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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
Protecting Texas by Reducing and Preventing Pollution

August 31, 2015

Bridget Bohac
Chief Clerk
Texas Commission on Environmental Quality
P. O Box 13087
Austin, TX 78711-3087

**Re Application by the Brazos River Authority for Water Use Permit No. 5851; TCEQ
Docket No. 2005-1490-WR; SOAH Docket No. 582-10-4184**

Dear Ms. Bohac:

**Attached is the Executive Director's Reply to Exceptions in this case. We have also filed
7 copies of this document with the your office. Thank you.**

Sincerely,

Robin Smith
Robin Smith

Enclosure

cc: Mailing list

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

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

EXECUTIVE DIRECTOR’S REPLY TO EXCEPTIONS

The Executive Director (or ED) of the Texas Commission on Environmental Quality (TCEQ or Commission) files this reply to exceptions in this case.

INTRODUCTION

The ED respectfully disagrees with other parties’ exceptions, specifically: Dow Chemical Company (Dow); Friends of the Brazos River, the Brazos River Alliance, and their members who are individual members (collectively, FBR); Lake Granbury Coalition (LGC); National Wildlife Federation (NWF); and the TCEQ’s Office of Public Interest Counsel (OPIC).

Bradley B. Ware has filed exceptions although he did not participate in the remand contested case hearing, and did not file closing arguments. The City of Lubbock and the Cities of Bryan and College Station (Cities) have filed exceptions, although they have settled the case. The ED disagrees with Bradley B. Ware’s contention that rulemaking is required before this application can be granted, and also disagrees with the City of Lubbock and the Cities concerning their proposed changes to the ALJs’ proposed permit Special Conditions 5.A.3 and 5.A.4. The ED reasserts that the Commission cannot issue a bed and banks authorization for an entity’s return flows if those return flows have been granted to BRA in this proceeding. Under Lubbock’s and the Cities’ proposed special conditions, BRA would not terminate its authorization until a bed and banks authorization had been issued. Neither Special Condition 5.A.3 nor 5.A.4, as in the ALJs’ proposed permit or as recommended by the Cities, can give the Commission this authority, which is why the ED excepted to the ALJs’ Findings of Fact Nos. 160, 161, and 162 and revised the proposed permit language. See Special Conditions 5.A.1 to 5.A.4 in the ED’s recommended permit, filed as Exhibit B in his exceptions.

The ED disagrees with exceptions filed regarding the following issues, which use the Roman numerals and headings in the ALJs’ 2015 Proposal for Decision (PFD):

VIII. JURISDICTION

The ALJs found that the TCEQ and SOAH had jurisdiction over this application at the preliminary hearing on August 26, 2013. This finding was not reversed in the 2011 PFD or the 2015 PFD.

FBR argues that the Commission may not approve this permit because it explicitly or implicitly amends BRA's existing water rights without following proper procedures; that BRA should have obtained amendments for its settlements; and that the inclusion of a term permit in Permit No. 5851 does not satisfy the requirements for a term permit.

The ED agrees with the ALJs that BRA was not required to amend its existing water rights or obtain amendments for its settlements because those existing water rights and settlements did not change Application No. 5851. The provisions of the underlying permits are still valid; the new permit would govern how BRA will operate the reservoirs as a system and allows further appropriation of water and reuse of return flows. Application No. 5851 is allowed by the applicable statutes and rules. Additionally, the ED agrees with the ALJs that sufficient notice was provided for a term permit until the Allens Creek Reservoir is built.

IX. MR. WARE'S IMPAIRMENT CLAIMS

The ED agrees with the ALJs' analysis in the 2011 PFD concerning Bradley Ware's and Comanche County Growers' claims. These parties have not shown that they are harmed by Application No. 5851. Because they did not participate in or put on any evidence in the 2015 hearing, there is no new evidence on which to alter the 2011 findings and conclusions. In his exceptions, Mr. Ware continues to argue about denial of a term permit by the Commission. That permit denial has been appealed to civil court, and is being considered there.

Also, as stated in the Introduction, the ED does not agree that there must be a rulemaking on Tex. Water Code §§ 11.042 and 11.046 before the Commission can rule on this application. The TCEQ has rules relating to this case which were argued in this hearing. If Mr. Ware believes these rules are inadequate, he could have addressed this by requesting initiation of rulemaking or by seeking relief in civil court.

XI. WATER AVAILABILITY, DROUGHT OF RECORD, AND IMPAIRMENT OF EXISTING RIGHTS

The ED disagrees with the exceptions filed by FBR, Dow, NWF, and LGC on these issues.

Water Availability

Dr. Alexander performed the water availability analysis using the TCEQ's WAM and found that approximately 1,001,449 acre feet of non-firm water available for appropriation at the Gulf, Ex. ED-R1, p. 4 lines 35-42. Dr. Alexander also reviewed BRA's modeling for its WMP. Dr. Alexander found that the water was available for the four demand levels although the amounts of the appropriation were slightly lower for BRA's amounts under its preferred approach to reuse. Ex. ED-R3, p. 8. Though the BRA has reduced the number of acre feet it seeks, the analysis by the ED was appropriate, water is available to support the application, and the ED position on availability has not changed.

The appropriation amounts are designed to show how much water can be appropriated by the System Operations Permit given current BRA contractual commitments at their actual locations, additional demands shown in the regional water plans, and additional demands in the Richmond to Gulf of Mexico reach. These analyses show that water is available under these conditions, while meeting environmental flow standards and without impacting other water rights. Ex. BRA 119, p. 18, lines 6 – 11.

The amounts that BRA will need may change in the future. Mr. Gooch testified that BRA's operational models are designed to indicate how contracting and needs may change. Ex. BRA 119, p. 43, line 21 to p. 44, line 7. At a minimum, BRA must file an application for "reconsideration or amendment of the WMP" every ten years. ED's Special Condition 5.D.(3).in the ED's recommended permit, filed as Exhibit B in his exceptions. See the WMP, Ex. BRA 113, Section I.B. p. 2, para. 1.

LGC opposes issuing Permit No. 5851 at all because LGC argues that this permit cannot be accurately modeled in the WAM and will therefore create more problems than it solves, and states that no one – including TCEQ staff – can articulate how Permit No. 5851 would be presented in future versions of the WAM. However, the ED disagrees that he did not articulate how Permit 5851 would be reflected in the WAM in the future. The ED acknowledges the complexity of Application No. 5851. However, as Dr. Alexander testified, Firm Level C would likely be used in representing full use of Permit No. 5851 in the WAM. Tr. 3852 lines 2-3. Firm Level C is appropriate because it represents the maximum amount of water that would be appropriated in the lower Brazos Basin under Permit 5851, which is the full authorization and the amount TCEQ protects in its permitting models. Tr. 4013 lines 13-15. Dr. Alexander also testified that the maximum amount of the appropriation would be reflected in TCEQ's full appropriation simulation and the actual demand level in place at a specific time in the future would be represented in TCEQ's current use model. This is exactly how TCEQ models permits across the state. Tr. 4013 lines 1-13.

LGC argues that there is no modeling that includes the diversion points that could be used under the permit. The ED disagrees. The models include diversion of run of river water under Permit 5851 at the locations of BRA's existing water rights and contracts, locations where demands from the regional water plans would likely occur and an additional amount at Rosharon. Ex. BRA 113 Water Management Plan Technical Report, page 2-22.

LGC further argues that the modeling runs do not represent what BRA will actually be authorized to do under the permit. The ED disagrees. The draft permit and WMP include the maximum amount of the appropriation and maximum amounts and rates at specified diversion locations. Water availability for river diversions will vary from year to year based on weather conditions, compliance with the adopted environmental flow standards, and the needs of senior water rights that would get the water first.

LGC argues that the Regional Water Plan only recognizes a need of 100,000 acre feet from this project. FBR argues that it could agree to an authorization for 100,000 to 200,000 acre feet. The ED has been very clear that these numbers, 100,000 to 200,000 acre feet in the Regional Water Plan are firm yield amounts. The appropriation in the ED's recommended permit, filed as Exhibit B in his exceptions, is for the river diversions themselves, which are non-firm water. Tr. 4215 lines 12-15. If BRA received 200,000 acre feet of firm water, the amount needed to be diverted from the river would be far more than 200,000 acre feet.

Permitted or Actual Storage

The ED has already excepted to the ALJs' determination that a reduction of 14% must be made to appropriation amounts to account for reservoir sedimentation. The ED disagrees that the appropriation amounts in Permit No. 5851 must be reduced to account for actual storage capacity because appropriation amounts are based on water availability, which is analyzed and determined using permitted capacity as required under the *Stacy Dam* case.

As stated in the ED's exceptions, Dr. Alexander also had some concerns about the analysis that Dr. Brandes had performed relating to the actual capacity of the reservoirs. Dr. Alexander testified that Dr. Brandes estimated values and simply subtracted them from the amount of the appropriation. Tr. 3685 lines 12-19. She further testified that basing appropriation amounts on these numbers could impact the TCEQ going forward in water right permitting in the Brazos River because there is no modeling to support it and one wouldn't know what the amounts are for each reach. Tr. 3698 line 18 to 3699 line 5; Tr. 3972 lines 10-12.

Dow states that BRA ran no appropriation models using actual storage capacity for existing BRA reservoirs and that Dow calculated the reduction amounts for only one scenario and did not do modeling for all four demand scenarios. Dow suggests requiring BRA to model new appropriation amounts for all four demand levels when BRA performs its evaluation of drought on the system. Dow exceptions p.26. The ED agrees that if the study shows that there is a new drought of record in the Brazos Basin, the naturalized flows would then need to be extended and all of the modeling for all demand levels would then need to be revised. There is no need to update the natural flows until this determination has been made. Tr. 3880 lines 1-14.

Dow states that Possum Kingdom Reservoir has approximately 16,000 acre feet of unused storage capacity because of the difference in surface elevations – the reservoir is operated up to 999 feet mean sea level rather than the 1,000 feet mean sea level assumed in the water availability modeling for Permit No. 5851. Because water availability is determined with permitted capacity, the ED does not believe that the modeling assumptions used to determine water availability for Permit No. 5851 needs to be changed, although this is certainly a factor BRA can use as it implements the WMP.

If Permit No. 5851 is issued, LGC argues that that a reduction in appropriation amounts to account for actual storage capacities in BRA’s reservoirs should be accompanied by a corresponding reduction in the maximum authorized diversions by reach. FBR argues that the appropriation amounts in the permit must be reduced to account for “actual” storage capacities in BRA’s system reservoirs, and agrees with LGC that a corresponding reduction in the maximum authorized diversion by reach is necessary. The ED agrees that if the amount of the appropriation is changed, the maximum authorized diversions by reach would also need to be changed. The ED, however, could not approve this change as a matter of form.

Junior Refill of Storage

Dow, LGC, FBR, and NWF argue that the SysOps Model in the TCEQ Water Availability Model (WAM) does not refill storage depleted under the Permit No. 5851 at a junior priority date.

The ED disagrees that refill of reservoir storage depleted under Permit No. 5851 is not at a junior priority date. Dr. Alexander testified that the amount of water to refill the reservoirs that have released water under operation of Permit No. 5851 is taken at the new priority date of Permit 5851. Tr. 3961 line 11 to 3962 line 9. As Dr. Alexander further testified, the amount of unappropriated water required to refill existing

reservoirs under operation of Permit No. 5851 is taken out of the WAM at the new priority date of Application No. 5851. Tr. 3961 lines 11-17.

Ex. BRA 151c indicates that water is available to refill the storage emptied by the System Operations Permit at the junior priority. Mr. Brunett also testified to this in BRA's rebuttal case. Tr. 4165 lines 2-5.

This junior priority for refill is in BRA's Exhibits 127 (ED's and BRA's proposed Draft Permit), and 132A (BRA's alternative draft permit, ED reuse version), and the ED's recommended permit, which is based on Ex. BRA 132A and filed as Exhibit B in his exceptions, in Special Condition 5.C.2. That special condition provides:

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.

Dr. Alexander testified that this provision is meant to apply to BRA when it makes releases or diversions under its System Operations Permit. The refilling of the reservoirs to replace that amount of water must be at the junior priority date. Tr. 3961 lines 11-17. Dow argues that the refilling of the reservoirs in the models was done at the reservoir permits' priority date instead of the new priority date, citing Dr. Brandes' testimony. Ex. Dow 57, p. 14, lines 4-26 to p. 15, lines 1-15. Dow argues that Dr. Brandes based his opinion on what the SysOps WAMs actually do, as opposed to Mr. Gooch and Dr. Alexander, who based their testimony on "their knowledge of how they believe the SysOps works." Dr. Brandes used a spreadsheet model, not the WAM; however, there were errors in his spreadsheet identified by Mr. Gooch. Tr. 4161 lines 16-23, Tr. 4163 line 20 to 4164 line 6. Mr. Gooch also looked at the actual amount that was available to refill storage. Tr. 4164 line 19 to 4165 line 5.

Mr. Gooch testified that the diversion with senior priority water is limited to the depletions available to the senior water rights, and that has the effect of preventing the fill of extra storage emptied by diversions beyond senior priority right at the senior diversions. Tr. 4266 lines 11-15. Mr. Gooch testified that there is no error in the WAM related to the junior refills. Tr. 4259 lines 14-21.

Dr. Alexander testified that the storage that is filled at the priority date of existing rights is storage that has not been emptied by the operation under Permit No. 5851. Tr. 3692 lines 19-22. Dr. Alexander based her opinion on what the WAM actually does as described in the model documentation:

The dual simulation feature is designed primarily for applications where multiple rights with different priorities divert water from the same reservoir system. Without the dual simulation, reservoir drawdowns associated with junior diversions may be inappropriately refilled in subsequent months by senior rights at the same reservoir. The set of dual simulation options allow streamflow depletions computed during an initial simulation to be used as upper limits constraining depletions during a second simulation. ED-R4 p. 143

Dual simulation options are specified by PX records in the model. ED R4 p. 143. PX Options 5 and 2 limit the streamflow depletion (diversions and storage) to only the amount BRA could have depleted under its existing water rights. ED-R4 p. 144. In the WMP, in the description of the second simulation, water rights using PX Options 5 and 2 limit the amount available under BRA's existing water rights to the amount BRA could have diverted and impounded under those existing water rights. Ex. BRA 113 Technical Appendix G-2 p. 26. Therefore, the model does not allow junior refills.

Dow further argues that the existing System Order for BRA's existing water rights has no priority and that using a WAM that does not perform storage accounting tracking of the volume of storage emptied by senior rights, the existing System Order, and Draft Permit No. 5851. Dow argues that storage emptied under the existing System Order can be refilled with senior priority water and that the existing System Order should be in the WAM. This results in the appropriation amount of Draft Permit No. 5851 being overstated. Ex. Dow 47 p. 37, lines 16 – 39.

The ED disagrees that the existing System Order should be in the WAM. The WAM protects the full authorization of BRA's existing water rights. The existing System Order does not allow BRA to use more water than is authorized under its existing permits. Ex. BRA 7A3. Because the WAM already protects the full amount of BRA's water rights there is no need to put the existing System Order in the WAM. Tr. 3967 lines 15-24. As Dr. Alexander testified, the existing System Order is addressed in BRA's accounting plan. Tr. 3968 lines 19-23. Accounting for the existing System Order is also included in BRA's WMP. Ex. BRA 113 Technical Report p. 5-11 to 5-12, Technical Appendix H p. 6.

Drought of Record

NWF argues that a more rigorous approach is needed to ascertain the drought's impact on water availability and permit authorization if Permit No. 5851 is granted – namely, a mechanism through which BRA proposes a methodology for review and approval by the ED, through which other parties could comment, with the results of the evaluation also subject to review and approval. LGC argues that the ALJs' proposed special condition on drought creates another two-step process that the ALJs' had denied before, and LGC,

FBR, and Dow argue that there is no specification of what BRA will do to determine if there is a new drought of record. They are concerned about Dr. Alexander's statement that this evaluation will not require a recalculation of naturalized flows. LGC argues that BRA should have demonstrated that the entire requested appropriation amount is available in the source of supply now. Dow suggests revising the ALJs' proposed permit Special Condition 5.c.7.

Dr. Alexander testified that the evaluation of whether there is a new drought of record will not require a recalculation of naturalized flow. Tr. 3879 lines 4-25. However, the ED's recommended permit, filed as Exhibit B in his exceptions, Special Condition 5.C.6 requires BRA to evaluate the impact of the recently ended drought and report to the ED whether it was worse than the drought of record and whether it decreases the amount of water available for appropriation under Permit No. 5851. 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. The determination of the amount of reduction will require a reevaluation of naturalized flows. T. p. 3870-3880.

Dow proposes that additional language be added to the provision requiring evaluation of whether the Brazos Basin is in a new drought of record. The ED disagrees that these provisions are necessary because they are unreasonable and beyond the requirements of TCEQ's rules. Dow's provision would require BRA to update the naturalized flows in the Brazos Basin before there was a determination that an update was necessary. As Dr. Alexander testified, unless there is a determination that a drought worse than the drought of record had occurred, there is no need to update the naturalized flows. Tr. 3880 lines 4-14. Dow's provision would also require BRA to evaluate current useable storage conditions in its reservoirs in the second pass of the simulation. The ED has repeatedly stated that Dow's analyses on these issues are not appropriate because BRA's existing water rights are not protected in Dow's analysis. BRA's existing water rights would be made available to junior permits. Tr. 1945 line 21 to 1946 line 1.

The ED also has concerns about Dow's proposed process. Dow's process would require BRA to complete these tasks within nine months. Dr. Alexander testified that updating the naturalized flows takes a significant amount of time and effort and is a detailed and intensive process. Tr. 3960 lines 12-19. The ED believes that data for 2015 may not be available until April of 2016 since evaporation data is not available until that time. In addition, Dow proposes that BRA would need to develop a Work Plan and that the Work Plan would be subject to public notice and review and TCEQ approval before the naturalized flow updates even begin. This process cannot be completed in nine months

and there are no rules related to such a process. For these reasons, the ED requests that the ALJs and the Commission reject Dow's proposed additional language.

Impairment of Existing Rights

FBR argues that BRA's existing water rights are not being adequately protected at the full authorized amount in the dual simulation model. FBR argues that the first round of the dual simulation protects and assumes full exercise of all senior, existing water rights, except BRA's existing water rights, because BRA's existing water rights are returned to the system during the second round of the simulation; in addition, BRA assumed in its modeling that that its water rights will not be fully utilized every year. FBR argues that Dr. Alexander's testimony about the dual simulation model was overly simplistic. The ED disagrees. Dr. Alexander has worked with models throughout the state for fifteen years and oversees model development. Ex. ED-R2. Dr. Alexander testified that BRA's existing water rights are appropriately accounted for in both the first and second passes of the dual simulation. Ex. ED-R1, p. 6 lines 14 – 28, Tr. 3948 line 7 to 3950 line 9

Dow incorporated by reference its arguments on the issue of salinity and impairment to water quality or existing water rights from Dow's closing arguments in the first hearing on the merits. The ED addressed those arguments at the time and incorporates them by reference as well.

LGC argues impairment to existing water rights in its discussion of whether the TCEQ's rules are directory, not mandatory, and in its discussion of water availability modeling and the issuance of Permit No. 5851. The ED has addressed the issue of TCEQ's rules and the ALJs' discussion of them in the ED's exceptions. The ED has addressed LGC's arguments regarding water availability modeling and the issuance of Permit No. 5851 in other sections of this brief, therefore does not specifically respond to them in this section.

BRA's existing water rights will not be impaired because the WAM protected the full permitted amount of these water rights at their location and priority date in the water availability analysis for this application. Dr. Alexander testified that the ED's water availability modeling assumes full use of the fully authorized amounts of BRA's existing water rights, at their locations, and at their priority dates. Ex. ED-R1, p. 5 lines 11-13. Therefore, the analysis fully protects those water rights. Dr. Alexander testified that in the WAM, once BRA's existing water rights are exercised at their existing locations and at their full authorized amounts, BRA can use that water in accordance with the terms and conditions of its permits. Ex. ED-R1, p. 6, lines 10-19.

Dr. Alexander concludes in her Hydrology Memo that there is no impact on senior water rights because the new water can only be taken at a junior priority date, BRA's accounting plans protect senior water rights, and there will be a watermaster in the Brazos River Basin effective June 1, 2015, who will actively manage water rights on a daily basis to ensure that senior water rights are protected in times of shortage. Ex. ED-R3, p. 14, second to last paragraph.

LGC argues in its discussion of 30 Tex. Admin. Code § 297.7 that Permit No. 5851's use of diversion reaches instead of specific diversion points is not protective of water rights. The ED disagrees that the use of diversion reaches is a concern. The actual diversion points for any new contracts will be specifically identified before new water supplies are diverted. Tr. 3687 lines 9-13 (Dr. Alexander). The watermaster will ensure that senior water rights will not be impaired by diversions by BRA. Tr. 3686 line 24 to 3687 line 9 (Dr. Alexander). Also, this is not an unusual practice for TCEQ. BRA put into evidence a list of numerous other water rights in the Brazos Basin that have reaches instead of specific diversion points in the water right. See Ex. BRA 135.

The ED agrees that it could be helpful to put the maximum amount of diversion for each reach into the permit. Tr.3998 lines 1-6. Dr. Alexander also indicated in her testimony that the ED would not object to putting specific firm use scenarios with different appropriation amounts in the permit. Tr. 4009 line 20 to 4010 line 3. The ED notes that Ex. BRA 133 provides the maximum diversion amounts for the different reaches under different scenarios. Dow argues that the TCEQ has never issued a permit with different scenarios; however, the Ex. ED R-13, admitted into evidence in this case, is a Certificate of Adjudication (No. 14-5474) that has different scenarios for projected future development. Ex. ED R-13, p. 2.

XII. BENEFICIAL USE

LGC and FBR argue that BRA has not shown that it will beneficially use the water. Dow argues that BRA seeks to appropriate a substantial amount of water that can never be beneficially used because the amount is based on the "junior refills" error in BRA's modeling. The ED has addressed Dow's argument in the section addressing water availability and will not address it again here.

FBR notes that it could support a permit for from 100,000 acre feet to 200,000 acre feet, but not approximately 500,000 acre feet because FBR argues that BRA has not presented evidence that it will beneficially use the water in a reasonable time. LGC understands the need for water in the state but argues that Permit No. 5851 is not the answer, and points out that the state Regional water planning groups' recommendations only account for about 100,000 acre feet from this permit.

The ED has addressed his position on the appropriation amount issue in his exceptions and his recommended permit, attached to his exceptions as Exhibit B. Therefore the ED will focus his reply on the issue of “reasonable time”.

FBR cites the *Stacy Dam* case, *Lower Colorado River Authority v. Texas Department of Water Resources*, 689 S.W.2d 873 (Tex. 1984). The court stated that “No person is granted a right to waste water by not using it.” The court went on to note that “unbeneficial use” can be corrected by cancellation when a permittee either is not justified in nonuse or does not have a bona fide intention of putting unused water to an authorized beneficial use within a reasonable time. Under current law, an a reasonable time period is 10 years. Tex. Water Code § 11.173.

Though the ED believes that the language cited by FBR is dicta because the *Stacy Dam* case related to permitting “unused” water and the statement was not necessary for that decision, the ED notes that BRA is required to submit an application for reconsideration or amendment of its WMP every 10 years as a Special Condition in Permit No. 5851 as proposed by the ALJs and in the version recommended by the ED. Because review of the WMP will occur every 10 years, BRA’s beneficial use of the appropriated water will come under scrutiny within a reasonable time. FBR does not propose the 10 year cancellation period as being a reasonable time to demonstrate beneficial use, but says that 50 years is not a reasonable time, and suggests using the time limits for reservoir construction under Texas law as a possible approach. Under Tex. Water Code § 11.145, reservoir construction must begin within two years of permit issuance unless the TCEQ extends the time period. FBR did not plainly state its position, but under the analogy presented the ED assumes that FBR believes a reasonable time to demonstrate beneficial use is two years.

Some projects contemplated in the state Regional water plans will take decades, and the population projections within the State water plan span decades. See Ex. BRA 115. The TCEQ’s approach to water rights permitting has been flexible historically so far as time limitations. Beneficial use is defined in TCEQ’s rules at 30 Tex. Admin. Code § 297.1(8) as “Use of the amount of water which is economically necessary for a purpose authorized by law, when reasonable intelligence and reasonable diligence are used in applying water to that purpose and shall include conserved water.” The 2 years FBR implies is reasonable appears unreasonable to the ED because this application is not for a new reservoir and Texas law allows up to 10 years to demonstrate nonbeneficial use or nonuse of a water right.

At the 2011 hearing, Ms. Kristin Wang, Senior Water Conservation Specialist at TCEQ, testified that need existed for the new appropriation based upon the projected water

shortages in Region G and Region H. At the 2015 hearing, Ms. Wang testified that a water shortage is still projected in the 2011 Regional Water Plan and that the System Operations Permit is identified as a recommended water management strategy to meet the projected shortages in Regions G and H. See Ex. ED-R6, lines 27-32. See also Ex. ED-R8, memo dated December 1, 2008, page 1 last sentence to page 2 paragraphs 1-3; Ex. ED-R9, memo dated June 28, 2013, page 1 paragraph 4 to page 2 paragraphs 1-3 and Table 1. Dr. Alexander also testified that the water plans for Region G and H indicate a need for the water supply that can be produced by BRA's application. Tr. 3672 line 20 to 3673 line 1. In addition, Dr. Alexander testified that the uses that BRA requested in its application are all purposes of use that are in the Water Code. Tr. 3672 lines 15-19. BRA's application requests municipal, industrial, and agricultural use, which are all included in the beneficial uses set forth in Tex. Water Code § 11.023.

The ALJs found in the 2011 PFD that BRA met its burden to prove that the System Operations Permit appropriations are intended for beneficial use, as required under Tex. Water Code § 11.134(b)(3)(A). The ALJs found that there was no evidence presented in the 2015 hearing to change this finding. The ED agrees.

XIV. APPLICATION'S COMPLIANCE WITH ENVIRONMENTAL FLOW RULES

Legal Issues

FBR and LGC argue that the Senate Bill 3 (S.B. 3) statutes do not preclude other types of analysis. The ED disagrees. Tex. Water Code § 11.147(e-3) provides that the Commission must consider adopted environmental flow standards "necessary to maintain freshwater inflows to an affected bay and estuary system, existing instream uses and water quality of a stream or river, or fish and aquatic wildlife habitats" "instead of" the provisions of § 11.147(b)-(e).

FBR and LGC argue that under § 11.134, for a new appropriation, the Commission must consider assessments performed under §§ 11.147(d) and (e) and 11.150, 11.151, and 11.152. Some of the evidence under this argument was stricken by the ALJs. The ED discusses this issue without waiving his objections to any testimony.

Section 11.134 requires the Commission to consider "any applicable environmental flow standards established under § 11.1471, and, *if applicable* [emphasis added], the assessments performed" under §§ 11.150-11.152. Tex. Water Code § 11.147(e-3) provides that when environmental flow conditions for a basin are adopted by the Commission, §§ 11.147(b)-(e) no longer apply. Thus, for this BRA application, it is clear that §§ 11.147 (d) and (e) do not apply.

Concerning §§ 11.150, 11.151 and 11.152, § 11.150 relates to water quality, § 11.151 relates to impact on groundwater resources, and § 11.152 relates to effects of water rights permits on fish and wildlife habitats. Section 11.147(d), which does not apply because of § 11.147(e-3), refers to water quality assessments performed under § 11.150. Likewise, § 11.147(e), specifically replaced by the S.B. 3 rules, discusses fish and wildlife habitat and refers to the studies done under § 11.152. Therefore, §§ 11.150 and 11.152 are not applicable to this application. The ED also believes § 11.151, impact on groundwater, also no longer applies.

If the ALJs or the Commissioners determine that § 11.152 can still apply to this application, the ED argues that there is no need for habitat mitigation for this application because there are no new impoundments being authorized. Dr. Alexander testified that she had never seen habitat mitigation review for an application to divert more water. Tr. 3693, lines 4 – 24. Furthermore, FBR's expert, Mr. Trungale, did not identify any specific mitigation he was requesting in his testimony and there is no evidence in the record of specific recommendations for mitigation of impact on habitat other than streamflow, which is covered by the S.B. 3 environmental flow standards.

Implementation/Compliance

FBR, OPIC and NWF argue that the S.B. 3 rules for the Brazos River Basin are not being implemented properly. The primary argument is that the way the rules are being implemented by the ED relating to what measuring points will govern an application.

OPIC argues that both a downstream and upstream measurement point should be utilized before diversions are authorized, and asserts that Dr. Alexander testified (with no citation to the transcript) that the permit should provide a mechanism to translate the flow requirement of the standards downstream to the point below where diversions under BRA's requested permit are taking place. OPIC may be referring to a discussion between Judge Burkhalter and Dr. Alexander on p. 3995, line 25, to 3997, line 2. Dr. Alexander agreed that the ALJ's suggested language for the WMP would clarify that BRA's diversions would be subject to the standards and would ensure that BRA was complying with Permit 5851 and the WMP. Ordering Provision 2.(b) in in the ED's proposed Order.

LGC argues that reservoirs are not protected under the S.B. 3 rules. The ED disagrees that implementation of the S.B. 3 rules has been improper. The ED notes that Dr. Alexander testified that the Commission adopted environmental flow standards for the Brazos River Basin on February 12, 2014 as part of its legislative implementation of the S.B. 3 statute. Ex. ED-R1, p. 16 lines 34-41. These rules (30 Tex. Admin. Code Chapter

298 Subchapter G) contain hydrologic conditions, schedule of flow quantities, measurement points, subsistence flows, base flows, high flow pulses, and permit conditions. Ex. ED- R1, p. 17 lines 17-22. These environmental flow standards are considered by rule to be adequate to support a sound ecological environment. 30 Tex. Admin. Code §§ 298.5, 298.460(a) and (b).

The process for adoption of environmental flow standards in the state has been extensive and taken several years. This process began in the major river basins with local bay and basin groups stakeholder committees, which appointed basin and bay expert science teams to make recommendations on these flows. The process results in the stakeholder committees preparing a report to the commission with its environmental flow recommendations. The TCEQ then writes rules to implement environmental flow standards for the basin and bay areas.

S.B. 3 amended § 11.147 and added § 11.1471 to the Tex. Water Code. Section 11.1471 requires the commission by rule to “adopt appropriate environmental flow standards for each river basin and bay system in this state that are adequate to support a sound ecological environment” These standards were to be based on existing studies rather than new studies because of the timeline for adoption of the rules. See, 30 Tex. Water Code § 11.1471(b)(9) (Commission is to consider “reasonably available scientific information.” Tex. Water Code § 11.02362(m). Further study can be conducted and the results can be considered later in the S.B. 3 adaptive management process, which is currently underway in the Brazos River Basin. Under the stakeholders committee’s work plan for the Brazos River Basin, the standards will be revisited every 10 years, which is the timeframe included in TCEQ’s adopted rules. Tex. Water Code § 11.02362(p). The only limit on changes to the standards is that the pass through or release requirement in the S.B. 3 standards in a permit cannot be increased by more than 12.5%. Tex. Water Code § 11.147 (e-1)(1).

FBR argues that BRA has not shown it can meet the requirements to pass pulse flows, using Lake Proctor as an example. BRA’s WMP states that the storage in Lake Proctor is not relevant to the System Operation Permit in most situations because of local demands. Ex. BRA 113, Technical Report Section 4.1.3.6. Mr. Brunett also testified that, operationally, BRA would not be using system operation water from storage in Lake Proctor. Tr. 4092 line 22 to Tr. 4093 line 1. The ED’s position continues to be that BRA has fully and completely implemented the adopted standards into its WMP and Permit 5851.

Additionally, concerning measurement points, the ED argues:

First, measuring points for the rule requirements are specifically listed in the rules. See 30 Tex. Admin. Code § 298.480.

Second, there is nothing in the S.B. 3 rules mandating the use of more than one measuring point.

Third, the applicability of different measuring points is discussed in the WMP. Ex. BRA 113 pp. 40-43. The applicable measuring points for each reach in the WMP area is set out on Table 4.4 on pages 41-43. For diversions upstream of a measurement point gage, this first downstream gage will be the applicable gage. For diversions downstream of a measuring point gage, the environmental flow requirement will be the addition of the aggregated downstream diversion rate to the flow standard at the gage. Ex. BRA 113, p. 40-41.

Fourth, in case of several measuring points possibly being “applicable” Dr. Alexander testified that the TCEQ would choose the measuring point closest to the diversion point. Tr. 3930, lines 8–11. Dr. Alexander testified that requiring the standard at more than one measurement point would be impractical and unreasonable. Tr. 3916 line 14 to 3917 line 3. Mr. Trungale agreed that to require a diversion to meet all measurement points downstream of a diversion would be complicated and challenging. Tr. 3500 lines 8-25. This would not be an instantaneous response, but would require determining what future flows will be at one of the lower gages. Tr. 3503 line 24 to 3504 line 8. Travel times will vary at different places. Tr. 3504 lines 18-23.

Fifth, except to the extent that state water flows through them, reservoirs are not specifically addressed in the S.B. 3 rules for the basin. There are no measurement points at reservoirs and BRA’s existing water rights are not subject to the standards. However, any additional inflows that BRA impounds under this Permit will be junior refills, which are subject to the standards. The rules were promulgated to protect the Brazos River, its associated tributaries and bay and estuary system, and the San Bernard River and its associated tributaries. 30 Tex. Admin. Code § 298.460(a).

Dow, FBR, and NWF argued that temporary impoundment of pulse flows is not in compliance with the adopted standards, Although the ED agrees with the ALJs that this limited temporary impoundment is a reasonable result that is feasible of execution, the ED agrees that a reasonable time limit could be placed on this temporary impoundment. BRA could then address any non-compliance with such a time limit in the Environmental Flows Achievement Report that BRA is required by its WMP to submit each year.

The environmental review for this permit was based on the S.B. 3 rules for the Brazos River basin, which were adequately implemented in Permit No. 5851 and its WMP.

XVI. PUBLIC WELFARE, PUBLIC INTEREST, AND INSTREAM USES

Public Welfare/ Public Interest

FBR, LGC, and Dow raise arguments on this issue in other areas of their exceptions, which the ED has already addressed. FBR adds a specific argument that the TCEQ's review of public interest should extend beyond recreational uses of water – such as interests to local communities, adjacent property owners, recreation, tourism, culture, aesthetics, and the economy. The ED disagrees, and re-states his position on this issue. Section 11.134(b)(3)(C) of the Tex. Water Code provides that the Commission shall grant an application for a new appropriation only if several factors are met. One of those factors is that the application “is not detrimental to the public welfare.” Tex. Water Code § 11.134(b)(3)(C). “Public welfare” is not defined in the Water Code, and there has been no case law on what this specific provision means.

The ED has consistently argued that the “public welfare” statute does not include factors outside of the TCEQ's jurisdiction. The supreme court's decision in *Texas Railroad Comm'n v. Texas Citizens for a Safe Future and Clean Water*, 336 S.W. 3d 619 (Tex. 2011), is support for that interpretation. The court decided that the Railroad Commission did not have to consider traffic considerations in considering the “public interest” when deciding whether to issue an injection well permit.

The *Texas Railroad Comm'n* case relied on the fact that no other factor in the relevant statute mentioned traffic concerns, the statement of purpose of the Act [in that case Tex. Water Code Chapter 27] did not promote a purpose of protecting public welfare outside of where natural resources were concerned, there is not statutory directive related to traffic safety in the Act, and that the Railroad Commission's interpretation of its statute was reasonable. 336 S.W. 3d 628-630.

The court specifically discussed whether the court should consider the agency's expertise in making this decision. In deciding that it should, the court stated:

We disagree with Texas Citizens that the Commission's public interest inquiry is unrelated to its administrative expertise: to the contrary, the Commission interpreted the public interest finding in such a way as to ensure that it will *only* consider matters within its expertise. As we concluded above, the Commission's determination that “public interest” does not include traffic-safety matters is reasonable under the Act's statutory scheme. We further conclude it is reasonable

given the Commission's unique competence as the state's agency overseeing oil and gas production.

As an initial matter, the breadth of the term “public interest” is a question of law that implicates the Commission's very technical decision of whether to grant an injection well permit. But, more importantly, we disagree with Texas Citizens that the Commission's public interest inquiry is unrelated to its administrative expertise: to the contrary, the Commission interpreted the public interest finding in such a way as to ensure that it will *only* consider matters within its expertise.

336 S.W.3d at 630.

Likewise, Tex. Water Code § 11.134(b)(3)(C) does not include impact on lake levels as a reason for granting or denying a water right. Chapter 11, in its provisions relating to Water Rights permitting, does not mention lake levels. The TCEQ has no authority to require certain lake levels within a reservoir in order to protect economic or recreational interests under the “not detrimental to public welfare” provision or otherwise.

The ED objected to the testimony in the record relating to economic impact, primarily from the parties who are concerned about lake levels at Lake Granbury. In Order No. 31, the ALJs struck some, but not all of this testimony. Lake levels are not relevant to a water right application under § 11.134. There is nothing in the Tex. Water Code that allows the TCEQ to reduce, modify, or deny a request to appropriate water because the action would draw down lake levels.

In the hearing, BRA discussed agreements it had made with Lake Granbury to keep reservoirs at certain levels. However, the fact that BRA does this voluntarily does not mean that there is a requirement in the law that the TCEQ must enforce regarding economic impact due to lake levels, or due to any other concern. The TCEQ cannot require that an applicant protect lake levels for economic reasons.

Additionally, an interest in recreation, which is not connected to a water right, is not specifically protected under § 11.134 of the Tex. Water Code. A permit can be granted for recreational use under Tex. Water Code § 11.023. However, review of a new appropriation of water would only consider recreation as it related to impact on the environment. That impact is now governed by the SB 3 rules.

For the reasons stated in the discussion of environmental flow rules, the S.B. 3 rules for the Brazos River Basin govern the environmental standards for Application No. 5851. This includes protection of instream uses. Tex. Water Code § 11.147(d) is the statute that requires a review of impact of an application on instream uses. Under § 11.147(e-3),

the adopted environmental flow standards will be placed in permits for new appropriations instead of the requirements in § 11.147(d).

XVI. CONSISTENCY WITH WATER PLANS

FBR argues that the ALJs are allowing BRA and the Commission to implement water planning, instead of following the strategies in the regional and State water plans because the SysOps permit is not a primary or secondary strategy in the regional and State plans. The ED replies that the TCEQ is not limited to issuing water rights permits based upon the primary or secondary strategies in the regional and State water plans; a proposed permit must instead be consistent with the plans, and Permit No. 5851 is a strategy in the plans.

For permit issuance, the Commission must find that an application addresses a water supply need in a manner that is consistent with the state water plan and the relevant approved regional water plan for any area in which the proposed appropriation is located, unless the commission determines that conditions warrant waiver of this requirement. Tex. Water Code § 11.134(b)(3)(E). An application must contain information describing how it addresses a water supply need in a manner that is consistent with the state water plan or the applicable approved regional water plan for any area in which the proposed appropriation is located or, in the alternative, describe conditions that warrant a waiver of this requirement. 30 Tex. Admin. Code § 295.16. BRA did not request a waiver of this requirement.

Ms. Wang, Senior Water Conservation Specialist at the TCEQ, found that Application No. 5851 is consistent with the approved 2011 Region G and H Water Plans and the approved 2012 State Water Plan because the BRA System Operations Permit is specifically listed as a strategy to meet future needs in these plans. Ex. ED-R6, page 9 lines 34-38; Ex. ED-R9, June 28, 2013 memo, second page, third full paragraph following Table 1. She testified that the 2011 Brazos Regional Water Plan identifies a projected water shortage for BRA of 382,841 acre feet in 2060 and that the System Operations Permit as a water management strategy would provide up to 84,899 and 25,350 acre feet of water per year for Regions G and H respectively. Ex. ED-R6, page 9 lines 27-32.

Brad Brunett sponsored Ex. BRA 115, which consists of applicable excerpts from the 2012 State Water Plan regarding Regions G and H. Mr. Brunett testified that water users within Region H need more water supply than that identified and recommended from the System Operations Permit in the 2011 Regional H Regional Water Plan and 2012 State Water Plan because entities located within Region H have approached the applicant to request additional water from the System Operations Permit. Ex. BRA 107

page 39 lines 7-14. Mr. Brunett testified that BRA's request list for water is ultimately larger than what BRA will be able to contract for under the System Operation permit. Tr. 4037 lines 7-12. See also Ex. BRA 143. Mr. Brunett testified that the 2011 regional water plan was produced prior to the 2011 hearing and prior to the modeling and water management plan subject to the 2015 hearing. Tr. 2815 lines 8-24. He also testified that the 2011 plan is the current regional water plan that's in effect. *Id.*

The ALJs found in the 2011 PFD that the Application No. 5851 and the proposed system operations permit was consistent with the State and regional water plans as required by Tex. Water Code § 11.134(b)(3)(E). The ALJs concluded in the 2015 PFD that the statute does not require that an application exclusively address water supply needs identified in the State plans, and that Application No. 5851 addressed water supply needs in a manner consistent with the plans. The ED agrees.

XVIII. CONSERVATION AND DROUGHT PLANNING

FBR argues that BRA's Water Conservation Plan and Drought Contingency Plan are too discretionary.

The ED replies that discretion is allowed in a water conservation plan or drought contingency plan because the goals established in both are inherently unenforceable.

Water Conservation Plan

For issuance of the permit under Tex. Water Code § 11.134(b)(4), the Commission must find that the applicant has provided evidence that reasonable diligence will be used to avoid waste and achieve water conservation as defined in Tex. Water Code § 11.002(8)(B), "those practices, techniques, and technologies that will reduce the consumption of water, reduce the loss or waste of water, improve the efficiency in the use of water, or increase the recycling and reuse of water so that a water supply is made available for future or alternative uses."

BRA provided testimony and evidence regarding its water conservation plan at the 2015 hearing. Mr. Gooch testified that the System Operation Permit is itself a water conservation strategy because it reduces the waste of water and improves efficiency in the use of water by coordinating reservoir operation with unappropriated stream flows. Ex. BRA 119, p. 86 lines 1-5. BRA as a wholesale water supplier does not have direct contact with retail customers who are the ultimate users of municipal water it supplies, nor does BRA own or operate the industrial or agricultural facilities it supplies. Ex. BRA 119, p.87 lines 8-12. Appropriate water conservation efforts for a wholesale supplier therefore differ from those of a retail supplier or an industrial or agricultural user, and TCEQ conservation requirements recognize this difference. Ex. BRA 119, p. 87 lines 12-

15. Mr. Gooch testified that BRA's water conservation plan meets the wholesale supplier requirements in 30 Tex. Admin. Code § 288.5. Ex. BRA 119, p.88 lines 4-21; p.89 lines 1-8. Mr. Gooch testified that BRA's water conservation plan meets the requirements for an agricultural user in 30 Tex. Admin. Code § 288.4. Ex. BRA 119, p.90 lines 5-21; p.91 lines 1-20.

BRA's water conservation plan for Permit No. 5851 has water use goals of 153 gallons per capita per day (gpcd) for year 2015 and 140 gpcd for year 2025. The plan also includes reasonable strategies to achieve the goals for reduction in per capita water use. Ex. ED-R9, page 1 paragraph 4. TCEQ rules specifically note that the goals are not enforceable. 30 Tex. Admin. Code §§ 288.4(a)(1)(B); 288.5(1)(B).

Drought Contingency Plan

BRA provided testimony and evidence regarding its drought contingency plan at the 2015 hearing. Mr. Gooch testified that BRA's drought contingency plan satisfies TCEQ requirements under 30 Tex. Admin. Code § 288.22. Ex. BRA 119 p. 92, lines 19-21; p 93, lines 1-21; p. 94, lines 1-6. Mr. Brunett testified that BRA's intent is to enforce its drought contingency plan, Tr. 4037 lines 10-12. See also Ex. BRA 143. Mr. Brunett testified that the 2011 regional water plan was produced prior to the 2011 hearing and prior to the modeling and water management plan subject to the 2015 hearing. Tr. 2815 lines 10-15. He also testified that the 2011 plan is the current regional water plan that's in effect. Tr. 2815 lines 19-20. Mr. Brunett testified that the methodology used to set the trigger levels in BRA's drought contingency plan was consistent across all of BRA's reservoirs.

Ms. Wang testified in the 2011 hearing that BRA's drought contingency plan met applicable requirements for a drought contingency plan. At the 2015 hearing, Ms. Wang testified that BRA's 2012 drought contingency plan meets the requirements in 30 TAC Chapter 288. Ex. ED-R6 p. 7, lines 16-24. The goals set in drought contingency planning are not enforceable. 30 Tex. Admin. Code § 288.22(a)(6).

The ALJs found in the 2011 PFD and the 2015 PFD that the application complied with all applicable drought and water conservation planning legal requirements. The ED agrees.

XIX. RETURN FLOWS

FBR relies on the arguments of NWF on this issue. NWF argues that any permit issued authorizing diversion of return flows must clearly identify the specific return flow amounts BRA would be authorized to divert and the sources of those amounts. The ED, who has already argued the issue of return flows in his exceptions, agrees with NWF. However, the ED does not agree that a portion of these return flows must be dedicated

to the environment because other statutes in the Water Code address environmental impact. For the Brazos River, the S.B. 3 rules govern this impact.

XXI. INTERBASIN TRANSFERS

FBR argues that BRA must comply with Tex. Water Code § 11.134 as well as § 11.085 for its interbasin transfer. The ED disagrees. Section 11.134 applies to the new appropriation part of this application, and § 11.085 applies to the request for an interbasin transfer.

While the ED believes that the plain language of the statute is sufficient, In the *City of Marshall v. City of Uncertain*, 124 S.W.3d 690 (Tex. App. – Austin 2003, pet. granted on other grounds), this issue was a basis of appeal. An application was filed with the TCEQ for a water right amendment. The applicant sought interbasin transfer authorization and a change in purpose of use. No public notice was provided of the application, which was approved. A motion to overturn and a motion for rehearing was subsequently filed with the TCEQ, which denied both motions. A civil lawsuit followed. On the issue of notice, the appellate court found that an application could and should be bifurcated when the application implicated separate sections of the Tex. Water Code. The court held that an application for an interbasin transfer is not subject to notice and hearing if it falls under § 11.085(v). Application No. 5851 falls under § 11.085(v) because BRA seeks to transfer water from a basin to its adjoining coastal basin or from the part its retail public utility service area to a contiguous part of its service area that is not within the basin of origin. Both factual scenarios constitute grounds for an exempt interbasin transfer.

The ALJs found in the 2011 PFD and in the 2015 PFD that the interbasin transfer authorization sought by BRA fits within the exemption to interbasin transfer requirements pursuant to Tex. Water Code § 11.085(v)(3) and (4). The ED agrees. The ALJs did not change this finding in the 2015 PFD and rejected FBR's proposed permit language on the issue. The ED believes that this was also appropriate.

XXII. OTHER CONCERNS REGARDING THE PROCESS

LGC argues that Application No. 5851, if granted, must be based on a new paradigm for water rights permitting that should come from legislation or rulemaking. The ED disagrees that either legislation or rulemaking is necessary to issue Permit No. 5851 because he believes that the current TCEQ statutes and rules are sufficient.

XXIII. BEFORE AND AFTER CONSTRUCTION OF THE ALLENS CREEK RESERVOIR

NWF argues that, if the term permit expires and Allens Creek Reservoir hasn't been built, there will be a significant amount of water granted to BRA that is unavailable. NWF suggests that this contingency be addressed. The ED replies that it has been addressed because the demand levels offered by BRA are based in part upon whether or not the reservoir is built.

If Allens Creek has not been built but the time period has been extended again for the construction of the reservoir, BRA can apply to extend the term permit. If Allens Creek has not been built and the time period for construction has not been extended, i.e. the Allens Creek permit expires, the term permit would expire and the water authorized under the Allens Creek permit would be available for use in the stream by priority.

The ED has argued that BRA should receive a term permit for the already appropriated water for the Allens Creek Reservoir to expire in 30 years or when the reservoir is actually built and impounding water. Ex. BRA 132B, used by the ALJs for their proposed permit, and the ED's recommended permit, based on Ex. BRA 132A and filed as Exhibit B in his exceptions, are both for a specific diversion amount only, not impoundment, and the extra water for Allens Creek Reservoir should not be added to that amount. Ex. ED-R1A, p. 2 line 18 to p. 3 line 6.

BRA has included the ED's recommended special condition discussed in Ex. ED-R3, p. 2 lines 18-29, in Exs. BRA 132A and B and it is included in the ED's recommended permit, which is based on Ex. BRA 132A, filed as Exhibit B in his exceptions. The special condition states that the Allens Creek diversion amount can be diverted as part of the authorized diversion amount. Exs. BRA 132A and B, Section 1.E. See also Exhibit B in the ED's exceptions.

XXIV. COASTAL MANAGEMENT PLAN

FBR arguments on this issue are related to its arguments on the S.B. 3 standards. The ED has addressed those arguments under the section discussing the issue of environmental flow rules.

The ED argues further that the TCEQ did perform a coastal management program (CMP) consistency review. Under 31 Tex. Admin. Code § 501.33, the TCEQ "shall assess the effects, if any, of the issuance of the permit on the bays and estuaries of Texas." In the 2011 hearing, Mr. Dakus Geeslin prepared an environmental memo and included a Coastal Management Program Consistency review. Ex. ED-DG-3B, pp. 12-13. Mr.

Geeslin concluded that the coastal policies specifically addressed in this analysis the proposed application should not have significant adverse impacts upon coastal natural resource areas.

The environmental review for the first application was based on statutes which no longer apply to this application. The environmental conditions are governed by the SB 3 rules for the Brazos River in Chapter 298, Subchapter G. These environmental standards by rule are adequate to support a sound ecological environment.

Additionally, the requirements in the S.B.3 rules are more stringent than the original flow requirements because the S.B.3 rules contain more measurement points, generally include higher flow rates, and include hydrologic conditions based on actual drought conditions in the basin. Application No. 5851 therefore remains consistent with applicable CMP goals and policies.

The ALJs in their 2011 PFD and 2015 PFD conclude that BRA's application and the ED's CMP review complies with the applicable law. The ED agrees.

XXV. WETLANDS

FBR's arguments on this issue are on statutes that no longer apply to this application. The ED has addressed the arguments in other sections, including his discussion on the environmental flow rules and the coastal management plan review.

The ALJs in their 2011 PFD and 2015 PFD found that wetland issues, and intentional overbanking, are outside the scope of this hearing and are not relevant. The ED agrees.

XXVI. WATERMASTER

Dow argues that a provision should be included in Permit No. 5851, making the permit contingent upon the continued existence of a watermaster in the lower Brazos River Basin. The ED replies that such a provision is unnecessary.

Dr. Alexander testified that an assumption that the watermaster program will cease is unrealistic, and current TCEQ statutes and rules govern appropriation by any water rights holder. Tr. 3981 lines 11-16. In addition, the last page of both the ALJs' proposed permit and the ED's recommended permit state that Permit No. 5851 "...is issued subject to all superior and senior water rights in the Brazos River Basin." BRA will be governed by the laws applicable to all water rights holders in Texas, regardless of the existence of a watermaster.

XXVII. POSSIBLE FUTURE LOSS OF USGS GAUGES

FBR argues that, regardless of whether a provision is required, a permit provision should be included to address the possible loss of a USGS gage. FBR bases its position on the Commission's discretion to add this type of provision to a permit to protect environmental flows.

The ED replies that the WMP Ex. BRA 113, page 2, provides if a streamflow gage is discontinued, BRA can submit an alternate gage to the ED for review. The ED did not include a gage loss provision in his recommended permit because the permit incorporates the WMP.

In their 2011 PFD, the ALJs did not require a special condition relating to streamflow gage loss or change. In their 2015 PFD, the ALJs did not find that a permit should include a gage replacement provision. The ED agrees because any permit issued in this case incorporates the WMP, which provides for the contingency raised by FBR.

XXVIII. ADDITIONAL PERMIT CHANGES PROPOSED BY OTHER PARTIES

FBR proposes a permit provision to address USGS gage contingencies in its exceptions at p.107. The ED does not support such a provision for the reasons stated in Section XXVII.

Dow proposes a revised drought special condition in its exceptions at p.46 and p.56, and a WMP that revises the ALJs' revision at p.47. The ED does not support the drought provision because he believes the provision in his recommended permit is sufficient and that Dow's provision is not reasonable.

LGC proposes a limitation of maximum diversions by reach updated to account for reductions in appropriation amounts in its exceptions. The ED disagrees because he doesn't believe the appropriation should change. If the appropriation amount does change, then the ED agrees that the WMP will need to be amended to change the maximum diversions by reach.

NWF did not offer specific provisions, but states that additional existing stream gages should be used as measurement points in its exceptions at p.22. The ED does not support this for the reasons stated in Section XIV.

OPIC did not offer specific provisions, but stated that two gages should be used as measurement points in its exceptions at p.4. The ED does not support this for the reasons stated in Section XIV.

The City of Lubbock offered revised Special Conditions 5.A.3 and 5.A.4 in its exceptions at p.7. The ED does not support the revisions for the reasons stated in Section I.

The Cities of Bryan and College Station offered revised Special Conditions 5.A.3 and 5.A.4 in its exceptions at pp.8-9. The ED does not support the revisions for the reasons stated in Section I.

The Executive Director again requests that the Commission adopt the ED's proposed Findings of Fact, Conclusions of Law, and Order, and issue the permit recommended by the ED.

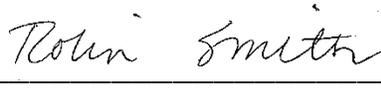
Respectfully submitted,

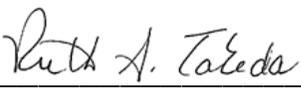
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CERTIFICATE OF SERVICE

I certify that on the 31st day of August 2015, the foregoing *Executive Director's Reply to Exceptions* was filed 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 to the persons on the attached Mailing List.



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