

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

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

**EXECUTIVE DIRECTOR'S EXCEPTIONS TO THE SUPPLEMENT TO THE
PROPOSAL FOR DECISION ON REMAND**

The Executive Director (ED) of the Texas Commission on Environmental Quality (TCEQ or Commission) files these exceptions to the Administrative Law Judges' (ALJs') Supplement to the Proposal for Decision on Remand (SPFDR) in this case. The ED agrees with the findings in the SPFDR and proposed Order but has concerns about the wording of some Findings of Fact (FOFs) and Conclusions of Law (COLs). In addition, the ED notes that his recommended revisions require corresponding changes to the Draft Permit.

FINDINGS OF FACT

FOF 60 is inconsistent with the ALJs' revised draft permit because it lists "return flows of treated wastewater" as an appropriation in the permit. The Finding should state, "return flows of treated wastewater *of others*." The ED also recommends that a sentence be added to the finding that states, "[A]nother source of water is BRA's own return flows." This would more accurately reflect the ALJs' and Commissioners' finding that BRA's own return flows are not a new appropriation but should be considered as a bed and banks authorization.

FOF 60 as revised would read:

For Permit No. 5851, there are three sources of unappropriated water: unappropriated riverine flows; return flows of treated wastewater of others, and water available for appropriation from BRA's existing reservoirs. Another source of water is BRA's own return flows.

For the same reason as above, FOF 62 needs to be revised to remove the words "this unappropriated water" from the sentence and substitute "BRA's sources of water identified in FOF 60."

FOF 62 as revised would read:

Through the use of its storage, BRA can make BRA's sources of water identified in FOF 60 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.

Additionally, FOFs 67 and 68 need to be revised to remove the words "of unappropriated water," because the amounts are not all unappropriated water. The wording is correctly stated in FOFs 65 and 66.

FOF 67 as revised would read:

Demand Level C anticipates construction of the Allens Creek Reservoir without the CPNPP expansion. As modeled by the Applicant it produces a maximum possible use of ~~unappropriated water of 516.955 af/yr.~~

FOF 68 as revised would read:

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 possible use of ~~unappropriated water of 482,035 af/yr.~~

FOF 73 should be reworded to state that the reduction due to sedimentation is in the unappropriated water, which includes the return flows of others. The SPFDR does not require reduction of the total use numbers, but reduction in the appropriated amount. PFD, p. 39, Section 5.C.6.

FOF 73 as revised would read:

In order to account for these losses of reservoir capacities due to sedimentation, Permit No. 5851 should include a special condition to immediately reduce BRA's maximum annual diversion and ~~use amounts~~ unappropriated water under each of the four Demand Levels, and each of the maximum diversions by river reach, by 14%.

FOF 88 should be amended to state that "the amount of that reduction shall be determined and the appropriation amounts specified in Paragraphs 1.A *and* 5.D.5 of this permit shall be correspondingly reduced." This is because the authorization and the allowable use provision should both be reduced if there is a reduction in the appropriation amount due to drought. This change should also be made in the Special Condition in the draft permit.

FOF 88 as revised would read:

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 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 amount of that reduction shall be determined and the appropriation amounts specified in Paragraphs 1.A and 5.D.5 of this permit shall be correspondingly reduced.

FOF 170 should be revised to state, "accounting for individual discharges and diversions of the return flows *of others* is not necessary." BRA will have to account for the discharge and diversion of its own return flows under 11.042(b) and (c).

FOF 170 as revised would read:

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

CONCLUSIONS OF LAW

COL 1 cites the statutory authorizations for Permit No. 5851. Based on the Commission's decision and the PFD, this conclusion should also include 11.042 and 11.046.

COL 1 as revised would read:

The Commission has jurisdiction over permits to use state water and to issue Permit No. 5851 under Texas Water Code §§ 5.013, 11.042, 11.046, 11.121, 11.134, and 11.1381.

COLs 16 and 17 are a rewording of special conditions 5A.3 and 5.A.4 of the draft permit. It would be clearer and more accurate to revise these COLs to state the language in special conditions 5.A.3 and 5.A.4 of the draft permit verbatim.

COL 19 should be amended to add the sentence "The authorization for BRA's own return flows is also subject to these environmental flow requirements under BRA's WMP." The environmental flow standards apply to all of the water authorized in this new permit. *See, FOF 104 – 108; BRA's Draft Permit Section 5.E.*

COL 19 as revised would read:

The appropriation by BRA of groundwater-based and surface water-based return flows discharged by other persons or entities is a new appropriation subject to the environmental flow requirement for the Brazos River Basin in 30 Texas Administrative Code Chapter 298. The authorization for BRA's own return flows is also subject to these SB 3 environmental flow requirements under BRA's WMP.

The ED respectfully requests that the ALJ's and the Commission accept the changes to the Findings of Fact and Conclusions of Law, and the Draft Permit.

Respectfully submitted,

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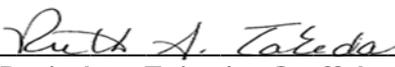
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CERTIFICATE OF SERVICE

I certify that on the 23rd day of June 2016, the foregoing *Executive Director's Exceptions To The Supplement To The Proposal For Decision On Remand* was filed electronically with the Chief Clerk of the Texas Commission on Environmental Quality and the State Office of Administrative Hearings in Austin, Texas, and that a true and correct copy was delivered as follows to:

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