

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

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

**RESPONSE TO EXCEPTIONS OF OTHER PARTIES
TO THE SUPPLEMENTAL PROPOSAL FOR DECISION
BY**

**FRIENDS OF THE BRAZOS RIVER, JANE VAUGHN, LAWRENCE D. WILSON,
KEN C. HACKETT, AND BRAZOS RIVER ALLIANCE**

Friends of the Brazos River, its members, Jane Vaughn and Lawrence Wilson, and Brazos River Alliance and its member Ken Hackett (hereinafter collectively “FBR”) file this, their response to the exceptions of other parties to the Supplemental Proposal for Decision following the remand on the issues of BRA’s return flows and reservoir capacity.

I. Summary

FBR supports the exceptions filed by Texas Parks and Wildlife Department (“TPWD”), Dow Chemical, Brazos Family Farmers and Ranchers, and Bryan, Texas.

FBR opposes the main exceptions filed by BRA. Those exceptions highlight one of the overall problems with the position of BRA on Texas water law.

II. FBR’s Specific Response to BRA’s Exceptions

A. BRA’s Exception 1: Undercutting Incentives for Conservation

BRA’s first exception, if adopted, would not only create a new and dangerous precedent in Texas law, but it also highlights the overall problem with BRA’s approach. Texas water policy has and should encourage conservation of water. It has done so in a number of ways, such as by allowing farmers and others to sell their conserved waters. The

state's water planning policy and funding priorities also encourage conservation for all uses to help address future water needs. The SysOp permit runs contrary to these state policies.

In its effort to tie up all possible water that others might obtain or sell, BRA proposes to limit the sale of water that is returned to the river by others. BRA's approach would undercut the economic incentives for conservation by cities, industries and others that the opportunity to market conserved water creates.

Moreover, one of the biggest problems for conservation by cities is the loss of revenues resulting from the imposition of conservation practices or even encouraging such practices by its customers. That loss of revenue could be offset if the cities could sell their return flows, and not just in their service area.

Instead of assisting with conservation, BRA wants the right to be the exclusive seller of others' return flows outside the water right owners' service areas. There is no legal basis for BRA's position.

BRA argues that its approach encourages conservation.¹ FBR disagrees. BRA has not provided a valid policy reason for its approach. And BRA could, under the SysOp permit, tie up return flows from others and yet, may not use those return flows for many decades. There is no time limit set on BRA's use or sale of the water it seeks to appropriate from return flows of others. There is no reasonable time proposed or set for a beneficial use of the water. BRA will have vast quantities of water over a very long time.

A city could have the incentive to sell its return flows in a more timely fashion. Of course, if a city could sell the water downstream it would compete with BRA sales. It might

¹ BRA's Exceptions at 2.

even undercut BRA's price. But isn't that open type of market structure what Texas should be seeking for water, as it does for electricity for example? Isn't that what Texas does in the Rio Grande Valley to move agriculture water to cities?

BRA distinguishes such approaches with its arguments that BRA was created by the legislature to conserve and manage the resources of the Brazos River Basin, not municipalities.²

FBR disagrees. The legislature did not create BRA to have a monopoly on the sale of the state's water by BRA. BRA's rights to the water in the Basin are still subject to TCEQ approval and oversight. Additionally, as explained above, allowing municipalities to manage their own return flows could result in the conservation of the resources in the Basin.

Moreover, FBR has no confidence that BRA will manage the resources of the Brazos River Basin in any way except that one that financially benefits BRA. Clearly, BRA has not managed the appropriations it currently has in ways that benefit the basin, except when it benefits BRA. It could have used its water and reservoirs under current permits to help protect fish and wildlife habitat through timely releases of pulse flows. It could already be implementing SB 3 flow standards, at least in wet years. It has not. There is no evidence that it has or will seek to manage the natural resources in a balanced way in the future.

BRA's approach to its claim to the role of manager of the water in the basin has certainly not convinced industries, such as Dow, farmers and ranchers such as those involved here, conservationists such as NWF, or landowners along the river such as those represented

² Id. at 2.

by FBR, that it will manage the river in a balanced way. Even TPWD had to intervene to obtain concessions from BRA on that agency's needs.

BRA's interest is in maximizing its control over the remaining water in the basin, not just water that can result from system operations, is why FBR also argues that the proposed decision will be contrary to the principles of beneficial use and consistency with regional water plans. BRA is seeking and will have the ability under this permit to sell water at prices that allow it to undercut conservation practices recommended in the water plans of Regions G and H. Then, if it cannot sell the water to replace such conservation strategies or other strategies identified in the regional plans, BRA can simply bank water for the long-term, even 100 years or more under this SysOp permit. In doing so, it can and will hold more water in its reservoirs than it can now, subjecting more of the waters of the Brazos basin to greater evaporation or seepage.

Further, with its weak conservation and drought contingency plans, BRA has almost no real incentive or program for implementing serious conservation or drought contingency plans for its water in a timely fashion. BRA appears not to simply be in the business of selling water to fund its operations.

B. BRA's Exception 2: Risky Practice

BRA's second exception is simply an effort to gain control over most, if not all, the remaining available water, not just what it can obtain through its operations of its reservoirs as a system. The current proposed permit allows this in a risky way. It does not reflect a conservative approach that should be taken when 1) essentially all of the existing available water in the basin is being appropriated, and 2) the appropriation is subject to a complex

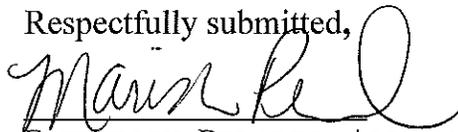
water management plan (“WMP”) that clearly allows BRA to try to meet “requirements,” such as the provisions for meeting environmental flow standards, with annual experiments rather than clear tests of compliance.

FBR continues to urge a conservative approach, limiting BRA to less water, such as the amount Dr. Brandes determined is available and allowing BRA to implement and experiment with the WPM. BRA can always return in the future and seek additional water once it has proven it can implement the WPM, once it has experimented with the environmental flow standards, which it is clearly intending to do, and once TCEQ has a better idea of the impacts of the new drought of record and up-to-date projection on needs in the evolving state and regional water planning process.

Conclusion

FBR urges the Commission to reject BRA’s exceptions and adopt the exceptions of FBR, TPWD, Dow, Bryan, Texas and the Brazos Family Farmers and Ranchers. FBR urges the ALJs to recommend and the Commission to implement the proposal of FBR in its exceptions that the Commission order mediation by all parties.

Respectfully submitted,

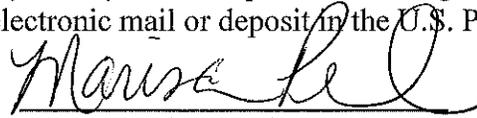


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CERTIFICATE OF SERVICE

By my signature below, I certify that on this 12th day of July, 2016, copies of the foregoing document were served upon the parties identified below via electronic mail or deposit in the U.S. Postal Mail.



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