

SOAH DOCKET NO. 582-13-3040  
TCEQ DOCKET NO. 2013-0174-WR

PETITION FOR THE APPOINTMENT § BEFORE THE STATE OFFICE  
OF A WATERMASTER IN THE BRAZOS §  
RIVER BASIN FILED BY THE BRAZOS § OF  
RIVER COALITION §  
§ ADMINISTRATIVE HEARINGS

**BRAZOS FAMILY FARMERS AND RANCHERS'**  
**REPLIES TO EXCEPTIONS**

TO THE HONORABLE ADMINISTRATIVE LAW JUDGES:

COMES NOW, Bradley B. Ware (“Ware”) and William and Gladys Gavranovic (“Gavranovics”), Comanche County Growers as interested persons only, all collectively referred to as the Brazos Family Farmers and Ranchers (“BFFR”), Protestants in the above styled and docketed water rights contested case hearing before the Texas Commission on Environmental Quality (“TCEQ” or “Commission”) and the State Office of Administrative Hearings (“SOAH”) regarding the appointment of a watermaster for the Brazos River Basin and respectfully file the following Replies to Exceptions to the Proposal for Decision. To that end, BFFR would respectfully state the following:

**I. INTRODUCTION**

The Administrative Law Judges (“ALJs”) timely issued their Proposal for Decision (“PFD”) in this case on December 17, 2013. In addition to BFFR, The Aligned Parties (“Petitioners” herein), the TCEQ Office of Public Interest Counsel (“OPIC”), Brazos River Authority (“BRA”), the TCEQ Executive Director (“ED”), the Bell County Group, and the Upper Brazos Coalition all timely filed exceptions to the PFD. In its Exceptions, BFFR noted the flawed legal premises, factual errors unsupported by the evidence of record, and lack of appropriate analysis in the ALJs presentation of this case in the PFD, which some of the other parties have also noted. Accordingly, BFFR offers the following responses to the Exceptions as stated below.

## **II. REPLIES TO EXCEPTIONS OF THE ALIGNED PARTIES AND THE OFFICE OF PUBLIC INTEREST COUNSEL**

The Aligned Parties provided a non-substantive edit of the Findings of Fact and Conclusions of Law, without bothering to provide the legal and factual analysis of the evidence of record absent from the PFD, or even to clarify or correct some of the obvious factual errors and omissions which would have made the PFD . Therefore, the Exceptions of the Aligned Parties suffer from the same legal and factual flaws as the PFD. Similarly, OPIC offered no legal or factual analysis in support of its own position or the PFD, and therefore provides no basis for reply beyond those previously stated in the BFFR Exceptions.

## **III. REPLIES TO EXCEPTIONS OF BRAZOS RIVER AUTHORITY AND THE EXECUTIVE DIRECTOR**

BRA and the TCEQ Executive Director, both took “neutral” positions in their pleadings, but then, at the hearing offered evidence and testimony in support of the appointment of a Watermaster. BRA’s exceptions find fault with the Aligned Parties position that BRA does not operate under the prior appropriation doctrine in its water supply contracts. The evidence, however, clearly established that BRA uses a credit system, and other means of compliance with the terms and conditions of its permits, which in and of themselves overlay systems operations provisions modifying the terms and conditions of its water rights. Neither BRA nor the Executive Director identified any way the appointment of a watermaster would or could address those contractual issues. Therefore, BRA’s exceptions to the findings regarding BRA’s specific operational non-compliance with the prior appropriation system should be denied as contrary to the evidence of record. That BRA finds fault with this factual determination of its non-compliance only highlights the absence of any information in the PFD or the record regarding how the appointment of a Brazos River Basin Watermaster would increase water rights compliance and enforcement as compared to the present resources of the entire TCEQ.

The TCEQ Executive Director’s Exceptions to the PFD also highlight the ED’s disingenuous and flawed participation in this contested case hearing. Why

did the TCEQ Executive Director only reveal its true position after the close of the record? Does the Executive Director no longer feel burdened with the requirement under 31 Tex. Admin. Code, §80.108, as set out below?

**RULE §80.108 Executive Director Party Status in Permit Hearings**

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The executive director is a party in all contested case hearings concerning permitting matters. The executive director's participation shall be to complete the administrative record and support the executive director's position developed in the underlying proceeding.

The Executive Director provided no guidance to the ALJs regarding their position on the existence of a threat or the determination of need, therefore all the parties were prejudiced at hearing by the assumption that the Executive Director either had no position, or were in favor of the appointment of a Watermaster for the entire basin. The Executive Director's evidence during the hearing presented by Dr. Alexander and quoted by the Aligned Parties and in the PFD was not equivocal on the question of threat and need, despite the position stated in the ED Exceptions. At the same time, BFFR agrees with the ED's Exceptions which seek to clarify the record regarding the efficacy of the current water rights enforcement conducted by the ED's staff and the "magical thinking" associated with the unspecified work of the Watermaster. If the PFD is modified and corrected to reflect that water rights have been heretofore appropriately administered in the Brazos River Basin, then there is no legal basis of adding the cost and government intrusion of a watermaster in any part of the basin, including the Upper, Lower and Middle Brazos River Basin.

More importantly, the actions of the Executive Director not just in this case, but on the issue of the appointment of a Brazos River Basin Watermaster, have had the effect of causing an unreasonable waste of time and resources to the water rights holders in the Brazos River Basin. Under Texas Water Code, §11.326, the Executive Director is empowered to appoint a watermaster after water rights have been adjudicated without any need for hearing, or need to satisfy Texas Water Code, §11.451. If the ED's position was that a watermaster was needed for all or part of the basin, then he could have exercised his discretion in appointing one and obviated the need for the ALJs' strained findings and lack of supporting evidence. The TCEQ Executive Director's coming out after the close of the record in a

contested case hearing in favor of results that could have been accomplished without resort to the hearing process makes a travesty of this entire hearing process, and only highlights the governmental disdain on the parts of the TCEQ and the SOAH ALJs for critically analyzing and enforcing the legal requirements of Tex. Water Code, §11.451 and §11.452.

#### **IV. REPLIES TO EXCEPTIONS OF THE BELL COUNTY GROUP AND UPPER BRAZOS COALITION**

BFFR agrees with the Exceptions of the Bell County Group and the Upper Brazos Coalition, and has no Replies to their Exceptions.

#### **V. SUMMARY AND CONCLUSIONS**

Brazos Family Farmers and Ranchers respectfully request the ALJs grant the Exceptions filed previously by BFFR, and those Exceptions of the TCEQ Executive Director, the Bell County Group, and the Upper Brazos Coalition, all of which identify factual and legal flaws in the PFD. Granting the Exceptions and making appropriate changes to the Proposal for Decision amending the Findings of Fact and Conclusions of Law in accordance with the statutory requirements of Texas Water Code, §11.451 and §11.452 should lead inescapably to a Final Order denying the Petitioners' request for a watermaster in the Brazos River Basin for the reasons stated by BFFR and other water rights holders throughout this proceeding.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served via hand delivery, facsimile, electronic mail, overnight mail, U.S. mail and/or Certified Mail Return Receipt Requested on all parties whose names appear on the attached mailing list on this the 16<sup>th</sup> day of January, 2014.

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