



August 31, 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 Reply to 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

SMM/dfb
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 REPLY TO EXCEPTIONS TO THE
PROPOSAL FOR DECISION ON REMAND**

Applicant, Brazos River Authority (BRA), files this Reply to Exceptions to Proposal for Decision on Remand for consideration by the Texas Commission on Environmental Quality (TCEQ or Commission) in this contested case.

**I.
INTRODUCTION**

The Brazos River Authority’s System Operation Permit is truly unique. As recognized by the Administrative Law Judges (ALJs), BRA will be able to produce a substantial new water supply through the coordinated operation of its eleven reservoirs, taking advantage of available run-of-river flows that would otherwise go unused. It will be able to do so while satisfying all applicable environmental flow standards. Because this water supply is made available without the necessity of constructing a reservoir, it is extremely economical and avoids environmental impacts associated with reservoir construction. As Chairman Shaw stated during the Commission’s prior consideration of BRA’s Application No. 5851, “I think frankly this provides a lot of opportunities. There’s a lot of public benefit contained in this permit proposal.”¹

As reflected by the Proposal for Decision on Remand (PFDR), the application, which now includes BRA’s Water Management Plan (WMP), is complex and represents the first

¹ BRA 130 – 22:23 to 23:1 (Transcript of Jan. 25, 2012 TCEQ Agenda).

application of TCEQ's Senate Bill 3 (SB 3) environmental flow standards for the Brazos River Basin to a major application. Additionally, it presents an opportunity for the Commission to address the issue of use and appropriation of return flows in a comprehensive fashion.

Of the twenty-five parties protesting the application at various times, only four remain who actively participated in the recent evidentiary hearing and oppose issuance of the permit. Those four present a wide range of issues that the ALJs have thoroughly considered and addressed in the PFDR. BRA submits that none of the protestants have raised issue that warrants rejection of the PFDR or denial of the System Operation Permit, and replies to those numerous exceptions below.

With the limited modifications presented in its exceptions to the PFDR, BRA urges the Commission to approve its Application No. 5851 without further studies or analyses. The water supply is needed now. As reflected by BRA Exhibit 143, BRA has received requests for additional long-term water supplies that exceed the amount that will be made available by the System Operation Permit.

II. **COMPLIANCE WITH WATER CODE CHAPTER 11 AND TCEQ RULES**

Dow Chemical Company (Dow), The National Wildlife Federation (NWF), the Lake Granbury Coalition (LGC) and the aligned group of parties known in this case as the Friends of the Brazos River (FBR) each take issue with the PFDR's conclusion that Sections 295.5, 295.6, and 295.7 of the TCEQ rules are directory rather than mandatory, and the conclusion that "the rules need not be complied with perfectly, so long as they are complied with sufficiently to provide the ED with the information he needs to adequately analyze an application."² (PFDR at

² In making their exceptions, Dow, FBR, LGC and NWF suggest that BRA's argument, which was raised in its post-hearing reply brief, was a surprise and prevented their response. However, the parties should not have been surprised by BRA's position since BRA presented evidence that the TCEQ and the ED do

28). (Dow Exceptions at 3-16; NWF Exceptions at 2-6; FBR Exceptions at 6-14; LGC Exceptions at 3-9). Also, while the Executive Director (ED) agrees with the ALJs that BRA has met the requirements of Sections 295.5, 295.6, and 295.7, the ED is concerned that the ALJs' analysis could set a precedent that would allow future water rights applicants to avoid providing the information that the ED's staff may require. (ED Exceptions at 22-23). BRA believes the ALJs correctly analyzed the requirements of Sections 295.5, 295.6, and 295.7 and concluded that BRA's Application meets all the requirements of those rules.

Much of the protestants' arguments regarding this issue hinges on the cases upon which the PFDR relies. They argue that the cases holding that a statute or rule is directory rather than mandatory all involve a statute or rule that simply imposes a time deadline. This is true of many, but not all, of these types of cases. Many courts have concluded that a non-deadline, substantive statute or rule is directory rather than mandatory. *See Prado v. Johnson*, 625 S.W.2d 368, 369 (Tex. App.—San Antonio 1981, writ dism'd) (statute providing procedures for delivering and counting ballots to judges was directory as it did not include consequences if violated); *Vinson v. Burgess*, 773 S.W.2d 263, 268 (Tex. 1989) (provision in Texas Constitution stating commissioners court "shall" set tax rates was not mandatory because other provisions suggested that authority was not exclusive); *Moore v. Corpus Christi*, 542 S.W.2d 720, 723-24 (Tex. App.—Corpus Christi 1976, writ ref'd n.r.e.) (statute did not require exact rate of interest to be specified in ballot proposition based on consideration of entire act, its nature, its object, and consequences of such construction); *Mutchler v. Texas Dep't. of Pub. Safety*, 681 S.W.2d 282, 285 (Tex. App.—Austin 1984, no writ) (statute providing that DPS officers "shall" receive supplemental pay, but not appropriating funds, was therefore not mandatory); *Texas Mut. Ins.*

not require water rights applicants to strictly comply with the exact language of several of its Chapter 295 rules. *See, e.g.*, BRA 135 and 141.

Co. v. Vista Cmty. Med. Ctr., LLP, 275 S.W.3d 538, 552-53 (Tex. App.—Austin 2008, pet. denied) (statute requiring worker’s comp fee guidelines to be reviewed and revised by Department of Insurance every two years not mandatory because legislature provided no consequences for failure to do so); *Serna v. Enriquez*, 545 S.W.2d 281, 282-83 (Tex. App.—Corpus Christi 1976, no writ) (statute stating absentee voter “shall” make written application for a ballot was directory because it provided no consequence to void ballots in absence of such an application). The protestants’ arguments in this regard are not persuasive.

The protestants also argue that if the Commission agrees with the PFDR’s conclusion that the rules are directory, water rights applicants would not be required to comply with the provisions at all. Dow goes so far as to suggest that an applicant could simply not pay the required fees.³ This is simply not the case, nor is it what the law requires. Applicants, like BRA, are required to provide the information required by these rules. However, the protestants would have the Commission conclude that applicants must *strictly* comply with each word of the rules, and that the agency has no authority to accept anything else.

The Commission should reject this argument. To start, the Commission’s own actions make it clear that strict compliance with each word of such procedural rules is not required. Take, for example, Dow’s recently issued water right amendment (COA No. 12-5382c). (*See* BRA 141). Dow’s water right amendment does not contain a diversion *point*, but rather sets out a diversion reach. *Id.* While Dow claimed it complied with the strict requirements of Section 295.7 because Dow provided survey information for the upstream and downstream locations, Dow did not provide, and its permit does not include, a diversion *point*. (Dow Exceptions at 5.) It has a diversion reach.

³ It should be noted that paying fees is actually a statutory requirement, under Texas Water Code §§ 5.701, 11.128, and 11.134.

Additionally, many of the rules in Chapter 295, including Sections 295.5, 295.6, and 295.7, are in the form, almost verbatim, as they were written in 1964 and possibly even earlier. *See* §§ 215.5, 215.6, 215.7 of the Rules, Regulations, and Modes of Procedure of the Texas Water Commission – 1964 Revision adopted by the January 2, 1964 Order of the Texas Water Commission. Technology, however, has moved beyond what was available fifty (50) years ago when these rules were first adopted.⁴ Modern tools such as the WAM and GIS capabilities have given the TCEQ far better information to evaluate applications than what was available in 1964. Given that fact, it makes sense that the Commission would accept various forms of the information required by Sections 295.5, 295.6, and 295.7 so long as that information allows the TCEQ staff to evaluate whether the application meets the requirements of Texas Water Code § 11.134.

Even so, contrary to what the protestants argue, BRA has provided the information required by Sections 295.5, 295.6, and 295.7 to evaluate its Application No. 5851.

A. Section 295.5

Section 295.5 states that the “total amount of water to be used shall be stated in definitive terms, *i.e.* a definitive number of acre-feet annually” Dow and FBR argue that BRA’s use of the four alternative demand levels does not meet this requirement. (Dow Exceptions at 16-18; FBR Exceptions at 14-15). Dow’s assertion that this requirement limits the amount of water to be used to one specific number, not a set of numbers under different scenarios, is not supported by Section 295.5 and is unnecessarily limiting. As correctly concluded by the PFDR, nothing in

⁴ As another example, Section 295.121 requires plans to be on tracing linen with waterproof ink, but also in the form of photographic reproductions if on a stable mat film such as Chronar, Estar, or Herculene. It is doubtful that anyone provides maps and plans to TCEQ on tracing linen, which was widely used by engineers and surveyors in the 19th and early 20th centuries, or provides the same in the form of photographic reproductions on stable mat film. Modern digital reproduction technologies have made these methods of producing copies obsolete.

Section 295.5 precludes establishing different amounts of water that can be diverted under different scenarios. In definitive terms, the System Operation Permit provides a total amount of water that may be diverted, which is the maximum annual water use limit of 516,955 acre-feet per year. (BRA 132B ¶ 1.A)⁵. The System Operation Permit and WMP go further, by considering four demand levels. (BRA 113 at p. 10 (Table 2.4))⁶. These demand levels represent four different possible scenarios that could happen in the future, based on needs identified in the most recently adopted state and regional water plans and other information available to BRA. For each of these demand levels, BRA has determined the total maximum amount of water that it can divert and use throughout the basin depending on the demand level, and a total maximum amount of water that BRA could use in each reach, depending on the demand level. Both are limitations on BRA. These values are specifically described in Tables G.3.2 through G.3.25 of WMP Appendix G-3. There is nothing in TCEQ’s rules or the Texas Water Code that prevents BRA from limiting the amount of water it may use in a particular reach or at a particular time. As required by Section 295.5, the amount of water BRA is authorized to use is stated in definite terms.

B. Section 295.6

Dow also argues that the application does not identify a maximum diversion rate as required by Section 295.6. (Dow Exceptions at 18-19). BRA’s Application and the draft System Operation Permit establish a maximum diversion rate. The maximum aggregate diversion rate

⁵ Wherever BRA references the “proposed System Operation Permit,” or “draft permit,” or similar reference, BRA is referring to BRA Exhibit 132B as modified by the ALJs in the PFDR, except with respect to any changes addressed in BRA’s Exceptions.

⁶ BRA’s Water Management Plan, in all three parts, is included in the record as BRA 113. Throughout this brief, BRA cites to various parts of the WMP as follows: citations to the WMP regulatory document itself are in the form “BRA 113 at p. ___”; citations to the WMP Technical Report are in the form “BRA 113 at p. ___-___ (chapter and page); and citations to a particular one of the Technical Appendices are in the form “BRA 113 at ___-___ (letter and number).

for each river segment is specified in Table 4.6 of the WMP. (BRA 113 at p. 45; Tr. 3687:19-21 (Alexander)). For BRA reservoirs, the maximum diversion rate for the reservoir is the rate specified in BRA's existing water rights. Whether BRA has one customer or twenty customers within any of the reaches identified on Table 4.6, the maximum diversion rate cannot exceed the value on the table. (Tr. 2826:6-10 (Brunett)). Further, these maximum diversion rates apply irrespective of the demand level under which BRA is operating. (Tr. 2923:6-13 (Brunett)). If BRA has an existing user within a reach, and later adds a new user in that reach, both diversions combined will have to comply with the applicable diversion rate in the WMP. (Tr. 3597:19-22 (Brandes)). Dow also complains that the diversion rates should be in the provisions of Permit No. 5851 itself rather than in the WMP. (Dow Exceptions at 19). This argument has no basis in law. The WMP clearly states that it is part of and incorporated into the System Operation Permit. (BRA 113 at p. 1; BRA 132B at Water Management Special Condition D.1.). Adding Table 4.6 into the draft permit adds nothing substantively. If BRA seeks to amend the maximum aggregate diversion rates in the future, BRA will have to amend its WMP, which will require TCEQ approval. (BRA 113 at pp. 2-3).

C. Section 295.7

Contrary to the assertions of Dow, LGC, and FBR, BRA's Application and the draft System Operation Permit also meet the requirements of Section 295.7 because BRA has identified specific points for diversions. (Dow Exceptions at 19-24; LGC Exceptions at 3-9; FBR Exceptions at 15). The protestants make arguments similar to those made in the first hearing regarding the "hypothetical" diversion points and concerns about effects on existing water rights holders. However, the revised application now pending before the TCEQ, including the WMP, no longer proposes four control points and specifically identifies diversion points.

The System Operation Permit, through the WMP, specifies diversion points and diversion reaches which are: (1) diversion points authorized by BRA's existing water rights, including those that have been added contractually on stream channels downstream of BRA reservoirs; (2) locations where future demands are identified in the 2011 regional water plans (Brazos G and Region H) as using supplies from the System Operation Permit; and (3) the Richmond to Gulf of Mexico reach where BRA anticipates additional supplies from the System Operation Permit would be used. (BRA 119 – 12:7 to 13:4 (Gooch)).

BRA has also demonstrated and explained how the diversion locations were modeled. (BRA 119-22:10). To the extent that new diversion points are added in the future based on new contracts, these new diversions of System Operation Permit water must be within the amount authorized for the reach in which the customer's diversion is located and the customer's diversion rate must not cause BRA to exceed the applicable maximum aggregate diversion rate in Table 4.6. (Tr. 2826:6-10 (Brunett); Tr. 3021:17-19 (Gooch); Tr. 3819:11-18 (Alexander)). And, as authorized by Section 297.102(b) of the TCEQ Rules, all new diversion points would be specifically identified and provided to TCEQ before diversions could occur. (Tr. 3687:10-13 (Alexander)).

Dow complains that BRA cannot use Section 297.102(b) to add specific diversion points later when BRA adds water supply customers, as BRA has done historically. (Dow Exceptions at 22-24). Contrary to Dow's assertions, however, identifying diversion reaches and later specifying the exact location of the diversion point once a water supply contract is executed is allowed by law and is a common practice of TCEQ. 30 Tex. Admin. Code § 297.102(b). Dow takes the position that Section 297.102(b) of TCEQ's rules is limited to adding a downstream diversion point so that stored water can be released and diverted downstream by a new purchaser

without an amendment. Dow relies in part on the list of changes to a water right outlined in Section 295.158(b) that require notice, to support its argument that BRA cannot later add diversion points in accordance with Section 297.102(b). BRA disagrees. Dow's analysis of these sections is incorrect. Section 297.102(b) provides that "if the exercise of rights under the contract between the supplier and the purchaser . . . would require amendment of the appropriative right only by adding a diversion point . . . of a water right which authorizes storage, the supplier shall submit a copy of the executed contract to the executive director and shall not have to submit an application for an amendment." (Emphasis added). The System Operation Permit is "a water right which authorizes storage." (BRA 132B). Special Condition 5.C.2. of the draft System Operation Permit recognizes that BRA will be storing System Operation Permit water in its system reservoirs at its junior priority. *Id.* There is nothing in Section 297.102(b) that prohibits a water right that authorizes both storage and the diversion of run-of-river water from utilizing this section. Moreover, BRA's ability under the System Operation Permit to add diversion points within a reach is more limited than the authorization of Section 297.102(b). Each such new diversion point is also subject to WMP limitations on the amount that may be diverted within each reach and the rate at which it may be diverted. Moreover, Section 295.158(b) is not controlling. It applies to amendments of water rights, while Section 297.102(b) carves out an exception because it states that an amendment is not required.

LGC argues that where a diversion point will be located matters to "future" applicants and that BRA's approach of adding diversion points when BRA enters into a new contract creates uncertainty and risk for these future applicants. (LGC Exceptions at 8-9). LGC's arguments regarding protection of unknown future applicants have no basis in law and are speculative at best. While it is true that the addition of a diversion point could affect a junior

water right holder, this is permissible because the junior water right is just that, junior. (Tr. 4177:15 to 4178:6 (Gooch)). When a junior water right applicant receives its permit, BRA's annual diversions each year by reach will be included in TCEQ's Water Availability Model (WAM), and thus the junior water right will be limited by BRA's senior appropriation. This is the law. *See* TEX. WATER CODE § 11.027 (stating "As between appropriators, the first in time is the first in right."). And, nothing in Texas Water Code § 11.134 requires TCEQ to consider the effects on future applicants. With respect to how TCEQ models the System Operation Permit in the Brazos WAM for future applicants, TCEQ's analysis must ensure that the new appropriation does not impair BRA's System Operation Permit, or other senior water rights. TEX. WATER CODE § 11.134(b)(3)(B). BRA is not required, in order to be granted its permit, to show or otherwise determine how TCEQ will model BRA's permit in the future for future applicants. These exceptions should be rejected.

III. **RETURN FLOWS**

A. Exceptions of the Executive Director

Only the ED seriously disputes the PFDR's treatment of return flows. Dow agrees that the PFDR's treatment of the issue is reasonable, but prefers the ED's approach because it is "more protective." (Dow Exceptions at 43-44). Certainly Dow and the ED are correct in asserting that the ED's approach to return flows is more protective of existing water rights. By excluding return flows from water that is available for appropriation, existing rights are "more protected," just as they would be if no new appropriations of state water were ever authorized. But, that is not the law or policy of the State of Texas. Quite to the contrary, both Texas statutory and common law agree that return flows discharged back into waters of the state become state water available for appropriation. Further, the policy underlying Texas water laws

promotes putting state water to beneficial use to the maximum extent possible without impairing existing rights or harming the environment.

The ED argues that use of return flows can only be authorized under Texas Water Code §§ 11.042 (b) and (c). Both the PFDR and BRA agree that use of return flows may be authorized under § 11.042; the disagreement with the ED focuses upon his assertion that use of return flows may *only* be authorized under this section. The ED's approach is contradicted by TCEQ rules, the Texas Water Code, and the Texas Supreme Court.

TCEQ's own rules provide that return flows, once discharged, are available for appropriation. 30 Texas Administrative Code § 297.49(a) states:

- (a) A right to take and use water is limited to the extent and purposes authorized in the water right. Except as specifically provided otherwise in the water right, state water appropriated under a water right may be beneficially used and reused by the water right holder in accordance with the water right prior to its release into a watercourse or stream. *Once water has been diverted under a water right and then returned to a watercourse or stream, however, it is considered surplus water and, therefore, subject to maintaining instream uses, beneficial inflows to bays and estuaries, or appropriation by others unless expressly provided otherwise in the water right.*

(Emphasis added). Virtually identical language is contained in Texas Water Code § 11.046(c):

- (c) Except as specifically provided otherwise in the water right, water appropriated under a permit, certified filing, or certificate of adjudication may, prior to its release into a watercourse or stream, be beneficially used and reused by the holder of a permit, certified filing, or certificate of adjudication for the purposes and locations of use provided in the permit, certified filing, or certificate of adjudication. *Once water has been diverted under a permit, certified filing, or certificate of adjudication and then returned to a watercourse or stream, however, it is considered surplus water and therefore subject to reservation for instream uses or beneficial inflows or to appropriation by others unless expressly provided otherwise in the permit, certified filing, or certificate of adjudication.*

(Emphasis added). The ED is correct in pointing out that these provisions address surface water based discharges but, as discussed below, the same is true for groundwater based discharges.

The ED argues alternatively (a) that § 11.046(c) is not an “authorization statute;” (b) that return flows are interruptible and interruptible flows are not included in the WAM; (c) that § 11.046(c) addresses surplus water, which does not include return flows; and (d) that the ALJs have improperly relied upon the Lake Grapevine case as a precedent. (ED Exceptions at 6-7). Each argument is incorrect.

Even if § 11.046(c) is only a statement of the law and does not itself authorize appropriation of return flows, the ED admits that the appropriation can be sought under § 11.121. (ED Exceptions at 6-7). Because BRA’s Application is made under Texas Water Code § 11.121, among other authorities, this argument adds nothing.

Perhaps at the heart of the ED’s approach to return flows is the argument that return flows are interruptible and interruptible flows are not included in the WAM.⁷ As observed by the PFDR, the decision to exclude return flows from the WAM is not based on prior history of the agency, formal action of the Commissioners, or specific statutory authority; it was a decision made in the process of developing the WAM. (PFDR at 217). This modeling decision has guided the ED’s approach since that time. As the ALJs recognize, the law, rather than modeling decisions or consequences, should guide the Commission’s action on this issue. (PFDR at 235-236). BRA concurs.

The ED argues that the term “surplus water” as used by § 11.046(c) “could be” interpreted not to include return flows. (ED Exceptions at 7). The problem with the ED’s argument is that it is contradicted by the express terms of § 11.046(c), which addresses water that has been diverted and “used or reused” prior to discharge back into the watercourse. Such

⁷ Interruptible flows are included in some runs of the WAM, for example, WAM Run 8, but not in WAM Run 3, which is used for evaluating the availability of water for new appropriations.

explicit language does not allow the construction urged by the ED. Nor does the definition of “surplus water” in Texas Water Code § 11.002(10) necessarily exclude return flows.

Finally, the ED argues that the ALJs, at pages 223-224 of the PFDR, misinterpreted his position in the Lake Grapevine case. (ED Exceptions at 7). That is incorrect. While the matter was not primarily a “reuse case,” it necessarily addressed how to account for all inflows to the reservoir. One issue from an accounting perspective was how to handle the City of Grapevine’s return flows, which were at the time subject to a pending reuse application by the City. As the PFDR correctly notes, the ED told the Commission, “if a water right holder uses water, then returns it to the watercourse or stream it is considered unappropriated state water and may be used by others.” (PFDR at 224, and authorities cited therein).⁸ For this reason Grapevine’s return flows were accounted as “inflow” to the reservoir – just like all the rest of the state water. (*Id.*).

Regarding groundwater based return flows, the ED argues that the Texas Supreme Court’s decision in *Edwards Aquifer Authority v. Day*, 369 S.W.3d 814 (Tex. 2012), supports the ED’s interpretation of Texas Water Code § 11.042(b), which is true. The Court recognized that the discharger of groundwater based return flows could obtain a bed and banks permit for their reuse under § 11.042(b). *Id.* at 822. What the Court also said (that the ED wishes to overlook) is that without a § 11.042(b) authorization the groundwater based discharge becomes state water – and state water is available for appropriation by others under § 11.121. *Id.* at 822-23. That is precisely what the PFDR recommends: that BRA obtain authorization to use its own

⁸ BRA strongly disagrees with the ED’s characterization of his position on reuse as “consistent” and “long-standing.” (ED Exceptions at 7, 8). Quite to the contrary, the ED’s position on reuse has evolved over time, moving away from the initial position taken in the Lake Grapevine matter, to approval of negotiated return flow agreements by major stakeholders on the Trinity River, to assigning priority dates for bed and banks permits and finally to reservation of return flows for the discharging entity or water supplier.

groundwater based return flows under § 11.042(b) and that it appropriate the groundwater based discharges of others (not subject to an existing § 11.042(b) authorization) as state water pursuant to § 11.121.

To the extent the ED challenges BRA's modeling of the availability of return flows by saying that the return flows should be incorporated into the WAM as part of the naturalized flows, the ED appears to be stretching. (ED Exceptions at 5). This is an entirely new argument, not supported by evidence in the record. The transcript passage cited in the ED's exceptions inconclusively addresses modifications that might need to be made in the WAM in the future to incorporate return flows. (Tr. 3708:10- 3710:4 (Alexander)). It is not an evaluation of BRA's modeling of return flow availability. Moreover, it doesn't make any difference. One thousand acre-feet of return flows can be added to the model as part of the naturalized flow or as an additional inflow that is not part of the naturalized flow. Either way, the same amount of additional water will be in the WAM.

The ED continues to recommend that BRA's accounting track individual sources of return flow from discharge to diversion, much like a bed and banks permit for each individual discharge. (ED Exceptions at 24-25). BRA presented evidence, accepted by the ALJs, that such accounting provisions are unnecessary and that annual review of the amount of actual return flow discharges compared to modeled amounts of return flow volumes would be sufficient, with re-computation of available water if actual return flow discharges were 5% or more below the modeled amounts. (PFDR at 236-238). The ED's exceptions add nothing to the arguments previously rejected by the ALJs.

B. Exceptions of NWF

NWF continues to request that the permit identify the specific sources of return flow that BRA is authorized to rely upon and that 50% of the return flows from the System Operation Permit be dedicated to instream flow protection. (NWF Exceptions at 8-11). As the PFDR notes, this return flow source information is provided in the WMP. (PFDR at 237). NWF states that the tables in Appendix G of the WMP also contain some sources of return flow that were excluded from BRA's calculations due to settlement agreements with the discharging entity or TCEQ's authorization of reuse by the discharging entity. This is correct. However, BRA submits that it does not necessitate revision of the permit as suggested by NWF. This information will be available annually as part of BRA's return flow accounting and, if the Commission directs, BRA can prepare and include such a table of return flow sources and authorized amounts as part of a conforming amendment of the WMP following approval of the permit.

Regarding NWF's request that 50% of System Operation Permit return flows be dedicated for instream flow protection, BRA submits that such a dedication is neither necessary nor reasonable. Instream flows are protected by TCEQ's SB 3 environmental flow standards and, as recognized by the PFDR at 239, BRA goes considerably beyond those requirements by virtue of its agreement with the Texas Parks and Wildlife (TPWD). (*see* BRA 39, 131).

C. Exceptions of Lubbock, Bryan and College Station

The Cities of Lubbock, Bryan and College Station have submitted exceptions proposing revision of provisions in the draft permit addressing the interruption of BRA's authorization to use surface water based return flows (Special Condition 5.A.3) and groundwater based return flows (Special Condition 5.A.4). BRA believes that the proposed revisions are unnecessary.

The Cities agree that the WMP handles interruption of use of return flows appropriately; it is only the draft permit's special conditions that worry the Cities. (Lubbock Exceptions at 3-4; Bryan/College Station Exceptions at 4-5). However, because the WMP, including the WMP Technical Report, is incorporated into Permit No. 5851 and already contains the limitations that Lubbock, Bryan and College Station believe are necessary, modification of the draft permit is unnecessary. (PFDR at 7). Moreover, contrary to the Cities' concern, amendment of the WMP to increase the appropriation by including additional return flows will be subject to notice and hearing. (*Cf.* Tr. 3695:3-11 (Alexander)). Thus, although the Cities perceive potential ambiguity or flexibility in the draft permit's provisions, that concern is addressed by the incorporation of the WMP which the Cities admit properly addresses their issue.

Examining the two provisions and the Cities' proposed revisions, BRA would provide some additional background information. Special Condition 5.A.3 is the result of BRA's discussions and compromise with numerous municipalities shortly after its application was filed in 2004. BRA agreed that its authorization to use a municipalities' return flows could be interrupted by the discharger's own reuse. Part of the compromise was to limit indirect reuse to the service area of the discharger to ensure that the discharger did not assume BRA's role as a raw water supplier within the basin. After reaching this compromise, BRA amended its pending application to specifically request inclusion of this special condition.

Special Condition 5.A.4 is the result of BRA's settlement with Bryan and College Station. It was approved by the Cities at the time of settlement (when College Station was represented by other counsel) and BRA requested its inclusion as a special condition in the permit, as required by the settlement agreement. The provision clarifies that indirect reuse of groundwater based return flows is not subject to an area of use restriction.

The proposed revision of Special Condition 5.A.3 is not acceptable as written. It has the likely unintended effect of making the area of use restriction applicable to direct reuse instead of indirect reuse. But for this modification, BRA would not seriously object to the proposed revisions even though it considers them to be unnecessary.

D. ED’s Objections to Special Conditions on Reuse

The Executive Director objects to the service area restriction of Special Condition 5.A.3 and to Special Condition 5.A.4, as well as findings of fact that correspond to those provisions. (ED Exceptions at 21-22). Special Condition 5.A.3 has been in all the various drafts of the permit since the original one was prepared by the ED before the first evidentiary hearing in 2011. BRA is at a loss to explain or understand the ED’s objections at this point. Special Condition 5.A.4 does not grant BRA authority to modify the permit’s terms by its agreement; rather, it is a condition that BRA has requested be imposed upon its reuse authorization.

IV.

SB 3 RULES AND ENVIRONMENTAL PROTECTIONS

Dow, NWF, FBR, the Office of Public Interest Counsel (OPIC), and LGC all object to certain conclusions the ALJs reached regarding the environmental flow requirements governing the System Operation Permit and WMP. However, none of these parties present any new arguments or new information that were not already addressed in the PFDR. Much of the protestant’s arguments are grounded in challenges to the adequacy of the SB 3 rules.

A. Compliance with Texas Water Code Provisions and TCEQ Rules Post SB 3 Rules.

NWF, FBR and LGC each complain that the ALJs committed a legal error when they concluded that “compliance with the SB 3 rules fully satisfies Texas Water Code §§ 11.0235(b) and (c), 11.046(b), 11.134(b)(3)(D), 11.147(b), (d), (e), 11.150, and 11.152, and 30 Texas

Administrative Code § 297.54(a).” (PFDR at 25). (NWF Exceptions at 26; FBR Exceptions at 45-58; LGC Exceptions at 14-17). Contrary to the protestants’ assertions, the PFDR correctly interprets the law with the adoption of SB 3 rules, and concludes that BRA’s Application complies. The protestants offer no new persuasive legal arguments that warrant a reversal of the PFDR’s conclusion that compliance with the SB 3 rules satisfies these other Water Code provisions addressing the same issues.

LGC makes the additional argument that these provisions should be considered separately from the SB 3 rules because the SB 3 rules do not consider the effects the permit will have on recreation and fisheries in reservoirs. (LGC Exceptions at 16-17). While it is true the standards do not adopt flow restrictions intended to specifically protect reservoirs, the Brazos River Bay and Basin Expert Science Team and the Brazos River and Associated Bay and Estuary System Stakeholder Committee declined to adopt such restrictions. (Tr. 3866:4-12 (Alexander)). Instead, the science team recommended that the TCEQ adopt environmental flow conditions at defined measuring points. To the extent that a new appropriation is associated with a reservoir, the applicable flow requirements will apply to the new appropriation. (Tr. 3866:13 to 3867:9 (Alexander)). Thus, for BRA to divert or store System Operation Permit water within any of BRA’s reservoirs, it must comply with the environmental flow conditions in the WMP. (BRA 113 at pp. 28-46). There is no need for an additional analysis for reservoirs specifically. The compliance with SB 3 rules ensures the protection of instream uses, water quality, fish and wildlife habitat and the bays and estuaries and thus eliminates the need for the ED and applicants to conduct separate analyses under Texas Water Code §§ 11.0235(b) and (c), 11.046(b), 11.134(b)(3)(D), 11.147(b), (d), and (e), 11.150, and 11.152.

While no separate analyses were required, BRA nevertheless assessed the effects on the System Operation Permit will have on instream uses, fish and wildlife habitat, water quality, and bays and estuaries, as provided by in the aforementioned Water Code provisions. The evidence shows that BRA's Application will have limited or negligible impact on existing fish and wildlife habitat. (BRA 128 – 46:13-14 (Osting)). The environmental flow conditions in the permit, which are consistent with TCEQ's adopted environmental flow standards, will be protective of instream uses. (BRA 128 – 46:14-18). Additionally, the System Operation Permit is based upon operations of already permitted reservoirs, which limits the effect of construction of new reservoirs on fish and wildlife habitat. (BRA 128 – 46:18-20). BRA has also adopted and implemented reservoir operating guidelines to manage the frequency and magnitude of reservoir level fluctuations to avoid or minimize impacts on reservoir fisheries, including fish habitat. (BRA 113 at pp. 27-28, 4-57 to 4-59, G-5).

BRA has conducted studies on the Brazos, Little, and Navasota rivers relating to water quality conditions (temperature and dissolved oxygen) which evaluated flow levels lower than or consistent with the System Operation Permit's environmental flow conditions. These studies showed achievement of temperature and dissolved oxygen goals at flow conditions that are comparable to the System Operation Permit's environmental flow conditions. (BRA 128 – 49:1-16 (Osting)). For chlorides and total dissolved solids (TDS), water quality standards attainment has varied between supporting and non-supporting in many segments in the Brazos River Basin. (BRA 128 – 50:13-15). There are natural sources of chlorides in the upper basin, primarily upstream of Possum Kingdom Lake in the Salt Fork Brazos River and Double Mountain Fork Brazos River. (BRA 128 – 50:13 to 51:2). BRA operations under the System Operation Permit are not anticipated to alter the chloride or TDS concentrations historically observed in the Brazos

River Basin. (BRA 97; BRA 98; BRA 128 – 51:2-3; Tr. 675 (Wurbs), 685-87, 2371-75 (Gooch), 2667-68); *see also* 2011 PFDR at 98).

Through BRA's amended Memorandum of Understanding (MOU) with TPWD, BRA has agreed to limit operations under the System Operation Permit so that its operations do not reduce flows to less than the 7Q2 flow values at seven locations, identified in Exhibit A of the MOU Amendment, which are in addition to the SB 3 measuring points. BRA will collect routine water quality monitoring data at or near eight locations, identified in Exhibit C of the MOU Amendment. (BRA 131 at ¶¶ 4, 5.C. and Exhs. A and C). Thus, these additional steps will help ensure that the System Operation Permit will have little or no effect on water quality in the Brazos River Basin. (BRA 128 – 49:17-18).

The bay and estuary system for the Brazos River is limited and the Brazos River estuary is a river-dominated estuary with no directly associated barrier island embayment. (BRA 128 – 54:14-20). In recognition of these facts, the SB 3 environmental flow standards provide sufficient inflows to support a sound ecological environment at the mouth of the Brazos River. (BRA 128 – 55:7-12). Because the Brazos River has no natural bay and limited connection to associated existing bays and the limited estuary is dominated by river flows, the System Operation Permit is not anticipated to have an impact on any bay or estuary. (BRA 128 – 55:3-7).

While these analyses show the System Operation Permit will not negatively affect the environment, there is also evidence that shows how the System Operation Permit will actually benefit the environment. For example, using the System Operation Permit during times when stream flows are higher than the applicable environmental flow conditions and using BRA's existing water rights during low flow periods will result in higher stream flow more consistent

with environmental flow standards, even during periods when System Operation Permit water is not being used. (BRA 128 – 52:1-5 (Osting)). Also, the impacts of the System Operation Permit are far less than the environmental impacts that would be associated with the construction of a new reservoir. (BRA 1 – 39:21-22 (Forté); BRA 15 – 89:1-12 (Gooch); BRA 29 – 42:16-20 (Harkins); BRA 128 – 46:19-20 (Osting)). Thus, even if a separate analysis is required by certain Texas Water Code provisions to assess the effects of the proposed System Operation Permit on water quality, instream uses, fish and wildlife habitat, and bays and estuaries, the evidence shows the BRA has done that analysis and the proposed System Operation Permit will be protective.

B. Use of Upstream Measuring points

FBR argues that the PFDR incorrectly concludes that the use of upstream measuring points complies with the SB 3 rules. (FBR Exceptions at 61, 67-68). NWF, while not opposing the use of upstream measuring points, believes there is “an improved approach” to ensure compliance. (NWF Exceptions at 13-21). Both FBR and NWF speculate that in some instances the use of an upstream measuring point could result in the reduction of flows that are necessary to provide for a sound ecological environment. The arguments presented by FBR and NWF are not substantively different than those that the ALJs considered in the PFDR. As noted in the PFDR, nothing in the SB 3 rules prohibits the use of upstream measuring points and the use of upstream measuring points is limited to only certain locations where the hydrologic and geographic conditions warrant the use of such points. (PFDR at 148-150, 158-159).

To comply with the environmental flow conditions where the reach is downstream of its applicable measuring point, the environmental flow requirement is calculated as the environmental flow condition in Table 4.4 of the WMP plus the aggregated BRA diversions

downstream of the applicable measuring point. (BRA 113 at pp. 40, 4-75; BRA 128 – 30:1 to 36:7 (Osting); Tr. 3270:23 to 3271:4 (Osting)). The diversion rate is added to the applicable environmental flow standard to help ensure that the applicable flow rate will exist in the stream downstream of the diversion point. (Tr. 3271:15-25 (Osting); Tr. 3728:4-9 (Alexander)).

This requirement is further bolstered by the PFDR's suggested language change for the WMP, which would prohibit BRA from reducing flows below the environmental flow standard *at a point immediately below BRA's point of diversion*. (PFDR at 159). NWF contends that this added language is not sufficiently protective because there is no means of enforcement. However, that is not the case. The Brazos Watermaster will have the final decision on whether BRA will be able to divert run-of-river water under the System Operation Permit and will ensure that BRA complies with the environmental flow conditions. (Tr. 3682:9-14 (Alexander), 3723:12-17, 3725:19 to 3727:4, 3728:4-9).

Moreover, BRA will be preparing an annual Environmental Flow Achievement Report for the TCEQ. (BRA 113 at 46). This report will provide an opportunity for BRA and the TCEQ staff to implement operational changes to ensure that any failure to achieve environmental flow standards due to diversions under the System Operation Permit is addressed to prevent a recurrence. (Tr. 3239:5-23 (Osting); Tr. 3340:21 to 3341:9, 3757:8-11 (Alexander)). Similarly, the adaptive management provisions in the TCEQ rules, which are incorporated into the System Operation Permit, will allow TCEQ to reconsider applicable measuring points if through the SB 3 process, new data shows that different or additional measuring points are warranted. (Tr. 3344:20 to 3325:16 (Osting); Tr. 3757:12-21 (Alexander)).

For these reasons, the use of upstream measuring points is consistent with the TCEQ rules and will protect the environmental flow standards adopted for the Brazos River Basin.

C. Use of One Measuring Point

FBR, NWF, and OPIC all contend that the SB 3 rules allow the use of more than one measuring point to determine compliance with the SB 3 rules, and specifically suggest that both upstream and downstream measuring points should be used. (FBR Exceptions at 61-67; NWF Exceptions at 21-23; OPIC Exceptions at 4-5). Again, these arguments are not new; the ALJs thoroughly evaluated the legal requirements and the evidence presented and concluded that the SB 3 rules should only apply at the measuring point nearest to the particular diversion as set out in the WMP. (PFDR at 146-148). The SB 3 rules only require that the environmental flow standards be applied “at *a measuring point* that applies to the water right.” (Emphasis added). Nowhere do the rules specifically require that a water right comply with the environmental flow standards at multiple measuring points. This makes sense given the distance between measuring points, time of travel of water movement between measuring points, intervening inflows at large river and creek confluences, different hydrologic conditions in different geographic areas, and intervening reservoirs. (BRA 113 at G-6; BRA 128 – 38:1-12 (Osting); Tr. 3201:24 to 3202:5 (Osting), 3233:2-6, 3359:19-21). There are complex temporal relationships between flows, including pulses, occurring at adjacent upstream or downstream measuring points in the Brazos River Basin because of existing structural and operational influences, and because of pulse magnitude relative to diversion rates. The statistical correspondence of the flows between two measuring points is not guaranteed. (BRA 113 at G-6; BRA 128 – 38:2-12; Tr. 3299:23-24, 3353:19-22 (Osting)).

FBR and NWF outline some “worst-case” scenarios. These same scenarios were presented to the ALJs and rejected. (PFDR at 146-148). Nevertheless, there are safeguards in place to ensure that such worst-case scenarios, if they occur, will not be repeated. BRA’s annual

Environmental Flow Achievement Report will provide an opportunity for BRA and TCEQ staff to implement operational changes to ensure that any problems with environmental flow standards resulting from the System Operation Permit are addressed to prevent reoccurrence. (Tr. 3239:5-23 (Osting), 3340:21 to 3341:9; Tr. 3757:8-11 (Alexander)). As previously noted, the adaptive management provisions, will allow TCEQ to redefine applicable measuring points if new information shows that new or additional measuring points are necessary. (Tr. 3344:20 to 3325:16 (Osting), 3757:12-21 (Alexander)).

D. Pulse Flow Requirements

Dow, FBR, and NWF all criticize the PFDR's conclusion that the System Operation Permit complies with the TCEQ's high flow pulse rule, which requires high flow pulses to be passed and not stored or diverted until the applicable volume amount has passed the measuring point, or the duration of time has passed since the high flow pulse passed the measuring point. (Dow Exceptions at 40-42; FBR Exceptions at 60, 68-70; NWF Exceptions at 23-24). *See* 30 Tex. Admin. Code § 298.475(d)(1). Dow contends that at a minimum BRA should be required to pass qualifying pulses within one or two days after the duration time elapsed since the high flow pulse trigger level occurred. (Dow Exceptions at 42). FBR also suggests that BRA does not have the physical ability to pass high flow pulses at some reservoirs and therefore would be unable to comply with the System Operation Permit.

BRA disagrees. Temporary storage of pulse events is simply a practical reality. A pulse event coming into a reservoir is going to be captured inside the reservoir. (Tr. 3198:18-22 (Osting); 3287:21-24, 3303:1-5). Temporary storage of a pulse may be necessary to determine (1) if storage is occurring under the System Operation Permit, and (2) whether applicable environmental flow conditions are being met. (BRA 113 at p. 50; Tr. 3199:11-12 (Osting)).

And, as the PFDR correctly notes, meeting the environmental flow conditions at a downstream measuring point is not solely predicated on releases from reservoirs. (Tr. 3194:7-13 (Osting)). If a qualifying pulse occurs at a measuring point downstream of a dam, BRA can capture and store the pulse of water entering the reservoir under the System Operation Permit. (Tr. 3196:14-18 (Osting)). BRA would only be obligated to pass sufficient additional water to ensure that there is a qualifying pulse. Given the magnitude of many of the pulses, it is likely that BRA will often be able to operate under the System Operation Permit without having to actively manage and actively forecast pulses and their passage downstream. (Tr. 3302:16-22 (Osting)).

A time period limiting how long BRA may temporarily store high flow pulses is also unnecessary. If a qualifying pulse must be released (if one, or part of one, is required to be released), the pulse requirements will need to be satisfied in accordance with the environmental flow conditions if BRA intends to use the water under the System Operation Permit. (Tr. 3198:2-5, 18-22 (Osting), 3200:16-18, 3233:2-17, 3294:5-7). BRA's best chance of meeting the environmental flow conditions will be to make the release consistent with other hydrological events that are occurring at the same time. (Tr. 3232:8-14, 3292:24 to 3293:2 (Osting)). It is to BRA's advantage to release a qualifying pulse while a larger event is ongoing, while there are other inflows and runoff to assist BRA in making sure that its release hits the applicable environmental flow condition target. (Tr. 3304:1-4, 3325:4-9 (Osting)).

With respect to FBR's claim about BRA's ability to pass pulses at certain dams, this situation is unlikely to occur. (FBR Exceptions at 70-73). Most of the System Operation Permit storage occurring at any of its reservoirs will likely be at the top of conservation pool. (Tr. 3328:9-10 (Osting)). Nevertheless, if BRA were faced with the unlikely situation where the facilities at one of the System reservoirs is unable to pass high flow pulses because of physical

limitations of the dam, BRA would need to operate its system in a manner that provides some reasonable expectation that BRA will be able to refill storage emptied by the System Operation Permit and pass the required pulse events, if necessary. (Tr. 3328:20 to 3329:6, 3338:22 to 3339:4 (Osting)). BRA can also avoid emptying space in a reservoir under the System Operation Permit, so that all storage will be occurring under its existing water rights, which are not subject to SB 3 environmental flow requirements. In the end, it is up to BRA to comply with its System Operation Permit and thus it may be necessary to limit the use of System Operation Permit water from some reservoirs if BRA is unable to comply with the terms and conditions for releasing water in order to meet high flow pulse requirements. And as the PFDR correctly notes, the TCEQ has the authority to enforce BRA's compliance with the environmental flow standards (PFDR at 177). In the final analysis, this is an enforcement or management issue, not a basis for denial of BRA's Application.

E. Operational Flexibility

NWF excepts to the ALJs' inclusion of the additional language suggested by BRA to Paragraph 5.C.3. that clarifies that the operational flexibility granted by the System Operation Permit may not prevent the achievement of environmental flow requirements that would have otherwise been achieved absent of the operational flexibility. (NWF Exceptions at 24-26). The operational flexibility will allow the BRA to elect to provide water from any reservoir (out of priority order), where the demands on the reservoir are less, in the event of a priority call. (Tr. 3082:1-25 (Gooch)). As a result, BRA would be impounding inflows at the reservoir that would otherwise have been required to pass inflows to the senior water right holder. NWF concern is primarily with how BRA will manage its existing water rights which currently are not subject to

environmental flow requirements, under this new authority. BRA believes that NWF's concern is adequately addressed by the PFDR's recommended condition.

There is no evidence in the record, and NWF cites to no evidence, that suggests that BRA will use this authority in conjunction with its existing water rights to avoid complying with the environmental flow standards. Certainly, the Brazos Watermaster would have authority to ensure that BRA did not use its operational flexibility to deliberately avoid complying with environmental flow requirements. Moreover, as with any impoundment of water under the System Operation Permit, BRA must comply with the environmental flow conditions. (Tr. 3301:13-23 (Osting)). If the use of Special Condition 5.C.3 causes the flows in the river to be reduced, BRA would not be able to impound or divert water under the System Operation Permit until BRA could meet the environmental flow condition. (BRA 132B; Tr: 3802:25 to 3803:6 (Alexander)).

F. Effects on Groundwater

While conceding there is no factual dispute regarding the System Operation Permit's effects on groundwater (*i.e.* there will be no impact to groundwater), FBR claims that the PFDR concludes that the effects on groundwater is addressed by compliance with the SB 3 rules. (FBR Exceptions at 74-76). This is incorrect. The PFDR separately considers the effects on groundwater and does not rely on the SB 3 rules for its analysis (PFDR at 178). Certainly, the SB 3 environmental flow standards could address the effects on groundwater, groundwater recharge, and groundwater quality, but this not a serious issue for the Brazos River basin. Moreover, as the PFDR found, BRA demonstrated that its System Operation Permit would not significantly impair existing uses of groundwater or groundwater quality, or spring flow. *Id.* This is not disputed. The Commission should disregard FBR's exception.

V.
WATER AVAILABILITY – HYDROLOGY AND MODELING ISSUES

A. Storage Capacity

BRA concurs completely in the ED's exceptions regarding reservoir storage capacity lost to sedimentation. (ED Exceptions at 11-15). Use of authorized storage capacity is required by the *Stacy Dam* decision.⁹ Moreover, it was directed by the Commissioners during their consideration of the first (2011) PFD in this case. (BRA Ex. 130, at 11). The ALJs have incorrectly recommended a 14% reduction in the authorized appropriation (maximum annual use, basin-wide) based upon an analysis of reduction of the firm yield of one reservoir. In so doing the ALJs both incorrectly rule on the merits of the issue and also make an incorrect adjustment to the amount of appropriation.

Ironically, like BRA and the ED, Dow's Exceptions also recognize that the PFDR's 14% across-the-board reduction cannot be justified. (Dow Exceptions at 24-26). However, Dow's proposed solution is to require BRA to analyze the impact of reduced storage capacity as part of its Drought Study analysis and adjust the permit's appropriation at that time. (Dow Exceptions at 26).

BRA submits that the special condition recommended by the ED properly addresses the issue, satisfying the requirements of the *Stacy Dam* decision yet also addressing the impact of sedimentation on the System Operation Permit's water supply. That special condition (5.D.5) provides:

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

⁹ See *Lower Colorado River Auth. v. Texas Dept. of Water Resources*, 689 S.W.2d 873 (Tex. 1984).

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.

Both BRA and the ED have agreed that “shall” could be substituted for “may” in the final sentence. (BRA Exceptions at 3; ED Exceptions at 15).

Under this provision, if replacement of lost storage capacity is not in progress, BRA would be required to perform an analysis of the impact of lost storage capacity when amendment of the WMP is next considered. As a practical matter, if BRA’s Drought Study indicates the necessity of extending the WAM to include the recent drought and reducing the System Operation Permit appropriation, this provision would require analysis of the impact of reduced storage capacity as part of the same amendment – as suggested by Dow.¹⁰

B. Drought Study

Dow, NWF, LGC and FBR all object to the Drought Study provision recommended by the PFDR. (Dow Exceptions at 27-31; NWF Exceptions at 7; LGC Exceptions at 10-14; FBR Exceptions at 17-18). One objection is to the lack of specificity as to the exact scope of work that will be entailed in BRA’s 9-month Drought Study. (*See, e.g.*, NWF Exceptions at 7; LGC Exceptions at 13). Dow’s exception goes so far as to specify the scope of work for the study in a detailed permit condition. (Dow Exceptions at 30). As described in BRA’s Exceptions to the Proposal for Decision on Remand, at page 4, the 9-month Drought Study would be an approximation of a basin-wide extension of the WAM, making many of the major adjustments required to develop naturalized flows. It would not, however, address all of the adjustments to develop naturalized flows for the extended time period throughout the basin; such a study would

¹⁰ Also, as suggested by Dow, LGC and FBR, the maximum diversion by reach computations could be re-analyzed as part of the same study. (Dow Exceptions at 46-47; LGC Exceptions at 23-25; FBR Exceptions at 17).

require several years and ought to include public comment and peer review. (BRA Exceptions at 4-5).

BRA submits that it is unnecessary to further define the scope of the Drought Study at this time and unnecessary to include that further definition as a permit condition. BRA also submits that the special condition recommended by Dow is totally unworkable and impossible to fulfill. Dow's permit condition would essentially require BRA to extend the Brazos WAM to include the period of 1997-2015. That cannot be accomplished in the 9 months allotted for completion of the Drought Study. Moreover, the Brazos WAM should be extended by TCEQ and subject to public comment and peer review. Requiring BRA to undertake that task and solely bear that expense is inappropriate.

LGC and FBR object to the PFDR's Drought Study requirement, saying that it re-creates the two-step process and may result in a decision that is not final. (LGC Exceptions at 12; FBR Exceptions at 18). BRA disagrees. The draft permit defines the rights that BRA would be authorized to exercise. The fact that those rights might be adjusted or reduced in the future does nothing to detract from the finality of the rights recognized when the permit is granted. All water rights are subject to possible cancellation or reduction for non-use. TEX. WATER CODE § 11.171, *et. seq.* The WMP, by the draft permit's own terms, is subject to review and modification at least every 10 years. (BRA 132B, ¶ 5.D.3). As recognized by the PFDR at 248-251, this is very different than the two-step process previously disapproved by the Commission and satisfies all legal finality requirements.

C. Junior Refills

Dow continues to push its argument that the WMP modeling allows storage emptied at a junior priority to be refilled with water at a senior priority. (Dow Exceptions at 31-38). FBR

supports Dow's arguments (*see* FBR Exceptions at 18), and NWF supports Dow's argument concerning construction of one provision of BRA's System Order. (NWF Exceptions at 6-7).

The PFDR, at 76-84, accurately summarizes the evidence and positions of the parties, and explains the ALJs' basis for rejecting Dow's junior refill argument. For the ALJs it came down to an issue of credibility because the testimony of different experts was flatly contradictory. Dow's exceptions provide the Commission no basis for second guessing the ALJs' conclusions in this regard. The ALJs heard the testimony and are in a position to objectively evaluate the credibility of contradictory expert testimony.

Contrary to Dow's assertion that Dr. Brandes conducted the only "direct analysis" of the junior refill issue, BRA demonstrated that Dr. Brandes' analysis did not directly examine the priority of water refilling storage capacity that was emptied at a junior priority. Rather, Dr. Brandes' testimony simply indicates that some storage was emptied at a junior priority and infers, without analyzing, that senior priority water must have been used to fill that space. Only BRA examined the availability of junior priority water to refill storage capacity emptied at a junior priority and BRA Exhibit 151C demonstrates that it is virtually always available during the time period examined by Dr. Brandes. Texas Gov't Code § 2001.058(e).

Regarding legal construction of the disputed condition of the System Order, BRA believes that the ALJs have properly concluded that the disputed provision actually authorizes storage of water that might be needed by senior or junior downstream appropriators. It also imposes a requirement that such water be released at the direction of TCEQ. (PFDR at 83-84). NWF and Dow disagree, but the issue is largely academic because, as Dr. Alexander and Mr. Gooch testified, the WMP modeling does not allow storage emptied at a junior priority to be filled with senior priority water. (Tr. 3138-3139; Tr. 3690-3691). Moreover, it will not be an

issue going forward as BRA exercises its rights under the System Operation Permit because the accounting plan ensures that storage emptied at a junior priority will only be filled at a junior priority. (PFDR at 77).

D. Impairment of Existing Rights

FBR argues that the WMP analysis is flawed because the WMP modeling does not fully exercise BRA's existing rights every year, thus impairing BRA's own water rights. (FBR Exceptions at 18-26). The PFDR explains and addresses this argument at pages 99-106. It is additionally addressed by BRA's Post-Hearing Reply Brief at 27-29. As explained in the PFDR and BRA's prior Reply Brief, one of the fundamental purposes of system operation is to utilize run-of-river water when it is available, saving water stored in BRA reservoirs for times when run-of-river water is not available. Adoption of FBR's approach would frustrate system operation rather than allow it. For brevity, BRA adopts and endorses the responses to FBR's exception regarding impairment of existing rights that are presented in its prior Reply Brief and the PFDR.

Dow resurrects its argument that potential changes in water quality might impair its existing water rights by adoption of its prior arguments from the first phase of the hearing. (Dow Exceptions at 38). BRA believes that the PFDR addresses this argument satisfactorily (PFDR at 85-97) and adopts its treatment of the issue and the authorities cited therein for reply.

VI. **PUBLIC WELFARE**

Among the protestants, only Dow and FBR revisited the ALJs' conclusion that the proposed appropriation to BRA under the System Operation Permit is not detrimental to the public welfare, as required under Texas Water Code §11.134(b)(3)(C). (PFDR at 195). Dow's summary exception is really just a brief reframing of two of its other exception issues – one

being the “junior refills” overappropriation argument addressed above, and the other being Dow’s water quality (salinity) argument, for which it simply refers back to its prior briefing. (Dow Exceptions at 42-43). The ALJs have addressed these issues comprehensively in both of their recommended decisions (2011 PFDR at 87-102, 105; PFDR at 76-84, 85-97), and Dow offers nothing new at this point. On a different front, FBR challenges, without any citation to the law, the record, or even the PFDR, the ALJs’ conclusions regarding the extent to which protection of recreational uses is evaluated as part of the public welfare inquiry. (FBR Exceptions at 76-78). On their face, FBR’s exceptions under this heading are summary restatements of their broader legal and policy positions regarding the framework for environmental analysis of water rights applications under TCEQ’s post-SB3 Rules regulatory regime, and offer no basis to reject the ALJs’ analysis. For the reasons articulated in the PFDR and previously addressed in BRA’s Post-Hearing Reply Brief (at pages 58-63), and in Sections IV and V above, the Commission should reject Dow’s and FBR’s exceptions and affirm the ALJs’ conclusion that “BRA has shown that approval of its Application is strongly in the interest of the public.” (PFDR at 195; *see id.* at 184).

BRA believes that findings of fact addressing the public interest benefits from the System Operation Permit, including providing lower cost, reliable water supplies and providing for further environmental study and protection, are appropriately included in the Proposed Order. (PFDR at 190-194, 195). These findings are based on uncontroverted record evidence, and are consistent with the ALJs’ recognition that BRA does not satisfy the “non-detrimental to the public welfare” requirement simply by complying with other applicable statutory requirements. (PFDR at 184). Thus, as discussed below, BRA disagrees with the ED’s exception proposing to delete certain findings of fact from the Proposed Order.

VII.
OTHER EXCEPTIONS

A. Executive Director’s Issues

1. *Diversion amount in the draft permit*

The ED objects to the amount of appropriation recognized in the PFDR and to certain corresponding findings of fact in the Proposed Order. BRA is unclear whether the ED’s exception addresses the treatment of return flows, perceived errors in BRA’s modeling, or both. The transcript reference does not clarify matters, as the referenced testimony is addressing the maximum diversion limitations by reach, while the exhibit referenced addresses the amount of appropriation under alternative demand levels. BRA does not object to use of the annual maximum appropriation numbers from the ED’s hydrology memo. (ED – R3 at 8), but the amounts utilized for each demand level should reflect the PFDR’s authorization for BRA’s use of all return flows. The ED’s proposed findings of fact and ordering provisions reflect the ED’s approach to return flows. The correct amounts of appropriation for each demand level, authorizing use of all return flows, according to the ED’s hydrology memo are:

Demand Level A	381,474 af/yr
Demand Level B	344,375 af/yr
Demand Level C	516,411 af/yr
Demand Level D	505,584 af/yr

These amounts should be reflected in Findings of Fact Nos. 56, 62-65, 69-70, and 176b, and Ordering Provision 1.b., as well as in the draft permit.

2. *Water quality/salinity*

The ED proposes striking certain findings and conclusions regarding water quality because they have been superseded by the SB 3 environmental flow standards. While BRA

agrees that the SB 3 standards make these findings unnecessary, as a matter of prudence BRA requests that they be retained. The scope of SB 3 standards is an issue likely to be litigated after the Commission grants the permit if that decision is appealed. Retaining these findings would allow a court to address the issue, and uphold the permit's issuance, without remanding to the Commission if it were to determine that the SB 3 rules had not completely superseded these other requirements.

3. *Public welfare*

Like his prior exception, the ED proposes striking several findings of fact and one conclusion of law because they are not necessary to support a public welfare finding in the ED's view. As with the prior exception, BRA agrees with the ED's view on the scope of the public welfare to be considered by the Commission, but out of prudence would recommend retaining these proposed findings and conclusion. This could allow the permit's issuance to be upheld if a court were to take a broader view of the public welfare issue.

4. *Conforming changes in the WMP and Permit*

BRA is, frankly, confused by the ED's exception regarding conforming changes. Although the ED's exception indicates a disagreement with the conclusion that making conforming changes in the WMP is clerical, the ED's proposed revision of Conclusion of Law No. 37 retains the statement that changes are clerical and do not affect the finality of the order.¹¹ In the final analysis, however, BRA believes that the ED's differences are primarily semantic. BRA agrees that it will need to re-run the WMP models in many instances to implement changes that could result from the Commission's decision, and that those changes will need to be reviewed by the ED. BRA does not object to the proposed changes in the ordering provisions.

¹¹ The ED's proposed modifications of Conclusion of Law No. 37 address the reuse issue, not finality, and should be rejected if the PFDR's treatment of the reuse issue is approved by the Commission.

5. *Rosharon Gage streamflow requirement*

The ED opposes the streamflow condition requested by Dow in the event that a watermaster is no longer available for the lower Brazos basin because it imposes a flow restriction greater than the SB 3 standard. BRA has no objection to the ED's exception.

6. *BRA's agreements relating to return flows*

The ED objects to the service area limitation included in Special Condition 5.A.3, discussed above in connection with the exceptions of the Cities of Lubbock, Bryan and College Station. BRA does not understand how the ED could include this provision in every draft permit he developed for this application, since before the initial hearing in 2011, and now raise it as an exception to the PFDR. As stated above, BRA amended its application to request inclusion of this provision (with the service area limitation) and neither it nor proposed Findings of Fact Nos. 160, 161, and 162 should be deleted.

7. *Rules: directory v. mandatory*

This exception states the ED's concern with the discussion in the PFDR of whether certain TCEQ rules applicable to water rights applications should be considered directory or mandatory. So far as BRA can tell, this is simply a statement of the ED's concern and does not require any action by the Commission.

8. *Drought*

By this exception the ED proposes modification of the permit's special condition, discussed above, requiring BRA to conduct a 9-month Drought Study. BRA agrees to the changes proposed by the ED. In explaining the proposed changes, the ED states that "the BRA will have to determine that amount [of reduction of water available due to the drought]." This statement is confusing. As discussed above, if the 9-month Drought Study indicates that a worse

drought has occurred and the System Operation Permit's water supply is reduced, then the TCEQ Brazos WAM will need to be extended to include the 1997-2015 period. It is the revision of the WAM, a multi-year process, which will make it possible to determine the amount that the appropriation should be reduced. After the WAM is extended BRA agrees that it would need to determine the amount of reduction. (*see* BRA Exceptions at 4).

9. *Typographical errors*

BRA concurs in the ED's exception regarding correction of typographical errors.

10. *ED's Conclusion*

In his Conclusion the ED proposes that if the ED's approach to return flows is not accepted, special provisions should be included in the Commission's Order to state that the decision is not intended as a precedent for future reuse decisions. (ED Exceptions at 24-25). The PFDR properly considered and rejected this proposal. (PFDR at 239-240). BRA urges the Commission to do the same.

B. Beneficial Use

Several protestants except to the ALJs' analysis and conclusion that "BRA met its burden to prove that the SysOp Permit Appropriations are intended for beneficial use." (PFDR at 108). As with the public welfare inquiry, however, these exceptions are generally a different approach to the parties' other substantive critiques of BRA's Application and of the PFDR's recommended approval of Permit No. 5851 and the WMP. For example, Dow's beneficial use argument is essentially just another statement of its overappropriation critiques of the modeling underlying BRA's Application, specifically on the "junior refills" issue addressed above. (Dow Exceptions at 38-39). The LGC indirectly addresses beneficial use by arguing against permit approval on the basis of the scope of the appropriation and representation of Permit No. 5851 in TCEQ's

Brazos WAM. (LGC Exceptions at 2, 21-23). Such arguments, however, go far outside the legal parameters of the beneficial use inquiry required under Water Code § 11.134(b)(3)(A). They have already been addressed by BRA (*see* BRA’s Post-Hearing Reply Brief at 35-38), and thoroughly considered and rejected by the ALJs (PFDR at 108, 110, 112, 114, 116).

The most extensive set of exceptions framed under the beneficial use topic is the lengthy treatment of the issue presented by FBR. (FBR Exceptions at 26-45). FBR has repeatedly argued some version of this beneficial use theory throughout the hearing and briefing history of this case, and its theory suffers from at least two major problems: (i) FBR intertwines its beneficial use argument with a creative, but legally wholly incorrect, theory of the nature and purpose of state and regional water planning as it relates to TCEQ’s role in water rights permitting; and (ii) FBR relies on “anti-speculation” case law from other states (and miscellaneous other provisions from, for example, other TCEQ rules) to argue that Texas law on beneficial use should be interpreted differently than it has been interpreted by the Commission and its predecessors. FBR suggests that there is Commission precedent for interpreting § 11.134(b)(3)(A) differently than the PFDR has done, but provides no such examples. The ALJs rejected prior iterations of these FBR arguments and legal authority following the initial evidentiary hearing (2011 PFDR at 65-69), BRA has again refuted them based on the additional record from the second hearing (*see* BRA’s Post-Hearing Reply Brief at 35-38),¹² and the ALJs have again thoroughly analyzed and rejected both the “quantity” and the “anti-speculation” arguments presented in FBR’s exceptions. (PFDR at 109-112, 114-116).

On the quantity issue, FBR has always taken the position that BRA should be limited to an appropriation matching (or slightly exceeding) the amount of water recognized in the adopted

¹² *See also* BRA’s Post-Hearing Reply Argument (Aug. 19, 2011) at 20-27 (addressing relevant Texas legal authorities in detail).

State Water Plan and applicable regional water plans to be provided from BRA's System Operation Permit. (*See, e.g.*, FBR's Initial Post-Hearing Written Argument (July 29, 2011) at 59-61). As they say repeatedly in these exceptions, this would be 'within the 100,000 to 200,000 af/yr range.' But FBR now goes even farther afield with its theory of how the regional water planning process (and plan contents) should dictate the outcomes of TCEQ water rights permitting decisions. Read together, FBR's arguments describe what would essentially be a dual permitting regime, wherein the state's 16 regional water planning groups (RWPGs) each determine for their area which surface water right strategies can be authorized to meet water use needs, specific to binding amounts and users identified in the RWPG process. (*See* FBR Exceptions at 32, 33, 42, 79-84). This is simply not the law in Texas; in fact, FBR's suggested framework turns the actual statutes on their head. TCEQ is required to consider RWP recommendations in water right permitting decisions, *see* Texas Water Code §11.1501, but it certainly is not bound to follow RWP or SWP strategy recommendations, to the letter or even in broader terms.¹³ In terms of the legal requirement for consistency with the State Water Plan and applicable regional water plan(s), Texas Water Code §11.134(b)(3)(E), that determination of consistency does not endow a collection of regional water planning groups with the authority to predetermine what water rights TCEQ may approve, much less the precise terms and conditions of those authorizations.¹⁴ The ALJs have correctly rejected FBR's overbroad theory of the role

¹³ BRA's System Operation Permit is a perfect illustration of why TCEQ could not feasibly be bound to the recommendations of the RWPG, even once those are incorporated into an adopted State Water Plan. Over time, BRA's Application No. 5851 has been included as a recommended strategy to meet water needs in Region G and Region H in three different cycles of regional water planning – 2006, 2011 (the most current adopted), and 2016. In each of those RWP cycles, however, the planning groups have identified different amounts of water that could be utilized under the System Operation Permit, and for different users.

¹⁴ BRA finds this argument of protestants particularly ironic, and internally inconsistent. On the one hand, FRB argues that the authority of one or more RWPGs cannot be usurped by a situation in which BRA contracts to sell water authorized under Permit No. 5851 to an entity such as GCWA or for an

of the state and regional water planning process as it informs the Commission's consideration of BRA's Application.

C. Watermaster

Dow was the only party to address watermaster issues in its exceptions, offering a single paragraph to state its disagreement with the ALJs' conclusion that there is no legal basis to include a condition in the System Operation Permit conditioning it upon the continued existence of a watermaster in the lower Brazos basin. (PFDR at 262). BRA has already addressed Dow's (and Chisholm's) arguments on this point (*see* BRA Post-Hearing Reply Brief at 81, 84-85), and Dow offers no new legal argument or factual basis in support of its exception. Dow's loose suggestion that BRA's compliance with legal requirements applicable to its System Operation Permit and WMP may not be possible without the Brazos Watermaster program (Dow Exceptions at 45) is contrary to the abundance of record evidence on this issue. (*See, e.g.*, Tr. 3680:7-10; 3681:16-25; 3691:11-24; 3717:2-7; 3735:12-17; 3737:18-21; 3801:19 to 3803:2 (Alexander)); Tr. 3165:5-8 (Brunett); Tr. 2790:4 to 2791:8; 2792:3-15; 2962:17-24 (Brunett); 3546:10-20 (Gooch)).

D. Termination of the Term Permit for Allens Creek

NWF excepts to the ALJs' conclusion that the expiration of the term is not problematic. (NWF Exceptions at 12-13). As the ALJs point out, if the term permit expires, BRA's right to divert water pursuant to the term permit would simply cease. NWF believes this causes a problem if Allens Creek is not constructed before the end of term because it would leave it

amount above that identified in the latest plan (*see* FBR Exceptions at 33). LGC, on the other hand, criticizes BRA for including the substantial water demand identified for a particular user, *i.e.*, Comanche Peak Nuclear Power Plant, in the latest adopted Region G Plan (*see* LGC Exceptions at 22). In both regards, the protestants advance overbroad and incorrect theories of the role of regional water plans in relation to TCEQ's permitting authority.

unclear how much water would be available for diversion under Demand Levels A or B. NWF's concern is speculative at best. There is nothing in the evidence to suggest that BRA and its co-permittees will not construct Allens Creek Reservoir and, in fact, the evidence shows that BRA is moving forward with the environmental permitting work for the reservoir. (BRA 107 – 44:1-8 (Brunett)). Nevertheless, if in the unlikely event that the reservoir is not constructed within the 30-year term permit, BRA will be required to take the necessary steps to ensure it continues to have the right to divert the 202,000 acre-feet, which could easily be addressed by an application to renew or extend the term permit. The Commission should reject NWF's exception.

E. Other Issues Reurged by FBR

There are a variety of other subjects addressed in the PFDR to which only FBR takes exception. On each of these additional topics, however, FBR offers little or nothing beyond the same arguments and the almost nonexistent citations to the law or the hearing record that they had presented in their extensive post-hearing briefing. Each of these FBR topics is addressed below.

1. *Jurisdiction* – FBR reurges its unsuccessful arguments regarding requirements that FBR believes govern BRA's Application No. 5851, both as it relates to BRA settlement agreements entered into with other parties, and in relation to amendment of BRA's existing water rights, including the Allens Creek Permit. BRA has previously addressed these FBR issues (*see* BRA's Initial Post-Hearing Brief at 10; BRA Post-Hearing Reply Brief at 7-8), and the ALJs have already considered and twice rejected them. (2011 PFDR at 11-12, 13-16; PFDR at 13-19). FBR has established no legal or factual basis to challenge the Commission's and SOAH's jurisdiction to hear and decide this contested case.

2. *Conservation and Drought Planning* – FBR repeats in summary form its argument that BRA has failed to show that its current Drought Contingency Plan (DCP) and Water Conservation Plan (WCP) comply with Texas law and are enforceable as they relate to the System Operation Permit. BRA has previously addressed this FBR issue, with citation to the extensive record evidence. (*See* BRA’s Initial Post-Hearing Brief at 44-46; BRA Post-Hearing Reply Brief at 65-67). The ALJs thoroughly revisited this issue and again concluded that BRA’s Application No. 5851 complies with all applicable legal requirements for drought planning and water conservation. (PFDR at 200-203, 211-214). FBR identifies no legal or factual basis supporting a contrary conclusion.

3. *Interbasin Transfer Authorization* – FBR repeats its invitation to the Commission to write, through this permit adjudication, a new set of requirements overlaying additional legal requirements on applications for exempt interbasin transfers. (FBR Exceptions at 86-94).¹⁵ The ALJs correctly rejected FBR’s argument that BRA must independently prove all requirements under Texas Water Code § 11.134 specifically for the interbasin transfer authorization under the System Operation Permit. (PFDR at 246-247). BRA and the ALJs have also already addressed FBR’s argument relating to authorizations under BRA’s existing water rights. (*See* BRA’s Post-Hearing Reply Brief at 71-72; PFDR at 247). FBR’s exceptions may be longer than the prior version of their argument, but they still have presented no authoritative legal basis to support the new legal interpretation they propose.

4. *Consistency with State and Regional Water Plans* – As discussed above, FBR largely bases its beneficial use argument on an expansive and legally incorrect concept of the

¹⁵ FBR is specifically concerned with the potential for BRA interbasin transfers under Tex. Water Code § 11.085(v)(4), and apparently particularly with respect to potential transfers to the Red River Basin. (FBR Exceptions at 88, 90, 91).

role of the state and regional water planning process as it relates to TCEQ's authority over water rights permitting decisions. BRA has already addressed FBR's arguments and authorities in prior briefing, and the ALJs have also thoroughly analyzed and correctly decided BRA's burden of proof under Texas Water Code §11.134(b)(3)(E). (PFDR at 196-200).

5. *Coastal Management Plan* – FBR itself acknowledges that its repeat challenge regarding compliance of BRA's Application No. 5851 with applicable Coastal Management Plan (CMP) requirements is now essentially a restatement of FBR's dispute regarding the scope and sufficiency of TCEQ's adopted SB3 Rules for the Brazos basin. BRA has previously addressed this FBR issue (*see* BRA Post-Hearing Reply Brief at 76-77), and FBR did not controvert BRA's expert evidence that its Application amended to include the WMP did not change the prior TCEQ staff expert conclusion regarding CMP consistency. ((BRA 119-98:5-17 (Gooch)). FBR has shown no legal or factual basis to challenge the ALJs' analysis on this issue, including their reliance on TCEQ's adoption of the SB3 Rules incorporated into BRA's WMP.¹⁶

6. *Wetlands* – FBR's repeat argument for further wetlands (overbanking) protection as part of the System Operation Permit is another example of FBR's underlying legal challenge to the SB 3 Rules. BRA has previously addressed this FBR issue (*see* BRA Post-Hearing Reply Brief at 77), and there was no record evidence that addresses FBR's allegations of effects on wetlands. FBR still has presented no legal or factual basis to overcome the ALJs' twice-rendered conclusion that wetlands issues are "outside the scope of and not relevant to this case." (2011 PFDR at 177-178; PFDR at 261-262).

¹⁶ BRA notes that neither FBR nor any other party excepted to the ALJs' having taken official notice of TCEQ's rule adoption package for the Brazos basin SB3 Rules. (*See* PFDR at 260, note 1141).

7. *Possible Future Loss of USGS Gages* – After (but not during) the second hearing, FBR has shifted its focus under this issue to now argue that the Commission should impose solely upon BRA the responsibility for maintaining gages at TCEQ’s designated measuring points (and also web-posting recorded flow results ‘simultaneously’) under the SB3 environmental flow standards. Just as the ALJs have already concluded there is no basis to include a USGS gage replacement provision in the System Operation Permit (*see* PFDR at 183; PFDR at 263), so also FBR’s latest creative argument, to impose an even more onerous permit condition on BRA, must also be rejected. No matter how unique BRA’s System Operation Permit may be among Texas water rights permits, there is no basis in fact nor under TCEQ’s legal authority to require one permit holder to shoulder the burden and expense of maintaining gages on which TCEQ relies for its environmental flow standards implementation, much less to make that permit holder’s diversion rights contingent upon its ability to do so. Although BRA had previously addressed this FBR issue (*see* BRA Post-Hearing Reply Brief at 81-82), it now further expressly rejects FBR’s newly proposed permit condition. (*See* FBR Exceptions at 107).

VIII.
PROPOSED ADDITIONAL OR REVISED PROVISIONS IN
PERMIT NO. 5851 AND THE WATER MANAGEMENT PLAN

BRA has addressed, throughout the topic-based discussion above, its replies to the various proposed additional or revised special conditions to Permit No. 5851 or the WMP contents that parties have raised in their exceptions to the PFDR. In some cases, a party provided the actual draft language or redlined changes showing its proposed revisions; otherwise, BRA is left to reply only to a party’s conceptual proposal for these revisions. For the Commissioners’ and the ALJs’ reference, BRA’s positions on each of those proposals are summarized below:

- a. NWF's proposal (without providing a drafted provision) to require Permit No. 5851 to identify specific sources of return flow authorized for BRA's reliance – BRA believes this requirement is unnecessary. (*See* Section III.B above).
- b. NWF's proposal (without providing a drafted provision) to require BRA to dedicate 50% of the return flows from the System Operation Permit for instream flow protection – BRA believes such a requirement is both unnecessary and unreasonable. (*See* Section III.B above).
- c. Cities of Lubbock, Bryan and College Station revisions to Special Conditions 5.A.3 and 5.A.4, regarding interruption of BRA's reuse authorization – BRA believes these revisions are unnecessary, but some modification to the proposed version of Special Condition 5.A.3 could be made. (*See* Section III.C above).
- d. ED's objection to the service area restriction of Special Condition 5.A.3, and to Special Condition 5.A.4 – BRA sees no need for the revisions suggested by the ED. (*See* Section III.D above).
- e. Dow's proposal (without providing drafted revised WMP text) to impose a one-day or two-day time limit within which BRA would be required to release pulse flows impounded in BRA's System reservoirs – BRA believes such a requirement is unnecessary. (*See* Section IV.D above).
- f. NWF's proposal to add the permit condition described on page 31 of NWF's Post Remand, Initial Post-Hearing Brief to limit BRA's exercise of flexibility authorized by Special Condition 5.C.2 – BRA believes NWF's proposed language is unnecessary. The additional language proposed by the PFDR (PFDR at 269) succinctly and succulently clarifies that BRA must comply with the

environmental flow standards when using its operational flexibility under the System Operation Permit. (*See* Section IV.E above.)

- g. ED's proposed addition of Special Condition 5.D.5 to address reservoir storage capacity reduction from sedimentation - BRA agrees with and has also proposed this solution for addressing reservoir sedimentation, instead of the unsubstantiated 14% reduction of the authorized appropriation (maximum annual use, basin-wide) proposed in the PFDR. (*See* Section V.A above; *see also* BRA Exceptions at 1-4).
- h. LGC's, FBR's, and Dow's proposals to require BRA to update the WMP's (Appendix G-3) tables identifying maximum System Operation Permit diversions by reach, based on other modeling updates – BRA agrees that, in the event that its Drought Study indicates the need to extend the Brazos WAM and reduce the Permit No. 5851 appropriation, these maximum diversion by reach computations would appropriately be reanalyzed following extension of the WAM. Dow's proposed revision to the PFDR's new draft paragraph for the WMP addressing this issue (*see* Dow Exceptions at 46-47) is not acceptable to BRA. (*See* Section V.A above).
- i. Dow's detailed requirements for BRA's Drought Study, proposed to be set out in Special Condition 5.C.7 (Dow Exceptions at 46) – BRA believes that it is unnecessary to further define the scope of the Drought Study at this time, and unnecessary to include such study definition as a permit condition. Relatedly, Dow's and NWF's respective proposals to provide for a public process and pre-approval of BRA's Drought Study methodology are unnecessary and unwarranted. (*See* Section V.B above; *see also* BRA Exceptions at 4-5).

- j. ED's proposed deletion of the PFDR's Special Condition 5.C.6, which would impose a streamflow restriction at the Rosharon gage – BRA does not object to this exception. (*See* Section VII.A.5 above).
- k. Dow's reurged proposal (without providing a drafted provision) to make BRA's operations under the System Operation Permit contingent upon the existence of the Brazos Watermaster program for the lower basin - BRA believes that such a permit condition is unnecessary and would potentially place undue burden on BRA not borne by other basin water right holders. (*See* Section VII.C above).
- l. FBR's newly proposed permit condition to make BRA responsible for maintaining gages at TCEQ's designated environmental flows measuring points and simultaneously posting recorded flow results – BRA can see no legal or factual basis (or TCEQ authority) to impose such onerous requirements on a single permit holder, particularly at the penalty of BRA being able to exercise its appropriative rights. (*See* Section VII.E.7 above).

IX.
PROPOSED REVISIONS TO THE PFDR'S PROPOSED COMMISSION ORDER

Only a few of the parties filing exceptions to the PFDR (notably, the ED and Dow) identified specific additions, deletions, or revisions to the numbered findings of fact, conclusions of law, and ordering provisions set out in the Proposed Order attached to the PFDR. To the significant extent that these proposed additions, deletions, and revisions track and reflect the party's exceptions arguments discussed above, BRA will refer to its corresponding reply arguments; otherwise, BRA's position will be provided below. References to each finding, conclusion, and ordering provision addressed are to the numbering of those provisions in the PFDR's Proposed Order.

- a. ED's revisions to the appropriation amounts stated in Findings of Fact Nos. 56, 62, 63, 64, 65, 69, 70, 176.b and Ordering Provision 1.b - BRA does not object to using the annual maximum appropriation numbers from the ED's August 18, 2014 hydrology memo, if the "all return flows" numbers are utilized. (*See* Section VII. A.1 above).
- b. Dow's proposal to delete Finding of Fact No. 53 and Conclusion of Law No. 13 - BRA opposes these exceptions, which reflect Dow's position regarding BRA's ability to add diversion points under the System Operation Permit based on future water supply contracts. (*See* Section II above).
- c. ED's proposed deletion of Findings of Fact Nos. 57, 59, 158, 159, 163, and 177.c, and Conclusions of Law Nos. 16, 17, and 18 - BRA opposes the ED's exceptions to these provisions reflecting and supporting the PFDR's legal treatment of return flows. BRA also opposes the ED's alternative proposal that "and with prior Commission practice" be deleted from Finding of Fact No. 159 in the event that the PFDR's return flow approach is approved by the Commission. (*See* Section III above).
- d. Dow's proposal not to rely upon the PFDR's proposed approach to address storage capacity reduction by a 14% reduction for all BRA reservoirs, as reflected in Findings of Fact Nos. 70 and 176.b - BRA concurs that the more accurate and reasonable approach to determine the correct appropriation reduction for each demand level would be done following the analysis under BRA's 9-month Drought Study and updating the WAM, if necessary. (*See* Section V.A. above; *see also* BRA Exceptions at 1-4).

- e. Dow's proposal to delete Findings of Fact Nos. 74 and 75, and to revise Finding of Fact No. 85 - BRA opposes these exceptions, which reflect Dow's position on the "junior refills" issue. (*See* Section V.C above).
- f. Dow's proposed revisions to Findings of Fact Nos. 82 and 176.f, and Ordering Provision 1.f – BRA opposes these unnecessary and overly burdensome details proposing to dictate the approach for BRA's 9-month Drought Study. (*See* Section V.B above).
- g. ED's proposed revisions to Findings of Fact Nos. 82 and 176.f, and Ordering Provision 1.f - BRA concurs with these revisions relating to BRA's 9-month Drought Study. (*See* Section V.B above).
- h. Dow's proposal to delete Findings of Fact Nos. 112 and 118 - BRA opposes these exceptions, which reflect Dow's position on compliance with applicable pulse flow requirements. (*See* Section IV.D above).
- i. Dow's proposal to revise Finding of Fact No. 119 – BRA opposes this revision, in connection with Dow's proposed time limit requirement on pulse flow impoundment. Relatedly, BRA opposes Dow's proposal that Conclusion of Law No. 25 should only be retained if Dow's revision to Finding of Fact No. 119 is accepted. (*See* Section IV.D above).
- j. ED's proposal to delete Findings of Fact Nos. 124, 125, 126, 127, and 145, and Conclusion of Law No. 26 - BRA believes that these findings and conclusion should be retained in the Proposed Order, so that a reviewing court may address these environmental review issues in the event of an appeal of the Commission's decision. (*See* Section VII.A.2 above).

- k. ED's proposal to delete Findings of Fact Nos. 138, 140, 142, and 143, and Conclusions of Law Nos. 23 and 26 – BRA believes that these provisions appropriately relate to the Commission's consideration of the public welfare issue, and should be included in the Proposed Order, so that a reviewing court may address the scope of the public welfare inquiry in the event of an appeal of the Commission's decision. (*See* Section VI and Section VII.A.3 above).
- l. ED's proposed deletion of Findings of Fact Nos. 160, 161, and 162 - BRA opposes these exceptions to its negotiated service area limitation regarding certain other entities' ability to reuse surface water based return flows. (*See* Section III.D and Section VII.A.6 above).
- m. ED's proposed deletion of Finding of Fact No. 176.e and Ordering Provision 1.e - BRA does not object to this exception relating to a proposed Rosharon gage streamflow condition. (*See* Section VII.A.5 above).
- n. Dow's proposed revision of Conclusion of Law No. 23 - BRA opposes this revision that would modify the PFDR's conclusion regarding BRA's compliance with applicable SB 3 rules in relation to other statutory provisions for various environmental requirements applicable to some water rights applications. Dow's suggestion that such SB 3 compliance achieves only a *presumption* of the applicant having satisfied other environmental requirements is not supported by the hearing record or any of the parties' prior briefing. Nor does Dow propose any further language, or underlying legal authority, for how such a presumption would be handled in permit processing and decisionmaking.
- o. ED's proposed revisions to Conclusion of Law No. 37, and Ordering Provisions 2

and 4 – BRA does not object to these proposed changes relating to conforming Permit No. 5851 and the WMP to reflect the Commission’s order. (See Section VII.A.4 above). BRA does object to changes in Conclusion of Law No. 37 that would incorporate the ED’s approach to return flows.

- p. ED’s alternative proposed language for the permit, regarding the treatment of return flows being unique to the System Operation Permit and non-precedential - BRA believes that such qualifying language in the Commission’s order approving Permit No. 5851 is neither necessary nor appropriate. (See Section VII.A.10 above).
- q. To the extent that Dow’s proposals to delete outright various Proposed Order provisions based on Dow’s belief that BRA has not met its burden of proof under some provision of Texas Water Code § 11.134 and the System Operation Permit should be denied, BRA opposes all of those deletions, including the following:
 - i. Findings of Fact Nos. 45, 50, 51, 90, 150
 - ii. Conclusions of Law Nos. 10, 11, 12, 14, 21, 25, 37.

X. CONCLUSION

BRA urges the Commission to approve the Proposal for Decision on Remand, with the modifications suggested by BRA’s Exceptions to the PFDR.

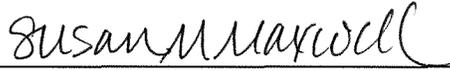
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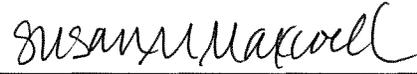
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CERTIFICATE OF SERVICE

I hereby certify by my signature below that on the 31st day of August, 2015, a true and correct copy of the above and foregoing BRA's Reply to Exceptions to the Proposal for Decision on Remand was forwarded via email or First Class Mail to the parties on the attached Service List.



Susan M. Maxwell

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

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