

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

APPLICATION BY THE BRAZOS
RIVER AUTHORITY FOR WATER
USE PERMIT NO. 5851

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BEFORE THE STATE OFFICE OF
ADMINISTRATIVE HEARINGS

NATIONAL WILDLIFE FEDERATION'S EXCEPTIONS
TO THE PROPOSAL FOR DECISION

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CHIEF CLERK'S OFFICE
TEXAS COMMISSION
ON ENVIRONMENTAL
QUALITY

COMES NOW, the National Wildlife Federation (NWF) and files its Exceptions to the Proposal For Decision (PFD) and would show as follows:

Because the Administrative Law Judges (ALJs) have not yet developed a proposed order or proposed findings of fact and conclusions of law, these exceptions will necessarily be more general in nature than exceptions filed in response to such an order. Accordingly, issues will be identified based on the discussion in the PFD.

Generally, NWF agrees with the discussion and conclusions in the PFD regarding the shortcomings of the application in terms of compliance with statutory requirements as those shortcomings relate to the "two-step" process. BRA's proposed approach simply does not fit within the statutory structure. However, as discussed further below, NWF does except to some of the mechanisms suggested by the ALJs for resolving those shortcomings. In addition, NWF has some serious concerns about what procedures would need to be followed in the event that a ruling is deferred and BRA is given time to prepare its WMP. In the event that the Commission chooses that option, NWF requests that the parties be allowed to propose, before the Commission enters an order to that effect, appropriate procedures to be followed for subsequent notice and for the accompanying remand for a SOAH hearing on the WMP in order to ensure that all interests are adequately protected.

In addition, NWF excepts to several specific determinations in the PFD.

1. Exception to Option Of Relying Solely On Hypothetical Diversion Points To Resolve The Deficiency In Identifying Actual Diversion Points.

NWF agrees that the ALJs correctly identify the deficiency of BRA's application in failing adequately to identify diversion points. PFD at p. 20. The ALJs propose three alternative options for resolving that deficiency. PFD at p. 30. The third such option suggests potentially granting a permit based on

diversion points at Glen Rose, Highbank, Richmond, and the Gulf. However, because those diversion points are simply fictional or hypothetical, that option would not resolve that deficiency in the application. Indeed, the PFD expressly acknowledges that at pp. 28-29. See also PFD at p. 44. No diversions are actually anticipated to take place at those locations. Indeed, BRA has no facilities that would allow it to make the diversions at those locations and has no plans for constructing such facilities.

2. Exception To Option Of Relying Solely On A Single Hypothetical Diversion Point To Resolve The Deficiency In The Ability To Assess Water Availability.

NWF believes the ALJs correctly identify the deficiency of BRA's application in failing adequately to inform an evaluation of available unappropriated flows because of the failure to identify specific diversion points and amounts. PFD at pp. 44-49. The ALJs propose three alternative options for resolving that deficiency. PFD at p. 49. The third such option suggests potentially granting a permit based on one of the diversion points at Glen Rose, Highbank, Richmond, or the Gulf. However, because those diversion points are simply fictional or hypothetical, that option would not resolve that deficiency in the application.

Although it might be possible to come up with some theoretical evaluation of unappropriated flows, and associated impacts on senior water rights and instream uses, at a single hypothetical diversion point, the evaluation would essentially be meaningless because BRA has no intention or possibility of operating the new permit in that manner. In addition, the existing record is not adequate to support such an evaluation because the analyses were done assuming both BRA's existing water rights and the requested rights would be diverted at the hypothetical locations.

3. Exception To Inappropriate Characterization Of The Required Showing For Meeting The Beneficial Use Aspect Of The Water Code.

NWF does not believe that BRA met its burden of showing the full requested amount "is intended for a beneficial use." Because of the hypothetical diversion points used, we still don't know how much water, out of the requested amount, can actually be made available. Beyond that, we don't know if those amounts would actually be available at the locations where the various demands are projected to occur.

In addition, NWF excepts to the characterization that the beneficial use test is “a low threshold.” That characterization ignores the statutory definition of beneficial use. That term is defined as follows:

“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 ALJs seem to equate the requirement of showing a “beneficial use” with a requirement for the listing of an authorized purpose. Section 11.023 lists the purposes for which water may be appropriated and, as stated in the definition of beneficial use, that is only one subset of the beneficial use requirement. Nothing in that definition supports the characterization that merely intending not to waste the water being requested satisfies the beneficial use test.

The reference in the PFD to *City of San Antonio v. Texas Water Comm’n* as supporting a conclusion that the current beneficial use requirement is a low threshold is inapposite. The applicable statutory test being construed in that case was characterized by the court as directing the agency, then the Water Rights Commission, to approve all applications:

if the proposed appropriation contemplates the application of water to any of the uses and purposes provided for in this chapter, and does not impair existing water rights, or vested riparian rights and is not detrimental to the public welfare.

~~407 S.W.2d 752, 758-59 (Tex. 1966) (emphasis added). That low threshold of simply applying water~~ to an authorized use is a very different test than the one established in the current Sections 11.134 (b)(3)(A) and 11.002 (4).

The cancellation provisions cited in the PFD illustrate only that prior tests were very lenient, resulting in water rights being granted that weren’t put to use for extended periods. The legislature did establish exceptions to cancellation of water rights. However, nothing in those exceptions is inconsistent with requiring an applicant to demonstrate that the applicable regional water plan contemplates that the requested right is predicted to be put to beneficial use to meet specific needs at some point within the 50-year planning period. That is not an unduly rigorous test.

In fact, the language of Section 11.173 (b)(2)¹ illustrates clear intent that a water right holder should have to tie its water right to “a specific recommendation for meeting a water need included in a regional water plan” rather than just to the total of water needs in the region. Tex. Water Code § 11.173 (b)(2). It just doesn’t make sense to ignore 11.002 (4) and construe 11.134 (b)(3)(A) as setting a very low threshold for beneficial use in issuing a water right when that same right would be subject to cancellation ten years later absent a more stringent showing of beneficial use tied to a specific recommendation in the regional water plan for meeting an identified water need.

4. Exception To Determination That BRA’s Water Conservation Plan Supporting the Application Meets Regulatory Requirements.

a. Failure to set specific, quantified targets.

Section 11.1271 (c) of the Water Code provides:

Beginning May 1, 2005, all water conservation plans required under this section must include specific, quantified 5-year and 10-year targets for water savings. The entity preparing the plan shall establish the targets. Targets must include goals for water loss programs and goals for municipal use in gallons per capita per day.

Tex. Water Code § 11.1271 (c). Section 11.1271 (a) specifically requires an applicant for a new or amended water right to prepare and submit a water conservation plan. Accordingly, such plans must meet the requirements of Section 11.1271 (c). There is nothing equivocal about the statutory requirement that such a conservation plan must include both 5-year and 10-year targets and they must be specific and quantified. In addition, where municipal use is involved those 5-year and 10-year targets must include goals in gallons per capita per day. BRA’s plan fails to provide any of the required 10-year targets and goals for any of the proposed use categories. Accepting BRA’s strained reading of the rules, the ALJs appear to ignore the clear statutory language and erroneously conclude that 10-year targets and per capita per day goals aren’t required. PFD at p. 131-32.

Requiring specific, quantified five-year and ten-year targets is not an unreasonable requirement. Any applicant that takes water conservation seriously could easily comply. It is simply absurd that with such a massive request for the use of state water, BRA did not submit a water conservation plan that meets even that simple standard. There has to be some accountability if water conservation is to be taken seriously.

¹ The PFD actually refers to Section 11.175 (a) and (b), which merely provide notice requirements for cancellation proceedings. NWF assumes that the intended reference is to Section 11.173.

Although TCEQ's rules provide something less than the model of clarity, those rules can't, and don't purport to, change that express statutory requirement of Section 11.1271 (c). Section 288.5 (1)(C), which is applicable to wholesale water suppliers, states the requirement for water conservation plan targets in the following terms: "beginning May 1, 2005, specific, quantified five-year and ten-year targets for water savings including, where appropriate, target goals for municipal use in gallons per capita per day for the wholesaler's service area, maximum acceptable unaccounted-for water, and the basis for the development of these goals." 30 TAC § 288.5 (1)(C).

The ALJs accept BRA's interpretation that the rules provide BRA with discretion to determine when targets for municipal use in gallons per capita per day are appropriate and, apparently, even when any quantified targets are required for uses other than municipal use. PFD at p. 131-32. Such a construction is directly inconsistent with Section 11.1271 (c) of the Water Code and is unsupportable. The only reasonable construction of the "where appropriate" language, in light of the explicit statutory language, is as an acknowledgement that some wholesale water suppliers may not supply water for municipal use. In such situations, gallons per capita per day goals aren't appropriate. It can't reasonably be read, as was done in the PFD, as negating an explicit statutory requirement. Similarly, nothing in that language can be read as qualifying the express requirement for some form of specific, quantified five-year and ten-year targets.

Alternatively, with respect to the gallons per capita per day requirement, the ALJs refer to Ms. Wang's testimony, on behalf of the Executive Director, that conservation plans sometimes mistakenly base the quantified goals on the base year of 2005, when the quantified goal requirement first became effective, as the starting point and neglect to update the 5-year and 10-year goals when updated plans are submitted to meet regulatory requirements. PFD at pp. 128-29. The ALJ's seem to interpret that testimony as indicating that basing a 5-year or a 10-year target on a starting date that predates the preparation of a required update, even by 4 or 5 years, is permissible. Again, such an interpretation is unsupportable. It reads right out of the law the explicit statutory requirement that conservation plans must always be looking ahead and establishing quantified targets in 5 and 10-year increments. Under that construction, in five more years, plans could just list what past water use has been and completely ignore targets for future use.

The ALJs also conclude that, as a wholesale water supplier, BRA is not required to address, in its water conservation plan, water destined for industrial or mining use. PFD at pp. 131-32. As noted at p. 131, BRA's witness, Mr. Brunett, acknowledged that quantified targets for non-municipal use are

not included in the conservation plan. Mr. Brunett also testified that about 46 percent of the contracted volume for BRA's existing water rights is for industrial use. Exh. BRA 35 at p. 9. Thus, under the strained interpretation of the rules proposed in the PFD, about half of the state water permitted to BRA would be exempted from water conservation plan requirements.

Again, a construction of TCEQ rules that purports to exempt industrial use supplied under a wholesale water supply arrangement from water conservation plan requirements is inconsistent with the Water Code and is unsupported. Whether that requirement to address all uses, including industrial use, is construed to apply under 30 TAC § 288.5, pursuant to the wholesale water supplier category, or under 30 TAC § 288.3, pursuant to the industrial or mining use category, a water conservation plan addressing those uses of water and establishing specific, quantified 5-year and 10-year targets is mandated. It is clear that BRA did not provide one.

b. Requirement for specific showing of adequacy

The PFD also appears to conclude that review of the adequacy of a required water conservation plan as part of the application process is discretionary. PFD at p. 133. The ALJs misconstrue the import of the language of 30 TAC § 288.30 in reaching that mistaken conclusion. Section 288.30 (8) does provide that a water conservation plan required to be submitted with a water right application "must also be subject to review and approval by the commission" rather than explicitly stating that it must be reviewed and approved by the commission. NWF contributed to that erroneous construction by failing to more fully explain the argument in its prior briefing. However, the point of Section 288.30 (8) is that unlike the other provisions of Section 288.30, which deal only with conservation plans required to be submitted for executive director review or for review by the Texas Water Development Board, conservation plans accompanying permit applications are subject to review and approval by the commission rather than just review by the executive director. That review and approval by the commission isn't stated there in mandatory terms because the executive director can issue permits that are not contested, in which case there would be no review by the commission. However, that language doesn't render the water conservation plan review and approval for a water right application discretionary.

The first sentence of Section 295.9 is unambiguous in requiring that an application for a water right must include a water conservation plan meeting the applicable requirements of that Section. 30 TAC § 295.9. That section directly incorporates the requirements of Chapter 288. BRA had the burden of

demonstrating compliance with all of those requirements and it failed to do so. The fact that the executive director didn't undertake a substantive review of the plan demonstrates that the executive director can't vouch for its adequacy. Moreover, such a review is a mandatory requirement as part of the commission's review of the application. Section 297.50 provides that "based upon its review" of information in the water conservation plan, the commission will determine whether to grant or deny the application in whole or in part. 30 TAC § 297.50 (a). With respect to water conservation requirements for irrigation use, the PFD acknowledges that they apply to the application. PFD at p. 132. However, the ALJs conclude, despite an explicit acknowledgement of the absence of any substantive TCEQ review and without any reference to testimony indicating compliance with those requirements, that BRA complied with the requirements. They draw that conclusion despite an explicit requirement for quantified 5-year and 10-year targets for water savings for the irrigation storage and distribution system, 30 TAC § 288.4 (3)(C), and despite the acknowledgement by BRA's witness that no quantified 5-year or 10-year target for that use is to be found in BRA's plan. The only evidence the ALJs cite in support of that conclusion is the testimony of Ms. Wang, on behalf of the Executive Director, that staff considers municipal use as the main category of use and that BRA's drought contingency plan, which is an entirely-separate requirement, complies with TCEQ's rules. There is no basis for concluding that BRA has complied with the requirements for quantified 5-year and 10-year targets for water savings.

c. BRA's obligation to ensure that customers implement water conservation.

In addition, the PFD reads any substantive standards out of the requirement that BRA ensure that its wholesale customers implement water conservation plans meeting TCEQ requirements. The rules require BRA's conservation plan to accomplish that result through mandating provisions in its water supply contracts. 30 TAC § 288.5 (1)(G). BRA's contracts merely state that its customers must implement water conservation plans if some other mechanism, such as TCEQ rules, require such plans. BRA Exh. 37 at p. 9. The ALJs erroneously conclude that "TCEQ's rules require wholesale customers to implement water conservation plans that are consistent with the requirements of Chapter 288 of the TCEQ rules." PFD at pp. 133-34. Water conservation plans are required from applicants for water rights, Texas Water Code § 11.1271 (a), and from the holders of water rights greater than a certain size, *id.* at § 11.1271 (b). In addition, retail public utilities that serve more than 3,300 connections with potable water also independently are required to develop water conservation plans. Tex. Water Code § 13.146. TCEQ's rules merely implement those requirements.

For customers of BRA, who get water from BRA and don't separately hold a water right or meet the 3,300 connection test, the water conservation requirements are imposed only through the contract provisions of BRA's water conservation plan.

In addition, the requirement that BRA must meet, pursuant to Section 288.5 (1)(G), is not simply to ensure that its customers have water conservation plans, but that such plans ensure compliance with the substantive requirements of Chapter 288. BRA's water supply contracts fail to do so. The contract language provides as follows:

If required by applicable law or regulation or by BRA, Purchaser agrees to implement a water conservation and drought management program in accordance with a water conservation plan and that the water made available and diverted by Purchaser pursuant to this Agreement will be used in accordance with such conservation plan.

BRA Exh. 37 at p. 9 (emphasis added). That language fails to establish any substantive requirement for the contents of water conservation plans prepared by BRA's customers. Developing adequate contract language is not an unreasonable requirement for an entity requesting a new water right for massive amounts of state water.

- d. BRA has not demonstrated compliance with water conservation requirements and TCEQ has not approved BRA's conservation plan.

The PFD also includes the erroneous statement that the commission has "approved" BRA's water conservation plan. PFD at 134. There is no evidence to support that statement. NWF also notes its exception, for the reasons stated above, to the unqualified statement on page 130 of the PFD that "In other words, BRA's water conservation plan fully complies with Section 288.5." That broad statement is not supported by the evidence.

5. Exception To Interpretation Of Subsection 11.147 (e-1) Of The Water Code As It Relates To Amendments Of Water Rights And Environmental Flow Protection.

The PFD inappropriately relies on a single sentence in Subsection 11.147 (e-1), taken out of context, to support a sweeping conclusion that environmental flow conditions can't be applied to existing appropriations in the context of amendments of water rights. PFD at p. 16. That conclusion ignores the clear language of the statute. Subsection 11.147 (e-1) deals only with the issue of how, and when, the permit reopener language mandated by Senate Bill 3, from 2007, applies to new permits or permit amendments. That provision has no relevance to the question of when environmental

flow conditions may be imposed as part of the amendment process for an existing water right that doesn't include the reopener language.

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

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

Texas Water Code § 11.147 (e-1)(emphasis added). The first sentence of Subsection (e-1) imposes a new requirement, effective as of September 1, 2007, for inclusion in a permit (and in an amendment to a water right that increases the amount of water authorized to be stored, taken, or diverted) of a provision allowing the commission to adjust, within certain limitations, the conditions in the permit (or in the amendment to the water right) that deal with environmental flow protection. That adjustment is allowed independent of any subsequent application to amend the water right. The second sentence serves only to limit the applicability of the provision required by the first sentence when it is being applied in the context of a permit amendment. That second sentence merely provides that, in the case of a permit amendment, the provision can only be used to adjust an environmental flow condition that controls the new authorization obtained through the amendment. In other words, it makes clear that nothing in Subsection 11.147 (e-1) affects the aspects of the authorizations that were granted prior to September 1, 2007.

It is this second sentence that the ALJs apparently misinterpret and mistakenly construe as evincing some new limitation on TCEQ's previously existing authority to impose environmental flow conditions in the context of permit amendments. Nothing in the statutory language supports that construction.

If BRA's application were treated as involving permit amendments, rather than a new permit, Subsection 11.147 (e-1) would be applicable in basically the same way as for a new permit. It would require the inclusion of a provision authorizing the commission to adjust the permit conditions for

protection of environmental flows that apply to any increased amount of water authorized, under the new amendment, to be stored, taken, or diverted. However, the Subsection would have no applicability to the question of what permit conditions for protection of environmental flows should actually be included. If new permit conditions for protection of environmental flows were imposed and made applicable to impoundment or diversion authorizations that predate September 1, 2007, the reopener provision of Subsection 11.147 (e-1) would not apply to those particular permit conditions.

In reaching the erroneous conclusion that permit conditions for the purpose of protecting environmental flows couldn't be imposed on existing authorizations in a permit amendment process, the ALJs ignore TCEQ rules and the testimony of witnesses for BRA and the Executive Director. Section 297.56 of TCEQ's rules acknowledges that, for permit amendments, the commission must consider the effects on existing instream uses of granting the application. 30 TAC § 297.56 (a). That section also acknowledges that permit conditions to protect instream uses may be imposed in the context of a permit amendment. *Id.* at 297.56 (b). That latter provision acknowledges the applicability of the "no injury rule" (30 TAC § 297.45 (b)) in determining what conditions might be appropriate.

Section 297.45 (b) expressly acknowledges that amendments to existing water rights may adversely affect instream flows even if they do not involve an increase in the appropriative amount or diversion rate. The operative question in deciding if such an amendment must be approved or if protective conditions are merited is whether "the requested change will not cause such adverse impact on ... the environment of the stream of greater magnitude than under circumstances in which the water right being sought for amendment was fully exercised" 30 TAC § 297.45 (b). If the applicant proves that no greater impacts will occur, then the application must be approved and conditions won't be imposed. *See* 30 TAC § 297.45 (b), (d). However, it is clear that permit amendments are subject to environmental flow conditions unless they are shown by the applicant not to affect instream uses to a greater extent than the authorization as it previously existed.

BRA's witness, Mr. Gooch, acknowledged that at least some types of amendments of existing permits that don't involve an increase in diversion, such as the movement of a diversion point to an upstream location, are properly subject to the imposition of environmental flow requirements.

Gooch, transcript, vol. 11 at pp. 2488-90. In addition, Ms. Alexander recognized that changes, such as authorizing operational flexibility in how existing water rights are used, could be addressed through environmental flow conditions where impacts to instream uses result. Alexander, transcript, vol. 9 at pp. 2101-03.

6. Exception To Determination Of Limited Scope For Consistency With Public Welfare Inquiry

The PFD recommends a limited scope for the public welfare inquiry required by Section 11.134 (b)(3)(C). PFD at p. 109. Such a limitation is neither appropriate nor necessary. It is not necessary to the disposition of this case to reach the issue of the breadth of that inquiry. It is not appropriate to recommend a limited scope because the legislature has charged TCEQ to consider a very expansive set of issues when dealing with water rights matters. For example, Section 11.085, dealing with interbasin transfers of water, directs the commission to consider the broad issue of the economic impacts of approving an application. Tex. Water Code § 11.085 (k)(2)(E). That is a very broad charge and inconsistent with the statement in the PFD that such issues are beyond the scope of water rights hearings. Certainly economic impacts would include, but not be limited to, issues such as tourism and economic value of flowing water. That broad scope of the relevant public welfare inquiry is also supported by Section 11.0235 (b), which acknowledges that maintaining biological soundness of the state's rivers, lakes, bays, and estuaries is very important to the state's economic health and general well-being. Tex. Water Code § 11.0235 (b).

7. Exception To Conclusion That Protection Of Wetlands Is Beyond The Scope Of The Case

Wetlands protection is a factor that BRA and TCEQ are required to consider in ruling on BRA's application. Section 11.152 of the Water Code expressly requires the commission to assess the effects of the issuance of any permit in excess of 5,000 acre-feet per year on fish and wildlife habitats. That provision also provides the commission with authority to impose mitigation requirements to compensate for adverse impacts to such habitat. TCEQ rules specifically provide that such consideration and mitigation must address wetlands issues. 30 TAC § 297.53 (e), (f).

8. Exception To Determinations That Various Proposed Permit Provisions Should Not Be Included In A Permit If One Is Granted.

The ALJs include a table beginning on page 186 of the PFD in which they list various recommendations by parties other than BRA or the Executive Director for permit conditions. Although no discussion of the issues raised is provided, the PFD summarizes BRA's arguments in

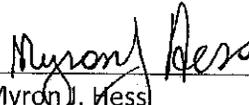
opposition and states that the ALJs agree with BRA's arguments and do not recommend the inclusion of those conditions.

NWF excepts, in particular, to the recommendation that no conditions should be included to impose constraints on the "operational flexibility" that BRA has requested for satisfying downstream water rights. The PFD states that no evidence in the record supports the imposition of such a condition. That statement is incorrect. The testimony of Mr. Geeslin, transcript, vol. 8 at pp. 1821-22, provides sufficient evidence to support the imposition of such a condition limiting the use of operational flexibility to times when flow at the downstream gages equals or exceeds the 7Q2 or subsistence flow levels.

Conclusion

The National Wildlife Federation believes that the ALJs correctly determined that BRA has not met the requirements for issuance of the requested permit and requests entry of an order consistent with that determination. Such an order need not, and should not, reach many of the issues set out in the PFD, which simply are not relevant to a decision not to grant the application. However, if those issues are reached, NWF requests that its exceptions be granted.

Respectfully Submitted

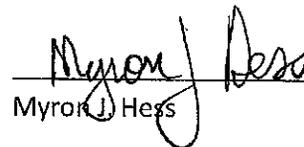


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CERTIFICATE OF SERVICE

I hereby certify, by my signature below, that on November 7, 2011 a true and correct copy of the above and foregoing **National Wildlife Federation's Exceptions to the Proposal For Decision** was forwarded via e-mail or First Class Mail to the parties on the attached Service List.



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SOAH DOCKET NO. 582-10-4184

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