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August 20, 2015

Via Electronic Filing Submission

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:

Please find attached a copy of the Brazos River Authority's Exceptions to the Proposal for Decision on Remand in connection with the above-referenced matter. Copies of this document have been served on all parties and on the Administrative Law Judges.

Please do not hesitate to contact me should you have any questions.

Sincerely,

Susan M. Maxwell

Susan M. Maxwell

SMM/dem
Enclosure

cc: Service List (*via e-mail)*

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

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

BRAZOS RIVER AUTHORITY'S EXCEPTIONS TO THE PROPOSAL FOR DECISION ON REMAND

Applicant, Brazos River Authority (BRA), compliments the Administrative Law Judges (ALJs) on a job well done. As noted by the ALJs, BRA's System Operation Permit application is probably the most complex water right application ever dealt with by the agency. With the limited exceptions set forth below and some proposed editorial changes set out in Attachment A, BRA believes that the ALJs' Proposal for Decision on Remand (PFDR) has done an excellent job of dealing with it.

Exception No. 1: BRA excepts to the 14% reduction in the amounts of appropriation (Findings of Fact Nos. 69, 70, and 176.b., Ordering Provision 1.b.).

The ALJs conclude that actual reservoir storage capacity should have been accounted for in the Water Availability Model (WAM) used for the System Operation Permit, and rely on Dow's incomplete analysis to estimate that the authorized maximum annual appropriation under each of the four demand scenarios would have been reduced by 14% if this had been done. (PFDR at 53-66 and 264-265).

BRA agrees with the ALJs that it is necessary to consider the impact of reductions in available storage capacity due to sedimentation on the water supply available under the System Operation Permit. In fact, BRA plans to take this into account in determining how much water it will make available for long-term firm supply contracts. (*See, e.g.*, Tr. 4041:21-4042:8; 4075:6-

24 (Brunett)). However, BRA disagrees with the way that the ALJs propose to take this into account. In BRA's opinion, a 14% reduction in the permit's maximum annual appropriation is not appropriate for several reasons.

First, as addressed more fully in BRA's Initial Post-Hearing Brief and BRA's Post-Hearing Reply Brief, BRA believes that the ALJs have erred by not following the express guidance provided by the Commissioners on this issue. (*See* Brazos River Authority's Initial Post-Hearing Brief at pp. 18-19; Brazos River Authority's Post-Hearing Reply Brief at pp. 23-25; BRA 130 – 8:1 to 9:19 (transcript of Jan. 25, 2012 TCEQ Agenda)).

Second, reduction of the permit's maximum annual authorized appropriation on the basis of Dr. Brandes' analysis is an inappropriate "apples to oranges" comparison. Dr. Brandes testified that Demand Level C's maximum annual appropriation of 516,955 af/yr should be reduced by 73,102 af/yr (Dow 57 at 8; PFDR at 65). However, the 73,102 af/yr value reflects the reduction in *firm supply* computed by Dr. Brandes, not a maximum annual use or appropriation amount. (*See* Dow 57 at 6-7; Dow 59). The firm annual supply under a given demand scenario is very different from the maximum annual appropriation under that scenario, which occurs only during a single year of the WAM's simulation. For example, under Demand Level C the maximum annual appropriation is 516,955 af/yr, while the firm supply is 329,109 af/yr. (BRA 126; BRA 124). If Dr. Brandes performed the modeling to determine reduction in the maximum annual appropriation under Demand Level C, it was not introduced in the hearing.

Third, the modeling runs that would be needed to document the 14% reduction are not in evidence and have not yet even been developed. Dr. Brandes' version of the System Operation WAM adjusted storage capacity for only one reservoir, Possum Kingdom, and was run for only

two of twelve scenarios. (Dow 57 at 6-7). The impact on other reservoirs and the BRA system as a whole are extrapolations from those two runs.

BRA does not disagree that reduction in available storage capacity needs to be taken into account. This information is incorporated into the WMP Accounting Plan and will be utilized on a daily operational basis. However, the modeling and analysis has not been done to support the approach recommended by the ALJs. BRA believes that the approach recommended by the Executive Director (ED), and generally concurred in by BRA, is a better way to address the issue. The ED recommended addition of a special condition to the permit providing:

> In the first reconsideration or major amendment of the WMP after issuance of the permit, Permittee shall demonstrate that it has additional sources of supply sufficient to offset any reduction in its system reservoirs due to sedimentation or shall, at a minimum, provide evidence demonstrating the Permittee has worked diligently and continuously to develop such alternate sources of supply. Should Permittee fail to either demonstrate that such supplies are available or that it has pursued diligent development of those supplies, the amount of water authorized for appropriation under this permit may be reduced.

(*See* ED R01A 4:15-5:3 (Alexander)). If there is concern about the uncertainty interjected by the word "may," the term "shall" could be substituted. This provision would allow modeling to accurately determine the amount of reduction in maximum annual appropriation under each demand level.

Although the ALJs correctly note that BRA has no plans to reclaim lost storage capacity by removing sediment from Possum Kingdom Reservoir (PFDR at 54), other realistic projects are available to potentially replace storage capacity lost to sedimentation, *e.g.*, reallocation of storage capacity in Lake Whitney from hydroelectric generation to water supply or raising the level of the conservation pool. (Tr. 4106:22-4107:13; 4104:6-22 (Brunett)).

For these reasons BRA submits that the special condition proposed by the ED to address the reduction of storage capacity is preferable to the 14% reduction recommended by the PFDR.

Specifically, BRA excepts to Findings of Fact Nos. 69, 70, and 176.b and to Ordering Provision 1.b.

Exception No. 2: BRA excepts to some of the PFDR's proposed modifications of the Drought Study provision (Findings of Fact Nos. 82 and 176.f., Ordering Provision 1.f.).

The ALJs propose modification of the provision requiring a detailed study of the impact of the recently ended drought by: (1) moving it from the WMP into the permit; (2) running the nine-month study period from the date of permit issuance; and (3) requiring reduction in the amount of water appropriated by the permit if the study indicates that the amount of water available for appropriation has decreased as a result of the drought. (PFDR at 65-66). BRA has no objection to the first two components of the ALJs' recommendation.

In BRA's opinion, however, the third component of the recommended modifications is unworkable. The nine-month study will examine whether the available water supply from the System Operation Permit has been reduced as a result of the drought, but it will not be an actual extension of the WAM for the Brazos River basin to encompass the record of the recent drought. (Tr. 3145:11-3146:9 and Tr. 3879:4-3880:14 (Gooch); Tr. 3955:6-13 (Alexander)). Considerably more time, as well as peer review and public comment, would be required to actually extend the Brazos WAM from 1997 to 2015. BRA's nine-month study will provide a good indication whether the available supply under the System Operation Permit has been reduced and the relative magnitude of the reduction, if any, but it will not provide the modeling necessary to determine the specific amount of reduction. For that, naturalized flows must be developed for the entire basin and the WAM extended.[1] BRA's study should indicate whether extension of the Brazos WAM is needed, but will not itself accomplish that actual extension.

[1] BRA's study is anticipated to make many, but not all, of the adjustments required to develop naturalized flows for the period of the drought. It will likely be conservative and show a greater impact on water available for appropriation than would be anticipated from complete development of naturalized flows

BRA proposes that the final sentence of the PFDR's proposed special condition 5.C.7 be modified to read 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.

This would still require that reductions in the permit's appropriation be made if the water available for appropriation has been reduced, but would allow for extension of the Brazos WAM to accurately determine the amount of reduction.

For these reasons BRA specifically excepts to Findings of Fact Nos. 82 and 176.f and to Ordering Provision 1.f.

CONCLUSION

BRA urges the Commission to affirm the PFDR, with the two modifications described above to address the unsupported 14% reduction of amounts of appropriation, and BRA's Drought Study.[2]

Respectfully submitted,

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and extension of the WAM. BRA would not object to use of results of its nine-month study on an interim basis until the Brazos WAM is extended.

[2] Attached hereto as Attachment A are BRA's suggested editorial changes to the PFDR and proposed Order, respectively.

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Attachment A

Proposed Revisions to the PFDR Analysis

BRA proposes to make the following corrections in the text of the PFD on Remand's analysis:

1. Page 32 – In the second full paragraph, first sentence, BRA believes that the reference should be to BRA's request to appropriate 516,955 (not 516,499) acre-feet per year; BRA believes that same number (516,499 af/yr) is also referenced in error, twice, in the second full paragraph of Page 255.

2. Page 61 – In the last sentence of the first full paragraph (preceding the quote), the attribution should be "As explained by Dow," (not BRA).

3. Page 176 – In the last sentence of the third paragraph, BRA believes the intended reference is to the March 1, 2012 priority date (not the effective date) of the SB3 Rules.

4. Page 214 – In the second sentence of the first full paragraph, the reference should be to what "NWF and FBR [not BRA] seem to believe."

5. Page 225 – In the last sentence of the first full paragraph, it appears that the intended statutory reference is to §11.042(c) (not §11.046(c)).

6. Page 228 – In the last sentence of the first full paragraph, BRA believes the intended statement is that ". . . BRA must obtain a permit amendment authorizing indirect reuse" (not direct reuse).

7. Page 272 – In the first sentence of the third paragraph, the reference should be to "Dow, LGC, NWF, and FBR" (not BRA).

8. At Pages 266-67, the ALJs recommend that BRA's requested downward revision of the Allens Creek term authorization amount, from 202,650 af/yr to 202,000 af/yr, be made in Permit No. 5851, acknowledging that the higher number had clearly been based on an error. Accordingly, BRA suggests that this corrected number be substituted globally throughout all references in the PFDR and accompanying Order, including the following additional ones that BRA has identified:

    - Page 8, in the third unnumbered bullet point;
    - Page 253, in the second sentence of the first full paragraph; and
    - Page 255, twice in the second full paragraph.

Proposed Revisions to the PFDR Order

BRA proposes to make the following editorial changes to the proposed form of Order included as part of the PFD on Remand:

1. Finding of Fact No. 43 – BRA proposes adding "2011" before the reference to "Region G" in the second sentence, for consistency and clarity.

2. Finding of Fact No. 76 – BRA suggests deleting "Reservoir" at the end of the sentence so that it says "Possum Kingdom Lake."

3. Finding of Fact No. 177 and Ordering Provision No. 2 – BRA requests that the phrase "and other attachments" be deleted from the sentence. It is not clear what is meant by "and other attachments." The WMP, the WMP Technical Report and related appendices are the only documents that were a part of BRA Exhibit 113.

4. Finding of Fact No. 177.b. and Ordering Provision No. 2.b. – BRA suggests adding "of the WMP" after the page reference in the introductory sentence to make it clear which document must be amended.

5. Finding of Fact No. 177.b. and Ordering Provision No. 2.b. – BRA believes the first sentence should say "within a reach" rather than "with a reach."

6. Finding of Fact No. 184 – BRA suggests that the last word of the sentence be changed to "witnesses" rather than "witness."

7. Conclusion of Law No. 12 – BRA notes that the TCEQ rule reference should be corrected to be "295.7."

CERTIFICATE OF SERVICE

I hereby certify by my signature below that on the 20th day of August, 2015, a true and correct copy of the above and foregoing BRA's Exceptions to the PFD on Remand was forwarded via email or First Class Mail to the parties on the attached Service List.

Susan M Maxwell

Susan M. Maxwell

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

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