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 REPLY TO EXCEPTIONS TO THE PROPOSAL FOR DECISION

I. INTRODUCTION

Lawyers are familiar with the adage that "hard cases make bad law." If the TCEQ were to grant the SysOp Permit, the analogous principle in this case would be: "bad permit applications make bad Texas water law." The parties' exceptions to the second Proposal for Decision demonstrate the many unacceptable precedents that approval of this permit would generate. These problems flow from the fact that BRA's application simply does not fit into the existing legal framework for water permits in Texas.

The incompatibility between Texas's rules and BRA's permit is perhaps best illustrated by 30 TEX. ADMIN. CODE § 295.7, which requires applicants to identify the points at which water will be diverted. Dow, FBR, NWF, and the LCG all object to the ALJs' adoption of BRA's late-breaking argument that this section is not mandatory. This argument was not raised, or seemingly even contemplated, during the first ten years of this proceeding. Indeed, BRA's failure to comply with this section was a primary basis for the First PFD's recommended denial of the application in 2011. But if section 295.7 were truly non-essential, there would have been no reason to insist upon compliance with it at that time. Now, despite BRA's continuing failure to specify "what diversion points [it] would be using and – and in what amounts,"[1] the permit is being recommended for approval.

Even the Executive Director appears to disagree with the notion that specification of diversion points is not mandatory. In his exceptions, the ED states that "an implication that these rules are directory rather than mandatory could be misused in future applications."[2] The ED is right to be worried about this issue. The location of proposed diversion points is important. In

[1] Tr. 1942 (Alexander) (emphasis added); *see also* First PFD at 26.

[2] ED Exceptions at 23.

this case, it dictates how much water can be made available by system operation.[3] In general, it is crucial to future applicants' understanding of what rights have been granted in a permit and what water remains available for later appropriation at a given location.[4] As the ED recognizes, it will not do to have other applicants now conclude that they do not have to specify their diversion points, either. Yet while the ED's institutional concern is valid, his ultimate position is still deficient, because he contends that BRA has *actually complied* with Section 295.7. Respectfully, if the SysOp Permit satisfies this requirement, then it is hard to imagine a permit application that would not. BRA is proposing to divert water at unlimited and unspecified points within 1,300 miles of river. As the ALJs correctly said in the first PFD, "An application that seeks approval to divert water anywhere cannot reasonably be considered to be compliant with the requirements of Section 295.7."[5]

The evisceration of the diversion points requirement is not the only vexing precedent that the granting of this permit would create. As emphasized in the exceptions of the LGC and the other protesting parties, the SysOp permit would: (1) allow appropriation of water based on modeling known to be inaccurate because of a new drought of record in a critical reservoir (subject to possible adjustment in a new second step of the process); (2) allow BRA to reserve and block others from using far more water than it has shown it can or will beneficially use; (3) wrongly interpret Senate Bill 3's environmental flow requirements as replacing all other statutory environmental and recreational analyses; and (4) introduce a permit in which the full exercise of authorized rights cannot even be captured in the Water Availability Models which will apply to future applicants.

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[3] *See* First PFD at 29 (noting BRA acknowledgment that "[T]he amount of water made available by system operation depends significantly upon the location in the basin at which the water is diverted.").

[4] *See* LGC Exceptions at 8-9.

[5] First PFD at 29.

All of these would be unacceptable consequences for the Texas water permitting system. None are justified by expediency for the sake of new water supplies. The State Water Plan has identified uses for only a small portion of the water to be given to BRA in the SysOp Permit, and much of this amount was targeted to the now-suspended expansion of the Comanche Peak Nuclear Power Plant.[6] The relatively modest water needs to be addressed by this permit would not compensate for the systemic problems its approval would create. Those water needs could, in any event, be easily addressed by a far more limited permit that does comply with Texas law. It is not too late for BRA to return to the drawing board and devise a lawful permit. But if the current permit is approved, it will be too late to rescue the Texas water permitting system from the impact of these harmful precedents.

The LGC will not repeat its elaboration of each of these arguments in this reply, and respectfully refers the Commissioners to its previous exceptions concerning these subjects. The LGC will devote the remainder of this reply to addressing a handful of specific points raised by other parties' exceptions.

II. RESPONSES TO EXCEPTIONS AND ARGUMENTS

A. Even the ED appears to agree that the requirement to specify points of diversion is mandatory, not directory.

It is no surprise that the protesting parties disagree with the Second PFD's finding that Section 295.7's requirement to identify diversion points is directory, not mandatory. It is noteworthy, however, that the ED also excepts to this finding.[7] Since BRA did not even raise this argument until its reply brief after the second contested case hearing, the ALJs issued the Second PFD without the benefit of any other party's (including the ED's) response to this new

[6] *Id.* at 110.

[7] *See* ED Exceptions at 1-2, 22-23.

contention. In his exceptions, the ED expresses concern about the precedent such a conclusion could set.[8] The ED offers, somewhat vaguely, that a finding that the rules of Section 295 are not mandatory "could be misused in future applications."[9] Although the ED does not elaborate, it is not hard to see that granting permit applications that fail to identify where water will be diverted would present problems for the Texas water permitting system.[10]

Unfortunately, this institutional concern cannot be addressed by a ruling that holds that Section 295.7 is mandatory, but that also determines, by implication, that the section has no real effect. But that is what the ED suggests by nevertheless arguing that BRA has complied with Section 295.7. It is undisputed that under the current version of the SysOp Permit, BRA would be entitled to divert water at any point(s) of its choosing within 1,300+ miles of river. Will other applicants now also be entitled to permits that would allow them to divert water at points of their choosing within thousands of miles of river? The question answers itself. And because others should not be able to do this, BRA should not either. BRA's failure to identify specific points of diversion led to the denial of BRA's application in 2011. The same problem is still present in 2015, and it should lead to the same result.

B. The ED acknowledges that *Stacy Dam* requires protection of authorized water rights at their full exercise, but ignores the fact that the WAM cannot model full exercise of the rights BRA would have under the SysOp Permit.

In his discussion of the sedimentation issue, the ED properly acknowledges that the Texas Supreme Court's *Stacy Dam* decision requires protection of the full amount of authorized rights in a water permit.[11] This prevents future applicants from receiving a permit for previously appropriated water. In other words, the same water cannot be double-permitted. The TCEQ's

[8] *Id.* at 23.

[9] *Id.*

[10] *See* LGC Exceptions at 3-9.

[11] *See* ED Exceptions at 11-12.

principal tool for determining whether water remains available for appropriation after full exercise of existing water rights is the WAM. It is perplexing, therefore, that the ED does not draw out the implications of these facts for the SysOp Permit.

As the LGC explained in its exceptions, the WAM simply cannot model the full exercise of BRA's rights under the SysOp Permit, due to the vast flexibility that BRA seeks.[12] Under the SysOp Permit in its current form, a diversion that does not appear in the WAM's simulation of "full exercise" of the permit's authorized rights could nonetheless suddenly appear on the river, in real life, at some point in the future. As explained in the LGC's exceptions, this is not due to a problem with the WAM. Rather, it is due to the fact that full use of this permit is inherently incapable of being properly captured or modeled.

The structure of the Texas water permitting system requires a clear understanding of the maximum use of every water permit. Future applicants for water, including those in the Brazos Basin, depend on this information. A permit for which this is not possible, like this one, should be denied.

C. The ALJs were correct to address the issue of reduced reservoir storage due to sedimentation, but the more appropriate response would be for BRA to start over and prepare a new application using proper modeling inputs.

BRA and the ED both except to the ALJs' recommendation of a 14% reduction in the SysOp Permit's various annual appropriation amounts due to the reduced storage capacity resulting from sedimentation in Possum Kingdom Reservoir. Among other points, BRA offers that modeling work has not yet been done to support this reduction.[13] Although the LGC did not specifically except to the ALJs' approach to this issue, the LCG does agree with Dow that a more accurate solution would be to include the reduced storage capacity as a new input when BRA re-

[12] *See* LGC Exceptions at 17-22.

[13] *See* BRA Exceptions at 3.

runs its modeling to account for reduced yield resulting from the drought.[14] A full re-running of the model in this manner would presumably also result in reductions in maximum authorized diversions *by reach*, thereby addressing another issue the LGC has raised.[15]

While this approach is certainly more reasonable than granting a permit based on faulty data that omits known reductions in reservoir yield and storage capacity, it still leaves all parties in the peculiar position of re-running modeling some months from now to determine what the SysOp Permit's appropriation *truly* will be. This is not the way that water permitting is supposed to work. As the LGC already noted in its exceptions, this will effectively create yet another two-step process, with the final appropriation amounts still to be determined in a subsequent proceeding or process whose scope and procedures are unclear. The question of whether drought or sedimentation or any other factor invalidates BRA's modeling—and the appropriation amounts resulting from this modeling—should be resolved *before* any permit is granted, and not afterward.

The best approach, therefore, would be for BRA to simply start over, and prepare a permit application that uses accurate data from the beginning. This is a better alternative than granting a permit known to be inaccurate, and then waiting for the data and appropriation amounts to be corrected in an ill-defined second-step proceeding.

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[14] *See* Dow Exceptions at 26. Although BRA and the ED propose some changes to Special Condition C.7 recommended in the Second PFD, it appears that neither objects to the requirement that BRA perform a detailed assessment of the drought, including whether the drought has decreased the amount of water available for appropriation under the permit. *See* BRA Exceptions at 4-5; ED Exceptions at 23-24. Presumably, this will require re-running BRA's models and assessing whether appropriation amounts by reach must be reduced. However, the LGC reiterates here its previous objections to the lack of specificity about what this evaluation will actually entail. *See* LGC Exceptions at 13.

[15] *See* LGC Exceptions at 23-25. The LGC does not fully understand the ED's argument on page 12 of its exceptions that a reduction in the modeled storage capacity of Possum Kingdom Reservoir would cause water authorized to BRA to be given to other water right holders. No applicant, BRA included, should be able to request appropriation of water that is no longer available because storage capacity in a reservoir has been reduced. Just as it is possible to adjust modeling to reflect reduced yield from a reservoir resulting from drought, it is possible to adjust modeling to reflect a reservoir's reduced storage capacity.

D. The Commissioners should adopt FBR's suggestion to send this matter to mediation.

FBR proposes in its exceptions that this matter be sent to mediation. The LGC believes this is a good suggestion.

It is important to consider that even if the Second PFD's recommendations were to be accepted in full (despite all of the protesting parties' exceptions), final appropriation numbers would await the conclusion of another study to be completed within nine months of the permit's issuance. There appears to be general acceptance that the effect of the drought needs to be evaluated and incorporated into the permit, although there is currently no clear protocol in place for doing so. Moreover, as the Commissioners may recall, the expansion of the Comanche Peak nuclear power facility near Lake Granbury was originally supposed to be—far and away—the largest use of water supplied by this permit. That project has since been put on indefinite hold. BRA's discussion of needs for water under the permit has shifted downstream, to Region H in the Houston metropolitan area. Yet only a small amount of the projected water needs in Region H are supposed to be supplied by this permit under the current State Water Plan.

In light of these factors, any perceived urgency in ruling on this permit is minimal at best. Given the many troubling precedents this permit would create for the Texas water permitting system—and the near-certainty of further appeals of any decision—a stay of proceedings and a direction to mediate is sensible.

An instruction by the Commissioners that the parties should discuss a total appropriation in the range of 100,000-200,000 acre-feet per year or less is also appropriate. BRA itself has estimated that the reliable firm supply it hopes to ultimately generate from the permit will be in the range of 100,000 to 150,000 acre-feet per year, and possibly less, given the recent drought. If

the result of a mediation could be agreement on a scaled-back permit which addresses legitimate concerns of the protesting parties, this could be a positive outcome for all involved.

If the Commission is not inclined to send the matter to mediation, then the LGC respectfully submits that the proper resolution should be denial of the application, for all of the reasons stated above and in the LGC's previous briefing.

Respectfully submitted,

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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 31st day of August, 2015.

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