

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

<b>CONCERNING THE APPLICATION</b>	§	<b>BEFORE THE TEXAS COMMISSION</b>
<b>BY THE BRAZOS RIVER</b>	§	
<b>AUTHORITY FOR WATER USE</b>	§	<b>ON</b>
<b>PERMIT NO. 5851 AND RELATED</b>	§	
<b>FILINGS</b>	§	<b>ENVIRONMENTAL QUALITY</b>

**BRIEF BY THE CITY OF LUBBOCK  
ON THE PROPOSAL FOR DECISION ON REMAND**

TO THE HONORABLE COMMISSIONERS:

The City of Lubbock (the “**City**”) is a party to this hearing.<sup>1</sup> It respectfully submits this brief pursuant to TCEQ Rule 80.257 regarding the Proposal for Decision on Remand (the “**PFD**”) on the above-referenced application (the “**Application**”). The purpose of this brief is to address certain ambiguities in the recommendation made by the Administrative Law Judges (the “**ALJs**”), and to seek clarification from the Texas Commission on Environmental Quality (the “**Commission**”) regarding the same matters. In support of its position on this matter, the City respectfully offers the following:

**I.  
BACKGROUND**

The City owns Water Use Permit No. 3985, as amended (“**Permit 3985A**”), which allows the City to secondarily use imported surface water-based effluent. Permit 3985A also allows the City to use the bed and banks of the North Fork Double Mountain

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<sup>1</sup> Order No. 18 at 1. The City and the Brazos River Authority entered into an interlocal agreement on May 14, 2009 resolving disputed issues and requiring the City to withdraw its protest of BRA’s Application No. 5851, provided, however, that the City’s withdrawal may be contingent upon review of a final draft permit to determine that it is consistent with the terms and conditions of the settlement agreement.

Fork of the Brazos River Basin (the “*North Fork*”) to convey and divert a total of 32,991 acre-feet of surface water-based and groundwater-based return flows pursuant to Sections 11.042(b) and (c) of the Texas Water Code.

In addition, the City owns Water Use Permit No. 4146B, which names the City as the exclusive user of 21,000 acre-feet of return flows each year derived from the use of surface water diverted from Lake Alan Henry. The City is currently applying for authorization under Section 11.042(c) of the Texas Water Code to convey and divert the 21,000 acre-feet of surface water-based return flows authorized under Permit No. 4146B.

The City believes that the record makes clear that BRA is not seeking authorization to divert return flows originating from the City’s discharges of either surface water-based or groundwater-based return flows. However, the Water Use Permit No. 5851 proposed by the ALJs (the “*Draft Permit*”) will create unnecessary confusion regarding BRA’s right to such return flows if the Draft Permit is issued in its current form.

## II.

### **DRAFT PERMIT AND WATER MANAGEMENT PLAN**

The Draft Permit would authorize BRA to “impound, divert and use return flows discharged into the Brazos River Basin subject to special conditions to protect” senior water rights.<sup>2</sup> The relevant special conditions under Section 5.A. of the draft permit are as follows:

- 1) Permittee’s authorization to divert and use return flows under this permit is limited to return flows that are authorized for discharge

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<sup>2</sup> Proposal for Decision, Attachment BRA Exhibit 132B at 5.

by Texas Pollutant Discharge Elimination System (TPDES) Permits in effect as of the issuance date of this permit, and as authorized by future modifications of this permit or the WMP. . . .

- 3) Permittee's storage, diversion and use of that portion of the appropriation based on return flows is dependent upon potentially interruptible return flows. Permittee's storage, diversion and use of that portion of the appropriation based on return flows will be interrupted by direct reuse or will be terminated by indirect reuse within the discharging entity's corporate limits, extraterritorial jurisdiction, or contiguous water certificate of convenience and necessity boundary, provided the discharging entity has applied for and been granted authorization to reuse the return flows. . . .
- 4) Permittee's storage, diversion and use of groundwater based return flows is subject to interruption by direct reuse or indirect reuse upon issuance of a bed and banks authorization pursuant to Texas Water Code § 11.042(b) by the Commission to the discharging entity.<sup>3</sup>

The WMP recognizes that the final permit issued to BRA (the "**SysOp Permit**") will only authorize BRA to use surface water and groundwater-based return flows that are not authorized for use by the discharger.<sup>4</sup> The Special Conditions in the Draft Permit, however, indicate that BRA's use of surface water and groundwater-based return flows will be either interrupted or terminated—or both—upon the *indirect reuse* of the discharger rather than by the existence of a bed and banks authorization for such reuse.<sup>5</sup> This appears to leave open the possibility that BRA could divert unused portions of surface water and groundwater-based return flows discharged by other entities in the basin like the City. In this sense, these Draft Permit terms appear to be inconsistent with the WMP, which states that BRA will be authorized "the use of all return flows discharged into a state watercourse *that are not authorized for use by the discharger or*

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<sup>3</sup> *Id.* at 6-7.

<sup>4</sup> BRA Exh. 113, Water Management Plan at 6.

<sup>5</sup> Proposal for Decision, Attachment BRA Exhibit 132B at 7.

*some other party*”<sup>6</sup> and that “[r]eturn flows for *currently permitted indirect reuse projects* were also not include as part of these flows.”<sup>7</sup>

In addition, the Draft Permit only limits BRA’s use of return flows to indirect reuse by the discharger within the discharger’s jurisdiction.<sup>8</sup> Permit 3985A authorizes the City to use its return flows anywhere within Lubbock and Lynn Counties. Those counties extend beyond the City’s extraterritorial jurisdiction (“*ETJ*”). Special Condition 5.A.3, therefore, appears to not terminate BRA’s use of return flows if the City exercises its rights under Permit 3985A to use its return flows in the portions of Lubbock or Lynn Counties outside of the City’s ETJ. The City is concerned that this ambiguity will lead to confusion about which entity has a right to use the City’s return flows or that it could be construed to limit the City’s reuse to within the City’s ETJ contrary to the clear provisions of Permit 3985A. Moreover, there is no provision in Section 11.042, or the Commission’s rules, that mandates geographical restrictions on use of return flows by the discharger. While the Commission may certainly include place of use restrictions within the terms of a Section 11.042 authorization, the Draft Permit appears to restrict the scope of future Section 11.042 authorizations for entities other than BRA. Such a provision would go beyond the scope of the Commission’s authority.

While the WMP generally states that BRA’s authorization under the SysOp Permit will be to use only those return flows that are not authorized for use by the discharger or another party,<sup>9</sup> it is silent with respect to the City’s return flows specifically. The Technical Report includes an itemized listing of return flow sources

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<sup>6</sup> *Id.* at 6 (emphasis added).

<sup>7</sup> BRA Exh. 113, Technical Report at 4-41 (emphasis added).

<sup>8</sup> Proposal for Decision, Attachment BRA Exhibit 132B at 7 (Special Condition 5.A.3).

<sup>9</sup> BRA Exh. 113, Water Management Plan at 6.

throughout the Brazos River Basin by permitted discharge, but omits the City's return flows.<sup>10</sup> It is unclear, therefore, whether the authorizations of the Draft Permit and WMP include any unused portion of the City's return flows in the overall appropriation of water under the SysOp Permit.

The terms of the Draft Permit would appear to allow BRA to divert unused portions of the City's return flows if those flows were included in BRA's availability or operational models. Special Condition 5.A.1 specifically allows BRA to use water subject to modifications to either the SysOp Permit or the WMP—not necessarily both.<sup>11</sup> The Commission's rules subject amendment to water rights that increase an appropriation to public notice requirements as provided for in the Texas Water Code.<sup>12</sup> However, there is no such rule requirement for water management plans or other documents that are offered in support of water rights applications. The Draft Permit expressly incorporates the WMP into the permit, but it does not incorporate the Technical Report or any of its appendices.<sup>13</sup> The Draft Permit provides that major amendments to the WMP shall be pursuant to contested case procedures.<sup>14</sup> However, the WMP states that modifications to the water availability models to address changed conditions could be considered minor amendments—presumably not subject to public notice and hearing.<sup>15</sup> Significantly, for purposes of the City's brief, the WMP expressly includes modifications to the amount of available return flows in a category of changes that could be considered minor

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<sup>10</sup> BRA Exh. 113, Technical Report, App. G-2, Table G.2.1.

<sup>11</sup> Proposal for Decision, Attachment BRA Exhibit 132B at 6.

<sup>12</sup> 30 Tex. Admin. Code § 295.158(b).

<sup>13</sup> Proposal for Decision, Attachment BRA Exhibit 132B at 9.

<sup>14</sup> *Id.* at 9.

<sup>15</sup> BRA Exh. 113, Water Management Plan at 2.

amendments not requiring notice and hearing.<sup>16</sup> Under the terms of the SysOp Permit as proposed by the ALJs, BRA and the Executive Director could, at any point in the future, include the City's return flows in the WMP Technical Report, the appendices thereto, or the availability model without providing the City an opportunity to intervene in that decision.

The only way to ensure that the City's water rights interests are fully protected by the terms of the SysOp Permit is for such protection to be included in the terms of the permit itself—not in the flexible terms of the WMP or the Technical Report and appendices. Limiting BRA's use of return flows upon the discharging entity's actual indirect reuse of those flows is different from terminating BRA's use of return flows that are authorized for use by the discharger under an existing bed and banks authorization as is contemplated in the WMP and the Technical Report. The Draft Permit expressly recognizes that BRA's use of return flows is limited "as authorized by future modifications of this permit *or the WMP*."<sup>17</sup> The City believes that this provision is appropriate, but only if the conditions of the permit make clear that BRA has no right to divert return flows that are authorized for use by the discharger under a Section 11.042 bed and banks authorization. Similarly, the limitation of BRA's use of return flows to only those used within

### III.

#### PROPOSED AMENDED SPECIAL CONDITIONS

To ensure that the final SysOp Permit is consistent with the general terms of the WMP and the terms of the Settlement Agreement, the City proposes that the

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<sup>16</sup> *Id.* at 2.

<sup>17</sup> Proposal for Decision, Attachment BRA Exhibit 132B at 6 (emphasis added).

Commission amend Special Conditions 5.A.3 and 5.A.4 in the final SysOp Permit, which will serve to protect the water rights of entities—like the City—who have bed and banks authorizations, and will accurately reflect the stated goals of the WMP.<sup>18</sup> The City proposes that the following additional Special Condition 5.A.3 be revised as follows in the final SysOp Permit issued by the Commission:

- 3) Permittee's storage, diversion and use of that portion of the appropriation based on return flows is dependent upon potentially interruptible return flows. Permittee's storage, diversion and use of that portion of the appropriation based on return flows will be interrupted by direct reuse [~~or will be terminated by indirect reuse~~] within the discharging entity's corporate limits, extraterritorial jurisdiction, or contiguous water certificate of convenience and necessity boundary, [~~provided the discharging entity has applied for and been granted authorization to reuse the return flows~~] or will be terminated upon the issuance of a bed and banks authorization issued by the Commission to the discharging entity pursuant to Texas Water Code § 11.042.

Further, the City recommends the following revisions to Special Condition 5.A.4 to conform the final SysOp Permit to the stated intent of BRA's use of groundwater-based return flows in the WMP and Technical Report:

- 4) Permittee's storage, diversion and use of groundwater based return flows is subject to interruption by direct reuse [~~or indirect reuse~~] and is terminated upon issuance of a bed and banks authorization pursuant to Texas Water Code § 11.042(b) by the Commission to the discharging entity.

These provisions are consistent with BRA's statement of the return flows authorizations in the WMP and improve the consistency of the wording of the Draft Permit. A reflection in the SysOp Permit of the WMP's provision that return flows permitted for reuse by the discharger are not included in water available for BRA's diversion and use will cure any ambiguity about whether BRA will be authorized to

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<sup>18</sup> BRA Exh. 113, Water Management Plan at 6.

divert unused portions of the City's return flows or potentially interfere with the City's ability to use its return flows outside of its ETJ or authorized service area.

**IV.**

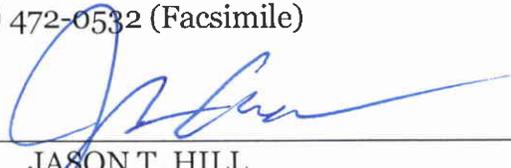
**CONCLUSION**

The City of Lubbock respectfully requests that the Commission adopt the proposed additional Special Condition 5.A.6 as proposed herein, and include the Special Condition in any final SysOp Permit that may be issued to BRA. The City can support issuance of the SysOp Permit with the inclusion of the proposed additional Special Condition. The City further requests that the Commission grant the City all other relief to which it is entitled by law.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that an original and seven true and correct copies of the City of Lubbock's Brief on the Proposal for Decision on Remand was filed with the Office of the Chief Clerk and that the same was served on the following by electronic mail on this 20th day of August, 2015.

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