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Ms. Bridget Bohac, Chief Clerk
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Texas Commission on Environmental Quality
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Re: SOAH Docket No. 582-10-4184; TCEQ Docket No. 2005-1490-WR;
Application of Brazos River Authority for Water Use Permit No. 5851

Dear Ms. Bohac,

Enclosed for filing, please find the Texas Parks and Wildlife Department's Exceptions in the above referenced matter.

Should you have any questions, please contact me at (512) 389-8899.

Sincerely,

Carter P. Smith
Executive Director

A handwritten signature in blue ink that reads "Colette Barron Bradsby".

Colette Barron Bradsby

cc: Service List

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

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

**TEXAS PARKS AND WILDLIFE DEPARTMENT'S
EXCEPTIONS TO THE PROPOSAL FOR DECISION**

TO: The Honorable William Newchurch and the Honorable Hunter Burkhalter,
Administrative Law Judges, State Office of Administrative Hearings.

Comes now the Texas Parks and Wildlife Department (TPWD) and files
Exceptions to the Proposal for Decision in the above referenced matter.

TPWD was admitted as a party for the limited purpose of addressing the legal
treatment of return flows and the reuse of water in the application by the Brazos River
Authority for Water Use Permit No. 5851 (application); this pleading addresses only the
limited subject matter.

I. Background

In their October 17, 2011 Proposal for Decision (PFD), the honorable
Administrative Law Judges (ALJs) recommend two options for the disposition of the
application to the Texas Commission on Environmental Quality (TCEQ) by the Brazos
River Authority (BRA or Authority) for Water Use Permit No. 5851. The ALJs
recommend either: (1) denial of the permit or (2) deferral of a final ruling on the
application by providing BRA time to prepare its initial Water Management Plan (WMP)
and remanding the application back to the State Office of Administrative Hearings for
further hearings on the WMP. The ALJs also describe a third route, which is for the
TCEQ to consider granting the application in party an only authorizing diversions at Glen
Rose, Highbank, Richmond, or the Gulf and solely for the quantities identified in the
application for those locations, but the ALJs note that alternative does not resolve all the
problems the ALJs found with the application.

Because the ALJs proposed a range of options for the TCEQ, no proposed order
with findings of fact and conclusions of law was prepared. Regarding the legal treatment
of return flows and the reuse of water contemplated in the BRA application, the PFD is
generally supportive of the position espoused by TPWD in its Closing Arguments.
TPWD construes the PFD to read that the resolution of the return flows issues would
apply to the BRA permit regardless of whether the permit is granted as requested or
granted in a modified form.

II. Exceptions to Conclusions Regarding Texas Water Code §11.046(c) and §11.042(c)

While there are no numbered conclusions of law to except to, TPWD respectfully excepts to and requests the ALJs reconsider the conclusion that interprets how Texas Water Code §11.046(c) and §11.042(c) jointly apply to a water right holder who wishes to make indirect reuse of his return flows discharged into a state water course.

The ALJs have interpreted Texas Water Code §11.046(c) to exclude the water right holder who discharged the flows from the group of “others” the statute references who may appropriate the return flows. *PFD* at 149. The ALJs find that “the discharger of the return flows is not among those who can seek to appropriate the flows pursuant to Section 11.046(c).” *Id.* TPWD requests the ALJs revise their conclusion to provide that the holder of the water right that generates the return flows sought to be appropriated has the option to either seek a permit amendment to appropriate the return flows or seek a new appropriation of the return flows.

The ALJs concluded that when BRA seeks to reuse “its own surface water-based return flows,” it need only obtain a bed and banks authorization pursuant to Texas Water Code §11.046(c) and need not obtain an appropriative right. *PFD* at 150. TPWD believes this conclusion is inconsistent with the plain language of Texas Water Code §11.046(c), and that an express appropriative right to use return flows is required for BRA or any water right holder as a prerequisite for obtaining a bed and banks authorization to convey and subsequently divert return flows that it generates. When discharged into a state watercourse, surface water-based return flows become state water, and the holder of the original water right that generated the return flows has no ownership of or right to use the return flows. *PFD* at 150. TPWD requests the ALJs revise their conclusion to provide that BRA (or any holder of a water right that generates the return flows sought to be conveyed and subsequently diverted) must have an express appropriative right to use those return flows as a prerequisite to securing a bed and banks authorization. This would be consistent with the ALJs conclusion that “a bed and banks authorization can only be issued to a person who already has the right to use the water he seeks to convey.” *PFD* at 149.

A. Texas Water Code §11.046(c) Requires an Appropriative Permit for Indirect Reuse

The ALJs rightly conclude that Texas Water Code §11.046(c) defines return flows from state water rights as water available for appropriation. The statute provides:

Except as specifically provided otherwise in the water right, water appropriated under a permit, certified filing, or certificate of adjudication may, prior to its release into a watercourse or stream, be beneficially used by the holder of a permit, certified filing, or certificate of adjudication for the purposes and locations of use provided in the permit, certified filing, or certificate of adjudication. *Once water has been diverted under a permit, certified filing, or certificate of*

adjudication and then returned to a watercourse or stream, however, it is considered surplus water and therefore subject to reservation for instream uses or beneficial inflows or to appropriation by others unless expressly provided otherwise in the permit, certified filing, or certificate of adjudication. (Emphasis added.)

Texas Water Code §11.046(c) addresses both direct and indirect reuse of appropriated water. Direct reuse, meaning reuse of the appropriated water *prior* to it being returned to the stream, is clearly a right of the water right holder, absent a permit provision otherwise. Indirect reuse, meaning use of the surplus water *after* the water is returned to the stream, is clearly not a right of the water right holder unless expressly provided for in a permit, certified filing, or certificate of adjudication. To use return flows already discharged into a state watercourse requires an appropriative right as evidenced through a provision in a permit or certificate of adjudication.

An appropriative right for indirect reuse could come in the form of an original permit provision or in an amendment to the underlying water right to increase the appropriation right for the desired quantity of water derived from the return flows. See Texas Water Code §11.121. These provisions are contemplated by the language “*unless expressly provided otherwise in the permit, certified filing, or certificate of adjudication*” in the last sentence of §11.046(c). (Emphasis added.) The amendment option is available *solely* to the underlying water right holder; there is no law allowing a third party to gain an appropriative right via the amendment of another person’s water right. The original water right holder must have either an original permit provision to authorize indirect reuse or must have a permit amendment to authorize indirect reuse. The exclusion or limitation of applicants for indirect reuse is directly related to the kind of authorizations that may be achieved through the underlying water right permit. Every person *except* the original water right holder is excluded from gaining an authorization for indirect reuse via a permit condition in the original water right.

Under Texas Water Code §11.046(c), a separate authorization for indirect reuse can also come in the form of a new permit. The new permit would be unrelated to and distinct from the original underlying water right. If the use of the discharged return flows is sought via a new appropriation, any person may file an application to appropriate the return flows as state water. There is no law or rule that excludes any person, including the holder of the water right that generates the return flows, from the potential group of qualified applicants for a new appropriation of state water. When the statute is read in whole, and meaning given to all words, the statute allows two options for a water right holder to gain authorization for the indirect use of return flows. There is no bar to the applicant in the word “others” in the second sentence; “others” refers to any persons who must file an application for a *new appropriation* of state water in order to use return flows already discharged into a watercourse. The distinction between applicants is based upon the vehicle available for gaining authorization for indirect reuse. For amendments, it is only the underlying water right holder who can seek authorization through an amendment of the underlying water

right to use return flows generated from the water right and already discharged into a state watercourse. For new appropriations, it is any person who files an application for a new appropriation of state water.

TPWD requests the ALJs revise their conclusion to provide that the holder of the water right that generates the return flows sought to be appropriated has the option to either seek a permit amendment to appropriate the return flows or seek a new appropriation of the return flows.

B. Texas Water Code §11.042(c) Authorizations for Conveyance of State Water Require an Underlying Appropriative Right

TPWD agrees with the ALJs that a bed and banks authorization under Texas Water Code §11.042(c) “merely entitles a person to convey and subsequently divert water for which he already holds an appropriative right.” (Emphasis added.) Without a permit authorization, there is no appropriative right of a water right holder to use his return flows after discharge into a state watercourse. That is the central proposition of Texas Water Code §11.046(c); absent a permit provision otherwise, return flows are state water, available for appropriation or reservation for instream uses. Texas Water Code §11.046(c) mirrors Texas case law and is consistent with Texas Water Code §11.021 which provides that water in a state watercourse is state water. See *City of Corpus Christi v. City of Pleasanton*, 154 Tex. 289, 276 S.W.2d 798 (1955) and *Denis v. Kickapoo Land Co.*, 771 S.W.2d 235 (Tex. App.—Austin 1989, writ denied), *City of San Marcos v. TCEQ*, 128 S.W.3d 264 (Tex.App.—Austin 2004, writ denied), *Edwards Aquifer Auth. v. Day*, 274 S.W.3d 742 at 752 (Tex. App.—San Antonio 2008, pet. granted).

In this proceeding, BRA is requesting the necessary appropriative right to the return flows it generates (among other return flow sources) via an application for a new permit. None of BRA’s existing permits grants an appropriative right to use the return flows sought by BRA in its application for new Permit No. 5851.

The ALJs conclude that “when BRA seeks to reuse its own surface water-based return flows, it need only obtain a bed and banks authorization pursuant to Section 11.042(c) and need not obtain an appropriative right pursuant to Section 11.046(c).” *PF* at 150. BRA has no existing right to reuse “its own surface water-based return flows.” The only appropriative rights afforded to BRA pursuant to Texas Water Code §11.046(c) and in its permits are the rights to originally use the water for permitted purposes and to directly reuse the return flows *prior* to discharge into a state watercourse. Pursuant to Texas Water Code §11.046(c), BRA has no right for indirect reuse of its water, that is no right to use the return flows *after* they are discharged into a state watercourse.

The unequivocal plain language of Texas Water Code §11.046(c) provides that a water right holder is prohibited from indirectly reusing his water “unless expressly provided otherwise in the permit, certified filing, or certificate of adjudication.”

Some type of permit authorization is always required for indirect reuse of state water. For the return flows generated by BRA's water rights, there is nothing "expressly provided otherwise in a permit, certified filing, or certificate of adjudication" that would allow BRA the right to use the return flows it generates. None of BRA's existing permits grants the appropriative right to use the return flows sought by BRA in its application for new Permit No. 5851. Therefore BRA must secure a permit to appropriate its return flows before it may secure a bed and banks authorization under Texas Water Code §11.042 (c) to convey and subsequently divert its return flows.

This approach would be consistent with the ALJs conclusion that the word "water" in Texas Water Code §11.042(c) should be construed to include return flows and should not be limited to developed water as argued by TPWD. The ALJs conclude that "a bed and banks authorization can only be issued to a person who already has the right to use the water he seeks to convey." *PFD* at 149. Clearly, authorization for the conveyance of return flows through the bed and banks of a watercourse requires a demonstration that the applicant has independent authority to use the water sought to be conveyed. If the water sought to be conveyed is surface water-based return flows, one must show a right to that water such that no other person may divert the water while it remains in the bed and banks of a state watercourse. The only authority to exclude others from the diversion and use of those return flows comes from a water right permit. The ALJs must grant BRA the appropriative right to use the return flows as a prerequisite to granting BRA's request for a bed and banks authorization.

TPWD respectfully requests the ALJs revise their conclusion to provide that BRA (or any holder of a water right that generates the return flows sought to be conveyed and subsequently diverted) must have an express appropriative right to use those return flows as a prerequisite to securing a bed and banks authorization. In this application, BRA requires a new appropriation to authorize the use of the requested return flows.

III. Relief Requested

For the reasons stated above, the Texas Parks and Wildlife Department respectfully urges the Administrative Law Judges to adopt TPWD's Exceptions.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of November, 2011, the original of the Texas Parks and Wildlife Department's Exceptions to the Proposal for Decision was served by electronic filing and deposit in the U.S. Mail upon the Chief Clerk of the Texas Commission on Environmental Quality and the State Office of Administrative Hearings, and a copy was served upon all persons listed on the attached service list via hand delivery, facsimile transmission, electronic transmission or deposit in the U.S. Mail.


Colette Barron Bradsby

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

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