

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

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

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CHIEF CLERKS OFFICE
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

**EXECUTIVE DIRECTOR'S EXCEPTIONS TO PROPOSAL FOR DECISION
AND PROPOSED ORDER**

TO THE HONORABLE COMMISSIONERS:

The Executive Director (ED) of the Texas Commission on Environmental Quality (TCEQ or Commission) files these Exceptions to the Proposal for Decision (PFD) and the proposed Order issued by the Administrative Law Judges (ALJs) on July 17, 2015, regarding the application filed by Brazos River Authority (BRA or Applicant). The ED also attaches his recommended Order for this application and a recommended permit based upon BRA Ex. 132A.

I. INTRODUCTION

The ED respectfully disagrees with several of the findings of fact, conclusions of law, and recommendations set forth in the PFD and the proposed Order. In particular, the ED excepts to the findings and conclusions related to addressing BRA's request for groundwater-based and surface-water based return flows and addressing sedimentation in the reservoirs when determining water availability.

The ED also excepts to discussion in the PFD, the Findings of Fact, the Conclusions of Law, and the proposed ordering provisions relating the following issues: the discussion finding that the TCEQ's rules, specifically 30 Texas Admin. Code

§§ 295.5, 295.6 and 295.7, are directory; the correction of diversion amounts in the draft permit, even if BRA's and the ALJ's analysis relating to reuse is adopted, because of modeling errors; the discussion of water quality issues; the public welfare analysis; the streamflow restriction at Dow's diversion point for salinity issues; the ALJs' statements about conforming changes to the WMP being clerical in nature; and the special condition in the draft permit relating to agreements BRA has entered into with other entities concerning return flows. The ED's exceptions to those discussions, findings, conclusions, or ordering provisions are discussed below. Though the ED does not except to a special condition in the permit relating to drought, the ED recommends that the condition be amended.

Finally, the ED requests correction of typographical errors in the proposed order.

II. REUSE

A. ALJs' Decision

In the PFD, the ALJs determine that:

- BRA can only be authorized to divert and use its own groundwater-based return flows under Texas Water Code § 11.042(b);
- BRA can only be authorized to divert and use its own surface-water based return flows under § 11.042(c); and
- BRA can be authorized to divert and use everyone else's return flows under § 11.046(c).

The ED agrees with the ALJs' first two determinations, but disagrees with the third determination regarding § 11.046(c) and believes that it will result in water rights permitting that will not be protective of senior water rights.

B. Specific Exceptions on Reuse

The ED excepts to the following in the proposed Order:

Findings of Fact Nos. 57, 59, 158, 159, 163, and 177.c.

The proposed Order also contains Findings of Fact (Nos. 160, 161 and 162) that BRA will interrupt its use of return flows if other persons obtain authorization to divert and use their own return flows under § 11.042. These Findings of Fact are discussed below under Section IV., Subsection F.

Findings of Fact No. 159 should be revised to delete the phrase “and with prior Commission practice” if the Commission adopts the ALJs’ proposed order.

Conclusions of Law Nos. 16, 17, and 18.

There is no specific Finding of Fact or Conclusion of Law relating to the ALJs’ determinations in the PFD that BRA can only obtain its own discharges under §§ 11.042(b) and 11.042(c). Instead, the proposed Order contains findings that BRA will interrupt its use of return flows if other persons obtain authorizations to divert and use their own return flows under Texas Water Code § 11.042. Findings of Fact Nos. 160, 161, and 162 are discussed under Section IV., Subsection F below.

Conclusion of Law No. 18 has broad implications for other applicants. BRA’s application must meet the TCEQ’s flow standards because the application also requested a new appropriation of water. Applicants who only request reuse of their own return flows and do not also request a new appropriation should not be subject to the TCEQ’s flow standards (absent agreement as was done for BRA) because the flow standards include pulse flows; return flows are a fairly constant volume. BRA Ex. 113, Technical Appendix G-2, Tables G.2.2-G.2.6.

Ordering Provision No. 2.c.

C. ED’s Position

1. Groundwater-based Return Flows

If BRA wants to reuse groundwater-based return flows that it has discharged to a watercourse, it must obtain authorization for these return flows under Texas Water Code § 11.042(b). Section 11.046(c) and the *Day v. Edwards Aquifer Authority* case, 369 S.W.3d 814 (Tex. 2012), do not change this. The ED's position is consistent with the Texas Supreme Court's decision. has consistently argued that § 11.046 is not a permitting statute and does not apply to reuse applications. The ED also re-iterates arguments he has made before, most notably in the *Janes Gravel Company* case currently under appeal.

BRA cannot obtain an authorization to reuse other people's groundwater-based return flows because neither § 11.042(b) or § 11.046(c) allow this. Additionally, BRA cannot use § 11.042(c) to transport groundwater-based return flows because under *Day*, § 11.042(c) will not prevent the groundwater from becoming surface water.

Texas Water Code § 11.046(c), which states that surplus water returned to a watercourse after diversion becomes "available for appropriation" does not apply to groundwater. The statute applies to surplus water, which is defined in Texas Water Code § 11.002(10) as "water in excess of the initial or continued beneficial use of the appropriator." This would not include groundwater or groundwater-based return flows because groundwater is not "appropriated." Specifically, § 11.046(c) applies to a holder of a "water right, water appropriated under a permit, certified filing, or certificate of adjudication," which would not include groundwater or groundwater-based return flows.

The *Day v. Edwards Aquifer Authority* case supports the ED's view. The exception to the court's finding that groundwater entering a watercourse becomes surface water is a § 11.042(b) bed and banks authorization. The ED agrees with the

Texas Supreme Court. BRA should obtain a § 11.042(b) authorization to reuse its own groundwater-based return flows. On page 242 of the PFD, the ALJs state that the *Day* case implies that groundwater discharged into a watercourse without a bed and banks authorization becomes state water. The ED agrees, which is why a person must get a § 11.042(b) authorization to reuse the person's own groundwater-based return flows.

BRA cannot obtain these specific groundwater-based return flows pursuant to Texas Water Code § 11.121 because they did not model those return flows as a new appropriation. In order for BRA to have modeled these return flows as a new appropriation, BRA should have recalculated the natural streamflows by adding return flows to that calculation. If these flows are just water in the river, they should be considered no different than any other water in the river. BRA did not do this. BRA specifically included all groundwater-based return flows from all TPDES permits in the Brazos Basin below its system of reservoirs in the appropriation model and modeled the use of those return flows under § 11.042(b). BRA added these return flows as constant inflows based on calculated recent return flows. BRA Ex. 113 Technical Appendix G2 p. 4. Simply adding the amount of return flows to the available water treats these return flows differently than any other flow in the stream, i.e. just like those return flows would be treated under § 11.042(b). Dr. Alexander, Tr. 3708 line 10 to 3710 line 4.

The ALJs agreed that BRA can only obtain an authorization to reuse its own groundwater-based return flows under § 11.042(b). PFD, p. 242. BRA's application shows that BRA did request its own groundwater-based return flows. Ex. 132B, p. 3. However, the ALJs did not require that BRA account for those return flows under § 11.042(b), which states that the authorization may allow for the diversion and reuse of existing return flows, less carriage losses. BRA's accounting would treat these return flows just like any water in the stream and there would be no way to determine the losses between discharge and diversion. The ED's recommended permit, based on BRA Ex. 132A, requires this accounting, by tracking individual return flows by source, availability, and diversion location, taking into account any losses in the stream.

Thus, under the ALJs’ analysis, the water that BRA has appropriated under this application includes groundwater-based return flows discharged by BRA that are not available under a new appropriation. As to other persons’ groundwater-based return flows – because Texas Water Code § 11.046(c) does not apply to groundwater-based return flows, this water does not become “available for appropriation” under § 11.046(c). The flows are not automatically available for appropriation nor should the availability of these flows be determined differently than other availability determinations.

Under § 11.042(b), only the discharger can obtain groundwater-based return flows. There is no legal vehicle for specifically obtaining other people’s groundwater-based return flows. Therefore in this case, the amount of the appropriation must be recalculated, or the Commission should use the ED’s recommended diversion amounts because they are closer to those amounts of return flows that BRA has legally appropriated. The ED’s recommended diversion amounts are (ED-R3 p.8):

Firm Level A	Firm Level B	Firm Level C	Firm Level D
366,350 acre-feet	321,669 acre-feet	512,473 acre-feet	456,645 acre-feet

2. Surface-water based Return Flows

The ALJs determine that BRA must obtain its own surface-water based return flows under Texas Water Code § 11.042(c). PFD, p. 227. As argued above in the discussion of groundwater-based return flows, the permit that the ALJs recommend and BRA’s WMP based on that permit do not account for these return flows under § 11.042(c).

Persons can obtain surface-water based return flows under Texas Water Code § 11.042(c). However, no one can obtain return flows under § 11.046(c) because it is not an authorization statute. It is only a statement that surplus water can become available for appropriation, for which a person must obtain a new appropriation of water under

§ 11.121. Under § 11.134, and TCEQ's other statutes and rules for a new appropriation, the new water has to be "available." Interruptible water is not available all the time; therefore interruptible flows are not included in TCEQ's models for new appropriations of water. Diversion of interruptible water must be based on that water being in the stream. *See*, 30 Texas Admin. Code § 297.42(g).

The ED has consistently argued that §11.046(c) does not apply when a person or entity wants to reuse return flows that have returned to a watercourse. The ED has argued that to reuse water, an applicant should have some control over the water and has interpreted these statutes in a manner that protects senior water right holders by proper accounting of return flows that are being discharged and used.

Additionally, the definition of "surplus water" could be interpreted to not apply to used water. There is no case law on this but it is a reasonable interpretation of § 11.046 and the definition of "surplus water" in that section and Section 11.002(10). This interpretation is consistent with the ED's argument that Section 11.046(c) does not apply when someone wants to reuse their return flows. Section 11.046(c) discusses water that is not going to be beneficially used or continued to be beneficially used, not water that an entity wants to reuse. Under this interpretation § 11.046 is inapplicable to surface water-based and groundwater-based return flows. This will be discussed further below.

The ALJs PFD on p. 223-224 states that the ED's position on § 11.046 is inconsistent with a Commission decision in a prior contested case hearing involving the City of Grapevine. Grapevine was not a reuse case. It was an accounting plan case involving allocation of inflows into a reservoir. The ED's argument in that case is consistent with his position that if a person has a § 11.042 authorization, which Grapevine did not, the person could reuse those return flows in accordance with the person's priority date, rather than losing them to the stream. Tr. 0436 lines 3-25.

3. Further Discussion of Reuse Issues

The ED's position and practice on reuse have been consistent since Senate Bill 1 was passed. ED Exs. A-1 - G-1 (first hearing). For purposes of arguing this exception to the PFD, the ED will re-iterate the basic premises of his long-standing position on reuse.

State water, defined in Texas Water Code § 11.021, requires authorization to use, Texas Water Code §§ 11.022 and 11.121. State water as defined does not include groundwater and the statutory framework in Texas Water Code Chapter 11 is structured for surface water.

Texas Water Code § 11.046 allows a water rights holder to divert appropriated surface water prior to releasing it into a watercourse, but once it is returned to a watercourse as surplus water – defined in TWC 11.002(10) as “water in excess of the initial or continued beneficial use of the appropriator” – it may be appropriated by others. Section 11.046 governs “surplus water” which does not include groundwater or groundwater-based return flows. There is no indication that § 11.046 was ever intended to apply to groundwater or to surface water that is authorized under § 11.042.

The ALJs dismissed the ED's argument concerning § 11.046 by referring to the Texas Supreme Court's opinion in *Edwards Aquifer Authority v. Day*, where the court stated that once unpermitted groundwater enters a watercourse, it becomes state water. The court specifically cited as an exception to this rule § 11.042(b), which allows a person an authorization to reuse the person's own groundwater-based return flows by discharging the flows into a watercourse and re-diverting this water. The person with such a permit uses the bed and banks of a watercourse to transport the person's groundwater-based discharges for subsequent diversion and reuse, but the water thus permitted does not become state water upon discharge into the watercourse.

The provisions in Texas Water Code § 11.042 govern reuse of return flows in

Texas. The provisions in § 11.046 govern surplus water, which is state water that has been authorized for use but which is in excess of the initial or continued beneficial use by the appropriator. Appropriated state water attains the status of “surplus” only when it is returned to a watercourse without conditions in a water right that allow its continued beneficial use and reuse by the water right holder. Once a person has a § 11.042 permit, the persons may return flow to a watercourse and re-divert it without it becoming subject to appropriation by others.

The ED re-iterates that Texas Water Code § 11.046 is not the statute that governs reuse. The statute governing reuse is § 11.042, specifically subsections (b) and (c). The “reuse” language in § 11.046(c) describes use and reuse of authorized state water for its authorized beneficial purposes by the holder of a state water right. The reuse contemplated in § 11.042(b) is groundwater-based effluent; the reuse contemplated in § 11.042(c) is state water, including surface-water based effluent, that will be conveyed and subsequently diverted and reused.

The Applicant has argued that it is appropriate to authorize groundwater-based and surface water-based return flows for reuse under Texas Water Code § 11.046(c), but § 11.046 governs surplus surface water only, which by its terms is appropriated state water. It was never meant to apply and does not apply to groundwater-based return flows. For surface water-based return flows, the appropriate permitting statute is § 11.042(c). Section 11.046(c) does not authorize any type of water right.

The Applicant has defined return flows as treated wastewater or unused portions of diversions that are discharged into watercourses in the state. BRA Ex. 15 at 46. The ED concurs that return flows include treated wastewater discharges. The ED believes that there is an alternative interpretation to the second half of the Applicant’s definition. Unused portions of surface water diversions that are discharged into watercourses in the state are not return flows but are surplus water if they are not otherwise permitted for continued beneficial use and reuse. The Applicant’s definition combines terms to arrive

at the Applicant's desired conclusion and unduly confuses the issues around reuse. The Applicant's arguments during this case also introduced the use of a term not recognized or used in TWC Chapter 11 – "developed water" – in the Applicant's arguments about the ED's position that further muddied the proverbial waters on this issue.

The Applicant has misinterpreted Texas Water Code § 11.046 and its purpose. Section 11.046(c) allows a water rights holder to use authorized state water once-for its stated beneficial purpose(s), and to directly reuse or obtain an authorization to reuse the authorized state water that remains after its first use so that it does not become surplus water.

If BRA's approach to reuse under Texas Water Code § 11.046(c) is approved, the TCEQ's models for new appropriations of water would need to be changed. This could affect pending water rights applications across the state, impact permitting timeframes, and fundamentally change the way TCEQ implements water rights permitting. The water availability models (WAMs) that the TCEQ uses for new appropriations do not currently include return flows because return flows are interruptible at any time, 30 Texas Admin. Code § 297.42(g). This assumption formed the basis for TCEQ's WAMs. BRA Ex. 70 WAM Resolved Technical Issues. If all return flows, including groundwater-based effluent, are considered to be surface water available for appropriation, the TCEQ would need to update its models and their underlying naturalized flows to add these return flows. Tr. 3707 lines 10-17. The models would need to be updated at least yearly, which would make water availability for new permits a moving target. ED-R2 p. 14 lines 2-6.

It would be very difficult for the TCEQ to grant new authorizations to reuse return flows in any Texas river basin if BRA's approach is approved. Reuse projects that contemplate run-of-river diversions, some of which are included in Texas Regional Water Plans, would probably not meet the water availability criteria for new appropriations of water if the projects do not include significant storage, because run-

of-river diversions would be significantly impacted by BRA's new approach to reuse.
ED-R2 p. 14 lines 7-14.

III. SEDIMENTATION

A. Exceptions

The ED excepts to the following:

Findings of Fact Nos. 56, 62, 63, 64, 65, 69, 70, 90, and 176.b.

Conclusions of Law No. 20.

Ordering Provision No. 1.b.

Finding of Fact No. 90 and Conclusion of Law No. 20 would not be correct under the ALJs' recommended reduction in appropriation based upon sedimentation.

B. ED's Position

The Texas Supreme Court in *Lower Colorado River Authority v. Texas Department of Water Resources (Stacy Dam)*, 689 S.W.2d 873 (Tex. 1984), held that the predecessor agency to the TCEQ violated the Texas Water Code when it authorized a new appropriation based on water that had been appropriated to others but had not been used. The court states that the purpose of this rule is to avoid "double permitting" of water and to prevent permitting of already appropriated water. 689 S.W.2d at 878. Water granted under a water right is not again subject to appropriation in another water right. 689 S.W.2d at 877.

Although *Stacy Dam* does not involve the volume of an existing reservoir that is being modeled to determine the availability of new water, the analysis should be the same. BRA's water rights authorize it to store specific quantities of water in its reservoirs. BRA Ex. 113 Water Management Plan Table 2.1. Protecting the full

authorized amounts in BRA's water rights is required under *Stacy Dam*. Water availability for a new water right must be based on the full authorization in the water right, not on what might be the current situation. The water right is the governing document.

The ALJs recommend reducing the amount of unappropriated water available to BRA based on reduced capacity in BRA's reservoirs resulting from sedimentation. The ALJs used Dow Ex. 59 as the starting point for their proposed reductions even though that was just an estimate. Tr. 3610 line 25. The ALJs subtracted the amount of an estimated reduction due to sedimentation from the amount of run-of-river water available for appropriation for each demand level. Dow only estimated the reduction for Firm Levels C and D. The ALJs then extrapolated this estimated reduction to the other demand levels based on the percentage of the estimated demand reduction for Firm Level C. The reduction included an estimated amount for other BRA reservoirs. PFD p. 65-66.

The ED continues to disagree with Dow and disagrees with the ALJs' approach to reducing the amount of run-of-river water available for appropriation. First, the ED does not agree that using the authorized capacity in the second simulation results in an overstatement of the amount of water available for appropriation. As Dr. Alexander testified in the first hearing, if you reduce the capacity of the reservoir, the water that was authorized to BRA would be given to other water right holders, Tr. 1945 line 21 to 1946 line 1. This would be inconsistent with *Stacy Dam* case. Simply reducing the capacity of one of BRA's reservoirs in the second simulation would continue to make BRA's authorized water available to junior water right holders but not to BRA. Thus, Dow's new modeling introduced in the second hearing suffers from the same flaws that existed in the modeling it offered in the first hearing. Calculating water availability the way Dow and the ALJs suggest would reallocate BRA's water to junior water rights or future permit applicants, a violation of the holding in *Stacy Dam*. BRA has a right to the amount of water it is authorized in its permits.

Second, there is not a direct correlation between a reduction in firm yield and an amount of water available for appropriation from the river. BRA's modeling utilized different demands in various locations throughout the Brazos River Basin, including the locations of BRA's current contracts and the locations of future demands identified in the Regional Water Plan. In BRA's modeling for the WMP, "an additional diversion is added at the Rosharon gage to determine the amount of unused system yield available after satisfying existing contracts and future demands in the Regional Water Plans." BRA Ex. 113 Water Management Plan Technical Report, p. 2-22. Dr. Brandes testified that the "undefined demand" at the Rosharon gage had to be reduced for all of BRA's demands to be fully satisfied. Dow Ex. 47 Page 33. The undefined demand is a firm yield number. Dr. Brandes improperly reduced the "undefined demand" at Rosharon in order to have a firm supply in all of the years. Tr. 3611 line 17 to 3612 line 21. Dr. Brandes did not calculate the amount of the maximum annual diversion, which is the amount that will be authorized in the draft permit. Tr. 3611 line 22 to 3612 line 8.

The reduction for Demand Level C, 71,500 acre-feet, is the reduction in the Rosharon SysOps Firm Supply. Dow Ex. 59. The reduction for Demand Level D, 69,000 acre-feet is a reduction in the BRA system yield. Dow Ex. 47, p. 35 lines 3-9. As shown in the WMP, the amount of additional firm yield generated by the appropriation of run-of-river diversions downstream is significantly different from the amount of those run-of-river diversions. For example, in Demand Level C, the maximum amount of run-of-river diversion (the new appropriation) assuming all return flows is 516,995 af/yr and the increase in system yield (firm yield) is 329,109 af/yr. BRA Ex. 113 Water Management Plan Technical Report Tables 2.11 and 2.13. As Dr. Alexander explained at the hearing, there was no model justification or evidence that Dow's reduction was appropriate. Tr. 3972 line 10-13. The ALJs and Dow subtracted apples (firm water) from oranges (run-of-river water) by reducing a firm demand at one location and then reducing the appropriation which is based on an amount of run-of-river water available throughout the Brazos Basin.

Third, there is no modeling to support the reductions in Demand Levels A and B nor is there any modeling to support the full amount of the estimated reduction in Demand Levels C and D. The ALJs calculated the percentage reduction in Demand Levels C and D, PFD p. 65-66, and applied that same percentage reduction to the other demand levels. However, the demands in each of BRA's four appropriation models are different and distributed differently throughout the Brazos River Basin. BRA Ex. 113 Water Management Plan Technical Report Table 2.9. Therefore, a uniform percentage cannot be used and the ED does not agree that this is an acceptable approach to determine water availability. Further, a portion of the reduction is based on estimated sediment reductions in other BRA reservoirs. Dow Ex. 59. The reduction for other BRA reservoirs was not based on modeling of any kind. Tr. 3613 lines 4-10. Therefore a percentage reduction based in part on subtracting firm water from river water and in part not based on modeling of any kind is not an appropriate or correct method to use to reduce the amount of the appropriation. At best, this evidence provides support for the ED's recommended special condition.

Fourth and finally, there is no analysis showing whether other water rights would be affected by Dow's and the ALJs' proposed changes. There is no evidence in the record to support Finding of Fact No. 90 or Conclusion of Law No. 20, which find that no water rights will be impaired by the ALJs' recommended draft permit.

For the reasons set out above, the ED believes that the most reasonable and practical approach is the one proposed by the Commissioners at the January 25, 2012 agenda. The Commissioners recommended including a special condition to address the issue of reservoir sedimentation. The ED argued that a special condition should be included in the permit requiring BRA to demonstrate that it has additional sources of supply sufficient to offset the impacts of sedimentation in its reservoirs, or demonstrate diligent development of those supplies – in the absence of either, the appropriation would be reduced. Dr. Alexander recommended such a special condition and it is

included in BRA Ex. 132A, and in the ED's recommend draft permit, which is based on BRA Ex. 132A.

Dr. Brandes testified that if Permit 5851 were issued with the appropriation based on permitted storage in BRA's reservoirs, a special condition could be included in the permit requiring the additional storage capacity to be restored by a date certain. (Dow Ex. 47 page 18 line 19 – page 19 line 4) Dr. Brandes testified that this would be consistent with TCEQ's existing practice. Tr. 3593 lines 13-20. Both Dr. Alexander and BRA's witness Brad Brunett testified about options available to BRA to mitigate for sedimentation in its reservoirs. These could include reallocation of existing reservoirs, off-channel reservoirs or other similar types of projects. Tr. 3972 lines 15-25 and Tr. 4107 lines 1-13. These projects take time to develop. Tr. 4110 lines 15-24. Allowing BRA to either develop additional sources of supply or pursue diligent development of those sources of supply during the first reconsideration or major amendment of the WMP is reasonable and consistent with TCEQ's rules that define reasonable diligence in requesting additional time to construct a project. 30 TAC § 295.72. The ED's proposed special condition includes a date certain. Special Condition 5.D.3 in the ED's draft permit, which is based on BRA EX. 132A requires BRA to submit to the ED an application for reconsideration or amendment of the WMP a minimum of once every ten years. The ED would change the word "may" to the word "shall" in his proposed special condition to address any concerns related to ambiguity in the special condition.

The ALJs also recommend including a special condition proposed by Dow that would reduce BRA's appropriation based on a future drought study. The ALJs special condition to account for drought is the exact same type of special condition the ED proposes for sedimentation issues. Although the ED agrees that such a special condition is appropriate, for the same reason that the ED's special condition related to sedimentation is appropriate, the ED would modify the condition. This will be discussed more below under "Other Issues."

IV. OTHER ISSUES

A. Errors in diversion amounts in draft permit

1. Exceptions

The ED excepts to the following in the proposed Order:

Findings of Fact Nos. 62, 63, 64, and 65. The ED excepts to the appropriation amounts in Demand Levels A, B, C, and D, based on the ED's position on reuse and errors in BRA's modeling.

Ordering Provision No. 1.b.

2. ED's Position

The ALJs recommend that BRA's diversion amounts in BRA's proposed draft permit be changed to reflect the different scenarios for diversion in the Water Management Plan (WMP). The ED does not contest that recommendation. However, under the ALJs' analysis or BRA's approach on reuse, or BRA's representation in its WMP of the ED's position on reuse, BRA's diversion amounts are not correct. As Dr. Alexander testified, she made corrections in these amounts. While these corrections are small, they should be reflected in the model for future permitting purposes. Tr. 3695 line 12 to 3694 line 21. These corrected amounts are at ED-R3 p. 8.

B. Water quality/salinity

1. Exceptions

The ED disagrees with the following in the PFD:

The ALJs' discussion of Dow's contention that its water right was being impaired because the water quality at its diversion points was being adversely affected by BRA's application. PFD, pp. 85 – 97. The ED believes that the discussion, the findings, and the

conclusions on this issue were unnecessary because the TCEQ's adopted environmental flow standards address this issue, and the ALJs found that these rules replace the analysis that was previously performed for applications prior to Senate Bill 3 (S.B. 3).

The ED excepts to the following in the proposed Order:

Findings of Fact No. 124, 125, 126, 127, and 145.

Conclusions of Law No. 26.

2. ED's Position

The ED agrees with the ALJs' conclusion that BRA's application will not cause water quality impairment or adversely affect Dow's water right. However, the ED does not believe that these determinations were necessary because the ALJs find under their discussion of the Environmental Flow Standards adopted by the Commission for the Brazos River Basin that these rules replace the analysis that was previously performed for applications prior to S.B. 3. Such concerns are now addressed by the Commission's adoption of S.B. 3 environmental flow standards.

C. Public welfare

1. Exceptions

The ED excepts to the following in the proposed Order:

Findings of Fact No. 138, 140, 142, and 143.

Conclusions of Law No. 23, 26.

2. ED Position

While the ED does not completely agree with the discussion of public welfare in the PFD, he does agree with Conclusion of Law No. 18 that the application is not detrimental to the public welfare.

The ED is concerned, however, about Finding of Fact No. 138, which discusses the impact on rates in the public welfare analysis in the PFD and draft Order. In the PFD, the ALJs discuss the issues they see as within the Commission's jurisdiction and competence under the Texas Water Code and therefore relevant to public welfare. One of those issues is "adequate and reliable water supplies at a just and reasonable cost," under Texas Water Code §§ 11.036, 11.041, and 12.013. The ED does not believe that these statutes are relevant to a public welfare analysis of a new appropriation of water. Sections 11.036 and 11.041 are sections relating to water suppliers contracts to provide water, and a person's right to receive a contract from a water supplier to buy water. Section 12.013 concerns wholesale water rates which are now under the jurisdiction of the Public Utility Commission. These statutes have nothing to do with an application for a new appropriation of water. The ED is also concerned about reliance on the impact of water rates that were established under Chapter 13 of the Texas Water Code for a decision on public welfare regarding a water right application. These rates are now set by the Public Utility Commission. These water rates are not included in any statute regulating a new appropriation of water.

Additionally, the ED is concerned about Finding of Fact Nos. 140 and 143, regarding agreements that BRA has made with other parties relating to water quality, reservoir levels, and additional environmental studies on the public welfare discussion. These are requirements that go beyond what is required in the statutes and rules that govern the ED's review and the issuance of the permit.

In Conclusions of Law No. 23 and 26, the citations to §§ 11.046b); 11.134(b)(3)(D); 11.147(b), (d), (e), and (3-3); 11.150; and 30 Texas Administrative Code §§ 297.54(a), 307.4(g)(1) and (2), and 307.10(1) are all to statutes that don't apply to a new appropriation of water (§ 11.046) and to a rule and statutes that are no longer used to protect the environment in water rights permitting (§§ 297.54(a); 11.134(b)(3)(D); 11.147(b), (d), (e), and (3-3); 11.150), or rules that apply to water quality permit reviews (30 Texas Admin. Code Chapter 307). The ED does not believe that these statutes

should be the basis of a public welfare review.

D. Conforming Changes in WMP and Permit

1. Exceptions

The ED excepts to the following in the proposed Order:

Conclusions of Law No. 37.

Ordering provision Nos. 3 and 4.

2. ED Position

The Executive Director respectfully disagrees that changes to the WMP and to the permit are merely clerical and/or a matter of conformance.

As stated above under the Sedimentation Section, if the Commission decides to reduce the appropriation amounts by a certain percentage to reflect sedimentation, BRA must re-do all of its modeling and its accounting plan as included in its WMP.

Numerous tables will also have to be updated and reviewed by the TCEQ. Additionally, if the Commission agrees with ALJs' analysis of reuse which says that BRA must obtain its own groundwater-based or surface water-based return flows under § 11.042(b) and (c), then this draft permit must include a § 11.042 authorization to BRA for its own return flows. At a minimum this would require BRA to re-do all of its accounting, because its accounting is all done under § 11.046(c).

The ED will need to substantively review this modeling and accounting to ensure that he agrees that it is appropriate and does what is intended.

E. Rosharon Gage Streamflow Requirement

1. Exceptions

The ED excepts to the following in the proposed Order:

Finding of Fact No.176.e.

Ordering Provision Nos. 1.e, which contains the same language as Finding of Fact No. 176.e.

2. ED Position

The ALJs' recommend this streamflow restriction in their proposed Draft Permit at the Rosharon gage. PFD, pp. 267 – 268. BRA has agreed to this special condition. This condition would only apply if there is no watermaster in the lower Brazos River Basin. There are currently three watermaster programs established in the state which have been active for more than ten years. A watermaster program has been established in the Brazos River Basin and went into operation on June 1, 2015. If the watermaster office in the Brazos River Basin was vacated, and if the commission adds this provision to the draft permit, water availability for this application could be changed. Instream flow requirements act as a limit on water availability. ED Ex. R-4 p. 102. The S.B. 3 subsistence flow standard for USGS Gage 081166550 is 430 cfs. Tex. Admin. Code § 298.480(19) Figure 30. If a higher flow standard such as 630 cfs is applied, especially during drier times, availability of unappropriated run-of-river water for Permit 5851 could be reduced. Therefore, the ED requests that this finding be removed from the Order and any permit issued in this case.

F. BRA's Agreements Relating to Return Flows and Special Conditions Nos.A3 and A4 in ALJ's recommended permit

1. Exceptions

The ED excepts to the following in the proposed Order:

Findings of Fact Nos. 160, 161, and 162.

The ALJ's recommended draft permit, BRA Ex. 132B, includes Special Conditions A. 3 and 4:

3. Permittee's storage, diversion and use of that portion of the appropriation based on return flows is dependent upon potentially interruptible return flows. Permittee's storage, diversion and use of that portion of the appropriation based on return flows will be interrupted by direct reuse or will be terminated by indirect reuse within the discharging entity's corporate limits, extraterritorial jurisdiction, or contiguous water certificate of convenience and necessity boundary, provided the discharging entity has applied for and been granted authorization to reuse the return flows.

4. Permittee's storage, diversion and use of groundwater based return flows is subject to interruption by direct reuse or indirect reduce upon issuance of a bed and banks authorization pursuant to Texas Water Code § 11.042(b) by the Commission to the discharging entity.

2. ED Position

Concerning Special Condition No. 3, the ED recommends that the service area language be taken out because it is not necessary. The ED does not believe that BRA can receive groundwater-based return flows under its approach on reuse, which is under Section 11.046(c). Additionally, BRA cannot give the TCEQ authority to issue a reuse authorization to any entity, much less when those return flows have been issued to someone else as a new appropriation of water. BRA does not have that authority, and this would be double permitting.

On Special Condition No. 4, the ED reiterates that he cannot support putting a provision in a permit based on an agreement made by BRA to "interrupt" its use of the

water right and allow someone else to either take the water under its own water right, or obtain a bed and banks authorization for that water. Whether the commission agrees that BRA should be granted the return flows it requests in this application under Texas Water Code § 11.121 and 11.046(c), or under § 11.042, no one else can request those return flows. If another party requests a bed and banks authorization to reuse these flows, the ED will recommend denying the request because BRA has appropriated or been authorized to reuse those flows. The ED objects to the inclusion of this provision in the draft permit.

G. Rules: Directory v. Mandatory

The ED disagrees with the following in the PFD:

Although not included in the ALJs' proposed Order, the ALJs determine in the PFD on p. 22 - 28 that TCEQ's procedural rules for applications – 30 Texas Admin. Code §§ 295.5, 295.6, and 295.7 – are directory, not mandatory. These rules contain requirements relating to amount and purpose of diversion and use, rate and method of diversion, and location of diversion point, reservoir or dam, respectively. The ED does not believe that the Commission needs to base its decision on a determination that these rules are directory rather than mandatory because the BRA's application meets the requirements of these rules.

In the ALJs' proposed Order there is no finding or conclusion of law that these rules are directory, not mandatory, but there are findings that BRA's application complied with these rules. Findings of Fact Nos. 37 to 55 discuss BRA's compliance with these and other rules. Conclusion of Law No. 14 states that the application "complies with the applicable procedural rules in chapter 295 of Title 30 of the Texas Administrative Code." Other conclusions state that the application "sufficiently identifies" the diversion amount, the maximum diversion rate, and diversion points and reaches. The ED agrees with all of these findings and conclusions.

The ED is concerned about setting precedent. An implication that these rules are directory rather than mandatory could be misused in future applications. The PFD states that an applicant may not perfectly and completely provide all information identified in these rules, “but he provides enough of the information requested in those rules to enable the ED to confirm that the application satisfies all the substantive requirement of Texas Water Code § 11.134.” PFD, p. 25. This may be enough for most applications, but the ED believes that this is a broad statement and there could be applications that comply with the quoted language, but would still require more work from ED staff to determine whether or how the information satisfies the rule requirements.

G. Drought

1. Exceptions

The ED excepts to the following:

Finding of Fact No. 176.f.

Conclusion of Law No. 1.f.

2. ED Arguments

The ED supports a special condition in the permit relating to drought. However, the ED recommends that Finding of Fact No. 176.f and conclusion of Law No. 1f be amended as follows:

In recognition of current drought conditions, ~~BRA Permittee~~ shall perform a detailed evaluation of whether the recently-ended drought: (1) represents a drought worse than the drought of record of the 1950s in the Brazos River Basin; and (2) decreases the amount of water available for appropriation under this permit. ~~BRA Permittee~~ shall provide a report to the TCEQ Executive Director documenting its findings within nine months after issuance of this permit. If the report concludes that the recently-ended drought decreases the amount of water available for appropriation under this permit, then the amount of that reduction shall be determined and the appropriation amounts specified in Paragraph 1.A. of this permit shall be correspondingly reduced.

This change would make it clear that BRA’s Report may not include the amount

of any reduction in available water, and the BRA will have to determine that amount.

H. Typographical errors

1. Exceptions

The ED requests the following be corrected in the proposed Order:

Findings of Fact Nos. 188.

Conclusions of Law Nos. 12 and 24.

2. ED Position

The ED believes that Finding of Fact No. 188 should read “\$11,052.50” instead of “11,052” based upon the information in Finding of Fact No. 180.

The ED believes that the citation in Conclusion of Law No. 12 should be “§ 295.7” instead of “2956.7” and that the citation in Conclusion of Law No. 24 should be “11.147(e-1)” instead of “11.47(e-1)” because neither § 2956.7 nor § 11.47(e-1) exist.

V. Conclusion

In conclusion, regarding the Applicant’s permit, the ED recommends that the Commission adopt the ED’s proposed permit and remove references to BRA’s approach to reuse in the WMP.

In the alternative, the ED recommends the following:

If the Commission decides to agree with BRA’s approach to reuse, require that BRA do the accounting that is recommended by the ED. In addition, require the inclusion of the following provision in the Commission’s Order to recognize the unique nature of the application, clearly stating that this application not precedent for future reuse applications:

BRA’s application for a new appropriation is only possible because of

BRA's system of reservoirs and its detailed accounting and water management plans. The decision in this case on return flows is limited to BRA's application because of its unique facts and is not a precedent for how the ED would analyze reuse applications in other river basins in the future.

If the Commission decides to agree with the ALJs' approach to reuse and § 11.042(c), require that BRA obtain a § 11.042 authorization for its own return flows, using the ED's proposed accounting, and make corresponding changes in the WMP. In addition, include the following provision in the Commission's Order to recognize the unique nature of the application, clearly stating that this application not being precedent for future reuse applications:

BRA's application for a new appropriation is only possible because of BRA's system of reservoirs and its detailed accounting and water management plans. The decision in this case on return flows is limited to BRA's application because of its unique facts and is not a precedent for how the ED would analyze reuse applications in other river basins in the future.

WHEREFORE the Executive Director requests that the Commission adopt the ED's recommended Order, attached as Exhibit A, and recommended permit, attached as Exhibit B.

Respectfully submitted,

TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

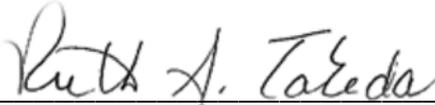
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CERTIFICATE OF SERVICE

I certify that on the 20th day of August 2015, a true and correct copy of the foregoing *Executive Director's Exceptions to Proposal for Decision and Proposed Order* was filed with the Chief Clerk of the Texas Commission on Environmental Quality in Austin, Texas and the State Office of Administrative Hearings in Austin, Texas; was sent via e-mail to the Office of Public Interest Counsel at the Texas Commission on Environmental Quality in Austin, Texas; and was delivered via e-mail and first-class mail to all other parties listed on the attached mailing list.



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EXHIBIT A

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



**AN ORDER GRANTING IN PART THE AMENDED APPLICATION BY
THE BRAZOS RIVER AUTHORITY FOR WATER USE
PERMIT NO. 5851 AND APPROVING ITS WATER
MANAGEMENT PLAN; TCEQ DOCKET NO. 2005-1490-WR;
SOAH DOCKET NO. 582-10-4184**

On _____, the Texas Commission on Environmental Quality (Commission or TCEQ) considered an amended application by the Brazos River Authority for Water use Permit No. 5851 and its incorporated Water Management Plan (WMP). A proposal for decision on remand (PFDR) was presented by William G. Newchurch and Hunter Burkhalter, Administrative Law Judges (ALJs) with the State Office of Administrative Hearings (SOAH), who conducted hearings concerning the original application, the amended application, and the WMP on May 9-20, and 31, and June 2, 2011, and February 17-20 and 23-26, 2015, in Austin, Texas.

After considering the ALJs' PFDR, the Commission adopts the following Findings of Fact and Conclusions of Law:

I. FINDINGS OF FACT

Procedural History

1. On June 25, 2004, the Brazos River Authority (BRA or the Applicant) filed an application (Application No. 5851) for an appropriative water right.
2. Application No. 5851 was declared administratively complete by Commission staff on October 15, 2004, and was filed with the Office of Chief Clerk.
3. Notice of the application was issued by mail to all water right holders in the Brazos River Basin on April 22, 2005. Notice was published in 27 newspapers on May 11 – 13, 2005.

4. A public meeting on Application No. 5851 was held on May 17, 2005, in Waco, Texas. On May 4, 2006, the Executive Director of TCEQ filed a written response to comments received at that meeting and written comments received after that meeting.
5. Numerous persons filed requests for a contested case hearing on the application. On May 5, 2010, the Commission issued an interim order granting hearing requests and referring this case to SOAH for a contested case hearing.
6. Notice of a preliminary hearing on the application before SOAH was issued by the Chief Clerk of the TCEQ on May 13, 2010.
7. The ALJs held the preliminary hearing on the application on June 7, 2010, in Austin, Texas. The ALJs issued Order No. 1 on June 8, 2010, memorializing the preliminary hearing, naming persons or entities admitted as a party to the proceeding, and setting a hearing schedule. In addition to the statutory parties, the following parties were named: Matthews Land and Cattle Company; Dow Chemical Company (Dow); Texas Westmoreland Coal Company; the City of Lubbock; Fort Bend County Levee Improvement District Nos. 11 and 15; Sienna Plantation Municipal Utility District (MUD) No. 1; the City of Bryan; the City of College Station; the Friends of the Brazos River; Helen Jane Vaughn; Lawrence Wilson; Mary Lee Lilly; the National Wildlife Federation (NWF); the Texas Parks and Wildlife Department (TPWD); the Gulf Coast Water Authority (GCWA); the City of Round Rock; Bradley B. Ware; Mike Bingham; and George Bingham, William D. and Mary L. Carroll, Frasier Clark, and Robert Starks, who collectively aligned themselves as the Comanche County Growers (CCG).
8. In accordance with settlement agreements, Fort Bend County Levee Improvement District Nos. 11 and 15, Sienna Plantation MUD No. 1, Texas Westmoreland Coal Company, and Matthews Land and Cattle Company withdrew their protests and were formally dismissed as parties.
9. In accordance with settlement agreements, the City of Lubbock, the City of Bryan, the City of College Station, GCWA, and the City of Round Rock withdrew their protests, but remained parties to the proceeding.
10. The ALJs held the evidentiary hearing on Application No. 5851 on May 9-20, and 31, and June 2, 2011, in Austin, Texas.
11. The record was closed on August 19, 2011, after the parties submitted written closing arguments and responses.
12. The ALJs issued a Proposal for Decision (PFD) on October 17, 2011; and the Commission considered Application No. 5851 and the PFD on January 25, 2012.
13. The Commission, after considering the PFD and Application No. 5851, issued an interim order dated January 30, 2012, that: (1) remanded Application No. 5851 to SOAH with instructions to abate the hearing to allow the Applicant to provide additional information

- to the Executive Director related to its permit application in the form of a WMP; (2) required the Applicant to submit its WMP to the Executive Director within 10 months of the date of the Commission's January 30, 2012 Interim Order; (3) provided the Executive Director with 7 months to review the WMP; (4) directed the ALJs to reopen the record upon completion of the Executive Director's review and compliance with additional application public participation requirements; (5) directed the ALJs to hold a hearing on the new information, including Application No. 5851 as modified by the WMP; and (6) directed the ALJs to issue a revised PFD and proposed order.
14. The Applicant prepared and filed its WMP on November 28, 2012, which was further revised on June 12, 2013. The Executive Director completed his review on June 28, 2013.
 15. On July 3, 2013, the Chief Clerk of the TCEQ mailed the combined revised notice of Application No. 5851, a public meeting, and the preliminary hearing to the persons and entities on the mailing list for Application No. 5851 and to those persons and entities required to be mailed notice under 30 Texas Administrative Code § 295.153.
 16. Between July 6 and July 12, 2013, the combined revised notice of Application No. 5851 was published in 35 newspapers of general circulation within the 81 counties that are within the Brazos River Basin.
 17. The Commission conducted a public meeting regarding Application No. 5851 at the Midway Independent School District Performing Arts Center in Hewitt, Texas, on July 25, 2013, to receive public comment.
 18. The ALJs convened a preliminary hearing on August 26, 2013, in Austin, Texas. The ALJs issued Order No. 18 on August 28, 2013, memorializing the preliminary hearing, naming additional persons or entities admitted as parties to the proceeding, and setting the hearing schedule for the second evidentiary hearing. In addition to the statutory parties, the following parties were named in this matter: Dow; the City of College Station; the City of Lubbock; the City of Bryan; Friends of the Brazos River, Helen Jane Vaughn, Lawrence Wilson, Mary Lee Lilly, Brazos River Alliance, Ken W. Hackett, and Joe Williams (collectively, FBR); NWF; TPWD; GCWA; Chisholm Trail Ventures, L.P.; George Bingham; Robert Starks; Frasier Clark; William D. and Mary Carroll; William and Gladys Gavranovic; Bradley B. Ware; NRG Texas Power, LLC (NRG); Friends of Lake Limestone and Mark Bissett; the City of Houston; Possum Kingdom Lake Association (PKLA); City of Round Rock; Mike Bingham; and the City of Granbury, Hood County, and Lake Granbury Waterfront Owners' Association (collectively, the Lake Granbury Coalition or LGC).
 19. On October 21, 2013, the ALJs abated the matter and certified questions to the Commission regarding the applicability to Application No. 5851 of the environmental flow rules for the Brazos River Basin that the Commission would later adopt on February 12, 2014.

20. After considering the certified questions on December 11, 2013, the Commission issued its December 17, 2013 Interim Order stating that Texas Water Code §11.147(e-3) required the environmental flow standards to be applied immediately to Application No. 5851 and remanding the case to SOAH.
21. On January 7, 2014, the ALJs issued a revised scheduling order (Order No. 22) that abated this matter until August 14, 2014, to allow the Applicant to revise its WMP and update its application to incorporate the environmental flow standards.
22. The Applicant submitted an updated WMP to the Executive Director on May 13, 2014, and the Executive Director completed his review of the application and updated WMP on August 18, 2014.
23. During the period leading up to the second evidentiary hearing, the following protesting parties withdrew their protests of Application No. 5851 and were granted the right to participate in this case only as non-aligned, interested parties: Chisholm Trail Ventures, L.P.; City of Houston; George Bingham; Robert Starks; Frasier Clark; William D. and Mary L. Carroll; PKLA; and NRG. Additionally, GCWA, Friends of Lake Limestone, Mark Bissett, and Joe Williams withdrew as parties.
24. The second evidentiary hearing on Application No. 5851 and its WMP was held on February 17 - 20 and 23 - 26, 2015 in Austin, Texas. William and Gladys Gavranovic, Bradley B. Ware, and Mike Bingham did not attend nor were they represented at the evidentiary hearing.

Background

25. The Applicant owns the water rights and reservoirs authorized by Certificate of Adjudication (Certificate) No. 12-5155 (Possum Kingdom Lake), Certificate No. 12-5156 (Lake Granbury), Certificate No. 12-5165 (Lake Limestone), and Water Use Permit No. 2925 (Allens Creek Reservoir, which the Applicant owns in conjunction with the Texas Water Development Board and the City of Houston).
26. The Applicant also owns the water rights and has contracts with the United States Army Corps of Engineers for storage authorized by Certificate No. 12-5157 (Lake Whitney), Certificate No. 12-5158 (Lake Aquilla), Certificate No. 12-5159 (Lake Proctor), Certificate No. 12-5160 (Lake Belton), Certificate No. 12-5161 (Lake Stillhouse Hollow), Certificate No. 12-5162 (Lake Georgetown), Certificate No. 12-5163 (Lake Granger), and Certificate No. 12-5164 (Lake Somerville).
27. The Applicant owns the water rights authorized by Certificate Nos. 12-5166 and 12-5167, which authorize various uses of water within the Applicant's other certificates and permits.
28. The Applicant is currently authorized, pursuant to the 1964 System Operation Order, as amended, to manage and operate its tributary reservoirs as elements of a system, coordinating releases and diversions from the tributary reservoirs with releases and

diversions from the Applicant's mainstem reservoirs to minimize waste, and to conserve water in reservoirs in which the supply is short by making releases from tributary reservoirs in which the supply is more abundant.

29. The TCEQ recently amended the Applicant's Excess Flows Permit (Certificate No. 12-5166) to include the diversion points for the proposed Allens Creek Reservoir.
30. The Applicant abandoned its Certificate No. 12-2939 that was associated with diversions for steam electric power generation downstream of Lake Belton.
31. TCEQ amended Permit No. 2925, the Allens Creek Reservoir water right, based on the statutory change in 2011 that modified the timeframe for construction of this new reservoir. The Allens Creek Reservoir must now be constructed by 2025.

Application No. 5851

32. The Applicant initially applied for new Water Use Permit No. 5851 (Permit No. 5851 or the System Operation Permit), with a priority date of October 15, 2004, to authorize a new appropriation of state water in the amount of 421,449 acre-feet per year (af/yr) in firm water and 670,000 af/yr in interruptible water for multiple uses, including domestic, municipal, agricultural, industrial, mining, recreation, and other beneficial uses on a firm basis in the Brazos River Basin.
33. The Applicant amended the application to include as a part of Permit No. 5851 the WMP and Technical Report and Appendices (collectively, the WMP), all of which would be incorporated into Permit No. 5851.
34. The amended and updated Application No. 5851 seeks:
 - a. A new appropriation of non-firm state water in the amount of 1,001,449 af/yr of water at the Gulf of Mexico for multiple uses, including domestic, municipal, agricultural, industrial, mining, recreation, and other beneficial uses in the Brazos River Basin. This appropriation request was clarified during the 2015 hearing on the merits to be limited to the amount of water available as shown in the WMP. This new appropriation of water can only be made available by the Applicant through the system operation of its water rights. To the extent water is diverted upstream, the amount of the water available under the new appropriation downstream is reduced and will itself vary depending upon the location of its diversion and use;
 - b. Diversion of the water authorized by this permit from: (1) the existing diversion points authorized by the Applicant's existing water rights (including contractually authorized diversion points); (2) the Brazos River at the Gulf of Mexico; and (3) at such other diversion points that are identified and included in Applicant's WMP;

- c. An exempt interbasin transfer authorization to transfer and use, on a firm and non-firm basis, such water in the adjoining San Jacinto-Brazos Coastal Basin and the Brazos-Colorado Coastal Basin, and to transfer such water to any county or municipality or the municipality's retail service area that is partially within the Brazos River Basin for use, on a firm and non-firm basis, in that part of the county or municipality and the municipality's retail service area not within the Brazos River Basin;
 - d. An appropriation of return flows (treated sewage effluent and brine bypass/return) to the extent that such return flows continue to be discharged or returned into the bed and banks of the Brazos River, its tributaries, and Applicant's reservoirs. The appropriation of return flows would be subject to interruption by direct reuse or termination by indirect reuse within the discharging entity's city limits, extraterritorial jurisdiction, or contiguous water certificate of convenience and necessity boundary;
 - e. Operational flexibility to: (1) use any source of water available to the Applicant to satisfy the diversion requirements of senior water rights to the same extent that those water rights would have been satisfied by passing inflows through Applicant's reservoirs on a priority basis; and (2) release, pump and transport water from any of Applicant's reservoirs for subsequent storage, diversion and use throughout Applicant's service area;
 - f. Use of the bed and banks of the Brazos River, its tributaries and the Applicant's reservoirs for the conveyance, storage, and subsequent diversion of: (1) the appropriated water; (2) waters that are being conveyed via pipelines and subsequently discharged into the Brazos River or its tributaries or stored in the Applicant's reservoirs; (3) surface water imported from areas located outside the Brazos River Basin for subsequent use; (4) in-basin surface water and groundwater subject to Applicant's control; (5) waters developed from future Applicant projects; and (6) reuse of surface and groundwater-based return flows appropriated in this permit; and
 - g. A term permit, pursuant to Texas Water Code § 11.1381, for a term of 30 years from the issued date of the permit, or until the ports are closed on the dam impounding Allens Creek Reservoir, whichever is earlier, to allow the Applicant to use the water appropriated under Water Use Permit No. 2925, as amended, until the construction of the Allens Creek Reservoir. The Applicant requested a term authorization to impound, divert, and use not to exceed 202,000 af/yr of water per year at the Gulf of Mexico.
35. The Applicant's amended application with the WMP:
- a. Includes TCEQ's adopted environmental flow standards;

- b. Includes an updated BRA accounting plan for BRA reservoirs, stream reaches of the Brazos River and its tributaries where water will be delivered and/or water authorized under Permit No. 5851 will be diverted, application of the adopted environmental flow standards, and other reference and summary information;
 - c. Specifies diversion points for the new appropriation as follows: (1) the diversion points authorized in BRA's existing water rights (including contractually authorized diversion points); (2) the Brazos River's outlet at the Gulf of Mexico; and (3) specified diversion points and reaches identified in BRA's WMP and associated technical documents, including accounting plans. Diversion rates at these diversion points are set out in BRA's WMP and associated technical documents, including accounting plans; and
 - d. Removes the request in Application No. 5851 for recognition that Permit No. 5851 prevail over inconsistent provisions in BRA's existing water rights regarding system operation.
36. During the evidentiary hearing on remand, the Applicant clarified that it was seeking an appropriation of water as shown by the appropriation runs for the various use scenarios in the WMP. Thus, the Applicant, with its amended application, seeks to appropriate a maximum amount of 516,955 af/yr of water as a result of system operations. This appropriation will be subject to and limited by Permit No. 5851 and the WMP. The amount of this new appropriation of water includes the current return flows requested in this application.

Texas Water Code §§ 11.124, 11.125, 11.128, and 11.135 Requirements

37. Permit No. 5851 contains the required provisions outlined in Texas Water Code § 11.135, with the exception of the time within which to construct water works. The Applicant does not propose to construct any new water works to exercise Permit No. 5851. The Applicant, instead, plans to rely on existing facilities and improved operations of those facilities. Because the Applicant plans no new construction, location and description information, commencement and completion dates for the construction, and the time required for the application of the water to the proposed use are not necessary.
38. The application is in writing and sworn, contains the name and address of the Applicant, and identifies the source of supply.
39. No one holds a lien on the Applicant's water rights.
40. The Applicant has paid the fees required by Texas Water Code § 11.128.
41. The Applicant in its application, as amended to include the WMP, provided maps that show existing reservoirs and diversion points, stream reaches for the bed and banks authorization, the diversion reaches, and locations where BRA intends to use the water. The Applicant also provided data identifying discharges for return flows.

Diversion Amount, Diversion Rate,s and Diversion Points

42. Permit No. 5851 states maximum annual water diversion limits that are equal to the annual use by the demand level scenario that is effective at the time of the diversion.
43. The four demand levels are: (1) Current Contracts (Level A); (2) Current Contracts with Comanche Peak Nuclear Power Plant (CPNPP) Expansion (Level B); (3) Current Contracts with Allens Creek Reservoir (Level C); and (4) Current Contracts with Allens Creek Reservoir and CPNPP Expansion (Level D). Current contracts include demands shown to be satisfied by the System Operation Permit in the Region G and Region H Water Plans. The demand levels represent four different possible scenarios that could happen in the future based on the State and Regional Water Plans and other information available to BRA. For each of the demand levels, the permit identifies the total maximum amount of water that BRA can use throughout the basin depending on the applicable demand level, and a total maximum amount of water that BRA can divert in each reach, depending on the applicable demand level.
44. BRA's use of water within a reach will be limited in two ways: (1) BRA will be limited to the total maximum amount of water available under the applicable demand scenario identified in the permit; and (2) BRA's water use within a reach will be limited to 1,460 af/yr or the maximum amount of water identified in Tables G.3.2 through G.3.25 of the WMP, whichever is more, for that reach and the applicable demand level.
45. The amount of water BRA is authorized to use is stated in definitive terms.
46. The WMP prescribes the maximum diversion rate limits by reach for run-of-the-river diversions under the System Operation Permit. The sum of all diversions under Permit 5851 within each reach cannot exceed that maximum diversion rate.
47. Setting the maximum diversion rate by a defined reach is consistent with TCEQ practice.
48. No additional diversion rates are proposed for diversions from reservoirs because the authorized diversion rates in BRA's current reservoir water rights will govern diversions that are lakeside.
49. Permit No. 5851, through its WMP, specifies diversion points and diversion reaches which are: (1) diversion points authorized by BRA's existing water rights, including those that have been added contractually on stream channels downstream of BRA reservoirs; (2) locations where future demands are identified in the 2011 Regional Water Plans (Regions G and H) as using supplies from the System Operation Permit; and (3) the Richmond to Gulf of Mexico reach where BRA anticipates additional supplies from the System Operation Permit would be used.
50. The WMP evaluates the impacts resulting from the use of the System Operation Permit appropriation at those actual and proposed diversion points and diversion reaches. There are 40 defined diversion reaches described in the WMP. Demands within these reaches were modeled as part of the WMP, and include the following:

- a. Demands at diversion points authorized by BRA's existing water rights, including current contractually authorized diversion points on stream channels downstream of BRA reservoirs;
 - b. Demands in reaches in which the 2011 Regional Water Plans (Region G and Region H) list the System Operation Permit as a recommended source of supply to meet demands; and
 - c. Demands in the reach from Richmond to the Gulf of Mexico.
51. Identifying a diversion reach is an accepted practice of TCEQ.
 52. Modeling diversions by reach where specific diversion points are anticipated is not problematic from a modeling perspective and the modeling for the application shows how much water can be developed under the System Operation Permit without affecting senior water rights.
 53. The System Operation Permit authorizes storage of System Operation Permit water. Therefore, BRA may use 30 Texas Administrative Code § 297.102(b) to add diversion points in the future and those new diversion points will be specifically identified and provided to the TCEQ before diversions can occur at the new location.
 54. To the extent that new diversion points are added in the future based on new contracts, the new diversions of System Operation Permit water must be within the amount authorized for the reach in which the customer's diversion is located and the customer's diversion rate must not cause BRA to exceed the applicable maximum aggregate diversion rate in Table 4.6 of the WMP.
 55. Permit No. 5851 and the WMP use actual and planned diversion points to determine water available for appropriation.

Water Availability, Drought of Record, Impairment of Existing Rights

56. ~~BRA's~~ The ED did not oppose the preferred permit ~~is offered in~~ BRA Exhibit No. 132BA, which proposes to reduce the amount of water BRA is authorized to use to ~~516,955~~ 512,473 af/yr.
57. For Permit No. 5851, there are three sources of ~~unappropriated~~ water: unappropriated riverine flows; return flows of treated wastewater; and water available for appropriation from BRA's existing reservoirs.
58. The Brazos River has a large uncontrolled drainage area downstream from BRA's reservoirs. The flows in this uncontrolled drainage area vary greatly. During times of high flow, there is water in the area that cannot be used by existing water rights and that is not needed to meet environmental flow requirements, but these flows are not reliable.

59. Through the use of its storage, BRA can make this unappropriated water and reuse of return flows into a reliable supply by using stream flows not being used by senior water rights when that water is available, and providing water from storage when there are little or no stream flows available for use.
60. In determining water availability, the permitted capacity of a reservoir is used when considering a new appropriation from the same reservoir.
61. The Applicant's WMP examined alternative water availability scenarios because the amount of water available depends, in part, upon the location of uses of water, as well as the development of authorized but not yet constructed projects. These scenarios are referred to as Demand Levels A, B, C, and D.
62. Demand Level A is a current conditions approach. It models all BRA's existing customers and all demands shown by the 2011 Regional Water Plans (Regions G and H) to be supplied by the System Operation Permit with the remainder of the water available for appropriation being taken in the reach below Richmond. As modeled by the Applicant, Demand Level A shows ~~381,474~~366,350 af/yr as the maximum possible use.
63. Demand Level B anticipates expansion of the CPNPP, a major demand located relatively high in the basin. The location of this demand results in an overall reduction in water availability as compared to Demand Level A. As modeled by the Applicant, the maximum possible use under Demand Level B is ~~344,625~~321,669 af/yr.
64. Demand Level C anticipates construction of the Allens Creek Reservoir without the CPNPP expansion. As modeled by the Applicant, this results in the largest possible use of unappropriated water: ~~516,955~~512,473af/yr.
65. Demand Level D anticipates both expansion of the CPNPP and construction of the Allens Creek Reservoir. As modeled by the Applicant, it produces a maximum year's use of unappropriated water of ~~482,035~~456,645 af/yr.
66. Permit No. 5851 authorizes the Applicant's diversion and use of water according to the Demand Level facts that exist at any given time in the future.
67. The water availability quantities in the WMP firm appropriation scenarios are those required to generate a firm water supply and do not include water for interruptible or non-firm water sales. Any amount of additional water appropriated for that purpose would be a new appropriation at a junior priority.
68. The WMP uses authorized reservoir storage capacity for its appropriation models, but actual or projected capacity for its operational models.

~~69. In calculating the appropriation amounts for the permit for the four Demand Levels, the WMP failed to properly account for the fact that BRA's reservoirs have lost capacity due to sedimentation.~~

~~70. When the losses of reservoir capacities are properly taken into account, the maximum annual diversion amounts under the Demand Levels, and the correct appropriation amounts for the permit, are:~~

- ~~• Demand Level A 328,068 af/yr;~~
- ~~• Demand Level B 296,378 af/yr;~~
- ~~• Demand Level C 443,853 af/yr; and~~
- ~~• Demand Level D 413,035 af/yr.~~

~~71.69.~~ The permit should authorize the Applicant to appropriate a diversion amount depending on the applicable demand scenario.

~~72.70.~~ The Applicant is not required in modeling the availability of water for Permit No. 5851 to fully utilize all of its existing storage rights every year before run-of-the-river water under the System Operation Permit can be used.

~~73.71.~~ WMP modeling resulted in complete utilization of the Applicant's existing rights without the necessity of making releases. Requiring the Applicant to fully utilize its existing rights before using run-of-the-river water is not required and would frustrate the purpose and goal of system operation.

~~74.72.~~ The Applicant's existing water rights permits do not require that storage under the System Order be at a junior priority. Instead they allow storage at the existing priority but the water so stored is subject to release for downstream needs at TCEQ's direction.

~~75.73.~~ The Water Availability Model (WAM) used by TCEQ operates in such a fashion that water storage capacity emptied at the junior priority is refilled at the junior priority.

~~76.74.~~ The Brazos River Basin has experienced serious drought conditions since mid-2008, particularly the upper portion of the basin above Possum Kingdom Lake Reservoir.

~~77.75.~~ The recent drought ended on May 26, 2015.

~~78.76.~~ It is possible that the recent drought reduced the amount of water available for appropriation below the amounts shown in the WMP. It is likely that it was a worse drought than the drought of record for the watershed above Possum Kingdom Reservoir.

~~79.77.~~ It is unknown whether the Brazos River Basin as a whole is suffered a worse drought than the 1950s drought of record.

~~80.78.~~ Determining the ultimate impact of this drought on water availability under Permit No. 5851 will require a major effort to evaluate the current impact of the drought, and halting permit processing to undertake this analysis is not justified.

~~81.79.~~ No purpose would be served by either delaying permit processing until complete evaluation of the recent drought or abating it until new hydrologic models could be developed to include the drought hydrology.

~~82.80.~~ In order to properly account for the recent drought, the following condition should be included in Permit No. 5851:

In recognition of current drought conditions, ~~BRA~~Permittee shall perform a detailed evaluation of whether the recently-ended drought: (1) represents a drought worse than the drought of record of the 1950s in the Brazos River Basin; and (2) decreases the amount of water available for appropriation under this permit. ~~BRA~~Permittee shall provide a report to the TCEQ documenting its findings within nine months after issuance of this permit. If the report concludes that the recently-ended drought decreases the amount of water available for appropriation under this permit, then the amount of that reduction shall be determined and appropriation amounts specified in Paragraph 1.A of this permit shall be correspondingly reduced.

~~83.81.~~ Under TCEQ's water availability rule (30 Texas Administrative Code § 297.42), no specific degree of reliability is required for water appropriated by Permit No. 5851 because it is one of the recognized exceptions of subsection (d). Instead, the required availability of unappropriated water for these special type projects is determined on a case-by-case basis based upon whether the proposed project can be viable for the intended purposes and the water will be beneficially used without waste.

~~84.82.~~ TCEQ's consideration of subsequent amendments to the WMP (including the certain changes to the accounting plan) will be treated as an amendment to the permit, and depending on the type of amendment, may be subject to TCEQ's notice and contested case hearing requirements as well as all other requirements applicable to a major water right amendment.

~~85.83.~~ To protect existing water rights, the WAM uses a "dual simulation" modeling technique that prevents any existing BRA water right from using more water at its original priority date than it would have without the System Operation Permit.

~~86.84.~~ There are multiple protections for existing water rights in the System Operation Permit, including the accounting plan and the other provisions of the WMP. The environmental flow conditions in Permit No. 5851 will prohibit diversions at times of low flow, leaving water that can be used by existing downstream water rights that are not subject to the same environmental flow requirements.

| ~~87.85.~~ The Applicant's ability to make water available through system operation, while protecting senior rights and environmental flows, will be improved by giving the Applicant operational flexibility to: (1) use any source of water available to the Applicant to satisfy the diversion requirements of senior water rights to the same extent that those water rights would have been satisfied by passing inflows through the Applicant's reservoirs on a priority basis; and (2) release, pump and transport water from any of the Applicant's reservoirs for subsequent storage, diversion and use throughout the Applicant's service area.

| ~~88.86.~~ Environmental flow conditions would apply to any impoundment of inflows at a reservoir under Permit No. 5851 even when BRA is exercising this operational flexibility.

| ~~89.87.~~ Vested riparian rights will be fully protected by the environmental flow requirements in the System Operation Permit.

| ~~90.88.~~ There will be no adverse effect on existing water rights by the System Operation Permit.

| ~~91.89.~~ The water requested by BRA is available for appropriation.

Beneficial Use

| ~~92.90.~~ The System Operation Permit would authorize for diversion of water for domestic uses, municipal uses, agricultural and industrial uses, mining, and recreation, which are all recognized beneficial uses.

| ~~93.91.~~ Of the 705,000 af/yr of water rights currently owned by BRA, 99% of this available water is under contract already.

| ~~94.92.~~ There is demand for additional water supplies in the Brazos River Basin. BRA has pending requests for additional long-term water supply. The approved 2011 Regional Water Plans for Regions G and H forecast that substantial additional water supplies will be needed between now and 2060. The increase in demand for water in both regions is primarily due to population growth. There are projected shortages for irrigation and manufacturing uses. Water users in Fort Bend County must convert a large portion of their current water use from groundwater to surface water.

| ~~95.93.~~ The adopted 2012 State Water Plan, based on the 2011 Regional Water Plans for Regions G and H, recommends a total amount of 110,249 af/yr of water to be supplied from the System Operation Permit to meet projected demands for a combination of municipal, industrial steam-electric, manufacturing, and mining uses in the Regions G and H planning areas.

| ~~96.94.~~ BRA has been approached by a number of current and prospective customers that have requested additional long-term water supply from the System Operation Permit. To date, BRA has received requests from 28 entities for over 300,000 af/yr of water.

| ~~97.95.~~ There is an immediate need for additional water supplies in a large portion of the Brazos River Basin and BRA intends to beneficially use the newly appropriated water by contracting with its existing and future customers who have a need for these additional supplies.

Environmental Flows

| ~~98.96.~~ The environmental flow conditions that are applicable to the System Operation Permit are set out in Tables 4.3A–4.3L of the WMP. These tables describe the minimum flows that must exist at each identified measurement point during specified hydrologic conditions within a season before diversions under the System Operation Permit may occur. The measurement points in the WMP coincide exactly with the applicable measurement points for the Brazos River Basin in the TCEQ rules. 30 Texas Administrative Code §§ 298.480(a)(6)-(8), (10)-(11), (13)-(19).

| ~~99.97.~~ Table 4.4 of the WMP describes which measurement point is applicable to each river reach. The environmental flow conditions applicable to a diversion are determined based upon the reach in which the diversion is located.

| ~~100.98.~~ Of the 40 river and lake reaches identified in the WMP, nine use an upstream measurement point to govern all or part of the diversions in the reach. Four of these reaches are associated with reservoirs: Possum Kingdom Lake, Dennis gage to Lake Granbury dam, Glen Rose gage to Lake Whitney dam, and Leon River at Gatesville to Lake Belton dam. For two of the reaches, the applicable measurement point is in the middle of the reach: Aquilla Creek/Brazos River confluences to Highbank gage, and Richmond gage to the Gulf of Mexico. There are three reaches where all diversions in the reach will look to an upstream measurement point: Palo Pinto gage to Dennis gage; Cameron gage to Brazos River and Little River confluence; and Easterly gage to the Brazos River and Navasota River confluence.

| ~~101.99.~~ Storage at BRA system reservoirs under Permit No. 5851 will be governed by the measurement point immediately downstream of each respective dam. Except for Possum Kingdom Lake, Lake Whitney, Lake Granbury, and Lake Belton, lakeside diversions will be governed by the next downstream measurement point. Lakeside diversions under the System Operation permit occurring within Possum Kingdom Lake, Lake Whitney, Lake Granbury, and Lake Belton will be according to the applicable measurement point that lies upstream of each respective lake. For diversions above Lake Granbury, Lake Whitney, and Lake Belton, the applicable measurement point is upstream of each lake.

| ~~102.100.~~ To divert System Operation Permit water, whether the reach is upstream or downstream of the applicable measurement point, the flow passing the measurement point gage must not be lower than the environmental flow requirement. For diversions upstream of the applicable measurement point, the daily maximum allowable run-of-the-river diversion under the System Operation Permit will be limited such that the daily flow at the measurement point gage is not reduced below the applicable environmental flow standard. For diversions located downstream of a measurement point, the environmental flow requirement will be calculated by adding the aggregate downstream System

Operation Permit diversion rate to the applicable environmental flow standard at the applicable measurement point gage.

~~103.101.~~ For each season and each hydrologic condition at the measurement point, there is a corresponding environmental flow condition which must be met before diversions under the System Operation permit may occur.

~~104.102.~~ Each measurement point is located in a defined geographic area which is used to determine the hydrologic condition. The WMP identifies three geographic areas, which coincide with the TCEQ's rules and are delineated by major existing reservoirs along the main stem of the Brazos River.

~~105.103.~~ The WMP determines the hydrological condition using the Palmer Hydrological Drought Index (PHDI), as required by TCEQ.

~~106.104.~~ Because the climate zones used by the National Climatic Data Center (NCDC) to calculate the PHDI each month are not exactly coincident with the WMP geographic areas, an area-weighted composite PHDI is calculated by adding together the NCDC's PHDI for each climate zone that has first been multiplied by the fraction of the area intersecting the geographic area.

~~107.105.~~ The composite PHDI is then compared to the values described in Table 4.12 of the WMP Technical Report to determine whether the hydrologic condition is dry, average, or wet. 30 Texas Administrative Code § 298.470(c).

~~108.106.~~ Because the NCDC does not report the preceding month's PHDI on the first day of the succeeding month, the Applicant will operate under an interim hydrologic condition between the first day of the season and the day the final hydrologic condition is determined. To determine the interim hydrologic condition, the interim PHDI values provided by the NCDC will be used.

~~109.107.~~ It is reasonable to use the interim PHDI values to determine an interim hydrologic condition because it is likely the hydrologic condition will not change once the NCDC's PHDI values are finalized. If there is any non-achievement of environmental flow conditions as a result of using the interim PHDI and hydrologic condition in the first few weeks of a season, BRA will report those non-achievements in an annual Environmental Flow Achievement Report to the TCEQ.

~~110.108.~~ For each measurement point a certain number of high flow pulses are required per season depending on the hydrologic condition. 30 Texas Administrative Code § 298.480.

~~111.109.~~ A high flow pulse begins after the flow at the measurement point becomes higher than the applicable pulse trigger flow and the pulse ends when either the applicable volume condition or duration condition is achieved.

~~112.110.~~ Consistent with the TCEQ rules, the WMP prohibits the Applicant from diverting or storing water under the System Operation Permit if such storage or diversion would prevent meeting a seasonal schedule or individual high flow pulse at the applicable measurement point, unless the seasonal schedule has already been met.

~~113.111.~~ Storage and diversion under the System Operation Permit are authorized during high flow pulse events if: (1) the stream flow is not reduced below the pulse trigger flow; or (2) the number of pulse events exceeds the frequency criteria. Storage and diversion under the System Operation Permit may also continue during a pulse as long as the storage amount or diversion amount is lower than the applicable diversion rate trigger level.

~~114.112.~~ The diversion rate trigger levels in the WMP were developed in accordance with TCEQ rules and are defined as 20% of the pulse trigger flow. 30 Texas Administrative Code § 298.485(b).

~~115.113.~~ As part of the development of the WMP, the Applicant evaluated how high flow pulses relate between adjacent selected measurement points. The evaluation illustrated the complex temporal relationship between pulses occurring at adjacent upstream and downstream measurement points because of travel time between measurement points, existing structural and operational influences, and pulse magnitude relative to diversion rates. Because of these factors, operations and accounting under the WMP will manage storage and diversion within a reach according to the measurement point applicable to that reach.

~~116.114.~~ The use of one measurement point and the use of upstream measurement points are permitted by TCEQ's rules and are justified considering the distance between measurement points, travel time, channel losses, attenuation, magnitude of pulses relative to base flow conditions, intervening inflows at large confluences, intervening structures, and different hydrologic conditions in different geographic areas.

~~117.115.~~ The WMP allows BRA to temporarily store pulse events. If impounded flows under the System Operation Permit would prevent the achievement of a qualifying pulse event at the applicable measurement point and should be released, BRA will coordinate with the United States Army Corps of Engineers (USACE) (if the reservoir's dam is operated by the USACE), and releases of the pulses will conform to existing BRA and USACE water control plans. BRA will coordinate its operational release pattern with downstream flow patterns to increase chances that an intended pulse achievement will occur at a downstream measurement point and to ensure the release conforms to any water control plan.

~~118.116.~~ Temporary storage of pulse events is a practical reality. A pulse event coming into a reservoir will be captured inside the reservoir. Temporary storage of a pulse is necessary to determine: (1) if storage is occurring under the System Operation Permit; and (2) whether applicable environmental flow conditions are being met.

~~119.~~117. While the WMP does not specify a period of time in which a qualifying pulse must be released (if one is required to be released), the pulse requirements will need to be satisfied in accordance with the environmental flow conditions if BRA intends to use the water under the System Operation Permit. BRA's best chance of meeting the environmental flow conditions will be to make the release consistent with other hydrological events that are occurring at the same time.

~~120.~~118. The environmental flow portion of the WMP Accounting Plan tracks what happens with respect to the environmental flow requirements, includes calculations that classify high flow pulses according to flow, duration and volume, and tracks releases of high flow pulses that are temporarily stored.

~~121.~~119. BRA will generate and submit to the TCEQ an Environmental Flow Achievement Report once per year. The report will summarize storage and diversions under the System Operation Permit occurring during the previous year with respect to the environmental flow conditions at each measurement point. If the report indicates that the WMP environmental flow conditions were not achieved due to storage or diversion under the System Operation Permit, BRA will include in the report an action plan that describes how BRA will prevent further non-achievement from occurring during System Operation Permit storage and diversion.

~~122.~~120. The environmental flow conditions for Permit No. 5851 include the exact measurement points, seasons, and hydrologic conditions as those found in the TCEQ rules. The flow values at each measurement point are the flow values adopted by TCEQ.

~~123.~~121. The environmental flow conditions for the System Operation Permit are subject to adjustment by the Commission pursuant to Texas Water Code §§ 11.147(e-1).

~~124. Even though a separate analysis under Texas Water Code §§ 11.150, 11.151, and 11.152 is no longer required with the adoption of the Senate Bill 3 environmental flow standards for the Brazos River Basin, BRA has nevertheless assessed the effects of Permit No. 5851 on fish and wildlife habitat, water quality, bays and estuaries, and groundwater.~~

~~125. With respect to the assessment of the effects of BRA's application on fish and wildlife habitat, the environmental flow conditions in the permit, which are consistent with TCEQ's adopted environmental flow conditions in the permit, which are consistent with TCEQ's adopted environmental flow standards, will be protective of instream uses. The System Operation Permit uses already permitted reservoirs. This limits the effect of construction of new reservoirs on fish and wildlife habitat. The System Operation Permit will use run-of-river flows during times when these flows are available instead of using BRA's existing water rights. This strategy will allow BRA to save water in storage under its existing water rights for delivery downstream when river flows are not high enough to meet environmental flow conditions and allow for diversions under the System Operation Permit. This strategy will benefit instream uses by providing more times of higher stream flows closer to the environmental flow conditions than would have otherwise occurred without the System Operation Permit. BRA has adopted and implemented~~

~~reservoir operating guidelines to manage the frequency and magnitude of reservoir level fluctuations to avoid or minimize impacts on reservoir fisheries, including fish and wildlife habitat.~~

~~126. With respect to water quality, recent studies on the Brazos, Little, and Navasota rivers relating to water quality conditions (temperature and dissolved oxygen) evaluated flow levels lower than or consistent with the System Operation Permit's environmental flow conditions. These studies showed achievement of temperature and dissolved oxygen goals at those flow conditions that are comparable to the System Operation Permit's environmental flow conditions.~~

~~127. BRA has agreed in its amended Memorandum of Understanding with TPWD to limit operations under the System Operation Permit so that its operations do not reduce flows to less than the lowest average flow for seven consecutive days in a two year period (7Q2) at seven locations, which are in addition to the applicable measurement points, and BRA will collect routine water quality monitoring data at or near eight locations.~~

~~128.~~122. The bay and estuary system for the Brazos River is limited. The Brazos River estuary is a river-dominated estuary that has no directly associated barrier island embayment. In recognition of these facts, the Senate Bill 3 environmental flow standards provide sufficient inflows to support a sound ecological environment at the mouth of the Brazos River. Because the Brazos River has no natural bay and limited connection to associated existing bays and the Brazos River estuary is dominated by river flows, the System Operation Permit is not anticipated to have an adverse impact on any bay or estuary.

~~129.~~123. The System Operation Permit will not affect groundwater resources or impair existing uses of groundwater, groundwater quality, or spring flow in the Brazos River Basin.

Public Welfare, Public Interest, Instream Uses

~~130.~~124. The approved 2011 Regional Water Plans for Regions G and Region H forecast that substantial additional water supplies will be needed between now and 2060.

~~131.~~125. The 2011 Region G Regional Water Plan anticipates that Permit No. 5851 will supply 86,429 af/yr of water by 2060 to meet municipal and steam-electric generation demands.

~~132.~~126. Region H projects that between 2010 and 2060 the water supply needs region-wide will grow from 2,376,414 af/yr to 3,524,666 af/yr. The 2011 Region H Regional Water Plan anticipates that Permit No. 5851 will supply a total of 25,347 af/yr to meet municipal, manufacturing, mining, and other demands in the region between 2010 and 2060.

~~133.~~127. The System Operation Permit water supply strategy has been adopted as a recommended water supply strategy in the 2012 State Water Plan, which recommends that 110,249 af/yr of water be supplied for various uses from the System Operation Permit.

~~134.~~128. BRA has continued to receive requests for long-term water supply and to date has received requests 28 entities for over 300,000 af/yr of water.

~~135.~~129. The water made available from Permit No. 5851 will address anticipated water shortages that are identified in the current adopted State and Regional Water Plans. Without the System Operation Permit, the Brazos River Basin will be faced with water supply shortages.

~~136.~~130. As compared to alternative water supply strategies, such as new reservoir construction, identified in the 2011 Region G and Region H water plans, the unit cost of the System Operation Permit water is substantially less.

~~137.~~131. Permit No. 5851 water is readily available and does not require significant land acquisitions, permitting, and construction.

~~138. The low cost of the water coupled with its availability in the near term will help the Applicant stabilize its water rates.~~

~~139.~~132. The environmental impacts of the System Operation Permit are far less than the environmental impacts that might be associated with an alternative new water supply project, such as the construction of a new reservoir.

~~140. BRA is committed to providing water out of the System Operation Permit to the Texas Water Trust and executed an amendment to its Memorandum of Understanding with TPWD reaffirming this commitment. BRA has also committed to limiting operations under the System Operation Permit so that such operations do not reduce flows to less than 7Q2 flow values at seven identified locations within the Brazos River Basin, and will be conducting additional environmental studies at eight locations in the Brazos River Basin for the benefit of the basin and bay area stakeholder committee.~~

~~141.~~133. BRA has agreed to maintain environmental flows that were required by BRA's Federal Energy Regulatory Commission (FERC) license for its now-decommissioned hydroelectric facilities at Possum Kingdom Lake. Those conditions are incorporated into Permit No. 5851 as Special Condition 5.C.5.

~~142.~~134. With the environmental flow conditions included in the System Operation Permit, the permit operations will not affect existing maintain adequate flows for a wide variety of recreational uses below Possum Kingdom Lake in the John Graves Scenic Riverway.

~~143. BRA, along with TPDWD, has developed operating guidelines to manage the frequency and magnitude of reservoir level fluctuations to avoid and minimize impacts on reservoir~~

~~fisheries and has incorporated those guidelines into the WMP. These guidelines will provide direction to TPWD fisheries managers on how BRA can be anticipated to manage the reservoirs and allow TPWD to minimize or mitigate impacts to fisheries, or adjust its management and stocking strategies.~~

~~144.135.~~ BRA has developed general guidelines for daily reservoir operations. Release decisions are made to provide for beneficial use of water downstream while at the same time considering local water supply needs around the reservoirs, environmental needs, and recreational uses.

~~145.~~ ~~Operations under the System Operation Permit as set out in the WMP will not cause chloride or total dissolved solid concentrations in the Brazos River Basin to exceed TCEQ's water quality standards.~~

~~146.136.~~ The System Operation Permit complies with and implements the TCEQ's adopted environmental flow standards.

~~147.137.~~ The System Operation Permit will allow BRA to provide water for a wide variety of beneficial uses including municipal, industrial, and agricultural uses.

~~148.138.~~ BRA has adopted and implemented water conservation and drought contingency plans and these plans are consistent with the requirements of Chapter 288, Title 30 of the Texas Administrative Code.

~~149.139.~~ The System Operation Permit is a water conservation strategy that reduces the waste of water and improves the efficient use of water through coordinating reservoir operations with unappropriated stream flows, increases BRA's recycling and reuse of water for the benefit of its customers, and makes additional water available for future and alternative uses.

~~150.140.~~ The System Operation Permit will not be detrimental to the public welfare, and in fact provides significant public welfare benefits.

Consistency with Water Plans

~~151.141.~~ The System Operation Permit is a recommended water management strategy in the approved 2011 Regional Water Plans for the Region G and Region H planning regions and is a recommended strategy in the most recently adopted state water plan, *2012 Water for Texas*, and is therefore consistent with those plans.

Conservation and Drought Planning

~~152.142.~~ BRA has adopted water conservation and drought contingency plans. TCEQ has approved these plans and determined they are consistent with the requirements in Chapter 288, Title 30 of the Texas Administrative Code.

~~153.~~143. BRA requires compliance with its adopted water conservation plan and drought contingency plan. BRA's water supply contracts require customers to implement a water conservation plan and meter water usage. The customers must operate and maintain facilities in a manner that will prevent unnecessary waste of water.

~~154.~~144. The System Operation Permit itself reduces the waste of water, improves the efficiency in water use by coordinating reservoir operations with unappropriated stream flows, increases the recycling and reuse of water, makes more water available from the facilities that are already in place, and requires the implementation of water conservation plans to help reduce or maintain the consumption of water, prevent or reduce waste of water, maintain or improve the efficient use of water, and prevent the pollution of water.

~~155.~~145. BRA will use reasonable diligence to avoid waste and achieve water conservation.

~~156.~~146. BRA presented evidence that supports the proposed use of the water with consideration of the water conservation goals in its plan and demonstrates that BRA evaluated water conservation as an alternative, but found it was insufficient to produce the amount of water needed or required significant financial resources to develop. The System Operation Permit itself is a form of water conservation.

~~157.~~147. The System Operation Permit also includes an additional provision requiring BRA to submit updated water conservation and drought contingency plans in connection with future applications for reconsideration or amendment of its WMP.

Return Flows

~~158. Return flows, once returned to a state watercourse, are unappropriated flows available for appropriation.~~

~~159.~~148. ~~The System Operation Permit No. 5851 and the WMP authorize BRA to appropriate-reuse current return flows from all sources once they are discharged into a watercourse under Texas Water Code § 11.042(b) and (c).~~ This is consistent with state law and with prior Commission practice; therefore, it is reasonable. Through the WMP Accounting Plan, BRA will account for the total discharges of return flows by source, availability, and diversion locations as these return flows are discharged and adjust its water availability computation if total discharges decrease by 5% or more.

~~160. Permit No. 5851 has a special condition that states that BRA's storage, diversion, and use of the portion of the appropriation based on return flows will be interrupted by direct reuse or will be terminated by indirect reuse within the discharging entity's corporate limits, extraterritorial jurisdiction, or contiguous water certificate of convenience and necessity.~~

~~161. Another special condition in the permit expressly makes BRA's authorization to use groundwater based return flows subject to the discharger's ability to obtain an authorization under § 11.042(e).~~

~~162. As a result of an agreement with the Cities of Bryan and College Station, a provision addressing groundwater-based return flows, without any service area limitation, is included in Permit No. 5851, which will allow for future indirect reuse by dischargers of such water.~~

~~163. Accounting for individual discharges and diversions of return flows is not necessary for the protection of senior water rights.~~

Bed and Banks Authorization

~~164.~~149. Permit No. 5851 authorizes the use of the bed and banks of the Brazos River and its tributaries subject to identification of specific losses and various special conditions. BRA, through its WMP accounting procedures, will estimate daily deliveries of water that considers losses and travel time.

~~165.~~150. The water to be transferred in the bed and banks of the Brazos River and its tributaries originates in the basin and will have water quality consistent with the natural water quality of the Brazos River. There should not be any effect on water quality in the Brazos River Basin as a result of the bed and banks authorization.

Interbasin Transfer

~~166.~~151. BRA requests authorization for exempt interbasin transfers of water to any county or municipality that is partially in the Brazos River Basin for use in that part of the county or municipality within the Guadalupe, Lavaca, Trinity, Red, Colorado, or San Jacinto river basins, and for use in San Jacinto-Brazos Coastal Basin and the Brazos-Colorado Coastal Basin.

~~167.~~152. BRA has demonstrated that its Application No. 5851, as amended to include the WMP, complies with all requirements for exempt interbasin transfer authorization.

Allens Creek Reservoir and Term Permit Authorization

~~168.~~153. Allens Creek Reservoir (Water Use Permit No. 2925) is a yet-to-be-constructed off-channel reservoir that may be filled primarily with diversions from the Brazos River. The Allens Creek Reservoir permit limits annual diversions from the Brazos River to 202,000 af/yr. Diversions from the Brazos River to Allens Creek Reservoir in excess of 202,000 af/yr are authorized by BRA's Certificate No. 12-5166.

~~169.~~154. For the period before the construction of Allens Creek Reservoir, BRA is seeking a term permit to use up to 202,000 af/yr of water for a period of 30 years or until the ports are closed on the dam impounding Allens Creek Reservoir, whichever is earlier. The Allens Creek Reservoir permit is not yet perfected and the use of the water under the term permit will not jeopardize the financial commitments to develop the reservoir and will

not prevent BRA or the City of Houston from beneficially using the Allens Creek Reservoir during the term permit authorization.

| ~~170.155.~~ Until construction of the Allens Creek Reservoir is completed, it is reasonable and consistent with Commission practice to authorize the use of the water appropriated under the Allens Creek Reservoir permit on a term basis.

| ~~171.156.~~ BRA's Application No. 5851 requests that all of its system reservoirs, including the Allens Creek Reservoir, be allowed to store additional water at the System Operation Permit priority date if storage capacity and unappropriated water are available.

| ~~172.157.~~ BRA has entered into an agreement with the City of Houston that allows BRA to use Houston's share of the storage capacity in the Allens Creek Reservoir for System Operation Permit water.

| ~~173.158.~~ BRA obtained an amendment to its Excess Flows Permit (Certificate No. 12-5166) to include the diversion points for the proposed Allens Creek Reservoir. The amendment to the Excess Flows Permit allows BRA to divert water from the Brazos River into the reservoir thereby increasing the supply of water that could be made available from the Allens Creek Reservoir.

| ~~174.159.~~ The inclusion of Allens Creek Reservoir in the System Operation Permit after the reservoir is constructed and the recognition of existing authority to divert from the Brazos River to Allens Creek Reservoir in excess of 202,000 af/yr is reasonable.

Texas Coastal Management Program

| ~~175.160.~~ BRA's operation under Permit No. 5851, as approved by this order, should not have significant adverse impacts on coastal natural resources and is consistent with the goals and policies of the Texas Coastal Management Program.

Proposed Permit Conditions

| ~~176.161.~~ Water use Permit No. 5851 should be issued in the form attached with the following changes:

- a. An unnumbered, bulleted paragraph on page 3 should be amended to read as follows:

A term permit, pursuant to Texas Water Code § 11.1381, for a term of thirty (30) years from the issued date of this permit, or until the ports are closed on the dam impounding Allens Creek Reservoir, whichever is earlier, to allow the Applicant to use the water appropriated under Water Use Permit No. 2925, as amended, until construction of the Allens Creek Reservoir. The Applicant requested a term authorization to impound, divert, and use not to exceed ~~202,650~~ 202,000 acre-feet of water per year at the Gulf of Mexico; and

- b. Paragraph 1.A should be amended to read as follows:

Permittee is authorized to divert and use, ~~not to exceed 516,955 acre-feet of water per year~~ for domestic, municipal, agricultural, industrial, mining and recreation use, water in the applicable amount shown below, as further described, and defined, and limited by in the Water Management Plan (WMP), within its service area, subject to special conditions:

- 1) not to exceed ~~328,068366,350~~ acre-feet per year at all times prior to: (1) an expansion of the Comanche Peak Nuclear Power Plant (CPNPP) in a manner that results in the plant needing at least 90,000 acre-feet per year of additional water; and (2) the point when the ports are closed on the dam impounding Allens Creek Reservoir;
- 2) not to exceed ~~296,378321,669~~ acre-feet per year at all times when: (1) CPNPP has been expanded in a manner that results in the plant needing at least 90,000 acre-feet per year of additional water; but (2) the ports on the dam impounding Allens Creek Reservoir have not yet been closed;
- 3) not to exceed ~~443,853-512,4723~~ acre-feet per year at all times when: (1) CPNPP has not yet been expanded in a manner that results in the plant needing at least 90,000 acre-feet per year of additional water; but (2) the ports have been closed on the dam impounding Allens Creek Reservoir;
or
- 4) not to exceed ~~413,035456,645~~ acre-feet per year at all times after: (1) CPNPP has been expanded in a manner that results in the plant needing at least 90,000 acre-feet per year of additional water; and (2) the ports on the dam impounding Allens Creek Reservoir have been closed.

- c. Paragraph 1.E should be amended to read as follows:

Pursuant to Texas Water Code § 11.1381, for a term of thirty (30) years from the issued date of this permit, or until the ports are closed on the dam impounding Allens Creek Reservoir, whichever is earlier, Permittee may use the water appropriated under Water Use Permit No. 2925, as amended. As part of the amount appropriated in Paragraph 1.A., during the term of this authorization Permittee may divert and use not to exceed ~~202,650~~ 202,000 acre-feet of water per year, subject to Special Conditions 5.C.1-~~57~~.

- d. Paragraph 5.C.3 should be amended to read as follows:

Permittee may use any source of water available to Permittee to satisfy the diversion requirements of senior water rights to the same extent that those water rights would have been satisfied by passing inflows through the Permittee's

system reservoirs on a priority basis. Permittee's use of water previously stored in Permittee's reservoirs or available for appropriation by Permittee's senior water rights shall be documented in the accounting/delivery plan. Use of this option shall not cause Permittee to be out of compliance with the accounting/delivery plan, or Special Condition 5.C.2, or prevent the achievement of environmental flow requirements that would have otherwise been achieved.

~~e. A new Special Condition 5.C.6 should be added to read as follows:~~

~~Permittee shall not divert or impound water pursuant to the authorizations in the permit if such diversions or impoundments would cause the flow at USGS Gage 081166550 (Brazos River near Rosharon) to all below the lesser of 630 cfs, or Dow Chemical Company's projected daily pumping rate. This provision is not effective if: (a) Dow Chemical Company has not provided its projected daily pumping rate to Permittee; or (b) a watermaster having jurisdiction over the lower Brazos River has been appointed and continues to function.~~

~~f.e. A new Special Condition 5.C.76 should be added to read as follows:~~

~~In recognition of current drought conditions, BRA- Permittee shall perform a detailed evaluation of whether the recently-ended drought: (1) represents a drought worse than the drought of record of the 1950s in the Brazos River Basin; and (2) decreases the amount of water available for appropriation under this permit. BRA- Permittee shall provide a report to the TCEQ-Executive Director documenting its findings within nine months after issuance of this permit. If the report concludes that the recently-ended drought decreases the amount of water available for appropriation under this permit, then the appropriation amounts specified in Paragraph 1.A. of this permit shall be correspondingly reduced.~~

~~177.162.~~ BRA should be directed to revise its WMP, which was admitted as BRA Exhibit 113 and includes the WMP Technical Report, all appendices, and other attachments, and is approved and incorporated as a part of the permit, with the following changes:

a. A new paragraph should be added at the bottom of page 9 of the WMP to read as follows:

The maximum annual use for each reach is limited to the largest maximum annual diversion under "SysOp" for that reach in Tables G.3.14 through G.3.25 of Appendix G-3 of the WMP Technical Report for the firm appropriation demand scenario that is applicable during the year in which water is diverted, or 1,460 acre-feet, whichever is greater.

b. A paragraph on page 41 should be amended to read as follows:

The maximum allowable System Operation Permit diversion amount with a reach applies to the aggregate of all diversions in the reach. An allowable System

Operation Permit diversion, whether upstream or downstream of the reach's applicable measurement point, will not reduce flow below the environmental flow standards at a point immediately below BRA's point of diversion and additionally will not exceed provisions set forth in Section IV.D.4.b below.

~~c. The last paragraph on page 5-7 and continuing on page 5-8 of the WMP Technical Report should be amended as follows:~~

~~[Initial portion of paragraph unchanged] The BRA approach version of the Accounting Plan includes reported monthly return flows for dischargers that have a permitted discharge greater than or equal to 1 million gallons per day (MGD). Within one month after this data is available from TCEQ for the prior calendar year, the total annual amount of return flows. These monthly amounts will be compared to the assumed amount used during the time period of this initial WMP. If actual return flows are substantially less than the amounts used in the modeling the assumptions used in the model will be adjusted and the model re-run to examine the impacts on yield less than the amount used in modeling by 5% or greater, BRA will revise the models and submit results to TCEQ.~~

~~178.163.~~ All other changes proposed by the parties to Permit No. 5851 and the WMP are unreasonable or unnecessary.

Transcript Costs

~~179.164.~~ BRA paid the full cost of the transcript fee for the first hearing and does not now seek to have that cost allocated among the parties.

~~180.165.~~ Reporting and transcription of the remanded second hearing on the merits was warranted because the hearing lasted eight days. The total cost of the transcript for the second hearing was \$11,052.50, which has been paid by BRA subject to allocation among the parties by the Commission.

~~181.166.~~ Several parties did not participate in the second hearing: the Cities of Lubbock, Round Rock, Bryan, and College Station, Mike Bingham, William and Gladys Gavranovic, and Bradley B. Ware. The following parties had no or limited participation at the second hearing because of their status as non-aligned, interested parties: Chisholm Trail Ventures, L.P., City of Houston, George Bingham, Robert Starks, Frasier Clark, William D. and Mary L. Carroll, PKLA, and NRG. TPWD's participation was limited to certain issues.

~~182.167.~~ Neither the Executive Director of the TCEQ nor the Office of Public Interest Counsel may be assessed transcription costs because they cannot appeal a TCEQ order.

~~183.168.~~ BRA, Dow, NWF, LGC, and FBR fully and actively participated in the second hearing. These parties benefit equally with BRA from the availability of a hearing

transcript, both in terms of preparation of written argument and exceptions, and possible appeal.

~~184.169.~~ BRA, Dow, NWF, LGC, and FBR each had multiple attorneys participating in the hearing, and each had one or more retained expert witness.

~~185.170.~~ BRA, Dow, LGC, and FBR, which retained multiple attorneys and expert witnesses to participate in the hearing, have sufficient resources to pay a share of the costs of the transcript.

~~186.171.~~ NWF is a non-profit entity.

~~187.172.~~ The second hearing was only necessary because BRA's application as considered during the first hearing was deficient, and the Commission gave BRA an opportunity to extensively amend it and have it reconsidered in the second hearing.

~~188.173.~~ BRA should pay the entire cost of the second-hearing transcript, \$11,052, 50, and no portion of that cost should be allocated to any other party.

II. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over permits to use state water and to issue Permit No. 5851 under Texas Water Code §§ 5.013, 11.121, 11.134, and 11.1381.
2. SOAH has jurisdiction over all matters relating to the conduct of a hearing in this proceeding, including the preparation of a PFD and findings of fact and conclusions of law, under Texas Government Code Ch. 2001 and 2003.
3. BRA published notice and the Commission mailed notice to navigation districts and water rights holders in the Brazos River Basin as required by Texas Water Code § 11.132 and 30 Texas Administrative Code Ch. 295.
4. BRA has complied with Texas Water Code §§ 11.124(a)(5)-(7), concerning facilities, and Texas Water Code § 11.125, concerning maps, to the extent they are applicable when no new facilities are proposed.
5. Notice of the Application, the opportunity for a hearing, and the hearing were provided as required by Texas Water Code §§ 11.128 and 11.132, and Texas Government Code §§ 2001.051 and 2001.052.
6. The Commission has jurisdiction to consider the application without amendments for settlements and notice was not required to address the settlements that are not part of the current application.

7. BRA's choice to proceed with a new permit application rather than a permit amendment application does not conflict with the Commission's traditional interpretation of the laws it administers, deny any affected party a right to notice or hearing, or avoid the application of environmental flow requirements to BRA's existing water rights.
8. The Commission's jurisdiction and broad authority over the appropriation of state water allows it to grant Permit No. 5851 and require the submittal and approval of a water management plan to be included as part of Permit No. 5851.
9. Application No. 5851 is administratively complete, includes all of the required information, was accompanied by all required fees, and was properly noticed, and therefore complies with Texas Water Code § 11.134(b)(1), and 30 Texas Administrative Code Ch. 295.
10. Application No. 5851 sufficiently identifies the total amount of water to be used in definitive terms in accordance with 30 Texas Administrative Code § 295.5.
11. Application No. 5851 sufficiently identifies the maximum diversion rate in accordance with 30 Texas Administrative Code § 295.6.
12. Application No. 5851 sufficiently identifies diversion points and reaches and complies with 30 Texas Administrative Code § 295.7.
13. New diversion points may be added in the future in accordance with 30 Texas Administrative Code § 297.102(b).
14. Application No. 5851 complies with the applicable procedural rules in Chapter 295 of Title 30 of the Texas Administrative Code.
15. Water is available for appropriation by Permit No. 5851 in the amounts indicated in this order, in accordance with the applicable Demand Level in effect at the time of diversions. Texas Water Code § 11.134(b)(2).
- ~~16. Return flows, once discharged into a state water course, are subject to appropriation by others. Texas Water Code § 11.046(e).~~
- ~~17. There is no conflict between Texas Water Code § 11.042 and § 11.046(e). Section 11.042(e) does not operate to reserve return flows for the discharger or water rights holder. Therefore, current return flows by third parties, subject to the limitations in Permit No. 5851, are appropriated to BRA.~~
- ~~18. The appropriation of return flows by BRA is a new appropriation subject to the environmental flow requirements for the Brazos River Basin in 30 Texas Administrative Code Chapter 298.~~

- ~~19.16.~~ BRA has demonstrated that the proposed appropriation is intended for a beneficial use. Texas Water Code § 11.134(b)(3)(A).
- ~~20.17.~~ Permit No. 5851 will not impair existing water rights or vested riparian water rights. Texas Water Code § 11.134(b)(3)(B); 30 Texas Administrative Code § 297.45.
- ~~21.18.~~ Permit No. 5851 will not be detrimental to the public welfare. Texas Water Code § 11.134(b)(3)(C).
- ~~22.19.~~ Texas Water Code 11.134(b)(3)(D) requires the TCEQ to consider applicable environmental flow standards under Texas Water Code § 11.1471. This provision is further clarified by Texas Water Code § 11.147(e-3). The environmental flow standards adopted by TCEQ in Chapter 298, Title 30 of the Texas Administrative Code are the standards that must be applied to any new water rights application.
- ~~23.20.~~ A water right permit that complies with the environmental flow standards of Chapter 298, Title 30 of the Texas Administrative Code will maintain water quality and instream uses, including recreation and habitat for fish and aquatic wildlife, and provide necessary beneficial flows to bays and estuaries while considering all public interests and fully satisfying the requirements of Texas Water Code ~~§§ 11.0235(b) and (c); 11.046(b); 11.134(b)(3)(D); 11.147(b), (d), (e), and (e-3); 11.150; and 11.152; and 30 Texas Administrative Code § 297.54(a).~~
- ~~24.21.~~ Environmental flow restrictions may only be applied to a new appropriation of water or to the increase in the amount of water to be stored, taken, or diverted that is authorized by an amendment to an existing permit. Texas Water Code § 11.47(e-1). Therefore, the environmental flow requirements in the System Operation Permit may not be applied to BRA's existing water rights.
- ~~25.22.~~ The environmental flow conditions in Permit No. 5851 implement and are consistent with the environmental flow standards adopted for the Brazos River Basin. 30 Texas Administrative Code Ch. 298, Subchapters A and G.
- ~~26.~~ ~~Permit No. 5851, as approved by this order, will maintain water quality and instream uses, including recreation and habitat for fish and aquatic wildlife, and provide necessary beneficial flows to bays and estuaries while considering all public interests and fully satisfying the requirements of Texas Water Code §§ 11.0235(b) and (c); 11.046(b); 11.134(b)(3)(D); 11.147(b), (d), (e), and (e-3); 11.150; 11.151; and 11.152; and 30 Texas Administrative Code §§ 297.54(a), 307.4(g)(1) and (2), and 307.10(1), and Chapter 298.~~
- ~~27.23.~~ The environmental flow limits in Permit No. 5851, as approved by this order, are subject to adjustment by the Commission.
- ~~28.24.~~ All of the regional planning areas within the Brazos River Basin have an approved regional water plan. Tex. Water Code § 11.134(c).

~~29.25.~~ Application No. 5851 and Permit No. 5851 are consistent with the adopted State Water Plan, and applicable regional water plans. § 11.134(b)(3)(E).

~~30.26.~~ BRA will use reasonable diligence to avoid waste and achieve water conservation. Tex. Water Code § 11.134(b)(4).

~~31.27.~~ BRA has an approved water conservation plan and drought contingency plan, and conservation measures and alternatives were evaluated in considering Application No. 5851. Tex. Water Code § 11.1271(a), (c); 30 Tex. Admin. Code §§ 288.4, 288.5, 288.7, 288.20, 288.22, 297.50.

~~32.28.~~ Application No. 5851's request for a bed and banks authorization and an exempt interbasin transfer authorization comply with the TCEQ rules. Tex. Water Code §§ 11.1042 and 11.085(v).

~~33.29.~~ The term permit to use water appropriated under Water Use Permit No. 2925 (Allens Creek Reservoir) prior to reservoir construction complies with Texas Water Code § 11.1381.

~~34.30.~~ The Commission has reviewed this action for consistency with the goals and policies of the Texas Coastal Management Program (CMP) in accordance with the regulations of the Coastal Coordination Council and has determined that the action is consistent with the applicable CMP goals and policies. 30 Tex. Admin. Code Ch. 281.

~~35.31.~~ BRA should be assessed the entire cost of the transcript of the First and Second Hearings in this case. 30 Tex. Admin. Code § 80.23.

~~36.32.~~ BRA has demonstrated that Application No. 5851 satisfies each applicable statutory and regulatory requirement for appropriation of water.

~~37.33.~~ The evidence admitted in this case shows that Application No. 5851 should be granted in part and Permit No. 5851 should be issued, ~~as that permit is proposed by BRA Exhibit No. 132B and that permit and its WMP are amended as provided in this order.~~ The changes BRA is ordered to make to conform the WMP to the Commission's order are clerical and do not affect the finality of the order so long as the ED approach to return flow is used.

NOW, THEREFORE, BE IT ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY THAT:

1. Application No. 5851 is granted in part and Water Use Permit No. 5851 is issued to the Brazos River Authority in the form attached with the following changes:

a. An unnumbered, bulleted paragraph on page 3 is amended to read as follows:

A term permit, pursuant to Texas Water Code § 11.1381, for a term of thirty (30) years from the issued date of this permit, or until the ports are closed on the dam

impounding Allens Creek Reservoir, whichever is earlier, to allow the Applicant to use the water appropriated under Water Use Permit No. 2925, as amended, until construction of the Allens Creek Reservoir. The Applicant requested a term authorization to impound, divert, and use not to exceed ~~202,650~~ 202,000 acre-feet of water per year at the Gulf of Mexico; and

b. Paragraph 1.A is amended to read as follows:

Permittee is authorized to divert and use, ~~not to exceed 516,955 acre-feet of water per year~~ for domestic, municipal, agricultural, industrial, mining and recreation use, water in the applicable amount shown below, as further described, and defined, and limited by in the Water Management Plan (WMP), within its service area, subject to special conditions:

- 1) not to exceed ~~328,068~~366,350 acre-feet per year at all times prior to: (1) an expansion of the Comanche Peak Nuclear Power Plant (CPNPP) in a manner that results in the plant needing at least 90,000 acre-feet per year of additional water; and (2) the point when the ports are closed on the dam impounding Allens Creek Reservoir;
- 2) not to exceed ~~296,378~~321,669 acre-feet per year at all times when: (1) CPNPP has been expanded in a manner that results in the plant needing at least 90,000 acre-feet per year of additional water; but (2) the ports on the dam impounding Allens Creek Reservoir have not yet been closed;
- 3) not to exceed ~~443,853~~512,473 acre-feet per year at all times when: (1) CPNPP has not yet been expanded in a manner that results in the plant needing at least 90,000 acre-feet per year of additional water; but (2) the ports have been closed on the dam impounding Allens Creek Reservoir; or
- 4) not to exceed ~~413,035~~ 456,645 acre-feet per year at all times after: (1) CPNPP has been expanded in a manner that results in the plant needing at least 90,000 acre-feet per year of additional water; and (2) the ports on the dam impounding Allens Creek Reservoir have been closed.

c. Paragraph 1.E is amended to read as follows:

Pursuant to Texas Water Code § 11.1381, for a term of thirty (30) years from the issued date of this permit, or until the ports are closed on the dam impounding Allens Creek Reservoir, whichever is earlier, Permittee may use the water appropriated under Water Use Permit No. 2925, as amended. As part of the amount appropriated in Paragraph 1.A., during the term of this authorization Permittee may divert and use not to exceed ~~202,650~~ 202,000 acre-feet of water per year, subject to Special Conditions 5.C.1-57.

- d. Paragraph 5.C.3 is amended to read as follows:

Permittee may use any source of water available to Permittee to satisfy the diversion requirements of senior water rights to the same extent that those water rights would have been satisfied by passing inflows through the Permittee's system reservoirs on a priority basis. Permittee's use of water previously stored in Permittee's reservoirs or available for appropriation by Permittee's senior water rights shall be documented in the accounting/delivery plan. Use of this option shall not cause Permittee to be out of compliance with the accounting/delivery plan, or Special Condition 5.C.2, or prevent the achievement of environmental flow requirements that would have otherwise been achieved.

- ~~e.—A new Special Condition 5.C.6 is added to read as follows:~~

~~Permittee shall not divert or impound water pursuant to the authorizations in the permit if such diversions or impoundments would cause the flow at USGS Gage 081166550 (Brazos River near Rosharon) to all below the lesser of 630 cfs, or Dow Chemical Company's projected daily pumping rate. This provision is not effective if: (a) Dow Chemical Company has not provided its projected daily pumping rate to Permittee; or (b) a watermaster having jurisdiction over the lower Brazos River has been appointed and continues to function.~~

- ~~f.e.~~ A new Special Condition 5.C.76 is added to read as follows:

In recognition of current drought conditions, BRA shall perform a detailed evaluation of whether the recently-ended drought: (1) represents a drought worse than the drought of record of the 1950s in the Brazos River Basin; and (2) decreases the amount of water available for appropriation under this permit. BRA shall provide a report to the TCEQ documenting its findings within nine months after issuance of this permit. If the report concludes that the recently-ended drought decreases the amount of water available for appropriation under this permit, then the appropriation amounts specified in Paragraph 1.A. of this permit shall be correspondingly reduced.

2. Brazos River Authority's WMP, which was admitted as BRA Exhibit 133 and includes the WMP Technical Report, all appendices, and other attachments, is approved and incorporated as a part of the permit, with the following changes:

- a. A new paragraph is added at the bottom of page 9 of the WMP to read as follows:

The maximum annual use for each reach is limited to the largest maximum annual diversion under "SysOp" for that reach in Tables G.3.14 through G.3.25 of Appendix G-3 of the WMP Technical Report for the firm appropriation demand scenario that is applicable during the year in which water is diverted, or 1,460 acre-feet, whichever is greater.

- b. A paragraph on page 41 is amended to read as follows:

The maximum allowable System Operation Permit diversion amount with a reach applies to the aggregate of all diversions in the reach. An allowable System Operation Permit diversion, whether upstream or downstream of the reach's applicable measurement point, will not reduce flow below the environmental flow standards at a point immediately below BRA's point of diversion and additionally will not exceed provisions set forth in Section IV.D.4.b below.

- c. The last paragraph on page 5-7 and continuing on page 5-8 of the WMP Technical Report is amended as follows:

[Initial portion of paragraph unchanged] The BRA approach version of the Accounting Plan includes reported monthly return flows for dischargers that have a permitted discharge greater than or equal to 1 million gallons per day (MGD). Within one month after this data is available from TCEQ for the prior calendar year, the total annual amount of return flows ~~These monthly amounts~~ will be compared to the assumed amount used during the time period of this initial WMP. If actual return flows are ~~substantially less than the amounts used in the modeling the assumptions used in the model will be adjusted and the model re-run to examine the impacts on yield~~ less than the amount used in modeling by 5% or greater, BRA will revise the models and submit results to TCEQ.

3. The Executive Director shall make any necessary changes in Permit No. 5851 to conform to this order.
4. The Brazos River Authority shall make changes to the WMP to conform with this order and submit them to the Executive Director for approval as to form.
5. Brazos River Authority shall pay the full cost of the transcript for the hearing.
6. The effective date of this Order is the date the Order is final.
7. All other motions, requests for entry of specific Findings of Fact or Conclusions of Law, and any other requests for general or specific relief not specifically granted herein, are hereby denied for want of merit.
8. If any provision, sentence, clause, or phrase of this Order is for any reason held to be invalid, the invalidity of any portion shall not affect the validity of the remaining portions of the Order.
9. The Chief Clerk of the Texas Commission on Environmental Quality shall forward a copy of this Order to the parties.

Issue Date:

**TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY**

**Bryan W. Shaw, Ph.D., P.E., Chairman
For the Commission**

EXHIBIT B

**ED Draft Permit
Post WMP (August 20, 2015)**

WATER USE PERMIT

PERMIT NO. 5851	TYPE §§ 11.121, 11.042, 11.085, & 11.1381
Permittee: Brazos River Authority	Address: P.O. Box 7555 Waco, Texas 76714-7555
Filed: October 15, 2004	Granted:
Purposes: Domestic, Municipal, Agricultural, Industrial, Mining, and Recreation	Counties: Parmer, Castro, Swisher, Bailey, Lamb, Hale, Floyd, Cochran, Hockley, Archer, Lubbock, Crosby, Baylor, Dickens, King, Knox, Jack, Terry, Lynn, Mitchell, Chambers, Young, Garza, Throckmorton, Kent, Haskell, Stonewall, Parker, Palo Pinto, Dawson, Scurry, Borden, Fisher, Stephens, Jones, Shackelford, Johnson, Hood, Nolan, Erath, Eastland, Taylor, Callahan, Somervell, Hill, Comanche, Bosque, Brown, Freestone, Hamilton, McLennan, Limestone, Mills, Coryell, Leon, Falls, Lampasas, Robertson, Bell, Madison, Milam, Burnet, Brazos, Grimes, Williamson, Burleson, Travis, Lee, Washington, Bastrop, Fayette, Waller, Harris, Austin, Colorado, Fort Bend, Galveston, Matagorda, Wharton, and Brazoria
Watercourses: Multiple Tributaries of the Brazos River and the Brazos River	Watersheds: Brazos River Basin, Trinity River Basin, Red River Basin, Colorado River Basin, San Jacinto River Basin, San Jacinto-Brazos Coastal Basin, Brazos-Colorado Coastal Basin, Lavaca River Basin, Guadalupe River Basin

WHEREAS, the Brazos River Authority, Applicant, owns the water rights and reservoirs authorized by Certificate of Adjudication (Certificate) No. 12-5155 (Possum Kingdom Lake), Certificate No. 12-5156 (Lake Granbury), Certificate No. 12-5165 (Lake Limestone), and Water Use Permit No. 2925, as amended, (Allens Creek Reservoir in conjunction with the Texas Water Development Board and the City of Houston); and

WHEREAS, Applicant also owns the water rights and has contracts with the United States Army Corps of Engineers for storage authorized by Certificate No. 12-5157 (Lake Whitney), Certificate No. 12-5158 (Lake Aquilla), Certificate No. 12-5159 (Lake Proctor), Certificate No. 12-5160 (Lake Belton), Certificate No. 12-5161 (Lake Stillhouse Hollow), Certificate No. 12-5162 (Lake Georgetown), Certificate No. 12-5163 (Lake Granger), and Certificate No. 12-5164 (Lake Somerville); and

WHEREAS, Applicant also owns the water rights authorized by Certificate Nos. 12-5166, as amended, and 12-5167, which authorize various uses of water within Applicant's other certificates and permits; and

WHEREAS, Applicant is authorized, pursuant to the 1964 System Operation Order (System Order), as amended, to manage and operate its tributary reservoirs as elements of a system, coordinating releases and diversions from the tributary reservoirs with releases and diversions from Applicant's mainstem reservoirs to minimize waste, and to conserve water in reservoirs in which the supply is short by making releases from tributary reservoirs in which the supply is more abundant; and

WHEREAS, Applicant's service area includes all or part of the following counties: Parmer, Castro, Swisher, Bailey, Lamb, Hale, Floyd, Cochran, Hockley, Archer, Lubbock, Crosby, Baylor, Dickens, King, Knox, Jack, Terry, Lynn, Mitchell, Chambers, Young, Garza, Throckmorton, Kent, Haskell, Stonewall, Parker, Palo Pinto, Dawson, Scurry, Borden, Fisher, Stephens, Jones, Shackelford, Johnson, Hood, Nolan, Erath, Eastland, Taylor, Callahan, Somervell, Hill, Comanche, Bosque, Brown, Freestone, Hamilton, McLennan, Limestone, Mills, Coryell, Leon, Falls, Lampasas, Robertson, Bell, Madison, Milam, Burnet, Brazos, Grimes, Williamson, Bureson, Travis, Lee, Washington, Bastrop, Fayette, Waller, Harris, Austin, Colorado, Fort Bend, Galveston, Matagorda, Wharton, and Brazoria; and

WHEREAS, Applicant initially applied for a new appropriation of state water in the amount of 421,449 acre-feet per year for multiple uses, including domestic, municipal, agricultural, industrial, mining, and other beneficial uses on a firm basis in the Brazos River Basin. The amount of the new appropriation of water included the current and future return flows requested in Applicant's application. Applicant also requested an appropriation of an interruptible supply of 670,000 acre-feet of water per year utilizing 90,000 acre-feet of water per year of the firm supply plus other unappropriated flows. The entire annual amount of 1,001,449 acre-feet of water (331,449 acre-feet of firm water and 670,000 acre-feet of interruptible water) is available only if all of it is diverted at the mouth of the Brazos River, and can only be made available by Applicant through the system operation of its water rights; and

WHEREAS, Applicant amended its initial application with the filing of its Water Management Plan and applied for this Water Use Permit to authorize:

- A new appropriation of non-firm state water in the amount of 1,001,449 acre-feet of water per year for multiple uses, including domestic, municipal, agricultural, industrial, mining, and other beneficial uses in the Brazos River Basin. This new appropriation of water can only be made available by Applicant through the system operation of its water rights, with the maximum amount of the water being available

at the mouth of the Brazos River. To the extent water is diverted upstream, the amount of the water available under the new appropriation downstream is reduced and will itself vary depending upon the location of its diversion and use;

- Diversion of the water authorized by this permit from: (i) the existing diversion points authorized by Applicant's existing water rights; (ii) the Brazos River at the Gulf of Mexico; and (iii) at such other diversion points that are identified and included in Applicant's Water Management Plan (WMP);
- An exempt interbasin transfer authorization to transfer and use, on a firm and non-firm basis, such water in the adjoining San Jacinto-Brazos Coastal Basin and the Brazos-Colorado Coastal Basin, and to transfer such water to any county or municipality or the municipality's retail service area that is partially within the Brazos River Basin for use, on a firm and non-firm basis, in that part of the county or municipality and the municipality's retail service area not within the Brazos River Basin;
- An appropriation of return flows (treated sewage effluent and brine bypass/return) to the extent that such return flows continue to be discharged or returned into the bed and banks of the Brazos River, its tributaries, and Applicant's reservoirs. The appropriation of return flows would be subject to interruption by direct reuse or termination by indirect reuse within the discharging entity's city limits, extraterritorial jurisdiction, or contiguous water certificate of convenience and necessity boundary;
- Operational flexibility to (i) use any source of water available to Applicant to satisfy the diversion requirements of senior water rights to the same extent that those water rights would have been satisfied by passing inflows through Applicant's reservoirs on a priority basis; and (ii) release, pump and transport water from any of Applicant's reservoirs for subsequent storage, diversion and use throughout Applicant's service area. (Applicant's "service area" includes all counties listed above);
- Use of the bed and banks of the Brazos River, its tributaries and Applicant's reservoirs for the conveyance, storage, and subsequent diversion of (i) the appropriated water; (ii) waters that are being conveyed via pipelines and subsequently discharged into the Brazos River, its tributaries or stored in Applicant's reservoirs; (iii) surface water imported from areas located outside the Brazos River Basin for subsequent use; (iv) in-basin surface water and groundwater subject to Applicant's control; (v) waters developed from future Applicant projects; and (vi) reuse of surface and groundwater based return flows appropriated in this permit;
- A term permit, pursuant to Texas Water Code § 11.1381, for a term of thirty (30) years from the issued date of this permit, or until the ports are closed on the dam impounding Allens Creek Reservoir, whichever is earlier, to allow Applicant to use the water appropriated under Water Use Permit No. 2925, as amended, until the construction of the Allens Creek Reservoir. Applicant requested a term authorization to impound, divert, and use not to exceed 202,000 acre-feet of water per year at the Gulf of Mexico; and

WHEREAS, Applicant requested that its appropriation under this permit be subject to and limited by the maximum amount of water available for appropriation in its various WMP use

scenarios.

WHEREAS, the Texas Commission on Environmental Quality (Commission) finds that jurisdiction over the application is established; and

WHEREAS, the Commission adopted environmental flow standards for the Brazos River Basin on February 12, 2014, which are required to be followed in any water right permit for a new appropriation issued following that adoption; and

WHEREAS, based on the Executive Director's recommendations, the Commission finds that in order to protect senior and superior water rights owners, special conditions should be included in the permit; and

WHEREAS, to avoid ambiguities between this system operation authorization and Applicant's previous system operation authorizations reflected by the System Order and existing permits, based on the Executive Director's recommendations, the Commission concludes that this permit is subject to all provisions included in the Commission's July 23, 1964 System Order, as amended, authorizing system operation of certain reservoirs in the Brazos River Basin, and to all terms and conditions of Applicant's authorizations in Certificates Nos. 12-5155, 12-5156, 12-5165, 12-5157, 12-5160, 12-5159, 12-5164, 12-5161, 12-5163, 12-5162, 12-5158, 12-5166 and 12-5167 and Water Use Permit No. 2925, as amended, except to the extent specifically provided otherwise by conditions in this permit regarding the total amount of water appropriated and available for storage, use and diversion and purpose of use, and as may be modified in the future by Commission approval of amendments to Applicant's WMP or these water rights; and

WHEREAS, the application supporting this permit is subject to the Texas Coastal Management Program (CMP) and must be consistent with the CMP goals and policies; and

WHEREAS, the Commission finds that the issuance of this permit is consistent with the goals and policies of the Texas CMP; and

WHEREAS, this permit, if granted, is subject to the requirements and orders of the Brazos Watermaster; and

WHEREAS, the Commission has complied with the requirements of the Texas Water Code and Rules of the Texas Commission on Environmental Quality in issuing this permit;

NOW, THEREFORE, Water Use Permit No. 5851 is issued to the Brazos River Authority (Permittee), subject to the following terms and conditions:

1. USE

A. APPROPRIATION

Permittee is authorized to divert and use for domestic, municipal, agricultural, industrial, mining and recreation use, water in the applicable amount shown below, as further described, defined, and limited by the Water Management Plan (WMP), within its service area, subject to special conditions:

- 1) not to exceed 366,350 acre-feet per year at all times prior to (1) an expansion of the Comanche Peak Nuclear Power Plant (CPNPP) in a manner that results in the plant needing at least 90,000 acre-feet per year of additional water; and (2) the point when the ports are closed on the dam

impounding Allens Creek Reservoir;

- 2) not to exceed 321,669 acre-feet per year at all times when: (1) CPNPP has been expanded in a manner that results in the plant needing at least 90,000 acre-feet per year of additional water; but (2) the ports on the dam impounding Allens Creek Reservoir have not been closed;
- 3) not to exceed 512,473 acre-feet per year at all times when (1) CPNPP has not yet been expanded in a manner that results in the plant needing at least 90,000 acre-feet of additional water but (2) the ports have been closed on the dam impounding Allens Creek Reservoir; or,
- 4) not to exceed 456,645 acre-feet per year at all times after (1) CPNPP has been expanded in a manner that results in the plant needing at least 90,000 acre-feet per year of additional water; and (2) the ports have been closed on the dam impounding Allens Creek Reservoir.

B. USE OF BED AND BANKS

Permittee is authorized to use the bed and banks of the Brazos River below Possum Kingdom Lake, the Brazos River tributaries and Permittee's authorized reservoirs for the conveyance, storage, and subsequent diversion of the water authorized herein, subject to identification of specific losses and to special conditions.

C. INTERBASIN TRANSFER

Permittee is hereby granted an exempt interbasin transfer authorization to transfer and use the water authorized herein in Permittee's service area in the adjoining San Jacinto-Brazos Coastal Basin and the Brazos-Colorado Coastal Basin and to transfer such water to the part of the geographic area of any county or municipality or a retail public utility's retail service area that is partially within the Brazos River Basin, San Jacinto-Brazos Coastal Basin, or Brazos-Colorado Coastal Basin for use on a firm and non-firm basis in that part of the geographic area of the county or municipality or that contiguous part of the utility's retail service area within the Trinity, Red, Colorado, Guadalupe, Lavaca and San Jacinto River Basins.

D. RETURN FLOWS

Permittee is authorized to impound, divert and use return flows discharged into the Brazos River Basin, subject to special conditions to protect water rights granted based on the presence of those return flows as well as other senior rights. The storage and diversion of return flows is subject to the requirements set out in Special Condition 5.A. and to environmental flow conditions set out in Special Condition 5.E.

E. TERM AUTHORIZATION

Pursuant to Texas Water Code § 11.1381, for a term of thirty (30) years from the issued date of this permit, or until the ports are closed on the dam impounding Allens Creek Reservoir, whichever is earlier, Permittee may use the water appropriated under Water Use Permit No. 2925, as amended. As part of the amount appropriated in Paragraph 1.A., during the term of this authorization

Permittee may divert and use not to exceed 202,000 acre-feet of water per year, subject to Special Conditions 5.C.1-5.

2. DIVERSION

Permittee is authorized to divert and use the water authorized by this permit as follows:

A. POINTS

- 1) At the diversion points authorized by Permittee's existing water rights, as amended.
- 2) At the mouth of the Brazos River at the Gulf of Mexico at Latitude 28.8783°N, Longitude 95.379111°W in Brazoria County.
- 3) At other such locations identified and included in Permittee's WMP.

B. RATES

- 1) At the diversion rates authorized by Permittee's Certificates of Adjudication and Water Use Permit, No. 2925, as amended, authorizing each of the reservoirs comprising the system operation as defined in this permit; and
- 2) At rates specified in Permittee's WMP.

3. PRIORITY

The priority date for the rights authorized by this permit, including diversion of return flows, is October 15, 2004.

4. CONSERVATION

- A. Permittee shall implement water conservation plans that provide for the utilization of those reasonable practices, techniques, and technologies that will reduce on a per unit basis the consumption of water, prevent or reduce the loss or waste of water, improve the efficiency in the use of water, increase the recycling and reuse of water, and prevent the pollution of water, so that a water supply is made available for future or alternative uses. The practices, techniques, and technologies used shall be designed to achieve a level of efficiency of use that is equal to or greater than the level provided for in Permittee's most recent water conservation plans on file with the Commission as of the date of the issuance of this permit. Such plans shall include a requirement that in every wholesale water supply contract entered into on or after the date of this permit, including any contract extension or renewal, each successive wholesale customer develop and implement conservation measures meeting the requirements of this provision. If the customer intends to resell the water, then the contract for resale of the water must have water conservation requirements so that each successive wholesale customer in the resale of the water is required to implement water conservation measures meeting the requirements of this provision.

- B. At least once every ten years after the issuance date of this permit and in connection with an application for reconsideration or amendment of the WMP, Permittee shall submit for review and approval updated water conservation plans and drought contingency plans demonstrating compliance with the requirements of the Commission rules then in effect for applications for new water rights and with the requirements of this Paragraph 4, applied as of the date of the filing of the application under consideration.

5. SPECIAL CONDITIONS

Unless expressly otherwise provided, the requirements of the Special Conditions of this permit apply only to diversion and storage under the authority of this permit and do not address or limit diversion or storage of water authorized by other water rights held by Permittee.

A. SPECIAL CONDITIONS RELATIVE TO USE OF RETURN FLOWS

- 1) Permittee's authorization to divert and use return flows under this permit is limited to return flows that are authorized for discharge by Texas Pollutant Discharge Elimination System (TPDES) Permits in effect as of the issuance date of this permit, and as authorized by future modifications of this permit or the WMP.
- 2) Permittee shall maintain a record of return flows as a part of its accounting plan required by Special Conditions 5.C and 5.D (return flow accounting plan). The return flow accounting plan must account, by source, for all return flows discharged. The return flow accounting plan shall include amounts discharged by outfall. Computation of the amount of additional water supply available due to return flows actually discharged is determined in the WMP, taking into account environmental flow conditions and demands of senior water rights. Permittee's use of additional water supply attributable to the presence of return flows is limited to the amount shown to be available, based upon amounts discharged as determined in the WMP. The return flow accounting plan shall be included as part of Permittee's accounting/delivery plan.
- 3) Permittee's storage, diversion and use of that portion of the appropriation based on return flows is dependent upon potentially interruptible return flows. Permittee's storage, diversion and use of that portion of the appropriation based on return flows will be interrupted by direct reuse or will be terminated by indirect reuse, provided the discharging entity has applied for and been granted authorization to reuse the return flows.
- 4) Permittee shall, at a minimum, use the return flow (effluent discharges) volumes reported monthly to the Commission by wastewater dischargers that have permitted discharges of greater than or equal to one (1) million gallons per day, and by other wastewater dischargers as provided by the accounting plan, to verify the available return flows for the accounting plan.

B. SPECIAL CONDITIONS RELATIVE TO USE OF BED AND BANKS

- 1) The use of the bed and banks of Allens Creek from below Allens Creek Reservoir to the Brazos River is not authorized until Permittee applies for and is granted an amendment to Water Use Permit No. 2925B authorizing

such use.

- 2) Permittee is authorized to use the following reaches, authorized in Permittee's certificates and amendments, for conveyance of water previously appropriated to Permittee and water authorized by this permit, downstream for diversion within these reaches in accordance with the WMP:
 - a. Brazos River from Possum Kingdom Lake to the Gulf of Mexico;
 - b. Leon River from Lake Proctor to the confluence with the Little River;
 - c. Lampasas River from Lake Stillhouse Hollow to the confluence with the Little River;
 - d. Little River from the junction of Leon and Lampasas Rivers to the confluence with the Brazos River;
 - e. Yegua Creek from Lake Somerville to the confluence with the Brazos River;
 - f. Navasota River from Lake Limestone to the confluence with the Brazos River;
 - g. San Gabriel River from Lake Granger to the confluence with the Little River and downstream to its confluence with the Brazos River;
 - h. North Fork San Gabriel River from Lake Georgetown to the confluence with the San Gabriel River, to its confluence with the Little River and downstream to its confluence with the Brazos River;
 - i. Aquilla Creek from Lake Aquilla downstream to its confluence with the Brazos River; and
 - j. Allens Creek, following construction of Allens Creek Reservoir, downstream from Allens Creek Reservoir to its confluence with the Brazos River, subject to Special Condition 5.B.1.

- 3) Permittee shall maintain an accounting/delivery plan that describes the procedure to estimate daily deliveries of water using the bed and banks identified in Special Condition 5.B.2. above. This procedure should be in electronic format and detail by source, type and priority date, the amounts to be conveyed and delivered, losses associated with the conveyance, specific points of diversion, associated travel times, and times of commencement and termination of transit for conveyed waters. Documentation of actual deliveries as well as the accounting/delivery plan shall be maintained by Permittee in electronic format and made available to the general public during normal business hours and to the Executive Director upon request. Modifications to the accounting/delivery plan must be approved by the Executive Director.

- 4) Before using the bed and banks of streams and tributaries in the Brazos River Basin not identified in the WMP for conveyance of water appropriated under this permit, or other sources available to Permittee, Permittee shall obtain approval by the Commission of an application by Permittee that identifies specific sources and types of water, specific points of discharge and diversion, and conveyance and other losses, and that satisfies the requirements of Texas Water Code § 11.042.

C. SPECIAL CONDITIONS RELATIVE TO APPROPRIATION

- 1) Permittee shall maintain an accounting/delivery plan as part of its WMP. Permittee shall maintain the accounting/delivery plan in electronic format and make it available to the general public during normal business hours and to the Executive Director upon request. Modifications to the plan must be approved by the Executive Director.
- 2) Permittee may not exercise a priority call on water rights in the Brazos River Basin with priority dates senior to October 15, 2004 for purposes of refilling storage in Permittee's system reservoirs where Permittee's system reservoir storage was emptied by diversion of water under this permit. The Commission shall consider the amount of water impounded at the October 15, 2004 priority date, consistent with the WMP and approved accounting plans, in analyses of future applications to appropriate water from the Brazos River Basin.
- 3) Permittee may use any source of water available to Permittee to satisfy the diversion requirements of senior water rights to the same extent that those water rights would have been satisfied by passing inflows through the Permittee's system reservoirs on a priority basis. Permittee's use of water previously stored in Permittee's reservoirs or available for appropriation by Permittee's senior water rights shall be documented in the accounting/delivery plan. Use of this option shall not cause Permittee to be out of compliance with the accounting/delivery plan or Special Condition 5.C.2., or prevent the achievement of environmental flow requirements that would have otherwise been achieved.
- 4) Permittee may divert water from storage in its permitted reservoirs and store that water in Permittee's other reservoirs for use within Permittee's service area so long as all diversions and storage are included in the accounting/delivery plan.
- 5) Permittee shall maintain, at a minimum, the release schedule from Possum Kingdom Lake at or above the appropriate value in the following table, except when inflow to Possum Kingdom Lake is less than the defined release value. In such instances, the release may be adjusted downward to match inflow. Additionally, temporary deviations from this release requirement may be made to accommodate maintenance or operational issues associated with Possum Kingdom Lake's Morris Sheppard Dam:

Reservoir Elevation	March – June	July – September	October - February
Above 994.5 msl	100 cfs	75 cfs	50 cfs
990 msl – 994.5 msl	50 cfs	37.5 cfs	25 cfs
Below 990 msl	Leakage (≈20 cfs)	Leakage (≈20 cfs)	Leakage (≈20 cfs)

- 6) In recognition of current drought conditions, Permittee shall perform a detailed evaluation of whether the recently-ended drought: (1) represents a drought worse than the drought of record of the 1950s in the Brazos River Basin; and (2) decreases the amount of water available for appropriation under this permit. Permittee shall provide a report to the Executive

Director documenting its findings within nine months after issuance of this permit. If the report concludes that the recently-ended drought decreases the amount of water available for appropriation under this permit, then the amount of that reduction shall be determined and appropriation amounts specified in Paragraph 1.A. of this permit shall be correspondingly reduced.

D. WATER MANAGEMENT PLAN SPECIAL CONDITIONS

- 1) Permittee shall maintain the Water Management Plan (WMP), which is attached to and incorporated into this permit, and which shall include, in addition to the specific requirements listed in Special Condition 5.D.4, such studies and other information as may be required by the Commission to demonstrate Permittee's compliance with and its ability to comply with all of the Special Conditions included in this permit.
- 2) Proceedings to consider any major amendment of the WMP shall be pursuant to contested case procedures. Any proceeding to consider a major amendment of the WMP shall be preceded by notice and opportunity to request a hearing, in accordance with the Commission's regulations applicable to water rights permitting proceedings.
- 3) At a minimum, every ten years after the issued date of this permit, Permittee shall submit to the Executive Director an application for reconsideration or amendment of the WMP.
- 4) Permittee shall maintain an approved WMP that includes the following:
 - a. Accounting/delivery plans;
 - b. Environmental flow conditions that comply with adopted environmental flow standards for the Brazos River Basin; and
 - c. Maximum diversion rates for diversions of water authorized in this permit, and a method to determine the amounts of firm and non-firm water available at any location, subject to the limitations on permit amounts in this permit.
- 5) In the first reconsideration or major amendment of the WMP after issuance of this permit, Permittee shall demonstrate that it has additional sources of supply sufficient to offset any reduction in its system reservoirs due to sedimentation or shall, at a minimum, provide evidence demonstrating that Permittee has worked diligently and continuously to develop such alternate sources of supply. Should Permittee fail to either demonstrate that such supplies are available or that it has pursued diligent development of those supplies, the amount of water appropriated under this permit may be reduced.

E. ENVIRONMENTAL FLOWS SPECIAL CONDITION

Environmental flow conditions for this permit shall be included in the WMP, and are subject to adjustment by the Commission pursuant to Texas Water Code §11.147(e-1) and 30 TAC §298.25.

F. BRAZOS WATERMASTER SPECIAL CONDITIONS

Upon implementation of the Brazos Watermaster Program, the diverter, as defined in 30 TAC §304.3(9), shall comply the rules and orders of the watermaster. Specifically, the diverter shall comply with the following special conditions pursuant to 30 TAC §304, Subchapter B.

- 1) Diverter shall install a measuring device which accounts for, within 5% accuracy, the quantity of water diverted from the diversion point. Diverter shall allow representatives of the TCEQ Brazos Watermaster reasonable access to the property to inspect the measuring device.
- 2) Diverter shall contact the Brazos Watermaster prior to diversion of water authorized by this permit.

This permit is issued subject to all superior and senior water rights in the Brazos River Basin. Permittee agrees to be bound by the terms, conditions and provisions contained herein and such agreement is a condition precedent to the granting of this permit.

All other matters requested in the application which are not specifically granted by this permit are denied.

This permit is issued subject to the Rules of the Texas Commission on Environmental Quality and to the right of continuing supervision of state water resources exercised by the Commission.

For the Commission

ISSUED: