

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

TO THE HONORABLE COMMISSIONERS:

COMES NOW The Dow Chemical Company (“Dow”) and files this Reply to 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 other parties’ Exceptions to the Supplement (“Exceptions”), Dow offers the following reply for consideration by the Texas Commission on Environmental Quality (“TCEQ” or “Commission”) Commissioners:

I. Replies to Exceptions Associated with the ALJs’ Supplement Findings on Return Flows

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

A. “Service Area” Limitation

Several of the parties filed exceptions regarding the types of special conditions the draft SysOps Permit should contain in order to reduce or terminate BRA’s appropriate

right to another discharger's return flows¹ if the discharger begins directly reusing the water or obtains a bed and banks authorization to reuse the water. BRA's latest version of the draft SysOps Permit included a special condition, Subsection 5.A.(3), which contained a "service area" limitation. This limitation only allowed BRA's appropriation of Others' Return Flows to terminate if the discharger of the return flows begins reusing that water within its "corporate limits, extraterritorial jurisdiction, or contiguous water certificate of convenience and necessity boundary." The City of College Station and City of Lubbock (the "Cities") proposed certain changes to Subsection 5.A.(3), including the elimination of the "service area" limitation. The ALJs found that the "verbiage proposed by the Cities best achieves the objectives specified in the Interim Order" and adopted that verbiage in the Supplement. ALJs' Supplement at 21.

BRA takes exception to the ALJs' adoption of the Cities' verbiage that eliminates the "service area" limitation in Subsection 5.A.(3). "Without the service area limitation originally contained in special condition 5.A.(3), BRA objects to the breadth of 5.A.(3)." BRA's Exceptions at 1. Dow disagrees with BRA that the service area limitation should be put back into the draft SysOps Permit special conditions. Dow agrees with the Cities that "[t]he TCEQ's directive to terminate BRA's appropriative rights in the return flows of others was not limited geographically. Rather, the Interim Order speaks to 11.042(b) and (c) authorizations without regard to whether the water is used within the discharging entity's limits, ETJ, or contiguous CCN boundary." Cities' Brief on Disputed Issues at 6. The TCEQ Interim Order clearly did not call for any type of geographical restrictions similar to the service area limitation. *See* TCEQ Interim Order, Section 6)ii), at 4.

BRA argues that, in making their finding on this issue, the ALJs only focused on

¹ When discussing return flows, Dow will refer to return flows derived from water supplied by BRA or from wastewater treatment plants owned or operated by BRA as "BRA Return Flows." Return flows to be discharged by other dischargers will be referred to as "Others' Return Flows."

the specifications in the TCEQ Interim Order, and did not discuss “the Commission’s legal authority to impose the requirement,” or “BRA’s legal arguments in support of retaining the service area limitation.” BRA’s Exceptions at 1-2. BRA cites to pages 11-14 in its Brief on Disputed Issues on Remand for its “legal arguments” on this issue. *See* BRA’s Exceptions at 2, fn. 1. However, these pages from BRA’s brief contain little to no actual legal argument, which may be the reason the ALJs chose not to address them in the Supplement. BRA cites to no cases, statutes, or TCEQ rules in its brief to support its service area limitation. Dow itself can find no cases, statutes, or TCEQ rules that require indirect reuse to be limited so that it is only allowed within a discharger’s corporate limits, extraterritorial jurisdiction, or contiguous water certificate of convenience and necessity boundary.

BRA also argues that “[a]s a matter of policy and good management of water resources, the service area limitation should be maintained.” BRA’s Exceptions at 2. BRA contends, “[w]ithout the service area limitation it encourages dischargers to engage in marketing their return flows downstream, creating both a category of water flowing in state watercourses that is not ‘state water’ and additional complications for the management of state water resources.” *Id.* Dow sees no reason why allowing dischargers to engage in marketing their return flows downstream is detrimental to public policy or the state’s management of its water resources. The goal for the state should be to get the most economically beneficial use out of the state’s water resources. Encouraging dischargers to market their return flows will only create more opportunities for people and/or entities to buy and sell this water and put it to beneficial use. Instead of only being able to buy the water from BRA, potential buyers may be able to negotiate:

- (1) different price terms, such as:
 - (a) lower overall cost for water,

- (b) a fixed price for the duration of a project’s financing, allowing more certainty of a project’s costs and perhaps better financing terms from a third party, or
- (c) lower cost for maintaining the potential to take water during a drought during periods of ample flow; and/or
- (2) more advantageous contract terms, including, for example:
 - (a) duration of water supply,
 - (b) guaranteed faster response when water is needed,
 - (c) faster response to cut off water usage when not needed,
 - (d) elimination of one or more potential contract contingencies for the supply of water.

Additionally, dischargers will have direct incentives to more efficiently conserve and reuse water in the future. BRA complains that this will create a category of water flowing in state watercourses that is not state water, yet every time BRA impounds water in one of its owned or operated reservoirs, it creates the same category of water. When BRA releases this water, covered by a bed and banks permit, the legal category of the water is the same as the water about which BRA complains. Clearly BRA did not mind this additional “category” of water when BRA believed it would be the only entity allowed to create the water in this category.

B. BRA’s Rights With Respect to a Discharger’s Return Flows

The City of Bryan (“Bryan”) takes exception to the ALJs’ recommendation not to provide language protecting a discharger’s ability to obtain a bed and banks authorization in the future. *See* Bryan’s Exceptions at 2-5. Specifically, Bryan requests that language be added to the SysOps 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.” *Id.* at 5.

Dow agrees with Bryan that the intent of the TCEQ Commissioners, based on their comments at the January 20, 2016 agenda meeting discussing the SysOps Permit

Application, was to allow dischargers to obtain indirect reuse authorizations for their return flows in the future even if BRA appropriates these return flows under the SysOps Permit. Like Bryan, Dow is also concerned that the current language in the draft permit does not protect the Commissioners' intent. Section 11.042(b) of the Texas Water Code states that an indirect reuse authorization for return flows derived from privately owned groundwater "shall be subject to special conditions if necessary to protect an existing water right that was granted based on the use or availability of these return flows." Tex. Water Code § 11.042(b). Similarly, a Section 11.042(c) indirect reuse authorization is "subject to any special conditions that may address the impact of the discharge, conveyance, and diversion on existing permits." Tex. Water Code § 11.042(c). In theory, BRA could rely on these provisions to protest any future bed and banks applications filed by a discharger to transport the discharger's return flows that BRA appropriates under the SysOps Permit.

The current language supported by the ALJs in the draft SysOps Permit clearly mandates that BRA's appropriation be terminated upon a bed and banks authorization being issued to the discharger. However, the special conditions fail to contain any language that would prevent BRA from protesting the bed and banks application before it is issued, where BRA, or others could (in theory) use the language cited above from Section 11.042 of the Texas Water Code to argue that the authorization would affect its existing rights. While Dow supports BRA's rights to protest for adverse impact, Dow also supports Bryan's efforts to protect dischargers' future bed and banks authorizations for their own return flows from this type of protest by adding the language proposed by Bryan, stating that BRA "may not subsequently assert that this water right was granted based on the permanent use or availability of such return flows." Bryan's Exceptions at 5.

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

The Brazos Family Farmers and Ranchers (“BFFR”) take exception to the ALJs’ finding in the Supplement that BRA’s modeling used the correct amounts of return flows. *See* BFFR’s Exceptions at 5. BFFR correctly points out that BRA only argues in its pleadings that it used the correct amounts of return flows, but BRA “does not point to any factual basis for its argument within the model calculations contained within the evidence of record.” *Id.* Dow agrees with BFFR that, “the ALJs are still required to identify the evidence of record used to support their determinations and not rely on mere argument of the parties as to what could be derived from the record. If the reductions cannot be made using the evidence in the record, then the record should be reopened to receive the necessary evidence.” *Id.*

Dow has already detailed the problems with BRA’s Table G.2.5, and how the mistakes in that table make it impossible to determine whether BRA used the correct amount of return flows in its Water Management Plan (“WMP”) modeling. *See* Dow’s Exceptions at 5-8. In short, Table G.2.5 indicates that BRA used the wrong amount of return flows in its modeling, and neither BRA nor the Executive Director can cite to any specific evidence in the record that the correct amount of return flows were used. BRA only argues in its pleadings that the return flow data used in its modeling is correct, but that is not actual evidence. It cannot be a “close issue,” as the ALJs find in the Supplement, when on one side there is no evidence that the modeling was correct and on the other side there is some evidence that it was wrong (Table G.2.5).

D. SysOps Permit Should Include a List of BRA’s and Others’ Return Flows

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 others and the volumes of the return flows used in modeling the appropriation amounts.” Bryan’s

Exceptions at 6-7. As stated above, Dow contends that Table G.2.5 indicates that BRA used the wrong amount of return flows in its WMP modeling, and there is no evidence to the contrary. *See* Dow's Exceptions at 5-8. If the Commission disagrees with Dow and ultimately determines that there is some evidence in the record that BRA used the correct amount of return flows in its modeling, Dow hopes that the Commission will at least follow this recommendation by Bryan so that a complete and accurate list of BRA Return Flows and Others' Return Flows is provided in the SysOps Permit materials.

E. BRA Return Flows Should Be Kept Out of the Appropriation

The TCEQ Interim Order, in Section 5)ii), directed the ALJs to "remove that portion of BRA's own return flows from the appropriation." Interim Order at 3. Based on this directive, the ALJs correctly held that the bed and banks authorizations to transport BRA Return Flows must be removed from the total appropriation amount. "Consistent with the directives from the Interim Order, the ALJs conclude that the appropriation amount in the SysOp Permit (paragraph 1.A.) must include others' return flows and exclude BRA's own return flows." ALJs' Supplement at 17.

BRA excepts to the ALJs' treatment of Interim Order Issue 5)ii), specifically to the removal of its return flows (the bed and banks authorization to transport the BRA Return Flows) from the appropriation. *See* BRA's Exceptions at 2-4. To make its argument in support of this exception, BRA now admits that its prior representations regarding water usage under the SysOps Permit was wrong. In the prior briefing, BRA represented that removing the amount of BRA Return Flows from the total appropriation amount would "*make no difference whatsoever in the amount of water BRA is authorized to use.*" BRA's Brief on Disputed Issues on Remand at 5. In its exception on this issue, BRA admits, "[t]hat representation was incorrect and counsel for BRA apologizes for the unintentional

misrepresentation. Although the numbers for the appropriation of unappropriated water, return flows of others, and BRA's return flow authorization, when totaled for each scenario, are the same as shown in the Proposed Order, *the actual authorization for water use by BRA is significantly different depending on where and how the amount of BRA's return flows is referenced.*" BRA's Exceptions at 2 (emphasis added).

Dow argued all along that BRA cannot provide accurate values for the actual authorizations for water use by its Application because its modeling is flawed. BRA conducted three different types of modeling runs within each Demand Level Scenario: (1) a run with no return flows, (2) a run with BRA Return Flows, and (3) a run with all return flows (including both BRA Return Flows and Others' Return Flows). See BRA Exhibit 113, WMP Technical Report, Table 2.11, at 2-39. Unfortunately, BRA failed to conduct any modeling runs simulating only the water that is being appropriated; BRA did not conduct a modeling run including only surface water and Others' Return Flows that were available for appropriation. Because of this lack of data in their Application (because it was not generated), there is no evidence in the record that BRA can use to prove the amount of water that BRA seeks to be "appropriated" by their SysOps Permit.

One might argue that BRA could take the total appropriation amount for each of the "All Return Flows" scenarios, and subtract the amount of BRA Return Flows diverted in each scenario to obtain an appropriation value for each scenario (Maximum Total Diversions – Diversions of BRA Return Flows = Appropriation Diversions). This cannot be done because the flaws in BRA's modeling that is in the record to support BRA's SysOps Permit Application make it impossible to obtain an accurate value for the diversions of BRA Return Flows. Dow has already gone into great detail regarding how BRA's modeling treated the bed and banks transport of the BRA Return Flows incorrectly

as an appropriation (subjecting them to diversion by third parties) and how this modeling mistake led to there being no real evidence as to the amount of BRA Return Flows that BRA will actually divert from the watercourse under the different modeling scenarios. *See* Dow's Brief on Disputed Issues on Remand at 2-9. Dow has also detailed how the mistakes in Table G.2.5 make it impossible, based on the record, to know if BRA used the correct amount of return flows in its modeling. *See* Dow's Reply to Parties' Briefs on Disputed Issues on Remand at 21-27; Dow's Exceptions at 5-8. Due to these modeling mistakes, it is impossible to state an accurate value of BRA Return Flows that are diverted under their desired SysOps Permit, and thus it is impossible to extrapolate the correct value of BRA's appropriation from the WMP modeling.

BRA complains that the entire bed and banks authorization should not be subtracted from the total maximum diversions to obtain the appropriation amount and it ridicules the permit formulation proposed by Dow and accepted by ALJs for making this deduction. "[A]s a practical matter the entire 47,332 af/yr is not available for BRA to use. Under the permit formulation proposed by Dow and accepted by the SPFDR, however, the entire 47,332 af/yr authorization is deducted from each demand scenario in draft permit Section 1.A. for every year. This effectively reduces BRA's authorization to use available unappropriated water from the authorization that otherwise would have been available." BRA's Exceptions at 3. If BRA is unhappy with the permit formulation adopted by the ALJs, BRA should be primarily unhappy with itself for providing insufficient evidence in the record to prove the appropriation amount, not Dow or the ALJs.

BRA has never provided the ALJs and the parties with a specific amount of BRA Return Flows and Others' Return Flows that are to be diverted under their SysOps Permit Application, despite being required to do so by the TCEQ. The TCEQ Commissioners

Interim Order required that, “[t]he ALJs should determine the amount of other entities’ return flows that BRA proved as a new appropriation.” Interim Order at 3-4. The TCEQ rules also require BRA to provide the exact amount of BRA Return Flows that will be diverted from the watercourse according to its bed and banks authorization. *See* 30 Tex. Admin. Code § 295.113(b)(3). Despite these TCEQ requirements, BRA has never in the record stated the amount of BRA Return Flows and Others’ Return Flows that it wants to be diverted from the watercourse. BRA continues to use the values of 47,332 af/yr and 50,076 af/yr, but these are the amount of BRA Return Flows and Others’ Return Flows that are DISCHARGED, respectively, not the amounts that are being DIVERTED. Because BRA failed to provide the values of diversions required by the TCEQ in the record, Dow contended that the TCEQ should deny all of BRA’s requests to appropriate or transport return flows under the SysOps Permit. *See* Dow’s Brief on Disputed Issues at 18 (“If BRA cannot satisfy these requirements based on the existing record, Dow prays that the ALJs will limit BRA’s SysOps Permit to only its appropriation of natural surface water, exclusive of return flows.”). As an **alternative**, Dow proposed a draft permit formulation that subtracted the values that BRA did provide, the discharge amounts, from the total maximum diversions under each scenario to formulate a draft permit that would remove all the bed and banks authorizations from the appropriation, as the TCEQ Commissioners explicitly ordered. *Id.* at 19; Interim Order at 3 (“the ALJs should remove that portion of BRA’s own return flows from the appropriation”).

Dow recognizes the validity of BRA’s complaint that subtracting the return flow “discharge” amounts instead of the “diversion” amounts from the total maximum diversions will result in slightly understated values for BRA’s authorization to divert and use surface water in the draft SysOps Permit. However, BRA has no one to blame but

itself since it holds the burden of proof. BRA did not provide the return flow diversion amounts, so it is impossible to obtain the information needed to formulate an accurate draft permit from the record evidence. It will be a gift if BRA receives authorization to divert any return flows, based on this record.

BRA's solution is to revert to a draft permit structure that was expressly rejected by the TCEQ Commissioners in the Interim Order. BRA again proposes to state the appropriation in the draft permit as the total maximum diversions per year, including the bed and banks authorizations. *See* BRA's Exceptions at 4. The TCEQ Commissioners explicitly stated, "the ALJs should remove that portion of BRA's own return flows from the appropriation." Interim Order at 3. More importantly, Dow does not believe BRA's draft permit formulation is protective of existing water rights. Dow contends the SysOps Permit, if granted at all, should state exactly how much surface water, Others' Return Flows, and BRA Return Flows that BRA will divert from the watercourse every year. This will aid the TCEQ, watermaster, and existing water right holders in determining exactly what water BRA is diverting and if they have the priority to divert this water at the time and location requested. BRA's draft permit formulation lumps all the water together as one maximum diversion number, the same as BRA's flawed modeling, incorrectly adding BRA's bed and banks authorization back into the appropriation.

Dow contends the TCEQ should deny all of BRA's authorizations associated with return flows due to a lack of evidence in the record to grant these authorizations. In the alternative, if the Commission somehow determines that there is enough evidence in the record to grant BRA authorizations to appropriate Others' Return Flows and transport the BRA Return Flows as part of the SysOps Permit, the Commission can adopt the draft permit language formulated by Dow and accepted by the ALJs, which removes the bed

and banks authorizations from the appropriation as the TCEQ Commissioners ordered.

II. Replies to Exceptions to the ALJs' Supplement Findings on Reservoir Capacities

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

A. Sedimentation Reductions Should Only Apply to Natural Surface Water

In his exceptions, the Executive Director ("ED") puts forth several potential revisions to the ALJs' Findings of Fact ("FOF"). The ED states, "FOF 73 should be reworded to state that the reduction due to sedimentation is in the unappropriated water, which includes the return flows of others." ED's Exceptions at 2 of 5. Dow contends that the reduction due to sedimentation should apply only to natural surface water that BRA is attempting to appropriate, and not any of the return flows.

In its exceptions, Dow described in detail how the reduction due to sedimentation should be calculated. *See* Dow's Exceptions at 8-11. "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." *Id.* at 10. "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." *Id.* at 10. Applying the reductions to all the unappropriated water including Others' Return Flows, as the ED seems to suggest, would apply the reduction to a category of water that may not be affected by sedimentation.²

² From Dow's review of the evidence in the record, it appears that most of the return flows are discharged downstream of BRA's reservoirs that are most affected by sedimentation. Therefore, Dow contends that most, if not all, of the reduction due to sedimentation should apply to BRA's appropriation of natural surface water, and not BRA's appropriation of Others' Return Flows. The only way to obtain an exact answer, however, is to model the SysOps Permit Application accounting for the loss of storage due to sedimentation, which it appears BRA consciously avoided.

The reduction due to sedimentation should apply only to unappropriated natural surface water, both as a whole and within the individual reaches.

B. Reductions by Reach Due to Sedimentation

Dow agrees with Bryan's exception to the ALJs' recommendation regarding maximum diversions by reach. *See* Bryan's Exceptions at 7-8. Bryan contends that "[n]o 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." *Id.* at 7. Dow agrees with Bryan that the ALJs method of applying the reduction due to sedimentation to the total maximum diversions cannot be applied to the individual reaches. Dow recognized this problem long ago, raising this problem at the beginning of this remand process. "In Dow's view, the information required to make the appropriate reductions to BRA's diversions of surface water is not in the record, except for the scenarios containing no return flows ('Firm Use Scenarios' 1, 4, 7, and 10)." Dow Brief on Disputed Issues at 13-14. There is no evidence in the record that provides the parties with the amount of BRA Return Flows within each individual reach. Due to this lack of evidence, there is no calculation or operation that can be performed to accurately calculate the sedimentation reductions within the individual reaches.

Bryan is also correct that the "only accurate 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)." Bryan's Exceptions at 8. The only way to accurately apply the reduction due to sedimentation is for BRA to go back and remodel the SysOps Permit, accounting for the loss of storage due to

sedimentation, and treating the BRA Return Flows as a bed and banks authorization instead of an appropriation.

III. Conclusion

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

Respectfully submitted,



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 Reply to 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 12th day of July, 2016.



Fred B. Werkenthin, Jr.

SERVICE LIST

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