

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

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

**NATIONAL WILDLIFE FEDERATION’S EXCEPTIONS
TO THE PROPOSAL FOR DECISION**

The National Wildlife Federation (NWF) files the following *Exceptions to the Proposal for Decision* in this matter. This application is the most significant that TCEQ has considered in many years. The Proposal for Decision (PFD), if accepted as drafted, will usher in a new era of uncertainty in water rights administration in a number of ways that go far beyond the massive scope of this individual application. The underlying application and proposed permit are unprecedented in scale and complexity, governing diversions, at an unlimited number of diversion locations, many of which are to be identified later, within diversion reaches covering over 1,200 miles of rivers and major streams. And, although the application does not comply with the Commission’s rules, the PFD recommends interpreting those rules establishing standards for water right applications as more general directions than mandatory requirements so that it can be approved anyway. Acceptance of that approach could significantly change the nature of the water rights application process for all applications going forward. NWF respectfully submits that BRA could, instead, submit a scaled-down version of the application that does comply with applicable law.

In order to accommodate the complexity and scale of the application, the PFD also recommends interpretations of the environmental flow standards that deprive rivers, streams, and the Brazos estuary of key protections otherwise accorded by those standards. The PFD and proposed permit implement, and interpret, the new environmental flow standards that will determine future environmental flow conditions for the Brazos River Basin all the way from Possum Kingdom Lake to the Gulf. Unfortunately, the standards are proposed to be implemented in a way that, again in order to simplify compliance for this incredibly complex permit, unduly and unjustifiably minimizes the level of protection provided by those standards. The issue raised here is not whether the standards are adequate but whether the standards are being adequately implemented. Unfortunately, they are not. And, because of the scope of the application, implementing the standards in that way adversely affects almost the entire Brazos Basin. The PFD also interprets the adoption of environmental flow standards as negating specific statutory provisions granting the Commission authority to provide additional environmental protections even though nothing in the flows standards or the Water Code indicates the standards can, much less are intended to, have that effect.

A. Exception to Recommendation that Compliance with Specific Requirements of Chapter 295 be Construed as Directory not Mandatory

At page 24, the PFD postulates a tension between water rights permitting requirements, including for BRA's requested permit, and the long range planning called for in the state's water planning process created by Senate Bill 1 in 1997. However, that purported tension is more perceived than real and it provides no basis for failing to follow the requirements of the Water Code and TCEQ's rules. Nothing in the record indicates that granting BRA's application in its current form is necessary to implement any water plan. The relevant water plans contemplate that a total of approximately 108,000 acre-feet of water might be supplied under BRA's System

Operation Permit (SysOp Permit). Instead of seeking such a massive right, BRA could identify specific diversion points, rates, and amounts that would allow it to meet specific demands identified in those plans.

It simply is not permissible, or necessary, to excuse a failure to comply with existing permitting requirements in order to meet the goals of water planning. Those goals can be met without discarding the plain language of the statute and rules. If BRA does not get all of the authority and water supply it currently seeks in this application, BRA could apply in the future, if additional demands are not met through other means, for an additional appropriation. At that juncture, BRA should be able to present a more focused application addressing specific water demands and avoiding the need to request such sweeping and undefined diversion authority.

Nonetheless, in response to the perceived tension and at BRA's last-minute urging,¹ the PFD proposes to read the requirements of Chapter 295 of TCEQ's rules, specifically Sections 295.5, 295.6, and 295.7, prescribing requirements for water rights applications, as being "directory" rather than "mandatory." That proposed distinction relies on a line of court cases excusing, under narrow circumstances, the failure to meet defined deadlines for certain actions and seeks to expand that limited exception far beyond its reasonable scope.² Those court cases allow

¹ The argument was first raised by BRA in its Reply to Final Arguments.

² The PFD cites the following cases as supporting the assertion that Chapter 295 provisions may be considered directory: *Lewis v. Jacksonville Bldg. and Loan Ass'n.*, 540 S.W.2d 307, 310 (Tex. 1976)(finding rule requirement for decision on applications within 45-calendar days is directory, not mandatory: "If the provision directed doing of a thing in a certain time without any negative words restraining it afterwards, the provision as to time is usually directory."); *Helena Chem. Co. v. Wilkins*, 47 S.W.3d 486 (Tex. 2001)(delay in submitting claims did not deprive trial court of jurisdiction to hear farmers' lawsuit); *Texas Dept. of Public Safety v. Pierce*, 238 S.W.3d 832, 835-36 (Tex. App. – El Paso 2007)(provision providing that continuance shall be granted under specific circumstance of discovery being provided less than 7 days before hearing construed as directory); and *Chisholm v. Bewley Mills*, 287 S.W. 2d 943 (Tex. 1956) (failure to file a certified copy of judgment within 30 day period will not, of itself, bar an otherwise valid claim). BRA, in its Post Hearing Reply Brief additionally cites the following cases in support of its argument: *Tex. Dept. of Public Safety v. Guerra*, 970 S.W.2d 645 (Tex. App. – Austin, 1998 *pet denied*)(statutory requirement that suspension of license hearing be held within 40 days of notice of suspension was directory); *Morrison v. Chan*, 699 S.W.2d 205 (Tex. 1985)(failure to bring suit within statute of limitations period bars

the interpretation of requirements as being directory only if, among other things, the statute or rule setting the deadline does not indicate any consequence for a late filing and only if the delayed action does not create a substantive problem. Thus, for example, the failure to file a document until shortly after a 45-day deadline might be excused by construing the requirement as directory if there is no clear stated or actual consequence for filing late. Here, however, the PFD proposes to excuse the failure to file an adequate application rather than a failure to file a document within a certain time period.

Setting a deadline for filing ensures that a process keeps moving forward in a timely fashion. Establishing application requirements ensures that the Commission has the information mandated to evaluate applications in order to protect existing users, the environment, and the public interest. Those are two very different things. In advancing that proposal, the PFD assigns great importance to the contention that “the rules do not state any consequence for failure to include” the required information.³ However, Section 297.41 (a) of the Commission’s rules clearly states that consequence, providing in pertinent part: “[e]xcept as otherwise provided by this chapter, the commission shall grant an application for a water right only if:

(1) the application conforms to the requirements prescribed by Chapter 295 of this title (relating to Water Rights, Procedural) and is accompanied by the prescribed fee”

The stated consequence for failure to comply is that the permit cannot be granted. Accordingly, the test for construing the rules as directory fails on that ground alone.

This approach was first raised by BRA in its Reply Brief so NWF and other parties have not previously had the opportunity to respond. It is important to recognize that the key authority⁴

recovery); and *Plano Parkway Office Condo. v. Bever Properties*, 246 S.W.3d 188 (Tex. App. – Dallas, 2007)(phrase “may not” was directory in situation involving failure of Secretary of State to issue certificate of incorporation for condominium association in a timely manner).

³ PFD at pages 26-27.

⁴ *Lewis v. Jacksonville Bldg. & Loan Ass’n*, 540 S.W.2d 307, 310 (Tex. 1974).

relied upon as providing the basis for making that directory versus mandatory distinction indicates that agency intent in imposing the requirement is a critical determinant. Section 297.41 (a) evinces the intent that the requirements of Chapter 295 were adopted to be mandatory.

It is important to acknowledge that the rules construed as being directory by the Supreme Court in the *Lewis* case and the other cases cited by BRA and in the PFD dealt with enforcing a deadline for taking an action as opposed to the question of whether the action taken had to meet an adequacy requirement. It is much different to construe a requirement that, for example, a judgment must be filed within 45 days after a certain event as directory with respect to the significance of missing the deadline than it is to construe as directory the requirement that the judgment must include specified information. The Supreme Court did the former, the PFD proposes to do the latter.

None of the cited cases support that dramatic extension of the doctrine. A key factor in the Supreme Court's deliberation in the *Lewis* case was the fact that no consequence for failing to meet the specific schedule was established. By contrast, the Commission's rules do prescribe a consequence: the application is not to be granted in the absence of compliance. In NWF's view, there likely could be compliance with Chapter 295 requirements with respect to some amount of water, some diversion rates, and some diversion points, that correspond to actual identified demands and users, to support the granting of a portion of BRA's application. However, what portion would meet those requirements remains to be determined. The problem here is that BRA has requested such a sweeping, and unprecedented, permit.

The PFD also focuses on Section 11.134 of the Water Code as setting out the applicable prerequisites for approval of an application. However, that analysis fails to acknowledge that one of the things Section 11.134 requires is that the Commission must determine, before granting an

application, that the “application conforms to the requirements prescribed by this chapter and is accompanied by the prescribed fee.” That is the same language found in Section 297.41 (a) of the rules except that the rule language incorporates a reference to Chapter 295 as fleshing out those Chapter 11 application requirements. Section 11.134 provides that the Commission may only grant an application if the application conforms to the requirements of Chapter 11. Those Chapter 11 requirements are set out in Chapter 295 of the rules. In its current form, the application does not conform to those Chapter 295 requirements.

It is true that some existing permits or certificates of adjudication exist that may not demonstrate strict compliance with Chapter 295 requirements regarding a specific diversion point.⁵ However, there has been no demonstration that the Commission has specifically approved such non-compliance and, as the ALJs acknowledged in at least one context, the scale of what BRA is proposing makes a comparison to past agency practice not particularly useful.

B. Exception to Recommendation that Modeling be Considered to Appropriately Account for Refilling of Storage Emptied Under 1964 System Operation Order.

One key issue in the water availability determination relates to whether BRA has appropriately modeled the refilling of storage that is emptied under BRA’s existing 1964 System Operation Order (System Order). The resolution of that issue depends on the interpretation to be given to language in the System Order. The operative language is as follows:

[BRA] shall store in the system reservoirs only appropriable waters of the Brazos River and its tributaries, subject to the rights of holders of other water rights. Subsequent to the diversion or release of water from any system reservoir in excess of the amount authorized as a priority right for that reservoir, [BRA’s] right to impound any additional water in that reservoir is subject to the rights of holders of downstream senior and junior water rights to require passage of inflows to which they would be entitled in the absence of this additional use under the systems operations. Whenever the Commission determines that [BRA] is

⁵ The Commission’s decision in this case will have no bearing on the validity of existing rights which are final and not subject to challenge.

storing any water to which holders of other Water rights are entitled, [BRA] shall release said water.

PFD at pp. 83-84 (quoting BRA Exh. 134 at 4, Paragraph 5J, emphasis added).

The disagreement centers on whether that language requires the refilling of storage emptied under the System Order to be done at a junior priority, or, more specifically, a non-priority, basis. Surprisingly, the PFD, despite the express reference in the quoted language to the refilling of storage being subject to the rights of holders of senior and “junior water rights” indicates that the ALJs see nothing in the language indicating a junior priority. It is difficult to understand the import of the express statement that downstream junior water rights holders also have the right to require passage of inflows that would otherwise refill the storage as anything other than the imposition of a junior priority for the refilling. If downstream junior water rights can require passage of inflows, then the refilling is necessarily made lower in priority than those junior downstream rights. Otherwise, the junior rights would have no claim to the water and the reference would be deprived of meaning. Because the refilling of storage was not interpreted correctly in terms of priority, the determination of water availability overstates the amount available.

C. Issue of Current Drought

NWF generally agrees with the treatment in the PFD of the issue of the recent drought and the need to ascertain its impact on water availability and permit authorization if a permit is granted. However, NWF does believe that a more rigorous approach is needed for developing the methodology that BRA would be required to use in evaluating that impact if a permit were granted. There should be a mechanism through which BRA proposes a methodology for review and approval by the Executive Director and through which other parties have the opportunity to provide timely comments for consideration. Similarly, the results of that evaluation also should be subject to a comparable review and approval process.

D. Exception to Recommendation that BRA Need Not Identify Specific Return Flows by Amount

The PFD incorrectly summarizes an aspect of NWF's position on return flows. NWF has not taken a position, one way or the other, on whether return flows should be treated as unappropriated flows.⁶ However, NWF does contend that, regardless of the theory relied upon in authorizing reuse of return flows, all return flows authorized to be reused should be subject to environmental flow requirements. There is ample legal authority to support making diversion of return flows subject to flow requirements regardless of the underlying legal theory used to authorize that diversion. The proposed permit imposes that requirement.

NWF also contends that the WMP must identify the specific current return flows, including amounts for each return flow source, that are included in any authorization granted to BRA. Without that information, it will not be possible to track the future availability of those return flows, as contemplated in the proposed permit, to ensure that BRA is not diverting water it is not entitled to. That is essential because return flows are, by their very nature, dependent on the actions of others and may not continue to be available. Although NWF acknowledges BRA's reference, in its Reply Brief, to Appendix G-2 to the Technical Report as indicating the amount of return flows BRA seeks to appropriate, that reference is not adequately specific.

Appendix G-2 actually includes several tables of return flow amounts based on different calculation approaches and producing different availability levels. NWF believes any permit issued that authorizes diversion of return flows must clearly identify the specific return flow amounts BRA would be authorized to divert and the sources of those amounts. A reference to a specific table in Appendix G-2 would be a good start. NWF understands Table G.2.5 to be the one that BRA used in calculating availability so it would be the appropriate starting point for

⁶ See, e.g., NWF's Initial Post-Hearing Final Arguments in this matter, filed on March 21, 2011, at p. 15.

identifying return flows. However, even that table includes return flows that BRA previously has specifically indicated it was excluding from its calculations based on existing settlements and/or existing indirect reuse authorizations.⁷ Any permit issued should specify that Table G.2.5 sets out the universe of return flows that BRA is authorized to rely on and should identify which of the return flows in that table are excluded because of existing indirect reuse authorizations or settlement agreements. That would be the minimum amount of information needed to be able to track BRA's use of "current" return flows as dischargers seek indirect reuse authorizations or change the amount they discharge.

In the discussion at page 238, the PFD suggests that NWF's concerns about return flows are addressed by BRA's proposed language, set out on that same page, regarding the tracking of actual discharge amounts on a monthly basis. That is a related, but separate, issue from the one discussed above. NWF agrees that return flow discharges do need to be tracked in the accounting plan to ensure that the water BRA wants to be able to divert is actually being discharged in the future. However, that is not a substitute for a clear listing in the permit of the specific return flows, with a designated maximum amount for each, that BRA's permit is based on. In addition, BRA's proposed language, as recommended for inclusion, fails to actually indicate that its diversion rights are to be reduced to reflect any reduction identified in return flows. Any permit issued should acknowledge that as a result of the submission of the information indicating a reduction in available return flows, BRA's use authorization will be reduced accordingly.

⁷ Mr. Gooch testified that although the return flows in Table G.2.5 in Appendix G-2 total 143,502 acre-feet per year, 44,915 acre-feet of those return flows already are subject to reuse permits and are not available under the proposed permit. BRA Exh. 119 at p. 33, lines 12-17. However, nothing in that table identifies which of the listed return flow amounts are associated with reuse permits.

E. Exception to Failure of Proposed Permit to Include a Requirement that BRA must return 50% of New Return Flows Resulting from the Permit to the Brazos Basin for Instream Flow Protection

The PFD, at p. 239, recommends the rejection of NWF's proposal that any permit issued should include a quantified return flow requirement pursuant to Section 11.046 (b) of the Water Code. If BRA is granted the kind of massive authorization it seeks in this application, which far exceeds specific identified demands, it would represent the type of situation in which a quantified return flow requirement is appropriate. The PFD also recommends two conclusions of law (COL 23 and 26) to the effect that mere compliance with the environmental flows standards fully satisfies, among other things, the requirements of Section 11.046 (b). NWF also excepts to those proposed conclusions.

BRA's unprecedented application seeks to tie up virtually all of the unappropriated water in the Brazos Basin in and below Possum Kingdom Reservoir, including current return flows. That is much more water than the Region G and Region H water plans, or the state water plan, recommend to be developed under the SysOp Permit. The proposed permit would authorize up to 443,853 acre-feet⁸ per year of diversions compared to the 108,000 acre-feet of supply recommended in those plans. However, if granted as proposed, BRA will actually have the right to use that amount of water plus the right to directly reuse all of the future return flows resulting from that water. As Mr. Gooch acknowledged,⁹ future return flows from the new authorization likely would equate to about an additional 50% of the diversion amount. So, for example, if under Demand Level C, BRA is authorized to divert and use 433,853 acre-feet per year, the permit also would authorize BRA to directly reuse about an additional 221,926 acre-feet of water per year, for

⁸ PFD at p. 273, recommendation b. 3). This is the highest of the four demand levels.

⁹ Transcript at p. 3104.

an annual total authorization of about 655,000 acre-feet. BRA has made no showing of any need for, or beneficial use of, that additional water.

It is undisputed in the record that the environmental flow standards are not met at all times¹⁰ and nothing in the proposed permit will ensure that they will be met in the future. Requiring a quantified portion of those new return flows to be returned to the stream is one way to help meet environmental needs and improve achievement of the environmental flow standards.¹¹

F. Exception to Failure of Proposed Permit to Ensure That Water Appropriated Will Actually Be Available After Term Authorization Expires

The PFD dismisses, in footnote 1120 at page 255, NWF's arguments about the need to account for the unaddressed contingency of the potential expiration of the term permit allowing the use of not to exceed 202,650 (to be adjusted to 202,000) acre-feet of water appropriated in the Allens Creek Reservoir permit. The PFD suggests such an expiration is not a problem because the authorization to divert water under term authorization would simply expire. However, the unaddressed contingency is that the appropriation amount in Paragraph 1.A. of the proposed permit is only available if either (1) the term authorization is in effect¹² (Demand Levels A and B) or (2) the Allens Creek Reservoir has been constructed and is operated as part of the system (Demand Levels C and D). If the term authorization expires and the Allens Creek Reservoir has not been constructed, a significant portion of the authorized amount included in Paragraph 1.A. will be unavailable. However, as currently drafted, BRA will have been granted a perpetual permit appropriating that water. Nothing in the proposed permit indicates the specific amount of water

¹⁰ Transcript at p. 3743.

¹¹ NWF sought to introduce testimony about the potential value of a quantified return flow requirement but that testimony and related testimony about implementation of the environmental flow regime recommendations as contemplated by the Brazos Basin Expert Science Team were excluded from the record.

¹² Proposed permit condition 1.E. expressly acknowledges that the term permit amount is "part of the amount appropriated in Paragraph 1.A."

authorized under Demand Levels A and B that would be available in the absence of the term authorization, much less how availability by diversion reach would be affected.

Each of those four Demand Levels includes either the water made available under the term permit or the water made available from operating the Reservoir as part of the system. As currently drafted, if the term authorization expires, the permit would continue in effect and would purport to authorize appropriations under Demand Level A or B even though the water previously available through that authorization would not actually be available to BRA. The Water Code requires a demonstration that the amount of water authorized actually will be available.

G. Exception to the Failure to Ensure That the Permit Will Ensure Compliance with the Environmental Flow Standards

By arguing that the permit should clearly mandate compliance with applicable environmental flow standards, NWF is not intending to question BRA's motives. NWF acknowledges, and appreciates, BRA's MOU with the Texas Parks and Wildlife Department and the commitments therein. However, particularly when dealing with perpetual permits, it is essential that applicable requirements be clearly established as enforceable permit conditions. Even as adjustments might be made in the future, it is critically important to have a clear starting point in the permit from which to make those adjustments. Voluntary commitments are very commendable but they are not an adequate substitute for enforceable permit requirements, which are called for in the Commission's rules.

The flow standards establish levels of subsistence flows, base flows, and pulse flows that are required to be protected and they establish specific locations at which those levels must be protected.¹³ However, the specific permit conditions that should be included in any permit in order

¹³ Additional environmental protections may also be required pursuant to other statutory provisions, such as Sections 11.042, 11.046, 11.085, and 11.152 of the Water Code.

to accomplish and flesh out that protection are not set out in the flow standards. Instead, the standards state: “The commission will incorporate into every water right permit any condition, restriction, limitation, or provision, as provided in Chapter 297 of this title (relating to Water Rights, Substantive) that is reasonably necessary to protect environmental flow standards.”¹⁴ Thus, in applying the flow standards in a complex situation like this one, individual evaluation is required in crafting the permit language needed to achieve the protections established in the flow standards. As discussed further below, additional conditions, beyond those found in the draft permit, are reasonably necessary to ensure compliance with the environmental flow standards up and down the basin in the context of the massive water right requested by BRA.

1. Inadequate Implementation of Upstream Measurement Points

The proposed permit relies on a limited number of measurement points to determine compliance with environmental flow requirements. Some of those measurement points are located upstream of the diversions they govern and that raises various implementation challenges. NWF does not oppose the use of upstream measurement points but does propose an improved approach for relying on them to ensure compliance with the flow standards. NWF’s proposed language represents an attempt to accomplish an equivalent level of protection when an upstream measurement point is used as is accomplished when a downstream measurement point is used. BRA should not be allowed to divert water when using an upstream measurement point if the diversion(s) could cause flows to fall below the levels protected in the flow standards. Authorizing that is inconsistent with the flow standards. Unfortunately, the WMP, even with the addition of the

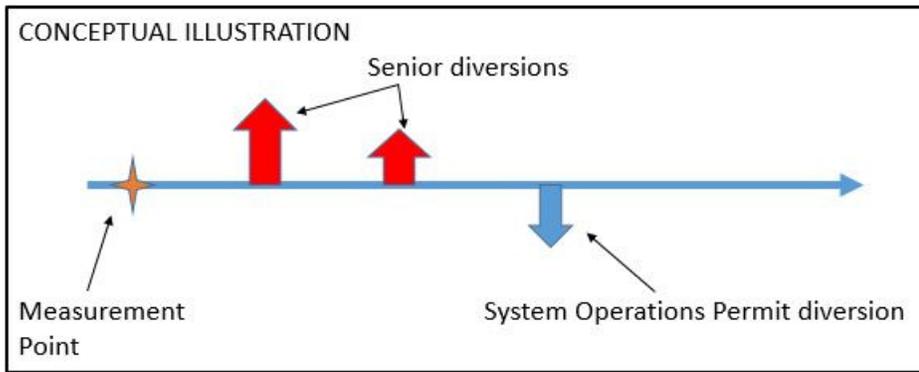
¹⁴ 30 TAC §298.15 (c). This provision is included in Subchapter A of Chapter 298, which includes general provisions applicable throughout the chapter in which all of the environmental flow standards are found. Nothing in Subchapter G is inconsistent with the plain language of Section 298.15 (c) and, in fact, Section 298.485 (a), which is included in that Subchapter, similarly notes the requirement for permits to include flow restriction special conditions adequate to protect the flow standards.

language recommended in the PFD, would authorize just that. Although only a minority—all, or a portion, of nine diversion reaches—of the forty diversion reaches, use an upstream measurement point, the reaches that include upstream measurement points are projected to include the bulk of the proposed diversions under the permit.¹⁵

The flow protection challenge created by using an upstream measurement point in a permit this complex is illustrated in the conceptual illustration that appears on the following page. The specific language of concern in the WMP would authorize diversions under the new permit anytime that flows at the upstream measurement point equal at least the required environmental flow level plus the expected rate of diversion under the new permit in that reach.¹⁶ That approach ignores the impacts of diversions authorized under existing permits, including BRA’s existing permits, occurring downstream of the measurement point. Consider an example in which the applicable environmental flow standard is 100 cubic-feet-per-second (cfs) and the authorized diversion under the SysOp Permit is 50 cfs. The WMP indicates that BRA can divert 50 cfs under the new permit anytime flow at the upstream Measurement Point is at least 150 cfs (100 cfs + 50 cfs). If there are no other diversions, no major channel losses, and the distances are not too great, that approach should work reasonably well because the flow below the SysOp Permit diversion would be 100 cfs, which is consistent with the flow standards.

¹⁵ Diversion amounts by aggregated reach are set in BRA Exh. 113, Appendix G-3 to the Technical Report, in various tables under the columns labeled SysOps. The Possum Kingdom Lake, Glen Rose gage to Lake Whitney Dam, and Richmond gage to Gulf of Mexico aggregated reaches, among others, include upstream measurement points and reflect the bulk of the projected diversions under the permit.

¹⁶ “For diversions located downstream of a measurement point, the environmental flow requirement will be calculated by adding the aggregated downstream System Operation Permit diversion rate to the applicable environmental flow standard at the corresponding measurement point gage.” BRA Exh. 113, WMP at p. 41.



However, that is not the reality of this application. There are hundreds of existing water rights in the 1,200+ miles of streams affected by this permit, many of which are not subject to environmental flow requirements. When some of those existing rights are actually diverting between the measurement point and the SysOp Permit diversion point or points, the SysOp Permit diversion will cause flows to fall below the applicable environmental flow standard. That is not authorized by the environmental flow standards. In the same example, consider two intervening senior diversions, diverting at 50 cfs and 25 cfs, respectively. In that situation, the language in the WMP would still authorize BRA to divert 50 cfs under the SysOp Permit even though the resulting stream flow, downstream of its SysOp Permit diversion, would be 25 cfs (150 cfs – 50 cfs – 25 cfs – 50 cfs)—far below the 100 cfs requirement in the flow standards. In that situation, the SysOp Permit diversion causes flows to be reduced to well below the applicable environmental flow standard. That particular problem does not occur when there is an applicable downstream measurement point because the impacts of all diversions, both under existing permits and the SysOp Permit, are necessarily reflected in the flows measured in determining compliance at the downstream point.

The PFD does acknowledge the shortcoming in the WMP but fails to propose an adequate solution. NWF proposed two potential approaches for addressing this particular failure to comply with the environmental flow standards. First, the minimum flow level at the upstream

Measurement Point could be adjusted to account for all downstream diversions—in this example, with the two intervening diversions, the required flow would be 225 cfs (100 cfs + 50 cfs + 25 cfs + 50 cfs)—so that the flow remaining after all of the diversions would be 100 cfs, which is consistent with the flow standards.¹⁷ NWF proposes this approach as requiring consideration only for actual diversions expected to occur on any given day. The PFD, at page 160, characterizes NWF’s proposal as not practical because the real-time data on diversions would not be available to BRA. Second, the ALJs conclude the approach would likely result in protecting flows in excess of rule requirements.¹⁸

Regarding the first rationale, NWF’s approach would require BRA to check with the watermaster to determine the diversion rates of any intervening diversions scheduled by entities other than BRA. Dr. Alexander clearly indicated that all diverters will be required to check with the watermaster daily to authorize specific diversions.¹⁹ That much is uncontroverted. Dr. Alexander also indicated that she believed the watermaster would probably consider such intervening diversions anyway in authorizing diversions by BRA under the permit.²⁰ Perhaps that is true, but to be consistent with the flow standards, the permit needs to require that approach—

¹⁷ Specifically, NWF proposed amending the WMP, at p. 41, as follows (proposed additions shown with underlining):

“For diversions located downstream of a measurement point, the environmental flow requirement will be calculated by adding the aggregated downstream System Operation Permit diversion rate plus the rate of all diversions made under other rights senior to the System Operation Permit, including other rights held by BRA, within the reaches controlled by the same upstream measurement point to the applicable environmental flow standard at the corresponding measurement point gage.” See NWF Initial Post Hearing Brief at pp. 19-20.

¹⁸ NWF would agree that if the authorized diversion rates of all existing rights in the intervening reach were required to be added to the flow rate at the upstream measurement point, regardless of whether diversions were occurring, the approach often would be overly protective. However, if, as NWF proposes, only actual scheduled diversions in the intervening reach are added, the approach actually represents the protection necessary to ensure compliance with the flow standards.

¹⁹ As Dr. Alexander testified that the watermaster will have that information because every diverter must clear a proposed diversion with the watermaster. It does not seem unreasonable that the watermaster in approving an proposed diversion by BRA will be able to share information about intervening diverters. Transcript, vol. 16, p. 3724 at lines 15-21.

²⁰ Transcript, p. 3918, lines 5-23.

not just be based on a belief that it may happen—and, by requiring it, the permit would provide the watermaster with clear authority to enforce the requirement and to achieve the protection the standards call for. NWF understands that the watermaster’s authority regarding environmental flow protections will be to enforce the permit terms so it is critically important that the permit terms are clear and adequately protective. At any rate, the watermaster will have the information on all authorized diversions and BRA is required to consult the watermaster before diverting.

According to Dr. Alexander, in discussing the language found at page 41 of the WMP, the Executive Director intends for the permit to ensure that BRA will pass sufficient flow below its diversion points to comply with the standards, not just to have sufficient flow present at the upstream measurement point:

Q: And it’s a violation of this language right here? Is that what you are saying?

A: I think it’s a violation of the requirement that BRA needs to pass the amount of flow past its diversion point. And that’s the way that we interpret this.

Q: Okay.

A: That’s all I can tell you.

Q: That’s what the permit is supposed to require. Right?

A: That’s what we believe that the permit and the water management plan do require.

Q: And it is what it should require?

A: I think that’s correct.²¹

NWF’s concern is that the language in the water management plan does not actually match what the standards require or what Dr. Alexander stated should be required. NWF proposed language to ensure that the permit actually requires enough flow to be passed below BRA’s SysOp

²¹ Transcript at p. 3738, lines 11 through 24. See also this excerpt at p. 3729, line 19 through p. 3730, line 1: “Q: And is there anything in the water management plan that indicates that it's a requirement that the flows downstream of the system operation permit have to be at the same level as at the upstream measurement point?

A: I think that's the intent of the information in the water management plan, and that's what I describe in my memo.”

permit diversion points, when using an upstream measurement point, to comply with the flow standards. Dr. Alexander indicated the Executive Director intends for that to happen and believes it should be required. As currently drafted, when using an upstream measurement point, the literal language of the water management plan appears to allow BRA to divert under the SysOp Permit even if doing so will cause flows just downstream of that diversion point to fall below, even far below, levels protected in the flow standards. That result is unjustified and fails to comply with the environmental flow standards.

Regarding the second criticism by the ALJs, NWF is not seeking to require more flow to be passed than would be required to comply with the standards. The approach proposed by NWF would merely add in the amount of downstream diversions actually scheduled for a given day so that the result would be a requirement to pass the amount of flow called for in the standards through the reach.

A second option, proposed by NWF, would be to allow BRA to divert under the SysOp Permit only if flow levels at both the upstream measurement point and the next downstream measurement point comply with the environmental flow standards.²² NWF believes that either option is a reasonable approach to compliance with the standards. But, regardless, BRA, as the applicant, has the burden of proof to demonstrate that the permit will comply with applicable requirements, including the environmental flow standards.²³ The language in the WMP does not provide that demonstration. The standards call for a certain flow level to be maintained. The only reasonable interpretation is that diversion or the refilling of storage under BRA's new permit must avoid causing, or contributing to causing, the flow to fall below protected levels anywhere in an affected reach. Another way to help ensure that would be to require compliance with the flow

²² Discussed in NWF's Initial Post Hearing Brief at pp. 20-23.

²³ 30 TAC §80.17 (a).

standards at both an upstream and a downstream measurement point. This is not a routine permit with a single diversion point or even a single diversion point in each reach, which would be amenable to a simpler approach. BRA seeks authority to divert anywhere within 40 reaches covering over 1,200 miles and permit conditions must provide environmental flow protection commensurate with the scope of the application. Although assessing compliance at an upstream and a downstream measurement point, admittedly, would involve some complexity, that complexity arises from the scope of the authority BRA seeks.

Unfortunately, the language recommended in the PFD, at p. 159, although an improvement and a step in the right direction, is not adequate to ensure compliance. The PFD provides as follows: “The ALJs recommend amending one paragraph in the WMP by adding the underlined language shown below to clarify one point: ‘The maximum allowable System Operation Permit diversion amount with a reach applies to the aggregate of all diversions in the reach. An allowable System Operation Permit diversion, whether upstream or downstream of the reach’s applicable measurement point, will not reduce flow below the environmental flow standard at a point immediately below BRA’s point of diversion and additionally will not exceed provisions set forth in Section IV.D.4.b below.’”

The problem is that general statement, as modified, does not reflect how compliance is actually proposed to be determined in the WMP or the accounting plan. The WMP does not require BRA to measure flow levels immediately below its diversion points and the permit includes no mechanism for determining compliance at those locations. NWF agrees that establishing compliance points immediately downstream of authorized SysOp Permit diversion points and requiring BRA to measure flows at those locations would be another potential solution for ensuring

compliance. NWF sought to recommend a less resource intensive approach that still has a reasonable chance of achieving compliance.

The specific method for determining compliance when using an upstream measurement point, as discussed above, is described in the sentence on page 41 of the WMP that precedes the language the PFD proposes to amend. BRA's accounting plan also tracks the approach set out in that preceding sentence and fails to provide for consideration of intervening diversions between the upstream measurement point and the diversion location under the proposed permit.²⁴ As a result, even with the inclusion of the language recommended in the PFD, the proposed permit purports to authorize diversions that would cause flows to fall below and to violate the applicable environmental flow standards.

The WMP does provide for BRA to develop an annual environmental flows achievement report.²⁵ However, that report again only looks at compliance at the specific measurement points listed in the WMP. Accordingly, as relevant here, that report will look at flows at the upstream measurement point and compare those flows to diversions under the SysOp Permit at the locations that are controlled by that measurement point. It will not look at flow levels just downstream of BRA's diversions under the SysOp Permit in order to determine if those diversions caused flows to drop below the levels protected by the flow standards.

Consider, for example, diversions downstream of Rosharon. The WMP projects that a very large percentage of total diversions will occur in the relevant reach.²⁶ Rosharon is the last measurement point on the Brazos and diversions below that point use Rosharon as an upstream

²⁴ The WMP currently states: "For diversions located downstream of a measurement point, the environmental flow requirement will be calculated by adding the aggregated downstream System Operation Permit diversion rate to the applicable environmental flow standard at the corresponding measurement point gage." Exh. 113 at p. 41

²⁵ BRA Exh. 113, Technical Report to WMP, at p. 4-88.

²⁶ Appendix G-3 includes diversions by general reach.

measurement point for environmental flow protection purposes. There simply is no mechanism for the annual environmental compliance report to assess how much flow is in the river downstream of any SysOp Permit diversions below Rosharon. Those protections must be incorporated in the permit conditions. There are very large existing diversions in the reach below Rosharon, including, for example, Dow's permit with a 630 cfs diversion rate. Failure to account for those diversions when determining how much flow is required at Rosharon in authorizing diversions under the SysOp Permit would impermissibly deprive the estuarine reach of the Brazos River of the protections required by the flow standards.

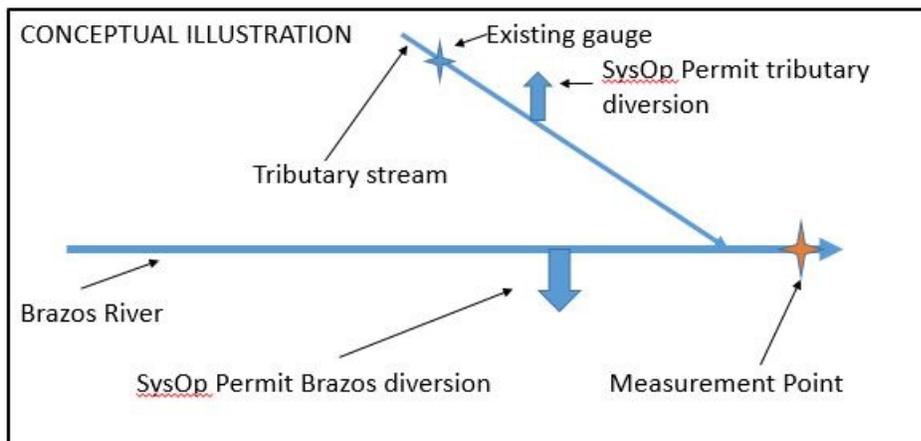
2. Failure to protect flows in specific tributary and mainstem reaches

Because of the large number of diversion points, which basically are unlimited and many of which are at locations to be determined later, compared to a relatively small number of measurement points, this massive proposed permit also creates the potential to dewater significant portions of tributary streams and even portions of the Brazos River itself. Diversions governed by a downstream measurement point can occur from one or more tributary streams, including at an unlimited rate from a reservoir located on the tributary, and from the Brazos River itself. Those complexities would not arise for a more typical permit that involves diversions only at a single location on a single stream.

For such a measurement point located on the Brazos River downstream of the confluence with a tributary, the proposed permit, as currently drafted, would allow the tributary stream to be entirely dewatered by permit diversions if there were adequate flow coming down the Brazos River to satisfy the flow requirement at the measurement point. The WMP and accounting plan only consider if the flow at the measurement point is sufficient to meet the standard and it does not matter what happens upstream of that point. That is not an adequate approach for achieving compliance with the flow standards. Certainly the Commission did not intend to allow the

dewatering of stream reaches in adopting the flow standards and permit conditions that do allow it are not adequate to implement the flow standards.

The conceptual illustration included below depicts the problem. If a diversion is occurring under the SysOp Permit at one or more diversion locations on the tributary, those diversions could entirely dry up flow in the tributary below the diversion without violating the proposed permit conditions as long as there is sufficient flow coming down the Brazos River at the measurement point. That simply is not a reasonable approach given the scale and scope of proposed diversions. Similarly, diversions under the new permit on the Brazos River could dry up a portion of that river without violating the permit if there were sufficient flow from the tributary to provide the required flow at the measurement point. Again, that simply is not an adequate approach to compliance for a permit of this scale.



That result can be avoided. For major tributaries and the Brazos River, additional existing stream gauges that are not specifically listed as measurement points in the flow standards could be used to avoid this potential outcome. Flow levels from the measurement point listed in the standards could be prorated to apply at the stream gauge locations, with the stream gauge added as an additional upstream or downstream permit compliance point, depending on its location relative to proposed diversions.

The failure to ensure that portions of streams are not dewatered also precludes a determination that vested riparian rights will not be impaired as required by Section 11.134 (b)(1)(B).

3. Failure to comply with Pulse Flow Requirements

The PFD recommends that authorization of impoundment of pulses protected by the flow standards should be allowed, despite the clear language of the standards to the contrary. The basic rationale is that impoundment of pulses is necessary to allow BRA to operate as it proposes and, therefore, the standards should be construed to allow that impoundment to avoid an unreasonable result—that is, to avoid not allowing BRA to operate as proposed. However, that begs the question of whether BRA’s proposed approach is reasonable in light of the language of the flow standards, which clearly indicates that protected pulses may not be impounded.²⁷ To be clear, BRA is not proposing to permanently impound protected pulses. The WMP indicates that pulses may be temporarily impounded, however there is no indication of the authorized duration of that temporary impoundment. Similarly, BRA was unable to provide assurance that it will be able to release impounded pulses at a rate that would replicate, up to the levels protected in the flow standards, the pulses it impounds. Nothing in the WMP limits the authorization to impound pulses on the ability to make such releases.

Consistent with the flow standards, BRA should not be authorized to impound protected pulses under the new permit. To the extent that existing reservoirs necessarily will temporarily catch pulse inflows, such a minimal duration impoundment only until the existence of a protected pulse can be ascertained²⁸ could reasonably be construed not to be a violation of the flow standards

²⁷ 30 Tex. Admin. Code Section 298.475(d).

²⁸ The existence of a protected pulse can be ascertained very quickly. It only requires the determination of whether a reservoir inflow rate meeting the pulse trigger level has occurred; whether diversion or impoundment has been, or

or the permit. However, authorization of an open-ended period of impoundment, as is currently included in the WMP, is not consistent with, or allowed by, the standards.

The timing of passage of pulse flows is very important because, with widespread rainfall events, pulses tend to increase in size as they move down the basin. If a pulse is impounded for any significant period, the remaining pulse flows farther downstream may be decreased in size such that they fail to serve the desired ecological function and may even fail to achieve the requisite pulse trigger level at downstream locations. In that instance, the pulses would not be protected at downstream locations because, unless the pulse trigger level is reached downstream, no pulse protection is triggered under the flow standards. That deprivation of protection at downstream locations would affect protections both under this permit and any other future permit that might be issued subject to the flow standards. Because of the complexity of BRA's permit, involving multiple reservoirs with temporary impoundment authorized in each, the potential impacts are dramatically multiplied as compared to more traditional permit applications. The WMP is devoid of discussion of how pulse flow protections would actually be achieved under the temporary impoundment approach proposed there. Although BRA did perform a limited study of pulse flows in two reaches that had no reservoirs, that study did not evaluate the impacts of its proposed operations on pulse flow occurrence.

H. Flexibility and Environmental Flow Standards

NWF excepts to the failure of the proposed permit adequately to address the environmental flow impacts of the proposed new grant of authority to BRA to flexibly manage its existing water rights. The proposed permit indicates that BRA will be able to use any source of water to satisfy senior rights instead of being required to pass water downstream through its reservoirs. The

will be, occurring under the SysOp Permit; and whether the seasonal requirements for pulses have already been achieved at the relevant compliance point.

potential effect of that is to reduce flows in the river downstream of a reservoir if BRA chooses not to pass the water downstream and, instead, to provide, for example, groundwater to satisfy the senior right.²⁹ NWF's concern with the proposed addition of the flexibility requested by BRA goes well beyond any potential impact on compliance of the proposed new appropriation with the environmental flow standards. This grant of flexibility would also authorize BRA to change how it operates its existing water rights and to do so to the detriment of environmental flows. Accordingly, NWF suggested permit language to address that impact.

As NWF understands it, the language recommended in response to NWF's proposal, at p. 269 of the PFD, for inclusion in the permit only addresses how BRA might use that flexibility in managing the new appropriation amounts it is seeking. It provides that BRA cannot use the flexibility to avoid compliance with environmental flow requirements that would otherwise have been achieved.³⁰ Although a step in the right direction, which NWF appreciates, that language fails to address, or consider, the adverse impacts that are authorized by the grant of new authority under this permit for flexibility in how BRA manages its existing rights, many of which are not currently subject to environmental flow requirements. The language that NWF proposed is intended to address both. That new authority to change management of existing rights does not represent a new appropriation and, as a result, the environmental flow standards do not actually apply.³¹ However, sections 11.147 (d), 11.150, and 11.152 of the Water Code do apply to that aspect of BRA's application and they require at least an assessment of the potential adverse impacts of that new flexibility, which has not occurred.

²⁹ Gooch testimony at Transcript, Vol. 13, P. 3129-3130.

³⁰ Proposed revision to Paragraph 5.C.3 in the proposed permit.

³¹ As acknowledged in TCEQ's rules, 30 TAC §298.10 (a), the flow standards apply only to a new appropriation or an increase in the amount of water authorized to be stored, taken, or diverted and do not otherwise restrict the commission's authority or responsibility to impose conditions to protect environmental flows.

NWF specifically excepts to proposed COL 23 to the extent it purports to indicate that mere compliance with environmental flow standards will fully comply with Water Code Sections 11.0235 (b) and (c), 11.046 (b), 11.134 (b)(3)(D), 11.147 (b), (d), (e), 11.150, and 11.152; and Section 297.54 (a) of the Commission's rules. That sweeping conclusion, stated without limitation to the context of the current application, is unnecessary and unjustified. First, the flow standards address only environmental flow issues and apply only to new appropriations or increases in the amount authorized to be stored, taken, or diverted. They do not address impacts to fish and wildlife habitat that may result, for example, from the construction of a reservoir and the direct destruction or inundation of habitat. Those issues fall within the scope of 11.134 (b)(3)(D) and 11.152 of the Water Code but are not addressed in the flow standards. The contention that compliance with the flow standards addresses compliance with Section 11.046 (b) is inconsistent with the Commission's flow standards rules. Section 298.10 (b) of the rules expressly provides that the flow standards do not affect the Commission's authority to protect environmental flows or senior rights under Section 11.046. Nothing in the flow standards indicates that they were developed to protect water quality in reservoirs, which is included in the scope of Water Code Section 11.150. Sections 11.0235 (b) and (c) encompass broad policy directives to the Commission that are not addressed merely through environmental flow standards.

CONCLUSION

If a permit is issued in response to BRA's application, it should be limited in scope to reflect the amount of water actually shown to be available for appropriation and use and to reflect specific, and realistic, diversion points, amounts, and rates that correspond to identified water needs. Any permit should also spell out clear requirements designed to ensure compliance with applicable environmental flow standards and to help protect environmental flows.

Respectfully Submitted,



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FEDERATION

CERTIFICATE OF SERVICE

I hereby certify by my signature below that on August 20, 2015, a true and correct copy of the foregoing document was served by U.S. mail, electronic mail or service to each party on the attached Service List.



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