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	§ § § § §	**BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS**

CITY OF BRYAN'S REPLIES TO THE EXCEPTIONS OF THE BRAZOS RIVER AUTHORITY TO THE SUPPLEMENT TO THE PROPOSAL FOR DECISION ON REMAND

The City of Bryan ("Bryan") offers the following replies to the exceptions of the Brazos River Authority ("BRA") to the Supplement to the Proposal for Decision on Remand.

SUMMARY

BRA's exceptions highlight the fundamental problem presented by BRA's flawed efforts to address the Commission's limited remand – the inability to accurately determine appropriation amounts because of the **complete lack of any modeling based solely on the return flows of others** (none of BRA's return flows) being included as water available for appropriation. BRA's application, and the evidence presented at hearing, addressed three specific return flow scenarios: (1) no return flows; (2) BRA-only return flows; and (3) all return flows.

Because no modeling was offered into evidence showing the amount of water available for appropriation with only the return flows of others being considered available, there is no basis in the record for determining an appropriation amount for that scenario, either for the total appropriation or the appropriation by reach. To be consistent with the Commission's direction not to reopen the record in this matter, there is only one solution to this problem available to the Commission: set BRA's appropriation amounts based on the no return flows scenarios for both the total appropriation amount, and the amounts by reach.

REPLIES TO EXCEPTIONS

A. Reply to BRA Exception No. 1

In its first exception, BRA brashly states that unless it agrees to allow dischargers to reclaim their return flows (e.g. by imposing a service area limitation), then the Commission has

no legal authority to allow dischargers to reclaim their return flows.[1] Rather than explaining the legal basis for such a broad claim, BRA criticizes the ALJs for not discussing the Commission's legal authority to impose a requirement that would allow dischargers to "reclaim" their return flows in the future. Such criticism is misplaced given the Commission's clear intent to include such a requirement.[2] Such criticism is also misplaced given that the Commission has broad discretion to condition appropriations based on return flows to avoid double-permitting and over-appropriation.

Water rights permits in Texas are granted only if there is "unappropriated water" available to ensure beneficial use by the applicant without waste.[3] Pursuant to Texas Water Code §11.146(e)[4] and the Legislative intent to prevent "double permitting,"[5] the Commission developed models and analytical techniques to account for existing water rights as fully used (diversion of all permitted amounts, with no return flows) when determining if unappropriated water was available to be permitted. Through the enactment of Texas Water Code §11.046(c) in 1997, SB1 altered slightly the Commission's authority to grant an appropriation for "surplus water"[6] returned to a watercourse. In 1999, the Commission revised its substantive water rights rules to implement Senate Bill 1, including the appropriation of surplus waters. These rules continued the requirement that a water rights applicant demonstrate a sufficient amount of unappropriated water to make the project viable[7] and defined "unappropriated water" consistent with the Stacy decision and Tex.Water Code 11.146(e) as "the amount of state water remaining in a watercourse...after taking into account complete satisfaction of all existing water rights valued at their full authorized amounts and conditions"[8]. In implementing the new authority given by Tex. Water Code 11.046(c), the rules provided that, "in order to make optimum

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[1] *BRA's Exceptions to the Supplement to the PFDR* at 1-2 (June 23, 2016).
[2] See Transcript Excerpt, TCEQ Open Meeting (January 20, 2016) cited in City of Bryan's Exceptions to the Supplement to the Proposal for Decision on Remand at 2-3.
[3] *Lower Colorado River Authority v. Texas Dept., of Water Resources*, 689 S.W.2d 873, 877-882 (Tex. 1984) ("*Stacy*" decision) ("We...hold the legislature meant the prohibition on "double permitting" water in subsection [11.146(e)]to be applied to define the term "unappropriated water.".... "A contrary decision would return water rights to the state of chaos that the act is designed to avoid"); Tex. Water Code 11.134(b); 30 TAC §297.42(a).
[4] "...if a permit has been issued for the use of water, the water is not subject to a new appropriation until the permit has been cancelled..."
[5] *LCRA v. TDWR*, 689 S.W.2d at 877
[6] Surplus water was defined as "water in excess of the initial or ***continued*** beneficial use of the appropriator". Tex. Water Code 11.002 (10).
[7] 30 TAC 297.42(a).
[8] 30 TAC 297.1(54)

beneficial use of available water",[9] a water right "***may***" be granted based on the availability of return flows or discharges that may cease because of direct reuse or "other lawful reasons".[10] This rule requires that such water rights include an express provision that "the water right is dependent upon potentially interruptible return flows."[11] In adopting this rule, the Commission made it clear that the granting of a water right based on return flows would be discretionary and subject to limits imposed by the Commission.[12]

BRA's position seems to be that the Commission may not limit the appropriation of the return flows of others to allow the discharger to reclaim its return flows later. Neither the changes in SB1 nor the addition of §297.42(g) restrict the Commission regarding the limitations that it might impose in those situations when it decides to issue a new permit based on surplus water returned to a watercourse. The Commission must place limits and conditions on such permits to avoid over-appropriation and double permitting. The Commission's decision to allow dischargers to reclaim their return flows through Texas Water Code §§11.042(b) and 11.042(c) is a recognition by the Commission that such actions are "other lawful reasons" to justify terminating the appropriation of the return flows to BRA. BRA offers no legal basis to support its contention.

BRA also complains that draft permit special condition 5.A.(3) is not limited to the return flows of others. BRA's reading of the special condition is plainly wrong. The special condition, by its own terms, only applies to "that portion of ***the appropriation*** based on surface water based surface water based return flows"[13] The Commission expressly directed the ALJs to remove BRA's return flows from the appropriation, and the ALJs complied with this direction. Because draft special condition 5.A.(3) only applies to that portion of the ***appropriation*** based on return flows, the special condition only applies to the return flows of others.

B. Reply to BRA Exception No. 2

BRA excepts to the ALJs approach to removing BRA's own return flows from the appropriation. BRA's argument is that the ALJs should not have simply subtracted the entire 47,332 af/yr of BRA return flows that were included in the model runs from the modeled yield

[9] In the preamble to the rule, the Commission clarified that this would apply "in cases where no water is available for a new water right except these potentially interruptible return flows". 24 Tex.Reg. 1162, 1175 (Feb. 19, 1999).
[10] 30 TAC §297.42(g)
[11] *Id.*
[12] 24 Tex.Reg. 1162, 1175 (Feb. 19, 1999).
[13] Finding of Fact 184.g., Supplement to the PFDR (June 3, 2016) (emphasis added).

results (*i.e,* 381,068 af/yr[14]) that provide the basis for the appropriation amount. As reflected in its filings in this matter during the limited remand, Bryan agrees that it is inappropriate to simply subtract return flow inputs from a modeled yield number (apples and oranges), but Bryan disagrees with BRA's proposed solution to the problem.

The Commission's Interim Order directed the ALJs to "remove that portion of BRA's own return flows from the appropriation," and also clearly stated that the Commission will not authorize including the BRA return flows as a new appropriation in this permit.[15] The problem on remand was that the record contains no modeling to determine an appropriation amount with just the return flows of others contained in the model inputs. During the hearing, only three return flow scenarios were modeled: (1) no return flows – modeling with no return flows considered as water available for appropriation; (2) BRA-only return flows – modeling with only BRA's own return flows considered as water available for appropriation; and (3) all return flows – modeling with all return flows (other than those subject to an existing bed and banks authorization) considered as water available for appropriation. Without the appropriate modeling, there is no way to know the effect of the removal of BRA's return flows has on BRA's system yield and the appropriation amount. From the record we know for Demand Level A, the system yield with only the return flows of others is somewhere between 354,081 af/yr (yield with no return flows)[16] and 381,474 af/yr (yield with all return flows), but without the appropriate modeling, the Commission can only guess at the correct amount.

BRA's proposed solution to this problem is simply to change the appropriation section of the water right to once again have an appropriation amount that includes BRA's own return flows and that adds the qualifier of "up to" when referencing the return flow amounts. The problems with BRA's solution are manifold. First, BRA's approach fails to "remove that portion of BRA's own return flows from the appropriation," as expressly directed by the Commission. It fails to explain how much of the 47,332 af/yr of BRA's return flows are included in the appropriation amount. BRA's "up to" language is somewhat disingenuous given that BRA's

[14] As noted in footnote number 58 in the Supplement to the PFDR, the amount for Demand Level A is slightly lower in the BRA initial brief (381,068) than it is in the PFDR (381,474). The source for the number in BRA's brief, or its location in the record, is never explained.
[15] Interim Order, TCEQ Docket 2005-1490-WR at 3 (Jan. 29, 2016).
[16] BRA's Technical Report in Support of the Water Management Plan, Table 2.11.

position is that "as a practical matter the entire 47,332 af/yr is not available for BRA to use"[17] because BRA knows that the effect on the yield will be substantially less than 47,332 af/yr.

BRA's language also fails to explain how the "up to" language regarding the return flows of others is supposed to be applied on a going forward basis, as the quantity of return flows is reduced by direct and indirect reuse. To avoid "double permitting" as required by the Stacy decision, the Commission must have a mechanism to remove the return flows of others from BRA's appropriation amount when a return flow is reused (either directly or indirectly) by the discharger. BRA's approach provides no guidance as to how the appropriation amount will be reduced when a return flow is no longer available. This is an important issue because if BRA's appropriation amount is not reduced when a return flow becomes unavailable, the river will be over-appropriated and the prohibited "double-permitting" rejected by the Supreme Court in the *Stacy* decision[18] will occur.

These same problems occur with regard to BRA's appropriations by reach. As pointed out in Bryan's exceptions, the lack of appropriate modeling makes it impossible to remove BRA's return flows from the appropriation by reach and impossible to reduce the appropriation by 14% by reach. These problems cannot be fixed by simple arithmetic. These problems can only be fixed by performing modeling to determine the amount of unappropriated water available to BRA assuming that only the return flows of others are available for appropriation by BRA and not its own return flows.

CONCLUSION

There is no evidence in the record to support the determination of the appropriation amount if only the return flows of others (and not BRA's return flows) are considered as being available for appropriation by BRA. No modeling was performed to allow the Commission to determine the appropriate amount. The only solution available to the Commission, without reopening the record, is to set BRA's appropriation amount based on no return flows being available for appropriation. If BRA wants to appropriate those return flows, it is free to file a new application, with the appropriate modeling. BRA should not be prejudiced by such an approach, and might benefit from increases in such discharges in recent years. Bryan takes no

[17] *BRA's Exceptions to the Supplement to the PFDR* at 3.
[18] *LCRA v. TDWR*, 689 S.W.2d at 876 ("Basically, our decision is that the article prohibits "double permitting" or the stacking of appropriated waters on appropriated waters.")

position regarding whether the Commission should grant BRA a bed and banks authorization for its own return flows.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this the 12th day of July, 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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