

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

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

**LAKE GRANBURY COALITION'S**  
**EXCEPTIONS TO THE PROPOSAL FOR DECISION**

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## I. INTRODUCTION

In 2011, this Commission properly applied Texas law and declined to approve the Brazos River Authority's application for the System Operation Permit ("SysOp"). The Commission rejected the "unprecedented" two-step process that would have allowed BRA to dodge many of the legal requirements imposed on every other water rights applicant. The Commission then gave BRA a second chance to submit a permit application and Water Management Plan ("WMP") that complied with Texas statutes and regulations. Remarkably, BRA came back with a WMP that had many of the exact same problems as the original – and a few new ones. Today, four years later, BRA's permit application remains inconsistent with Texas law.

The Lake Granbury Coalition ("LGC") therefore offers these exceptions to the second proposal for decision ("Second PFD") and respectfully requests that the Commission reject the Second PFD's recommendation. The LGC asks that the SysOp Permit be denied for several reasons.<sup>1</sup>

*First*, and most notable, is the ALJs' position on the TCEQ rule requiring all water rights applicants to identify their proposed diversion points. While BRA's lack of compliance with this rule was sufficient to merit denial in the first proposal for decision ("First PFD"), the Second PFD concludes that this rule is not mandatory, based on an argument BRA raised for the first time in its post-hearing reply brief following the *second* contested case hearing. On that basis, the ALJs recommend a permit that admittedly does not identify all diversion points and instead, allows BRA to make diversions at an unlimited and as-of-yet unspecified number of diversion points along roughly 1,300 miles of river.

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<sup>1</sup> See TEX. GOV'T CODE § 2001.058(e) (state agency may vacate or modify an order issued by the administrative judge if "the administrative law judge did not properly apply or interpret applicable law, agency rules, written policies . . . or prior administrative decisions").

*Second*, the Second PFD improperly minimizes BRA's burden to prove that the full amount of its requested appropriation is available in light of a new drought of record in Possum Kingdom Reservoir (and potentially beyond). The ALJs rightly push back on BRA's and the ED's suggested approach to this issue – which would have had no effect on the requested appropriation – and the Second PFD requires the appropriation amounts to be reduced following further evaluation of the drought. But while that approach is unquestionably better, it still exempts BRA from the showing required by the Water Code *before* receiving a permit.

*Third*, the Second PFD misinterprets several provisions of the Water Code to find that the Senate Bill 3 environmental flow standards replace all other environmental, instream flow, and fish and wildlife analyses in permit applications. In so doing, the Second PFD improperly recommends a permit that has not been subject to the full scrutiny required by the Legislature.

*Finally*, the Second PFD does not account for the fact that the SysOp Permit cannot be coherently represented in the state water availability models and that it therefore poses significant long-term problems for the water permitting system as a whole. The LGC readily acknowledges the need to develop new water supplies, but satisfying that need should not come at the expense of a faithful application of the Water Code and this Commission's rules. And that is particularly true here, because BRA's proposed permit would appropriate up to four times more water than BRA actually intends to use, and up to four times more water than the need identified for this permit through 2060 by the regional water planning groups – which are entrusted with the duty to ensure sufficient development of water resources. Moreover, the SysOp Permit actually runs counter to the goal of developing water resources, at least as far as anyone other than BRA is concerned. Because the “full exercise” of this permit cannot be

accurately modeled in the WAM (as required by the Texas Supreme Court's *Stacy Dam* decision), future appropriations in the Brazos River Basin may be plagued with uncertainty.

The rules and statutes that comprise the Texas water permitting system exist for a reason, and they should be applied to BRA just like any other applicant. The Second PFD readily acknowledges that SysOp is “markedly different from a ‘run-of-the-mill’ water right application.”<sup>2</sup> That is true, and that is why the permit should be denied. If there is to be a new paradigm for water rights permits, it should come from the Legislature or, at the very least, the agency through the notice-and-comment rulemaking process. It should not, and cannot, happen as the result of an ad hoc determination in a contested case, especially one involving a convoluted permit application that will end up doing more long-term harm than it does good. The SysOp Permit should be denied.

## II. EXCEPTIONS AND ARGUMENTS

### A. **The diversion point requirement in Section 295.7 is not optional, and the granting of the permit would improperly ignore the very same deficiencies found to be fatal after the First PFD.**

The LGC first excepts to the finding that BRA has adequately identified its diversion points as required by 30 TEX. ADMIN. CODE § 295.7 and the subsidiary finding that this rule is not mandatory. In denying the original SysOp application in the First PFD, the ALJs provided clear directives on the requirements of this rule – which BRA essentially ignored in the WMP. The Second PFD thus improperly applies Section 295.7 because BRA has not sufficiently “stated the location of [its] point(s) of diversion.” The permit application should be denied on this basis alone.

To read the First PFD, denial is the only real option here. In reviewing BRA's initial permit application, the ALJs rightly held BRA to the diversion point requirement and made it

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<sup>2</sup> Second PFD at 23.

clear that, system operation or not, Section 295.7 would not be made a nullity.<sup>3</sup> The ALJs found that Section 295.7 plainly requires every applicant to identify real, specific diversion points where the water will be withdrawn and they provided this unambiguous assessment of BRA's approach: "An application that seeks approval to divert water anywhere cannot reasonably be considered to be compliant with the requirements of Section 295.7."<sup>4</sup> The ALJs therefore rejected BRA's application, in which it had refused to identify specific diversion points and had instead sought a permit that would have allowed it "to make diversions at an essentially infinite array of diversion points along many hundreds of miles of the Brazos River and its tributaries."<sup>5</sup>

On that score, nothing has changed. The Second PFD notes that BRA has still not identified the points where water will be diverted under the SysOp Permit.<sup>6</sup> Instead, BRA has "artificial[ly]" divided the river into 40 segments, or reaches, and has claimed the right to divert water at an unlimited and unspecified number of diversion points in those reaches – which comprise 1,300 miles of river between Possum Kingdom and the Gulf of Mexico.<sup>7</sup> That is undisputed. But despite the clear analysis from the First PFD, the Second PFD recommends a permit that would, still, allow BRA to "divert water anywhere."<sup>8</sup>

This conclusion is apparently linked to the finding that Section 295.7 isn't actually mandatory, an argument that was never mentioned (much less considered) for the first ten years of this proceeding.<sup>9</sup> In fact, BRA raised this argument for the first time in its reply brief after the second contested case hearing, an unfortunate approach because it meant that the protesting

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<sup>3</sup> First PFD at 29.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 27.

<sup>6</sup> Second PFD at 41.

<sup>7</sup> *See id.* at 41, 47.

<sup>8</sup> *Compare* Second PFD at 47 *with* First PFD at 29.

<sup>9</sup> *See* Second PFD at 41, 47.

parties never had a chance to respond.<sup>10</sup> But in any event, the ALJs properly analyzed this issue in their First PFD and BRA’s new argument should have been rejected. Section 295.7 is mandatory, and BRA cannot be granted a permit that does not comply with its straightforward requirements.

Contrary to BRA’s 11th-hour argument (or more precisely, 11th-year argument), Section 295.7 is not merely directory. As the ALJs properly acknowledge, BRA’s new argument faced an uphill battle in light of the plain text of the rule, which states that an applicant “*shall* state the location of point(s) of diversion.”<sup>11</sup> While the use of “shall” is not dispositive, none of the factors cited in the Second PFD overcomes the general presumption under Texas law that a “shall” rule is mandatory.<sup>12</sup> First, the mere fact that Section 295.7 is listed as a “procedural” rule does not mean it is directory, and the cases BRA relied upon do not say otherwise.<sup>13</sup> In fact, “procedural” or not, the broader regulatory scheme here labels Section 295.7 as a “requirement” of water rights applications, not an optional record-keeping tool, suggesting that it is indeed mandatory.<sup>14</sup> Second, it is simply wrong to say that the rules provide no consequences for failing to comply with Section 295.7.<sup>15</sup> To the contrary, Section 297.41 states that a water permit can “only” be granted if the application “conforms to the *requirements* prescribed by Chapter 295 of this title (relating to Water Rights, Procedural).”<sup>16</sup> In other words, the consequence for non-

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<sup>10</sup> See LGC Reply Brief at 10 (noting that BRA said little on the diversion point issue in its opening brief, but “may be waiting until the reply brief, when the protesting parties have no further say”).

<sup>11</sup> Second PFD at 26; *see also* 30 TEX. ADMIN. CODE § 295.7 (emphasis added).

<sup>12</sup> See *Lewis v. Jacksonville Bldg. & Loan Ass’n*, 540 S.W.2d 307, 310 (Tex. 1976) (the word “shall” is generally, if not always, construed to be mandatory).

<sup>13</sup> See Second PFD at 26.

<sup>14</sup> See generally 30 TEX. ADMIN. CODE, Chapter 295, Subchapter A.

<sup>15</sup> See Second PFD at 26-27.

<sup>16</sup> 30 TEX. ADMIN. CODE § 297.41 (emphasis added).

compliance with the rules listed in Chapter 295 – including the identification of diversion points – is denial of the application.

Interestingly enough, in the first proceeding, both BRA and the ED seemed to acknowledge that the identification of diversion points was a mandatory obligation – their only dispute was over the proper time for compliance. In suggesting the two-step process, BRA represented that it would develop the details and necessary protections for how the SysOp Permit would operate, including specific diversion points, as part of a future water management plan.<sup>17</sup> BRA rightly acknowledged that it would not be possible to determine how much water was truly available for appropriation – as required by the Water Code – without knowing the specific locations of diversions under the SysOp Permit.<sup>18</sup> The Executive Director was even more explicit about the mandatory nature of this requirement (at least in the first hearing). Dr. Kathy Alexander testified on behalf of the ED that BRA would be “*required* to come back and specify *exactly* what diversion points they would be using and – and in what amounts” during the WMP process.<sup>19</sup>

These original positions suggest that, given the nature and object of Section 295.7, no one even considered that it might not be mandatory, and for good reason. This is not some clerical suggestion to assist TCEQ staff in their review of an application – it is instead a “critically necessary” component of any meaningful water availability analysis, as the ALJs held in the First PFD.<sup>20</sup> BRA conceded as much long before it came up with this argument: “[T]he amount of water made available by system operation depends significantly upon the location in the basin

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<sup>17</sup> See First PFD at 22.

<sup>18</sup> *Id.* at 29.

<sup>19</sup> Tr. 1942 (Alexander) (emphasis added); *see also* First PFD at 26.

<sup>20</sup> Compare Second PFD at 27 with First PFD at 29.

at which the water is diverted.”<sup>21</sup> For all those reasons, Section 295.7 must be enforced as written: any applicant, including BRA, must identify its requested diversion points.

But BRA has again failed to identify its diversion points, and the ALJs essentially acknowledge this.<sup>22</sup> It is not sufficient, as BRA claims, to divide the river into 40 reaches and simply state that the diversion points will be located somewhere within those reaches.<sup>23</sup> The ALJs correctly note that this approach carries “an air of artificiality.”<sup>24</sup> Indeed, an application that identifies “the whole river” as a possible diversion point has identified nothing at all. The ALJs reached that very conclusion in the First PFD, when BRA first hinted that it could ignore Section 295.7 because of other cases where TCEQ had purportedly authorized diversions by reach:

BRA is not seeking authorization to divert from a specific reach of a stream. It is seeking authorization to divert water anywhere along the hundreds of miles of stream front on the Brazos River below Possum Kingdom Reservoir and its tributaries.<sup>25</sup>

For the very same reason, the limited evidence presented at the second contested case hearing about other diversion-reach permits is “meaningless” and does not excuse compliance with Section 295.7.<sup>26</sup>

Nor does it make any difference that BRA has now submitted modeling of possible water usage at some locations on the river (rather than four hypothetical locations, as in the first proceeding). The key point here is that the WMP does not limit where the water is *actually going to be used*. In fact, BRA has essentially admitted that the modeled locations in the WMP

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<sup>21</sup> See First PFD at 29.

<sup>22</sup> See Second PFD at 41-42.

<sup>23</sup> See BRA Ex. 113, WMP at 52.

<sup>24</sup> Second PFD at 47.

<sup>25</sup> First PFD at 29, n.82.

<sup>26</sup> See Second PFD at 46.

should not be considered anything more than a modeling exercise.<sup>27</sup> BRA’s expert, Tom Gooch, testified that “the actual exact locations of those diversions would be established when contracts are made for that water . . . . I don’t think that those points are identified as authorized diversion points in the water management plan.”<sup>28</sup> In short, BRA has stated that the modeled locations do not represent the actual diversion points. The ALJs properly held in the First PFD that Section 295.7 is not satisfied by simply identifying “actual physical locations that can be modeled;” BRA must instead “identify the specific locations where water will be diverted pursuant to the SysOp Permit.”<sup>29</sup> That is just as true now, and BRA has again failed to meet that standard. Moreover, the question in this proceeding is not whether this application is merely “superior to the application in the First Hearing”<sup>30</sup> – the question is whether it complies with the law. And it does not.

But even more than that, the Second PFD’s interpretation of the diversion point requirement as merely directory is bad policy and dangerous precedent. If this rule is merely directory – and BRA’s “somewhere on the river” approach is acceptable – then there can be no certainty in future permitting decisions in the Brazos Basin (or anywhere else this approach spreads). For the Texas water permitting system to work, future water rights applicants – whether municipalities, industrial users, or others – must be able to accurately estimate the reliability of the water they seek. In determining availability, those applicants have no choice but to rely on the diversion locations modeled in the WMP (and thus included in the state water availability models).<sup>31</sup> But BRA has been explicit that it does not intend to limit itself to those

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<sup>27</sup> See BRA Ex. 113, WMP at 52; *see also* Tr. 3141-42 (Gooch).

<sup>28</sup> Tr. 3141-42 (Gooch).

<sup>29</sup> First PFD at 28.

<sup>30</sup> Second PFD at 47.

<sup>31</sup> See Tr. 3032-33, 4246-47 (Gooch).

locations. BRA will therefore have the right to add a diversion point *directly upstream* of any junior diverter anytime it chooses.<sup>32</sup> While this new diversion point may not have even existed when the junior applicant made its availability determination, BRA would have a priority right to run-of-river water that the junior reasonably believed would be available.<sup>33</sup>

BRA tried to avoid this problem at the hearing by saying that those are simply the risks of holding a junior priority. But that is not true if the rules are applied as written, and it cannot be true as a matter of policy. For the permitting system to work, future applicants must be entitled to know what water has already been appropriated (and where) – and to rely on the state water availability models for this information. That process is defeated if BRA can unilaterally start diverting water at a new diversion point, never previously built into the WAM, directly above the point of the junior’s diversion. Addressing this problem now is appropriate and necessary, as the Commission is tasked with a legislative directive to ensure that water permits are consistent with plans for “the orderly development, management, and conservation of water resources.”<sup>34</sup>

TCEQ rules – especially Section 295.7 – exist to avoid the very uncertainty this permit would create. BRA should not be granted an exception from these clear requirements. In fact, this is exactly the kind of case where strict adherence to the requirements of Texas law is most needed, in order to prevent an immense, unprecedented application like this one from impacting other water rights, both now and in the future. Section 295.7 should be enforced as written and the permit application should be denied.<sup>35</sup>

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<sup>32</sup> See Tr. 4243-45 (Gooch); *see also* Tr. 3818 (Alexander).

<sup>33</sup> Tr. 4177-78, 4244-45 (Gooch); *see also* Tr. 3820 (Alexander).

<sup>34</sup> See TEX. WATER CODE §§ 11.134(b)(3)(E), 16.053(a).

<sup>35</sup> See TEX. GOV’T CODE § 2001.058(e)(1).

**B. Despite increased protections to account for the new drought of record, the Second PFD recommends a permit for more water than BRA has proven is available.**

The LGC also excepts to the finding that the SysOp Permit can issue now, without any further reduction in the appropriation amounts to account for the new drought of record in Possum Kingdom (and potentially beyond).<sup>36</sup> The LGC does agree with much of what the ALJs said about the need to account for a reduction in yield due to drought, and it appreciates the attempt to push back on the extreme positions taken by BRA and the ED. However, the Second PFD does not go far enough and still allows BRA to avoid its burden of proving that *all* of the requested appropriation is “available in the source of supply.”<sup>37</sup> At a minimum, this approach triggers another two-step process with respect to the appropriation amount, creating again the possibility that any order granting this permit might be non-final.

Drought is a critical component of any water availability analysis. The drought of record is the period of low inflows to a reservoir or basin that is used to determine the firm yield of that reservoir or basin.<sup>38</sup> In other words, the water availability models are set up to calculate a reservoir’s firm yield based on the amount of water that would be available through the drought of record.<sup>39</sup> If the drought of record changes, the amount of water available over the period of record likely changes as well.

And at least for Possum Kingdom Reservoir, the drought of record has changed.<sup>40</sup> The Second PFD properly finds that the recent drought has reduced the firm yield in Possum Kingdom – the largest and most significant reservoir in the BRA system – by roughly 100,000

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<sup>36</sup> Second PFD at 75.

<sup>37</sup> TEX. WATER CODE § 11.134(b)(2).

<sup>38</sup> BRA Ex. 119 at 73 (Gooch prefiled); *see also* Second PFD at 67.

<sup>39</sup> Tr. 3059-60 (Gooch); Second PFD at 67.

<sup>40</sup> Second PFD at 74.

acre-feet per year (and probably more).<sup>41</sup> While the ALJs only find it “possible” that this significant change had also reduced the overall amount of water available under the SysOp Permit,<sup>42</sup> the Protestants presented evidence that it had.<sup>43</sup> BRA and the ED, on the other hand, simply admitted they don’t know.<sup>44</sup>

Nevertheless, BRA and the ED took the position that this new drought of record should have no effect on this permit application. Rather than requiring BRA to limit its appropriation to the amount that is actually available in light of the recent drought, the ED proposed an empty condition that would require BRA to perform a “detailed evaluation” of the effects of the new drought of record after it concludes.<sup>45</sup> However, that condition did not require any action in the event that the drought had, in fact, reduced the amount of available water.<sup>46</sup> Indeed, both the ED and BRA maintained that this evaluation would have *no effect* on the appropriation under this permit.<sup>47</sup> Unsurprisingly, BRA agreed to include this ineffective condition in the permit.<sup>48</sup>

Fortunately, the Second PFD rejects this casual approach to a drought that indisputably “impacts the hydrology” of the SysOp Permit.<sup>49</sup> It rightly finds that BRA cannot be issued a permit to appropriate more water than is available to it.<sup>50</sup> The problem comes in the proposed solution, which still allows BRA to potentially do just that. More specifically, the Second PFD

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<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *E.g.* Dow Ex. 57 at 9-10 (Brandes supp. prefiled).

<sup>44</sup> *See* Tr. 3063, 4154 (Gooch); Tr. 3868 (Alexander).

<sup>45</sup> *See* Second PFD at 70.

<sup>46</sup> *Id.* at 75.

<sup>47</sup> *See id.* at 72.

<sup>48</sup> *Id.* at 70.

<sup>49</sup> *Id.* at 74.

<sup>50</sup> *Id.* at 74-75.

recommends that the SysOp Permit should issue without any drought reduction.<sup>51</sup> While the ALJs attempt to fix that problem by requiring a reduction in the appropriation amounts following the drought evaluation, this proposed permit condition is not sufficient to meet the requirements of the Water Code and TCEQ rules.<sup>52</sup>

*First*, this approach creates yet another two-step process that both the ALJs and the Commission found to be inconsistent with Texas water permitting law in the first proceeding.<sup>53</sup> If the applicable statutes and regulations do not permit BRA to defer the identification of specific diversion points to a second proceeding – as the ALJs found in the First PFD – then they also do not allow BRA to defer its analysis of whether drought has reduced the amount of water available for appropriation. In both cases, BRA would be seeking a special right to defer critical determinations – which are supposed to be made before a permit issues – to a subsequent proceeding.<sup>54</sup> The law does not contemplate such a process.

But because the Second PFD grants that allowance in this case, the overall appropriation amount under this permit will not be “fixed” until this subsequent evaluation is completed.<sup>55</sup> The proposed condition therefore creates just the kind of finality problem the ALJs found to be unacceptable in the First PFD.<sup>56</sup> While the Second PFD concludes that the two-step process is no more,<sup>57</sup> that process has now been re-introduced in a different form, at least as it relates to the drought of record and its effect on BRA’s appropriation amounts.

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<sup>51</sup> *Id.* at 75.

<sup>52</sup> *Id.* at 75, 275.

<sup>53</sup> *See* First PFD at 24.

<sup>54</sup> *Id.* at 45.

<sup>55</sup> *See* Second PFD at 74-75.

<sup>56</sup> First PFD at 170 (permit not final where there is no definite answer on the “amounts of water that will actually be appropriated”).

<sup>57</sup> *See* Second PFD at 251.

*Second*, there is no assurance or requirement of what this “detailed evaluation” will actually entail or how credible the data will be.<sup>58</sup> Neither the ED nor BRA provided any real details about the scope or rigor of this evaluation, and the ALJs do not make specific recommendations.<sup>59</sup> If BRA does find that a new drought of record has occurred, it will “develop hydrologic data” to model the correct amount of unappropriated water that is available.<sup>60</sup> While this presumably entails re-running the modeling used in the WMP, the Second PFD leaves that up to BRA. It similarly provides no guidance as to what BRA must do to determine a new drought of record in the first place. The evidence showed that TCEQ generally makes that determination through an update to the naturalized inflows used in the WAM.<sup>61</sup> However, Alexander testified on behalf of the ED that the “detailed evaluation” contemplated by this condition *will not* require an update of the naturalized flows.<sup>62</sup> In other words, it appears that this evaluation will not be based on the most reliable data. Finally, even if that evaluation were to produce meaningful data, the Executive Director is not even sure that TCEQ has the *authority* to retroactively adjust the appropriation amount in a permit to account for a new drought of record, as the ALJs require.<sup>63</sup> In short, while the LGC certainly agrees with the ALJs that the drought must be addressed in a “meaningful way,”<sup>64</sup> the proposed permit condition does not appear to require this.

With respect to the drought, BRA presented a false choice in the contested case hearing. The options in this proceeding were not simply to either: (a) place this permit application on an

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<sup>58</sup> *Id.* at 274-75.

<sup>59</sup> See Tr. 3145-46 (Gooch); see also BRA Ex. 119 at 74-75 (Gooch prefiled); Tr. 3880, 3955 (Alexander).

<sup>60</sup> Second PFD at 70.

<sup>61</sup> See Tr. 3870, 3879 (Alexander).

<sup>62</sup> Tr. 3879, 3955 (Alexander).

<sup>63</sup> See Tr. 3881 (Alexander); see also Second PFD at 71.

<sup>64</sup> Second PFD at 75.

indefinite hold; or (b) issue the permit without any reduction for drought. There is a third, more reasonable option, one that should be adopted in this case and others like it. BRA should be held to its burden of demonstrating that the entire requested appropriation amount is “available in the source of supply” as required by Section 11.134, and – in light of the difficulties created by an ongoing drought of record – should be limited to the amount of water it can conservatively prove is available right now. The evidence presented at the hearing demonstrated several different ways to do this.<sup>65</sup> BRA simply declined. The Commission should not be so lax, and should hold BRA to this clear legal standard before issuing any permit.<sup>66</sup>

**C. Senate Bill 3 does not replace all other environmental and recreational analyses.**

The LGC excepts to the conclusion that the Legislature intended the SB3 environmental flow rules to replace all other environmental, recreational, and instream use analyses for water permit applications.<sup>67</sup> This conclusion reflects an incorrect reading of the controlling statutes, and one that allows applicants and TCEQ staff to avoid the full evaluation required by the Water Code. The Commission should correct this legal error.<sup>68</sup>

There is no dispute that Water Code Section 11.134 controls the issuance of this permit or that it *requires* the consideration of “any applicable environmental flow standards established under Section 11.1471 and, if applicable, the assessments performed under Sections 11.147(d) and (e) and Sections 11.150, 11.151, and 11.152.”<sup>69</sup> Thus, according to the plain text of the statute, TCEQ has an obligation to analyze the effects of the requested permit on instream uses

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<sup>65</sup> See Tr. 3870 (Alexander); Tr. 3584 (Brandes); Tr. 4239-41 (Gooch); Dow Ex. 57 at 9-10 (Brandes supp. prefiled); Tr. 4075-76 (Brunett).

<sup>66</sup> TEX. GOV'T CODE § 2001.058(e).

<sup>67</sup> See Second PFD at 124, 186.

<sup>68</sup> See TEX. GOV'T CODE § 2001.058(e)(1).

<sup>69</sup> TEX. WATER CODE § 11.134(b)(3)(E).

(11.147(d)), water quality (11.150), and fish and wildlife habitat (11.152). The question here is whether the SB3 rules created a back-door exemption from those analyses.

The Water Code says nothing of the sort. Instead, the SB3 statutes include important limiting language that has essentially been read out of the text. Specifically, Section 11.147(e-3) states that the adopted SB3 standards (“any applicable environmental flow standard . . . adopted under Section 11.1471”) should be considered instead of the factors contained in Sections 11.147(b)-(e) “*for the purpose of determining the environmental flow conditions*” necessary to protect instream uses, water quality, and fish/wildlife habitats.<sup>70</sup> The import of that limiting language is unambiguous. By its terms, Section (e-3) was not intended to replace *all* analyses of instream uses, water quality, and aquatic habitat – it was merely intended to direct a uniform application of the *environmental flow conditions* that might be necessary to protect those interests. It is not an accident that the Legislature limited the purpose of Section (e-3) to “environmental flow conditions,” while Sections (b)-(e) contemplate a broader analysis of “conditions.”<sup>71</sup> Simply put, the latter requirements call for a consideration of more than just environmental flow conditions, and they remain in effect for those other purposes.<sup>72</sup>

Section 11.134 bears this interpretation out. That provision – which was not repealed and remains in effect since the passage of SB3 – plainly requires TCEQ to consider “any applicable environmental flow standards under Section 11.1471 **and**, if applicable, the assessments performed under Sections 11.147(d) and (e) **and** Sections 11.150, 11.151, and 11.152.”<sup>73</sup> The

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<sup>70</sup> TEX. WATER CODE § 11.147(e-3) (emphasis added).

<sup>71</sup> Compare TEX. WATER CODE § 11.147(e-3) with TEX. WATER CODE § 11.147(d).

<sup>72</sup> This construction does not render “instead” meaningless, as the PFD suggests. Second PFD at 124. It just puts “instead” in its proper place – to the extent environmental flow conditions are at issue, the Commission should apply the SB3 rules “instead” of the assessments in Section 11.147(b)-(e). Otherwise, Section 11.147(e-3) does not even apply.

<sup>73</sup> TEX. WATER CODE § 11.134(b)(3)(E) (emphasis added).

use of “and” in this provision demonstrates the continuing obligation – SB3 or not – to consider both the environmental flow standards *and* the independent assessments of instream uses, water quality, and fish and wildlife habitats required by the other listed sections. In fact, the very existence of those statutes in a post-SB3 world is itself evidence that the Legislature intends more than mere compliance with the environmental flow standards in a permit application. The “ands” in Section 11.134 should not be (mis)read as “ors.”

But that is exactly what the Second PFD concludes. It effectively allows TCEQ to stop reading Section 11.134 after “environmental flow standards” – under the Second PFD’s interpretation, if the permit application complies with SB3, then the other assessments are irrelevant and unnecessary.<sup>74</sup> On that basis, the ALJs hold that BRA’s compliance with SB3 *precludes further consideration* of measures to protect instream uses, water quality, and fish and wildlife habitat.<sup>75</sup> This is problematic for a number of reasons, not the least of which is that it distorts the meaning of these statutes. More practically, this construction has introduced a fatal flaw to this proceeding. The ED admitted that TCEQ staff failed to perform any other environmental analyses for the new appropriations under this permit (beyond mere compliance with SB3).<sup>76</sup> Because these analyses are required by Section 11.134, the permit cannot be granted in its current form.

More broadly, this interpretation sets a dangerous precedent for future applications, particularly it relates to impacts on reservoirs. At least according to BRA and the ED (and now, apparently, the ALJs), the SB3 standards provide no protection for reservoirs.<sup>77</sup> Nevertheless,

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<sup>74</sup> See Second PFD at 124, 186.

<sup>75</sup> *Id.* at 190.

<sup>76</sup> Tr. 3867 (Alexander).

<sup>77</sup> Tr. 3311-12 (Osting); Tr. 3866 (Alexander).

this holding means that the SB3 standards subsume all environmental analyses for *both* rivers and reservoirs. This position is not merely illogical – it defies common sense, as it will essentially exempt from any environmental consideration whatsoever the aquatic environment of the state’s reservoirs or the reservoir-based recreational impacts of a new permit. Under this interpretation, the State is apparently concerned about protecting the health of flowing rivers and streams, but once a dam is erected and the same river or stream backs up to become a reservoir, the State no longer considers the environmental and recreational needs of that water body. This cannot possibly be the interpretation intended by the Legislature in adopting the SB3 rules, and it should be rejected.

**D. The recommended permit cannot be accurately modeled in the WAM and will therefore create more problems than it solves.**

This exception involves a global issue that is mostly unaccounted for in the Second PFD. The Commission should be wary of similarly ignoring this issue, as it poses serious long-term consequences for the Texas water permitting system. In short, the evidence presented at the second contested case hearing demonstrated that no one – not the Executive Director, not BRA, not any of the other experts in the room – knows how to coherently account for the SysOp Permit in the state water availability model (WAM). But it’s not for lack of trying. Instead, there is simply no single model that can encapsulate the incredibly flexible rights BRA will have under this permit. While this is yet another reminder of how inconsistent this application is with Texas law, it also suggests that it’s just a bad idea.

The structure of the Texas water permitting system requires a clear understanding of the maximum possible use of every water permit. This is inherent in the principle that subsequent appropriations will only be granted if there is unappropriated water available after all existing rights are fully exercised. That was the core holding of the *Stacy Dam* decision, which was

discussed in both PFDs.<sup>78</sup> As the ALJs acknowledge again, “‘unappropriated water’ has been defined to mean ‘the amount of water remaining after taking into account all existing uncanceled permits and filings valued at their recorded levels.’”<sup>79</sup> To analyze this issue in the context of permit applications, the State has developed computer programs called water availability models. As the First PFD noted, “[i]n conformity with the holding in *Stacy Dam*, TCEQ’s staff determines the availability of unappropriated water rights through use of WAM Run 3, which assumes that all existing recorded water rights in the basin are being fully exercised.”<sup>80</sup> Said differently, in order for permitting decisions to be made in accordance with *Stacy Dam*, the WAM must be able to account for the “full exercise” of all existing water rights.<sup>81</sup>

This principle is important, and not just for senior water rights holders who do not want their existing rights to be impaired. It also matters to *future* applicants, who must be able to understand the amount of water that remains available for appropriation after a permit is granted. It would be highly detrimental to the orderly permitting of water in Texas to grant a permit when the meaning of its “full exercise” is incapable of clear determination, or in other words, when its full utilization cannot be sufficiently modeled in the WAM. Yet the SysOp Permit presents exactly these problems.

As evidence of that fact, TCEQ staff struggled to articulate how, exactly, it would represent the SysOp Permit in future versions of the WAM.<sup>82</sup> In the last word on this subject,

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<sup>78</sup> See *Lower Colorado River Auth. v. Tex. Dep’t of Water Res. (Stacy Dam)*, 689 S.W.2d 873 (Tex. 1984); see also First PFD at 41, 57; Second PFD at 104-05.

<sup>79</sup> Second PFD at 104 (citing *Stacy Dam*, 689 S.W.2d at 874).

<sup>80</sup> First PFD at 57.

<sup>81</sup> Second PFD at 105.

<sup>82</sup> See Tr. 3842-43, 3851-52 (Alexander).

Alexander testified that TCEQ would likely use BRA's Firm Level C modeling run to represent the full use of SysOp in the WAM.<sup>83</sup> In other words, when future applicants try to make their water availability determinations, all they will see from the SysOp Permit is the assumptions, demands, and outputs from Firm Level C. The problem is, Firm Level C does not and cannot capture the full range of flexibility that BRA will have. It therefore does not represent what a "full exercise" might look like.<sup>84</sup> But that is not simply a problem with Firm Level C – because of the nature of this permit, SysOp cannot be rationally represented in the WAM by *any* of the modeling runs. This is so for several reasons.

*First*, there is no modeling run that contains the diversion points to be used under this permit, since the Second PFD grants BRA the right to identify its diversion points at some unspecified time in the future.<sup>85</sup> Relatedly, the Second PFD allows BRA to divert up to 1,460 acre-feet per year in 21 river reaches where there were no diversions modeled or where the maximum modeled diversion did not exceed that amount.<sup>86</sup> This catch-all authorization grants BRA roughly 23,000 acre-feet of additional annual diversions that will not register in future versions of the WAM.<sup>87</sup> For both of those reasons, the WAM will essentially contain only a theoretical listing of BRA's diversion points; BRA has repeatedly admitted that the real-world, full exercise of this permit will look very different.

*Second*, the modeling runs (and by extension, the WAM) do not represent what BRA will actually be authorized to do under this permit. As an initial matter, if TCEQ uses Firm Level C in the WAM, that means the WAM will be wrong essentially 75% of the time, *i.e.* for so long as

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<sup>83</sup> Tr. 3852 (Alexander).

<sup>84</sup> See Second PFD at 105.

<sup>85</sup> *Id.* at 41-42.

<sup>86</sup> *Id.* at 42-43, 275.

<sup>87</sup> Tr. 4226-27 (Gooch).

BRA operates under Scenarios A, B, and D.<sup>88</sup> It is not sufficient to say that the total authorized appropriations under those scenarios are smaller than Level C. More critically, the appropriations under those scenarios are *fundamentally different* than Level C because they contemplate differing amounts of demands and diversions from different locations across 1,300 miles of river and tributaries.<sup>89</sup>

But even assuming a situation where BRA's authorization in the real-world matches up with the WAM (*i.e.* Firm Level C in both), the "full exercise" of BRA's new water right will still vastly exceed what is captured in the modeling. Firm Level C, like all of BRA's modeling in the WMP, assumes that, for each year in a 58-year modeling period, BRA will meet existing contractual requirements and various possible new demands. To meet those demands, the model shows BRA diverting different amounts of SysOp water (*i.e.* water in excess of its existing rights) from different reservoirs and river reaches in each year. In some years of the modeling, a very large amount of SysOp water comes from one particular reach or reservoir; in other years, a very large amount of SysOp water comes from a different reach or reservoir.<sup>90</sup> The same goes for BRA's total diversions from the system as a whole – some years show more diversions than others.<sup>91</sup> In short, the source – and size – of SysOp diversions in the model depends on the weather conditions for any given modeled year.<sup>92</sup> And that year-to-year variance is what the WAM will show future applicants in Firm Level C.

However, what the permit authorizes is very different. BRA will have the right to divert, from *every* reach and reservoir, in *every* year, the *maximum* amount of SysOp water that the

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<sup>88</sup> Second PFD at 33-34, 273-74.

<sup>89</sup> See BRA Ex. 133.

<sup>90</sup> See, *e.g.* BRA Ex. 133; Tr. 4211-12, 4216 (Gooch); Tr. 2842 (Brunett).

<sup>91</sup> See Tr. 4216 (Gooch).

<sup>92</sup> See Tr. 2842 (Brunett). Tr. 4216, 4218 (Gooch); BRA Ex. 113, Technical Report at ES-2.

modeling showed being diverted from that reach or reservoir in *any* year of the modeling under the applicable scenario.<sup>93</sup> And, BRA will have the right to divert, every year, a total appropriation derived from the *maximum* amount of SysOp water the model showed being diverted from the basin as a whole in a *single year* of the 58-year simulation.<sup>94</sup> Thus, BRA’s legal rights go well beyond what the WAM will show future applicants. If the WAM simply runs Firm Level C as the “full exercise” of this permit, those future applicants will have the impression that BRA is unlikely to use the full appropriation, either by reach or in total, other than in an exceptional year.<sup>95</sup> And as a practical matter, that may be true. But BRA will still apparently have an absolute, unilateral right to use these maximum amounts in *any year* – not just one year out of 58. The WAM will therefore not reflect the “full exercise” of this permit, in violation of *Stacy Dam*.

This does not mean that the WAM is deficient; it means the permit is. It is no mistake that Texas law requires any applicant to request a specific quantity of water, at a specific location, for a specific purpose.<sup>96</sup> For such a properly specified permit, modeling the full exercise of its authorization in the WAM is relatively straightforward. Not so with the SysOp Permit, but this is not merely a technicality. If a true *Stacy Dam* analysis is unfeasible, future development of water resources in the Brazos Basin may be plagued with uncertainty. A municipality seeking to construct a reservoir, an industrial user seeking a water right for a new facility, or a farmer seeking a diversion for a new irrigation project – all could easily find that the State’s WAM told them one thing about the location and amount of the existing water rights, but

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<sup>93</sup> Second PFD at 42-43.

<sup>94</sup> *See, e.g. id.* at 28-29; Tr. 3008, 3026-27 (Gooch).

<sup>95</sup> In fact, the Second PFD notes that, if BRA complies with the law, that maximum amount is only available in one year out of 58. *See* Second PFD at 108.

<sup>96</sup> *Id.* at 23.

BRA's "full exercise" turned out to be something else entirely. No one could make plans based on the assumption that the WAM accurately models BRA's rights.

It is ultimately the duty of the Commission to manage the long-term workability of the permitting system. The LGC recognizes that Texas needs new water supplies and it is clear the ALJs placed a great deal of emphasis on that goal. But this deeply flawed permit is simply not worth the long-term costs of ignoring clear requirements of Texas law. Indeed, the State Water Plan has identified needs for only a small portion of the water to be appropriated in the SysOp Permit (roughly 110,000 acre-feet), and much of this amount was targeted to the expansion of the Comanche Peak Nuclear Power Plant, which is now in an indefinite hold.<sup>97</sup> While there may exist other possible uses for this water, the Water Plan demands represent the long-term needs allocated to this permit by the regional water planning groups, which are entrusted with a statutory duty to provide for "the orderly development, management, and conservation of water resources . . . in order that sufficient water will be available at a reasonable cost."<sup>98</sup>

In other words, the regional water planning groups have carefully considered, over many years, how to provide "sufficient water" for the State's needs and have recommended this permit to account for roughly 100,000 acre-feet of those needs. That is a far more limited ask than what the Second PFD recommends, and it does not justify the inflated, unwieldy, and largely unfettered permit currently on the table. Moreover, those needs certainly do not make up for the confusion and disorder this precedent would introduce to the Texas water permitting system, which must function in an orderly and consistent way if our State is to meet its water challenges in the future. Because the Commission is the keeper of that system, the LGC respectfully

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<sup>97</sup> *Id.* at 110.

<sup>98</sup> TEX. WATER CODE § 16.053(a); *see also* Second PFD at 24.

requests that the Commissioners reject the Second PFD's recommendation and deny BRA's permit application in its current form.<sup>99</sup>

**E. If the Commission disagrees with all of the LGC's other exceptions and approves a permit, the limitation on maximum diversions by reach must be updated to account for the Second PFD's reductions in the overall appropriation amounts.**

For all the reasons described above, the LGC excepts to the conclusion that *any* permit can properly be granted in this case. The issue discussed in this final section is raised only in the alternative – solely in the event the Commission rejects all of the LGC's other arguments and decides to approve a permit.

In several different respects, the ALJs rightly reduce the appropriation amounts in the SysOp Permit from what BRA requested (and modeled). As discussed on pp. 53-66 of the Second PFD, the ALJs find that BRA's modeling overstated the amount of water available from the system reservoirs in light of sediment build-up, and therefore recommend reducing BRA's appropriation amounts to account for the "actual" storage capacities of these reservoirs.<sup>100</sup> These appropriation amounts will likely be reduced even further following the drought evaluation discussed in Section B above.<sup>101</sup> However, the Second PFD says nothing about a corresponding reduction in the maximum authorized diversions *by reach*.<sup>102</sup> The LGC presumes that such an update would naturally be required, and therefore seeks confirmation from either the ALJs or the Commission on this point.

The proposed limitation on maximum diversions by reach has a tortured history in this proceeding (if not a long one). In brief, BRA suggested – for the first time in its prefiled

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<sup>99</sup> TEX. GOV'T CODE § 2001.058(e).

<sup>100</sup> *See* Second PFD at 65-66.

<sup>101</sup> *Id.* at 75, 275.

<sup>102</sup> *Id.* at 42-43, 275.

testimony – that the WMP should include a practical limitation on the amount of water BRA would be able to divert annually from each of the 40 diversion reaches identified in the WMP.<sup>103</sup> That limitation would be based on the maximum amount of water the modeling showed BRA diverting from each reach in any single year of the 58-year period of record.<sup>104</sup> In other words, BRA would be entitled to divert, in every year, the largest amount ever diverted from a given reach in the modeling.<sup>105</sup> While BRA changed its position several times on the scope of this limitation, it eventually linked these maximum amounts to whichever scenario (A, B, C, or D) that applies in the real world.<sup>106</sup> In any event, BRA placed a great deal of emphasis on the “protection” this limitation would offer, and the Second PFD ultimately adopts it.<sup>107</sup>

While the protections offered by this limitation are almost certainly overstated (and do not resolve any legal deficiencies), the LGC supports its inclusion should a permit be issued despite all of the other exceptions stated above. But the proper *amounts* for this limitation would need to be adjusted to correspond with the overall appropriation amounts recommended by the ALJs. As it stands, BRA will be limited to the maximum diversions by reach found in the current Appendix G-3 of the Water Management Plan.<sup>108</sup> However, those amounts are based on modeling that: (a) improperly relies on the permitted capacity of the system reservoirs, instead of their actual capacity; and (b) fails to account for reductions in yield caused by the new drought of record in Possum Kingdom and beyond.<sup>109</sup> It stands to reason then, that the maximum diversion

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<sup>103</sup> See BRA Ex. 119 at 40 (Gooch prefiled).

<sup>104</sup> See Second PFD at 42-43; *see also* BRA Ex. 133.

<sup>105</sup> See Second PFD at 42-43.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 275.

<sup>108</sup> *Id.* at 275; BRA Ex. 133.

<sup>109</sup> See Second PFD at 65-66, 75.

amounts by reach currently found in Appendix G-3 are overstated in precisely the same way as the overall appropriation amounts.

For this proposed limitation to have any meaning, BRA must therefore re-run the models after accounting for the ALJs' required reductions, and must provide an updated chart showing the new, accurate maximum diversions by reach. This is consistent with the ALJs' recommendation that BRA conform the WMP to rulings on contested issues,<sup>110</sup> but because the Second PFD is not explicit in this requirement, the LGC simply seeks a note of clarification on this point from either the ALJs or the Commission.

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<sup>110</sup> *Id.* at 267.

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of this document and the enclosed materials have been served via electronic transmission or first class mail on all parties whose names appear below on this 20th day of August, 2015.

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