

**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
SUPPLEMENT TO THE PROPOSAL FOR DECISION ON REMAND**

I. INTRODUCTION

For better or worse, depending upon one’s point of view, at this stage of this contested case proceeding the Administrative Law Judges (ALJs) and the parties are implementing the decisions announced by the Commission’s January 29, 2016 Interim Order. It is *not* an opportunity to take “another bite of the apple” regarding issues previously addressed and resolved by the Proposal for Decision on Remand (PFDR) or the Interim Order.

Two prime examples of raising issues well beyond the scope of the Interim Order are presented by the exceptions of the Friends of the Brazos River aligned parties (FBR) and of the Brazos Family Farmers and Ranchers (BFFR). FBR, with the endorsement of BFFR, urges mediation of all contested issues as a way to avoid a threatened appeal of the Commission’s decision. Exceptions of Friends of the Brazos River, Jane Vaughn, Lawrence D. Wilson, Ken C. Hackett and Brazos River Alliance to the Supplemental Proposal for Decision (FBR Exceptions), at 2-4; Protestant Brazos Family Farmers and Ranchers’ Exceptions to the Supplement to the Proposal for Decision on Remand (BFFR Exceptions), at 7. Similarly, both urge that further action on BRA’s application be delayed until the Commission can undertake rulemaking regarding

implementation of Texas Water Code §§ 11.042 and 11.046, and possibly other issues pertaining to use of return flows. FBR Exceptions at 2; BFFR Exceptions at 8.

BRA objects to these proposals. Not only are they completely outside the scope of the limited issues remanded to the ALJs by the Interim Order, they are simply an additional basis for further delay and have little or no chance of success. BRA has reached out to every protestant of Application No. 5851, including FBR and BFFR, and attempted to reach a negotiated settlement. No reason exists to think that ordering mediation at this juncture will produce a different result or foreclose a possible appeal.

Similarly, BFFR's suggestion that the record be reopened to receive additional evidence on the remanded issues is not only outside the scope of the Interim Order, it is directly contrary to its direction that the record *not* be reopened for evidence on these issues.

II. REPLY TO EXCEPTIONS REGARDING RETURN FLOWS

A. Texas Parks and Wildlife Department

BRA agrees with the basic legal position of the Texas Parks and Wildlife Department (TPWD), that the authorization to make indirect reuse of return flows, whether by the discharger or a third party, ought to be a new appropriation. This has the consequence of making those return flows both available for senior appropriators and subject to SB 3 environmental flow requirements before they can be used by the appropriator. This was the approach taken by the PFDR, considering BRA's authorization to use its own return flows both a new appropriation and a bed and banks authorization under Texas Water Code § 11.042. But, the Commission's Interim Order requires modification of that approach, and that BRA's authorization to use its own return flows

be only under § 11.042. Whether BRA and TPWD agree with it or not, that was the Commission's ruling.¹

TPWD now suggests that there is an "ownership issue," that unless BRA has amended its base appropriation of each existing water right to authorize reuse, it cannot take advantage of § 11.042 and obtain a bed and banks authorization to reuse its own return flows. Texas Parks and Wildlife Department's Exceptions to the Supplement to the Proposal for Decision on Remand (TPWD Exceptions), at 2-4. The problem with TPWD's argument is that it is a direct challenge to the Commission's ruling in the Interim Order. The Commission's Interim Order is predicated upon the existence of some continuing ownership right of the discharger or water supplier in their return flows.

A second problem with TPWD's argument is that it is contrary to the PFDR's ruling that it is BRA's choice whether to seek reuse authorization via amendment of its base permits or as a new appropriation. PFDR at 117. As noted by the PFDR, § 11.122(a) speaks of "authority" and does not require an amendment. *Id.* This is one of the contested issues that has been affirmed by the Commission. Interim Order ¶ 7.

Finally, BRA objects to TPWD's attempt to narrow its stipulation regarding whether BRA had sought a bed and banks authorization to convey and divert its own return flows. TPWD stipulated:

BRA, in its permit application, sought a bed and banks authorization to convey and divert all of its requested appropriation, including water derived from groundwater based and surface water based return flows, and that BRA met all bed and banks application requirements.

¹ If the Commission's intent was to clarify that § 11.042 does not itself authorize a new appropriation, this could be accomplished by revision of the draft permit and order, without emphasizing that BRA's use of its own return flows is not a new appropriation.

TPWD Proposed Stipulations and Disputed Issues (March 11, 2016), at 2. However, in its exceptions to the Supplement to the Proposal for Decision on Remand (SPFDR) TPWD now attempts to impose the additional qualification that BRA's request is "conditioned upon receiving the new appropriation." TPWD Exceptions at 5. TPWD's stipulation was correct when made and was relied upon by the parties and the ALJs. TPWD should not be allowed to change it now.

B. City of Bryan

The City of Bryan seeks additional language in the permit special condition making BRA's use of return flows interruptible. That language would affirmatively recognize the discharger's right to obtain a bed and banks authorization in the future. City of Bryan's Exceptions to the Supplement to the Proposal for Decision on Remand (Bryan Exceptions), at 2-5. The simplest response to Bryan's suggestion is that the Commission's Interim Order does not impose this limitation or suggest the requirement of such language. Bryan is seeking more than the Commission directed and its request is outside the scope of the Interim Order.

Secondarily, Bryan cites no legal authority to justify imposing its additional requirement and, as noted in BRA's Exceptions to the SPFDR, BRA believes that none exists. One is inclined to wonder whether Bryan or its attorney is attempting to establish a legal precedent that might be of use in another case. BRA suggests that a conservative approach, making no broader a ruling than required by the Interim Order, is appropriate.

Bryan's request that a list of return flow discharges be included in the permit has been previously presented and appropriately addressed by the SPFDR. Bryan Exceptions at 5-7; SPFDR at 18-19.

C. Dow Chemical Company

Dow presents two exceptions regarding the SPFDR's handling of return flow issues: (a) that BRA's application does not satisfy TCEQ rules applicable to a § 11.042 authorization; and (b) that there is no evidence that BRA used the correct amounts of its return flows in the Water Management Plan. The Dow Chemical Company's Exceptions to the Supplement to the Proposal for Decision on Remand (Dow Exceptions), at 2-5 and 5-8. The former exception mirrors arguments already presented in Dow's Brief on Disputed Issues, at pages 16-17, with the additional identification of two other rule subsections Dow believes have not been satisfied. The latter exception is a rehash of Bryan's objections to (WMP Technical Report Appendix G) Table G.2.5. *See* SPFDR at 12-14.

In BRA's opinion, both issues were thoroughly and properly addressed by the SPFDR. Dow has raised nothing new that would justify modification of the SPFDR.

D. FBR

FBR's primary exception addresses the evaluation of environmental impact of the Commission's new reuse approach. FBR Exceptions at 6-9. Initially, BRA would note that although the legal basis for authorizing use of BRA return flows has been modified from that proposed by the PFDR, the actual environmental impacts of the use of water being authorized have not changed. The impact will be the same, regardless of the legal theory underlying it.

FBR's argument, as BRA understands it, is that Texas Water Code § 11.042(b) and (c) require imposition of special conditions to maintain instream uses and protect bays and estuaries. The argument fails for several reasons. First, it is far outside the scope of the Interim Order. Second, it is based upon a statutory provision, § 11.042(b), which states that the Commission "may" impose such special conditions; it is not mandatory. Third, FBR concludes, without legal

authority, that TCEQ's SB 3 environmental flow standards "do not apply and other statutory provisions must be applied." FBR Exceptions at 7. Not only is this conclusion unsupported, it is illogical. The SB 3 environmental flow standards are what TCEQ has determined is needed to protect instream uses and a healthy environment. Even though their application is not mandated for § 11.042 applications, nothing prevents their utilization for this purpose, particularly when suggested by the applicant.

FBR's various "Additional Exceptions" on return flow issues, presented at pages 9-12, are either outside the scope of the Interim Order (*e.g.*, "FBR does not, however, agree that current law supports the Commission's approach" (FBR Exceptions at 10)), or a repetition of issues previously addressed by the ALJs (*e.g.*, "FBR agrees with Dow's position . . . that BRA cannot identify, in the record, where it has properly applied for authority for use of any bed and banks . . . for any of its return flows. (FBR Exceptions at 11-12)). All should be rejected for these reasons.

III. REPLY TO EXCEPTIONS REGARDING STORAGE CAPACITY

A. Dow Chemical Company

Dow continues its efforts to maximize the amount of reduction in BRA's authorization that can be achieved using the 14% reduction standard proposed by the ALJs and approved by the Commission. Specifically, Dow argues for two reductions in the draft permit: First, Dow would add to the maximum annual appropriation of Paragraph 1.A. the § 11.042 authorization to make use of BRA's own return flows before computing the 14% reduction, which produces a larger number to deduct from the Paragraph 1.A. authorization. Second, rather than using the 14% reduction recommended by the ALJs and approved by the Commission, Dow would substitute other numbers presented by Dr. Brandes during the evidentiary hearing (which, not surprisingly, produce a larger reduction than 14%). Dow Exceptions at 8-11.

BRA believes that both suggestions must be rejected. First, on computing the 14% reduction, Dow cannot have it both ways. If BRA's authorization to use its own return flows under § 11.042 is not a new appropriation (as Dow insists), then it is not included in the "maximum annual authorized appropriation" to which the Interim Order directs that the 14% be applied. In the SPFDR the ALJs correctly performed the computation directed by the Commission's Interim Order. Dow's proposed revision is inappropriate.

Moreover, both of Dow's proposed modifications are beyond the scope of the Interim Order. The first suggestion, including BRA's return flow use authorization in the 14% computation, is contrary to the express terms of the order. The second suggestion, using Dr. Brandes' prior testimony instead of the 14% is also contrary to the Interim Order's direction that the 14% value recommended by the ALJs be used.

As BRA understands Dow's second exception, Dow argues that the 14% reduction for lost storage capacity must be applied to the maximum authorized diversion in each reach, but cannot be because BRA's modeling for the reaches included return flows that are not actually impacted by lost storage.² Dow Exceptions at 11-13. This is the same argument that was rejected by the SPFDR at page 27. Dow apparently misunderstands the SPFDR on this point, arguing that it is reasonable to consider the scope of the Interim Order broad enough to include a 14% reduction in the authorized diversion for each reach, when, in fact, the Executive Director, BRA and the ALJs have all agreed with this proposition. As BRA understands the SPFDR, this Dow exception is beyond the scope of the Interim Order because Dow is arguing that new modeling is required and that the 14% reduction cannot be applied to the maximum authorization in the reaches since they include return flows. And that issue is not addressed in Dow's exceptions. As a practical matter,

² Bryan also makes this argument. Bryan Exceptions at 7-8. BRA's reply to Dow's exception is also a reply to Bryan's exception.

the inclusion of return flows in the maximum authorization for each reach results in a larger reduction than would result if return flows were excluded from the 14% reduction. It is surprising that Dow does not embrace that inclusion also.

B. FBR

Although not clearly delineated as such, BRA understands FBR's objections regarding storage capacity to present three exceptions: (a) that the 14% reduction is invalid and arbitrary (FBR Exceptions at 13); (b) that the special condition allowing BRA to recover lost storage capacity is too broad and should be limited to removal of sediment (FBR Exceptions at 13-15); and (c) that another special condition should be added addressing this issue in terms of temporary and permanent losses of storage capacity (FBR Exceptions at 15-16).

The short answer to FBR's exceptions (a) and (c) is that they are beyond the limited scope of the issues remanded by the Interim Order. The Interim Order approved the 14% reduction for lost storage capacity. Interim Order ¶ 4, ii), 1). As reflected by its exception to the PFDR, BRA does not agree with this conclusion, but it is what we are dealing with at this point. Similarly, the Interim Order does not raise any issue regarding temporary vs. permanent loss of storage capacity. FBR's attempt to inject the issue at this point is clearly beyond the scope of the order.

Regarding FBR's exception (b), that the recovery of lost storage provision is too broad, BRA would point out that this exception raises the same issues presented by FBR's Brief on Disputed Issues and dealt with by the SPFDR at page 28. So far as BRA can ascertain, FBR's exception adds nothing new to the previous arguments, other than slightly editing the special condition that FBR previously proposed.

IV. EXECUTIVE DIRECTOR'S RECOMMENDED REVISIONS

The Executive Director's (ED) exceptions are not, in fact, exceptions. Rather, the ED proposes revision of the wording of several findings of fact and conclusions of law in the ALJs' Proposed Order.

With the exception of Finding of Fact No. 73 and Conclusions of Law Nos. 16 and 17, BRA has no objection to the ED's proposals.³ BRA's difference with the ED over Conclusions of Law Nos. 16 and 17 is substantive because of the different versions of Special Conditions 5.A.3 and 5.A.4 supported by the ED and by BRA. Regarding the ED's proposed revision of Finding of Fact No. 73, BRA believes that the revision is unnecessary and could cause confusion. It is also contrary to the use of these terms in the Interim Order, which says "authorized diversion and use" as the unedited finding does. Interim Order ¶ 4, ii), 1).

V. CONCLUSION

The ALJs have been asked by the Commission to implement their Interim Order, and in BRA's view, with the exception of BRA's exceptions regarding the service area limitation and complete removal of BRA return flows from Permit Paragraph 1.A, the SPFDR and accompanying Proposed Order have done that.

Respectfully submitted,

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³ BRA agrees with the ED's proposed revision of Finding of Fact No. 184 and suggests that the revision also be made in Ordering Provision No. 1.

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CERTIFICATE OF SERVICE

I hereby certify by my signature below that on July 12, 2016 a true and correct copy of the above and foregoing document was forwarded via email or First Class Mail to the parties on the attached Service List.


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