

**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 RESPONSE TO EXCEPTIONS
TO THE PROPOSAL FOR DECISION**

TO THE HONORABLE COMMISSIONERS:

COMES NOW National Wildlife Federation (NWF) and files the following *Response to Exceptions to the Proposal for Decision* in this matter.

INTRODUCTION

Throughout this entire proceeding the Brazos River Authority (BRA) has overreached in what it seeks from a water permit under Texas law. The Commission gave BRA a second chance to develop a proposed Water Management Plan (WMP) to provide sufficient specificity to bring its application into compliance with applicable requirements. Unfortunately, BRA has failed to do that. Instead, BRA continues to seek to conform the Water Code and TCEQ regulations to its application instead of conforming its application to meet those requirements. The latest version of that is the argument that relevant TCEQ regulations are directory rather than mandatory. No other party joins in that argument, which the ALJs endorse, and NWF joins in the exceptions to that sweeping change in Texas law.

BRA could have developed a WMP to support a permit for the amount of water needed to meet identified demands at identified diversion locations, with realistic diversion rates and amounts, but it, again, chose to roll the dice and go for much more. However, again, BRA has come up short with an application that does not comply with applicable requirements.

Because the PFD recommends most of what BRA sought, BRA's exceptions to the PFD were minimal. Therefore, NWF responds primarily to the Executive Director's (ED's) exceptions in the order in which they were presented and then responds to certain aspects of other parties' exceptions.

DISCUSSION

1. Response to ED's exception to COL 18

As noted in previous filings, NWF has not taken a position on whether reuse of return flows should be treated as a new appropriation. However, NWF disagrees with the Executive Director's rationale for its argument that environmental flow standards should not apply to reuse of return flows.¹ The ED argues that reuse applicants should not be subject to the flow standards because the standards include pulse flows and because return flows have a fairly constant volume. The implication seems to be that constant flow volumes should not be subject to the standards. NWF disagrees. The flow standards are designed to protect constant level flows and pulse flows. With respect to the flow standards applicable to the Brazos Basin, only diversions at a rate that is at least 20% of the pulse trigger level are subject to the pulse flow requirements,² so the pulse flow component would be a non-issue unless the diversion rate is large enough, even without considering cumulative effects, to affect the pulse flow. In addition, even a fairly constant volume flow, when added to a varying river flow, can play an important role in reaching a pulse trigger level and activating pulse flow protections, which argues for making reuse subject to flow protection, including protection of pulse flows. NWF believes that all reuse applications should be subject to permit conditions protective of environmental flows, including reasonable pulse flow protections, regardless of the theory under which reuse is authorized. In many areas of the state,

¹ *Executive Director's Exceptions to Proposal for Decision and Proposed Order* at p. 3.

² 30 TAC § 298.485 (b).

return flows play a critical role in maintaining environmental flows during dry periods, and pulse flows occur and play an important ecological role during dry periods.

2. Response to ED's exceptions re: sedimentation issue

The ED, in his exceptions, appears to argue that BRA's existing rights are somehow adversely affected by the proposed ruling on sedimentation in existing reservoirs.³ No party has taken the position in this hearing that BRA's existing water rights should be reduced. The Commissioners made clear during the January 25, 2012 agenda session that those existing rights are to be left intact. Nothing in any version of a permit under consideration purports to reduce the authorizations in BRA's existing water rights. That simply is not at issue.

The proceeding, in all of its iterations, has focused only on BRA's requests for new, additional authority to divert and manage water under its existing rights in combination with a new appropriation (or a combination of a new appropriation and a Section 11.042 indirect reuse authorization under the Executive Director's proposed return flows approach), plus a term permit. BRA is asking for new authority to make increased diversions, including increased diversions based on non-existent storage. If any permit is issued in this proceeding, BRA will end up with increased authorizations beyond its existing rights. The question under such a permit is how large the increased authorization would be and, on this issue, if BRA will get new authority to divert increased amounts based on storage that does not currently exist. Nothing in the *Stacy Dam* case requires that BRA get any new authority, much less new authority based on non-existent storage. That case limits when new rights can be granted: no new rights can be issued based on a new appropriation of previously appropriated water. Other parties raise important issues about whether

³ See ED's Exceptions at p. 12.

the availability modeling for BRA's application complies with those requirements, but that is a separate question. The *Stacy Dam* decision does not require that any new rights be issued to BRA.

If BRA does succeed in restoring or replacing lost storage at some future time, nothing in a permit issued in this proceeding would prevent BRA from applying then for increased authorizations based on a system operation with that additional increment of actual storage. Regardless of what happens in this case, BRA's existing water rights will continue in effect with the same protections against subsequent applications by other applicants as existed before this application was filed. For example, BRA's existing water rights for Possum Kingdom Reservoir will continue at the current authorized firm diversion amount even though, with the effects of the new drought combined with the continuing loss of storage as a result of sedimentation, that authorized amount is not actually fully available. That is not the issue in this matter. The issue in this case is what, if any, new diversion rights BRA has demonstrated that it should be granted from Possum Kingdom Reservoir and elsewhere in the basin.

The ED also takes exception to the proposed methodology in the PFD for calculating how much BRA's request for additional appropriations should be reduced to reflect the reality that a portion of the storage it seeks to rely on for the new appropriation does not exist. The ED objects that the analysis presented in the hearing by Dr. Brandes is not adequately rigorous to quantify the extent of the impact of the non-existent storage. The PFD proposes to rely on the only evidence in the record on that issue. NWF agrees with the ALJs that the evidence presented by Dr. Brandes is the best evidence in the record on the issue and the only basis on which an appropriation amount could be determined at this time.

NWF also agrees, however, with the exceptions of the ED and Dow that, even considering Dr. Brandes' testimony, the record is inadequate to support an accurate determination of the

amount of unappropriated water available, in the absence of that storage, for all of the Demand Levels proposed by BRA. NWF believes the result of the lack of evidence is that BRA has not met its burden of proof because it failed to demonstrate that sufficient unappropriated water is actually available to support its requested amounts. However, if a permit is granted, it must include an adequate mechanism for determining how much water is available.

NWF does not agree with the ED's argument,⁴ or that of BRA,⁵ that the Water Code authorizes issuing a permit for an appropriation amount that has not been shown to be available if the permit includes a special condition providing for a potential reduction of the use authorization in the future if the non-existent storage on which the permit is based is not restored or compensated for in some manner. Proposed permit special condition 5.D.5) would authorize the use of water that is known not to be available and allow that use to continue at least until the first reconsideration or major amendment of the WMP. That is very different from issuing an entirely new water right with a requirement that the applicant must begin construction of facilities within a certain period. For an entirely new right, no diversion or impoundment can occur until the facilities are constructed. Here, diversions would be authorized immediately, subject to future reduction, even though the storage on which the new right depends currently does not exist.

That special condition also fails to establish the methodology for determining the amount of the reduction, the criteria to be used in determining what a sufficient offset would be, or the criteria for determining what would constitute evidence of diligent and continuous work to develop alternate sources of supply. Additionally, the provision fails to indicate what is required in the future if a finding of diligent and continuous work is made during the first reconsideration or major

⁴ See ED's Exceptions at p. 15.

⁵ See BRA's Exceptions at p. 3.

amendment. As currently drafted, such a finding would appear to excuse BRA from ever actually having to compensate for or restore the non-existent storage.

NWF agrees with Dow's discussion on this issue regarding an appropriate procedure to require if the Commission chooses to grant a permit based on the current record. See Dow's Exceptions at pages 24-27. BRA should be required to determine, within a defined and brief period of time, the amount of appropriation available for each Demand Level based on existing storage. The modeling approach should be made available for review and comment, as should the results of the modeling, and, upon completion, the appropriation amounts in the permit should be adjusted accordingly.

3. Response to ED's Objections to Proposed COL 23 and 26

Nothing in the Commission's rules or the Water Code supports the ED's apparent position⁶ that entire statutory provisions and TCEQ rules have become inapplicable to applications for new appropriations as a result of the adoption of environmental flow standards.⁷ NWF would agree that certain aspects of how some of the various statutory and rule provisions are to be applied has changed, but the statutes remain applicable. In addition, the environmental flow standards address only environmental flow issues, whereas many of those statutory provisions address aspects of environmental protection that are not adequately addressed through the imposition of environmental flow requirements. Examples of such aspects include impacts on fish and wildlife habitat within reservoirs, wildlife habitat affected by construction of reservoirs (although not

⁶ The precise nature of the ED's concerns is unclear from the discussion at pages 18-19 of his Exceptions. The reference is to COL 23 and 26 but the ED goes on to state the referenced statutes should not be the basis of a public welfare review. Because COL 23 and 26 do not reference a public welfare review, the ED's concern on that aspect is difficult to discern. At any rate, as discussed in the main text, the various provisions are applicable and the issues addressed by those provisions are necessarily also relevant to a public welfare review under Section 11.134 (b)(3)(C).

⁷See ED's Exceptions at p. 18.

directly relevant in this case, the global language of proposed COL 23 and of the ED's exceptions is not limited to this case) and water quality in reservoirs.

Furthermore, the current proceeding is not limited to a request for new appropriation of water. BRA has requested, and the proposed permit would grant, BRA new flexibility in the management of its existing rights. That aspect of BRA's request is not a new appropriation and, in the proposed permit, changes in flow caused by that flexibility are not made subject to the environmental flow standards.⁸ However, because that flexibility does, as previously noted in NWF's Exceptions at pp.24-25, have the potential to reduce flows, the impacts of granting that request must be assessed and protective conditions considered. Specific provisions listed by the Executive Director in his Exceptions⁹ are discussed below.

Section 11.046 (b), which authorizes requirements for quantified levels of newly generated return flows as part of a new appropriation, expressly applies to the granting of any water right and remains in full force and effect. Nothing in the Water Code even suggests that its applicability is limited by the adoption of environmental flow standards. In addition, the Commission's environmental flow rules—30 TAC §298.10 (b)—specifically acknowledge that the Commission retains full authority under Section 11.046 to protect environmental flows or senior water rights.

Section 11.134(b)(3)(D), by its plain language, applies to new appropriations and acknowledges that any applicable environmental flow standards and, depending on specific circumstances, various other statutory provisions also apply.

⁸ The proposed permit does include language indicating that the new flexibility cannot be used to excuse compliance with the flow standards for the new appropriation portion of the permit but it does not include any limitations on the use of that flexibility in BRA's management of its existing rights. The statutory provisions related to environmental protection apply to BRA's application for new authority in managing its existing rights and the impacts of that new authority have not been assessed as required by those provisions and protective conditions have not been proposed to minimize adverse impacts.

⁹ See ED's Exceptions at p. 18.

Section 11.147 (b) remains in effect and provides express authority and a directive for the Commission to impose permit conditions to protect beneficial inflows. Applicable environmental flow standards, if any, help inform the conditions to be imposed. As the Commission's rules¹⁰ expressly provide, however, even with respect to the flow standards, the Commission still must determine environmental flow conditions, restrictions, limitations, or provisions reasonably necessary to protect the flow standards.

Section 11.147 (d) remains in effect and provides express authority and a directive for the Commission to impose any type of permit conditions appropriate to maintain existing instream uses and water quality of a stream or river. Applicable environmental flow standards, if any, help inform the conditions to be imposed.

Section 11.147 (e) also remains in effect and provides authority and a directive for the Commission to impose conditions to protect fish and wildlife habitat. Those conditions are not limited to environmental flow protection and TCEQ has long included permit conditions addressing other environmental issues, including mitigation for impacts to terrestrial habitats affected by reservoir construction and measures to protect fish habitat within reservoirs. Again, nothing in Senate Bill 3 even suggests that the Commission's authority or responsibility to address those issues is no longer applicable. Applicable environmental flow standards, if any, help inform environmental flow conditions to be included, but do not address other fish and wildlife habitat issues.

Section 11.147 (e-3)¹¹ is the primary provision addressing the role of environmental flow standards and, by its plain language, it indicates that flow standards apply "for the purpose of determining the environmental flow conditions" for various purposes. There simply is no

¹⁰ 30 TAC §298.15 (c).

¹¹ NWF assumes that the reference in the ED's Exceptions to (3-3) is a typographic error intended to reference (e-3).

reasonable basis for contending that environmental flow standards somehow address all types of environmental issues.

Section 11.150 addresses water quality impacts in all water bodies in the state, including wetlands and reservoirs, whereas, by contrast, Section 11.147 (d) only addresses water quality of the stream or river to which the application applies. Section 11.150 remains in full force and effect and applicable environmental flow standards, if any, help inform environmental flow conditions to be included to protect water quality in a stream or river.

30 TAC Section 297.54(a) also remains in full force and effect. Applicable environmental flow standards, if any, help inform environmental flow conditions to be included to protect water quality for environmental protection in a stream or river. However, nothing in the Water Code or the flow standards suggests that TCEQ's obligation to address water quality issues to protect water rights, including riparian rights, is relieved by the adoption of flow standards. Those standards may or may not provide adequate protections.

30 TAC Sections 307.4(g)(1) and (2), 307.10 (1), as well as other provisions of Chapter 307 of the Commission's rules also remain in effect and, as indicated in Section 297.54 (a), are relevant to consideration of water quality impacts.

4. Response to Process for Conforming WMP to Permit Requirements, if a Permit is Granted

NWF agrees with the ED in his observation that, if a permit were to be granted, there are numerous, substantive changes to the WMP and Technical Report that would be required to conform them to the base permit document and to recommendations in the PFD.¹² Because the changes would not be limited to clerical corrections, but would involve substantive changes, a meaningful review process would be required. Otherwise, because the WMP and Technical Report

¹² See ED Exceptions at p. 19.

are considered part of the overall permit, BRA would be drafting its own permit after the Commission's decision has been made and after other parties have lost the opportunity for meaningful participation.

5. Response to Interpretation of Chapter 295 as Directory

Only BRA agrees with the ALJs that key provisions of Chapter 295 should be interpreted as directory rather than as imposing mandatory requirements. The ED suggests, in his exceptions, that the ALJs included that discussion for no real purpose and did not rely on that distinction in determining that BRA complied with the requirements of Chapter 295.¹³ As Dow's Exceptions make clear, that simply is not accurate. BRA's application does not comply with the requirements of Chapter 295 and, because those requirements are mandatory, the current application may not be granted.¹⁴ NWF agrees with the exceptions of Dow, Lake Granbury Coalition, and Friends of the Brazos River et al (FBR) that BRA has not demonstrated compliance with the requirements of Chapter 295.

6. Response to Provisions to Address Current Drought

The changes to permit language to address the effects of the recent drought proposed by the ED and by BRA would result in an impermissibly open-ended provision that sets no deadline for an actual determination of the amount of water appropriated to BRA.¹⁵ That proposed language only sets a deadline—9 months after permit issuance—for an initial assessment of whether the recently-ended drought decreased the amount of water available. Additionally, it includes no deadline for a determination of the amount of such a reduction. Neither the language proposed in

¹³ See ED Exceptions at p. 22.

¹⁴ As NWF noted in its Exceptions, BRA likely could prepare a more limited application addressing only actual identified demands, instead of hypothetical ones, that would allow it to identify specific diversion points, rates, and amounts. It is BRA's insistence on obtaining sweeping authority to divert water anywhere within more than a 1,200 mile expanse that prevents compliance with Chapter 295 requirements.

¹⁵ See ED's Exceptions at p. 19 and BRA's Exceptions at p. 5,

the PFD nor that proposed by the ED and BRA provides for any review, much less a meaningful review, by anyone of either evaluation undertaken by BRA. Beyond the problem that BRA has not met the burden of demonstrating how much unappropriated water is available to support its application, which is a requisite to granting a permit, this approach basically delegates to BRA the determination of how much unappropriated water is available after accounting for the recent drought without the ability for future input by other parties.

NWF agrees with Dow's Exceptions on this issue.¹⁶ With respect to Dow's proposed changes to proposed Special Condition C.7, NWF believes the recommended steps and opportunity for participation are appropriate but believes that the detailed evaluation recommended may require more than nine months to complete. In any event, any permit issued must establish specific deadlines for completion.

7. Response to FBR Exceptions Regarding Authority for Environmental Flow Conditions for Amendments

NWF disagrees with the discussion in the Exceptions of FBR regarding a suggested limitation on the authority of TCEQ to impose environmental flow conditions on water right amendments.¹⁷ Although NWF agrees that many factors have to be considered in determining if a particular amendment is the type of change that triggers the potential addition of environmental flow conditions, NWF does not agree that Subsection 11.147 (e-1) is relevant to that consideration in any context other than a Commission-initiated "adjustment" to help achieve compliance with flow standards.

The argument incorrectly seems to suggest that a sentence in Subsection 11.147 (e-1) of the Water Code, applied out of context and beyond its stated applicability, supports a sweeping

¹⁶ See Dow's Exceptions at pp. 27-31.

¹⁷ See FBR's Exceptions at pp. 5-6.

conclusion, also reflected in COL 24 in the PFD, that TCEQ no longer has authority to impose environmental flow conditions in granting amendments to existing appropriations unless the amendments involve an increase in the amount to be stored, taken, or diverted. That conclusion goes beyond the clear language of the statute, including the explicit statement that Subsection 11.147 (e-1) does not even apply to appropriations granted under permits or amendments issued before September 1, 2007. Subsection 11.147 (e-1) deals solely with the issue of how, and when, the new environmental flows permit reopener language mandated by Senate Bill 3 applies to new appropriations issued on or after September 1, 2007. That provision has no relevance to the question of when environmental flow conditions may be imposed as part of the amendment process for an existing water right, including, for example, an amendment to move a diversion point upstream. It applies only in the context of implementing the reopener language that has been included in new appropriations and certain amendments approved on or after September 1, 2007.

Subsection 11.147 (e-1) provides, in relevant part, as follows:

Any permit for a new appropriation of water or an amendment to an existing water right that increases the amount of water authorized to be stored, taken, or diverted must include a provision allowing the commission to adjust the conditions included in the permit or amended water right to provide for protection of instream flows or freshwater inflows. With respect to an amended water right, the provision may not allow the commission to adjust a condition of the amendment other than a condition that applies only to the increase in the amount of water to be stored, taken, or diverted authorized by the amendment. This subsection does not affect an appropriation of or an authorization to store, take, or divert water under a permit or amendment to a water right issued before September 1, 2007.

Texas Water Code § 11.147 (e-1)(emphasis added).

The first sentence of Subsection (e-1) imposes a new requirement, effective as of September 1, 2007, for inclusion in a permit (and in an amendment to a water right that increases the amount of water authorized to be stored, taken, or diverted) of a provision allowing the commission to adjust, within certain limitations, the conditions in the permit (or in the amendment

to the water right) that deal with environmental flow protection. That adjustment is expressly authorized regardless of whether there is any subsequent application to amend the water right. The second sentence serves only to limit the applicability of the provision required by the first sentence when it is being inserted into an existing water right as a result of a permit amendment seeking an increase in the amount of water to be stored, taken, or diverted. That sentence merely provides that, in the case of a permit amendment, the reopener provision only gives the commission authority to adjust an environmental flow condition that controls the new authorization obtained through the amendment under which the provision was added to the permit. In other words, it makes clear that nothing in Subsection 11.147 (e-1) affects the portion of any appropriation that was granted prior to September 1, 2007, even if there has been a subsequent amendment involving a new appropriation. The last sentence of the Subsection confirms that concept by noting that the nothing in the Subsection affects an appropriation made before that date.

It is this second sentence that appears to be misinterpreted in FBR's Exceptions, and in the PFD, and mistakenly construed as evincing some new limitation on TCEQ's ongoing authority to impose environmental flow conditions in the context of permit amendments. Nothing in the statutory language supports that construction. Regardless of what conclusion the Commission may reach on the question of whether this application involves, or requires, amendments to BRA's existing rights, any interpretation of Section 11.147 (e-1) as limiting the Commission's authority to impose environmental flow conditions on permit amendments that do not involve the application of a reopener provision is erroneous.

8. Response to OPIC Exceptions Regarding Environmental Flow Measurement Points.

In its exceptions, OPIC argues that both an upstream and a downstream measurement point should be used to determine compliance with environmental flow requirements because of the

“sheer complexity, the enormity of the appropriation, and the ambiguity of the diversion by reach approach.”¹⁸ NWF agrees with OPIC that use of both an upstream and a downstream measurement would be an important step in the right direction. In many locations, it would help address the inadequacy of BRA’s proposed approach for determining flow requirements at an upstream measurement point.¹⁹ It would also help address the problem created by diversions located on a tributary where the only applicable measurement point is on the Brazos River downstream of the confluence of the tributary and the Brazos.²⁰

Unquestionably, that would introduce additional complexity for BRA. But, BRA made the decision to pursue this incredibly complex water right with an unlimited number of diversion points, some of which have unlimited diversion rates, at undetermined locations scattered over more than 1,200 miles of streams and rivers, combined with potential storage in 12 different reservoirs. If this permit is going to be authorized, it should be made subject to assessment at a sufficient number of compliance points to ensure that environmental flow standards will be met throughout the basin. The environmental flow standards require nothing less.

However, instituting one upstream and one downstream measurement point for each diversion point would not address all of the outstanding environmental flow issues raised by the proposed permit. For example, an improved approach would still be needed for ensuring compliance with environmental flow requirements in the reach below the Rosharon gage because there is no available downstream compliance point. Accordingly, environmental flow calculations for that upstream diversion point must take into account all diversions occurring downstream, including those under existing water rights, in order to protect flows throughout the reach and into

¹⁸ *The Office of Public Interest Counsel’s Exceptions to the Proposal for Decision* at p. 4.

¹⁹ NWF Exceptions at p. 15-16.

²⁰ NWF Exceptions at p. 22.

the Brazos River estuary.²¹ The failure to ensure compliance with the flow standards all the way downstream to the estuary certainly precludes any determination of consistency with the coastal management plan. NWF agrees with FBR's exceptions to the effect that consistency with the coastal management plan has not been established.²² In addition, use of both an upstream and downstream measurement point, or compliance point, would not resolve the various issues associated with the proposed authorization of temporary impoundment of protected pulse flows in contravention of the flow standards.

There is no established approach for implementing the environmental flow standards. Instead, the approach is being invented in this proceeding. An inadequate approach puts over 1,200 miles of rivers and streams at unnecessary risk. BRA should be required to focus its application to a limited number of realistic diversion locations with nearby environmental flow compliance points or to use a sufficient number of compliance points to ensure the standards are fully protected over those 1,200 miles even with the unlimited locations its seeks to have authorized.

CONCLUSION

BRA should be required to reduce the scope of its application to address only actual identified water demands with specific diversion points, rates, and amounts or the application should be denied. If a permit is going to be issued in response to BRA's current application, it should be limited in scope to reflect the amount of water actually shown to be available for appropriation, should include a procedure for input on the issues of appropriation amount, including the amount affected by the recent drought and ongoing sedimentation, and to assure the WMP is conformed to any permit issued. Any permit should also spell out clear requirements

²¹ NWF Exceptions at p. 21-22.

²² See FBR's Exceptions beginning at p. 95.

designed to ensure compliance with applicable environmental flow standards and to help protect environmental flows throughout all affected reaches.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I hereby certify by my signature below that on August 31, 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.



Myron J. Hess

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TCEQ DOCKET NO. 2005-1490-WR

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