

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

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

**PROTESTANTS COMANCHE COUNTY GROWERS' AND BRADLEY B.  
WARE'S REPLIES TO BRAZOS RIVER AUTHORITY'S AND THE  
EXECUTIVE DIRECTOR'S EXCEPTIONS TO THE PROPOSAL FOR  
DECISION**

TO THE HONORABLE ADMINISTRATIVE LAW JUDGES:

COMES NOW, Texas family farmers and ranchers George Bingham, Frazier Clark by next friend Dusty Jones, and William D. "Dwayne" and Mary L. Carroll by next friend Neil Carroll, collectively referred to as the Comanche County Growers ("CCG"), and Bradley B. Ware ("Ware") (sometimes referred to herein as "Protestants"), Protestants in the above styled and docketed water rights contested case hearing before the Texas Commission on Environmental Quality ("TCEQ" or "Commission") and the State Office of Administrative Hearings ("SOAH") regarding the Application for Water Rights Permit No. 5851 by the Brazos River Authority (hereafter "BRA" or "Applicant") and respectfully submit the following Replies to Exceptions to the Proposal for Decision. Protestants would respectfully state as follows:

**I. INTRODUCTION**

The Exceptions of BRA and the Executive Director of the TCEQ ("ED") should be denied.

Both BRA and the ED except to the Administrative Law Judges' ("ALJs") Proposal for Decision ("PFD") in its determination that the BRA Application cannot be granted because it does not comply with Texas Water Code, §11.134(b), which states:

- (b) The commission shall grant the application **only** if:  
**(1) the application conforms to the requirements prescribed by this chapter and is accompanied by the prescribed fee; ...**[Emphasis supplied]

The ALJs determined that the BRA Application was deficient. The application failed to specify diversion rates (*PFD*, p.20); identify the specific locations where water will be diverted (*PFD* pp. 28-29); and to comply with "the other applicable requirements of Water Code Chapter 11" (*PFD* p.31). The ALJs acknowledged, as did the Protestants, that, by leaving diversion rates unspecified, it is impossible, at this stage, to determine whether the SysOp Permit will adversely affect senior water rights. The Protestants agree with this determination and this obvious conclusion<sup>1</sup>, but would note that it is not a complete statement of the criteria BRA must meet in order for the BRA Application to be granted. Specifically, Texas Water Code, §11.134(b)(3)(B) states that the Commission must find that the proposed appropriation: "does not impair *existing water rights* or vested riparian rights; ..." This non-impairment requirement is codified in TCEQ Rules at 30 Tex. Admin. Code, §297.45, the "No Injury Rule" which states:

(a) The granting of an application for a new water right or an amended water right shall not cause an adverse impact to an existing water right as provided by this section. An application for an amendment to a water right requesting an increase in the appropriative amount, a change in the point of diversion or return flow, an increase in the consumptive use of the water based upon a comparison between the full, legal exercise of the existing water right with the proposed amended right, an increase in the rate of diversion, or a change from the direct diversion of water to on-channel storage shall not be granted unless the commission determines that such amended water right shall not cause adverse impact to the uses of other appropriators. For the purposes of this section, adverse impact to another appropriator includes: the possibility of depriving an appropriator of the equivalent quantity or quality of water that was available with the full, legal exercise of the existing water right before the change; increasing an appropriator's

---

<sup>1</sup> In fact, the ED's lead technical witness, stated: "I reviewed this request and determined that *although this request has the potential to affect river flows in the Brazos River and its tributaries, implementing [yet to be specified or determined effective] accounting measures should mitigate any impacts to senior and superior water rights.*" Ex. KA-1, p. 17, Lines 7-10. [Emphasis and parenthetical comments added.]

legal obligation to a senior water right holder; or otherwise substantially affecting the continuation of stream conditions as they would exist with the full, legal exercise of the existing water right at the time of the appropriator's water right was granted.

The requirements of the Tex. Water Code, §11.134, codified in the No Injury Rule, which address impacts on even appropriators junior to a senior water right which is the subject of an amendment application, clarifies that in the absence of an application which is capable of being evaluated and determined not to impair *existing* water rights (not just senior water rights), the application cannot be granted, even to the extent the ALJs propose. It is precisely the incompleteness of the BRA Application, as evidenced by its request for a two-step process which would essentially complete the application at a later date, which renders any order on the pending BRA Application for Water Use Permit No. 5851 a non-final order, as the ALJs correctly concluded.

BRA's Exceptions, as well as the ED's ignore this fatal flaw in the BRA Application. Instead, BRA and the ED propose a process which, in considering the first "step" which would grant the appropriation, shifts the burden of proof:

From the Applicant to support the BRA Application's compliance with Tex. Water Code, §11.134;  
To the protestants to disprove the appropriateness of the terms and conditions of Draft Water Use Permit No. 5851.

And, in proposing a partial grant or an interim order of a partial grant, it is not clear that the ALJs PFD does not have this same problem. In their exceptions, BRA simply ignores the obvious legal conclusions and the legal requirements of a complete application subject to consideration in a contested case hearing *before*-not after-a right to appropriate State water is granted. It suggests another two-step process for a different water right (BRA Exceptions, pp. 20-21) which the

parties and the ALJs have never had the opportunity to consider, and which has the same lack of completeness, and therefore compliance with Water Code Chapter 11, as the BRA Application which was the subject of this contested case hearing, and which is an unlawful substantive amendment of the application after notice has been issued.

Additionally, both BRA and the ED suggest that the BRA Application must be granted, contrary to the ALJs' legal analysis and conclusions, for the sake of expediency to deal with existing statewide drought conditions. CCG and Ware would counter that the drought conditions only make compliance with Texas Water Code, Chapter II before a water right is granted even more important. The CCG members and Ware note that BRA and the ED, while professing to need additional tools to address drought conditions, completely and deliberately ignored the impacts on existing water rights exacerbated by the drought, and the opportunity to address some of obvious and specific concerns highlighted by the ongoing drought conditions<sup>2</sup>. Specifically, the ALJs, in agreement with BRA and the ED, found that they could not consider any of the policy interests or public welfare concerns required to be considered by Tex. Water Code, §11.134(b)(3)(C). (*See*, PFD, pp. 105-119) The Exceptions of the BRA and the ED suggest that the rights of the parties to fully consider the nature and extent of BRA's proposed appropriation before it is granted should be disregarded, so that the remaining available water the Brazos River Basin can be quickly given to BRA with the details and impacts there-from to be considered later. For good reason, the Exceptions of BRA and the ED should be overruled and the Commission should deny the BRA Application which was the subject of the contested case hearing and PFD in its entirety.

---

<sup>2</sup> The Texas Water Development Board website refers to conceptual definitions of drought, one of which states: "Drought is a protracted period of deficient precipitation resulting in extensive damage to crops, resulting in loss of yield." It was undisputed by BRA that CCG and Ware had an ongoing and continuing need for water for agricultural purposes, as set forth in their existing and former water rights.

## II. THE TWO-STEP STRATEGY IS LEGALLY INSUPPORTABLE

BRA suggests that the requirements imposed by the Texas Water Code on *all* applicants for a water right pose a “chicken and egg” conundrum” (BRA Exceptions, p.1). BRA contends that the Commission can suspend the rules, rewrite or ignore the law, or perhaps adopt a procedural “work around” scheme to implement the rejected two-step strategy. This theme--that the legal requirements are optional-- pervades BRA’s Exceptions. Applicant asserts, repeatedly, that the size and complexity of its application, combined with the severity of the on-going drought, entitles BRA to special treatment and a suspension of the applicable statutory requirements. The ED’s Exceptions plead for “flexibility” repeatedly; and the ED argues for a functional amendment to the Water Code.<sup>3</sup> Both BRA and the ED use a manufactured sense of urgency based on current extreme conditions to justify their legal positions. It is as if *only* BRA is suffering through this Statewide drought and the burdens of compliance with §11.134 of the Water Code. Perhaps, if the CCG parties and Ware had been allowed to present supporting evidence for their applications along with BRA’s presentation in this hearing, then BRA and the ED would come to understand the full consequences of BRA’s Application, which the ongoing drought has drawn into sharp relief. Both BRA and the ED should realize that the perspective of the drought from the vantage point of long term family farmers presents a more urgent, even dire circumstance in the face of vanishing water supplies. In fact, CCG and Ware contend that the current state of severe drought supports strict adherence to the law which governs water permitting. Even in the absence of severe water shortages, expediency and/or “flexibility” are not appropriate bases for any unlawful action by the Commission.

---

<sup>3</sup> All references to Water Code refer to the Texas Water Code.

CCG and Ware contend that BRA has provided insubstantial support for the practical necessity of the two-step process, and no support for the legal justification of the extra-statutory process being requested. BRA asserts that it *cannot* develop a water management plan before it receives the water right. BRA states that the complexity of the operations which will maximize the yield of its reservoir system and the complexities of using the information contained in the water permit it seeks to develop a Water Management Plan (“WMP”) to justify a proposal to grant the appropriation without knowing any of the details of the intended appropriation of water. BRA argues that it cannot develop the WMP without owning the water. Logically and legally, this argument has *never* made sense. The award of an authorization to divert and use all the water shown to be available on a reasonable basis in the Brazos River Basin does not define or determine the soundness of an operational plan. A sound operational plan with specific proposals to divert and use water for identified and specific beneficial uses must be the *basis* for the award of a water right. Any application for a water right presents a paradigm. The applicant comes to the TCEQ with a proposal to use water, and the TCEQ evaluates the specific proposal in accordance with the Water Code and Commission Rules. Applicant’s general statement regarding the availability of water and Applicant’s general desire for the water shown to be available are not sufficient to justify granting a water right which not only provides no details of the diversion locations, rates and purposes of use, but also forecloses any awards of water rights to others who might be able to appropriate (or continue to appropriate, in the case of Protestants) water immediately in specified amounts for specific purposes. Logically, the parties to the contested case who have shown themselves to be affected persons, and the ALJs should review the specifics of Applicant’s proposed appropriation including the WMP *before* an award of the

water right. Instead of the “chicken and egg” metaphor that BRA suggests, this case has always been more of a “cart before the horse” application.

CCG’s arguments on this point are supported by BRA’s new alternative approach. It now wants the Commission to award it water on an *interim basis* so that it can hastily develop a WMP that it promises to bring to hearing in 20 months. Obviously, contrary to BRA’s testimony throughout this case, the lack of a legal right to divert and use 1,001,449 acre-feet/year at the Richmond gage (BRA Exceptions, p.21) does not affect BRA’s development of a WMP, after all. The two-step process never made any logical sense, and was never authorized within the existing framework of the Water Code. It was always a BRA device to “close the door” on water for everyone else in the Brazos River Basin while it develops a plan for the beneficial, non-injurious use of its extra-legal award, at its leisure. But, there are specific reasons why the Water Code and Commission Rules do not allow this type of procedure and, in fact, why Texas water law cannot apply the doctrine of prior appropriation in the manner requested by BRA.

Therefore, the BRA Application must be denied in its entirety until the Application is amended to comply with the Water Code and Commission Rules and to state the specific plan for use of the water and protection of existing water rights through the development of a WMP. The continued requests by BRA and the ED to ignore, delay, or circumnavigate the legal requirements of the Water Code cannot be allowed to prevail.

### **III. PRIOR APPROPRIATION DOCTRINE REQUIRES A SPECIFIC PROPOSED APPROPRIATION WHICH BRA HAS NOT PROVIDED**

Protestants believe that BRA and the ED have lost sight of the fundamental legal underpinnings of water rights administration in their over-reliance on computer modeling and their haste to ensure that the interests of BRA, and no other party to this proceeding, are addressed. Accordingly, it is appropriate to provide the legal context at this time.

The doctrine of prior appropriation is the fundamental precept of Western water law and is the basis of the Texas Water Code, Chapter 11 and implementing Commission Rules. Prior appropriation assumes that water is a scarce resource which must be carefully administered so as to preserve not only the health and safety, but also the economic viability of the State. The water is owned by the State as the ED correctly recognizes, but it is held in trust for beneficial use by the people of the state. In order to obtain a right to divert and use State water in specific amounts and at specific locations, the details of the proposed appropriation must be known. Then, with the specific information of the proposed appropriation, a new appropriation can be reviewed to determine whether it should be granted in full or in part. If granted, the appropriator is given time limits within which to commence and complete construction of the diversion facilities so that the water right can begin to be used. The appropriation is given a priority date which “relates back” to the date the complete application was filed, so as to preserve the viability of the new appropriation *vis a vis* later appropriators. The purpose of the priority date is to protect the economic investments of existing water rights holders, and the continued economic development of the State. Legally, under the Administrative Procedure Act (“APA”), Texas Government Code, §2001.001, *et seq*, existing water rights holders, water users and affected persons are entitled to review the specifics of the proposed appropriation and to determine if the appropriation will endanger their legally protected interests, including existing water rights.

Texas Water Code, Sec. 11.134 states the criteria which must be met in order for a water right to be granted.

In this case, BRA proposed a preemptive appropriation of all water shown to be available under the current theoretical construct included in the Brazos River Basin Water Availability Model ("WAM"). As the ALJs noted, with the acquiescence of the ED, BRA offered no specifics of its proposed appropriation other than a determination of the water theoretically available under the WAM at four theoretical diversion points. For BRA, the cleverness of this approach is that its proposal defied analysis. Further, as noted by the ALJs, the BRA Application remains simply a theoretical construct without any definition of the specifics of appropriation--which were proposed to be provided at a later date--so that no party could review the actual appropriation to determine its actual impact. BRA's appropriation would be protected from factual analysis and legal scrutiny until it was too late to effectively oppose the breadth of the appropriation. Moreover, BRA would obtain its right to appropriate all available water in the Brazos River Basin under a priority date unrelated to any commitment to complete the appropriation through a diversion and use of water.

The irrationality of this approach is particularly obvious now when water is not generally available and drought conditions prevail. Whether a proposed appropriation is simple or complex, *all* applicants for water rights would prefer to have their applications granted without factual analysis or legal scrutiny using BRA's two-step scheme rather than conforming doing as the Water Code actually requires. Considering water is an extremely scarce resource under current conditions, we are all fortunate that the Water Code and implementing TCEQ regulations require that any applicant's proposed appropriation meet basic requirements which will ensure that the water is put to beneficial use in a timely manner consistent with the grant of a priority

date. An application which both precludes a determination of its effect on existing water rights and effectively precludes any further appropriations must be denied. In order to effectively administer water rights in the Brazos River Basin, the Commission must deny BRA's Application for Permit No. 5851 and require BRA to present a new application which meets the legal requirements and allows for effective review.

**IV. THE COMMISSION HAS NOT RESOLVED THE TWO-STEP STRATEGY  
ISSUE AS SUGGESTED BY BRA**

Predictably, BRA and the ED assert that the Commission's actions in prior cases involving a two-step process should legitimate the two-step proposal presented in this case. The Irving application (ED-Ex. A-1 – City of Irving, Certificate of Adjudication No. 03-4799C ) and the Lower Colorado River Authority (“LCRA”) application (LCRA excess flow permit, Permit No. 5731) are both offered as examples where the two-step process has been used by the TCEQ with positive results. The CCG parties and Ware will not spend much time trying to distinguish those cases from the BRA Application. Those permits were developed in response to the specific parties and facts and not tested by judicial review. The validity for the two-step process was not litigated by the parties to those cases and affirmed on its merits by order of the Commission (and judicially confirmed). CCG and Ware believe those factors distinguish those cases, but they cloud the real issue. Simply put, the Irving application and the LCRA application do not control the outcome of this case because they are separate contested cases involving different parties that did not include the CCG parties and Ware, or the other facts and parties of this case.

By mentioning prior applications that employ the two-step process, both BRA and the ED are attempting to “round-off” the corners of well-established legal principles. BRA and the ED

would argue that the Irving and LCRA applications are prior “statements of Commission policy” about the need to be more “flexible” on “complex” cases. BRA has even sought to “boot-strap” the cases into an argument that the Irving and LCRA applications are evidence that a “pragmatic and flexible approach” would pass muster of judicial review under the *Texas- New Mexico Power Co. v. Tex. Indus. Energy Consumers*, 806 S.W.2d 230 (Tex. 1991) case<sup>4</sup>. BRA and the ED would point to the Irving and LCRA cases as “precedents” that the Commission is obligated to follow in *this case* and with *these* parties. These arguments fail because the “corners” of the law are well established: agency policy is best made by formal rulemakings and a state agency’s holding in one contested case does not control the outcome of another contested case.

#### A. AGENCY “POLICY” V. RULEMAKING

Texas courts do not recognize the validity of administrative agency statements of “policy” or the law as controlling authority for *third parties* where the policy was not derived through formal rulemaking procedures. In *Brinkley v. Texas Lottery Commission*, 986 S.W.2d 764 (Tex. App. –Austin 1999) the Third Court of Appeals evaluated the legal force and effect of informal letters issued by the Texas Lottery Commission to its licensees that interpreted the propriety of certain gaming machines. The Court acknowledged that the legislature intends for administrative agencies to exercise effectively their delegated power with some flexibility (at p. 769). However, the Court went on to hold:

“...the definition in Section 2001.003 (6) [of the Administrative Procedures Act] is sufficiently flexible to allow agencies to perform their functions without unnecessary procedural obstacles; the definition expressly excludes from the

---

<sup>4</sup> The CCG parties discussed the applicable caselaw, including *Texas New Mexico Power*, at length in their Closing Argument, attached to their Exceptions as Ex. A. Suffice it to say that “flexible and pragmatic” approaches still have to be *authorized* by the enabling statute.

definition of a ‘rule’ any agency statement regarding only the internal management or organization of an agency that *do not affect* [emphasis court’s] private rights or procedures, *See* Tex. Govt. Code, Ann. § 2001.003. (6) (C). This statutory exclusion encompasses any agency statement regarding “law”, “policy”, or procedural “requirements” made outside the rulemaking and contested cases context; such statements *have no legal effect* on private persons absent a statute that so provides or some attempt by the agency to enforce its statement against a private person,....” [Emphasis supplied]

(p. 770)

The Texas Supreme Court discussed, at length, the differences between rulemaking procedures and contested cases in *R.R. Comm. of TX v. WBD Oil & Gas Co.*, 104 S.W.3d 69 (Tex. 2003). After describing the procedural characteristics of rulemaking proceedings and contested cases under the APA, the Court concluded:

“Plainly, rulemaking procedures maximize ‘public participation in the rulemaking process,’ a stated purpose of the APA, while contested case procedures limit participation to those directly affected by the dispute.”  
(*Id.*, at p. 77)

The court rejected the lower court’s suggestion that there could be a “hybrid” contested case/rulemaking agency approach wherein a “rule” or “policy” could be established lawfully in a contested case. The Court could not have been more certain in its rejection of this notion:

“The Court of Appeals suggested that determining field rules is a hybrid process, but this cannot be true. Contested case procedures and rulemaking procedures are mutually exclusive; a rule cannot be adopted without public input, and a contested case cannot be decided with it.”<sup>5</sup>  
(*Id.*, at p.78)

---

<sup>5</sup> It is worth noting that even if the CCG parties and Mr. Ware had known about and sought to participate in either the Irving or LCRA applications, they would have likely been denied party status because they were located in the Brazos River Basin, rather than the Trinity or the Colorado.

The ED's so-called "policy" for handling water right applications internally should not be considered "law" unless or until it is subjected to formal rule-making procedure. The same standard applies to statements, letters or written opinions of the TCEQ Commissioners themselves. There are no exceptions, middle ground, or "hybrid" outcomes to this well settled rule of Administrative Law.

#### B. AGENCY DECISIONS ARE NOT CONTROLLING ON OTHER CASES

The corollary principle of the foregoing caselaw is that administrative agencies are not obligated to follow past decisions in contested cases, as if they are courts. In *Flores v. E.R.S. of Texas*, 74 S.W.3d 532 (Tex. App. – Austin [3<sup>rd</sup> Dist] 2002) the Court of Appeals, citing *Miner v. Federal Communications Comm'n*, 663 F.2d 157 (D.C. Cir. 1980) stated that an agency is not bound to follow its decisions in contested cases in the same way that a court is bound by precedent (*Id.*, at p. 544). The Court did acknowledge that a reviewing court can require an agency to explain its reasoning when it departs from an administrative policy<sup>6</sup>. The administrative agency that "changes course" on an issue from one contested case to another is likely to be accused of acting in an arbitrary and capricious manner. This was what the court of appeals addressed in *Grubbs Nissan v. Nissan*, 03-06-00357-CR (Tex. App. – Austin 5-23-2007). In the face of a specific challenge that the Texas Department of Transportation, Motor Vehicle Division was acting arbitrarily and capriciously, the Court cited *Austin Chevrolet, Inc. v. Motor Vehicle Bd.*, 212 S.W.3d 425,438 [quoting *Flores* (*id.*)] and held that an agency is not bound to

---

<sup>6</sup> In this context, the term "policy" is appropriately related to how the agency considered the case from a procedural stand point and arbitrarily and capriciously made finding of fact for inexplicable reasons (p.545).

follow its prior decisions. In short, BRA's and the ED's suggestions that the TCEQ may be somehow bound to follow the rulings of any past contested cases has no support in the law.

The CCG parties and Ware assert that there is ample reason why the TCEQ should not follow its past decision in the Irving and LCRA applications. For one thing, the legal flaws of the two-step process have been pointed out to the Commission in this case. For another, there are parties objecting to the two-step process in this case. But, the best reason for rejecting the two-step process in this case is that the two-step process does not provide sufficient proof of all the required elements of the Texas Water Code, which are necessary to authorize a new appropriation of water. The fact of the deficient application would not be changed by even a careful review of the administrative records in any other contested case for a water right. For these reasons, it would be arbitrary and capricious for the Commission to use either of the cited applications as controlling authority in this case.

#### **V. THE ALJ'S APPROPRIATELY DECIDED THE FINALITY ISSUE**

Protestants CCG and Ware discussed the lack of finality of BRA's proposed order in their Closing Arguments (*See*, CCG and Ware Exceptions, Exhibit A). The issue need not be re-argued here. Both BRA and the ED focus on what they call the "definitive" nature of approving a major appropriation based on four hypothetical diversion points. The *Texas New Mexico Power* case controls the issue. If that case only required final orders to be *definite*, then BRA's proposed order in this case would be final. Without a doubt, BRA seeks the definite award of all available water in the Brazos River Basin. The ALJs appropriately found that a final order that attempts to resolve only some of the required issues of the Water Code must be authorized by the Water

Code. The two-step process is simply not authorized. It is, in fact, prohibited under Texas Water Code, §11.134.

BRA's discussion of the two-step process in the *Texas New Mexico Power* case is puzzling. CCG agrees: *Texas New Mexico Power* does not broadly state that a two-step process can never result in a final agency order. In fact, CCG and Ware discussed, at length, cases where the first step of a two-step approach to an administrative matter *was* a final order (see Exceptions Ex. A). *Texas New Mexico Power* simply states, emphatically, that the two-step process *must be authorized by statute*. In its description of the subject matter of the *Texas New Mexico Power* case at page 16 of BRA's Exceptions, even BRA states: "that case involved the interpretation of a specific two-step process *set out by statute*. . ." It is this detail of statutory authorization that BRA and the ED seem to forget. BRA cites *City of San Antonio v. Tex. Water Comm'n*, 407 SW2d 752, 759 (Tex. 1969) as authority for the breadth of TCEQ's authority to permit water rights, but the case includes a quote at Footnote 27, p. 12 of its Exceptions that actually undermines its argument for the two-step process in this case:

" . . . the Legislature has created the TCEQ and has entrusted to it broad discretion *within certain statutory limits*, in determining whether an application for a permit to appropriate and divert such waters to a particular use shall be granted or denied." (Emphasis supplied.)

Frankly, the issue of finality is not very complicated. No one argues that the TCEQ does not have broad permitting authority. It simply does not have *unlimited* permitting authority. TCEQ cannot rewrite or amend the Texas Water Code to fit the applicant of its choice, no matter how much the ED believes that he needs "flexibility" in the Water Code with respect to some applications. (CCG and Ware can both attest to the fact that the ED does not always seek

flexibility in water rights permitting, and, as to some applicants even chooses to reject what statutory flexibility there is.) BRA and the ED devised a perfectly plausible sounding scheme to divide BRA's water needs into two contested cases. Unfortunately for them, the Water Code requires BRA's application, including its putative WMP, to be completed in *one* contested case. There is little more to debate on the issue necessary. The ALJs' conclusion on finality is completely unassailable.

## VI. BRA'S REQUEST FOR AN INTERIM ORDER

BRA now seeks an "alternative" treatment of its deficient application. It now requests the TCEQ to grant its request for a water right on an "interim" basis and "reserve" all of the water that it originally sought until it develops its WMP. Obviously, this scheme is simply "two-step process—redux." BRA considers this alternative a "workable option" (BRA Exceptions, p. 7) and even suggests strategic legal "cover" for the TCEQ. First, BRA cites sections of the Water Code as authority for the TCEQ to issue an interim order on certain factual and legal issues in the case<sup>7</sup>. Then, BRA extols the virtues of the interim order approach by boldly stating that its requested action would ". . . avoid the time and expense of a possible appeal of the Commission's decision. . ." (BRA Exceptions, p.2) This incredibly cynical statement is really suggesting that the agency could do whatever it chooses, no matter how unlawful or unfair, on an interim basis and no one would be able to overturn the action through judicial review.

BRA is aware of the well established case law that disfavors judicial review of a non-final administrative action. In the interim order strategy, BRA proposes to *embrace* the lack of

---

<sup>7</sup> BRA cites scant authority for an interim order. §5.102 authorizes general powers to the TCEQ and an ability to hold hearings; §5.116 confers authority to *recess* hearings; and §11.133 is more authority to hold hearings. There was no specific cite or reference to authority to issue water rights on partial or "pending" proof.

finality of an interim order and be given almost two years (subject to a predictable request for additional time) to correct the deficiencies of its original application. The interim order approach satisfies BRA's objectives in filing its Application for Water Use Permit No. 5851, because BRA always wanted the TCEQ to reserve all of the Brazos River Basin water for its use. A non-final reservation serves BRA's purposes, because as of the date of the interim order, no one else could receive a water right in the Brazos River Basin no matter how long it takes BRA to develop the specifics of its appropriation through the WMP. BRA would point to cases such as *Coastal v. Public Utility Comm'n*, 294 SW3rd 276, 285 (Tex. App. [3<sup>rd</sup>] 2009) for authority that review of interim agency actions is barred by the APA if the agency is exercising its discretion. BRA argues that the emergency circumstances of the drought, and the need for BRA to control water in the Brazos River Basin justifies this extra legal agency action.

BRA's interim order request is wrong on multiple levels. First, it is patently unfair to the Protestants, including CCG and Ware to give BRA a huge "second bite of the apple" while their own pending applications are held in limbo under the ED's interminable "review." Moreover, such a procedure would deny procedural due process to all of the Protestants. When this case began, the parties were only notified that the case would proceed according to the normal statutory and regulatory requirements and time limits.<sup>8</sup> At no time were the parties advised that if BRA did not prove its case, then the TCEQ would grant BRA's theoretical appropriation on an interim basis and give BRA years to repair the deficient part of its case. This case has been expensive for all parties, not simply for BRA which, as the Applicant, reported that it budgeted \$12 million to obtain the permit. (See, Testimony of Jim Forte, BRA's Planning and

---

<sup>8</sup> See, Order No. 1 of the Administrative Law Judges which sets out the hearing schedule and the projected schedule for case consideration by the TCEQ.

Development Manager, Transcript, p. 34, line 9) BRA's proposal for interim treatment amounts to a new policy of the type that is legally prohibited without prior notice to the parties. [See, *AEP v. Public Utility Comm'n*, 286 SW3rd 450, 475 (Tex. App. 13<sup>th</sup>] 2008) citing *Flores v. Employees Retirement Sys. of Texas*, 74 SW3rd 532, 544 (Tex. App.—Austin 2002, pet. denied)] Simply put, it is a denial of procedural due process for an agency to adopt new policy in the course of a contested case hearing without giving the parties prior notice.

Most importantly, BRA has not justified even an interim grant of any water right, because its application was found to be *incomplete*. Under the Water Code and applicable TCEQ rules, a complete application for a water right is a condition precedent for receiving a first hearing, at all. An incomplete application cannot be the basis for granting all or any part of an application. The incompleteness of BRA's application, and therefore, BRA's failure to comply with the requirements of Texas Water Code, §11.134, cannot be cured by granting BRA's application on either an interim or permanent basis. Under TCEQ rules, the incomplete application which has been the subject of a contested case hearing cannot be substantively amended *after* the hearing has taken place. If BRA now wishes to substantively amend its application to make it complete in accordance with TCEQ regulations<sup>9</sup>, then there is no substantive value to the existing record in this case. All pre-filed testimony was submitted based on what BRA *did* propose, not based on what it *will* propose at some point in the future. BRA must file a complete application with the required substantive amendments in accordance with applicable law and regulations, and the TCEQ must provide an opportunity for the parties to have a contested case on the (perhaps) complete application. Only then, will the Protestants' cross-examination of BRA's witnesses

---

<sup>9</sup> TCEQ Rules at 30 Tex. Admin. Code, §295.201 states: "No substantive changes may be made after an application has been filed with the Chief Clerk of the Commission by the Executive Director."

have relevance. For example, the cross examination on the hypothetical diversion points in the existing record will be irrelevant once the *real* diversion points are finally revealed. The impact of the specific proposed appropriation on existing water rights and the analysis under the “No Injury” Rule, 30 Tex. Admin. Code, Sec. 297.45 could be performed in that case. The record from the contested case hearing on BRA’s incomplete application does not support the grant of any water right. Instead, the ED’s staff must conduct its technical review of the new application, issue notice, and, if protested, convene a contested case hearing on all the issues raised under the new application must be held.

Ultimately, the problem with BRA’s interim order approach is that it only delays the inevitable. Eventually, TCEQ’s final decision in this case will be subject to judicial review.

Following the requested interim action would put the agency in the position of having a final order judicially reviewed that was based on the multiple violations of the Water Code and due process under law identified by the parties and the ALJs. Those issues would be raised by the CCG parties and Ware, if no one else. Even BRA cannot explain the value of the wasted time and expense of *two* contested case hearings which could only result in a *voidable* final order of the TCEQ. Certainly, the CCG parties and Ware cannot find any benefit – to any party to this case, including BRA – in granting the BRA application through a faulty procedural process through continued Commission action which is obviously subject to being overturned on appeal, as the ALJs pointed out.

Of course, BRA wants the possibility of obtaining a water right under an incomplete application without proper legal or factual review by any of the protesting parties, but the Protestants would argue that such an obviously unlawful approach leading to a voidable Commission order does not even serve BRA’s interests. And, considering the quantity of water

requested and the limitation of further appropriations in the Brazos River Basin, BRA's proposed resolution of the deficiencies of its case by interim order should not be considered a fair, lawful or satisfactory approach for the TCEQ.

## VII. RELIEF REQUESTED

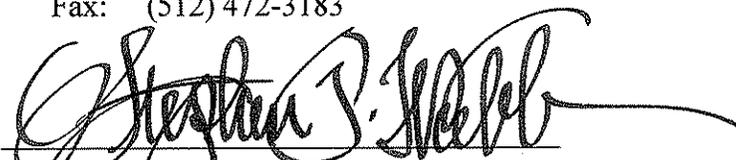
CCG and Ware respectfully request the ALJs grant these exceptions and recommend appropriate changes to the Proposal for Decision to be incorporated into a Final Order denying the BRA Application for the reasons stated herein in addition to the reasons set forth in their Proposal for Decision, issued October 17, 2011.

Respectfully submitted,

**WEBB & WEBB**  
ATTORNEYS AT LAW

211 East Seventh Street, Ste. 712  
Austin, Texas 78701  
Tel: (512) 472-9990  
Fax: (512) 472-3183

By:

  
Stephen P. Webb  
State Bar No. 21033800

By:

  
Gwendolyn Hill Webb  
State Bar No. 21026300  
ATTORNEYS FOR PROTESTANTS COMANCHE  
COUNTY GROWERS AND BRADLEY B. WARE

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing document has been served via hand delivery, facsimile, electronic mail, overnight mail, U.S. mail and/or Certified Mail Return Receipt Requested on all parties whose names appear on the attached mailing list on this the 17<sup>th</sup> day of November, 2011.

FOR THE CHIEF CLERK:

Melissa Chao  
Office of the Chief Clerk, MC 105  
Texas Commission on Environmental Quality  
P.O. Box 13087  
Austin, TX 78711-3087  
512-239-3300  
512-239-3311 (fax)

FOR BRAZOS RIVER AUTHORITY:

Douglas G. Caroom  
Bickerstaff Heath Delgado Acosta LLP  
3711 S. MoPac Expressway  
Building One, Suite 300  
Austin, TX 78746  
512-472-8021  
512-320-5638 (fax)  
[dcaroom@bickerstaff.com](mailto:dcaroom@bickerstaff.com)

FOR THE ADMINISTRATIVE LAW JUDGES:

Hon. William G. Newchurch  
Hon. Hunter Burkhalter  
State Office of Administrative Hearings  
300 W. 15<sup>th</sup> St., Suite 502  
Austin, TX 78701  
512-475-4993  
512-475-4994 (fax)

FOR THE CITY OF LUBBOCK AND TEXAS  
WESTMORELAND COMPANY:

Brad B. Castleberry  
Llyod Gosselink Rochelle & Townsend, P.C.  
816 Congress Ave., Suite 1900  
Austin, TX 78701-2442  
512-472-0532 (fax)  
[bcastleberry@lglawfirm.com](mailto:bcastleberry@lglawfirm.com)

FOR THE EXECUTIVE DIRECTOR:

Robin Smith, Staff Attorney  
Texas Commission on Environmental Quality  
Environmental Law Division, MC-173  
P.O. Box 13087  
Austin, TX 78711-3087  
512-239-0463  
512-239-3434 (fax)  
[rsmith@tceq.state.tx.us](mailto:rsmith@tceq.state.tx.us)

FOR PUBLIC INTEREST COUNSEL:

Eli Martinez, Attorney  
Texas Commission on Environmental Quality  
Public Interest Counsel, MC-103  
P.O. Box 13087  
Austin, TX 78711-3087  
512-239-6363  
512-239-6377 (fax)  
[elmartin@tceq.state.tx.us](mailto:elmartin@tceq.state.tx.us)

FOR THE CITY OF BRYAN AND CITY OF  
COLLEGE STATION:

Jim Mathews  
Mathews & Freeland LLP  
P.O. Box 1568  
Austin, TX 78767-1568  
512-703-2785 (fax)  
[jmathews@mandf.com](mailto:jmathews@mandf.com)

FOR THE NATIONAL WILDLIFE FEDERATION:

Myron J. Hess  
44 East Ave., Suite 200  
Austin, TX 78701-4384  
512-610-7754  
512-476-9810 (fax)  
[hess@nwf.org](mailto:hess@nwf.org)

FOR DOW CHEMICAL CO.:  
Fred B. Werkenthin, Jr.  
Booth, Ahrens & Werkenthin, PC  
515 Congress Ave., Suite 1515  
Austin, TX 78701-3504  
512-472-3263  
512-473-2609 (fax)  
[fbw@baw.com](mailto:fbw@baw.com)

FOR TEXAS PARKS AND WILDLIFE  
DEPARTMENT:  
Colette Barron-Bradsby  
Texas Parks and Wildlife Department  
4200 Smith School Rd.  
Austin, TX 78744  
512-389-8899  
512-389-4482 (fax)  
[Colette.barron@tpwd.state.tx.us](mailto:Colette.barron@tpwd.state.tx.us)

FOR THE GULF COAST WATER AUTHORITY:  
Molly Cagle  
Vinson & Elkins LLP  
The Terrace 7, Suite 100  
2801 Via Fortuna  
Austin, TX 78746-7567  
512-542-8552  
512-236-3280 (fax)  
[mcagle@velaw.com](mailto:mcagle@velaw.com)

Ronald J. Freeman  
Freeman & Corbett LLP  
8500 Bluffstone Cove, Ste. B-104  
Austin, TX 78759-7811  
512-451-6689  
512-453-0865 (fax)  
[rfreeman@freemanandcorbett.com](mailto:rfreeman@freemanandcorbett.com)

FOR THE CITY OF ROUND ROCK:  
Steve Sheets  
Sheets & Crossfield PC  
309 E. Main St.  
Round Rock, TX 78664-5246  
512-255-8877  
512-255-8986 (fax)  
[slsheets@sheets-crossfield.com](mailto:slsheets@sheets-crossfield.com)

FOR THE FRIENDS OF THE BRAZOS RIVER,  
HELEN JANE VAUGHN, LAWRENCE WILSON,  
AND MARY LEE LILLY:  
Richard Lowerre  
Marisa Perales  
Lowerre Frederick Perales Allmon & Rockwell  
707 Rio Grande St., Suite 200  
Austin, TX 78701-2719  
512-469-6000  
512-482-9346 (fax)  
[rl@lf-lawfirm.com](mailto:rl@lf-lawfirm.com)  
[marisa@lf-lawfirm.com](mailto:marisa@lf-lawfirm.com)

FOR MIKE BINGHAM:  
Mike Bingham  
1251 C.R. 184  
Comanche, Texas 76442  
254-842-5899

  
Stephen P. Webb