

SOAH DOCKET NO. 582-10-4182
TCEQ DOCKET NO. 2005-1490-WR

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

EXECUTIVE DIRECTOR'S RESPONSES TO EXCEPTIONS

The Executive Director (ED) of the Texas Commission on Environmental Quality (Commission or TCEQ) files these responses to the Exceptions filed by the other parties.

BRA's Exceptions: The ED agrees with BRA's exceptions to the ALJs' recommendations concerning the two-step process. The ED also agrees, as set out in our exceptions, that if the Commission approves the ALJs' analysis of this issue, that an interim order and a remand is appropriate.

Concerning the contents of an interim order, the ED agrees that an Interim Order containing the amount of unappropriated water available at the Richmond gage, the environmental requirements, and a determination of the reuse issues is necessary for in the Interim Order. The ED requests that the Commission affirm the ALJs' recommendations concerning environmental flows, and also affirm the ALJs' findings on beneficial use, public welfare, conservation, consistency with the state and regional plan, and the Comanche County Grower's issues. The ED agrees that an amount of available water at the Richmond gage would be sufficient to approve in the interim order because the other diversion points can be determined based on that number. This number is the maximum amount of water that BRA can divert from the Brazos River Basin per year. All other amounts determined at other diversion points must add up to less than that amount.

The ED and BRA have two different proposed amounts for the Richmond gage. As Ms. Alexander testified in the hearing, at the time of the modeling, the ED had not reviewed the revised modeling on which BRA bases its proposed amount. However, Ms. Alexander testified that the revised model with a different approach to modeling environmental flows "would better represent the environmental flow requirements and what those impacts on availability would be." Tr. p. 1951, pp. 18 – 32. This model has been vetted by being used in the environmental flow process. Tr. p. 1950, line 4 to p. 1951, line 2. Therefore, the ED does not oppose this number. BRA will need to determine how much water is interruptible and how much is firm, after taking into account the environmental flow requirements.

The ED strongly agrees with BRA's argument that the Possum Kingdom storage must be modeled at its authorized capacity and not the existing capacity because BRA has a right to the authorized amount and can obtain that amount if it dredges or raises the dam. This is an important issue for the ED's modeling of new appropriations and we ask the Commission to affirm that availability determinations must consider water rights with storage at the full authorized amount of storage.

The ED maintains that its reuse approach is better than BRA's or the ALJs' approach for the reasons set out in the ED's closing arguments and exceptions.

Concerning staying the proceedings for 12 months to allow BRA to develop and submit the Water Management Plan to the ED and other parties for review, the ED has no objection.

Concerning the 8 month timeline for the ED to review the plan and for SOAH to hold a hearing, the ED can agree as long as the interim order contains the following provision:

The ED will use its best efforts to complete his technical review of the Water Management Plan in time for SOAH to hold a hearing within 8 months of BRA's initial submission of the Water Management Plan to the ED. However this timeline is dependent upon the ED receiving the Water Management Plan from BRA for review by the 12 month deadline, and on BRA's prompt response to any issues the ED requests. The ED may request an extension of time for the commencement of the hearing if BRA does not timely respond to the ED's requests, or if circumstances beyond the control of the ED and his Staff prevent the ED from completing his review and approving the Water Management Plan in time for the hearing to commence in time to meet the 8 month deadline.

The ED further requests that if the Commission decides to issue an interim order and remand, the Commission include in the interim order the Special Conditions for the Draft Permit included in BRA's Attachment 1 to its Exceptions, with the following exceptions:

1. P. 9, Special Conditions A.1 - A.4, do not include if the Commission agrees with the ED's reuse approach. Instead include Special Conditions A.1 – A.13 in Ex. ED-K-2.
2. P. 11, Special Conditions C. 2 - C.5 in the ED's draft permit, in Ex. ED-K-2, include if the Commission agrees with the ED's reuse approach.
3. P. 13, Special Condition C.7, do not include "a Water Management Plan for the Brazos River Basin which details how such limitations will be altered." The Special Condition could substitute "an amendment to the Allen's Creek permit" for this language. However, if the Commission decides to affirm BRA's amount of water available at Richmond and defer a consideration of firm/interruptible water (based on the Commission's determination on reuse) until the Water Management Plan, this exception is unnecessary.
4. P. 13, Special Condition D.2, Sentence with Footnote 6, do not include if the Commission agrees with the ED's reuse approach.
5. P. 15, Special Condition D.4.l, do not include if the Commission agrees with the ED's reuse approach. Include the Special Condition D.4.m in Ex. ED-K-2.
6. P. 16, Special Condition E.5, sentence with Footnote 8, delete BRA's added clarification that instream flow conditions must be met at the next downstream gage. This issue can be determined in the WMP proceedings if BRA can produce hydrologic analyses showing that if the flows were met at the next downstream point, there would be no impact on the instream conditions at measurement points further downstream. See, Ex. ED-K-2, Special Condition D.4.b.
7. P. 18, Special Condition E.7, Sentence with Footnote 9, include.

Texas Parks and Wildlife Department (TPWD) Exceptions: The ED agrees with TPWD that Tex. Water Code Section 11.046(c) is not a separate authorization for reuse. However, the ED continues to disagree with TPWD on how reuse is authorized. To say that a person has to have the authorization for the water prior to obtaining a reuse authorization is inconsistent with Texas Water Code Section 11.042(b) and (c). Both of these statutes allow a person to put some type of water into the river and take it back out for use. It is not a conveyance of stored water under Tex. Water Code § 11.042(a). It is an authorization for use (as in the case of groundwater

that has just been taken out of the ground or possibly water from another basin) or reuse (in the case of effluent or other types of return flows).

However, even if an authorization is required to apply for a Section 11.042(c) permit, what type of authorization does an entity have to have? Under Section 11.042(c), if having an authorization means owning underlying water right, a TPDES permit, or having a contract, the ED agrees.

The ED recommends that TPWD's exceptions be overruled.

Cities of Bryan and College Station (the Cities): The Cities are concerned that the ALJs did not address the settlement agreements of the parties which allow several entities to come in and obtain a bed and banks authorization for their own return flows. In fact, under the PFD, entities could not obtain a bed and banks authorization for their own return flows. The ED agrees with the Cities that the settlement with the parties is not protected in this proceeding. BRA has appropriated (under BRA's modeling) the Cities' return flows and the Cities cannot obtain an authorization for these flows that are already appropriated. The ED raised this concern and discussed this issue at the hearing. E.g., Ex. ED-KA-1, p. 44, line 14 to p. 45, line 12. This issue does not prevent the draft permit from being issued, but the ED cannot issue another reuse permit to other entities for the return flows granted to BRA, under either reuse theory. This issue may be able to be resolved in the Water Management Plan proceeding.

National Wildlife Federation (NWF): NWF would require more of a showing that BRA will beneficially use the water it is appropriating in this application. The ED disagrees. BRA is a river authority and a water supplier that testified at length about its plans for the water in the future. PFD, pp. 63 – 64. NWF asserts that BRA cannot show beneficial use without showing that every drop of water it is requesting is in the region or state plan. This has never been a requirement and cannot be because water developers and suppliers must have the flexibility for planning in the future. The Water Code recognizes this need in the cancellation statutes, Tex. Water Code §§ 11.171 - .177. The ED agrees with the ALJs' analysis of this issue.

Concerning the conservation review, NWF refers to Ms. Wang's testimony as her saying that conservation plans "sometimes mistakenly base the quantified goals on the base year 2005." NWF Brief, p. 5, second full paragraph, first sentence. This statement implies that Ms. Wang said that basing quantified goals on year 2005 is a "mistake." In fact, Ms. Wang testified that basing 5 and 10 goals in the 2009 plan on the 2005 plan is an "acceptable range". Tr. p. 1776, lines 12 -15. These plans were due to be updated in 2009, based on the 2005 law. See Tex. Admin. Code § 288.30. The five and ten year goals could run from 2005 and did not have to run from 2009, the date of the plan, because the requirement began in 2005. Tr. p. 1775, line 9, to p. 1776, line 15.

There are two types of ED review of a conservation plan. A new application for new water requires a technical review of the applicant's conservation plan. Tex. Water Code § 11.1271(a). 30 Tex. Admin. Code § 295.9. There is also the review required by Tex. Water Code Section 11.1271 by water right holders over a certain amount.

Ms. Wang testified that for the BRA application review, she considered BRA's wholesale water supplier Conservation Plan to be the primary plan for BRA and therefore she did a technical review of that plan. Tr. p. 1781 line 17 to p. 1782 line 5. She reviewed BRA's 2005 wholesale water supplier conservation plan, as that was the one existing at the time the application was filed. Ex. ED-KW-1, p 6, lines 19 – 21. She later did an administrative review of BRA's 2009

non-irrigation and irrigation water conservation plans as part of her standard conservation review of plans. Tr. p. 1781 line 17 to p. 1782 line 5. ED-Ex. KA-1, p. 8, lines 11 – 24. Ms. Wang followed TCEQ rules in her review.

NWF argues that the ALJs incorrectly determined that environmental flow conditions cannot be added to existing water rights. The ALJs were correct, because none of those existing water rights were in front of the ALJs in the form of amendments. Tr. p. 1949, lines 3 – 16. Mr. Gooch's and Ms. Alexander's testimony only stated that a water right that is being amended is subject to environmental flow conditions to protect impact on the environment. NWF's brief p. 10 last 3 lines to p. 11, first 4 lines.

NWF's excepts to the ALJs' conclusion that the scope of review is limited for detriment to the public welfare. NWF cites statutory criteria that relate to public welfare for its argument. This argument actually supports the ED's argument that if the other requirements of Section 11.134 and its cited statutes are met, the applicant has shown the application will not be detrimental to the public welfare absent some other information indicating harm to the public welfare. This is because these statutory criteria already contain public welfare considerations.

The ED recommends that NWF's exceptions be overruled.

Dow Chemical Company's (Dow) Exceptions: Concerning beneficial use, Dow argues that BRA's water right must be cut back in the second step of the two-step process if BRA cannot show that it can beneficially use the entire amount. As was the case for NWF, this argument assumes that BRA must have committed all of its water to a contract or project at the time it requests the appropriation. As stated above and as the ALJs stated, the "beneficial" use statute only requires that the water be "intended" for beneficial use.

Concerning salinity, Dow contends that BRA had the burden of proof on salinity, and that it did not meet that burden because BRA provided no independent analysis as to how the operation of its reservoirs would affect the water quality of existing water rights. No statute or TCEQ rule requires an applicant to perform a water quality analysis or study. The TCEQ rule on water quality review governs what the TCEQ requires for an application to appropriate water. 30 Tex. Admin. Code § 297.54 provides that the diversion cannot impair Texas Surface Water Quality Standards for the segment. BRA must meet these standards. Furthermore, the cases cited by Dow are not relevant. *Hale v. Colorado River Mun. Water Dist.*, 818 S.W.2d 537 (Tex. App. – Austin 1991, no writ, and *Biggs v. Lee*, 147 S.W. 709, 711 (Tex. Civ. App. – El Paso 1912, writ *dism'd w.o.j.*), were suits by a riparian landowner for water quality damage to their water right from diversions. *Bigham Bros. v. Port Arthur Canal & Dock Co.*, 997 S.W. 686 (Tex. 1906) was a suit for damages by a riparian for damage to its water right due to a canal being dug across their land. None of the three Texas cases involved an application for a new appropriation of water and the water quality analysis that should be done for those applications. None of these cases require the type of review requested by Dow for this application.

Dow also argues that Dow has a right to the water quality in the river at the time Dow received its permit. Nothing in the law supports that premise, including the TCEQ's "no injury rule" at 30 Tex. Admin. Code § 297.45(a) which states that an application should not adversely impact an existing appropriator of the "equivalent quantity or quality of water that was available with the full legal exercise of the existing water right before the change." As the ALJs found, this is reasonably construed to be water quality standards at the time that the application is granted.

The ED recommends that Dow's exceptions be overruled.

Friends of the Brazos River (FBR) Exceptions: FBR generally excepts to any of the options the ALJs made going forward except outright denial. Specifically, FBR opposes any action of the commission that would defer or abate the proceedings pending a more developed record on the Water Management Plan. Next FBR opposes any issuance of any permit that is based upon the ED's or BRA's draft permits. Finally, FBR urges the commission to defer decision making on a litany of issues raised by the parties throughout the hearing process. The ED urges the commission to choose either to approve the ED's draft permit or remand for further hearing on the WMP. Barring one of those outcomes, the ED urges the commission to rule on several of the issues raised by the parties. Some of the issues the commission should rule on include: the amount of water available due to system operations and Allen's Creek, the conservation plan, consistency with the state and regional water plans, environmental flows, environmental flow triggers, beneficial use, effects on wetlands and finally reuse. The ED believes the record is sufficiently developed to rule on each these issues. Further delay in decision making may negate the significant efforts and resources expended by the ALJs and the parties involved. A decision specifically on the two-step process and the return flows issue would bring much needed finality to the ED program staff and the regulated community and reduce costly debate in future permitting actions.

FBR generally opposes any decision which would result in a further hearing on the WMP. FBR's purported reasons include: a lack of definition about the process for the WMP, the amount of water to be considered under the WMP, and what types of changes to the WMP would require notice and hearing. The ED believes the WMP is sufficiently defined by the parameters set in the draft permits and that in the WMP process, to the extent any questions remain, those parameters could be further defined by the commission if the commission shares FBR's concerns.

The remaining issues raised have been extensively discussed in other parts of this brief and in previous filings by the ED.

The ED recommends that FBR's exceptions be overruled.

Comanche County Growers and Bradley Ware's (CCG) Exceptions: CCG raises essentially the same arguments it has made throughout this proceeding. CCG has continually tried to make its own applications consolidated into this proceeding. The ED agrees with the ALJs' treatment of CCG's applications for the reasons set forth in the PFD and for the reasons set forth by the ED in the hearing and in the ED's closing arguments and responses.

CCG complains that the ALJs incorrectly decided CCG's term permits are not entitled to protection under the no injury analysis. This argument is a continuation of CCG's efforts to turn their permits into something that they're not, permanent water rights. The TCEQ issued term permits to CCG and others over the years based upon the availability of water that was appropriated to others, but not currently being fully utilized. The ED has not yet determined whether these permits may be renewed. To the extent that the underlying senior water rights which CCG is essentially "borrowing" are protected under the "no-injury" analysis, then CCG is also protected. CCG is not entitled to any further protection under the law.

CCG's complains that if BRA should have access to others' return flows (which do not emanate from a source which BRA can control) and to future return flows which are based on speculative estimates out to 2060, then CCG should also have an opportunity to have those return flows. CCG essentially argues that since it applied for term permits before BRA applied for these reuse

flows, then some “implied administrative promise” dictates that it should have “dibs” over those return flows before BRA. As has been discussed in detail, the ED’s position is that BRA should be given the return flows only over which they have control and that CCG’s arguments (along with the Bryan and College Station’s arguments) illustrate precisely the problem with giving BRA those return flows for which it has no control and cannot account for. However, the ED also points out that CCG ignores the fact that BRA applied specifically for those return flows before CCG. CCG also ignores the fact that there may be other term permit holders that would be entitled to these flows under their theory.

The ED recommends that CCG’s and Bradley Ware’s exceptions be overruled.

Therefore, the Executive Director respectfully requests that the Commission either reverse the ALJs’ recommendation to deny and issue the ED’s draft permit Ex. ED-K-2, or enter an interim order ruling on several issues as discussed above, and remand the proceeding back to the State Office of Administrative Hearing for a determination of the contents of the Water Management Plan.

Respectfully submitted,

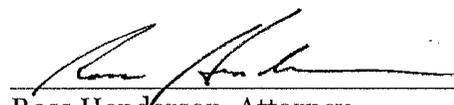
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CERTIFICATE OF SERVICE

I hereby certify that on November 17, 2011, "The Executive Director's Response to Exceptions" was sent via email to the persons on the attached mailing list and filed with the Chief Clerks Office and with SOAH.



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