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November 7, 2011

*via Hand Delivery*

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

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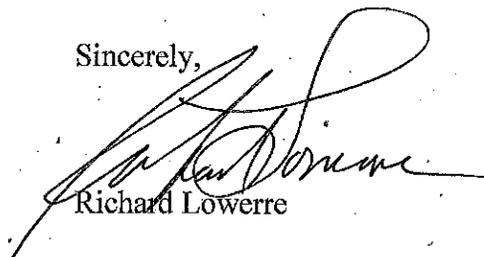
Re: **SOAH Docket No. 582-10-4184; TCEQ Docket No. 2005-1490-WR; In the Matter of the Application by Brazos River Authority for Water Use Permit No. 5851.**

Dear Ms. Bohac:

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

Please contact me if you have any questions or concerns.

Sincerely,



Richard Lowerre

cc: Service List

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November 7, 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

CHIEF CLERKS OFFICE

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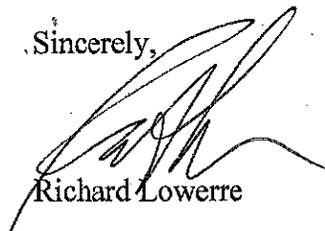
Re: **SOAH Docket No. 582-10-4184; TCEQ Docket No. 2005-1490-WR; In the Matter of the Application by Brazos River Authority for Water Use Permit No. 5851.**

Dear Judges Newchurch and Burkhalter:

The Exceptions of Protestants Friends of the Brazos River, H. Jane Vaughn, Lawrence D. Wilson and Mary Lee Lilly to the Proposal for Decision 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

NOV 7 4 59 PM '11

TCEQ DOCKET NO. 2005-1490-AWR

CHIEF CLERK'S OFFICE

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

EXCEPTIONS OF  
FRIENDS OF THE BRAZOS RIVER, III, JANE VAUGHN,  
LAWRENCE D. WILSON, AND MARY LEE LILLY

November 7, 2011

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## I. Introduction

### A. FBR supports the recommendation of denial, with some exceptions.

FBR agrees with the ALJs that BRA's proposal to postpone application of clear permit requirements to a second or later step must be rejected. BRA could have filed one or a set of applications for many, if not most, aspects of its application here and provided sufficient detail to allow the evaluation required by the statutes and rules. BRA chose to try a novel approach not authorized by Texas law or TCEQ rules. Denial is required.

While FBR appreciates 1) the hard look that the Judges have given to the law and facts relevant to the SysOp Permit and 2) the recommendation of denial, FBR must except to some other aspects of the PFD. FBR opposes the following:

1. The option of deferring or abating the application process to allow BRA to prepare a proposed WMP,
2. The option of issuance of a permit based on the draft permits of the ED or BRA, and
3. Several aspects of the PFD that appear to propose that any final order include statutory interpretations on critical water policy questions of statewide significance. These questions do not need be addressed here, given a denial.

### B. Two Examples

With regard to the third set of exceptions above, two examples might help. There are at least 8 issues where the PFD suggests establishing TCEQ's policies, some that would interpret Texas law to set either a very weak test for permit issuance. In addition, one proposal in the PFD would appear to set a precedent that the issue of protection of wetlands is outside the scope of the water right permit decisions. In each case, a resolution of the proper interpretation should be done, whenever possible, through rulemaking or some other broader policy making process open to all potentially affected stakeholders. Contested case proceedings involve limited geographic scope and a limited number of parties. Thus, the Judges and the Commissioners are not able to obtain the broader perspectives needed for developing statutory or regulatory interpretations or policies with

statewide implications. Two examples are discussed briefly here and they and the others are addressed in the full argument below.

1. Consistency with regional water plans: The threshold approach proposed for this Section 11.134(b)(3)E test by BRA and the ED is not appropriate given the role of regional planning groups and the specific waiver provision in that section of the law. In brief, regional planning groups and others not participating in this hearing process will have strong objections to the interpretation posed by the PFD. The proposed low threshold test would greatly reduce the role of regional planning groups.

It is those groups that are given the responsibility to determine how water needs should be addressed. They are authorized to decide, for example, how much reliance they want to place on water conservation to address future needs. They may chose a very aggressive approach, in part because conservation allows more water to remain in streams, rivers and lakes for the protection of natural resources, other instream uses and the economic benefits that instream flows provide. They may also recommend reliance on more ground water, if they have an abundant renewable supply and a desire to leave more water in surface water bodies. These are decisions the Legislature has left to the regions, at least initially. Thus, the law requires a finding of consistency with the plans for issuance of a water right. If there is an overriding state interest, there is a waiver provision.

The effect of the low threshold approach would be that TCEQ could ignore the goals and strategies developed by a regional planning group and authorize more water rights or development projects in the region than the region itself determined are needed or beneficial. Incentives for conservation that the regional planning group may have intended to create could, for example, then be lost through the development of water that the conservation was intended to replace.

The test in Section 11.134(b)(3)(E) of “consistent with” regional plans should not be read as BRA proposes. It seeks a test of “not inconsistent with” regional plans.

2. Consideration of wetlands: The PFD recommends that the Commissioners rule that consideration of impacts on wetlands is outside the scope of the proceeding. FBR disagrees. TCEQ rules make it clear that wetlands protection is an appropriate consideration. Again, however, the Commission need not make such a broad-reaching statutory interpretation in this particular case. Denial will avoid any such need.

The Legislature included consideration of the need to protect all fish and wildlife habitat in adopting Section 11.152<sup>1</sup> and making it part of the test in Section 11.134 for permit issuance. TCEQ rules for assessing fish and wildlife habitat in water right permitting specifically provide for protection of wetlands, and set out the clear TCEQ policy of “no net loss of wetland functions” as a result of issuance of water right permits. Impacts on wetlands are within the scope of issues here.

## II. Summary of Exceptions

The 3 major areas of exceptions to proposals in the PFD are summarized below and discussed in more detail in the exceptions below or by reference to exceptions filed by NWF.

### **A. FBR excepts to the option of deferring or abating the hearing and allowing BRA to file for approval of the permit with a WMP.**

This alternative to denial leaves in limbo the rights of the parties here who have had to spend significant resources on BRA’s flawed approach. In addition, the alternative approach of deferral and a continuing process for the WMP should not be used because:

1. The scope and process for any WMP have not been defined. The process that should be used for development of the type of WMP proposed by BRA as well as the substance test for such a plan are not defined in law, rule or guidance. There are many unresolved issues that would require the TCEQ and the Judges to make up the rules as they go, with potentially significant implications for other water right holders and the public statewide.

2. The WMP would be a major amendment and continuation of the hearing would create significant inefficiencies. New notice would be required and new parties will, no doubt, seek

<sup>1</sup> ASSESSMENT OF EFFECTS OF PERMITS ON FISH AND WILDLIFE HABITATS. In its consideration of an application for a permit to store, take, or divert water in excess of 5,000 acre feet per year, the commission shall assess the effects, if any, on the issuance of the permit on fish and wildlife habitats and may require the applicant to take reasonable actions to mitigate adverse impacts on such habitat. (Emphasis added.)

to participate. Since such parties have not had the opportunity to object to exhibits or cross-examine the witnesses in the hearing, much of the evidence in the record could not be used directly. The current record and the current PFD could not be simply fixed for the WMP process.

3. BRA has argued that it cannot develop a WMP without first obtaining a clear water right authorization. BRA and the ED argue that it would be impossible to develop a WMP plan for a complex application such as BRA's without first knowing the amount of the water right. Under the deferral option, BRA will still not know the amount.

4. An abatement is not needed based on BRA's position. BRA claims that only it can "create" the new water it seeks. BRA's position means that it believes that only BRA can get the water right for the water. Under this line of reasoning, no reservation of the application's priority date is needed as no other parties could apply for and receive this "new" water.

5. Changes in facts and laws: It has been over 7 years since BRA applied for the SysOp Permit. An abatement would add another significant period of time. Delay in a decision on the application is not reasonable and will create problems in the basin.

**B. FBR excepts to the option of issuance of a SysOp Permit based on any ED or BRA draft permit.**

While the Judges do not appear to support the issuance of any permit, the PFD suggests it might be possible. FBR disagrees. The Judges have clearly identified legal problems with issuance. They have also identified a number of unresolved issues that should bar any issuance of a permit as proposed by the ED or BRA. FBR would add to those arguments against issuance of a permit the following:

1. There are additional errors in the application and modeling: The error in development of the Glen Rose Scenario was just one example of the type of problems that exist with the modeling. BRA even admitted that there is a similar error in relying upon reduction in BRA's existing water rights in the modeling for the Highbank Scenario. There are more such errors.

2. There are a number of other unresolved issues: There are a number of issues that would need to be addressed prior to issuance, including, but not limited to:

a) The uncertainties in the WMP process; and

b) The dispute on whether environmental flow triggers have to be met at all gages to allow diversions or just at the closest downstream gage.

**C. FBR excepts to the approach in the PFD that would seek to resolve broad policy issues that need not be addressed here.**

FBR urges the Judges to recommend that the Commissioners deny the application and not address the issues that need not be reached, including the following. These issues are more appropriately addressed in rulemaking or another policy making process that allows interests across the state to participate:

- 1) Consistency with regional water plans: A summary is provided in the Introduction above.
2. Water conservation plans: The ALJs have proposed a low threshold approach to water conservation plans. The approach would significantly limit the role that the Legislature intended water conservation plans to play in managing Texas' finite water resources for a growing population.
3. Beneficial Use. The approach by the ALJs' essentially reads the beneficial use requirement out of the permit test. The test in Section 11.134 should not be read as requiring an applicant only to identify one of the purposes listed for water rights. "Beneficial use" is defined by Texas law to require more.
4. Instream flows for the environment and recreation: The reasoning of the ALJs on why impacts on senior water right holders cannot be determined applies to all other uses of the water. Whether the test for protection of instream flows and uses is less strict than that for water rights and if so, the appropriate burden of proof, should be resolved in a broad policy making process open to all stakeholders, not in this specific case. Likewise, there is no need for the discussion in the PFD on the application of environmental flow conditions to amendments, since this application involves a new permit and the PFD has not correctly read the language of the statute on this matter.
5. Term permit: Whether BRA's application can be considered a request for a term permit need not be addressed. BRA did not ask for a term permit. The application does not provide the information required for an application for a term permit. FBR also supports the ED's position that BRA cannot seek such a permit here because it cuts off others from using water that BRA will not use for many years.
6. Scope of Public Welfare: The interpretation proposed by the PFD appears to limit significantly the scope of the public welfare test. This is contrary to agency decisions, such as that on the Paluxy reservoir. It is contrary to the constitutional protections of the public trust in state waters.
7. Wetlands: A summary is provided in the Introduction above.
8. Return flows: This is a very complex issue, for which there is no consensus on the approach because of the language in the law. The return flow issue is one of huge interest

statewide. A broad policy-making process is needed, not decisions on the law through contested case hearings.

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### III. Argument on the Exceptions

As FBR has agreed from the beginning, a systems operation approach can have benefits. The approach is not, however, without costs and risks also. While additional water can be made available for diversion for consumptive uses, that means there will be less water in the streams, rivers and lakes. Thus, as here, when most of the available water in the system has already been appropriated for diversion, the impacts of a sysop permit to allow more diversions needs very close scrutiny. BRA's request for flexibility is also reasonable to a degree, but the protections required by state law must still be assured.

These protections would not be assured under BRA's application or the draft permits of the ED or BRA. Denial is the correct decision. Neither deferral for the development of a WMP nor the issuance of a limited permit based on the ED or BRA drafts is the correct approach in law or based on the evidence in the record.

Because this application is so complex, bringing in many types of appropriations—firm yields from existing reservoirs, return flows, system operations, and existing water rights—it raised many new public policy issues that have not to date been addressed. That is, in part, the result of the fact that many prior water right applications have been approved by the ED after settlements with all parties. Thus, the Commission has not been asked to address a number of significant issues.

This application could force the Commission to do so. As the ALJs indicate, however, the Commission does not need to do so.

FBR will not repeat many of its written arguments here. FBR does, however, adopt by reference those arguments, as they set out many of the detailed analyses of law and evidence relied upon here. In particular, FBR incorporates here Sections II A, III B and III C. Those sections present arguments not adopted by the ALJ that FBR reurges. FBR also incorporates Appendix B.

**A. FBR opposes deferring the process to allow BRA to attempt to prepare a WMP.**

The basic problem with this option is that it will require TCEQ staff, the Judges and other parties to make up the rules of the WMP as they proceed with no guidance from the Legislature or the Commissioners. That would be difficult for any application. For this complex permit, it would create significant risks of legal error and bad precedent.

For example, BRA and the ED disagree on whether BRA's existing water rights can or ever will have to be included in the WMP process. They will have to be if BRA intends to sacrifice some existing water to allow new water to be taken elsewhere. Tr. 2128. They will have to be if BRA intends on relying on existing water rights to meet environmental flow requirements or the "FERC flows" from Possum Kingdom.

Defining the procedures and standards for a two-step process, either as was proposed by BRA or as is now proposed as an option in the PFD, will influence future water right applications. The process will set a precedent for a complex process that should clearly be set out first in law or rules.

BRA or the ED could have approached the Legislature or the Commission to address these issues in a broad policy making process. Instead, they seek to create in this application process a whole new way of issuing water rights.

Here, there are many unresolved issues of procedure and substance for the WMP.

\* The scope of the WMP has not been defined. As mentioned above, the role of existing water rights and use of those rights for environmental flows will clearly be issues.

\* The scope and/or staging of the first WMP application has not been defined. Must BRA submit a proposed WMP for all of the approximate 1,000,000 acre feet of water rights it now seeks or can it file a plan for some and seek to defer the decisions on the rest of the water for a later amendment to the WMP?

\* Are amendments to the WMP covered by the limitations on amendments in Section 11.122(b)? This "four corners," or full use assumption could be applied, but clearly was not intended for the type of WMP process where all current diversion points and rates are not

set. If applied, amendments to the WMP, even large ones, could be exempt from public notice and the opportunity for a hearing.

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There are several additional reasons why the deferral or abatement alternative should be rejected including:

1. The WMP application would be a major amendment. Opening up the current process to other parties and other issues could create greater expenses for all. Any BRA proposal for a WMP under the current application would require a major amendment to the application. BRA and the ED have already agreed that the WMP must be subject to notice and the opportunity for a contested case hearing.

With new notice, additional parties would no doubt seek to participate. Such new parties would not have had the opportunity to cross examine witnesses from the original hearing or object to exhibits now in the record. The evidence in the first hearing cannot simply be used as evidence in the process that now looks at an amended application.

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2) The time needed for deferral for a WMP process is too long. BRA filed its SysOp application in June 2004. It has now been over 7 years. It is unreasonable for BRA to tie up a million acre feet of water and all the parties in a process for another significant period of time.

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This is true, in part, because the facts have changed and will continue to do so, given the drought conditions. Laws have also changed and could again before the WMP process is complete.

Among the laws that were passed by the Legislature after the application was filed is SB 3, which while passed in 2007, could continue to be trumped in part if the current application is deferred for additional work. The Commissioners will issue a new rule under SB 3 for the Brazos River before the WMP process ends, since the SB 3 process is almost complete. Those rules will provide a set of recommendations for environmental flow regimes and potentially a set aside or reservation of unappropriated water for instream flows. With BRA's application, those rules may not apply and there will essentially be no unappropriated water to be set aside.

A process that delays a decision on the BRA application could limit the ability of agencies to have other new rules apply to BRA's proposal. The Commissioners may, for example, adopt new rules or guidance for water conservation plans. TWDB may adopt new rules for regional planning that will affect consistency decisions. (Just last week, a Texas court struck down a TWDB interpretation of the Texas law on interregional conflicts in regional water plans.) BRA will, no doubt, argue that new rules do not apply to a pending application.

Finally, since the application was filed, Texas has seen a significant drought, possibly a drought of record for much of the Brazos River Basin. That new fact will likely affect estimates of firm annual yields in some reservoirs that are the basis of much of BRA's SysOp approach. The drought may also change the priorities and recommendations of the Region G and H regional planning groups. It certainly could create opportunities and incentives for new creative ways of conserving water.

3. BRA argued that development of a WMP for its application would not be possible. BRA argued and the ED agreed that BRA could not develop a WMP for **this complex** application because BRA did not know the amount of water that will be appropriated. (See the testimony of BRA's witness Brunett at Tr. 896-99 and BRA Ex. 35 at 21.) The ED agreed (Tr. 1947.) Yet, BRA will still not know the amount of water if this proceeding is deferred for the filing of a WMP.

BRA chose to seek an unnecessarily complex permit rather than file small applications aimed at the water it currently can justify as needed. The result is large costs for all parties and the State. BRA took an unreasonable risk and it should not be given a second chance for doing so in this same process.

4. An abatement is not needed according to BRA. BRA also claimed that only it could "create" the new water. If true, BRA need not worry about the impacts of a denial. BRA could

reapply anytime and the water right it wants will still be available. A later priority date would not matter for this new water. BRA is not harmed by denial and the opportunity to reapply.

**B. FBR also opposes the issuance of any permit based on the ED or BRA drafts.**

The ALJs identify the problems with this option, including the violations of TCEQ rules on diversion points and amounts and the lack of finality. There are other reasons why the option of issuance of a permit based on the evidence in the record is not a valid option.

1. Other errors in modeling: The ALJs suggest that one option for the Commissioners, other than denial of the requested water right, is that the Commission could grant the Application in part and only authorize diversions at Glen Rose, or at Highbank, or at Richmond, or at the Gulf and solely for the quantities identified in the application for those locations. PFD at 49. The ALJs go on to clarify that the withdrawal amounts identified in the Application for the four control points would have to be reduced to account for the specific errors identified in the PFD, including the double-permitting of BRA's existing water rights. PFD at 49, note 158. Finally, the ALJs posit that if BRA desired to change the appropriation amounts or locations, it could presumably seek approval to do so during the WMP phase.

~~There are several problems with this proposal. Among them is the very basic issue of BRA~~ being unable to prove that the water it has requested is available for permitting. In fact, BRA has failed to do so. This is true not only for the Glen Rose scenario. It is true of all scenarios. The Glen Rose scenario was simply an example of the inadequacy of the modeling that was done to support this application and permit.

Neither FBR nor any of the other Protestants was required to point out and prove each instance in which BRA's modeling assumptions were inaccurate. BRA bore the burden of proof here. FBR's expert witness, Mr. Trungale, revealed how BRA's modeling could not support the permit, because it assumed that at least a portion of BRA's existing water rights would be used to

satisfy instream flow requirements in the new SYSOP. In other words, by focusing on only one example, Mr. Trungale revealed how BRA could not satisfy its burden of proof. This is true not only for the Glen Rose scenario, but for BRA's modeling, in general.

In fact, Mr. Gooch testified that the approach that was used for the Glen Rose scenario—*i.e.*, relying on existing water rights to meet environmental flow conditions—was used for diversions at Highbank too. Tr. 400-401. He speculated that the amount of flows that BRA would have to allow to pass to satisfy environmental flow requirements at Highbank is less than at Glen Rose. He could not, however, provide any specific numbers—for either Glen Rose or Highbank. Tr. 401. In any event, the salient point is that even at Highbank, BRA must rely on its existing water rights to satisfy environmental flow requirements in order to maximize diversions as proposed in the SYSOP.

Thus, it would be impossible to determine, based on the evidence in the record, how much water is truly available for permitting at any of the proposed diversion points—that is, water that is currently unappropriated and available for diversion *and* for environmental flow requirements under the SYSOP. Accordingly, the third option proposed by the ALJs is simply untenable based on the evidence in the record, because BRA failed to meet its burden of proof.

In addition, while the PFD suggests that the Commission might consider authorizing diversions at the proposed diversion points and “solely for the quantities identified in the Application for those locations,” PFD at 194, the Application requests more water than the ED's staff was even willing to authorize. In support of its Application, BRA used a form of the automated dual-simulation modeling, but it was not the same modeling that the ED ultimately relied on in drafting its draft permit. Tr. 2122. In fact, no witness appears to support the obsolete modeling technique used by BRA to support its initial Application.

The ED staff did not adopt the diversion amounts requested in BRA's Application. Instead, the ED ran an automated dual simulation model that incorporated instream flow requirements (which BRA's initial Application did not include) and other factors. ED Ex. KA-1 at 15; FBR Ex. 3 at 1-16. The modeling resulted in diversions that were substantially less than what BRA requested in its Application. Thus, the ED does not even support the requested diversions from BRA's original Application.

Moreover, the Application does not even include a Richmond diversion point; it only includes one at the Gulf. As Ms. Alexander testified, the diversions requested by BRA in its application for the Gulf location would be inappropriate because they would allow BRA "to basically have access to all of the bypass environmental flow requirements at that point." Tr. 2003-2004. See also ED Ex. KA-1 at 19.

In short, the requested diversions in BRA's Application are simply too speculative and theoretical to be granted. Not even the ED supported those diversions. Thus, granting diversions based on BRA's Applications should not be considered a viable option.

2. Conflicts in ED and BRA's draft permits: There is also the problem that, while the PFD has collectively referred to BRA's and the ED's current recommendations as the "Proposed Permit," finding them the same on many points, (PFD at 4) there are some very significant differences. With the option for issuance of a permit, (and even for the option of deferral for the BRA WMP proposal) many of those differences will be unresolved by the Commission, leaving BRA and others without guidance on the position of the Commissioners.

One good and critical example is the conflict in draft permits for condition 5 in Section 6E on environmental flows. The ED recommends that all instream flow requirements in Section 6 downstream of any diversion point be met before any diversion can take place there. BRA proposes that only one—the next downstream flow requirement—be met before diversion. The ED modeled

the impacts on downstream water right holders and other users based on the additional flows that would be required prior to diversions. BRA apparently did not model its approach.

The ED's experts testified on the impacts of downstream water right holders and the environment on the modeling that was based on the ED's position on conditions for instream flows and diversion. See for example testimony of Kathy Alexander Tr. 1967.<sup>2</sup> She also stated that they could not say if BRA's approach would be protective. Tr. 1968.

There are a number of other differences in the two drafts that should be resolved by the Commissioners before any option other than denial would be viable.

**C. FBR opposes proposals in the PFD to resolve policy issues that can and should be resolved through a broad policy making process.**

Denial has additional justifications. FBR believes a conservative approach is needed to allow TCEQ to consider the following broad policy issues in the context of water rights across the state, not just in this one proceeding. Clearly the Texas Legislature intended that TCEQ and other agencies adopt policies of general application through rulemaking. See §2001.003(6), Tex. Gov. Code.<sup>3</sup>

<sup>2</sup> Q: (Caroom) On Page 21, there is an easily-overlooked change that is very significant. BRA has requested that the environmental flow requirements be applicable at the next downstream gage as opposed to the ED's view, which we heard yesterday from Mr. Geeslin, that environmental flow requirements are applicable at all downstream gages. Is that correct?

A: (Alexander) Yes.

<sup>3</sup> The Government Code defines a rule as:

- an agency statement of general applicability that:
- (i) implements, interprets, or prescribes law or policy; or
- (ii) describes the procedure or practice requirements of a state agency. . . .

Tex. Gov't Code § 2001.003(6).

Moreover, TCEQ is the one agency that has been explicitly directed to adopt its policies by rulemaking:

- (a) Except as otherwise specifically provided by this code, the commission, by rule, shall establish and approve all general policy of the commission. . .
- (c) Rules shall be adopted in the manner provided by Chapter 2001, Government Code. As provided by that Act, **the commission must adopt rules when adopting, repealing, or amending any agency statement of general applicability that interprets or prescribes law or policy or describes the procedure or practice requirements of an agency.** Tex. Water Code § 5.105. Emphasis added.

Even if TCEQ chose to use guidance, (such as its prior guidance document on water rights) a much more diverse set of stakeholders and a wider range of policy options would be involved.

Contested case hearings are not the place for such major statutory interpretations or policy decisions, except when clearly required. With denial of the permit, there is no reason for the Commissioners to address a number of other issues.

Many of the issues addressed in the PFD are also more complex and interrelated than the BRA hearing would suggest. Thus, the PFD addressed some interrelated issues separately.

The best example may be the issue of need which is part of three tests and directly related to the Legislature's desire to encourage conservation.

\* **Beneficial use:** Is defined as the:

amount of water which is economically **necessary** for a purpose authorized by this chapter, when reasonable intelligence and reasonable diligence are used in applying the water to that purpose.... § 11.002 (4), Tex. Water Code. Emphasis added.

\* **Water conservation plans:** TCEQ rules, for example, provide that

it shall be the burden of proof of the applicant to demonstrate that no feasible alternative to the proposed appropriation exists and that the requested amount of appropriation is **necessary and reasonable** for the proposed use. 30 TAC 288.7(b). Emphasis added.

\* **Consistency with regional water plans:** The test is whether the water right

**addresses a water supply need** in a manner that is consistent with the state water plan and the relevant approved regional water plan for any area in which the proposed appropriation is located. § 11.134 (b)(3)(E). Emphasis added.

It should be noted for this third test, the Water Code and TWDB rules provide for this bottom up regional planning process to balance the needs and find the best solutions. Regional planning groups are tasked to make the decisions on how water conservation should be encouraged, and as a result, how much water can be left in the rivers and lakes. The regional water plans must have a "balance

of economic, social, aesthetic and ecological viability,” (31 TAC § 358.3(b)(6)) including, for example, how conservation could help retain water for instream needs.<sup>4</sup>

While each of these three tests for issuance of a water right permit could be read as a low bar or threshold on the question of need, it is clear that collectively the need for the water has to be real. Section 11.134 and the rules of TCEQ require a significant showing of need for the water right. They should do so, especially when the regional planning group finds that conservation fills a significant part of the needs. In fact, the consistency test in the Water Code allows issuance of a water right that is not consistent **only if “the commission determines that conditions warrant waiver of this requirement.”** § 11.134 (b)(3)E, Tex. Water Code.

It appears from the PFD that the ALJs were not comfortable with the low threshold approach proposed by BRA and the ED for the regional plan consistency provision. There is good reason. The approach proposed by BRA and the ED takes the terms “consistent with” and converts it into “not inconsistent with.” That is a very different test.

This low bar approach proposed by BRA and the ED would allow the following scenario: Someone who is identified in a regional plan as a potential provider of a small amount of water could then boot strap the recognition into a basis to apply for ten, if not a hundred times that amount of a water right. No showing of “a water supply need” for the large amount would be required as part of the test for consistency. People could speculate in water simply by getting “a foot in the door” in a regional plan.

At the same time, the person or entity that the regional plan identified as the source for the other needs in the plan could obtain water rights also; possibly appropriations that are also much higher than the projected need in the regional plan.

<sup>4</sup> Regional plans must “ensure that water management strategies are adjusted to provide for appropriate environmental water needs, including instream flows...” 31 TAC § 357.5 (e)(1). *See also* 31 TAC § 357.5(I), which provides, “In developing a regional water plan, a regional water planning group shall consider environmental water needs including instream flows.”

Regional planning groups are the state entities given the responsibility to balance the water needs in a region with other needs, including economic values that may be derived water in the river for a healthy ecosystem and tourism. The regional plan could for example, decide to protect flows in the John Graves Scenic Riverway. TCEQ should not be allowed to undercut that goal by issuing permits to divert water that the regional plan determines is needed in that segment.

The stricter test for consistency is certainly consistent with and complimentary to the test for water conservation plans that:

it shall be the burden of proof of the applicant to demonstrate that no feasible alternative to the proposed appropriation exists and that the requested amount of appropriation is necessary and reasonable for the proposed use. § 11.134(b)(3)(E), Tex. Water Code.

It is consistent with the definition of "Beneficial use."

Both the Region G and Region H plans call for significant water conservation. These planning groups apparently believe that water conservation is a reasonable alternative for much of their future needs. Texas law encourages such an approach. One beneficiary of this approach is the environment, since less water needs to be diverted from rivers and lakes.

Whether TCEQ should be able to issue a water right that provides additional water that could replace the role of water conservation is not something that should be treated lightly. The test of consistency should not be set at the low bar of "not inconsistent with" the plan.

Thus, FBR urges the Judges to recommend that such an issue not be addressed in this proceeding, if it is not necessary to do so. Denial of the SysOp Permit will avoid any need for addressing the issue.

1. Consistency with state and regional water plans: FBR's position on its disagreement with the low threshold test in the PFD is addressed above. The diverse regional planning groups in the 16 regions of the state have an important role and the authority to decide how our limited water resources should be used in the future. The waiver provision allows the Commission to overrule the

regions in specific cases, but clearly such a decision must be based on some evidence to support such a waiver, probably some overriding state interest.

2. Water conservation plans: There are a number of novel issues for water conservation plans that the PFD addresses by accepting the ED's proposals for interpretations of the relevant laws and rules. FBR and NWF do not agree with these interpretations. If adopted, they would set a very low bar for all water conservation plans. Moreover, the current drought conditions suggest that water conservation is more important than it has been assumed by many. TCEQ has the opportunity to set by rules or guidance requirements for water conservation plans that will help in future droughts. If TCEQ adopts the approach in the PFD, it will take legislation to give TCEQ the authority to require stricter plans.

FBR reurges its argument that a plan has to be a plan, not a promise to develop at some undefined time in the future in a fashion that may or may not meet the legal tests for such plans. The legislature did not intend that there be plans, it would have called them "plans".

FBR also adopts the exceptions of the National Wildlife Federation on water conservation.

3. Beneficial Use: The ALJs reject FBR's beneficial use arguments, characterizing them as "anti-speculation" arguments. The PFD then argues that the Water Code contemplates a low threshold for demonstrating beneficial use.

FBR disagrees. First, anti-speculation is just one aspect of FBR's argument. It is an example of how other western states—that have adopted similar definitions of the term "beneficial use"—have interpreted and applied the beneficial use requirement. The crux of FBR's argument, however, is that the Legislature has provided a clear definition of the term, and that definition must be applied and enforced, as the Legislature intended.

"Beneficial Use" means use of the amount of water which is economically necessary for a purpose authorized by this chapter, when reasonable intelligence and reasonable diligence are used

in supplying the water to that purpose and shall include conserved water. Tex. Water Code §11.002

(4).

The Texas Legislature clearly intended the term beneficial use to have a meaningful, substantive purpose. “Beneficial use is the yardstick by which to measure the legality of a permit.” *Texas Rivers Protection Agency v. Texas Natural Res. Conservation Comm’n*, 910 S.W.2d 148, 153 (Tex. App.—Austin 1995, writ denied); *see also* Tex. Water Code § 11.134(b)(3)(A).

The definition not only prohibits speculation; it does more. It requires a showing of a nexus between the amount of water to be appropriated and one of the listed purposes for that water, such as municipal or industrial use. Authorized purposes are listed in Section 11.023 of the Water Code. It is not enough just to identify generally the purpose of the use of the water. Clearly, the Legislature intended more than a listing of the purpose when it defined beneficial use; the purpose is only one part of the definition.

Additionally, there is simply no support for the very low bar that the ALJs have proposed for satisfying the beneficial use requirement. As the ALJs point out, there is little (if any) Texas case law to support the anti-speculation doctrine that other western states have adopted in defining beneficial use. On the other hand, there is no precedent for adopting a definition of beneficial use that essentially requires an applicant to simply identify the purpose of the water or to simply show that it has no intent to waste the water. While requiring an applicant to present actual water supply contracts may be too high a bar, the proposed test here is too low a threshold.

The PFD quotes and agrees with BRA’s argument that full development of the state’s water resources is paramount. PFD, p. 68. BRA cites to the Texas Constitution and to Texas Water Code Sections 16.051 and 16.052 for support, but there is simply nothing in the law to suggest that full development of the state’s water resources has any part in the beneficial use inquiry. Section 16.051 provides for

the orderly development, management, and conservation of water resources and preparation for and response to drought conditions, in order that sufficient water will be available at a reasonable cost to ensure public health, safety, and welfare; further economic development; and protect the agricultural and natural resources of the entire state.

Section 16.052 does not even exist.

The PFD also cites to a 1966 Texas case in support of its analysis of the beneficial use issue. PFD, p. 67 (citing *City of San Antonio v. Texas Water Comm'n*, 407 S.W.2d 752 (Tex. 1966)). But this case is based on a different, outdated standard. Back in 1966, all that was required was that the appropriation “contemplate” the application of water to a beneficial use. In 1997, the language of the statute was changed to more clearly and directly require that the appropriation be intended for a beneficial use.

Development of water law in other western states provides a useful legal background for making the beneficial use determination. Texas law developed in concert with the law of the other western states, based on a common set of principles. Proof of a beneficial use is one of the key principles.

FBR cited and discussed a number of cases from western states. Some of those courts ascribed to the term beneficial use an intent to prohibit speculative permitting. See, e.g., *Upper Yampa Water Conservancy Dist. v. Dequine Family L.L.C.*, 249 P.3d 794 (Colo. 2011) and *Central Delta Water Agency v. State Water Res. Control Bd.*, 124 Cal. App.4<sup>th</sup> 245 (App. Ct. 2004). Not all do, however.

The ALJs (and Commission) need not adopt the holdings from the above-described cases in determining what the Legislature intended by requiring a showing of beneficial use. The Colorado Legislature, however, adopted a definition of beneficial use that is not unlike the definition adopted

by this state's Legislature.<sup>5</sup> Thus, the Colorado Supreme Court's interpretation of the term is instructive.

The Colorado Supreme Court applied the beneficial use requirement to deny an application for a water right amendment where the applicant failed to identify the specific use, the place of use, and the end user. *High Plains A&M, LLC v. Southeastern Colo. Water Conservancy Dist.*, 120 P.3d 710, 716 (Colo. 2005). The application at issue proposed several new diversion points, several places of use where the water **might** be used, and an array of proposed uses. *Id.* at 715, 721. The state agency that initially considered and denied the application determined that it was "so expansive and nebulous that it is impossible for other holders of water rights to determine whether they will be injured," and "there is no discernible method to determine whether the water will be put to beneficial use." *Id.* at 716, 724. The Colorado Supreme Court agreed.

The same can be observed in BRA's application. It proposes theoretical diversion points and an array of proposed uses. This too is "so expansive and nebulous that it is impossible for other holders of water rights to determine whether they will be injured," and there is no discernible method to determine whether the water will be put to beneficial use."

~~For instance, as Ms. Alexander explained in her testimony, the SysOp permit would allow~~  
BRA to divert all the 1,000,000 acre-feet of water authorized at a single diversion point during two months of the year. Tr. 2212-2216. It is difficult to envision a scenario in which BRA could beneficially use the water, if it were all diverted during two months. And yet, the SysOp permit would allow BRA to do that and a full range of other options, notwithstanding a failure to demonstrate how this would ensure beneficial use of the water it sold.

<sup>5</sup> In Colorado law, beneficial use is defined as "the use of that amount of water that is reasonable and appropriate under reasonably efficient practices to accomplish without waste the purpose for which the appropriation is lawfully made". Colo. Rev. Stat. § 37-92-103(4).

In other words, the issue here is not simply that BRA has failed to produce water supply contracts for the water it seeks to appropriate. Rather, the issue is that no one (not the protesting parties, the TCEQ staff, the ALJs, or the Commissioners) can glean from the application even an estimate of how much water BRA intends to divert in different parts of this large basin or for what purposes.

There is no indication of how, when or where most of the water will be used. There is no showing of any need for most water and no showing of beneficial use. The water may be put to beneficial use eventually, but by obtaining the water right, BRA will block others from getting water rights for the beneficial uses they may have now or in the near future. These others will then be required to buy the public's water from BRA.

A showing of beneficial use of the water must be made by BRA. It is BRA's burden of proof, and it entails more than simply showing that the application lists at least one of the beneficial purposes identified in the Water Code. The PFD does not clearly reinforce this. In fact, in the beneficial use analysis, the PFD notes that no protesting party alleges that BRA is intending to waste the water. PFD, p. 67. BRA's claim that it does not intend to waste water is not the test that the Legislature intended for proving beneficial use of water. The waste issue is in a separate test of Section 11.134. Moreover the protesting parties do not bear the burden here to provide BRA intends to waste water or even that it might.

More importantly, FBR has indeed raised the issue of waste. For example, FBR has argued that BRA will be able to sell the water to the highest bidder. FBR Final Arg. at 56 and 57. BRA could sell to people who may waste water. There will be no enforceable restriction on such a sale and no Section 11.134 test for BRA water sales.<sup>6</sup>

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<sup>6</sup> FBR also pointed out that while the water conservation plan states that BRA will check for leaks periodically, it does not present any showing that the plan is adequate to avoid losses of water that would constitute waste. There is no deadline or schedule for those checks or for repairs if leaks are found. Thus, FBR argued "BRA's plans are not proof of diligence to avoid waste." FBR Response Arg. at 9.

Obviously, BRA's application does not state that BRA may waste some of the water it has requested. To do so would kill its own application under a separate provision of Section 11.134.

Water used in excess of what is economically necessary is a "waste" of water. 30 Tex. Admin. Code § 297.54; FBR Ex 14 at 27. FBR Arg at 29.

Again, however, the issue of waste cannot be the entire test of beneficial use. Nor can simply a listing of approved purposes for water in the Water Code. The definition speaks in terms of amounts and, in fact, necessary amounts

Moreover, it makes good sense to limit BRA's water right to the amount of water that is reasonable for the needs for which beneficial uses are identified. The impacts of that amount of water, diverted at specified diversion points and specified rates, can then be evaluated. Later, BRA can apply for and obtain additional water rights, if BRA can show other beneficial uses and that the impacts are acceptable. In the interim, however, others may be able show a need, that unappropriated water is available and that there will be beneficial use. They should be able to obtain a water right.

Moreover, with the science and law on protecting instream flows in development, TCEQ will certainly be better able to determine what is needed for such flows in the future. There is no reason to foreclose such improved decisions now. Texas foreclosed such decision in the past, resulting in over-appropriation of many Texas basins and leaving rivers, bays and estuaries in dire straits during drought times.

Any water diverted under a SysOp permit is water that will no longer be in the rivers and lakes. BRA will not be creating any new water, just the opportunity for new diversions of existing water.

Moreover, any water appropriated in the SysOp permit will not be available for set-asides for instream uses under SB 3. BRA should be required to meet a reasonable test of a beneficial use of all of the proposed amounts of the appropriation.

Again, as with other issues raised by this unprecedented water right application, this case does not present the most ideal set of facts for evaluating what the state's policy should be regarding the doctrine of beneficial use. Thus, FBR again urges the ALJs to simply recommend denial and that the Commission avoid reaching a potentially far-reaching policy decision about the meaning of the term "beneficial use."

If defining the term "beneficial use" is necessary here, FBR urges that the ALJs (and the Commissioners) adopt a definition that requires proof of an adequate nexus between the amount of water sought and the needs for such amount.

4. Instream flows for the environment and recreation: There are several proposals in the PFD on instream flow that cause FBR great concern. One involves the proposal in the PFD that the Commission adopt the position that amendments are not subject to requirements for environmental flows. NWF's exceptions explain how the Judges read Section 11.147 (e-1) incorrectly. FBR ~~adopts NWF's arguments on this issue.~~

Second, FBR objects to what appears to be a proposal that essentially eliminate any significant burden of proof on an applicant to present studies or even data on which the impacts of diversions on the environment and recreational uses can be assessed by the Commission. If that was not the intent of the Judges, FBR urges the Judges to indicate that.

The PFD states, "Environmental-Flow and Instream-Use Requirements Are Not Onerous." PFD at 74. The Judges go on to say,

...the above laws do not impose rigid standards or heavy burdens of proof on water-right permit applicants concerning protection of the environment or instream uses. Instead, they require the Commission to "assess" and "consider" certain effects, studies, standards, and assessments concerning water quality, groundwater, groundwater recharge, bays, estuaries,

and fish and wildlife habitat. After these assessments and reviews, the Commission is required to include permit conditions to protect the environment, but only to the extent the Commission considers such protections “necessary” and “practicable,” “when considering all public interests.” PFD at 74. Emphasis added.

The Judges clearly believe that the burden of proof on BRA on the impacts on instream use issues, such as recreational uses, is not as heavy as the burden on BRA for impacts on senior water rights. FBR does not like that result, but it is not unreasonable. While the reasoning of the ALJs on why impacts on senior water right holders cannot be determined could be applied equally to all other uses of the water, there are differences in the language used for senior water right holders and the environment or recreational uses.

FBR does not, however, agree that the test for these instream uses is set at the low bar the PFD then suggests. There would be almost no burden of proof on BRA and other applicants under the position suggested in the PFD to present evidence with which the Commission could assess and consider the effects. **BRA did not even identify the potential effects, much less provide the data needed to assess them.**

The Judges may not have intended to suggest that BRA has almost no burden to identify potential impacts and facts that the Commission can then use to “assess and consider,” the impacts, but that is how it appears. While the PFD states that the Commission has broad discretion, the issue is not the extent of discussion, it is the burden of proof on BRA.

The PFD does not identify the burden on BRA to present information which the Commission can assess and consider. It just says it is low. It appears from the PFD that the Judges, like the ED’s witnesses, are simply willing to accept the settlement reached by BRA and TPWD, and the broad statements that the settlement should protect instream flows.

FBR presented one clear case where they do not—the John Graves Scenic Riverway. BRA responded with a vague promise, accepted by the Judges, that some later agreement with FERC on operations of Possum Kingdom dam will add adequate protections. Such an agreement certainly

could help. There is, however, no evidence that any needed flows will be required, or if they are, whether they will be timed to fill needs for fish and wildlife or recreational uses. Clearly the old idea of instream flows some minimum flow is no longer accepted as the right approach to mimic natural flow conditions for a healthy environment. The TPWD-BRA agreed flow regimes show that.

Moreover, there are at least 6 other segments that are also simply subject to the type of subsidence flow requirement that applies to the segment below Possum Kingdom dam.

TCEQ has already set a precedent for the burden of proof and BRA failed the test. The September 2004 letter from the ED's permit manager for this application stated, in essence, that it is the policy of TCEQ—for a significant water right—that an applicant prepare and present studies of the environmental impacts. FBR Ex 3-D at 2-3. BRA did not.

The test that the PFD sets out for applicants would indicate that TCEQ could not even make such a request for studies in the future, because of the low bar for showing that instream uses are adequate. All an applicant has to do is have someone who can qualify as an expert to say that it is so, even if that person has done no analysis. That would be a terrible precedent.

FBR believes that the ED did not follow-up on the requirement that BRA do basic studies on the impacts because BRA and TPWD reached a settlement, which appeared to the ED to be a reasonable approach. FBR agrees that it is for some segments, but clearly not the segment with the John Graves Scenic Riverway and several other segments. TPWD's documents show that it sought flow regimes for these other segments, but simply settled for half a loaf. Neither TPWD nor BRA has presented any reason for treating the John Graves Scenic Riverway differently than other segments. Given its location downstream of a reservoir where BRA is seeking additional water from a theoretical firm yield, this segment is particularly vulnerable.

The ED, however, does not have to follow up on its request for studies to make it part of BRA's burden. The 2004 request set out the only evidence of the ED's practice and interpretation of the law.

It was then BRA's burden to identify the potential impacts and provide information with which the Commission can assess those impacts. In some cases, that may require studies. For some aspects, such as recreational uses, BRA did not even identify any recreational uses or potential impacts. It did not provide any facts on how the proposed appropriation would affect such recreational uses. It did almost nothing.

Witnesses for BRA and the ED did express opinions that on balance recreation would be protected, but they had no data or information as to the bases for those opinions. There was nothing in the record and no showing of any expert type evaluation to reach the conclusions. In fact, the conclusions simply accept a rosy scenario, not the conditions allowed in the permit.

As a result, all that would be required in the SysOp permit for instream flows in the JGSR is the very minimum or "subsistence flow" of 32 cfs. The testimony made it clear that this flow is only set to protect water quality. There was no evaluation of the impacts of such minimum flows on recreation or on fish and wildlife to support any expert opinion.

The draft permits would allow that 32 cfs flow 24 hours a day, 7 days a week and 365 days a year. One would have to be willing to trust BRA to exceed that minimum flow, in order to reach an opinion that there will ever be enough water in the river to canoe this scenic riverway, the only scenic riverway in Texas. The permit should include requirements for any such assumptions.

Even if we assume something more might flow into this segment, there is no evaluation of the timing of more flows. Will they be on weekends where recreation will occur? Will they be in the spring when pulses for spawning are needed? There is no evidence or testimony that any set of conditions protects the environment, fish and wildlife habitat or recreational uses. There are just

general, “everything will be fine” type of statements, that do not qualify as expert opinions under Texas law.<sup>7</sup>

As the Judges explain in their PFD, for recreational use, there could be benefits and harm to different types of recreational uses. High flows could benefit boating; low flows could benefit wade fishing. There are statements like that in the evidence, but those statements do not constitute evidence and certainly do not meet any reasonable test of a real burden of proof for instream flows for recreational uses. They do not let the Commission consider and assess impacts. They are conclusory, and either have to be accepted as true or not.

The low flows that support fishing could come at times where high flows are needed for boating, and vice versa. There is, again, however, nothing in the evidence to support any finding that there will be any flows except 32 cfs.

What BRA is asking is that the Judges and Commissioners assume that BRA will do better than the minimum requirements. Testimony on the FERC releases could have been the evidence on which to base such an assumption, but BRA would even not present it. It would not make any specific commitment to any specific flow requirements that might result from a FERC-BRA agreement in the future. If BRA had presented that information or commitment the Judges and the Commission could then “assess and consider” whether the flow regimes were adequate, timed correctly, etc.

FBR appreciates the Judges’ proposal to include the FERC – BRA release agreement for the JGSR, but even if that turns out to be a meaningful flow regime, there is nothing like it for many other segments. Moreover, there is nothing to require BRA to continue meeting such flow regimes.

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<sup>7</sup> As is explained in FBR’s written argument, FBR has a very serious concern that the judicial test of the adequacy of what can be accepted as expert testimony is being ignored or rejected. FBR provided a legal brief on this issue as Appendix B to its written argument. FBR incorporates that brief here to avoid attaching it again.

All BRA has to do is convince FERC to drop the flow requirement. BRA could, for example, simply show that TCEQ's permits or rules require BRA to meet some flow standards.

Moreover, as a precedent for future BRA applications, the WMP process and other applications, this PFD could greatly limit the ability of TCEQ and affected parties to urge a stricter burden of proof.

Thus, FBR urges the Judges to reconsider their proposal on these instream flow issues, and, at a minimum, encourage the Commissioners to avoid defining the test for the burden of proof for the environmental and recreational flow requirements for permit applications for large appropriations.

5. Term Permits: The PFD accurately explains why BRA's request for appropriation of water that is already appropriated under the Allens Creek Permit should be denied. FBR agrees with this analysis and recommendation.

The PFD also explains why BRA's request should not be treated as a request for a term permit and should not be granted as a term permit. FBR agrees with this analysis as well.

The PFD, however, then provides an alternative proposal, suggesting that "the Commission could consider whether to grant BRA a term permit for the 202,000-acre-feet of Allens Creek Permit water for a specific term of years." PFD, p. 60. The PFD reasons that this "might be appropriate if the Commission chose to view the granting of such a term permit as a partial grant of what BRA applied for." *Id.* FBR disagrees with this proposition.

As the PFD correctly noted, BRA has not applied for a term permit. PFD, p. 58. None of the various proposed permits submitted by BRA includes a specific term of years for the Allens Creek Permit water, as is required for a term permit. Tex. Water Code § 11.1381(a). No modeling was done for a term permit. No notice was given of any request for a term permit.

It should be noted that the ED's position is that the permittee for an underlying perpetual water right cannot also apply for a term permit for that same water. As the ED's permit writer explained, water that is currently in the Allens Creek permit is now available to others for term permits. Ellis Hearing Testimony, Tr. 1734-1735. Granting BRA a term permit for the water would deprive others of the opportunity to apply for this water, and BRA has presented no evidence of current need for this water that is now available for others.

6. Scope of Public Welfare: The PFD again proposes an unnecessary and far-reaching policy-type decision in attempting to define the scope of the factors that can be considered by the Commission in the test for public welfare. FBR disagrees with the approach proposed in the PFD. Yet, again, it is unnecessary to engage in this type of ad-hoc rulemaking here.

In addressing public welfare tests, the PFD essentially treats the public interests the same as public welfare. It then applies the same factors to the two terms. Relying on the Supreme Court's opinion in the *Popp* case, *Railroad Comm'n v. Texas Citizens for a Safe Future & Clean Water*, 336 S.W.3d 619 (Tex. 2011), the PFD then recommends limiting the relevant factors to those that are included in other sections of Chapter 11 of the Water Code. *See* PFD, pp. 108-09. The PFD posits that factors that are not included in the governing statutes or TCEQ rules are outside the Commission's jurisdiction and field of competence, and thus, not within the scope of the public-interest or public-welfare inquiry. The PFD, however, has taken too limited a view of the scope of public interest and public welfare.

The *Popp* case cited in the PFD is not, applicable to a water rights case for several reasons. In that case, the Supreme Court was presented with the issue of whether the Railroad Commission was required to consider traffic safety concerns when assessing an application for an injection well. *Popp*, 336 S.W.3d at 621. In holding that traffic safety concerns are not among the public interest criteria that the Railroad Commission must consider, the court noted that: (1) the Railroad

Commission's responsibilities are quite limited; (2) the Railroad Commission's area of expertise is likewise limited; and (3) the Railroad Commission had never before considered traffic safety concerns as part of its public interest analysis.

Importantly, the Supreme Court clearly distinguished the Railroad Commission's limited authority regarding public interest from TCEQ's broader public interest authority and its broader expertise. *Id.* at 626-27 & 628-29. Indeed, this was part of the basis for its holding: "TCEQ is not limited to consideration of these [statutorily listed public interest] factors." *Id.* at 627.

Unlike the Railroad Commission, the TCEQ has broad responsibilities, rooted in the Texas Constitution. The State is charged with conserving public waters, which it holds in public trust for the use and benefit of the public. Tex. Const. Art. III, § 49-d; Art. XVI, § 59. In order to uphold this constitutional responsibility of conserving public waters for the use and benefit of the public, the State (and thus, TCEQ) cannot take such a narrow view of what constitutes the public's interest and welfare.

TCEQ also has a history of broadly interpreting its responsibility to consider public welfare. There is no evidence that TCEQ (or its predecessors) has ever taken the type of narrow view of its public interest and public welfare responsibilities in the past that the Railroad Commission took. *Cf. Popp*, 336 S.W.3d at 632 (Railroad Commission has never considered traffic safety concerns in its longstanding construction of public interest).

Significantly, there is precedent for the broader scope. For example, when the Texas Water Commission (one of the predecessor agencies to the TCEQ) was considering an application for a permit to construct a dam and reservoir on the Paluxy River, the TWC recognized that the proposed reservoir could have adverse consequences on historic features, namely a series of 2,000 dinosaur tracks made by brontosaurus, pterodactyls, and other species that are preserved in the limestone beds in and around the Paluxy River. *See City of Stephenville v. Texas Parks & Wildlife Dep't*, 940

S.W.2d 667 (Tex. App.—Austin 1996, writ denied). Instream flows affect the tracks, and the agency not only accepted evidence of that fact, it adopted a position that it could protect such historic or cultural features.

That decision is consistent with the agency's broad discretion--under the Texas Constitution and statutory directives--in determining what public interest means and what factors to consider. *Public Util. Comm'n v. Texas Tel. Ass'n*, 163 S.W.3d 204, 213 (Tex. App.—Austin 2005, no pet.). In considering the public's interest, an agency must typically assess competing policies and weigh both the potential benefits and the potential harms associated with the proposed permit. *Id.* at pp. 212-13, 216. When making a decision that implicates the public's water resources, the Commission must consider a broader array of competing policies.

That decision is a reflection of the position TCEQ has historically taken. The regulatory guidance on water rights (FBR Ex 14) is part of that history. It shows a very different approach to that of the Railroad Commission.

This guidance is relevant here.<sup>8</sup> It is a reflection of TCEQ's interpretation at the time of the guidance and is relevant to the issue of whether TCEQ has a long standing interpretation that it is now trying to change. If, as here, there is no written rule, guidance or decision by the Commission to the contrary, the position of TCEQ in that guidance is very significant.

The guidance makes it clear that the agency read the term "public welfare" broadly for purposes of the test for water rights permits.

In this case, the Judges have accepted that the issues raised by FBR, such as recreational use, are covered by the term public welfare. The problem is the analysis in the PFD goes beyond that to recommend that impacts on cultural or historic features or impacts on local economic interests are beyond the scope of the test of public welfare. It is not necessary for the PFD to recommend

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<sup>8</sup> FBR believes that the guidance is relevant and significant on other issues where the agency was interpreting laws and rules that have not changed and where the agency has not expressed any other position until this hearing.

consideration of such matters. FBR urges the Judges to revise the PFD and the Commission not to take a position on the scope of public welfare since it need not do so here.

7. Wetlands: As was discussed in the Introduction, FBR disagrees with the PFD's position that protection of wetlands is outside the scope of this or any water right permit proceeding. The Legislature included consideration of the need to protect all fish and wildlife habitat in adopting Section 11.152<sup>9</sup> and making it part of the test in Section 11.134 for permit issuance.<sup>10</sup> To date, TCEQ has read that provision of the law to include consideration of wetlands.

TCEQ rules for assessing fish and wildlife habitat specifically provide for protection of wetlands. 30 TAC 297.5(e) & (f).<sup>11</sup> TCEQ rules set out the clear state policy that is based on a broader statewide policy. It has been adopted in other states, as well as federal programs.<sup>12</sup> The state policy requires efforts to achieve "no net loss of wetland functions" as a result of the issuance of large water right permits and other significant projects in Texas. Wetland functions are defined in TCEQ's water quality standards, where wetland protection is also emphasized.<sup>13</sup>

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<sup>9</sup> ASSESSMENT OF EFFECTS OF PERMITS ON FISH AND WILDLIFE HABITATS. In its consideration of an application for a permit to store, take, or divert water in excess of 5,000 acre feet per year, **the commission shall assess the effects, if any, on the issuance of the permit on fish and wildlife habitats and may require the applicant to take reasonable actions to mitigate adverse impacts on such habitat.** (Emphasis added.)

<sup>10</sup> ACTION ON APPLICATIONS.... (b) The commission shall grant the application only if: ... (3) the proposed appropriation:... (D) considers ...if applicable, the assessments performed under Sections 11.147(d) and (e) and Sections 11.150, 11.151, and 11.152... (emphasis added.)

<sup>11</sup> **Habitat Mitigation.** (a) In its consideration of an application for a new or amended water right to store, take, or divert state water in excess of 5,000 acre-feet per year, **the commission shall assess the effects, if any, of the granting of the application on fish and wildlife habitats.** ...

(b) For an application for a new or amended water right to store, take, or divert state water, the commission may require the applicant to take **reasonable actions to mitigate adverse impacts**, if any, on fish and wildlife habitat....

(e) The goal of the **mitigation of wetlands is to achieve a "no net loss" of wetland functions and values.** In addition to aquatic and wildlife habitat, wetland functions also include, but are not limited to, water quality protection through sediment catchment and filtration, storage plans for flood control, erosion control, groundwater recharge, and other uses.

<sup>12</sup> For example, the no net loss policy is included in the state coastal program. 31 TAC §501.33(a)(3) and 30 TAC 279.2.

<sup>13</sup> 30 TAC § 307.2 & 307.3(a)(81)&(82).

8. Return Flows: As with other issues addressed by these exceptions, FBR again suggests that the Commission defer reaching a decision on how return flows—particularly, future return flows—should be permitted. As evidenced by the ample testimony presented by various witnesses, this issue is currently in a state of flux. Although the Commission has held work sessions and has attempted to initiate some guidance on how return flows should be addressed, the issue is far from resolved.

Rather than resolve the issue via this unprecedented request for water, the Commission should deny this application for the other reasons reflected in the PFD and avoid reaching the issue of return flows until it has had an opportunity to address, via rulemaking or other formal guidance, the most appropriate manner of treating return flows, particularly future return flows.

The parties to this proceeding presented a range of very different interpretations of how return flows should be appropriated. Parties also presented diametrically opposed positions regarding the issue of whether future return flows should be permitted.

The PFD presents a third interpretation. The PFD presents a thoughtful and reasoned interpretation of the applicable statutes and rules, and the Commission should consider this analysis when it develops a rule or guidance on the issues.

FBR is particularly concerned with the issue of future return flows that are predicted to come from use of groundwater. The PFD does not address BRA's request for flows that originate from future groundwater pumping, which BRA seeks. Prefiled Testimony of Gooch BRA Ex. 15, at 46. BRA has no legal basis to ask for future return flows of water that was not originally owned by the state, such as groundwater.

TCEQ defines return flows as: "That portion of *state water diverted* from a water supply and beneficially used which is not consumed as a consequence of that use and returns to a watercourse."

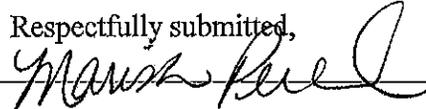
30 TAC § 297.1(43) (emphasis added). Because, in Texas, groundwater is not state-owned, return flows from groundwater sources should not be permitted under state water right permits.

FBR's other main concern is that the Water Code, including Section 11.046, should ensure that any appropriation of return flows be done through the application of the requirements set out in Section 11.134, just as any other new appropriation of water. As the PFD points out, though, BRA's application does not include sufficient, reliable data (as to the availability of water, for instance, and the rates and places of diversion) to conduct an accurate Section 11.134 analysis. Moreover, BRA cannot show that that the water it seeks "is available in the source of supply" as required by Section 11.134(b)(2).

#### IV. PRAYER

FBR supports the recommendation for denial of the permit. FBR requests that the other options be dropped from the proposal for decision or not be a basis for any final order. FBR also requests that the Judges recommend and the Commission rule that all issues that do not need to be addressed to support denial of the permit be left unresolved and not part of any final order.

Respectfully submitted,



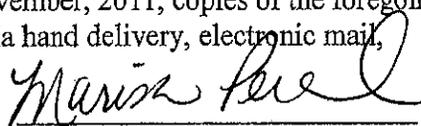
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By my signature below, I certify that on this 7<sup>th</sup> day of November, 2011, copies of the foregoing document were served upon the parties identified below via hand delivery, electronic mail, facsimile and/or Certified U.S. Postal Mail.

  
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