

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

CONCERNING THE APPLICATION	§	BEFORE THE STATE OFFICE
BY THE BRAZOS RIVER	§	
AUTHORITY FOR WATER USE	§	OF
PERMIT NO. 5851 AND RELATED	§	
FILINGS	§	ADMINISTRATIVE HEARINGS

**CITY OF BRYAN'S EXCEPTIONS TO
THE SUPPLEMENT TO THE PROPOSAL FOR DECISION ON REMAND**

INTRODUCTION

In its briefing on remand, the City of Bryan ("Bryan") addressed four major issues of concern: (1) that the BRA's own return flows must be removed from the appropriation amount; (2) that, because of undisputed errors in Table G.2.5, the record does not support a determination of the amount of return flows of others; (3) that the language recommended by BRA would not allow dischargers to "reclaim" their return flows from BRA once the discharger has a desire to indirectly use those return flows; and (4) that the management of this water right in the future would be much more transparent if the permit contained a definitive list of BRA's return flows and the return flows of others that are being authorized or appropriated by this permit.

Bryan's first issue was addressed by the ALJs, who are recommending that the total amount of BRA's return flows simply be subtracted from the firm system yield appropriation amount.¹ While Bryan does not agree with the manner in which the ALJs removed BRA's return flows from the appropriation amount, Bryan declines to submit further argument on this point or argue for any change herein.

Bryan's second issue was characterized by the ALJ's as a "close issue"² and resolved by a tortured reading of the record.³ The ALJs accepted BRA's and the ED's argument that errors in Table G.2.5 were not carried over into the appropriation modeling rather than forcing BRA or the ED to specifically identify the model inputs or other record evidence which would have shown whether the errors were or were not reflected in the modeling.⁴ While Bryan still believes

¹ *Supplement to the PFD on Remand* at 17.

² *Id.* at 14.

³ *Id.* at 13-14.

⁴ The problem may lie in the fact that the model inputs may not be in the record. Bryan reviewed BRA's hearing exhibits and could not locate the model inputs for the appropriation modeling used to establish the recommended appropriation amounts.

that BRA has the burden of showing based on the current record that the errors did not affect the model by directing the Commission and the parties to the location of the model inputs in the record, Bryan will not submit additional briefing on this issue. Bryan believes that its concern would be substantially addressed if the Commission includes a definitive list of return flows in the final permit.

Bryan does except to the ALJs' recommendations related to Bryan's last two issues. Bryan's exceptions are addressed below.

BRYAN'S EXCEPTIONS TO THE SUPPLEMENTAL PFD ON REMAND

A. Exception to the recommendation not to provide language protecting a discharger's ability to obtain a bed and banks authorization in the future

In the Interim Order, the Commission directed the ALJs to recommend special conditions that reduce or terminate BRA's appropriative rights in the return flows of others once another discharger directly reuses or obtains an indirect reuse bed and banks authorization under TWC § 11.042(b) or (c) that lessens the availability of the proportionate return flows of others.⁵ During the open meeting on January 20, 2016, the Commissioners were clear that their intention was to allow BRA to use these return flows until such time as a discharger reclaimed its water by either directly reusing the effluent or by obtaining a bed and banks authorization, and that they did not want the granting of this permit to BRA to preclude these dischargers from reclaiming their discharges in the future.

The following excerpts from the transcript demonstrate the Commissioners' positions. At the outset of the discussion of the topic, Chairman Shaw stated:

"I also think we have some challenges to ensure that we, while trying to approach, to approve a novel approach to using those waters, *that we don't unintentionally bring into question some of the water rights that we want to protect* or question if we're able *to protect some of those other approaches that we should be giving preference to*. Given example of that, that's sort of fresh because of the discussion we've had is with regard to what happens if waters are appropriated through this permit to BRA but then *you have some of those return flows or discharges, groundwater based discharges and those entities that had that use want to sometime in the future be able to apply for bed and banks in order to be able to, for indirect reuse of those waters*. It's my intention as we consider going through this *that we find a way to recognize that those are not only rights and approaches that we want to protect, but also that are encouraged*. That reuse is something that is valuable and something that we both from the standpoint of

⁵ *Interim Order*, ¶ 6)ii) (Jan. 29, 2016).

being able to use the water multiple times, I think that if we can find a way in our decisions, should we approve the permit or work toward that end, if we could *ensure that we recognize that those will be protected going forward*, it prevents hopefully, or doesn't, certainly *minimize the likelihood of suggesting that all of those entities that may at some point want a bed and banks better get to us quickly*, and create, and protect that water before it's gone. My hope is that, as I read through and understand the legal things before us, that we can find a way to get there that recognizes the water that's available through the modeling today, because the entities have not chosen and have not obtained indirect reuse through the bed and banks process, *that won't prevent them from being able to secure that in the future* and therefore I think that allows for that *preferred use to be both protected and encouraged* moving forward."⁶

Later, Commissioner Baker echoed the Chairman's views:

"[R]ights that exist or could exist in the future through a bed and banks permit *have to be protected* and if groundwater, as the Day case would say, is to be treated as state water once it enters into a river, or becomes surface water and in term becoming state water, the discharger, whether that, if that new right is then given to BRA, *the discharger has to have the ability in my mind to go in and request a bed and banks permit at some point in the future and be able to get that piece back*. In the meantime, however, if it's water that's going into, becoming state water, why would we, I guess the question is *why would we not make that available for appropriation up until the time that the discharger actually applies for a bed and banks permit?* Does that make sense?"⁷

Similarly Commissioner Niermann concurred:

"So that's my understanding of the paradigm now post Senate Bill 1. And I think, so let me make this point, *to the extent that BRA is seeking to appropriate the water of others I think we need those conditions that protect the rights of those other folks to come back later and indirectly reuse their water. In other words, the water right is contingent on future bed and banks permits*. Alright, so that's my understanding of sort of where the law is."⁸

Finally, the Commissioners' views were summarized by ALJ Burkhalter:

"I've heard a concern that if City X is discharging its return flows in 2016 and effectively abandoning those return flows by letting go of them, the applicant can appropriate. *If City X changes its mind in 2020, the permit says BRA's right to that water goes away and City X can appropriate those waters.*"⁹

⁶ Transcript Excerpt, TCEQ Open Meeting (January 20, 2016).

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

During briefing on remand, Bryan pointed out that the permit language recommended by the ALJs fails to protect a discharger's ability to obtain a bed and banks permit in the future under TWC § 11.042(b) or (c) unaffected by this Sys-Ops Permit. This is because Texas Water Code § 11.042 directs the Commission to include special conditions in a bed and banks authorization "to protect an existing water right that was granted based on the use or availability of these return flows."¹⁰ Language is needed in the permit to make it clear that affected dischargers are free to apply for bed and banks authorizations in the future *without being faced with an argument from BRA or the ED that BRA's Sys-Ops permit was granted based on the permanent use or availability of these return flows.*

Under the ALJs' language, BRA retains control over the return flows until the discharger "obtains" a bed and banks authorization. This language does not prevent BRA from later claiming in a future bed and banks proceeding that its Sys-Ops Permit was granted based on the use or availability of the return flows at issue in that proceeding. BRA's briefing on remand demonstrate that BRA will not let these dischargers reclaim their water without a fight. In its reply brief, BRA expressly states its position that dischargers of both surface and groundwater-based return flows cannot "reclaim" their water after that water has been appropriated to BRA in this matter.¹¹ The ALJs' language fails to protect the very rights that the Commissioners wanted to encourage and give preference to by allowing the discharger to "get that piece back" without objection by BRA.

The ALJs did not respond to Bryan's concerns in the Supplement to the PFD.¹² Instead, the ALJs misconstrued Bryan's argument and dismissed it as counter to the Commission's directive. Bryan did not contend that BRA's right to discharger's return flows ought to terminate when a discharger *applies* to obtain such an authorization. Bryan contended that the permit needed language that would prevent BRA from asserting that a discharger should not be granted a bed and banks authorization in a future proceeding because the return flows had been appropriated permanently to BRA in this proceeding.¹³ Under Bryan's language, BRA could continue to use the return flows of others up until the time the discharger obtained a bed and

¹⁰ Tex. Water Code § 11.042(b). §11.042(c) similarly requires special conditions to "address the impacts of the discharge, conveyance and diversion on existing permits..."

¹¹ *BRA Reply Brief* at 12 (April 11, 2016).

¹² *Supplement to the PFD on Remand* at 20 (June 3, 2016).

¹³ *Bryan's Brief on Disputed Issues* at 5 (March 28, 2016); *Bryan's Reply Brief on Disputed Issues* at 12. (April 11, 2016).

banks authorization to indirectly reuse those flows, but that BRA could not assert that these return flows were permanently appropriated to BRA by this SysOps permit in order to defeat the bed and banks application.

Bryan excepts to the ALJs recommendation to not include language in BRA's permit that would prevent BRA from later claiming, in a subsequent bed and banks application associated with any of the return flows of others that are at issue in this matter, that this permit was granted based on the permanent use or availability of the return flows of others. To implement the Commission's desire (and to avoid a flood of bed and banks applications),¹⁴ Bryan recommends the following special condition language (which could be added to either Section 1.A, or 5.A) to make it clear that a discharger whose return flows are being appropriated by BRA in this water right will be able, at some point in the future, to "get those [return flows] back."

Permittee's storage, diversion and use of the portion of the appropriation based on return flows of others is not permanent and is dependent upon potentially interruptible return flows. Permittee's storage, diversion and use of these return flows will be interrupted by direct reuse and will be terminated upon the issuance of an authorization under § 11.042(b) or (c) for indirect reuse of the return flows. Permittee may not subsequently assert that this water right was granted based on the permanent use or availability of such return flows.

B. Exception to ALJs recommendation not to include a revised list of return flows used as a basis for this permit.

In future water rights matters and when BRA is required to adjust its appropriated amounts due to changes in direct reuse or issuance of bed and banks authorizations to existing dischargers (adjustments as necessary under Special Condition 5.A), the parties and the Commission will look to the provisions of this water right to determine which return flows were actually appropriated by BRA, including information regarding the owner, location and modeled volumes of the return flows. Other than a total amount of return flows of others, the ALJs recommendations provide no specific information regarding these return flows (information such as the source of the return flows or the assumed amounts of the return flows). The ALJs state

¹⁴ If the Commission is concerned about whether this case will lead to a flood of bed and banks authorizations, then granting the water right with the language recommended by the ALJs will not allay those concerns. The recommended language continues to promote the conclusion that the first entity to apply for use of the return flows gets the permanent right to use the return flows.

that BRA's return flows total 47,332 acre-feet, and that the return flows of others total 50,076 acre-feet.¹⁵

These totals determined by the ALJs are based on a complicated set of factors that are only summarily described in the *Supplement to the PFD on Remand*.¹⁶ The ALJs start with Table G.2.3, which itemizes *all return flows* (BRA's plus others) and Table G.2.5, which purports to itemize only *BRA's return flows*, and then they subtract BRA's return flows from the sum of all return flows. The ALJs acknowledge that Table G.2.5 contains significant errors (such as including more than 70 discharges that are not BRA discharges), so they only subtract the part of Table G.2.5 that they believe to be error-free. To arrive at the return flows of others, the ALJs take the remainder of Table G.2.3 less Table G.2.5 (as corrected) and then remove the amounts associated with dischargers with existing bed and banks authorizations (Bryan, College Station, Abilene, Waco and Cleburne).

Bryan is concerned that future management of BRA's water right will be overly-complex, if not impossible, unless the permit is clear as to the sources and assumed volumes of the return flows that BRA is being allowed to use, including both BRA's own return flows and the return flows of others. The errors in BRA's tables need to be fully exorcised by adding language to the permit clearly identifying the discharges, or these errors will haunt the management of the water rights system in the future.

The ALJs take the position that Bryan's concerns were addressed in the *PFD on Remand* and are beyond the scope of this limited remand. The portion of the *PFD on Remand* cited¹⁷, however, does not address the argument presented by Bryan on this remand – that the lists are needed for ongoing management of this water right. That portion of the *PFD on Remand* addressed whether the Commission should follow BRA's return flows approach or the ED's approach, not with the need for a list of the return flows. The issue is also firmly within the scope of Interim Order Issues (6)(i) and (6)(ii). The Commission will have a hard time accounting for BRA's use of its own return flows and the return flows of others if it cannot easily determine what return flows were modeled.

To address this concern, Bryan recommends that the final permit contain a list of the wastewater discharge plants included in both BRA-Only return flows and the return flows of

¹⁵ *Supplement to the PFD on Remand* at 11.

¹⁶ *Id.*

¹⁷ *PFD on Remand* at 236-38.

others and the volumes of the return flows used in modeling the appropriation amounts. The identity of the dischargers and the volumes of discharge are in the record, and it would not be a difficult task to simply take that information and put it into clear and definitive lists. Such a requirement would also provide some level of notice to the dischargers whose rights are being affected by the granting of the permit and certainty to those whose discharges were excluded.

C. Exception to the ALJs recommendation regarding maximum diversions by reach

In recommended Finding of Fact No. 185.a. in the *Supplement to the PFD on Remand*, the ALJs address how the Commission should reduce the maximum annual use amount by reach to account for the 14% reduction due to sedimentation in BRA's reservoirs. The ALJs recommend that the maximum be limited to 86% of the amount shown for the reach in Tables G.3.14 through G.3.25 *for the applicable demand scenario*.

The problem with the ALJs' approach is that **there is no applicable table in the WMP**. Tables G.3.14 through G.3.25 reflect the modeling of three separate return flow scenarios (no return flows, BRA-only return flows, and all return flows) and the four different demand scenarios. **None of these tables reflect the modeling of only the return flows of others because no modeling was performed for appropriation of only the return flows of others.** While the ALJs might believe that they can remove the return flows of others simply by subtracting the return flows from the modeled yield amounts, they provide no guidance as to how that modification should be done on a reach-by-reach basis. The relevant column is the SysOps Maximum column. In none of the referenced tables does this column have an entry on the last row (Total at the Gulf of Mexico) of 336,736 acre-feet or to any of the other appropriation amounts listed in recommended permit provision 1.A. Under the current recommendation from the ALJs, BRA will be appropriated (under Scenario A) a total of 287,013 acre-feet in total under Paragraph 1.A, but up to 86% of 381,474 acre-feet¹⁸ in total by reach under the WMP.

Bryan does not believe that this discrepancy between total appropriation and appropriation by reach can be fixed based on the existing record. No modeling exists that only includes the return flows of others. The problem cannot be fixed by simply subtracting the BRA return flows (as the ALJs recommend as the fix for the total appropriation amount), because the record does not clearly identify the location of the BRA return flows by reach. The only accurate

¹⁸ Table G.3.16.

way to fix the problem would be to model BRA's diversions using the return flow scenario selected by the Commissioners – only the return flows of others (excluding BRA's own return flows). Such an approach is beyond the scope of this remand because it would require a reopening of the record.

CONCLUSION

If BRA is going to be allowed to appropriate the return flows of others, the Commission needs to make it clear that BRA's appropriation is temporary and subject to a dischargers right to reclaim the discharge by seeking and obtaining a bed and banks authorization. This was clearly the Commission's intent expressed at the January 20, 2016 agenda meeting. The language recommended by the ALJs fails to accomplish the Commissioners' intent. Bryan has also suggested language that would accomplish the Commissioners' intent and would provide the Commission and the regulated community transparency that would prevent BRA's permit from becoming a "black box" of complexity frustrating its ongoing supervision by the Commission. Bryan requests that the Commission grant its exceptions and revise BRA's permit accordingly.

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CERTIFICATE OF SERVICE

I hereby certify that on this the 23rd day of June, 2016 a true and correct copy of the foregoing document was served by electronic mail or regular mail on the attached service list.



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