

DOCKET NO. 2006-1819-WR

2007 AUG 27 PM 3: 30

APPLICATION OF LOWER
COLORADO RIVER AUTHORITY
FOR PERMIT NO. 5731

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BEFORE THE
TEXAS COMMISSION
ENVIRONMENTAL QUALITY
CHIEF CLERKS OFFICE

EXECUTIVE DIRECTOR'S RESPONSE TO HEARING REQUESTS

The Executive Director of the Texas Commission on Environmental Quality (TCEQ) files this Response to twenty-three hearing requests filed on Lower Colorado River Authority's (LCRA) application to appropriate 853,514 acre-feet of water in the Colorado River Basin for municipal, industrial, and agricultural purposes. The Executive Director recommends that six requests be granted, and that the other 17 requests be denied.

BACKGROUND

The Lower Colorado River Authority (LCRA) seeks authorization to divert, store, and use those excess flood waters and those unappropriated flows of the Colorado River Basin downstream of O.H. Ivie Reservoir and downstream of Lake Brownwood in an amount not to exceed 853,514 acre-feet (AF) of water per year for use anywhere within its authorized water service area within the Colorado, Brazos, Brazos-Colorado, Lavaca, and the Lavaca-Colorado River and Coastal Basins and/or such other areas that hereinafter may be authorized by law for municipal, industrial, and agricultural purposes. LCRA seeks to divert and use the requested appropriation of water at nine existing diversion points downstream of the USGS Gage (08161000) at Columbus in Colorado County at a maximum combined diversion rate of 40,000 cfs. LCRA seeks to construct an unspecified number of off-channel reservoirs within Colorado, Wharton, and Matagorda Counties with a maximum combined storage capacity of 500,000 AF of water and maximum combined surface area of 25,408 acres.

PROCEDURAL HISTORY

LCRA filed this application with the TCEQ on March 31, 1999. The application was declared administratively complete on February 28, 2001, and mailed notice was issued to every water right holder in the Colorado River Basin on August 22, 2001. Published notice was provided in the Blanco County News, Blanco County on September 5, 2001; the Bastrop Advertiser, Bastrop County on September 8, 2001; the Brownwood Bulletin, Brown and Coleman Counties on September 11, 2001; the Highlander, Burnet County on September 7, 2001; the Clyde Journal, Callahan County on September 5, 2001; the Colorado County Citizen, Colorado County on September 5, 2001; the Fayette County Record, Fayette County on September 11, 2001; the Llano News, Llano County on September 5, 2001; the Daily Tribune, Matagorda County on September 7, 2001; the Brady Standard-Herald, McCulloch County on September 7, 2001; the Ballinger Ledger, Runnels County on September 6, 2001; the San Saba News, San Saba County on September 6, 2001; the Austin American Statesman, Travis County on September 5, 2001; and the Wharton Journal-Spectator, Wharton County on September 5, 2001. Requests for contested case hearing had to be filed by October 11, 2001. A public meeting was held on

September 26, 2006 in Austin, Texas, and the Executive Director's Response to Comments was filed on June 11, 2007.

This application has been pending for several years. It is a unique application which raised new complex hydrological and environmental issues. In this application, LCRA will take large amounts of water on an infrequent basis, a different diversion scheme than in other water right permits. Staff had to analyze how this would alter the river and to develop ways to protect the aquatic environment. Also, when the application was filed, the Colorado River Basin Water Availability Models (WAMs) had not been finished. These WAMs were necessary to analyze LCRA's request.

LEGAL AUTHORITY

The application is subject to the procedures for evaluating hearing requests on applications declared administratively complete on or after September 1, 1999 in 30 Texas Administrative Code, Chapter 55, Subchapter G (Sections 55.250-55.256).

Title 30, Sections 55.251(b) and (c) of the Texas Administrative Code specify that a hearing request must:

- (1) be in writing and be filed with the Office of the Chief Clerk during the public comment period;
- (2) give the name, address, and daytime telephone number of the person who files the request;
- (3) identify the person's personal justiciable interest affected by the application including a brief, but specific, written statement explaining in plain language the requestor's location and distance relative to the activity that is the subject of the application and how and why the requestor believes he or she will be affected by the activity in a manner not common to members of the general public; and
- (4) request a contested case hearing.

A hearing request must comply with requirement (1) above and must "substantially comply" with requirements (2) through (4). 30 TEX. ADMIN. CODE § 55.251(c).

A request for a contested case hearing must be granted if the request is made by an affected person and the request:

- (A) complies with the requirements of 30 TEX. ADMIN. CODE § 55.251;
- (B) is timely filed; and
- (C) is pursuant to a right to hearing authorized by law.

30 TEX. ADMIN. CODE § 55.255(b)(2).

An "affected person" is one who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application. An interest common to the general public does not constitute a justiciable interest. 30 TEX. ADMIN. CODE § 55.256(a).

For a group or an association, the hearing request may be granted if the group shows that one or more of the members would have standing to be a party in his or her own right, the interests the group seeks to protect are germane to the group's purpose, and the claim asserted would not require the presence of the individual members. 30 TEX. ADMIN. CODE § 55.252(a).

To determine whether a person is an affected person, all relevant factors must be considered, including but not limited to:

- (1) whether the interest claimed is one protected by the law under which the application will be considered;
- (2) distance restrictions or other limitations imposed by law on the affected interest;
- (3) whether a reasonable relationship exists between the interest claimed and the activity regulated;
- (4) the likely impact of the regulated activity on the health, safety, and use of property of the person;
- (5) the likely impact of the regulated activity on the use of the impacted natural resource by the person; and
- (6) for governmental entities, their statutory authority over or interest in the issues relevant to the application.

30 TEX. ADMIN. CODE § 55.256(c).

HEARING REQUESTS

All of the hearing requests meet the requirements of Section 55.251(c). Twenty-three hearing requests were filed for this application. Each request will be discussed separately.

1. South Texas Nuclear Operating Company (STPNOC): Although STPNOC has settled with LCRA, it is preserving its request for a hearing.

STPNOC operates the South Texas Project and is filing this hearing request on its own behalf and on behalf of the four owners of the South Texas Project (STP), the City of Austin, the City of San Antonio, Reliant Energy, Inc, and Central Power and Light Company. STP is financed by the owners of STP to operate electric generating facilities, including the water supply necessary to operate the power plants. STP owns Certificate

of Adjudication No. 14-5437 and CP-327, which was a partial assignment and transfer between several entities, with a right of reversion of certain interested in certain circumstances. STP was granted the right to divert 102,000 AF of water from the Colorado River for industrial purposes, and two off channel reservoirs. STP can consumptively use up to 80,125 AF per annum.

LCRA's proposed application includes diversion points and reservoir sites in Colorado Wharton and Matagorda Counties that are upstream of STP on the Colorado River. STP's facilities and diversion points are located in Matagorda County. STPNOC argues that LCRA's application could impact STPNOC and STP, both in terms of water supply needed for power, and investments. STNOC asserts that the City of Austin and the City of San Antonio have the kinds of responsibility, authority, and interest in the issues relevant to the application to be affected persons.

Recommendation: Grant as to STPNOC and the four owners. Under Tex. Water Code § 11.134(b)(3)(B), the TCEQ can only grant application that do not impair existing water rights or vested riparian rights. Because of STP's location, its water rights could potentially be impaired by this application.

2. Texas Parks and Wildlife (TPWD): TPWD is concerned that the diversion of unappropriated flows and excess flows on the Colorado River directly impact the water quality, instream uses of the river and freshwater inflow to bays and estuaries, which affects TPWD statutory obligation and ability to protect the fish and wildlife resources of the State. TPWD is concerned about the special conditions that will be placed in any permit for this environmental protection. It is also concerned that the application fails to identify specific locations of off channel reservoirs. This prevents TPWD from knowing what the impact of the reservoirs will be on fish and wildlife. And, TPWD is concerned that the notice did not identify whether the LCRA application seeks an interbasin transfer of water.

Recommendation: Grant. TPWD has a statutory right to be a party in any water rights hearing. Tex. Water Code §11.147(f).

3. Matagorda Bay Foundation (MBF): MBF is a non-profit organization dedicated to the protection and preservation of Matagorda Bay, and considers itself to be the steward of the bay. It asserts that the membership of the organization would be directly and profoundly affected by the granting of these water rights. Much of the water that LCRA desires to appropriate flows into Matagorda Bay. The membership of MBF is made up of users of the bay who also live and recreate on the bay. Al Garrison is a fishing guide on the bay, and owns a fishing cabin on the Colorado River. Jim Blackburn is a frequent user of the bay, fishing in his kayak. Henry Hamman and Phil Fitzgerald own homes in Port O'Connor and Mr. Hamman is a recreational user on the bay. David Burrow and Jim Gann have homes on the bay. Bill Balboa owns a home in the Palacios. Recent studies have shown the need for freshwater inflows for this bay.

Recommendation: Grant. The group has an interest in Matagorda Bay that is more

specific than that of the general population, and names several members who live near and recreate on the bay.

4. National Wildlife Federation, Gulf States Natural Resource Center (NWF): NWF states that it would be affected in a way that is not common to the general public because NWF is a national, non-profit organization composed of people dedicated to protecting fish and wildlife and the right to enjoy those resources. It contends that the application has the potential to cause tremendous harm to the fish and wildlife resources of the Colorado River, including Matagorda Bay and to NWF members. LCRA would be diverting all of the unappropriated flows and a large percentage of the flood flows in the lower portions of the Colorado River. LCRA's target flows (flows to maintain good productivity of representative species) for the river currently are only being met about 62% of the time. This will decrease, and impact water quality and fish and wildlife. Thus NWF's interests would be adversely affected. The impact on the bays and estuaries would be even worse because target freshwater inflows into Matagorda Bay are currently projected to be met only 36% of the time. Al Garrison is one member of NWF who owns property along the lower reaches of the river and would be adversely impacted. Jim Blackburn is a member who fishes and recreates on Matagorda Bay.

Recommendation: Grant. The group has an interest in the Colorado River and Matagorda Bay that is more specific than that of the general population, and names members who live on and recreate on the bay.

5. Sierra Club, Lone Star Chapter (SC): SC has 29 members who live in Colorado, Matagorda, and Wharton Counties, where the off-channel reservoirs will be, and 51 members who live in Calhoun, Victoria, and Jackson Counties, which adjoin the Matagorda Bay system. Several of these members recreate in this part of the Colorado River. Members include persons in other communities who recreate on the Colorado and its coastal areas. These opportunities for recreation will be adversely impacted by the application.

Recommendation: Deny. Although the group expresses a special interest in this application and states that several members recreate on this part of the river, it did not name a specific individual that could be affected.

6. Texas Chapter of the Coastal Conservation Association (CCA): CCA is a nonprofit organization of sportfishing enthusiasts and conservationist working to save the natural resources of the Texas coast. It has a strong interest in maintaining the freshwater inflows to estuaries necessary to support marine breeding habitats. CCA has 40,000 members, many of which fish in Matagorda Bay around the mouth of the Colorado River. Granting LCRA's application has the potential to greatly impact the flow of freshwater into the Bay, impacting the health of the bay. CCA includes an affidavit from Venable Proctor, who states that he is a member of CCA and owns a home in Port O'Connor. He spends half of his weekends a year there, fishing in Matagorda and other bays.

Recommendation: Grant. The group has an interest in the lower Colorado River and the

Matagorda Bay that is more specific than that of the general population, and includes a member who lives on and recreates on the bay.

7. The City of Austin: The City states that it has significant water rights throughout the Colorado River basin, including below O.H. Ivie Reservoir and above Matagorda Bay under Certificates of Adjudication Nos. 14-5471 and 14-5489. The City argues that it is an affected person because LCRA has not outlined the details of the permit, including the amount of water that will actually be diverted and used, the diversion point, or the intended uses. It states that this huge appropriation which would have a sweeping impact on the entire basin. The City also argues that the application could impact the City's right to its return flows, that it will impair the City's right to obtain future water, and it may have a negative impact on flows for the environment.

Recommendation: Grant. Although the City is upstream of the proposed project, it is below the Highland Lakes and therefore within the LCRA system operation of those lakes. Because of the possibility that this application could alter the timing of releases of water for the environment mandated by LCRA's Water Management Plan, this application could possibly affect the City's Certificates of Adjudication Nos. 14-5471 and 14-5489.

Hearing Requestors Nos. 8 through 22 are all on the San Saba River:

8. Willard Keith Bessent and Christine Bessent: The Bessents are water right holders (Certificates of Adjudication Nos. 14 - 1859, 1861, and 1862) on the San Saba River in the Colorado River Basin, and believe that their rights would be negatively affected if LCRA's permit is granted. They are located approximately 13 miles west of the City of San Saba. They assert that they will be impacted because there is no specific quantification of total flows that are allocated to each of the tributaries and mainstream of the Upper Colorado River.

9. James Cameron, Independent Executor of the Estate of Sara Jean Cameron: Mr. Cameron (as Executor) has a water right on the San Saba River, Certificate of Adjudication No. 14 - 1891-63. The water right is approximately 3 miles west of the City of San Saba. He asserts that he will be impacted because there is no specific quantification of total flows that are allocated to each of the tributaries and mainstream of the Upper Colorado River.

10. Riley Harkey: Mr. Harkey owns Certificate of Adjudication Nos. 14-1876, 1878, and 1877 on the San Saba River, approximately 5 miles west of the City of San Saba. He asserts that he will be impacted because there is no specific quantification of total flows that are allocated to each of the tributaries and mainstream of the Upper Colorado River.

11. Roger Ricky and Susana Lambert: The Lamberts own Certificate of Adjudication No. 14-1886 on the San Saba River, approximately 3 miles west of the City of San Saba. They assert that they will be impacted because there is no specific quantification of total

flows that are allocated to each of the tributaries and mainstream of the Upper Colorado River.

12. Patsy McConnell: Ms. McConnell owns Certificate of Adjudication No. 14-1907 on the San Saba River, approximately 3 or 4 miles northeast of the City of San Saba. She asserts that he will be impacted because there is no specific quantification of total flows that are allocated to each of the tributaries and mainstream of the Upper Colorado River.

13. Sue Mears, Executor of the Estate of Herbert H. Mears: Ms. Mears, as Executor, owns Certificate of Adjudication No. 14-1769, approximately 20 miles west of the City of Menard. She asserts that he will be impacted because there is no specific quantification of total flows that are allocated to each of the tributaries and mainstream of the Upper Colorado River.

14. Majorie Ann O'Banon Altizer: Ms. Altizer owns Certificate of Adjudication No. 14-1927 on the San Saba River, approximately ten miles east of the City of San Saba. She asserts that he will be impacted because there is no specific quantification of total flows that are allocated to each of the tributaries and mainstream of the Upper Colorado River.

15. Jimmie Bray: Mr. Bray owns Certificate of Adjudication No. 14 - 1832 on the San Saba River, ten miles east of the City of Menard. He claims he would be negatively affected by the application because there is no specific quantification of total flows that are allocated to each of the tributaries and mainstream of the Upper Colorado River. He also asserts that there is not enough water in the river in Menard County now. The Menard County Water Control and Improvement District No. 1 is currently in the process to study the feasibility of creating facilities to store water for the purpose of augmenting flows during drought years. Also, the District is in the process of creating a non-profit entity to purchase and lease existing water rights in the river to maintain streamflows for the environment and agricultural purposes during drought. LCRA's application could impair both of these efforts.

16. Wanda Ellis: Ms. Ellis holds Certificate of Adjudication No. 14 - 1823 in the San Saba River, approximately 6 miles east of the City of Menard. She claims she would be negatively affected by the application because there is no specific quantification of total flows that are allocated to each of the tributaries and mainstream of the Upper Colorado River. She also asserts that there is not enough water in the river in Menard County now. The Menard County Water Control and Improvement District No. 1 is currently in the process to study the feasibility of creating facilities to store water for the purpose of augmenting flows during drought years. Also, the District is in the process of creating a non-profit entity to purchase and lease existing water rights in the river to maintain streamflows for the environment and agricultural purposes during drought. LCRA's application could impair both of these efforts.

17. Bobby and Donald Huss own Certificate of Adjudication No. 14-1819 on the San Saba River, approximately 5 miles east of the City of Menard. They claim they would be negatively affected by the application because there is no specific quantification of total

flows that are allocated to each of the tributaries and mainstream of the Upper Colorado River. They also assert that there is not enough water in the river in Menard County now. The Menard County Water Control and Improvement District No. 1 is currently in the process to study the feasibility of creating facilities to store water for the purpose of augmenting flows during drought years. Also, the District is in the process of creating a non-profit entity to purchase and lease existing water rights in the river to maintain streamflows for the environment and agricultural purposes during drought. LCRA's application could impair both of these efforts.

18. John and Katherine Kniffen say that they own Certificate of Adjudication No. 14-177, on the San Saba River, approximately 2 ½ miles east of the City of Menard. (Staff has been unable to locate a water right for the Kniffens.) They claim they would be negatively affected by the application because there is no specific quantification of total flows that are allocated to each of the tributaries and mainstream of the Upper Colorado River. They also assert that there is not enough water in the river in Menard County now. The Menard County Water Control and Improvement District No. 1 is currently in the process to study the feasibility of creating facilities to store water for the purpose of augmenting flows during drought years. Also, the District is in the process of creating a non-profit entity to purchase and lease existing water rights in the river to maintain streamflows for the environment and agricultural purposes during drought. LCRA's application could impair both of these efforts.

19. Gary Land: Mr. Land owns certificate of Adjudication No. 14-1806 on the San Saba River, approximately .1 miles west of the City of Menard. He claims he would be negatively affected by the application because there is no specific quantification of total flows that are allocated to each of the tributaries and mainstream of the Upper Colorado River. He also asserts that there is not enough water in the river in Menard County now. The Menard County Water Control and Improvement District No. 1 is currently in the process to study the feasibility of creating facilities to store water for the purpose of augmenting flows during drought years. Also, the District is in the process of creating a non-profit entity to purchase and lease existing water rights in the river to maintain streamflows for the environment and agricultural purposes during drought. LCRA's application could impair both of these efforts.

20. Jerry Rambo: Mr. Rambo has Certificate of Adjudication No. 14-1811 on the San Saba River, approximately 3 ½ miles east of the City of Menard. He claims he would be negatively affected by the application because there is no specific quantification of total flows that are allocated to each of the tributaries and mainstream of the Upper Colorado River. He also asserts that there is not enough water in the river in Menard County now. The Menard County Water Control and Improvement District No. 1 is currently in the process to study the feasibility of creating facilities to store water for the purpose of augmenting flows during drought years. Also, the District is in the process of creating a non-profit entity to purchase and lease existing water rights in the river to maintain streamflows for the environment and agricultural purposes during drought. LCRA's application could impair both of these efforts.

21. George and Jean Sultemeier: The Sultemeiers own Certificate of Adjudication No. 14-1811, which is approximately 3 ½ miles east of the City of Menard. They claim they would be negatively affected by the application because there is no specific quantification of total flows that are allocated to each of the tributaries and mainstream of the Upper Colorado River. They also assert that there is not enough water in the river in Menard County now. The Menard County Water Control and Improvement District No. 1 is currently in the process to study the feasibility of creating facilities to store water for the purpose of augmenting flows during drought years. Also, the District is in the process of creating a non-profit entity to purchase and lease existing water rights in the river to maintain streamflows for the environment and agricultural purposes during drought. LCRA's application could impair both of these efforts.

22. Carl S. Menzies: Mr. Menzies owns Certificate of Adjudication No. 14-6814 on the San Saba River, approximately 2 ½ miles east of the City of Menard. He claims he would be negatively affected by the application because there is no specific quantification of total flows that are allocated to each of the tributaries and mainstream of the Upper Colorado River. He also asserts that there is not enough water in the river in Menard County now. The Menard County Water Control and Improvement District No. 1 is currently in the process to study the feasibility of creating facilities to store water for the purpose of augmenting flows during drought years. Also, the District is in the process of creating a non-profit entity to purchase and lease existing water rights in the river to maintain streamflows for the environment and agricultural purposes during drought. LCRA's application could impair both of these efforts.

Recommendations for Nos. 8 through 22: Deny. These water right holders are many miles upstream of the proposed diversion points and off-channel reservoirs and on an upstream tributary of the Colorado River. These water rights will be senior to LCRA's permit, and therefore, cannot be called on for water. These water right holders cannot be harmed by this application.

23. Sand Supply: Sand Supply operates a gravel quarry near Columbus, Texas. It has an application pending for a temporary permit to divert up to 250 AF per year from the Colorado River. Sand Supply also argued that the commission should dismiss deny the application because it does not include required information for an application (location of facilities) and does not state whether it includes an interbasin transfer as part of its request.

Recommendation: Deny. Sand Supply was granted the temporary permit and it has expired.

CONCLUSION

The Executive Director recommends that the hearing requests of South Texas Project, and the four owners, Matagorda Bay Foundation, Texas Parks and Wildlife Department, National Wildlife Federation, Texas Chapter of the Coastal Conservation Association,

and the City of Austin be granted, and the remaining 17 hearing requests be denied.

Respectfully submitted,

TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

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CERTIFICATE OF SERVICE

I hereby certify that on this day, August 27, 2007, I filed the original with the Chief Clerk of the Texas Commission on Environmental Quality and that a true and correct copy of the foregoing was mailed via first class mail to the persons on the attached mailing list.



Robin Smith
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DOCKET NO. 2006-1819-WR, PERMIT NO. WRPERM 5731

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*See attached for list of all Request(s) and
Comment(s).*

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