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November 26, 2012

Ms. Bridget Bohac
Chief Clerk
Texas Commission on Environmental Quality
12100 Park 35 Circle
Building F, 1st Floor
Austin, TX 78753

Via E-Filing & First Class Mail

Re: TCEQ Docket No. 2012-2138-AIR; *In the Matter of the Application of Lower Colorado River Authority for Amendment of Air Permit Nos. 51770 and PSD-TX486M3*

Dear Ms. Bohac:

Enclosed please find the original copy of Texas Campaign for the Environment and Sierra Club's Brief in Support of their Request for a Contested Case Hearing, which was filed electronically. A copy of this filing has also been served on the parties to this matter in the manner indicated on the attached service list.

Sincerely,

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Enclosures

CC: service list

TCEQ DOCKET NO. 2012-2138-AIR

IN THE MATTER OF THE APPLICATION OF LOWER COLORADO RIVER AUTHORITY FOR AMENDMENT OF AIR PERMIT NOS. 51770 AND PSD-TX-486M3	§ § § § § § § §	BEFORE THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

TEXAS CAMPAIGN FOR THE ENVIRONMENT AND SIERRA CLUB'S BRIEF IN SUPPORT OF THEIR REQUEST FOR A CONTESTED CASE HEARING

TO THE HONORABLE COMMISSIONERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

I. INTRODUCTION

In 2002, LCRA submitted an application to the TCEQ for a flexible permit for the Fayette Power Project ("power plant") pursuant to 30 TAC Chapter 116, Subchapter G, §§ 116/710 *et seq*. As the commission is well-ware, the TCEQ's Subchapter G "Flexible Permit" rules provided sources with the flexibility to make certain modifications without triggering federal New Source Review, but only in exchange for a commitment that the source will meet *best available control technology* (BACT) levels of control within the 10-year life of the permit.[1]

The Lower Colorado River Authority violated TCEQ's rules when it obtained its Flexible Permit in 2002, by misrepresenting actual emissions, by knowingly inflating the Fayette power plant's actual emissions and knowingly inflating the Fayette power plant's actual maximum

[1] 30 TAC § 116.711(3). See also, Executive Director's Source Analysis and Technical Review for the original, 2002, Fayette power plant Flexible Permit ("The flexible permit program allows existing facilities to replace individual emission limits with plant wide emission caps, and remove existing operational limitations in exchange for a commitment to upgrade emissions controls on existing facilities to current BACT levels.")

operating capacity (heat input), in order to obtain Flexible Permit limits for certain pollutants (e.g., particulate matter) that far exceed any actual emissions *ever* reported, and in order to avoid the installation of pollution controls for ozone-causing nitrogen oxides, harmful particulate matter, and other contaminants. Moreover, it is undisputed that the Fayette plant has undergone major modifications during the last ten years, without undergoing federal PSD permit review in reliance on the plant's Flexible Permit. In addition, since LCRA obtained its Flexible Permit ten years ago, several new rules have been adopted, and the plant must demonstrate compliance with all federal Clean Air Act requirements in order to be granted a federal PSD permit today.

Neither LCRA nor the Executive Director have provided responses to the questions of fact and law raised in the Comments and Hearing Requests. Given that the Commission is now fully aware of the disputed issues of law and fact, Texas Campaign for the Environment and the Sierra Club ("Requestors") respectfully request a contested case hearing to address these issues and correct permit deficiencies.

Requestors have submitted comments and hearing requests on two related air permit actions: (1) LCRA's Plantwide Applicability Limits ("PAL") Permit No. PAL 2, and (2) LCRA's requested permit authorizing increased allowable emissions during planned maintenance, startup, and shutdown ("MSS") activities. These permit actions are directly connected to the current permit action, and they should not be treated separately from this De-Flex application.

II. ARGUMENT

Requestors' incorporate by reference the arguments and facts detailed in our June 14, 2012, Comments and Request for a Contested Case Hearing ("Hearing Request"). Our Hearing

Request contains ample evidence that LCRA has never disputed or refuted, demonstrating that LCRA misrepresented actual emissions and capacity in order to obtain inflated Flexible Permit limits for the purpose of avoiding the installation of selective catalytic reduction ("SCR," the top pollution control for ozone-causing nitrogen oxides). In addition, the Hearing Request shows that the Fayette plant has undergone major modifications during the life of the Flex Permit, and that LCRA has admitted that these modifications would have triggered federal new source review ("NSR/PSD") permit review but for LCRA's reliance on its Flexible Permit to avoid the federal permitting requirements. Both LCRA's and the Executive Director's briefs and responses to the Comments are silent as to these concerns.

This permitting action presents several important questions of law, policy, and factual disputes for the Commission. First, as the Executive Director readily admits, the request for contested case hearing involving LCRA's de-flex permit application is "one of first impression for the commission." ED Brief at p. 5. Second, notwithstanding the question of whether a permit amendment converting a Flexible Air Permit issued under TCEQ's "Subchapter G" air rules into a "Subchapter B" permit is subject to a contested case, this particular permitting action poses at least the following two policy questions:

- May the Commission approve emission limits based on underlying assumptions or representations by the source that the Commission knows are materially incorrect?
- Is the commission required to specify in a "PSD" permit which permit conditions are federal PSD limits, or are all the conditions PSD limits?

LCRA mischaracterizes both the factual disputes and the questions of law in this matter, and LCRA's suggestion that any of the issues raised in this permitting context have been adjudicated by any federal court is incorrect. The federal court simply said it lacked jurisdiction

over certain enforcement matters based on its interpretation of the LCRA's permits, but that only bolsters the argument for a thorough review by TCEQ of the permit. If the Commission takes LCRA's advice to "disregard [the disputed factual and legal issues raised by the Requestors] for the same reasons" contained in the March 28, 2012, federal district court ruling that LCRA attaches to its brief, the Commission should do so with extreme caution, because the federal district court ruling dismisses certain claims only on the ground that the claims could have or should have been raised in the permitting context. So here we are, before the permitting agency, requesting a careful review of the power plant's federal PSD permit.

The Flexible Permit is currently expired, as is LCRA's Texas Plantwide Applicability Limit ("PAL") permit. The Commission now has the benefit of a ten-year track record for the LCRA's Flex Permit, and the facts are clear:

- The Application and Draft Permit fail to demonstrate how the proposed emission limits meet the *best available control technology* ("BACT") standard.
- The Application and Draft Permit fail to demonstrate that the emissions will not cause or contribute to violations of health-based ambient air quality standards.
- The Application and Draft Permit do not set emission limits that are as least as stringent as the emission limits in effect prior to the Flexible Permit.
- LCRA misrepresented emissions and inflated capacity (annualized heat input) in order to get high Flex Permit limits. Those past misrepresentations should be corrected in this Permit proceeding.
- LCRA Fayette plant has undergone major modifications to its boilers, which would have triggered NSR/PSD review had LCRA not relied on its Flex Permit and PAL to avoid federal permitting requirements. These modifications resulted in increased life of the boilers, fewer maintenance outages, and more annual hours in operation. Thus, these major modifications are classic NSR activities that require BACT analyses and impacts analyses.
- The Application and Draft Permit should be strengthened to reduce air toxics such as lead and mercury, in light of new federal rules requiring *maximum achievable control technology* ("MACT") to reduce dangerous toxics from coal-fired power plant boilers.

LCRA's complaint that the allegations detailed in the Requestors' comments are "harassing" is puzzling, given LCRA's unwillingness to refute the merits of any of these charges. LCRA brief at p. 13. These charges include: that FPP is currently operating without a valid PSD permit; that LCRA has undertaken several major modifications without undergoing NSR/PSD review; that LCRA misled TCEQ (and EPA) in 2002 in the original Flexible Permit application by knowingly inflating represented actual emissions and annual heat input for all three boilers; and other questions of law and fact. Remarkably, LCRA has never once provided a reasoned explanation or response to these claims. LCRA's only attempt to set the record straight appears to involve a description of the PM stack tests that it had available to it in July 2002, a fact that the Requestors do not dispute and which does nothing to resolve any of the factual and legal disputes that the Requestors have presented. LCRA has been unable or unwilling to refute the documentary evidence – containing LCRA's own statements and admissions – relied on by the Requestors.

The bottom line is that LCRA wishes that the Commission will simply disregard the evidence and the disputed issues. On the contrary, the Commission may not simply disregard the questions of law and policy, and the disputed factual issues, because the TCEQ is obligated to ensure that a federal PSD permit is issued only after a thorough review and only after the Commission is satisfied that the permit complies with the Commission's rules.

Health and Safety Code Section 382.056(g) does not apply in this case, because the permit, if granted, will effectively increase annual and hourly proposed carbon monoxide, VOC, lead, NOx, and PM limits, as compared to previously authorized limits. In addition, the sum of

certain hourly or annual limits is higher than the previously authorized Flexible Permit caps, and thus, by definition, Section 382.056(g) does not apply. For example, as demonstrated in the permit engineer's Technical Review Document, the requested carbon monoxide limits are higher than the limits contained in the PSD permit in effect prior to the currently expired Flexible Permit. In addition, several PSD limits that were in effect prior to the issuance of the Flexible Permit (e.g., an hourly limit on particulate matter at Unit 3) are not found in the Draft PSD Permit. The Commission can easily resolve these disputed issues by referring this matter to SOAH so that the "PSD limits" can be identified and adequately justified.

Due to the unique circumstances in this permitting matter, in which a major source has undoubtedly undergone major modifications during the life of its Flexible Permit; the current permitting action is an effort to create a federal PSD permit from a Texas Flexible Permit (and both the Flexible Permit and the PAL have expired); and there are several clearly disputed issues of law and fact, the Commission should refer the matter to the State Office of Administrative Hearings to resolve these disputes.

TCE and Sierra Club satisfy the requirements for affected party status. Carol Daniels and Maggie Rivers have personal justiciable interests, including health and property interests, that are not common to members of the general public.

The distance of Sierra Club and TCE members' property from the power plant is close enough to be affected by emissions from the plant. In previous permitting actions involving coal-fired power plants, the Commission has conferred affected party status on individuals living similar distances from a coal-fired power plant. For example, Sierra Club was admitted as an affected party in a contested case involving the proposed White Stallion Energy Center near Bay

City, based on testimony from a single member who testified that he owns property approximately 10 miles from the power plant site.

In addition, in the past, TCEQ has readily acknowledged that emissions from coal-fired power plants, and from the Fayette plant in particular, can be dispersed over great distances. For example, TCEQ and EPA have relied on estimated emissions from the Fayette plant in order to make demonstrations relating to Central Texas' Clean Air Act attainment status, thus providing further evidence that emissions from this large coal-fired power plant affect air quality on a local and regional level. Moreover, LCRA routinely provides TCEQ with written "emission event" reports in which LCRA attempts to explain that smokestack opacity deviations did not cause air pollution, based on LCRA's analysis of an ambient particulate matter monitor *miles* away from the Fayette plant.

The federal district court ruling that LCRA attaches to its brief discusses the question of federal legal standing, which is not dissimilar to TCEQ's affected party analysis. In that regard, TCE's purpose is germane to the question of whether the Fayette power plant's air permit complies with Clean Air Act standards. And, TCE member Maggie Rivers' asthma and her concerns regarding her health and property are sufficient to meet the jurisdictional test for Clean Air Act legal standing. The Commission's analysis need not depart from the federal court's analysis as to standing. Given the nature of smokestack emissions from the Fayette plant, which are known to travel distances including, and well beyond, the handful of miles that Sierra Club's and TCE's members live from the plant, the Commission should remain faithful to its own precedent, and confer party status on Sierra Club and TCE.

III. CONCLUSION

Requestors ask the Commission to refer this matter to SOAH for a contested case hearing. In the alternative, TCEQ should hold this permit in abeyance until the Executive Director has completed its technical review of the MSS permit amendment, and also completed its review of LCRA's requested PAL renewal. These related permitting actions should not be piecemealed. They are interrelated and each separate permitting action deals with the same pollutants.

Respectfully Submitted,

ENVIRONMENTAL INTEGRITY PROJECT

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CERTIFICATE OF SERVICE

By my signature below, I certify that a copy of this Brief in Support was served on the following individuals via U.S. mail and/or e-mail on the 26th day of November, 2012, as indicated below:

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