

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

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

**PROTESTANT BRAZOS FAMILY FARMERS AND RANCHERS'
EXCEPTIONS TO THE SUPPLEMENT TO THE PROPOSAL FOR DECISION ON
REMAND**

TO THE HONORABLE ADMINISTRATIVE LAW JUDGES:

COMES NOW, Brazos Family Farmers and Ranchers (“BFFR”), including Bradley B. Ware (“Ware”) and William and Gladys Gavranovic (“Gavranovic”), Protestants in the above styled and docketed water rights contested case hearing before the Texas Commission on Environmental Quality (“TCEQ” or “Commission”) and the State Office of Administrative Hearings (“SOAH”) regarding the Application for Water Rights Permit No. 5851 by the Brazos River Authority (hereafter “BRA”) and respectfully files the following Exceptions to the Supplement to the Proposal for Decision on Remand. BFFR respectfully states as follows:

I. BRAZOS FAMILY FARMERS AND RANCHERS

When this case began in 2010, BFFR included the following Comanche County Growers: George E. Bingham, Juanita Sue Bingham, Brian Bingham, Kellie Bingham, Carey Bingham; Neil Carroll on behalf of William D. “Dwayne” Carroll and Mary L. Carroll; Dusty and Donna Clark Jones on behalf of Mary Frazier Clark, Don Frazier Clark, Donna Clark Jones; and Robert Starks, all of whom had pending water rights application for extension or removal of water rights permit terms. Since the issuance of the first Proposal for Decision and the subsequent remand, the Comanche County Growers have not participated actively in further proceedings and are pursuing their water rights through different counsel. Accordingly, BFFR as represented by Webb & Webb, Attorneys at Law, continues to include the Comanche County Growers nominally based on their participation in the Application for Water Use Permit No. 5851, but now also specifically includes Bradley B. Ware and William and Gladys Gavranovic, agricultural users in

the Brazos River Basin, as set forth in the BFFR briefing on the Proposal for Decision on Remand.

II. PROCEDURAL BACKGROUND

1. A Second Hearing on the Merits (“Second Hearing”) was conducted from February 17, 2015 through February 26, 2015 before the Administrative Law Judges (“ALJs”) Honorable William B. Newchurch and Honorable Hunter Burkhalter to consider BRA’s Water Management Plan for proposed Permit No. 5851.
2. The ALJs issued the Proposal for Decision (“PFD”) on July 17, 2105.
3. On January 20, 2016, the ALJ’s PFD, Exceptions and Replies to Exceptions were considered by the Commissioners at the January 20, 2016 TCEQ Agenda Meeting.
4. On January 29, 2016 the Commission entered an Interim Order (“the January 29, 2016 Commission Order”) remanding certain matters back to SOAH as specified in the Interim Order.
5. On February 19, 2016 the ALJs issued SOAH Order No. 36 Setting Schedule for Remand. In that Order, the Parties were directed to submit their stipulations of undisputed issues and list of disputed issues on or before March 11, 2016. The Parties’ Briefs on Disputed issues were due on or before March 28, 2016.
6. On March 10, 2016, BFFR, filed their Comments on BRA’s Proposed Stipulation on Remand Issues.
7. On March 28, 2016, the following parties filed Notices of Participation:
 - a. Brazos Family Farmers and Ranchers;
 - b. National Wildlife Federation; and
 - c. Lake Granbury Coalition.

8. On March 28, 2016, the following parties filed Briefs on Disputed Issues:
 - a. The Executive Director of the TCEQ;
 - b. Brazos River Authority;
 - c. Texas Parks and Wildlife Department;
 - d. DOW Chemical Company;
 - e. City of College Station and City of Lubbock;
 - f. City of Bryan; and
 - g. Friends of the Brazos River;

9. On April 5, 2016 BRA filed an Unopposed Motion for Extension of Time requesting one additional business day for any submissions by parties to file reply briefs. Of the parties that responded to BRA's request, no party objected to BRA's request.

10. On April 7, 2016 the ALJs issued SOAH Order No. 36 Granting [BRA's Unopposed] Motion to Amend Briefing Schedule.

11. On April 11, 2016, the following parties filed Reply Briefs on Disputed Issues:
 - a. The Executive Director of the TCEQ;
 - b. Brazos River Authority;
 - c. Texas Parks and Wildlife Department;
 - d. DOW Chemical Company;
 - e. City of College Station and City of Lubbock;
 - f. City of Bryan;
 - g. Friends of the Brazos River; and
 - h. Brazos Family Farmers and Ranchers.

12. On June 3, 2016, the ALJs issued a Supplement to the Proposal for Decision on Remand.

III. BFFR's ARGUMENT

In the Reply Brief on Disputed Issues, BFFR argued that the record was insufficient to allow the ALJ's to determine the issue set forth in the January 29, 2016 Order. Specifically, BFFR noted as follows:

“Contrary to BRA's assertions, other parties' expert legal and hydrology opinions suggest that the existing record cannot be clarified, but that additional evidence is needed to determine the water available for

appropriation by BRA under Systems Operation Permit No. 5851, including:

1. The amount of return flows which are groundwater based, versus the amount of return flows which are based on state water, which must be authorized for appropriation under §11.046, not TWC §11.042(c);
2. The amount of return flows—whether BRA’s own return flows or the return flows of others—which are available for BRA’s appropriation, including: a) A determination of carriage losses from the point of discharge to BRA’s diversion points, and b) The amount of return flows which could be subject to reuse by others;
3. The amount of BRA’s own return flows which should be subject to TWC §11.042 bed and banks authorization, and which are not the subject of a new appropriation (Note that this issue is inconsistent with the plain reading of TWC §11.046);
4. The amount of BRA’s own return flows which have satisfied the requirements of TWC §11.042, such that BRA can be granted bed and banks authorization;
5. Whether any other party’s indirect reuse of its own return flows should be limited as requested by BRA to a specific service area when no other party’s water right was at issue in this proceeding;
6. The impact of reducing the amount of BRA’s appropriation by the amount of return flows discharged from the City of Bryan, when BRA has contracted with Bryan to allow it to use its own return flows;
7. The impact of the 14% reduction of storage capacity on water availability, based on the authorized diversions and use of water at each diversion point; and
8. Given all the above determinations, what terms and conditions should be included in BRA’s Systems Operations Permit No. 5851?

As recognized by the parties, especially FBR, there is insufficient evidence in the record to implement the directives of the January 29, 2016 Interim Order. The record should be reopened to allow notice and hearing on the recent TCEQ policy directives, which will govern the issuance of Permit No. 5851, but which policy guidance was not available at the time of the contested case hearing.”

The Supplement to the Proposal for Decision on Remand was needed to address the critical issue of the reduction in BRA's appropriation based on eliminating the return flows of others, the associated reductions in storage and reservoir yields, the hydrology modeling, and the need for evidence of record to support that appropriation. Instead of requiring BRA to demonstrate and substantiate the impact of reducing its appropriation by eliminating the correct amounts of return flows of others, the ALJs accepted BRA's argument and simple arithmetical subtraction of basin-wide return flows as conclusive evidence of modeling outcomes regarding BRA's systems operations. In water rights hearings based on the TCEQ's Brazos River Basin Water Availability Model, the Executive Director has consistently maintained that hydrology modeling for the Brazos River Basin goes far beyond simple addition and subtraction of discharges, but is affected by a variety of factors, including but not limited to diversions, diversion rates, use of storage, and environmental flows as should be calculated in an Accounting Plan or Water Management Plan.

The ALJs state on pp. 13-14 of Supplement to the Proposal for Decision on Remand: "*Although it is a close issue,*" the ALJs conclude that BRA's argument that the modelling was performed using the correct amounts for BRA's own return flows, and only Table G.2.5 contained the error as argued is best supported by the evidence. But, BRA's "argument" does not point to any factual basis for its argument within the model calculations contained within the evidence of record. Accordingly, BRA's argument and the conclusions of the ALJs do not appear to satisfy the directives in the January 29, 2016 Commission Order to identify specific reductions in BRA's appropriation within the evidence of record. As stated by BFFR previously, even with the Commission's directive to make quantitative determinations of BRA's reduced appropriation using the evidence of record, the ALJs are still required to identify the evidence of record used to support their determinations and not rely on mere argument of the parties as to what could be derived from the record. If the reductions cannot be made using the evidence of record, then the record should be reopened to receive the necessary evidence.

Another critical issue which has become clouded under the January 29, 2016 Commission Order is the central question of how return flows should be considered in water

rights applications. There are no Commission rules specifying the consideration of return flows, and so the ALJs were left to develop their own approach which the Commission disagreed with, in part. Because of lack of TCEQ rules regarding return flows, the evidence of record is not clear or sufficient on the return flow issue. The parties—including the Executive Director—did not know what evidence to present to substantiate the Commission’s policy on return flows, because that policy was not announced until after the close of the record.

IV. SUMMARY

Considering the record in this case, Brazos Family Farmers and Ranchers objects to the following Findings of Fact, Conclusions of Law and Ordering Paragraphs:

Findings of Fact No.s 45 – 81 regarding Diversion Amount, Diversion Rates, and Diversion Points;

Findings of Fact No.s 162 – 170 regarding Return Flows; and

Finding of Fact No. 184 regarding Permit Conditions/Revisions.

Conclusions of Law No.s 10 – 19 concluding that the evidence of record was sufficient to support all specifically required permit terms and conditions under Texas Water Code, Chapter 11.

Ordering Paragraph No.1 1 through 4.

Based on the required revisions to the Revised Proposal for Decision contained in the January 29, 2016 Commission Order, these Findings of Fact, Conclusions of Law and Ordering Paragraph are not legally supportable under Tex. Gov’t Code which states:

Sec. 2001.174. REVIEW UNDER SUBSTANTIAL EVIDENCE RULE OR UNDEFINED SCOPE OF REVIEW. If the law authorizes review of a decision in a contested case under the substantial evidence rule or if the law does not define the scope of judicial review, a court may not substitute its judgment for the judgment of the state agency on the weight of the evidence on questions committed to agency discretion but:

- (1) may affirm the agency decision in whole or in part; and
- (2) shall reverse or remand the case for further proceedings if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:**

- (A) in violation of a constitutional or statutory provision;
 - (B) in excess of the agency's statutory authority;
 - (C) made through unlawful procedure;
 - (D) affected by other error of law;
 - (E) not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole; or
 - (F) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.
- [Emphasis supplied.]

Commission action on BRA's Application for Systems Operations Permit No. 5851 is subject to reversal or remand based on a substantial evidence review. The requirements of Texas Water Code, §11.134 (b) have not been met through lawful procedures and consideration of the evidence of record. Many of the terms and conditions of Permit No. 5851 rely on facts to be determined later and not reasonably supported or limited as required for permit issuance.

BFFR recognizes that this application process has been long and frustrating for all the parties, including BRA, the Executive Director, and all protestants, whether they actively participated or not. Friends of the Brazos River has proposed a resolution process which could short cut the cost and delay of rehearing or appeals: refer this matter to mediation for appropriate resolution of disputed issues, based on the TCEQ's asserted positions in this case. BFFR asserts that the TCEQ should act as FBR has suggested, so that the breadth of BRA's proposed appropriation can be fully considered in accordance with law, TCEQ policy, the public interest and the Parties' interests, and without further commitment of hearing resources. BFFR agrees and supports the Exceptions of Friends of the Brazos River, H. Jane Vaughn, et al and the relief requested.

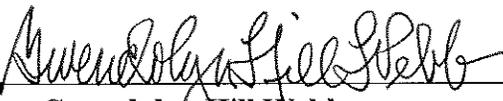
V. REQUESTED RELIEF

CONSIDERING THE FOREGOING, BFFR RESPECTFULLY REQUESTS that the Honorable Texas Commission on Environmental Quality take the following actions:

1. Initiate and complete rulemaking applicable to TWC Section 11.042 and Section 11.046;
2. Proceed to mediation to resolve pending issues so as to avoid additional commitment of contested case hearing resources which could only result in a legally voidable decision; and
3. Ultimately issue any Permit No. 5851 to Brazos River Authority in accordance with existing Commission policy and the Parties' agreements.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served via hand delivery, facsimile, electronic mail, overnight mail, U.S. mail and/or Certified Mail Return Receipt Requested on all parties whose names appear on the attached mailing list on this the 23rd day of June, 2016.

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