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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

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August 27, 2007

LaDonna Castañuela, Chief Clerk
Texas Commission on Environmental Quality
Office of the Chief Clerk (MC-105)
P.O. Box 13087
Austin, Texas 78711-3087

2007 AUG 27 PM 2:29
CHIEF CLERKS OFFICE
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

**RE: LOWER COLORADO RIVER AUTHORITY
TCEQ DOCKET NO. 2006-1819-WR**

Dear Ms. Castañuela:

Enclosed for filing is the Public Interest Counsel's Response to Requests for Hearing in the above-entitled matter.

Sincerely,

A handwritten signature in cursive script that reads "Emily A. Collins".

Emily A. Collins, Attorney
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cc: Mailing List

Enclosure

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TCEQ DOCKET NO. 2006-1819-WR

**IN THE MATTER OF THE
APPLICATION OF THE LOWER
COLORADO RIVER AUTHORITY
FOR WATER RIGHTS PERMIT NO.
WRPERM 5731**

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**BEFORE THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY**

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S
RESPONSE TO REQUESTS FOR HEARING**

COMES NOW, the Office of Public Interest Counsel ("OPIC") of the Texas Commission on Environmental Quality (the "Commission" or "TCEQ") and files this Response to Requests for Hearing in the above-referenced matter, and would respectfully recommend referring this matter to the State Office of Administrative Hearings ("SOAH").

I. INTRODUCTION

The Lower Colorado River Authority ("Applicant" or "LCRA") applied to TCEQ on March 31, 1999, for a Water Right Permit to appropriate 853,514 acre-feet of water per year anywhere within its authorized water service area within the Colorado, Brazos, Brazos-Colorado, Lavaca, and the Lavaca-Colorado River and Coastal Basins for municipal, industrial, and agricultural purposes. LCRA's application requests authorization to divert and use excess flood waters and unappropriated flows of the Colorado River Basin downstream of O.H. Ivie Reservoir and downstream of Lake Brownwood through nine existing diversion points in the amount mentioned above at a maximum combined diversion rate of 40,000 cfs. In addition, LCRA seeks to construct off-channel reservoirs within Colorado, Wharton, and Matagorda Counties with a maximum combined storage capacity of 500,000 acre-feet of water and maximum combined surface area of 25,408 acres.

The Executive Director ("ED") declared LCRA's application administratively complete on February 28, 2001. The Applicant published notice of its water rights application in the newspapers listed below on the dates indicated:

- *Brownwood Bulletin*, a newspaper of general circulation in Brown and Coleman Counties, on September 11, 2001;
- *Blanco County News*, a newspaper of general circulation in Blanco County, on September 5, 2001;
- *Bastrop Advertiser*, a newspaper of general circulation in Bastrop County, on September 8, 2001;
- *The Highlander*, a newspaper of general circulation in Burnet County, on September 7, 2001;
- *The Clyde Journal*, a newspaper of general circulation in Callahan County, on September 5, 2001;
- *The Colorado County Citizen*, a newspaper of general circulation in Colorado County, on September 5, 2001;
- *The Fayette County Record*, a newspaper of general circulation in Fayette County, on September 11, 2001;
- *The Llano News*, a newspaper of general circulation in Llano County, on September 5, 2001;
- *The Daily Tribune*, a newspaper of general circulation in Matagorda County, on September 7, 2001;
- *The Brady Standard-Herald*, a newspaper of general circulation in McCulloch County, on September 7, 2001;
- *The Ballinger Ledger*, a newspaper of general circulation in Runnels County, on September 6, 2001;
- *The San Saba News*, a newspaper of general circulation in San Saba County, on September 6, 2001;
- *The Austin American-Statesman*, a newspaper of general circulation in Travis County, on September 5, 2001; and
- *The Wharton-Journal-Spectator*, a newspaper of general circulation in Wharton County, on September 5, 2001.

The comment period ended on September 26, 2006, which is the same date that a public meeting was held. The hearing request period ended on July 18, 2007. TCEQ received twenty-three hearing requests from people with environmental flow interests and water rights holders in the Colorado River Basin concerned about water availability, instream and bay and estuary flows, and the effects of the requested appropriation on the hearing requestors' ability to divert

and use their own water rights. Pursuant to the analysis provided below, OPIC recommends granting the hearing requests of the Texas Parks and Wildlife Department, STP Nuclear Operating Co., the Matagorda Bay Foundation, the Texas Chapter of the Coastal Conservation Association, the City of Austin, and the National Wildlife Federation and referring this matter to SOAH to determine if LCRA's application meets the requirements of applicable law.

II. APPLICABLE LAW

Persons seeking to appropriate state water or to begin construction of work designed for the storage, taking or diversion of water must first obtain a permit from the Commission to make the appropriation. TEX. WATER CODE ("TWC") § 11.121 (2006). Applications to appropriate unappropriated state water must be made pursuant to the requirements in TWC section 11.124. In accordance with TWC section 11.134, the Commission must consider the following issues in its decision to grant or deny the application: whether unappropriated water is available; whether the proposed appropriation is intended for a beneficial use, does not impair existing water rights or vested riparian rights, is not detrimental to the public welfare, considers assessments performed under sections 11.147(d) and (e) and sections 11.150, 11.151, and 11.152, and addresses water supply needs consistent with the state and applicable regional water plans; and whether the applicant will avoid waste and achieve water conservation. TWC § 11.134(b) (2006).

A. Requirements for Contested Case Hearing Requests

This application was declared administratively complete on February 28, 2001. As the application was declared administratively complete after September 1, 1999, it is subject to the

requirements of Title 30, Chapter 55, Subchapter G, sections 55.250-55.256 of the Texas Administrative Code ("TAC"). Under those provisions, a contested case hearing may be requested by the Commission, the Executive Director, the Applicant, and affected persons. 30 TAC § 55.251(a).

A hearing requestor must make their request in writing 30 days after the publication of the notice of the application and identify the requestor's personal justiciable interest affected by the application, specifically noting the "requestor's location and distance relative to the activity" 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." 30 TAC § 55.251(b), (c); 30 TAC § 295.171.

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." 30 TAC § 55.256(a). 30 TAC section 55.256(c) provides relevant factors to be considered in determining whether a person is affected. These factors include, but are 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) Likely impact of the regulated activity on the health, safety, and use of property of the person;
- (5) Likely impact of the regulated activity on 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 TAC § 55.256(c). In addition, governmental entities with authority under state law over issues contemplated by the application may be considered affected persons. 30 TAC § 55.256(b).

Furthermore, pursuant to 30 TAC section 55.252(a), a request for hearing from a group or association must demonstrate the following:

- (1) one or more members of the group would otherwise have standing to request a hearing in their own right;
- (2) the interests the group seeks to protect are germane to the organization's purpose; and
- (3) neither the claim asserted nor the relief requested requires the participation of the individual members in the case.

III. HEARING REQUESTS

A. Upstream Senior Water Rights Holders Along the San Saba River Have Not Shown Affected Person Status.

Several hearing requestors (hereinafter the "San Saba hearing requestors") submitted a form letter to the Commission stating that they have water rights on the San Saba River within a certain amount of miles from either the City of San Saba or the City of Menard.¹ The hearing requestors who identify their water right in proximity to the City of San Saba state an interest in the application based on a current lack of quantification of total flows allocated to each of the tributaries and main stem of the Upper Colorado River. The hearing requestors who identify their water right in relation to the City of Menard state the same concern and also express concern that a future application to divert and store excess flood waters for themselves has been contemplated by the Menard County Water Control and Improvement District No. 1 (MCWCID). The latter hearing requestors also state a concern with the ability to donate, sell, or lease their water rights to the MCWCID if LCRA's request is granted.

¹ The San Saba hearing requestors include the following: Christine Bessent and Willard Keith Bessent, the Estate of Sara Jean Cameron, Riley C. Harkey, Ricky and Susana Lambert, Patsy McConnell, Marjorie Ann O'Banon Altizer, Jimmie L. Bray, Wanda Ellis, Donald and Bobby Huss, John and Katherine Kniffen, Gary P. Land, the Estate of Herbert H. Mears, Jerry M. Rambo, George Sullemeier, and Carl S. Menzies.

A person or group seeking standing does not need to show that they will ultimately prevail on the merits of their assertion that their water rights will be impaired to secure administrative standing in this proceeding, but only needs to show that they will potentially suffer harm or have a justiciable interest related to the proceedings.² However, OPIC cannot find that the hearing requestors with water rights along the San Saba River have demonstrated affected person status because the San Saba hearing requestors hold upstream water rights that appear to be senior to LCRA's requested appropriation. OPIC cannot envision a scenario in which the San Saba hearing requestors would be potentially affected by a distant downstream diversion when LCRA's proposed appropriation is junior to the hearing requestors, and the hearing requests do not describe any such potential impairment. Therefore, OPIC recommends that the Commission deny the contested case hearing requests of the upstream water rights holders listed above.

B. The Hearing Requests of the Texas Parks and Wildlife Department, STP Nuclear Operating Co., the Matagorda Bay Foundation, the Texas Chapter of the Coastal Conservation Association, the City of Austin, and the National Wildlife Federation Demonstrate Affected Person Status.

TCEQ received timely hearing requests contesting LCRA's application from the Sierra Club, Sand Supply, the Texas Parks and Wildlife Department ("TPWD"), STP Nuclear Operating Co. ("STP Nuclear"), the Matagorda Bay Foundation ("MBF"), the Texas Chapter of the Coastal Conservation Association ("CCA"), the City of Austin (the "City"), and the National Wildlife Federation ("NWF").

² *Heat Energy Advanced Tech. v. West Dallas Coalition for Envnt'l Justice*, 962 S.W.2d 288 (Tex.App.—Austin 2000, pet. disp'd).

The Texas Water Code allows TPWD to participate as a party in TCEQ contested case hearings regarding applications for permits to store, take or divert water upon request, and the Commission *must* consider all information, evidence, and testimony presented by TPWD.³ In addition, TPWD's status as an affected person is demonstrated by the fact that it is a governmental entity with authority under state law over the protection of the state's fish and wildlife resources, including maintenance of adequate instream flows and freshwater inflows for habitat protection,⁴ which are issues contemplated by the application.⁵ TPWD's concerns regarding water quality, instream uses, and freshwater inflows are protected by the law under which the application will be considered,⁶ including TWC sections 11.147, 11.152, and 30 TAC sections 297.53, 297.56. Furthermore, a reasonable relationship exists between the interests claimed and the activity regulated as the proposed appropriation may affect fish and wildlife habitat.⁷ Based on this showing, OPIC recommends that the Commission find that TPWD has demonstrated that it is an affected person entitled to a hearing.

The City of Austin states in its hearing request that it has water rights below O.H. Ivie Reservoir and above Matagorda Bay, an area which lies downstream of the proposed diversion area. The City states concern that LCRA's proposed appropriation may include the City's current and future return flows that the City intends to reuse. The Commission may grant an

³ TWC § 11.147(f) (2006).

⁴ TEX. PARKS AND WILDLIFE CODE § 12.001.

⁵ 30 TAC § 55.256(b).

⁶ 30 TAC § 55.256(c)(1).

⁷ 30 TAC § 297.53; 30 TAC § 55.256(c)(3), (4), (5).

application only when the proposed use will not impair existing water rights.⁸ Therefore, the City's interest in the potential adverse effects to its existing water rights is protected by the law under which the application will be considered.⁹ Furthermore, a reasonable relationship exists between the interest claimed and the activity regulated as the City states that it has senior water rights that may be impacted by the requested appropriation.¹⁰ Similarly, the proposed appropriation may affect water availability¹¹ and, thereby, the regulated activity may impact the City's use of its return flows.¹² The City also states concern with the potential effects on instream uses and bay and estuary flows, which are also interests protected by the law under which the application will be considered.¹³ Based on this showing, OPIC recommends that the Commission find that the City of Austin has demonstrated that it is an affected person entitled to a hearing.

Sand Supply requests a contested case hearing based on its interest in an upstream temporary water rights permit that was declared administratively complete at approximately the same time of the hearing request, which was date-stamped October 15, 2001. However, the Commission may only authorize temporary permits for a maximum term of three years.¹⁴ Therefore, it appears that Sand Supply's only stated interest in the LCRA application at issue has

⁸ TWC § 11.134(b)(3)(B).

⁹ 30 TAC § 55.256(c)(1).

¹⁰ 30 TAC § 55.256(c)(3).

¹¹ 30 TAC § 297.42.

¹² 30 TAC § 55.256(c)(4), (5).

¹³ 30 TAC § 55.256(c)(1); TWC §§ 11.147, 11.152; 30 TAC §§ 297.53, 297.56;

¹⁴ 30 TAC § 297.13(b) (2006).

expired, and, as such, is no longer protected by the law under which the application will be considered.¹⁵ Therefore, OPIC recommends that the Commission deny Sand Supply's hearing request.

As groups or associations, Sierra Club, MBF, CCA, and NWF must show associational standing in accordance with the requirements of 30 TAC section 55.252. Each of the associations, with the exception of the Sierra Club, identify a member (or members) of their respective groups that have standing to request a hearing in their own right. While the Sierra Club states that it has several members who recreate on the Colorado River and at the mouth of the Colorado, and those members would seem to be protected by Texas' laws on instream uses,¹⁶ the Sierra Club does not describe those members and their interests with sufficient specificity for OPIC to conclude that they are individuals entitled to a hearing in their own right. Therefore, OPIC recommends at the time of filing this Response that the Commission deny the Sierra Club's hearing request. However, OPIC requests, in accordance with 30 TAC section 55.252(b), that the Sierra Club provide an explanation of how it meets the requirements of 30 TAC section 55.252(a), and particularly the requirement that it describe one or more members of the group that would otherwise have standing to request a hearing in their own right.

¹⁵ 30 TAC § 55.256(c)(1).

¹⁶ 30 TAC § 297.56.

MBF,¹⁷ CCA,¹⁸ and NWF¹⁹ each specify members of their respective groups who regularly fish and recreate in Matagorda Bay and the mouth of the Colorado. The individual members interests, which are also reflective of their respective groups' interests as shown in the hearing requests, are protected by Texas' instream use and habitat mitigation rules.²⁰ As individuals who regularly and actively recreate and fish in the specific areas potentially affected by LCRA's excess flows application, the members' interests are distinct from those of the general public.²¹ Furthermore, a reasonable relationship exists between the recreation and fish habitat protection interests claimed and the activity regulated, as the proposed appropriation may affect fish and wildlife habitat as well as instream uses.²² Therefore, MBF, CCA, and NWF have each identified members of their groups with standing to request a hearing in their own right.

In addition MBF, CCA, and NWF's respective purposes in the protection and preservation of Matagorda Bay, sport-fishing and the conservation of Texas' coastal waters and

¹⁷ MBF's members who have standing in their own right include the following: Al Garrison, who owns a fishing cabin on the banks of the Colorado River and is a fishing guide operating out of Matagorda who is concerned that the recreational fishing in Matagorda Bay will be negatively affected; Jim Blackburn, who frequently uses Matagorda Bay while fishing from his kayak in Parker's Cut and the Mouth of the Colorado River and Oyster Lake; Henry Hamman, who owns a house in Port O'Connor and is a recreational fisherman of the lower Matagorda Bay system.

¹⁸ CCA member Venable B. Proctor states that he is the Vice President of CCA Texas and the chairman of the Governmental Affairs Committee. Mr. Proctor states that he owns a home in Port O'Connor, where he spends at least one-half of his weekends per year, and regularly fishes in Matagorda Bay.

¹⁹ NWF's members who have standing in their own right include the following: Al Garrison, who owns property "along the lower reaches of the [Colorado] River and would be adversely affected by reduced flows;" and Jim Blackburn, who "fishes and recreates in Matagorda Bay near the mouth of the Colorado River."

²⁰ 30 TAC §§ 297.53, 297.56.

²¹ 30 TAC § 55.256(a).

²² 30 TAC § 297.53; 30 TAC § 55.256(c)(3), (4), (5).

freshwater inflows, and the protection of stream and river flows to support fish and wildlife resources in Texas are each directly related to their interests in ensuring that LCRA's proposed appropriation does not impair instream and estuary flow conditions necessary to protect fish and wildlife.²³ Therefore, OPIC recommends that the Commission grant the hearing requests of MBF, CCA, and NWF.

STP Nuclear requested a hearing based on their water rights interest in the South Texas Project, which has diversion points downstream of LCRA's requested diversion area. STP Nuclear states concern that LCRA's proposed appropriation may interrupt an otherwise dependable water supply at STP Nuclear's existing diversion points, which would adversely affect the supply of power to their customers. The Commission may grant an application only when the proposed use will not impair existing water rights.²⁴ Therefore, STP Nuclear's interest in the potential adverse effects to its existing water rights is protected by the law under which the application will be considered.²⁵ Furthermore, a reasonable relationship exists between the interest claimed and the activity regulated as STP Nuclear states that it has downstream senior water rights that may be impacted by the requested appropriation.²⁶ Similarly, the proposed appropriation may affect water availability²⁷ and, thereby, the regulated activity may impact STP Nuclear's use of its water rights.²⁸ Based on this showing, OPIC recommends that the

²³ 30 TAC § 55.252(a)(2).

²⁴ TWC § 11.134(b)(3)(B).

²⁵ 30 TAC § 55.256(c)(1).

²⁶ 30 TAC § 55.256(c)(3).

²⁷ 30 TAC § 297.42.

²⁸ 30 TAC § 55.256(c)(4), (5).

Commission find that STP Nuclear has demonstrated that it is an affected person entitled to a hearing.

IV. CONCLUSION

For the reasons set forth above, the Office of Public Interest Counsel respectfully recommends that the Commission grant the contested case hearing requests of the Texas Parks and Wildlife Department, STP Nuclear Operating Co., the Matagorda Bay Foundation, the Texas Chapter of the Coastal Conservation Association, the City of Austin, and the National Wildlife Federation and refer this matter to SOAH for a contested case hearing to determine whether LCRA's application meets the requirements of applicable law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 27, 2007, the original and eleven true and correct copies of the Office of Public Interest Counsel's Response to Requests for Hearing were filed with the Chief Clerk of the TCEQ and a copy was served to all persons listed on the attached mailing list via hand delivery, facsimile transmission, Inter-Agency Mail or by deposit in the U.S. Mail.



Emily A. Collins

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