

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

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

**THE DOW CHEMICAL COMPANY’S EXCEPTIONS TO THE
SUPPLEMENT TO THE PROPOSAL FOR DECISION ON REMAND**

TO THE HONORABLE COMMISSIONERS:

COMES NOW The Dow Chemical Company (“Dow”) and files these Exceptions to the State Office of Administrative Hearings (“SOAH”) Administrative Law Judges’ (“ALJs”) Supplement to the Proposal for Decision on Remand (“Supplement”) associated with the Brazos River Authority’s (“BRA”) above-referenced Application (the “Application”) for Water Use Permit No. 5851 (the “SysOps Permit”). Based on Dow’s review of the ALJs’ Supplement, which addresses issues associated with the Texas Commission on Environmental Quality (“TCEQ” or “Commission”) Commissioners’ Interim Order to Remand the matter to SOAH (“Interim Order”), Dow offers the following exceptions:

I. Introduction

The TCEQ held an agenda hearing on January 20, 2016 on BRA’s Application for Water Use Permit No. 5851. Based on the record, arguments and discussions regarding the Application during the agenda hearing, the TCEQ Commissioners issued an Interim Order on January 29, 2016, remanding the “matter to SOAH in the form of a limited remand for the purposes of clearing up the existing record and allowing the Parties and the ALJs to implement the Commission’s decision on two issues regarding reservoir

capacities and return flows in the Special Conditions” and Water Management Plan (“WMP”) portions of the SysOps Permit recommended by the ALJs. Interim Order at 1. After reviewing the briefs on disputed issues and replies to briefs on disputed issues associated with the Interim Order submitted by Dow, BRA, the TCEQ Executive Director (“ED”), the City of Bryan (“Bryan”), the Friends of the Brazos River (“FBR”), the City of College Station and the City of Lubbock (collectively, the “Cities”), and the Texas Parks and Wildlife Department (“TPWD”), the ALJs provided their Supplement associated with the Interim Order on June 3, 2016.

These arguments by Dow are only exceptions to the ALJs’ Supplement associated with the limited remand proposed by the TCEQ Interim Order. Nothing in these exceptions should be interpreted as Dow waiving or contradicting its prior arguments associated with BRA’s SysOps Permit Application. Subject to these reservations, Dow submits the following exceptions:

II. Exceptions to the ALJs’ Findings on Return Flows

Dow provides the following exceptions with respect to Section II of the ALJs’ Supplement, titled “RETURN FLOWS”:

- A. Application Does Not Satisfy 30 Tex. Admin. Code §§ 295.112(b) and 295.113(b)

The Interim Order specified that the ALJs and parties should “determine if BRA demonstrated that the amount of BRA’s own return flows meets all of the bed and banks application requirements.” Interim Order at 3. The TCEQ application requirements for bed and banks transport of groundwater based effluent and transport of other water are contained in 30 Tex. Admin. Code §§ 295.112-.113. Section 295.113(b) lists the following requirements for an application to transport water in the state’s bed and banks:

- (b) A person wishing to place water into a stream or watercourse, convey the water in the watercourse or stream, and subsequently divert such water shall file an application with the commission containing the following information:
- (1) the name, mailing address, and telephone number of the applicant;
 - (2) the name of the stream and the locations of the point of discharge and diversion as identified on a USGS 7.5 minute topographical map(s);
 - (3) the source, amount, and rates of discharge and diversion;
 - (4) a description of the water quality of the water discharged and, if applicable, the permit number and name of any related discharge permit;
 - (5) if the water to be placed into the stream is from an existing, authorized interwatershed or interbasin transfer, a certified copy of the related water right;
 - (6) if the water placed into the stream is from a proposed interwatershed or interbasin transfer, the information required by this subsection shall be provided in the application for the interwatershed or interbasin transfer and the bed and banks authorization shall be combined with the authorization for the interbasin transfer;
 - (7) the estimated amount of water that will be lost to transportation, evaporation, seepage, channel or other associated carriage losses from the point of discharge to the point of diversion;
 - (8) an assessment of the adequacy of the quantity and quality of flows remaining after the proposed diversion to meet instream uses and bay and estuary freshwater inflow needs; and
 - 9) any other information the executive director may need to complete an analysis of the application.

30 Tex. Admin. Code § 295.113(b).

Section 295.112(b) contains similar requirements for BRA's bed and banks transport of groundwater based effluent.

The ALJs' determined, "[t]he only specific requirement that Dow contends BRA failed to prove is the requirement to identify 'the estimated amount of water that will be lost to transportation, evaporation, seepage, channel or other associated carriage losses from the point of discharge to the point of diversion.'" ALJs' Supplement at 7. This

statement by the ALJs is not accurate. In its briefing, Dow did focus mainly on BRA's inability to satisfy the TCEQ bed and banks requirements by failing to provide "the estimated amount of water that will be lost to transportation, evaporation, seepage, channel or other associated carriage losses from the point of discharge to the point of diversion." *See* Dow's Reply to Parties' Briefs on Disputed Issues on Remand at 18-20; 30 Tex. Admin. Code § 295.113(b)(7). However, Dow also argued that BRA failed to provide, as was required by 30 Tex. Admin. Code § 295.113(b)(2), "the locations of the point of...diversion" for its own return flows. *See* Dow's Reply to Parties' Briefs on Disputed Issues on Remand at 18. Moreover, Dow contends that BRA has not satisfied 30 Tex. Admin. Code § 295.113(b)(3), which requires the applicant to provide "the source, amount, and rates of discharge and diversion," because BRA has never provided the exact "amount" of its own bed and banks water that it is going to divert from the watercourse. Therefore, contrary to the ALJs' statement, Dow contends that BRA has violated 3 provisions in the TCEQ bed and banks rules, not just 1.

Dow would urge the TCEQ Commissioners, before making a final decision on BRA Application, to ask one question: What is the amount of water that BRA will divert from the watercourse pursuant to 30 Tex. Admin. Code §§ 295.112(b)(3) and 295.113(b)(3) under the SysOps Permit? These TCEQ rules clearly require a bed and banks applicant to state the specific amount of water that will be diverted from the watercourse under its proposed bed and banks authorization. BRA has never stated, and probably cannot state, the exact amount of its own groundwater based return flows and surface water based return flows that it will divert from the watercourse pursuant to its bed and banks authorization in the SysOps Permit Application. The only actual value

BRA has ever provided for its own return flows is 47,332 acre-feet/year, but that is the amount that is being *discharged*, not the amount that will be *diverted* under its proposed authorization.

The ALJs seem to believe that BRA's WMP modeling, and the reach concept utilized in that modeling, satisfies these TCEQ bed and banks rules in the same manner that the ALJs determined it satisfied the TCEQ rules associated with BRA's surface water appropriation in the Application. The ALJs state that "Dow's concern about the uses of river reaches to estimate losses rather than estimating losses from specific points of discharge to points of diversion mirrors the concerns regarding points of diversion versus the use of river reaches that have already been decided in BRA's favor in the PFDR." ALJs' Supplement at 10. Assuming that the reach concept complies with Texas law, it is possible that the data from this type of reach-based modeling could provide the amounts, losses, and diversions associated with a bed and banks transport. The problem is that BRA did not model the discharge, transport, and diversion of its own return flows as a bed and banks authorization in its WMP modeling. Instead, BRA modeled its own return flows as an appropriation of water, subjecting them to appropriation by third party water rights just like other water in the stream. This created inaccurate data associated with its own return flows, meaning that the WMP modeling, and reach concept, cannot be used to answer questions regarding the amounts, diversions, and losses associated with its bed and banks authorization. Moreover, the record indicates that BRA used the wrong return flow data, as detailed in Dow's next exception.

B. No Evidence that BRA Used the Correct Amount of Return Flows

The Interim Order required the parties to “determine the amount of other entities’ return flows that BRA proved as a new appropriation.” Interim Order at 3-4. During the briefing associated with the Interim Order, both Bryan and Dow disputed that anything in the record can be used to support an amount of other entities’ return flows that BRA proved as a new appropriation, because the record indicates that BRA’s modeling used incorrect information. BRA’s Appendix G-2 states the following:

Minimum Monthly Return Flows, BRA only. These return flows are the minimum monthly historical discharge from 2007 to 2011, limited to return flows that originate from BRA sources or from plants owned and operated by the BRA. **Table G.2.5 shows the monthly return flows. These return flows are used for appropriation modeling runs** that are associated with the Executive Director of the TCEQ’s preferred approach to return flows.

BRA Exhibit 113, Technical Report in Support of the WMP, Appendix G-2 at 4, Section G.2.2.1 (emphasis added).

These statements, taken directly from the record evidence, indicate that the information in Table G.2.5 was used in BRA’s appropriation modeling runs. Unfortunately, Table G.2.5 contained at least 70 errors.

None of the parties, including BRA and the ED, now dispute the fact that Table G.2.5 is riddled with errors. BRA and the ED only argued that even though the information in Table G.2.5 is wrong, the correct information was used in the modeling. BRA acknowledged that the Table G.2.5 contains a mistake, but maintained that the “first portion of Table G.2.5 is correct and was used in computation of BRA’s 47,332 af/yr bed and banks authorization.” BRA’s Brief on Disputed Issues on Remand at 11. BRA claimed that these corrections were made, but BRA cited to nothing in the record as proof. Similarly, the ED stated that he “agrees that Table G.2.5 should be revised to remove return flows that were inadvertently included in that table; however, the ED notes

that these discharges were not included in the modeling submitted in support of BRA's WMP. See BRA Ex. 113." ED's Brief on Disputed Issues on Remand at 5. The ED also claimed that these mistakes were not included in the modeling, but he only cited to BRA Exhibit 113 in support of this claim. BRA Exhibit 113 is BRA's entire WMP, Technical Report in support of the WMP, and Appendices to the Technical Report. Neither BRA nor the ED could cite to one specific page or document in the record that proves the correct information was used in BRA's WMP modeling.

After reviewing the briefing on this issue, the ALJs determined that, "[a]lthough it is a close issue, the ALJs conclude the reading that is best supported by the evidence is" that the "modeling was performed using the correct amounts for BRA's own return flows, and only Table G.2.5 contained the error." ALJs' Supplement at 13-14. Dow excepts to this conclusion by the ALJs, because neither BRA nor the ED have cited to anything specific in the record indicating that the modeling was performed using the correct amounts for BRA's own return flows. As the applicant, BRA has the burden of proof to show the correct amounts were used in its modeling. 30 Tex. Admin. Code § 80.17(a) ("The burden of proof is on the moving party by a preponderance of the evidence..."). The information in the Technical Report (Appendix G-2 at 4, Section G.2.2.1), cited by Dow above, clearly evidences that the wrong information was used. For BRA to prove, by a preponderance of the evidence, that they used the correct information, BRA should have to cite to something that at least indicates that the correct information was provided. BRA has cited to nothing in the record to this point. Therefore, Dow disagrees with the ALJs that this is a "close issue"; because BRA cannot cite to anything in the record, it really is a one-sided issue.

The correct quantification of BRA's own return flows is important not only because it identifies the discharges that are subject to the proposed bed and banks authorization, establishing the amount discharged for the bed and banks authorization, but also, by subtraction, is used to quantify BRA's appropriation of 3rd party (others') return flows.¹ Therefore, there is insufficient evidence for BRA to obtain the right to transport its own return flows or appropriate others' return flows pursuant to Draft Permit No. 5851.

III. Exceptions to the ALJs' Findings on Reservoir Capacities

Dow provides the following exceptions with respect to Section III of the ALJs' Supplement, titled "RESERVOIR CAPACITIES":

A. ALJs Miscalculate the Reduction Due to Sedimentation

In the ALJs' Proposal for Decision on Remand ("PFDR"), the ALJs proposed reducing BRA's appropriation under the SysOps Permit by fourteen percent (14%) for each demand level due to the loss of storage capacity in BRA's reservoirs due to sedimentation. *See* ALJs' PFDR at 65-66. This percent reduction was based on Dow's expert witness's (Dr. Brandes') calculations regarding the effect of drought and lack of storage on BRA's available SysOps water supply. *See* Dow Exhibit-59. For example, in Dow-Exhibit 59, Dr. Brandes presented the reduction in SysOps firm supply due to nonexistent storage (lost to sedimentation) to be 73,102 acre-feet per year for Demand Level C. The ALJs divided this reduction by the total appropriation amount for Demand Level C (516,955 acre-feet per year) to obtain an approximate percentage that the other

¹ This is due to the fact that BRA did not perform modeling runs with only 3rd party return flows or containing only its appropriation of surface water and 3rd party return flows. BRA only performed 3 modeling runs: 1) an appropriation of surface water with no return flows, 2) an appropriation of surface water and an appropriation of BRA return flows, and 3) an appropriation of surface water and an appropriation of all return flows.

demand levels should be reduced by, because Dow's expert did not perform specific calculations for Demand Levels A and B. Therefore, because $73,102/516,955 = 0.1414$, or approximately 14%, the ALJs created a "14% Rule" whereby all demand levels would be reduced by that percentage. As the ALJs stated, "the reductions in Demand Levels C and D both equate to 14% reductions. Therefore, the ALJs recommend that 14% reductions likewise be applied to the appropriation amounts in Demand Levels A and B." ALJs' PFDR at 66.

Thus, the ALJs intended for the 14% Rule to take 14% of the total appropriation amount for each demand level to approximate an appropriate reduction due to sedimentation for each demand level. The problem is that the total appropriation amount for each demand level, as BRA calculated in its WMP, included BRA return flows and BRA's appropriation of third party return flows. If BRA return flows are removed from the total appropriation amount, as was ordered by the TCEQ Commissioners in the Interim Order, this also lowers the reduction due to sedimentation when one applies the 14% Rule.

Returning to the previous example, BRA's Demand Level C (516,955 acre-feet per year) included within it an amount of third party return flows (50,076 af/y) and BRA return flows (47,332 af/y). If one subtracts the amount of BRA return flows from the total appropriation amount, and then applies the 14% Rule, this results in a smaller (and inaccurate) reduction due to sedimentation. Unfortunately, this is the way the ALJs have calculated the sedimentation reductions in the proposed order accompanying the Supplement. On page 26 of the ALJs' proposed order, the ALJs calculate the amount of BRA's appropriation under Demand Level C to be 469,623 acre-feet per year. This was

correctly calculated by subtracting out the amount of BRA's own return flows (516,955 - 47,332 = 469,623). However, on page 29 of the proposed order, the ALJs state that BRA can only divert and use 403,876 acre-feet per year under Demand Level C. The ALJs obtained this number by applying the 14% Rule to the new appropriation amount, or multiplying it by 0.86. ($469,623 * 86\% = 403,876$). Thus results in a much lower reduction due to sedimentation. $469,623 - 403,876 = 65,747$. Instead of reducing BRA's appropriation by 73,102 acre-feet per year, as Dow originally calculated, applying the 14% Rule in this manner only reduces BRA's appropriation by 65,747 acre-feet per year for Demand Level C.

This is how the ALJs have mistakenly applied the 14% Rule for each demand level in the proposed order. To correctly apply the 14% Rule, one must go back and take 14% of BRA's total appropriation amounts for each demand level BEFORE subtracting BRA's own return flows from those values. This results in the following reductions for each Demand Level:

- Demand Level A => $381,474 * 14\% = 53,406$ a-f/y reduction
- Demand Level B => $344,625 * 14\% = 48,248$ a-f/y reduction
- Demand Level C => 73,102 a-f/y reduction²
- Demand Level D => 69,000 a-f/y reduction³

² Dr. Brandes calculated the exact reduction due to sedimentation for Demand Level C as 73,102 acre-feet/year. See Dow Exhibit-59. This is more accurate than the approximation made from application of the 14% Rule.

³ Dr. Brandes calculated the exact reduction due to sedimentation for Demand Level D as 69,000 acre-feet/year. See Dow Exhibit-47, p. 35 of 44, Ins. 3 - 4. This is more accurate than the approximation made from application of the 14% Rule.

Then, one must subtract these reductions from the appropriation amounts for each demand level, after the BRA return flows are removed from the appropriation as mandated by the Interim Order. This results in the following amounts that BRA can “divert and use” under each demand level, correctly accounting for the loss of storage capacity due to sedimentation:

- Demand Level A => $333,736 - 53,406 = 280,330$ a-f/y
- Demand Level B => $297,293 - 48,248 = 249,045$ a-f/y
- Demand Level C => $469,623 - 73,102 = 396,521$ a-f/y
- Demand Level D => $434,703 - 69,000 = 365,703$ a-f/y

These values should replace the ALJs calculated maximum amounts that BRA can divert and use for each demand level on Page 29 of the ALJs’ proposed order accompanying the Supplement.

As to its practical application, the adjustment to account for non-existent storage caused by storage lost due to sedimentation should only reduce BRA’s authorization to appropriate natural surface water under Tex. Water Code § 11.121. BRA’s authorization to appropriate others surface water based return flows, its authorization to appropriate others groundwater based return flows, and its bed and banks authorization to transport its own return flows are not based on storage and should not be affected or reduced due to reservoir sedimentation.

B. Reductions Due to Sedimentation Must Also Apply to the Reaches

As detailed above, Dow contends that the reductions due to sedimentation mandated by the Commissioners to BRA’s diversion and use were based and calculated on all the diversions being grouped together, but the reductions should apply only to

BRA's diversions of natural surface water and not to the other authorizations that are independent of storage. *See also* Dow's Brief on Disputed Issue on Remand at 12-14. Additionally, Dow argued this principle should apply not only to the total authorized amount associated with each Demand Level, but also to the values within the individual reaches. *Id.* In other words, the sedimentation reductions should be applied to the total authorized diversion amounts and the total authorized diversions within each individual reach to protect existing water rights located within those individual reaches. Dow maintains that there is not enough evidence in the record to make these sedimentation reduction calculations within the individual reaches, because BRA modeled all of its water together as a single appropriation. *See* Dow's Brief on Disputed Issues on Remand at 13-14.

The ALJs determined that Dow's argument that the sedimentation reductions cannot be calculated within the individual reaches "is beyond the scope of the remand." ALJs' Supplement at 27. Dow takes exception to this finding. The TCEQ Commissioners ordered the parties to redraft the SysOps draft permit in a manner that "directs BRA's WMP to immediately reduce the authorized diversion and use of the maximum annual authorized appropriation by the ALJs' proposed 14% reduced appropriation levels under the four Demand Level scenarios due to sedimentation in the system reservoirs." Interim Order at 2. Nothing in this order directed the parties to only concentrate on the total authorized diversion amount, and ignore the maximum diversion amounts within the individual reaches. The order can also be interpreted as directing the parties to "reduce the authorized diversion and use of the maximum annual authorized appropriation" within each individual reach. Dow believes the ALJs and the Commission

intended for the sedimentation reductions to be applied not only to the total authorized diversion amount for each Demand Level, but also to the maximum diversion amount per reach for each Demand Level.

The ALJs attempt to apply the sedimentation reduction and calculate the amount that BRA can divert and use by multiplying the total appropriation amount (which includes BRA's appropriation of surface water and others' return flows) by 86%. *See* ALJs' Supplement, Proposed Order at 25 – 29. Even assuming that this was done correctly (which Dow disputes as detailed above), this same operation is impossible to perform within the individual reaches, because BRA did not perform a modeling run that contained only its appropriation of surface water and its appropriation of others' return flows.⁴ Dow maintains that the reduction due to sedimentation must be calculated in each individual reach to protect existing water rights and the environment. Because sufficient information is not contained in the record to make these reductions, Dow contends that BRA's Application needs to be remodeled before any appropriation can be granted to BRA in this matter.

IV. Conclusion

The forgoing are Dow's Exceptions to the ALJs' Supplement. If a permit is issued to BRA in this matter, Dow requests that the TCEQ Commissioners take these exceptions into account and implement the changes suggested within before granting any permit to BRA based on the Application.

Respectfully submitted,

⁴ Again, BRA only performed 3 modeling runs for each Demand Level: 1) an appropriation of surface water with no return flows, 2) an appropriation of surface water and an appropriation of BRA return flows, and 3) an appropriation of surface water and an appropriation of all return flows.

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By: _____

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CERTIFICATE OF SERVICE

I hereby certify, by my signature below, that a true and complete copy of The Dow Chemical Company’s Exceptions to the Administrative Law Judges’ Supplement to the Proposal for Decision on Remand was served on the following parties of record as outlined below on this the 23rd day of June, 2016.

Fred B. Werkenthin, Jr

Fred B. Werkenthin, Jr.

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