation is intended for beneficial use. Prior to SB 1, the statute required the Commission to grant an application only if the proposed

⁷⁰ Although the ED's expert hydrologist took no position regarding Dow's proposed water quality permit condition, she stated that she was not familiar with any water rights that have "special conditions in them to protect the water quality as to a downstream water right holder." Tr. 2191:17-22 (Alexander).

⁷¹ Tr. 2382:2 to 2383:13 (Gooch); *see also* Tr. 1091:5-13 (Brunett).

⁷² 407 S.W.2d 752 (Tex. 1966); FBR Exceptions at 19; NWF Exceptions at 3.

⁷³ Acts 1997, 76th Leg., R.S., ch. 1223, § 1.

⁷⁴ FBR Exceptions at 19; NWF Exceptions at 3.

⁷⁵ FBR Exceptions at 23.

appropriation “contemplates the application of water to any beneficial use.”⁷⁶ SB 1 amended Texas Water Code § 11.134 to require the Commission to grant an application only if the proposed appropriation “is intended for a beneficial use.” Substantively, this language is very similar to the original language, if not simply a clearer, more concise way of saying the same thing.⁷⁷ Certainly, the definition of “beneficial use” has seen little change since the adoption of the Irrigation Act in 1917.⁷⁸ No analysis of SB 1 states that by amending the language in Texas Water Code § 11.134(b), the Legislature intended to adopt a “very different” standard than that which was previously required.⁷⁹ And, counsel for BRA can find no other sources analyzing SB 1 that suggest a new standard was instituted by SB 1.⁸⁰ Certainly, one might expect to find commentary regarding an announcement of a “very different” test.

⁷⁶ Acts 1977, 65th Leg., R.S., ch. 870, § 1.

⁷⁷ Merriam-Webster Dictionary defines “intend” to mean “to have in mind as a purpose or goal; plan” and lists “contemplate” as a synonym. *See* <http://www.merriam-webster.com/dictionary/intend>.

⁷⁸ The current definition of “beneficial use” is substantially the same definition originally adopted by the Texas Legislature in 1917. Compare TEX. WATER CODE § 11.002(4) to Acts 1917, 35th Leg., R.S., ch. 88, § 9 (“For purposes of this Act, beneficial use shall be held to mean the use of such a quantity of water, when reasonable intelligence and reasonable diligence are exercised in its application for a lawful purpose, as is economically necessary for that purpose.”).

⁷⁹ The Senate Natural Resources Committee bill analysis states that 11.134(b) is amended to require the TCEQ to grant an application only if the proposed appropriation is intended for a beneficial use. *See* Senate Research Center, Natural Resources Committee Report Bill Analysis (March 25, 1997). The SB 1 Conference Committee Report Section by Section Analysis provides the following analyses:

Senate Version – 4.01. Amends Section 11.134, Water Code, to provide that a water right permit may not be granted unless the TNRCC (1) considers the hydrological connection between the surface water and groundwater, and (2) finds that the application is consistent with the State Water Plan or an approved regional water plan, unless the TNRCC determines conditions warrant waiving this requirement.

House Version – 4.01. Same as Senate version, except adds new subsection 11.134(c), Water Code, providing that after September 1, 2001, TNRCC may not issue a water right for a municipal purpose in a region without an approved regional water plan, unless the TNRCC determines that conditions warrant waiver of the requirement.

⁸⁰ *See, e.g.,* M. Hubert and B. Bullock, *Senate Bill 1, The First Big and Bold Step Toward Meeting Texas’s Future Water Needs*, 30 Tex. Tech. L. Rev. 53 (1999). Mr. Hubert served as Lieutenant Governor Bullock’s General Counsel during the 75th Legislative Session and kept the Lt. Governor informed about SB 1 during the legislative process and drafted much of the language of the bill. *See also*

Moreover, the TCEQ rulemaking and decisions in post-SB 1 water rights cases indicate that there was no substantive change in the standard required to show that an appropriation is intended for a beneficial use. The Commission, in its proposal for the new water rights rules after the passage of SB 1, merely noted that the new section 297.41 of the Commission rules “is to provide the general statutory criteria that the Commission must use in its review and action on a water right application pursuant to Texas Water Code § 11.134.”⁸¹ While no comments were made regarding the requirements set out in section 297.41 (one might expect comments regarding a fundamental change in the burden of proof), in response to a comment regarding the feasibility analysis required for conservation plans, the Commission noted that it must determine whether an application is intended for a beneficial use, and that “these standards have been in place prior to [the] rule adoption.”⁸²

Post-SB 1 water rights contested cases also confirm that the TCEQ has not interpreted the SB 1 amendment of Section 11.134 as a fundamental shift of an applicant’s burden to demonstrate that a proposed appropriation is intended for a beneficial use. *See In Re Application No. 14-1298B by City of San Angelo for Amendment to Certificate of Adjudication No. 14-1298*, Proposal For Decision at p. 17, SOAH Docket No. 582-10-0292, TCEQ Docket No. 2008-1616-WR (October 29, 2010) (finding that the type of water use “falls squarely within the types of uses of State water that are authorized by law”); *In Re Application No. 03-4799C of the City of Irving to Amend its Water Right*, Proposal for Decision at p. 15, SOAH Docket No. 582-04-8097, TCEQ Docket No. 2003-1530-WR (August 26, 2006) (noting that the request was based on

R. Kaiser, *A Primer on Texas Surface Water Law for the Regional Planning Process*, paper presented at the Texas Water Law Institute’s Texas Water Law Conference: Regional Water Planning under SB 1, October 1-2, 1998; T. Bray, *Overview and Practical Applications of Senate Bill 1*, paper presented at The Changing Face of Water Rights in Texas 2001 Conference, February 1 – 2, 2001; 73 TEX. JUR. 2D *Water* §§ 129, 137 (2003).

⁸¹ 23 TEX. REG. 10306, 10309 (Oct. 9, 1998).

⁸² 24 TEX. REG. 1162, 1177 (Feb. 9, 1999).

reasonable projections of future need); *In Re Application of Southerland Properties, Inc. for a Permit to Use Water from the Guadalupe River*, Proposal for Decision at p. 28, SOAH Docket No. 582-01-1272, TNRCC Docket No. 2000-1230-WR (March 19, 2002) (concluding that the proposed use of the water right for golf course irrigation is a beneficial use).

The ALJs correctly articulate the “intended for beneficial use” standard that is applicable in water rights cases, and correctly conclude that BRA has met its burden of proof. As recognized by the PFD, the evidence overwhelmingly shows that the water appropriated by the System Operation Permit will be put to beneficial use.⁸³ As the ALJs note, virtually all of BRA’s existing water rights are committed under contract to its customers, and the projected water needs in the basin exceed that of its existing water rights.⁸⁴ These demands are evidenced by the 2011 Regional Water Plans for Regions G and H. BRA also has received requests for water from about twenty different entities that would contract for over 150,000 acre feet of water per year.⁸⁵ The need for the water is throughout the basin, and that need spans a 50 year planning period. Thus, permitting the maximum amount of water that can be made available through System Operation, and other unappropriated water that would otherwise be unreliable without storage, provides BRA the ability and flexibility to address the water supply shortages and needs as they occur and where they occur.

E. Consistency with the State and Regional Water Plans

FBR claims that the ALJs’ analysis about whether BRA’s proposed appropriation is consistent with the regional and state water plans effectively allows the TCEQ to ignore the

⁸³ PFD at 63.

⁸⁴ BRA 1 – 16:3-7; BRA 10-8:1 to 17:3 (analyzing existing water rights and water supply demands in Regions G and H).

⁸⁵ BRA 1 – 18:15-22; BRA 10 – 21:1-14.

goals and strategies developed by the regional planning groups.⁸⁶ FBR also claims the ALJs applied a “not inconsistent with” test.⁸⁷ These claims are without merit.

The standard FBR advocates would unnecessarily interject rigidity and inflexibility into the State’s water resource planning process and effectively eliminate the ability of TCEQ, water suppliers, regional planning groups, and others to address water needs both known and unknown. As Region G notes in its 2011 Water Plan, not all recommended water management strategies will be necessary to meet the projected needs within the planning period; however, the strategies are recommended because (1) some strategies might fail to develop through legal or economic reasons, (2) regulatory restrictions could limit the use of planned strategies, (3) certain uses of specific projects may not be captured in the supply and demand projections of the plan, and (4) if there is a drought worse than the drought of record (given the drought conditions to date, this is not an unlikely event), there will be a need for the additional water supplies.⁸⁸ By limiting an appropriation to *exactly* the amount identified in the plan, the TCEQ would hamstring itself and the planning entities by taking water off the table that could be used to address shortfalls in the amount of water available to meet the regional water needs.

BRA’s System Operation Permit application, as it was submitted to the TCEQ, was analyzed and included as a water management strategy in both Region G’s and Region H’s 2011 Regional Water Plans.⁸⁹ Region G, in its water plan, made first use of the water, and modeled the water available under the System Operation Permit accordingly, noting that “[i]f the BRA’s contractual commitments change in the future, the availability of water from the BRA System

⁸⁶ FBR Exceptions at 16-17.

⁸⁷ *Id.* at 15.

⁸⁸ 2011 Region G Water Plan at p. 4C.39-1. The entire 2011 Region G Water Plan, 2011 Region H Water Plan, and 2007 State Water Plan are in the record of this proceeding, per the ALJs’ Order No. 7 taking official notice of these documents.

⁸⁹ *See* 2011 Region G Regional Water Plan at pp. 4B.4-1 to 4B.4-13; 2011 Region H Regional Water Plan at pp. 4B36-1 to 4B36-4.

would also change accordingly.”⁹⁰ With a large amount of the System Operation Permit water being planned for use higher in the basin, there will be less water available downstream. As noted in BRA’s Post-Hearing Reply Argument,⁹¹ Region H calculated what amount of water would be available from the System Operation Permit for use in Region H taking into account the fact that Region G intended to make greater use of the System Operation water.⁹² The increased demand on System Operation Permit water by Region G, along with reductions in the amount of water available because of the ED’s treatment of Allens Creek and return flows, forced Region H in this planning cycle to reduce its reliance on System Operation Permit water from 248,650 acre-feet per year (as projected by the 2006 Regional Water plan) to 25,350 acre-feet of water per year.⁹³ This reduction in System Operation Permit water forced Region H to place greater emphasis on other water supply strategies such as on- and off-channel reservoirs.⁹⁴ Thus, it is evident that if more System Operation Permit water were available, Region H would use it to meet demands.

The ALJs’ analysis regarding whether a proposed appropriation is consistent with the state and regional water plans is correct. Neither the TCEQ nor the regional planning groups should be hamstrung in their respective water permitting and planning roles by the adoption of a rigid rule such as the one proposed by FBR.

⁹⁰ See 2011 Region G Regional Water Plan at p. 4B.4-3.

⁹¹ BRA’s Post-Hearing Reply Argument at pp. 26-27.

⁹² BRA 10 – 16:8-12.

⁹³ *Id.*; See also 2011 Region H Regional Water Plan at p. 4B36-1.

⁹⁴ BRA 10 – 17:1-3; Tr. 907:4 to 909:4 (Brunett).

F. Public Welfare

Both FBR and NWF claim that the ALJs' interpretation of the *Popp* case⁹⁵ and of the statutory requirement that the proposed appropriation not be "detrimental to the public welfare" is too narrow.⁹⁶ Along with Dow, each also advocates that the public welfare inquiry is more expansive and includes matters of personal importance to each Protestant.⁹⁷

The ALJs' analysis of the *Popp* case and its applicability in this water rights permitting case is correct and is consistent with the court's analysis of the meaning of "public welfare" in the water rights permitting context.⁹⁸ In *Clark v. Briscoe Irrigation Company*,⁹⁹ the Austin Court of Appeals analyzed the scope of the "public welfare" criteria and the role of the Board of Water Engineers in determining whether a proposed appropriation was detrimental to the public welfare. The court found that the legislature had delegated to the Board the authority "to determine from the factual situation presented in each particular case, whether granting the permit would be 'detrimental to the public welfare,' as declared in those enactments."¹⁰⁰ According to the court, the Board must look to the "declared objectives of [the water rights] enactments, the prescribed uses and priorities in uses, the conservation of the water and their application and use in the greatest serviceable manner."¹⁰¹ As also articulated by the Texas Supreme Court in the *Popp* case, the term "public welfare" is not unlimited, but is defined in

⁹⁵ *Railroad Comm'n of Tex. v. Texas Citizens for a Safe Future & Clean Water*, 336 S.W.3d 619 (Tex. 2011).

⁹⁶ FBR Exceptions at 29-30; NWF Exceptions at 11.

⁹⁷ *Id.*; see also Dow Exceptions at 17-19.

⁹⁸ Whether a proposed appropriation is "detrimental to the public welfare" has long been a consideration in water rights permitting in Texas. Acts 1913, 33rd Leg., R.S., ch. 171, § 19 ("It shall be the duty of the board to reject all applications . . . if there is no unappropriated water . . . or if the proposed use conflicts with existing water rights . . . or is detrimental to the public welfare"); Acts 1917, 35th Leg., R.S., ch. 88, § 24 ("It shall be the duty of the board to reject all applications . . . if there is no unappropriated water . . . or if the proposed use conflicts with existing water rights, or is detrimental to the public welfare").

⁹⁹ See 200 S.W.2d 674, 683-685 (Tex.Civ.App.—Austin 1947, writ dismissed).

¹⁰⁰ *Id.* at 684.

¹⁰¹ *Id.*

accordance with the statutory scheme under which the Commission derives its authority to regulate.¹⁰²

Under this standard, BRA has met its burden of proof by demonstrating that the proposed appropriation is the least expensive, most readily available, new source of water to meet demands in the Brazos River Basin, with the least environmental impact. The System Operation Permit does not require the construction of a new reservoir or extensive groundwater development.¹⁰³ As compared to reservoir construction or groundwater development, the cost of the System Operation Permit water is substantially less expensive – \$10 per acre-foot for System Operation water, as compared to \$182 per-acre foot for water from Allens Creek Reservoir, and \$1,325 per-acre foot for the Carrizo-Wilcox Aquifer water supply.¹⁰⁴ With this low cost, readily available water, BRA will be able to keep its water rates stable, and will be able to leverage income from the sale of the water to create more sources of water to sustain BRA’s ability to meet future demands.¹⁰⁵ Moreover, this low cost water is being made available while advancing an instream flow regime that protects instream uses, water quality, and fish and wildlife habitat, incorporates continued study and development, and that has become the prototype for the development of the Hydrology-Based Environmental Flow Regime (“HEFR”) that is being used in SB 3 environmental flow planning and rulemaking for various Texas river basins.¹⁰⁶

In weighing this evidence, as compared to the evidence regarding public welfare presented by the Protestants, it is clear that BRA met its burden to demonstrate that the proposed appropriation will not be detrimental to the public welfare as that is defined in the water rights permitting context.

¹⁰² *Railroad Comm’n of Tex.*, 336 S.W.3d at 629.

¹⁰³ BRA 1 – 39:20 to 40:2; BRA 15 – 88:5-12.

¹⁰⁴ BRA 15 – 89:13 to 91:9; BRA 25; BRA 26.

¹⁰⁵ BRA 1 – 36:1-9, 36:17 to 37:5; BRA 10 – 18:8-17, 21:15-21; BRA 15 – 91:7-21; BRA 39.

¹⁰⁶ See BRA Post-Hearing Argument §§ II.A.4, and III.B.

G. Remaining Issues Raised By Protestants' Exceptions

1. Rulemaking Not Necessary

For the first time in this proceeding, FBR advances a rather creative argument, suggesting that the Commission should not address many of the issues presented by the PFD in this contested case proceeding, but should instead handle them through rulemaking because this would enable the Commission to “obtain the broader perspectives needed for developing statutory or regulatory interpretations of policies with statewide implications.”¹⁰⁷ Initially, BRA would note that FBR did not apparently perceive the need for broad-based rulemaking until *after* receiving the ALJs’ proposed rulings.¹⁰⁸ In its Post-Hearing Written Argument, FBR had argued that the ALJs *should* rule upon these issues, albeit in a different fashion than the ALJs have chosen to recommend.

More fundamentally, however, it is the agency’s choice whether to address such issues on a case-by-case basis or through rulemaking. The Commission has complete discretion to take action on each of these issues via *ad hoc* adjudication in a contested case instead of formal rulemaking if it chooses to do so. *See City of El Paso v. Public Util. Comm’n*, 883 S.W.2d 179, 188-89 (Tex. 1994). This is particularly true when an issue is specialized or varying in nature, and involves “complex technical considerations and competing statutory objectives,” such as the present unique and complex application. *Id.* In such circumstances, the Commission has the choice of creating a rule by notice and comment rulemaking proceedings or of establishing substantive standards through adjudication in a contested case hearing. *Id.*; *R.R. Comm’n v. Lone Star Gas Co.*, 844 S.W.2d 679, 689 (Tex. 1992). In the interest of resolving the disputed

¹⁰⁷ FBR Exceptions at 1-2 and 13-16.

¹⁰⁸ The only issues that FBR believes should not be addressed in this proceeding, not coincidentally, are the issues on which the ALJs have disagreed with FBR’s position.

issues and moving forward to develop a needed water supply, BRA urges the Commission to address these issues in an interim order, prior to remanding for further hearings on the WMP.

2. Protection of wetlands

FBR asserts that the ALJs' conclusion that the consideration of wetlands is outside the scope of this proceeding is one of the "policy issues" that should instead be resolved through rulemaking.¹⁰⁹ As discussed above, the question of whether any TCEQ authority requires the consideration of the protection of wetlands periodically inundated by overbanking flows in the Brazos River does not require rulemaking, but rather is an entirely appropriate issue for ALJs to determine in a contested case hearing. Importantly, although FBR cites background references to authority regarding TCEQ's consideration of wetlands in *other contexts*, FBR has cited no authority and no record evidence for its contention that protection of wetlands is required in any water rights application proceeding such as the present one.¹¹⁰ The ED agrees that there is no rule or statute requiring overbanking or any other type of extra condition related to wetlands to be placed in this type of permit.¹¹¹ FBR mistakenly conflates BRA's duty to protect fish and wildlife habitats in its application under Water Code § 11.152 with unrelated provisions that concern wetlands. Even were this concern an issue in a water rights permit application, both of BRA's experts, when cross-examined by FBR on this issue, testified that the draft permit's high-flow pulse provisions would accomplish the very overbanking effect that FBR advocates, addressing its wetlands concerns.¹¹²

¹⁰⁹ See FBR Exceptions at 32.

¹¹⁰ See PFD at 177.

¹¹¹ ED Response to Closing Arguments at 12-13.

¹¹² Tr. 754:5-14 (Harkins); Tr. 792:9-11 (Loeffler).

3. Provision for Brazos River Basin Watermaster

Dow argues that, in order to protect its water rights, BRA's System Operation Permit should include a special condition to prevent it from operating its water right until a watermaster is appointed for the Brazos River Basin.¹¹³ The ALJs examined this issue and correctly determined that it was improper, as this was not an issue specifically referred to SOAH as part of this hearing, and no notice was provided to the public that a watermaster might be appointed as part of this proceeding.¹¹⁴ If the Commission determines that a watermaster is necessary for the Brazos, it would be appropriate to direct the ED to initiate a proceeding pursuant to Water Code §§ 11.451 – 11.455, which includes the requirement of a hearing specifically to determine if a need for an appointment exists. Such a proceeding would likely be completed before the WMP and System Operation Permit is back before the Commission – even on BRA's expedited schedule. Therefore, there is no need for a special condition in BRA's permit to establish a watermaster.

4. Protestants' Proposed Special Conditions

BRA agrees with the ALJs in their rejection of the additional permit changes proposed by Protestants.¹¹⁵ NWF excepts to the PFD's rejection of its proposed permit term that would condition the "operational flexibility" of BRA to satisfy downstream water rights in such a way that BRA could not cause flows to fall below the 7Q2/subsistence level at any of the 14 identified gages.¹¹⁶ NWF contends that the testimony of Mr. Geeslin "provides sufficient evidence to support the imposition of such a condition."¹¹⁷ The ALJs were correct in finding that

¹¹³ Dow Exceptions at 22-23. Or, in the alternative, Dow suggests that its proposed streamflow restriction could retroactively be made applicable to BRA's new water right as well as all of its existing water rights.

¹¹⁴ PFD at 179.

¹¹⁵ See PFD at 185-189.

¹¹⁶ NWF Exceptions at 11-12.

¹¹⁷ *Id.*

no evidence in the record supports the imposition of this condition. In the testimony of Mr. Geeslin to which NWF cites, Mr. Geeslin states his opinion that the ED's draft permit protects instream uses with its environmental flows conditions.¹¹⁸ To support its exception, NWF cites to this section of testimony where counsel for NWF asked Mr. Geeslin an inapplicable hypothetical question assuming that instream flow requirements in the permit would apply to BRA's existing water right permits. Based on the record evidence and testimony before them, the ALJs properly concluded that the proposed environmental flow standards are "reasonable and necessary" to protect all public interests.¹¹⁹

5. CCG's Impairment Claims

Virtually the entirety of CCG's exceptions to the PFD concerns their own term permit water rights. The PFD gives considerable attention to CCG's claims that approval of BRA's Application No. 5851 would impair their existing permit rights.¹²⁰ Contrary to CCG's contentions, the fact that CCG members have applications pending at TCEQ to renew their expired term permits is not relevant to BRA's application, nor are these respective applications "mutually exclusive."¹²¹ First, to the extent that these Protestants take issue with the processing of their term permit renewal applications, this issue can *only* be addressed with the ED of the TCEQ and is irrelevant to this proceeding.

Second, the PFD correctly finds that CCG's claims that BRA's application may have negative impacts on their water rights are based on a legally flawed interpretation of the nature of term permits vis-à-vis permanent water rights under Texas law. As term permit holders, CCG members have no existing rights entitled to protection under the impact analysis of Water Code

¹¹⁸ Tr. 1821.

¹¹⁹ PFD at 78.

¹²⁰ PFD at 35.

¹²¹ CCG Exceptions at 4.

§ 11.134(b)(3)(B) and they are not entitled to the unappropriated water or return flows under consideration in this proceeding.¹²² Based on an analysis of the *Stacy Dam* case¹²³ and Water Code §§ 11.134(b) and 11.1381(a) and (d), term permits are not appropriations of water, but rather grants for terms of years to use water that are subordinate to water rights that have already appropriated the water to others (in this case, to BRA in Lakes Proctor and Stillhouse Hollow).¹²⁴

6. BRA's Water Conservation Plan

NWF excepts to a number of the PFD's findings that BRA's water conservation plan meets all applicable regulatory requirements. It is important to place the ED staff's review of BRA's water conservation plan in context. BRA has shown that it uses and will continue to use techniques to avoid waste and achieve water conservation, such as monitoring and maintaining facilities, metering usage, and engaging in education and public awareness.¹²⁵ These conservation techniques are found in BRA's water conservation plan, which was approved following review by the ED, and will be implemented through BRA's water supply contracts and internal operating policies.¹²⁶ The ED's staff conducted a full technical review of BRA's 2005 Water Conservation and Drought Contingency Plans for BRA's application pursuant to 30 TAC § 295.9.¹²⁷ The ED's staff also reviewed BRA's later-submitted 2009 Water Conservation and Drought Contingency Plans and determined that they contain all requirements of 30 TAC

¹²² PFD at 35.

¹²³ *Lower Colorado River Auth. v. Texas Dep't of Water Resources* ("Stacy Dam"), 689 S.W.2d 873 (Tex. 1984). Curiously, CCG asserts that "[t]he reason for granting water rights issued under the *Stacy Dam* case was to preserve the rights of appropriators under term permits to use that new water made available from the cancellation program when it became available." CCG Exceptions at 8. However, the *Stacy Dam* case did not involve term permits in any way.

¹²⁴ PFD at 38.

¹²⁵ PFD at 126-27.

¹²⁶ BRA 4; BRA 5; BRA 9; BRA 35 – 10:12 to 11:21, 37:7 to 38:8; BRA 37.

¹²⁷ ED-KW-4; ED-KW-1 – 5:4-13.

Chapter 288.¹²⁸ The ED found that these plans contained quantified five- and ten- year targets and methods to implement these targets, and meet all TCEQ administrative requirements.¹²⁹

BRA believes that the ALJs properly reviewed BRA's water conservation plan and properly rejected NWF's objections to the plan. Therefore, BRA urges the Commission to overrule NWF's exceptions in this regard. Should the Commission determine that any of NWF's objections are valid, BRA will make appropriate revisions of its water conservation plan while the WMP is being developed.

III. CONCLUSION

BRA respectfully requests the Commission to direct the ALJs to prepare an interim order that includes the following:

- 1) Approving of interim environmental flow conditions reflected in the ED and BRA Draft Permits;
- 2) Authorizing of an appropriation of 1,001,449 af/yr at the Richmond gage, as interruptible supply,¹³⁰ to be classified as firm and non-firm supply as part of the WMP, taking into account the location of use and other factors, including the following:
 - a. The availability of current and future return flows as requested in BRA's application;
 - b. Adjustment of reservoir storage capacities to reflect the most current volumetric survey data as part of the WMP process; and
 - c. No limitation on diversions from the Brazos River into Allens Creek Reservoir under the authorization of the System Operation Permit;
- 3) All other rulings, with the exception of transcript cost allocation, as reflected by the PFD;
- 4) Generally approving preparation of the WMP as described in the draft permit attached to BRA's Exceptions to the Proposal for Decision as Attachment 1;

¹²⁸ ED Reply to Closing Arguments at 7.

¹²⁹ Tr. 1775:9 – 1786:8 (Wang).

¹³⁰ Based upon the Executive Director's analysis, this equates with approximately 256,000 af/yr firm supply at Richmond, with the remainder interruptible. BRA Ex. 105. It should be recognized, however, that use of this water above Richmond could reduce the firm supply to something more like 150,000 af/yr.

- 5) Staying proceedings in this matter for 12 months to allow BRA to develop and submit the WMP to the Executive Director and other parties for review; and
- 6) Directing SOAH to hold a contested case hearing on the WMP and provide the Commission with its PFD within 8 months following BRA's initial submission of the WMP.

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CERTIFICATE OF SERVICE

I hereby certify by my signature below that on the 17th day of November, 2011, a true and correct copy of the above and foregoing Brazos River Authority's Reply to Exceptions to the Proposal for Decision was forwarded via email, hand delivery, or First Class Mail to the parties on the attached Service List.


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