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November 17, 2011

via e-filing and first-class mail

Ms. Bridget Bohac
Office of the Chief Clerk
Texas Commission on Environmental Quality
Office of the Chief Clerk, MC-105
P.O. Box 13087
Austin, Texas 78711-3087

**Re: SOAH Docket No. 582-10-4184; TCEQ Docket No. 2005-1490-WR; In the Matter of
the Application by Brazos River Authority for Water Use Permit No. 5851.**

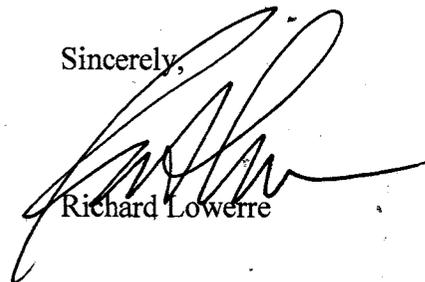
Dear Ms. Bohac:

The Responses to Exceptions of BRA and the ED by Protestants Friends of the Brazos River, H. Jane Vaughn, Lawrence D. Wilson and Mary Lee Lilly is enclosed for filing.

In addition, the original and 7 copies of Protestants' Responses to Exceptions have been deposited in the U.S. mail.

Please contact me if you have any questions or concerns.

Sincerely,



Richard Lowerre

cc: Service List

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November 17, 2011

via Hand Delivery

The Honorable William Newchurch
The Honorable Hunter Burkhalter
Administrative Law Judges
State Office of Administrative Hearings
P.O. Box 13025
Austin, TX 78711-3025

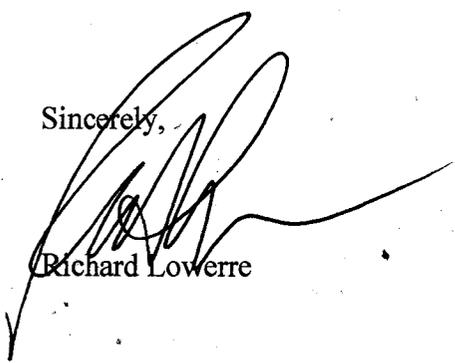
**Re: SOAH Docket No. 582-10-4184; TCEQ Docket No. 2005-1490-WR; In the Matter of
the Application by Brazos River Authority for Water Use Permit No. 5851.**

Dear Judges Newchurch and Burkhalter:

The Responses to Exceptions of BRA and the ED by Friends of the Brazos River, H. Jané
Vaughn, Lawrence D. Wilson and Mary Lee Lilly is enclosed for filing.

Thank you for your consideration of this matter. Should you have any questions, please feel free
to contact me.

Sincerely,



Richard Lowerre

cc: Service List

SOAH DOCKET NO. 582-10-4184

TCEQ DOCKET NO. 2005-1490-WR

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

**RESPONSES TO EXCEPTIONS OF BRA AND THE ED BY
FRIENDS OF THE BRAZOS RIVER, H. JANE VAUGHN,
LAWRENCE D. WILSON, AND MARY LEE LILLY**

November 17, 2011

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I. Summary of Responses

The Brazos River Authority “BRA” and the Executive Director “ED” argue against denial of the permit. FBR and other Protestants have explained in detail the problems with each of the options to denial. Several of the arguments of BRA and the ED for the option of abatement and the filing of a proposed WMP require responses. Those arguments and FBR’s responses are summarized below and are later discussed in detail.

A. Summary Responses to BRA’s Proposal for Abatement

1. BRA’s Uniqueness Argument and Texas Law: BRA’s argument for a new type of permitting process is contrary to Texas law and would create insurmountable problem in this case and future water rights. BRA created its problem by trying to combine requests for increased appropriation from reservoirs, new appropriations from return flows and new appropriations from systems operations. Clearly the first and second requests need not special treatment. Combining them with the system operations caused the complexity.
2. BRA’s Argument for Freezing Decisions and Against a Major Amendment Process: BRA and the ED initially conceded that any proceeding regarding a WMP would require new notice and the opportunity for others to participate. Their exceptions reverse their positions, arguing that the Commission could issue an order now, which would in effect "freeze" decisions on certain issues and prevent those issues from being addressed during the initial WMP proceeding. BRA's arguments in support of this position, however, are without merit. First, the WMP proceeding would need to include BRA's existing water rights. Second, the WMP would constitute a major amendment, requiring new notice and an opportunity for new parties to participate in the proceeding. Thus, all issues related to such a major amendment would need to be open for consideration.
3. BRA’s Argument for a Fast Track WMP: Now instead needing three years to develop a WMP, as it did throughout the hearing, BRA claims it can do it in one year. It also now seeks a fast-track process. That fast-track approach ensures that the WMP will be even less of an overall plan than it would have been under the original process. It will not have actual diversion points or rates for the majority of the water BRA seeks. With the remand and a WMP process, BRA would still need to ask to bank hundreds of thousands of acre-feet of water for which it can show no specific need, diversion point or rate. Thus, the ALJs and the Commission would be facing the same issues - the lack of compliance with rules for actual diversions, finality, etc. in an initial decision on the WMP.
4. BRA’s Precedent Argument: The PFD correctly distinguishes what BRA claims are precedents for a two-step process. Neither of the process for the City of Irving or that for the LCRA permit is precedent. Neither requires the key decisions for issuance of a permit to be delayed to a second stage.
5. BRA’s Drought Argument: BRA argues that current drought conditions justify making a special case with its application. In fact, the drought does the opposite. The extreme drought conditions show that the entire foundation for BRA’s application is likely incorrect.

Current estimates of firm yields of BRA's reservoirs and the WAM for the basin could be wrong. If anything, the time should be taken to allow consideration of the lessons to be learned from the drought.

6. BRA's Immediate Need Argument: BRA argues that there is an immediate need for the permit now some 7 years after it applied for it. Yet, the evidence shows that BRA has 400,000 acre feet of water than has not and is not being used. Moreover, the Region G and H plans do not identify any significant immediate needs for SysOp water.

7. BRA's Argument to Protect its "Investment": This application was not an investment; it was a gamble. BRA may have convinced the ED and TPWD to accept its approach, but both warned of the risks. BRA chose to take the risk on a novel approach not authorized in law. Now, BRA is asking the Commission to consider its costs but ignore the costs to Protestants. If BRA were allowed to go forward, it should first offer (or be required) to reimburse all the costs of the other parties.

8. BRA's Argument on Saving Time and Money: TCEQ will not likely save time or resources using the remand approach to avoid court appeals. First, with denial here, only BRA would be appealing. Second, no one will save money or time if the WMP decision together with the decision on the water right is reversed by the courts in the future. It is in the best interest of all parties that we get everything right the first time. A new and reasonable BRA application could even lead to settlements for all parties.

B. Summary Responses to the ED's Arguments for Abatement

1. ED's Argument on Permit Requirements: The ED's argument that BRA's imaginary control points are diversion points under Texas law is without legal or factual basis. BRA has never intended to divert at those points. The ED argues that the application meets all requirements for permitting. The ED also mischaracterizes the PFD, arguing that it requires "every detail" of operation in a draft permit. It does not. It simply requires the details required explicitly by laws.

2. ED's Argument on Flexibility: The ED's argument that TCEQ needs to provide greater flexibility may be valid, but it is not supported in any statute or rule. The law is strict, as it should be, when handing out the state's water held in a public trust under the Texas Constitution. Moreover, the ED does not propose a test or any limits on this flexibility for this case or for any future water right that might be sought. The ED is arguing for a large expansion of the limited discretion given to TCEQ by the Legislature to decide who gets a permit and under what conditions.

3. ED's Argument on the Multi-Step Process: The ED's arguments appear to support FBR's position that the WMP process will require more than two steps and that the initial WMP will have the same problems as the current application, i.e. not final and not in compliance with requirements to identify diversion points and rates.

4. ED's Argument on Freezing Decisions: The ED argues that the decisions can be made for issues "fully litigated," but as the PFD shows, many issues are not fully litigated. Many are subject to change in the WMP process. To do what the ED proposes would improperly tie the hands of future Commissions.

5. ED's Argument on Reservoir Capacities: The ED's position is contrary to and not supported by the *Stacy Dam* decision. The Supreme Court sought a conservative approach

to water rights, where the State would not issue water rights for more water than exists. The recent drought emphasizes the need for this conservative approach. Moreover, using theoretical capacities does nothing to protect the capacity of a reservoir, as the ED argues it does. The ED cites no evidence, law or policy for that argument.

6. ED's Argument for a Term Permit for Allen's Creek Water: BRA has never sought a term permit or provided any evidence to support one. There was no public notice that BRA was seeking a term permit. Protestants have evidence on this issue, but did not present it because it was not an issue. Moreover, issuing BRA a term permit would eliminate the opportunity for others to seek term permits, as is allowed under Texas law, for water that is not being used and that has not been shown to be needed.

7. ED's Argument on the Glen Rose Scenario: It appears that the ED is arguing that it will fix the problem of the lack of unappropriated water in one of the future steps of the WMP process. Again, the Supreme Court in the *Stacy Dam* decision made it clear that TCEQ cannot use that approach.

C. Summary Response to BRA's Exceptions on Transcript Costs

1. BRA's Argument on Transcript Costs: FBR supports the position of the Judges on transcript costs. BRA gambled and put the parties through significant costs. BRA wants Protestants, who explained the problems as early as 2004, to help pay BRA for its mistake. With denial, BRA will likely return. If it does so in pieces, FBR can pick and choose which, if any, proposals it needs to protest. There is, however, no reason to think that BRA will take that approach, given its exceptions. Thus, FBR and others are facing the costs of a second complex hearing.

II. Responses to BRA's Arguments for Abatement

There are a number of issues raised in the exceptions of BRA and the ED that FBR has adequately addressed in its final arguments and exceptions. One is the issues such as the adequacy of instream flows, especially for the John Graves Scenic Riverway segment. Other issues include the double permitting of Allen's Creek water, the need for actual, not theoretical, firm yields, finality, and the proper approach to return flows. These issues will not be addressed below. Instead, the **arguments** of BRA and the ED that focus on the option of abatement and a WMP process are addressed. Transcript costs are also discussed.

1. BRA's Uniqueness Argument and Texas Law: BRA argues that it could not, in its application or now, develop a proposal for a WMP because it did not and does not know how much

water it will be authorized. No applicant knows how much water it will obtain through the permit process, but that has not required the type of change in process for permits that BRA is proposing.

BRA's problem is self-imposed since it sought to include requests for appropriations that could have been handled in a normal fashion, while creating a complex systems operation permit. If BRA had, for example, filed an application for the existing unappropriated water from the Possum Kingdom reservoir and other sources, it would not make that type of argument. FBR would not have had to participate in such a complex permitting process. It would not have taken the ED 7 years to bring the application to hearing.

BRA's argument is also not valid because it already has a systems operation order, which did not take any complex process. BRA could use it again. It could simply file several new applications, some of which some Protestants here would not likely even protest.

Moreover, if a multi-step process is needed for future water rights, it should be created in statutes or rules to avoid making the ED, the Judges and the participants guess what the process is and fight over the process as it is being created. The proper way to create such a process—one that could be used in the future for many water right applications—is through statute or rule, where all interests across the state can participate in its development. Such a process will also better withstand any appeal to court.

2. BRA's Argument for Freezing Decisions: In this proceeding, BRA and the ED argued that the second step—the approval of the *initial* WMP—would occur after new notice and the opportunity for others to participate. They took that position because the WMP will require a significant amount of new information and analysis.

The evidence shows that WMP will affect and likely require amending existing water right permits, something BRA has argued the current permit process does not.

Questions by Marisa Perales: And so is it your position that the water management plan will address existing water rights as well as this new sysop permit?

Answer by Kathy Alexander: Yes. Tr. 2128, l. 16- 18.

Kathy Alexander also testified that there is nothing in the permit or elsewhere that would restrict the WMP from amending an aspect of the SysOp permit or any other permit.¹ Even BRA's Exceptions seem to agree that amendments to existing permits will be needed. See for example BRA's Exception at page 4, the first sentence of the first full paragraph.

In opening up existing permits, BRA's existing water rights will be subject to additional amendments including environmental flow restrictions and limits to protect recreational uses. While FBR would like to see that happen, the process needs to be done after proper public notice and the opportunity for others to participate.

¹ Questions by Judge Newchurch: . . . There is a provision in there that, according to my notes, concerns Allen's Creek – the Allen's Creek permit, and I think I even asked you about this earlier, and whether or not you were intending to say through this in the draft permit that if BRA wanted to make amendments with regard to Allen's Creek, it should amend the Allen's Creek permit, not come back with something in the water management plan for this permit that's under consideration?

Answer by Kathy Alexander: It could be done in the water management plan, but it could also be done by an amendment to Allen's Creek water right itself, and I think what we had -- what I said is that conceptually we don't have too many issues with this provision, but it needs some refinement as far as the language, and I think that's something that we expressed in our -- some of the information that we provided in this hearing.

Q: Okay. My broader question is, aside from possibly that provision, is there anything else in the draft permit that purports to prohibit any proposed amendment in the water management plan that might be brought forth? In other words, is there something in this permit that says don't ask to do that in the water management plan? You've got to do that through some other vehicle?

A: Not to my knowledge.

Q: Okay. So any amendment regarding this permit that BRA wanted to propose in the water management plan, would be fair game as far as you know?

A: It could be. We would review those when it was actually submitted, but it is subject to notice and contested-case hearing.

Q: Absolutely. All I'm trying to say is you're not in any way trying to say amendments through that vehicle are inappropriate; that has to be some other vehicle, some separate vehicle?

A: No, we're not saying that. Tr. 2203, l. 11 to 2204, l. 24

Even if the proposal for the WMP did not affect BRA's existing water rights, it would still be a major amendment under TCEQ past interpretations. It will change diversion points and rates, for example, requiring a major amendment.²

Moreover, even if the proposal for the WMP were not a major amendment, the Commission cannot and should not try to foreclose a future Commission from making different policy decisions or applying law to facts in a fashion different from this Commission.

BRA now proposes to foreclose the opportunity for future Commissioners to consider significant policy issues and for many people affected by the BRA decision to participate in the larger permit and WMP process. FBR is aware of people who have obtained land along the river since the date of the preliminary hearing who will seek to participate. Many could have moved to the basin after the public notice in 2005. Even people or entities that were aware of the opportunity to participate in the current proceeding had the right to wait until the second stage to participate to see if a SysOp permit was issued and if so, to know what the permit conditions and the real, not theoretical impacts.

Even for existing parties, there will be significant new information. In addition to data on drought conditions and firm yields, TCEQ will have new data from the studies on environmental flows in the Brazos River basin under both Senate Bill 2 and Senate Bill 3. Likewise, in this current process, we have seen significant changes in the WAM. That modeling process is clearly an evolving tool, changing as new information is available and as more experience with it is gained. Freezing decisions now is clearly not appropriate.

² For example, Section 11.122, Tex Water Code provides:

AMENDMENTS TO WATER RIGHTS REQUIRED. (a) All holders of permits, certified filings, and certificates of adjudication issued under Section 11.323 of this code shall obtain from the commission authority to change the place of use, purpose of use, point of diversion, rate of diversion, acreage to be irrigated, or otherwise alter a water right.

BRA makes two suggestions for justification: the Commission's use of certified questions and courts' use of "law of the case." Neither is valid here. Neither involves the complex, undefined process present here. Neither involves the addition of a major amendment. The certified question process allows a specific issue to be taken to the Commission to assist with a decision in a hearing. Here, BRA wants to use the process to begin a second round of hearings.

Likewise, the idea of law of the case is also not relevant. This doctrine is defined as that principle under which questions of law decided on appeal to a court of last resort will govern the case throughout its subsequent stages. *Hudson v. Wakefield*, 711 S.W.2d 628, 630 (Tex. 1986). The doctrine only applies to questions of law and does not apply to questions of fact. *Id.* Further, the doctrine does not apply when either the issues or the facts presented at successive appeals are not substantially the same as those involved in the first trial. *Id.* Thus, when in the second trial or proceeding, one or both of the parties amend their pleadings and facts change as they would here, the law of the case no longer applies. *Id.*

Moreover, BRA and the ED are proposing that the Commission decide and then freeze a wide range of factual and legal issues, including a large number of interconnected policy decisions that have state-wide impact and that would be addressed here for the first time in a contested case. They would be decided based on the facts as they stand now, not the facts that will exist at the end of the WMP process, nor with the type of factual basis that is used in a rule-making proceeding.

Freezing any decisions now would tie the hands of future Commissions and create additional risks of reversal by a Texas court if any SysOp permit is then issued.

3. BRA's Argument for a WMP in 12 Months: BRA's fast-track proposal highlights one of the biggest issues FBR has raised repeatedly in this case, the scope of the *initial* WMP in a two-step or, what is actually a multi-step process. That scope has never been defined. There is not even any

minimum requirement for scope or detail for the proposed WMP. There are no rules to create any requirements.

BRA will not be able to identify all of the actual diversion points or rates for the full amount of water it proposes. It will not know much, if anything more about those diversions in a year or two than it knows now.

Thus, BRA will propose a WMP that does not address actual diversion points or rates for the majority of the water it seeks. BRA will continue to ask to bank hundreds of thousands of acre-feet of water. Thus, the ALJs and the Commission would be facing in a decision on the initial WMP the same barriers to issuance that it faces now, i.e. the lack of compliance with rules for actual diversions, lack of finality, etc.

4. BRA's Precedent Argument: The PFD correctly distinguishes what BRA claims are precedents for a two-step process. Neither of the process or decision for the City of Irving permit or for the LCRA permit is precedent here. Neither requires the key decisions for issuance of a permit to be delayed to a second stage.

The City of Irving case involved an amendment to a water right, not a new appropriation. ED Ex. A1 at 6, FOF 44. This amendment authorized the City to reuse its water. *Id.* at 5, FOF 37. It was not an authorization for unappropriated water.

Significantly, the Commission expressly limited the impact of the findings, conclusions, determination and decision “to the facts relating to the subject amendment.” *Id.* at 9, Ordering Provision 2.

That the Commission allowed a two-step process for the City's specific reuse authorization is not precedent here. The full evaluation could be and was done before the permit was issued. No impact analysis was put off.

Appendix A provides excerpts from the LCRA permit that was issued recently. It makes it clear that the decision on that permit is also not precedent here. First, it was done by settlement. Second, the permit does not require a WMP. LCRA provided all the information needed to issue a permit, including actual diversion points and rates for evaluation of impacts downstream. The requirement for the accounting plan is provided in detail in the permit. It does not create any finality issues. That plan is a requirement, like those in waste water permits that require submission of plans and specifications after the required tests of permitting have been met.

5. BRA's Drought Argument: FBR's summary of its response above adequately explains the fallacy of BRA's argument. The last thing Texas needs is a set of quick decisions that turn out to allow more over-allocation of water in rivers and streams.

6. BRA's Immediate Need Argument: Likewise, the Commission should reject BRA's argument that its proposal is appropriate because there are immediate needs for new water. BRA is currently selling 150,000 acre-feet of water per year, possibly more, on short term contracts. It has approximately 400,000 acre feet of water per year to sell. If there are immediate needs, BRA can provide water for them.

The needs that the SysOp Permit was intended to serve are longer-term needs. In fact, the original draft permit, based on an application filed over seven years ago, prohibited BRA from diverting any water under the SysOp Permit until it had completed a WMP process, a process that would not even start for three more years. As proposed, that WMP could have taken another five years if not more. The permit was not aimed at short-term or immediate needs.

Moreover, there is no evidence in the record of any specific immediate need, amount or potential customer that could not be addressed with existing water rights.

Finally, there is no evidence in the record that any water BRA wants under this SysOp permit could solve any immediate or short term needs. There has been no matching of any short-

term need with the diversions and options for delivery of water. How much infrastructure will be required?

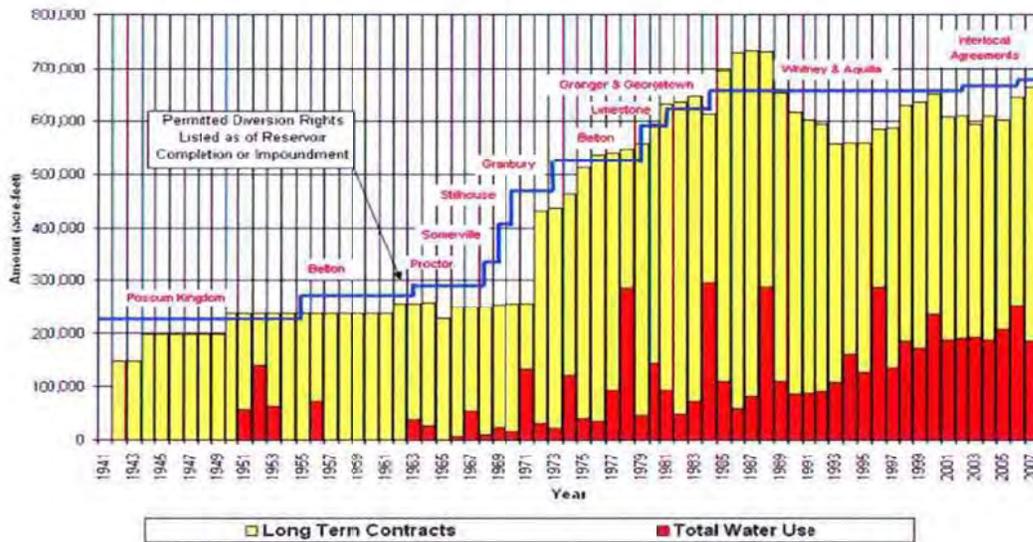
If there are shortages in the basin that BRA can address quickly, it could have presented evidence (such as the infrastructure) for how and where BRA could do so. The Region G and H plans certainly do not identify significant short-term needs. Together they propose 111,000 acre-feet of SysOp permit water. About 75,000 of that 111,000 acre-feet of water per year is proposed to meet needs of an expanded Comanche Peak Nuclear Power Plant, which has not be licensed and is years in the future if it is ever built.

If there are short-term needs, BRA could have applied and still can apply for permits or amendments to deal with them. It could have applied and can apply to amend the Allen's Creek permit to use some of the water before the reservoir is built. It could seek to amend its systems operation order to move additional water around the basin to serve the needs.

Again, BRA's own documents show that it controls almost 400,000 acre-feet of water rights per year that it can use to satisfy any such needs. Those water rights are senior to any it would get in the SysOp permit. BRA can already use its systems operation order to do much of what it is proposing. BRA's chart of water rights, contracts, and deliveries show these current conditions. BRA Ex. 37 at 4.³

³ This chart shows that while BRA has sold almost all of the water it has to sell (compare the blue line showing water rights with the yellow for contract sales), it has never had to deliver even half of what it has sold (red). The most it has had to provide in any one year is about 300,000 acre-feet, yet it has almost 700,000 acre-feet of firm water every year. With proper management, much of the other 300,000 to 400,000 acre-feet should be available to help with other needs.

Figure 2
Permitted Diversion Rights and Total Water Use
TOTAL PERMITTED DIVERSION RIGHTS, LONG TERM CONTRACTS, & ANNUAL WATER USE



While BRA has the option of selling the extra 300,000 to 400,000 acre-feet each year, it could also allow some of the cities and others with take-or-pay contracts and who have significantly more water than they need for the foreseeable future, to sell or lease the extra water to address the short-term needs. Then, a reasonable SysOp permit could be developed and could provide water in the longer-term.

7. BRA’s Argument to Protect its “Investment:” FBR’s summary of its response above adequately explains the fallacy of BRA’s argument.

8. BRA’s Argument on Saving Time and Money: It is not true that TCEQ, BRA or anyone will save time or money by cutting off the opportunity for a court appeal now. First, with denial, only BRA would be appealing, and it probably will not, given the sound reasoning for denial.

Second, as BRA suggests, an appeal will likely be taken by at least one Protestant of any permit decision here. There are, in fact, a dozen major policy decisions identified in the PFD, and a reversal on only one would start the process over.

What is needed for TCEQ and all other parties is a clear process, one established in rules to help everyone get things done correctly the next time. A reasonable new SysOp proposal by BRA could even lead to settlement with all parties. No one is trying to stop BRA from getting the amount of water that the regional plans propose for this SysOp permit. In fact, FBR offered a reasonable alternative: a permit that provided BRA with sufficient water rights for the foreseeable future and without a large number of significant issues left for the future.

III. Arguments on Responses to the ED's Exceptions

1. ED's Argument on Permit Requirements: FBR's summary response above and its exceptions explains much of the fallacy of the ED's argument on diversion points and rates and on other requirements under Section 11.134, Tex. Water Code.

In addition, Appendices B and C provide two documents that show the positions of State agencies and Texas courts on the public welfare and beneficial use tests. Appendix B is the proposal for decision in the application for a water right for a new reservoir on the Paluxy River, a tributary of the Brazos River. In that decision, the administrative law judge discusses the public welfare test and the negative impacts on a historic sites of cultural and scientific importance. The sites include the dinosaur tracks in the river. (Pages 17 - 20 & 38.) The PFD also discusses the other public welfare issues, including impacts on property rights and public values. (Pages 38 & 9.)

Appendix C provides the District Court opinion on the appeal by Texas Parks and Wildlife Department and others of the decision on the water right. The Court reversed the issuance of that water right. The opinion highlights the public welfare issue of protecting the historic dinosaur tracks in the River on page 3.

Moreover, the Court's opinion provides an important interpretation of Texas law for the test of beneficial use. (See page 7.) That test is similar to those used in other western states. It is much

more than a low-bar test. It requires more than identifying the beneficial uses and some needs. The decision was not reversed or rejected by the Court of Appeals.

In fact, no Texas court decision has reversed or rejected this approach. There is one case that says that contracts are not required, but that does not mean that this Court's interpretation of Texas law is not binding on TCEQ. This opinion requires a reasonable nexus or matching of the amount of water sought and identifiable needs, not specific agreements or contracts. (The detailed facts for the beneficial use issue are set out in the PFD in Appendix B, pages 2-5.)

2. ED's Argument on Flexibility: FBR's summary response above adequately addresses the ED's argument.

3. ED's Argument on the Multi-Step Process: FBR's summary response above and the more detailed responses on BRA's similar arguments provide a number of reasons why this multi-step process is not consistent with state law and not needed. It will create more problems than it can solve.

Moreover, it is not possible to proceed as BRA proposes because there is no evidence in the record to support it. BRA asks that the Commission issue an interim order that authorizes BRA to appropriate a certain amount of water. There is no amount of water that the Commission could set that is supported in evidence because of a number of errors that the PFD identifies.

Even if BRA were to rely only on the amount proposed for diversion at the Richmond location, BRA's application and the modeling overstates the amount of water available coming from Possum Kingdom Reservoir and from other reservoirs. PFD, p. 49. BRA also inappropriately relied on water that has already been permitted for the Allen's Creek Reservoir.

The modeling that was done in support of this application includes these overstatements of the amount of water available for appropriation. Thus, it is simply not possible to determine from the modeling or other evidence presented in this case how much water is available for appropriation

at the Richmond diversion location and what the impacts would be of the diversion of that water there.

There are other complications, including the disagreements in the amounts of return flows to model now and in the future. There is also the new requirement for the FERC flow conditions that have never been considered. If BRA needs certainty for an amount of water to be authorized so it can develop the needed details for an application for the SysOp Permit or a WMP, no such figure is supported in the record.

In addition, the Commission should consider the precedent it will set with this process. Other applicants will no doubt want to use a two-step process that is vague and without rules or limits. For example, someone seeking to keep water in a river could apply for unappropriated water in a river claiming a need to divert for a beneficial purpose and identify a theoretical diversion point. If that person had its one customer identified in a regional water plan, it will have passed the low threshold tests for beneficial use and consistency with regional plans, under the PFD. It can then get a permit for the rest of the water in the River. It might have to come back for a WMP, but when, how, and for what is not defined in law or the type of permit proposed by BRA. It will, then, as here, have blocked others from obtaining water rights for diversion for as long as it can string out the WMP process, possibly for fifty years more under the approach taken with BRA.

4. ED's Argument on Freezing Decisions: FBR's summary response above and its responses to BRA's freeze argument are sufficient to explain why no order can or should attempt to tie the hands of future Commissioners.

5. ED's Argument on Reservoir Capacities: The ED's position that it needs to authorize and assume the use of the theoretical reservoir capacity is contrary to and not supported by the *Stacy Dam* decision. Clearly the Supreme Court sought a conservative approach to water rights. It rejected the prior attempt to issue more water rights than there is water available. Section 11.134 of

the Texas Water Code clearly calls for a limit on appropriations to the water that is available, not water that might be available. There is no evidence that it ever will be available. The SysOp permit would, however, let BRA sell the water as if it existed. That would certainly could have impacts on other water right holders and flows in the River.

TCEQ does issue permits for water that will be stored in new reservoirs before they are built, but conditions any diversion of water to when the reservoir is constructed and water actually available.

TCEQ does not even grant water rights for the full firm yield of a reservoir, when the applicant for the reservoir permit cannot show the need. The decisions in the Paluxy River case, documented in Appendix B and C show that to be true. The ED knows that for the Toledo Bend reservoir and many others. Thus, using theoretical capacities does nothing to protect the capacity of a reservoir, as the ED argues in its Exceptions at 2 item a. TCEQ can protect the capacities by how it issues water rights permits. Moreover, the ED makes no valid argument to support this “protection” argument. It cites nothing in the evidence or law for such a TCEQ policy.

Finally, the current drought should remind everyone that the firm yield of a reservoir is only an estimate in the first place and with a greater drought of record, is likely to be less than currently estimated.

6. ED’s Argument on Term Permits for Allen’s Creek Water: BRA has never applied for a term permit or provided any of the information needed to obtain one. There was no public notice that BRA was seeking a term permit. There is no basis in the evidence for issuing one.

As the deposition testimony of the ED's expert indicates, the TCEQ's position on whether term permits can be used in this type of case is not clear.⁴ FBR has clearly must be provided right to present evidence on the issue of the use of a term permit here, if that use is now going to be added to the application.

Moreover, the use of a term permit here is contrary to the goals of the Constitution and Chapter 11 of the Water Code. There may be others who need water in the short-term and should, under Texas law, be allowed to obtain term permits for a beneficial use. That is how the Constitution requires the public interest to be protected. The water should be put to used, not hoarded. There is no showing that BRA can put any of the water to a beneficial use now or in the near future. BRA's water right is protected, and BRA could seek an amendment to its permit if there is a real need the water can solve.

In fact, last session BRA pushed legislation to delay the reservoir start date to 2025. For the next 14 years, maybe more, the water should be made available to meet demonstrated needs, not speculation.

7. ED's Argument on the Glen Rose Scenario: The problem is that the draft permits of the BRA and the ED propose appropriating to BRA in the SysOp permit water that is already appropriated in existing water rights. It appears the ED is arguing that it should be allowed to fix this problem in one of the futures steps of the WMP process; apparently when BRA asks for it to be fixed.

That approach is not supported by any Texas law. It is contrary to the Supreme Court decision in the *Stacy Dam* case. It is not a conservative approach to managing the State's water.

⁴ Question by Perales: So I heard you testify earlier today, in response to questions by Mr. Caroom, that you did not believe that the way that Allen's Creek water is being treated by this new [system] operations permit is the same as a term permit; it's not equivalent. Is that right?

Answer by Kathy Alexander. Yes.

If the remand process occurs, TCEQ will issue a permit with a WMP for only some of the water. BRA will, however, have a right to the full amount. BRA will fight to keep that full amount in subsequent WMP processes, even if it can show no need. It will use its right to argue against providing more water for instream needs or for water rights for others. Anyone who wants water for instream uses or other uses will be at the mercy of BRA or will have to buy water from BRA.

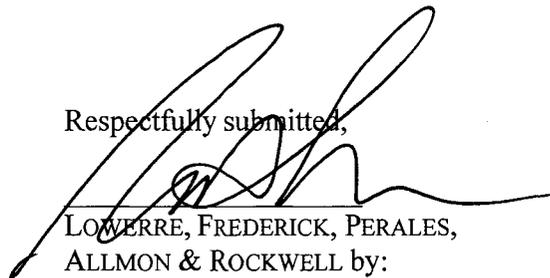
IV. Response to BRA's Exception on Transcript Costs

FBR's summary of its response above adequately explains the fallacy of BRA's exception.

V. Prayer

FBR supports the recommendation for denial of the permit and opposes most of the exceptions and arguments of BRA and the ED. FBR requests that the options that would lead to issuance of a permit based on this application be rejected.

Respectfully submitted,



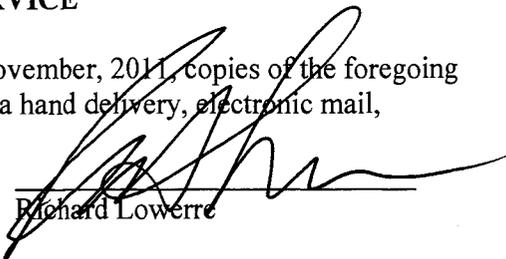
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CERTIFICATE OF SERVICE

By my signature below, I certify that on this 17th day of November, 2011, copies of the foregoing document were served upon the parties identified below via hand delivery, electronic mail, facsimile and/or Certified U.S. Postal Mail.


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