Kathleen Hartnett White, *Chairman*
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H. S. Buddy Garcia, *Commissioner*
Glenn Shankle, *Executive Director*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

June 18, 2007

TO: Person on the attached mailing list.

RE: Lower Colorado River Authority
TCEQ Permit No. 5731

Enclosed is a copy of the Executive Director's response to public comments.

Should you have any questions, please contact Cynthia Zapata of the Texas Commission on Environmental Quality's Office of the Chief Clerk (MC 105) at (512) 239-4517.

Sincerely,

LaDonna Castañuela
Chief Clerk

LDC/cz

Enclosure

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for
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PROPOSED WATER RIGHT PERMIT NO. 5731

APPLICATION OF LOWER COLORADO RIVER AUTHORITY FOR PERMIT NO. 5731	§ § §	BEFORE THE TEXAS COMMISSION ENVIRONMENTAL QUALITY

EXECUTIVE DIRECTOR'S RESPONSE TO COMMENTS

The Executive Director of the Texas Commission on Environmental Quality (TCEQ) files this Response to Comments made at the September 26, 2006, public meeting on the 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 responds to the written and verbal comments made at the meeting and written comments received prior to that meeting and to the draft permit.

BACKGROUND

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 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. At the time of this Response to Comments, the Executive Director's staff had conducted its technical review and prepared a draft permit.

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 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 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 acre-feet of water and maximum combined surface area of 25,408 acres.

COMMENTERS

The following persons provided written and/or oral comment:

The City of Austin
STP Nuclear Operating Company
Connie Adams
George and Jean Sultemeier
Sloan Livestock, Ltd.
Del Venado Ranch
Ray Orson
Danny Pennington
Rob Bagley
Craigan Johnson
Eleanor Owen Johnson
Jerry Johnson
Christine Bagley
Roger Edmondson
J.A. Davis
James Cameron
E.L. Byrd
Dean Bagley, Jr.
Max Mahan
Texas Parks & Wildlife Department
Patsy McConnell
Jerry M. Rambo
Estate of Herbert H. Mears
Carl Menzies
Marjorie Ann O'Banon Altizer
Christine and Willard Keith Bessent
Gary P. Land
Jimmie L. Bray
James T. Cameron
Wanda Ellis
Roger Ricky Lambert
Susana Lambert
Riley C. Harkey
John & Katherine Kniffin
Donald L. and Bobby M. Huss
Matagorda Bay Foundation

Nacie Kniffin
Vern Hancock
National Wildlife Federation
Sierra Club
Texas Chapter of the Coastal Conservation Association
United States Department of Interior, Fish & Wildlife Service
Elsie Millican
Sand Supply, a division of Campbell Concrete and Materials, L.P.

RESPONSE TO COMMENTS

MISCELLANEOUS

COMMENT NO. 1. Sand Supply comments that LCRA's application does not include maps that show the location of facilities, including reservoirs, a violation of Texas Water Code (TWC) Section 11.125.

RESPONSE NO. 1: The Executive Director responds that the application did not request specific reservoirs but does request authorization for 500,000 acre-feet of off-channel storage. The permit includes a special condition requiring that prior to diversion and storage of the authorized water, the LCRA must apply for and be granted authorization to store water in particular off-channel reservoirs.

COMMENT NO. 2: Sand Supply comments that LCRA's application asks to use water outside the Colorado River Basin and does not include the information required for an interbasin transfer in TWC Section 11.085.

RESPONSE NO. 2: The Executive Director responds that the application requests to use the water within LCRA's service area in other basins than the Colorado River Basin and that the transfer is exempt pursuant to TWC Section 11.085(v)(3-4). These provisions allow interbasin transfers without meeting all of the requirements of Section 11.085 if the water is going to an adjoining coastal basin, or if beginning and end points are all within a county that is partially within both basins.

COMMENT NO. 3: The National Wildlife Federation (NWF) comments that the draft permit should expressly limit the area of authorized use to the authorized water service area in existence at the time of the permit issuance. There is ambiguity about the use authorization in the permit because LCRA seeks authorization for use within its service area that may expand in the future.

NWF also comments that consideration of the draft permit be reserved until LCRA fully evaluates projects involving the water in this permit, such as a project to move water from the Colorado River to San Antonio, are finalized to avoid duplicative contested case hearings.

RESPONSE NO. 3: The Executive Director responds that staff must evaluate the application as submitted and cannot abate applications because projects may change in the future. Staff does not consider applications that may be filed in the future when they perform technical reviews of applications. The application did not request authorization to move water from the Colorado River Basin to the San Antonio River Basin; therefore, any issues related to this were not considered during technical review.

COMMENT NO. 4: The Sierra Club comments that issuance of the permit is premature without specific off-channel reservoir locations in Special Condition 6.G. Without specific locations, the Commission cannot conduct a proper environmental analysis of the terrestrial mitigation and other related issues. If TCEQ proceeds without specific locations, the agency must make it explicit that the permit must be amended to expressly authorize specific off-channel reservoirs before diversions take place under this permit.

RESPONSE NO. 4: The Executive Director responds that the permit includes a special condition requiring LCRA to apply for and be granted authorization for specific off-channel reservoirs prior to diverting the authorized water. Once LCRA applies for specific reservoirs, an environmental analysis will be conducted for that application.

COMMENT NO. 5: The Sierra Club supports a permit condition that requires the applicant and successive wholesale customers to develop and implement conservation measures. However, specific requirements need to be developed and included in the permit such as requirements that customers purchasing the waters obtained as a result of this permit be required to adopt conservation measures or goals as aggressive as those already adopted by SAWS within its retail service areas. Since water obtained by this permit will be transferred to another river basin, the water conservation requirements of the permit should be the "highest practicable levels of water conservation and efficiency achievable . . .".

RESPONSE NO. 5: The requirement of "highest practicable levels of water conservation and efficiency achievable" is in TWC Section 11.085, the interbasin transfer statute. The Executive Director responds that the application did not request an interbasin transfer to the San Antonio River Basin. See response to Comment No. 3, above. If, in the future, LCRA applies for this authorization, the applicable water conservation requirements will be included as a special condition in the permit. The interbasin transfer LCRA has applied for is exempt from the provision of Section 11.085.

COMMENT NO. 6: The Sierra Club comments that the diversion points in this draft permit and special conditions related to the diversion points are unclear. The diversion points in 3.A. (iii), (iv), and (vi) state that water will be drawn from existing off-channel reservoirs or Eagle Lake, but this permit seeks to divert water for storage in new off-channel reservoirs. It is also unclear how the diversion point identified in 3.A.(i) can be on the west bank of the Colorado, while the diversion point in 3.A.(v) is described as being on the east bank, despite the fact that they have the same latitude and 3.A.(v) has a longitude that is further west than 3.A.(i).

RESPONSE NO. 6: The Executive Director responds that the application requests not only the diversion from the off-channel reservoirs or Eagle Lake (points 3.A. (iii, iv and v)) but diversions from the Colorado River to those points (points 3.A. ii and vi). The Executive Director agrees that some of the latitude and longitude points in the draft permit are incorrect. These points will be corrected.

COMMENT NO. 7: The Sierra Club comments that it has concerns regarding the vagueness of this draft permit in regards to the location, quantity, and manner in which water authorized by this permit would be used.

RESPONSE NO. 7: The Executive Director responds that the permit authorizes a maximum diversion from the river (853,514 acre-feet) and a maximum diversion from off-channel storage (327,591 acre-feet). The water may be diverted from the authorized diversion points for municipal, industrial and agricultural purposes. As stated above, LCRA must file and amendment with the TCEQ providing location(s) for the off-channel reservoir(s) prior to diversion and storage of the authorized water.

COMMENT NO. 8: Sierra Club comments that the allocation of water does not meet the test set forth in 11.134(b)(3)(E) of the Texas Water Code that requires that appropriations must be consistent with the state water plan and regional water plan unless the Commission determines that conditions warrant a waiver of that requirement. The conditions do not seem to warrant a waiver of the requirement.

RESPONSE NO. 8: The Executive Director responds that staff first performed a review of this application based on the then current state and regional water plans. Since the time of that initial review, new state and regional water plans have been adopted. The staff has since reviewed the application for consistency with the current state and regional plans. Staff found that the application was not inconsistent with the new plans. Please see the addendum to the water conservation plan technical memo for information on the staff's position on consistency with the state and regional water plans.

COMMENT NO. 9: The City of Austin asks what accounting method will be used, which gaging stations will be used, and requests any other relevant information that will be used to ensure that water originating upstream of O.H. Ivie Reservoir and Lake Brownwood will not be diverted.

RESPONSE NO. 9: The Executive Director responds that Special Condition H. of the permit prohibits LCRA from making a priority call on water right owners upstream of Lakes Ivie and Brownwood. Once any unappropriated water has passed these points, and is available at LCRA's requested diversion points, it may be diverted by LCRA under Permit 5731 subject to applicable environmental requirements and to the extent that water is not needed by downstream senior water rights.

COMMENT NO. 10: Texas Parks and Wildlife Department (TPWD) is concerned that the notice did not identify whether this application is for an interbasin transfer. United States Department of the Interior, Fish and Wildlife Service (F&W) comment that if this is an interbasin transfer, more information regarding impacts to the natural environment resulting from interbasin transfers is required before this application can be granted.

RESPONSE NO. 10: The Executive Director responds that the notice of the application specified the place of use as LCRA's service area, which includes other basins. The transfer is exempt pursuant to TWC Section 11.085(v)(3-4). See Response to Comment No. 2. The application did not request an interbasin transfer to the San Antonio River Basin. Therefore, any issues related to a transfer to the San Antonio River Basin were not considered during technical review of the application.

COMMENT NO. 11: NWF comments that the water conservation measures in the draft permit are unnecessarily vague and that there are no measurable performance measures, BMP, or actual quantified use goal that might be preferable. If LCRA's existing conservation programs are determined to be adequate, the basic components of those programs should be established as the minimum requirements.

RESPONSE NO. 11: The Executive Director responds that the Executive Director has performed a technical review of the applicant's current water conservation plan. Staff found that the application complies with the TCEQ conservation rules in 30 TAC Chapter 288. Please see the addendum to the water conservation technical memo for staff's review of the current water conservation plan that includes quantified per capita water use goals.

COMMENT NO. 12: The Sierra Club comments that granting this application may impair the recreational and other interests of its members.

RESPONSE NO. 12: The Executive Director responds that, as noted in the staff environmental analysis, the Colorado River downstream of Columbus is currently used for moderate recreational use, mostly small boats, fishing and swimming. The proposed draft permit contains special conditions requiring, among other things, that the applicant's diversions not reduce stream-flow to less than a target flow at Columbus and Wharton. The proposed target flows vary by month, but the lowest target flow at Columbus is 200 cfs and the lowest target flow at Wharton is 160 cfs. At the lowest target flows, there would still be enough water in the stream to support recreational boating and fishing. At Columbus, a 200 cfs flow results in a river depth of approximately 9-10 feet. At Wharton, a 160 cfs flow results in a river depth of approximately 8 feet. In both cases, this is a sufficient depth to support small recreational boating. As outlined in the environmental analysis, other special conditions are recommended to support existing aquatic life uses.

COMMENT NO. 13: The City of Austin comments that this permit would substantially affect the City's legal right to maintain and use its return flows.

RESPONSE NO. 13: The Executive Director responds that any impacts on the ability of other applicants to request new appropriations of water in the Colorado Basin subsequent to any permit issued to the LCRA cannot be determined until TCEQ receives an application and staff conducts a hydrological and environmental review of those applications. Any issued water rights will be subject to the priority system relating to who can get their water first.

COMMENT NO. 14: Nacie Kniffin and Vern Hancock believe that economic production will be seriously impaired by this application.

RESPONSE NO. 14: The Commission and Executive Director must review and issue applications for water rights based on the statutory criteria applicable to the agency. Chapter 11 of the Water Code, relating to water right permitting, does not specifically allow the agency to consider economic loss when reviewing or considering a permit.

COMMENT NO. 15: NWF comments that the draft permit should include a provision requiring that unconsumed water be returned to the river.

RESPONSE NO 15: The Executive Director responds that TWC Section 11.046 requires a diverter to return surplus water to the watercourse or stream from which it was taken if the water can be returned by gravity flow and it is reasonably practicable to do so. Therefore, a provision in the permit is unnecessary. The Executive Director notes that some of the water may be used in portions of the LCRA's service area that are outside of the Colorado River Basin.

ENVIRONMENTAL IMPACT

COMMENT NO. 16: National Wildlife Federation (NWF) comments that this application has the potential to cause tremendous harm to the fish and wildlife resources of the Colorado River watershed, including Matagorda Bay because LCRA seeks to divert all of the unappropriated flows and a large percentage of flood flows, at least during non-major flood events, in the lower portions of the Colorado River. The Texas Chapter of the Coastal Conservation Association (TCCA) comments that the diversion of the amount in this application from the lower Colorado River Basin has the potential to greatly impact the health of the marine breeding habitat in the Matagorda Bay. Nacie Kniffin Vern Hancock, and James and Carol Taylor believe that environmental values will be seriously impaired by the permit. The City of Austin asserts that the draft permit may have a negative impact on basin-wide instream uses and bay and estuary flows.

RESPONSE NO. 16: The Executive Director responds that staff performed an environmental analysis of the application and proposed special conditions to protect riparian habitat, instream flows, and freshwater inflows to Matagorda Bay. Please refer to the environmental analysis memorandum and addendums for a full explanation of how those special conditions protect the riverine ecosystem and the downstream bay.

COMMENT NO. 17: NWF comments that at the present time LCRA's calculations indicate the previously determined target instream flows would be expected to be met only about 62% of the time in the next 10 years. The targets would be met only 38% of the time in drought periods. The application would worsen the already unacceptable conditions.

RESPONSE NO. 17: The Executive Director responds that under the proposed permit, target instream flows will still have to be met before water can be diverted. The proposed permit will not decrease the frequency that target instream flow requirements are met. The Executive Director's recommended special conditions prohibit diversions if they would cause the streamflow to fall below the target instream flow requirement.

COMMENT NO. 18: NWF comments that with respect to bay and estuary inflows, even before this permit might be granted, currently available calculations indicate that previously determined target freshwater inflows into Matagorda Bay are projected to be met only about 36% of the time in the next ten years. During higher than expected demand or critical drought, they would be met only about 15% of the time. The previously determined critical flows would only be met 5% on average and 73% of the time during a recurrence of critical drought conditions. This will be worsened by the application.

RESPONSE NO. 18: The Executive Director responds that target freshwater inflows will still have to be met in accordance with the LCRA Water Management Plan (WMP) and those targets will not change as a result of this application. Furthermore, the proposed permit will not decrease the frequency with which target freshwater inflow requirements are met. LCRA cannot divert water under Permit 5731 unless the target freshwater inflow requirements are met.

COMMENT NO. 19: NWF comments that diversions, if authorized, should be limited only to periods of high flows.

RESPONSE NO. 19: The Executive Director responds that diversions can only occur under the proposed permit when flows are higher that the target flow levels and the special condition for a peak flow event has been met. The target and peak flow conditions were determined to be the flows necessary to support existing instream uses. Please see the environmental analysis memorandums for a further explanation.

COMMENT NO. 20: F&W comments that it is currently participating in the Advisory Committee that is reviewing LCRA's Water Management Plan. F&W is concerned that at the time of the comment LCRA was not willing to change the trigger point for target and critical freshwater inflows into Matagorda Bay to less than 80%. Until this issue is addressed, F&W does not believe that issuance of LCRA's permit would be appropriate. The health of this bay depends on further analysis of how much freshwater inflow is required.

RESPONSE NO. 20: The Executive Director responds that water appropriated under Permit 5731 requires LCRA's adherence to the Commission-approved WMP in effect at the time of any diversions, The WMP is currently dated March 1, 1999. If, in the future, the WMP is amended to require additional inflows into Matagorda Bay then LCRA will have to comply with those amended requirements.

COMMENT NO. 21: F&W comment that, regarding the request to construct an unspecified number of off-channel reservoirs within the Colorado, Wharton and Matagorda Counties, it recommends that this authorization be deleted from the application. There is a lack of specific information on these reservoirs, and there are endangered and threatened species in these areas

RESPONSE NO. 21: The Executive Director responds that the permit includes a special condition requiring LCRA to apply for and be granted authorization for specific off-channel reservoirs prior to diverting the authorized water. Once LCRA applies for specific reservoirs, an environmental analysis will be conducted.

COMMENT NO. 22: Matagorda Bay Foundation (MBF) comments that the water that is the subject of this application flows into the Matagorda Bay. MBF is concerned that the permit could impair Matagorda Bay in the long term if not the short term. Studies done by the state clearly indicate the need for freshwater inflows. The freshwater inflow from the Colorado affects shrimp, crab, speckled trout, menhaden, red drum, and virtually all other fisheries. No further water rights should be issued until the flows are provided for.

RESPONSE NO. 22: The Executive Director responds that target freshwater inflows will still have to be met in accordance with the Commission-approved LCRA Water Management Plan in effect at the time of diversions. The proposed permit will not decrease the frequency with which target freshwater inflow requirements are met. LCRA cannot divert water under Permit 5731 unless the target freshwater inflow requirements are met.

COMMENT NO. 23: TPWD comments that the TCEQ must maintain adequate instream flows and freshwater inflows to protect fish and wildlife resources. TPWD asserts that it cannot assess the impact on the environment without knowing actual amounts and rate of diversion from each diversion point. It is concerned that failure to identify the locations of the off--channel reservoirs will interfere with the ability to assess the effects of the application. Several of the counties where the water will be used have endangered or threatened species.

RESPONSE NO. 23: The Executive Director responds that the permit includes a special condition requiring LCRA to apply for and be granted authorization for specific off-channel reservoirs prior to diverting the authorized water. Once LCRA applies for specific reservoirs, an environmental analysis will be conducted.

ENVIRONMENTAL CONDITIONS IN DRAFT PERMIT

COMMENT NO. 24: NWF comments that the draft permit needs to have a downstream measuring gage below the lowest diversion point in condition 6.A. The permit as drafted makes it difficult to know whether the applicant is meeting environmental flow compliance because a diversion point might be added below the Wharton gage and there will be no gage there to measure environmental compliance. The provision should also specify that compliance is required based on instantaneous measurement rather than on a measurement over some averaging period. The Sierra Club comments that special condition 6.A. should include an appropriate target flow at an existing gage location downstream of the last diversion point. Target instream flow requirements should be met on an instantaneous measurement basis rather than a daily average. It should be clear in the permit that no diversions are to take place unless the instantaneous flow measurement at the downstream gage above the target flows listed in Table 1. The Sierra Club comments that Special Condition 6.F. is insufficient, because it does not measure flows for permit compliance downstream of the furthest downstream diversion point. Flows should also be measured downstream of any diverter on the Colorado River for assessment of compliance with freshwater inflow requirements. The City of Austin asks whether the target flows are to be counted as instantaneous flow requirements or alternatively, will the daily, multiple daily, or entire monthly flows satisfy the target flows on an average basis.

RESPONSE NO. 24: The Executive Director responds that the permit's special conditions specifying measurement points are taken from the Commission-approved LCRA Water Management Plan. The permit includes a special condition requiring LCRA to apply for and be granted authorization for specific off-channel reservoirs prior to diverting the authorized water. Once LCRA applies for specific reservoirs, and identifies specific diversion points associated with those reservoirs, an environmental analysis will be conducted and diversions may be subject to additional conditions such as the installation of new measuring gauges. Provision 6.A. has been clarified to read 'instantaneous'.

COMMENT NO. 25: NWF comments that it believes that the language in Special Condition 6.A. of the draft permit intends to keep applicant from diverting when instream flows are less than the target flows in the permit. However, the language is ambiguous and could be interpreted to mean that when flows are just below the target, applicant will be able to divert all of the water because that diversion would not technically reduce streamflow to less than the target. NWF suggests language that restricts diversions unless flows are greater than the target flow specified in Table 1.

RESPONSE NO. 25: The Executive Director responds that the permit language has been clarified to state that that diversions cannot occur unless streamflow is at least the specified target flow.

COMMENT NO. 26: NWF comments that Special Condition 6.B. of the draft permit, which allows for channel maintenance flows is a welcome addition to the common technique of crafting time-constant flows varying by month. The draft permit would prevent the applicant from diverting from certain peak flows. However, the draft permit is not clear what actions and constraints will be applied if flows are less than the peak flows. NWF suggests the following: "In addition, the requirement for compliance with this condition is temporarily suspended if rainfall has already occurred upstream in the basin that is reasonably forecast by Permittee to result in a flow of at least 27,000 cfs for a duration of 48 hours at the Columbus and Wharton gages and immediately downstream of the lowermost diversion location authorized pursuant to this permit. Permittee shall include in the LCRA Water Management Plan a description of the forecast method to be used."

The Sierra Club comments that it supports the inclusion of Special Condition 6.B. because river ecosystems require a variety of flow types, however, it needs to be clarified whether or not the applicant will be able to divert water if flow is less than 27,000 cfs. The inclusion of the phrase "is forecast to occur" introduces uncertainty because there is no guideline for how or when that forecast would occur. The TCCA comments that the only exception for "is forecast to occur" in Paragraph 6.B. should be when rain has already fallen and the rise of the river upstream manifests that prerequisite flow will be at the diversion points within seven days.

RESPONSE NO. 26: The Executive Director responds that LCRA is required to ensure that a bankfull flow occurs at the frequency it has occurred historically, once every two years. The draft permit language has been altered to clarify the "forecast to occur" provision such that the forecast must be based on rainfall that must have fallen or be falling in the basin at the time of diversion.

COMMENT NO. 27: The City of Austin asks whether releases from conservation storage from LCRA's upstream reservoirs or storage facilities will be counted towards the requirement in Special Condition 6.B., which requires that a flow event of 27,000 cubic feet per second for the duration of 48 hours has occurred before diversions can be made.

RESPONSE NO. 27: The Executive Director responds that the flow requirement for Special Condition 6.B. can be met from river flows or releases from storage in upstream reservoirs.

COMMENT NO. 28: NWF comments that condition 6.C. of the draft permit needs clarification. In the words "target inflow levels" "targets" is not capitalized, whereas in instream flows it has "Targets" with a capital letter which seems to make it refer to other documents. Here, "targets" could be construed as the general use of the word in reference to the Water Management Plan. Clarification is needed for which elements of the Water Management Plan are embodied in "target flows".

RESPONSE NO. 28: The Executive Director responds that whether or not 'target' is capitalized, reference is being made to the Water Management Plan and not any other documents.

COMMENT NO. 29: NWF comments that it does not believe that incorporation of trigger levels based on reservoir elevations is intended in the draft permit or is appropriate. Reference to the "most recent Commission Water Management Plan" could cause future complications because "most recent" could refer to the plan in existence at issuance of the permit or the plan in existence at the time of compliance. The TCCA comments that environmental discharges in Paragraph 6.C. should not be limited to waters impounded in the preceding month. Instead all water stored in the reservoir should be available to meet LCRA's environmental flow requirements.

RESPONSE NO. 29: The Executive Director responds that the permit language has been clarified to specify that trigger levels in the Commission-approved LCRA Water Management Plan in effect at the time of diversions must be met. In response to TCCA, target flows are required before diversions may occur, irrespective of Highland Lakes reservoir levels.

COMMENT NO. 30: NWF comments that it supports adaptive management practices in the draft permit. It may be more appropriate to avoid reference to the Water Management Plan and use the target flows in the August 2006 Matagorda Bay Freshwater Inflow Needs Study. A limited reopener provision could be added to the permit to allow future adjustment of flow conditions within some defined limits. The Sierra Club comments that it is generally supportive of Special Condition 6.C. in the draft permit; however, monthly target flows should come from the best available science and most current data. The currently adopted and pending LCRA water management plans do not include the most recent data on freshwater inflow needs to Matagorda Bay. It may be more appropriate to use the August 2006 Matagorda Bay Freshwater Inflow Needs Study to establish criteria.

RESPONSE NO. 30: The Executive Director responds that water appropriated under Permit 5731 requires LCRA's adherence to the Commission-approved WMP in effect at the time of any diversions. That WMP is currently dated March 1, 1999. If, in the future, the WMP is amended to require additional inflows into Matagorda Bay, LCRA will have to comply with those amended requirements.

COMMENT NO. 31: NWF comments that a new condition should be added to the draft permit that requires higher periodic inflows into the bays. These higher periodic flows are ecologically important for delivering sediments for marshland replenishment and nutrients for support of the food chain. Under the draft permit NWF believes that the potential for these inflows is eliminated, because the permit is vague as to what is an excess flow and what is unappropriated flows. A large range of flows is undefined by the permit and the target flows are too low. Is a flow which occurs 68% of the time a flood event?

RESPONSE NO. 31: The Executive Director responds that target freshwater inflows will have to be met in accordance with the Commission-approved LCRA WMP in effect at the time of diversions. If, in the future, the WMP is amended to require additional inflows into Matagorda Bay, LCRA will have to comply with those amended requirements in order to divert water under this proposed permit.

COMMENT NO. 32: NWF comments that additional special conditions that address multi-year inflow patterns be added to the draft permit. Rainfall events are highly variable, and LCRA will be taking a large amount of water. Periodic pulses of freshwater in the spring and early summer need to be preserved.

RESPONSE NO. 32: The Executive Director responds that target freshwater inflows will have to be met in accordance with the Commission-approved LCRA WMP in effect at the time of diversions. If in the future the WMP is amended to require additional inflows into Matagorda Bay, LCRA will have to comply with those amended requirements in order to divert water under this proposed permit.

COMMENT NO. 33: NWF comments that the draft permit should indicate that compliance with all freshwater inflow provisions should be measured downstream of the lowermost authorized diversion point to ensure the flow is making it to the bay. The Sierra Club comments that compliance with special condition 6.C. should be measured below the lowermost authorized diversion point to ensure that required flows are reaching the Bay.

RESPONSE NO 33: The Executive Director responds that compliance with the permit's special conditions that are taken from the WMP, such as Special Condition 6.C., will be measured in accordance with stipulations of the WMP. The WMP already requires that target flows be measured at the lowest diversion gage. The draft permit requires target flows be met in full before LCRA can divert water.

COMMENT NO. 34: NWF comments that the draft permit states that the terrestrial mitigation requirements for the off-channel reservoirs will be imposed when these off-channel reservoirs are authorized and that a permit amendment is required for this authorization. NWF comments that the special condition in the draft permit requiring a riparian management plan be strengthened by specifying performance criteria. What is the goal of the plan? The Sierra Club comments that it supports the inclusion of special condition 6.E. (the Riparian Management Plan), but that the plan should include riparian area from Columbus to the lowermost diversion point and should include more guidance on the contents of the plan, the extent and components of the plan, and the performance criteria for evaluating and implementation.

RESPONSE NO. 34: The Executive Director responds that the permit requires a riparian management plan that would provide for the ongoing functionality of specific riparian land in the public domain along the river corridor affected by the permit. The draft permits requires Executive Director approval of the riparian management plan prior to diverting water under the permit.

COMMENT NO. 35: The City of Austin asks for clarification why the Special Condition 6.B. in the draft permit does not include a gaging station for the flow requirement.

RESPONSE NO. 35: The Executive Director responds that the draft permit language has been modified to specify the Columbus gauge.

COMMENT NO. 36: The City of Austin asks whether the TCEQ has considered whether granting the draft permit could potentially complicate implementation of the instream flow protections currently under study by the Tri-Agency Texas Instream Flow Program, which has yet to adopt its final recommendations.

RESPONSE NO. 36: The Executive Director responds that the Texas Instream Flow Program (TIFP) is not specifically studying the Colorado River at this time. Also, the requirements for maintaining existing instream flow targets, ensuring that a bankfull event occurs at the frequency it has occurred historically, and developing a riparian management plan are consistent with the TIFP.

COMMENT NO. 37: The City of Austin asks whether any other low flow criteria were considered in the technical analysis, including the Lyon's method, other than the Target Flow regime found in the 1999 LCRA Water Management Plan. The City asks whether the instream flow requirements would differ under alternative methods. The City also asks for an explanation of the rationale behind the choice of criteria.

RESPONSE NO. 37: The Executive Director responds that the Lyon's method is a default method for determining instream flow requirements. The Lyon's method does not use basin-specific field data to obtain a recommendation for a particular site. Since instream flow requirements are known to vary considerably between different areas of the state, the TCEQ does not use the Lyon's method when better data are available. In the case of the Lower Colorado River Basin, the LCRA has engaged in site-specific, long-term, field studies of the instream flow needs of those segments of the Colorado. Those instream flow studies have been incorporated into flow recommendations in a Commission approved WMP. Instream flow recommendations produced by the Lyon's method would likely be different from the instream flow requirements of the WMP. Staff considers the LCRA's WMP to be superior to the recommendations of the Lyon's method, which have never been verified by data taken from the Colorado Basin. This permit was drafted to be consistent with the Commission-approved LCRA Water Management Plan dated March 1, 1999.

COMMENT NO. 38: The City of Austin asks whether limitations to the rate of change in flow conditions were considered, and specifically, whether flood hydrographs at the Columbus gage were examined to determine the natural variability in rates of change in flow.

RESPONSE NO. 38: The Executive Director responds that staff analyzed historic hydrologic records from the Columbus gage to determine natural flow variability. Staff

did not specifically analyze the rate of change in flow conditions, however; the shape of the flood hydrograph was incorporated into staff's recommendations in Special Condition 6.B. of the draft permit.

WATER AVAILABILITY

COMMENT NO. 39: Elsie Millican comments that in the summer, the Colorado River near Bend, Texas on her ranch barely runs because so much water is drained by irrigation. She is opposed to giving away any more water.

RESPONSE NO. 39: The Executive Director responds that the water requested for appropriation by this application is unappropriated water in the Colorado River that will be diverted from points located downstream of the Highland Lakes. As such, these diversions would not affect the Colorado River near Bend, Texas, which is located upstream of the Highland Lakes.

COMMENT NO. 40: Sand Supply comments that LCRA should not be allowed to claim that there is unappropriated water for this application when it is protesting other applications in the basin.

REPONSE NO. 40: There is no prohibition on protesting applications while a person has an application pending in the same area. The Executive Director's staff evaluated this application using the TCEQ Water Availability Model (WAM) for the Colorado Basin and found that sufficient water would be available to recommend granting this application. The Executive Director will only recommend issuance of a permit for water that has not been appropriated by others.

COMMENT NO. 41: The TCCA comments that granting the permit should be limited to the volume of water needed for present use or certain quantified future use. A permit for 853,514 acre feet of water per year without a showing of current need is an abnegation of Commission responsibility for its statutory responsibility to approve appropriations only when needed by appropriators. The Commission retains only limited control over the state water in approval or disapproval of LCRA's Management Plan. The Commission should delay granting the permit until a finite amount of water required is established.

RESPONSE NO. 41: The Executive Director responds that 853,514 acre-feet per year is the amount needed to maintain the off-channel reservoirs and support the diversion demand of 327,591 acre-feet. The Executive Director believes that municipal water suppliers have a responsibility to obtain required regulatory approvals and develop water supplies for project future water use rather than waiting for a new current need before developing additional water supplies. Please see the addendum to the water conservation technical memo for additional information on the LCRA future need.

COMMENT NO. 42: The City of Austin asks whether waters previously diverted, stored, and/or returned to the Colorado River Basin downstream of O.H. Ivie Reservoir and Lake Brownwood will count towards the "excess flood waters" and "unappropriated flows" made available under the draft permit and how the water will be counted as "excess flood waters" or "unappropriated flows."

RESPONSE NO. 42: The Executive Director responds that Special Condition H of the permit prohibits LCRA from making a priority call on water right owners upstream of Lakes Ivie and Brownwood. Once any unappropriated water has passed these points, and is available at the diversion points LCRA requested, it is subject to diversion by LCRA under Permit 5731 at its priority date subject to instream flow requirements and to the extent that water is not needed by senior downstream water rights.

COMMENT NO. 43. The City of Austin comments that if this permit is granted, it will be unable to secure additional water rights. This will harm the city's ability to serve its growing population.

RESPONSE NO. 43: The Executive Director and the Commission cannot consider future applications for water when evaluating an existing application for water. The impact on the ability of other applicants to request new appropriations of water in the Colorado Basin, subsequent to any permit issued to the LCRA, cannot be determined until TCEQ receives an application and staff conducts a hydrological and environmental review of those applications. Any issued water rights will be subject to the priority system relating to who can get their water first.

COMMENT NO. 44: STP Nuclear Operating Company (STP) comments that it provides electric power for customers of the STP owners and also uses water for cooling purposes. Based on STP's Water Right Permit No. 3233 and the water supply of the Colorado River, it is possible that granting this permit could adversely affect STP.

RESPONSE NO. 44: The Executive Director's staff evaluated this application using the TCEQ WAM for the Colorado Basin and found that sufficient water would be available to recommend granting this application. The Executive Director will only recommend issuance of a permit for water that has not been appropriated by others.

COMMENT NO. 45: Connie Adams, Jean Sultemeier, Sloan Livestock, Ltd., Del Venado Ranch, Ray Orson, Danny Pennington, Rob Bagly, John Kniffen, Craigan Johnson, Eleanor Owen Johnson, Jerry Johnson, Christine Bagley and Roger Edmondson, J. A. Davis, James Cameron, E. L. Byrd, Dean Bagley, Jr., and Max Mahan comment that they own water rights in the San Saba River and believe that their water rights will be seriously impaired by granting this permit.

RESPONSE NO. 45: The Executive Director responds that the water requested for appropriation by this application is unappropriated water in the Colorado River available

at LCRA's requested diversion points located downstream of the Highland Lakes. As such, these diversions would not affect water rights owners in the San Saba River because any issued water rights will be subject to the priority system relating to who can get their water first, and Permit 5731 will be junior to all rights issued before February 28, 2001. If there is a contested case hearing, the commenters can present evidence on the impairment of their water rights.

COMMENT NO. 46: Patsy McConnell, George and Jean Sultemeier, Jerry M. Rambo, the Estate of Herbert H. Mears, Carl Menzies, Marjorie Ann O'Banon Altizer-, Christine and Willard Keith Bessent, Gary P. Land, Jimmie L. Bray, James T. Cameron, Wanda Ellis, Roger Ricky Lambert, Susana Lambert, Riley C. Harkey, John & Katherine Kniffin, and Donald L. and Bobby M. Huss, comment that their water rights would be negatively affected by granting this permit because other water rights will not be adequately protected unless there is specific quantification of total flows that are allocated to each of the tributaries and main stem of the Upper Colorado River under various rainfall and drought condition scenarios. They request that this be identified through the year 2050.

RESPONSE NO. 46: The Executive Director responds that the water requested for appropriation by this application is unappropriated water in the Colorado River available at LCRA's requested diversion points located downstream of the Highland Lakes. The Executive Director will only recommend issuance of a permit for water that has not been appropriated by others. If there is a contested case hearing, the commenters can present evidence on impairment of their water rights. The Executive Director further responds that just because water is generated within a watershed does not mean that the water can only be used within that watershed. Texas uses the priority system which determines who can exercise a priority call on upstream watersheds.

COMMENT NO. 47: Patsy McConnell, George and Jean Sultemeier, Jerry M. Rambo, Marjorie Ann O'Banon Altizer, the Estate of Herbert H. Mears, Carl Menzies, Christine and Willard Keith Bessent, Gary P. Land, James T. Cameron, Wanda Ellis, Roger Ricky Lambert, Susana Lambert, Riley C. Harkey, Jimmie L. Bray, Donald L. and Bobby M. Huss, and John & Katherine Kniffin, ask that any permit issued to LCRA provide a ten--year moratorium from the date of the granting of the application on forfeiture of any existing water right in the Upper Colorado River basin, and the San Saba River in its entirety be excepted from the authorization, or that the permit specify that only flood waters and unappropriated flows in excess of 30,000 acre--feet in the San Saba River be subject to the permit.

RESPONSE NO. 47: The Executive Director responds the Texas Water Code specifies when a water right may be subject to forfeiture. Special Condition H of the permit prohibits LCRA from making a priority call on water right owners upstream of Lakes Ivie and Brownwood. Once any unappropriated water has passed these points, it is subject to diversion by LCRA under Permit 5731 to the extent that water is not needed by senior downstream water rights. The Executive Director further notes that the priority date for Permit 5731 is February 28, 2001, and LCRA would not be able to make a priority call on

upstream water right owners with priority dates senior to this date to pass water downstream for diversion under Permit 5731.

COMMENT NO. 48: John & Katherine Kniffen, George and Jean Sultemeier, Jerry M. Rambo, Carl Menzies, Donald L. and Bobby M. Huss, Gary P. Land, Jimmie L. Bray, and Wanda Ellis comment that Menard County Water Control and Improvement District No. 1 (Menard District) is currently in the process of entering into a contract with an engineering firm to study the feasibility of creating facilities to store water to augment flows during drought years, and this project will need a modest amount of excess flood water.

RESPONSE NO. 48: The Executive Director responds that he and the Commission cannot consider future applications to appropriate water when considering an existing application to appropriate water, and that the impact on the ability of other applicants to request new appropriations of water in the Colorado Basin subsequent to any permit issued to the LCRA cannot be determined until TCEQ receives an application and staff conducts a hydrological and environmental review of those applications. Any issued water rights will be subject to the priority system relating to who can get their water first.

COMMENT NO. 49: John & Katherine Kniffin, George and Jean Sultemeier, Jerry M. Rambo, Carl Menzies, Donald L. and Bobby M. Huss, Gary P. Land, Wanda Ellis, and Jimmie L. Bray comment that Menard District is in the process of creating a non-profit entity to purchase and/or lease existing water rights in the San Saba in Menard County to maintain flows for agriculture and the environment, and granting this permit to LCRA will impair their water right because it may prohibit their donation, sale, or lease of water to this entity.

RESPONSE NO. 49: The Executive Director responds that the impact on the ability of other applicants to request new appropriations of water or amend existing water rights in the Colorado Basin subsequent to any permit issued to the LCRA cannot be considered by the Executive Director or the Commission in reviewing an existing application for water, and cannot be determined until TCEQ receives an application and staff conducts a hydrological and environmental review of those applications. Any issued water rights will be subject to the priority system relating to who can get their water first.

COMMENT NO. 50: James and Carol Taylor comment that the long drought has created serious local water needs and made it impossible to estimate what is "normal" flow.

RESPONSE NO. 50: The Executive Director responds that he does not have any formal records of the normal flow, which can be interpreted several ways, of the Colorado River. Staff used the TCEQ WAM to determine whether there was sufficient water available to recommend granting this application. The WAM does not use "normal flows."

LCRA/SAN ANTONIO WATER SYSTEM (SAWS) PROJECT

COMMENT NO. 51: The TCCA comments that Paragraph 7(B) should not require that commencement of the reservoirs should begin within two years of the issuance of the permit because the LCRA/SAWS Project study period will not expire until 2010 and this would put unwarranted pressure on both participants to proceed with the project that may be found to be ill-advised.

RESPONSE NO. 51: The Executive Director responds that the application did not request authorization for the LCRA/SAWS water project; and therefore, these issues were not considered during technical review of the application. If the LCRA cannot meet the time requirements for commencement of construction of the reservoirs, they can apply for an extension of time pursuant to Texas Water Code Section 11.145 and TCEQ rules.

COMMENT NO. 52: The TCCA comments that the permit does not indicate what the "Use" is for the water. Paragraph 2 of the permit does not authorize use of the water in Bexar County or for use of the water in the LCRA/SAWS Project.

RESPONSE NO. 52: The Executive Director responds that the permit authorizes use of the water for municipal, industrial and agricultural purposes. The application did not request an interbasin transfer of water from the Colorado to the San Antonio River Basin; therefore, use of the water in Bexar County was not considered during technical review of the application.

COMMENT NO. 53: The Sierra Club comments that this permit is one of several permits that are prerequisites to LCRA diverting and transferring water from the Colorado River to the San Antonio River Basin for municipal use by the SAWS. The Sierra Club requests that consideration of this permit be reserved until such time as LCRA and SAWS have finalized their agreement and LCRA has finalized the location and intakes for off-channel reservoirs.

RESPONSE NO. 53: The Executive Director responds that the application did not request an interbasin transfer of water from the Colorado to the San Antonio River Basin. Therefore, these issues were not considered during technical review of the application.

COMMENT NO. 54: The Sierra Club comments that the release of this draft permit was premature and illogical in light of intensive environmental and other studies underway, but not yet complete, which are part of the evaluation of the proposed LCRA/SAWS project. Those studies will provide valuable information that would be relevant to TCEQ's own environmental analysis of this permit application. Sierra Club comments that the amount of excess flood flows and unappropriated water that LCRA is seeking exceeds by three times the 250,000 acre-feet stated in the LCRA/SAWS Definitive Agreement and the current Region K and Region L water plans do not call for this large a volume of water to be transferred from the Colorado to the San Antonio Basin.

RESPONSE NO. 54: The Executive Director responds that the application did not request an interbasin transfer of water from the Colorado River to the San Antonio River Basin. Therefore, these issues were not considered during technical review of the application.

COMMENT NO. 55: The Sierra Club comments that according to the LCRA/SAWS project proposal and approved Region K plan, none of the irrigation needs in Colorado, Wharton, and Matagorda Counties is to be met by excess flows stored in the off-channel reservoirs proposed under this permit.

RESPONSE NO. 55: The Executive Director responds that the LCRA/SAWS project proposal is not part of this application. The Executive Director did not limit its consideration of the need for the proposed water to the irrigation needs in Colorado, Wharton, and Matagorda Counties.

COMMENT NO. 56: The Sierra Club comments that the magnitude of water contained in the draft permit outstrips the water requirements for the LCRA/SAWS project since SAWS' terminal storage facilities are not being designed to handle 327,000 acre-feet of water. No justification has been provided for authorizing that large of an appropriation.

RESPONSE NO. 56: The Executive Director responds that he does not know the capacity of SAWS' terminal storage facilities. This was not part of the application and was not considered during technical review.

Respectfully submitted,

TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of June, 2007, a true and correct copy of the foregoing document was delivered to the Office of the Chief Clerk of the TCEQ.

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