

TCEQ DOCKET NO. 2016-0531-WR

**APPLICATION OF THE LOWER
COLORADO RIVER AUTHORITY
FOR AN AMENDMENT TO
CERTIFICATE OF ADJUDICATION
NO. 14-5434**

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**BEFORE THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY**

EXECUTIVE DIRECTOR'S RESPONSE TO HEARING REQUESTS

The Executive Director (ED) of the Texas Commission on Environmental Quality (TCEQ or Commission) files this response to hearing requests for the Lower Colorado River Authority's (LCRA) application to amend Certificate of Adjudication No. 14-5434. Six timely hearing requests were received and not withdrawn. These hearing requests are from STP Nuclear Operating Company (STPNOC) and STP Owners (Owners); Colorado River Municipal Water District (CRMWD); City of Austin (City); Kevin and Helen Weber (Webers); National Wildlife Federation (NWF); and the Sierra Club.

The ED recommends that two of the six hearing requests, STPNOC and STP and the City of Austin, be granted, and that the other hearing requests be denied.

I. BACKGROUND AND APPLICATION

LCRA owns a portion of Certificate of Adjudication No. 14-5434 which allows it to maintain an overflow type structure and a reservoir on the Colorado River, Colorado River basin, and temporarily impound therein not to exceed 86 acre feet of water in Colorado County. The Certificate also authorizes the LCRA to divert and use not to exceed 133,000 acre feet of water per year from a point on the Colorado River (referred to as the Garwood diversion point) for municipal, industrial and agricultural use in Colorado Wharton, Travis, Bastrop, Fayette and Matagorda Counties with the Colorado River Basin, Lavaca River Basin, Guadalupe River Basin, Colorado-Lavaca Coastal Basin, and the Brazos-Colorado Coastal Basin at a maximum rate of 600.00 cfs (269,400 gpm). The priority date of this right is November 1, 1900.

The Lower Colorado River Authority (LCRA) seeks to amend Certificate of Adjudication No. 14-5434 to add additional diversion points both upstream and downstream of its existing Garwood diversion point. These diversions are authorized in LCRA's Certificates of Adjudication Nos. 14-5473, 14-5476, 14-5475, 14-5477, and 14-5437. LCRA also seeks to divert and use the water from anywhere

on the perimeter of Town Lake, Lake Austin, and Lake Travis. This water will not be diverted from storage.

The application was filed on August 26, 2002. The application was declared administratively complete on February 5, 2003. Notice for the application was mailed under the existing rules at the time after administrative completeness on May 23, 2003. The last day for commenting or requesting a hearing was June 23, 2003.

This ED acknowledges that this application has been pending before the agency for an extended period of time. In addition to this application, LCRA also submitted an amendment to its Water Management Plan (WMP) in 2003. Both this application and the 2003 WMP were contested. LCRA and ED staff determined that priority should be given to processing the WMP amendment application. Technical review of the WMP amendment was completed in 2009, and the amended WMP was approved in 2010. Staff also completed technical review of the LCRA Garwood application in 2009. After LCRA received the draft permit for the LCRA Garwood application, LCRA requested changes to the streamflow conditions in the draft permit to be consistent with the most recent scientific studies. By 2012, after several meetings with LCRA, staff was prepared to finalize technical review of this application; however, by that time the LCRA reservoir system was in severe drought conditions. Therefore, LCRA and staff prioritized a series of LCRA applications for Emergency Orders and emergency temporary permits to address the drought conditions. LCRA also submitted an application for an amendment to its WMP in 2012, which was also a high priority. As a result of the severe drought conditions, TCEQ updated the naturalized flows in the Colorado River basin, which affected the analysis of the LCRA Garwood application. LCRA submitted a revised WMP amendment application in 2014, which was approved in November of 2015. Once the amended WMP was approved, staff finalized processing of LCRA's Garwood application.

The draft permit grants LCRA's application with several special conditions relating to protection of water rights and the environment.

II. LEGAL AUTHORITY FOR AFFECTED PERSON STATUS

Pursuant to 30 Tex. Admin. Code § 55.251(a), the following may request a contested case hearing on water rights applications: the Commission, the Executive Director, the applicant, and affected persons when authorized by law. Affected persons are authorized to submit hearing requests for water rights applications under Tex. Water Code § 11.132(a). The Commission, on the request of any affected person, shall hold a hearing on a water rights application. The procedures for determining whether a hearing requestor is an affected person and whether the hearing request is valid are set forth in 30 Tex. Admin. Code §§ 55.250-55.256, which apply to water rights applications such as this one that were declared administratively complete after September 1, 1999.

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 Tex. Admin. Code § 55.256(a). An interest “common to members of the general public” does not qualify as a personal justiciable interest. *Id.*

Governmental entities with authority under state law over issues contemplated by the application may be considered affected persons. 30 Tex. Admin. Code § 55.256(b).

To determine whether a hearing requestor is an affected person, all relevant factors must be considered. 30 Tex. § 55.256(c). 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.

A hearing request by a group or association must meet the requirements set forth in 30 Tex. Admin. Code § 55.252(a). There are three requirements. First, at least one member of the group or association would have standing to request a hearing on his or her own. Second, the interests that the group or association seeks to protect must be germane to its purpose. Third, neither the claim asserted nor the relief requested by the group or association requires participation of the individual member(s) in the case.

A hearing request must substantially comply with the four requirements set forth in 30 Tex. Admin. Code § 55.251(c):

- (1) Give the name, address, and daytime telephone number of the person filing the request. If made by a group or association, the request must identify one person by who shall be responsible for receiving all official communications for the group, with the person’s name, address, daytime telephone number and facsimile number if possible.
- (2) Identify the person’s personal justiciable interest affected by the application, including a written statement explaining the requestor’s

location and distance relative to the application activity and how/ why the requestor believes he or she will be affected by the activity in a manner not common to members of the general public.

(3) Request a contested case hearing.

(4) Provide any other information specified in the public notice of the application.

The request for a contested case hearing must be filed with the Commission's Chief Clerk during the public comment period. 30 Tex. Admin. Code § 55.251(d).

The Commission must grant a request for a contested case hearing made by an affected person if the request complies with the requirements of 30 Tex. Admin. Code § 55.251; is timely filed with the Chief Clerk; and is pursuant to a right to hearing authorized by law. 30 Tex. Admin Code § 55.255(b)(2).

III. DISCUSSION

All six of the hearing requests meet the administrative requirements of 30 Tex. Admin. Code § 55.251(c). The hearing requests are attached as Attachment A. A map showing the location of LCRA's new diversion points and the hearing requestors' diversion points is attached as Attachment B.

Hearing Requests:

City of Austin:

The City is a municipal corporation that owns, operates, and maintains facilities for providing electric power and potable water service to its many citizens. It owns water rights that have diversion points located between LCRA's existing diversion point and the diversion points LCRA seeks to add to its permit application. The City argues that the proposed amendment would dramatically impact hydrological conditions in the Colorado Basin by adding countless diversion points hundreds of miles upstream of the existing diversion point and these new points will have a 1900 priority date. This could substantially injure the City's ability to divert water.

It also argues the reduced flow could require the City's current return flows be used to maintain instream flows and bay and estuary needs, force the City wastewater dischargers into non-compliance, and adversely impact the City's run-of-river rights. Also, as a matter of policy, fairness, and equal protection, LCRA should be required to change the priority date of these diversion points.

Recommendation: Grant. The City's intervening water rights could be adversely impacted without adequate special conditions. The interest claimed is protected by law and the City's water rights could be impaired.

STP Nuclear Operating Co. (STPNOC) and STP Owners (Owners):

STPNOC is a Texas non-profit corporation created and financed by Owners to maintain and operate the STP electric generating facilities in Matagorda County, Texas. STPNOC is the operator of the South Texas Nuclear Project and the Owners are Texas Genco, L.P., the City of Austin, the City of San Antonio, and AEP Texas Central Company. STPNOC and Owners state that STPNOC has a diversion point for its water right, Certificate of Adjudication No. 14-5437, which allows diversion by STPNOC of 102,000 acre feet of water per annum and storage in two off-channel reservoirs. One of LCRA's proposed diversion points is STPNOC's existing diversion point. STPNOC and Owners argue that this water right and several contracts will be impaired by the new upstream diversion points because new points are above STPNOC but below delivery points for contracted water.

Recommendation: Grant. STPNOC's and STP Owners' water right could be impaired by these new diversion points at their diversion point and above without adequate special conditions. The interest claimed is protected by law and the requestors' water rights could be impaired.

Colorado River Municipal Water District (CRMWD):

CRMWD is a political subdivision of the state created by the Constitution in 1949. It owns and operates three municipal water supply reservoirs upstream of LCRA's existing diversion point. CRMWD owns water rights upstream but does not provide these certificate numbers. CRMWD's claim for standing is based on a contract with LCRA in which LCRA agreed that it would not require CRMWD to pass through any more inflows than would have been required had the 133,000 acre feet per year Garwood irrigation water right remained at its original diversion point and had been used for irrigation purposes to the fullest extent possible.

Recommendation: Deny. CRMWD's water rights are all upstream of LCRA's proposed new diversion points and therefore will not be impacted since this application is not for new water. The same amount of water below CRMWD's water rights can be taken by LCRA after the amendment as before. The contract provision does not provide standing but is an agreement between the parties.

Keith and Helen Weber:

Keith and Helen Weber have a pending application for nine acre feet of water per annum from the Colorado River. They argue that the application was declared administratively complete on January 2, 2003 and that approving this amendment would have an adverse effect on the Webers' pending application. They further argue that granting LCRA's application will allow LCRA to use water which is now available to downstream water users, such as the Webers. The Webers state that the TCEQ has changed the priority date of other applications for amendments to add diversion points to the date of filing that application.

Recommendation: Deny. Commission records indicate that the Webers have withdrawn their application.

Sierra Club:

The Lone Star Chapter of the Sierra Club is a non-profit organization dedicated to protecting natural resources and the right of people to use and enjoy these resources. The members share the goals of protecting fish and wildlife and enjoy the fish and wildlife resources of Texas. Sierra Club is concerned that this application will divert water much further upstream than has historically been authorized, with an early priority date, which could impact persons' enjoyment of these resources. It is also concerned about how this application will impact the conditions to protect the environment in LCRA's Water Management Plan (WMP). And, Sierra Club states that movement of water diversions upstream, as sought pursuant to the application, would decrease river flows and worsen the already unacceptable conditions. Water quality would be reduced and the flows would not be enough to protect fish and wildlife resources.

Recommendation. Deny. Sierra Club does not name a member who would have standing in his own right as an affected person.

National Wildlife Federation:

NWF makes the same arguments that Sierra Club makes but also does not name a member that would have standing in his own right as an affected person.

Recommendation: Deny. NWF does not name a member who would have standing in his own right as an affected person.

IV. CONCLUSION

Grant the hearing requests of the City of Austin and STPNOC and STP Owners.
Deny the hearing requests of CRMWD, the Webers, NWF, and Sierra Club.

Respectfully submitted,

Richard A. Hyde, P.E.
Executive Director

Caroline Sweeney, Deputy Director
Office of Legal Services

Robert Martinez, Director
Environmental Law Division

by 
Robin Smith
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Environmental Law Division, MC 173
P.O. Box 13087
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(512) 239-0463
(512) 239-0606 (FAX)
Robin.Smith@tceq.texas.gov

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of August, a true and correct copy of the Executive Director's Response to Hearing Requests was filed with the Chief Clerk of the Texas Commission on Environmental Quality and sent to the persons on the attached Mailing List.


Robin Smith, Staff Attorney
Environmental Law Division

MAILING LIST
LOWER COLORADO RIVER AUTHORITY
DOCKET NO. 2016-0531-WR; CERTIFICATE OF ADJUDICATION NO. ADJ
5434

FOR THE APPLICANT:

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FOR THE CHIEF CLERK:

via electronic filing:

Bridget C. Bohac
Texas Commission on Environmental
Quality
Office of Chief Clerk, MC-105
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**Attachment A
Hearing Requests**

LAW OFFICES OF
BOOTH, AHRENS & WERKENTHIN, P.C.
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512 / 472-3263 • FAX 512 / 473-2609

MICHAEL J. BOOTH
CAROLYN AHRENS
FRED B. WERKENTHIN, JR.
ROSS RICHARD-CROW
WIL GALLOWAY

June 23, 2003

Via Facsimile: 239-3311

LaDonna Castanuela
Chief Clerk, MC-105
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

RE: Hearing Request of Colorado River Municipal Water District regarding Notice of an Application to Amend Certificate of Adjudication No. 14-5434E of Lower Colorado River Authority ("LCRA")

Dear Ms. Castanuela:

The Colorado River Municipal Water District ("CRMWD") submits the following comments and request for a contested case hearing on the above-referenced application:

PROTESTANT INFORMATION

Colorado River Municipal Water District
P.O. Box 869
Big Spring, Texas 79721-0869

c/o Fred B. Werkenthin, Jr.
Booth, Ahrens & Werkenthin, P.C.
515 Congress Avenue, Suite 1515
Austin, Texas 78701
(512) 472-3263
(512) 473-2609 (fax)
fbw@baw.com

CRMWD is a political subdivision of the State of Texas created by the Legislature in 1949 under Article XVI § 59 of the Texas Constitution. CRMWD owns and operates three municipal water supply reservoirs and other facilities upstream of LCRA's Garwood rights in the Colorado River Basin, including Lake J.B. Thomas, under Certificate of Adjudication No. 14-1002; E.V. Spence Reservoir, under Certificate of Adjudication No. 14-1008A; and O.H. Ivie Reservoir, under Permit No. 3676.

APPLICANT INFORMATION

Lower Colorado River Authority
Application No. 14-5434E

H OPA
JUN 24 2003
BY 
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WR

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
2003 JUN 23 PM 4:09
CHIEF CLERKS OFFICE



HEARING / PUBLIC COMMENT REQUEST

CRMWD requests a contested case hearing.

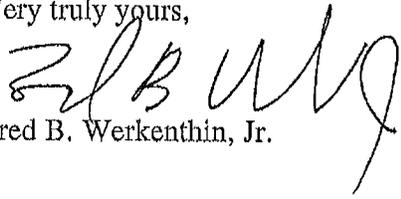
EFFECT OF PROPOSED WATER RIGHT

Without the inclusion of special conditions, adding upstream diversion points could increase the effect of this water right on CRMWD water rights. In 1998, CRMWD and LCRA entered into an agreement regarding LCRA's purchase and amendment of Certificate of Adjudication No. 14-5434. Among other things, CRMWD and LCRA agreed that "LCRA will not require CRMWD to pass through any more inflows than would have been required had the 133,000 acre-feet per year Garwood irrigation water right remained at its original diversion point and been used for irrigation purposes to the fullest extent possible."

CONCLUSION

CRMWD files these comments and requests that the Texas Commission on Environmental Quality convene a contested case hearing regarding LCRA's Application to Amend Certificate of Adjudication No. 14-5434E. Upon inclusion of a special condition implementing the CRMWD / LCRA 1998 Agreement, CRMWD will withdraw its comments and hearing request.

Very truly yours,


Fred B. Werkenthin, Jr.

FBW/db
270-030611-Garwood-prot-CC-ltr

cc: John Grant

The application by LCRA that is the subject of this hearing request has the potential to significantly affect the fish and wildlife resources of the Colorado River watershed and to affect Sierra Club's members. Through this application, LCRA basically seeks authority to divert some, and perhaps all, of the water authorized for diversion under Certificate 14-5434 much further upstream than has historically been authorized. As a result of such diversions, a large stretch of the Colorado River would experience significantly reduced flows. Unless appropriately controlled, that would result in reductions in water quality and in adverse impacts to fish and wildlife resources and to the ability of people, including Sierra Club's members, to use and enjoy those resources.

The changes sought by this application also have the potential to significantly affect the assumptions underlying the "Water Management Plan for the Lower Colorado River Basin" (Water Management Plan). In particular, the Water Management Plan's discussion of protection of instream flows assumes that water to satisfy Certificate 14-5434 will be present in the River for much of the reach below Austin. Even without the upstream diversions sought in the application, LCRA's projections, as prepared in connection with proposed revisions to the Water Management Plan, indicate that fish and wildlife resources may not be adequately protected. Those projections indicate that target instream flows, which are designed to provide reasonable conditions for reproduction and health of fish and wildlife resources, would be expected to be met only about 60% of the time overall. That percentage would be much lower during drought periods (about 33% of the time). Similarly, it would decline as water demands under existing rights increase over time. The upstream diversions for which authorization is sought pursuant to this application would cause those already low percentages to decline even further.

LCRA recently submitted an amended version of the Water Management Plan to TCEQ for review and approval. Because the Water Management Plan is required to consider and address the impacts of water management on water quality and on fish and wildlife resources, this application and the review of the Water Management Plan are integrally related. Accordingly, TCEQ should provide for a combined review of this application and the Water Management Plan. In addition, TCEQ should provide the opportunity for a consolidated hearing proceeding on both matters.

Obviously, the movement of water diversions upstream, as sought pursuant to the current application, would decrease river flows and worsen the already unacceptable conditions. Those reduced flows would reduce water quality in the river and would diminish river flows below levels necessary to protect fish and wildlife resources. Accordingly, the Sierra Club's interests in protecting fish and wildlife resources would be adversely affected by the granting of this application, as would its interests in protecting the ability of its members and others to recreate in and along the River.

The Sierra Club is particularly interested in participating in the development of special conditions to be included in any amended certificate to limit additional adverse impacts to fish and wildlife resources, water quality, and recreational activities resulting from the requested amendments.

Please contact me at the phone number or address listed above if you have any questions or need additional information.

Sincerely,

A handwritten signature in cursive script that reads "Ken Kramer".

Ken. Kramer, Ph.D.
Director
Lone Star Chapter
Sierra Club

LAW OFFICES OF
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MICHAEL J. BOOTH
FRED B. WERKENTHIN, JR.
WIL GALLOWAY

CAROLYN AHRENS
OF COUNSEL

OPA

February 9, 2006

FEB 09 2006

BY

[Signature]

CHIEF CLERK'S OFFICE

2:55 FEB -9 AM '06

ADD
2/8/06

Via Hand Delivery

LaDonna Castañuela, Chief Clerk
Office of the Chief Clerk
Texas Commission on Environmental Quality
P.O. Box 13807, MC-105
Austin, Texas 78711-3087

**Re: Water Rights Application No. 14-5434E by Lower Colorado River Authority
(Garwood)**

Dear Ms. Castañuela:

By letter signed by me and filed with your office on June 23, 2003, STP Nuclear Operating Co. ("STPNOC") requested a contested case hearing regarding Lower Colorado River Authority's ("LCRA") Water Rights Application No. 14-5434E and stated various objections to the application. As noticed, the application requests, among other things, authorization to add additional diversion points both upstream and downstream of the existing diversion point referenced in LCRA's Garwood water rights and with no change of priority date.

STPNOC and LCRA recently entered into a settlement agreement to resolve various matters of dispute, including STPNOC's objections to several LCRA water rights applications pending before the Texas Commission on Environmental Quality. Pursuant to that settlement agreement, STPNOC withdraws its objections to, and documents its support for, Application No. 14-5434E to the extent consistent with the settlement.

The settlement agreement expressly preserves STPNOC's right to participate in any proceedings on Application No. 14-5434E to the extent necessary to protect interests obtained in the settlement agreement. For the limited purpose of exercising that right, STPNOC maintains its request for contested case hearing on the application at this time, recognizing that there are various uncertainties remaining in the administrative process including requests for contested case hearing filed by other parties. It is STPNOC's intent that if a draft permit is agreed to that is consistent with STPNOC's interests under the settlement agreement with LCRA and all other parties withdraw their request for contested case hearing, then STPNOC would do the same.

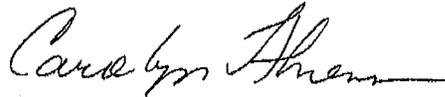
As part of STPNOC's settlement with LCRA, an Amended and Restated Contract and an Amended Partial Assignment and Transfer of Water Permit are entered between the parties

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pursuant to which STPNOC holds stated interests in Certificate of Adjudication No. 14-5437. Certificate of Adjudication No. 14-5437 is referenced in STPNOC's request for hearing. For additional reasons stated in STPNOC's June 23, 2003 letter, STPNOC remains a party affected by LCRA's application in ways not common to the general public and has a personal justiciable interest in the application that entitles STPNOC to be a party in any uncontested case that does proceed.

In consideration of the matters outlined above, STPNOC asks that this letter be placed in the agency's files regarding Application No. 14-5434E and that STPNOC continue to receive all notices and correspondence related to that application. Please let me know if there is any additional information required of STPNOC at this time.

Respectfully submitted,



Carolyn Ahrens
LAW OFFICES OF BOOTH, AHRENS
& WERKENTHIN, P.C.
515 Congress Avenue, Suite 1515
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(512) 472-3262 (phone)
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Cc:

Rick Gangluff
Jon Wood
Lyn Dean
Kellye Rila



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People and Nature: Our Future is in the Balance
NATIONAL WILDLIFE FEDERATION

GULF STATES NATURAL RESOURCE CENTER
44 East Avenue, Suite 200
Austin, Texas 78701

H OPA
JUN 24 2003
BY *[Signature]*

(512) 476-9805
FAX (512) 476-9810
http://www.nwf.org

26878
WR

June 23, 2003

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

Re: Request for Contested Case Hearing in the Matter of Application No. 14-5434E
by the Lower Colorado River Authority to amend Certificate of Adjudication No.
14-5434

Dear Ms. Castañuela:

The National Wildlife Federation ("NWF") hereby requests a contested case hearing on the above-referenced application. NWF provides the following information in support of that request.

This request for a contested case hearing is submitted on behalf of the National Wildlife Federation through its Gulf States Natural Resource Center. The contact information for NWF in this matter is as follows:

Myron J. Hess, Counsel
National Wildlife Federation
44 East Avenue, Suite 200
Austin, TX 78701
Ph: 512-476-9805
Fax: 512-476-9810
email: hess@nwf.org

This is a **REQUEST FOR A CONTESTED CASE HEARING** on water rights amendment application number 14-5434E, which was filed by the Lower Colorado River Authority. The National Wildlife Federation would be affected in a way that is not common to the general public because the National Wildlife Federation is a national, non-profit organization dedicated, among other things, to protecting natural resources and the right of people to use and enjoy those resources. NWF's membership is composed of people who share the goals of protecting fish and wildlife resources and the right of people to use and enjoy those resources.¹ NWF has

¹ The formal mission of the National Wildlife Federation "is to educate, inspire and assist individuals and organizations of diverse cultures to conserve wildlife and other natural resources and to protect the earth's environment in order to achieve a peaceful, equitable and sustainable future."

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*Hearing Request of NWF
Appl. No. 14-5434E, LCRA
Page 2*

wildlife resources and the right of people to use and enjoy those resources.¹ NWF has approximately 38,000 members in Texas many of whom use and enjoy those resources, including the resources of the Colorado River, both recreationally and, in some cases, for economic benefit. NWF's participation in the hearing does not require the participation of individual members in any capacity other than possibly to establish standing.

The Gulf States Natural Resource Center is a regional office of NWF and is located in Austin, Texas. One of the primary functions of the office is the implementation of a program to ensure adequate protection of stream and river flows to support fish and wildlife resources in Texas. NWF is pursuing that goal through a variety of avenues, including the filing of this hearing request.

The application by LCRA that is the subject of this hearing request has the potential to significantly affect the fish and wildlife resources of the Colorado River watershed and to affect NWF members. Through this application, LCRA basically seeks authority to divert some, and perhaps all, of the water authorized for diversion under Certificate 14-5434 much further upstream than has historically been authorized. As a result of such diversions, a large stretch of the Colorado River would experience significantly reduced flows. Unless appropriately controlled, that would result in reductions in water quality and in adverse impacts to fish and wildlife resources and to the ability of people, including NWF members, to use and enjoy those resources.

The changes sought by this application also have the potential to significantly affect the assumptions underlying the "Water Management Plan for the Lower Colorado River Basin" (Water Management Plan). In particular, the Water Management Plan's discussion of protection of instream flows assumes that water to satisfy Certificate 14-5434 will be present in the River for much of the reach below Austin. Even without the upstream diversions sought in the application, LCRA's projections, as prepared in connection with proposed revisions to the Water Management Plan, indicate that fish and wildlife resources may not be adequately protected. Those projections indicate that target instream flows, which are designed to provide reasonable conditions for reproduction and health of fish and wildlife resources, would be expected to be met only about 60% of the time overall. That percentage would be much lower during drought periods (about 33% of the time). Similarly, it would decline as water demands under existing rights increase over time. The upstream diversions for which authorization is sought pursuant to this application would cause those already low percentages to decline even further.

LCRA recently submitted an amended version of the Water Management Plan to TCEQ for

¹ The formal mission of the National Wildlife Federation "is to educate, inspire and assist individuals and organizations of diverse cultures to conserve wildlife and other natural resources and to protect the earth's environment in order to achieve a peaceful, equitable and sustainable future."



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JUN 24 2003
BY *Jky*

Kenneth Ramirez
Partner

*26878
WR*

111 Congress Avenue, Suite 2300
Austin, Texas 78701-4043
Phone: 512.494.3611
Fax: 512.472.9123
kramirez@bracepatt.com

June 23, 2003

VIA FACSIMILE AND HAND DELIVERY

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

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
JUN 23 PM 12:15
CHIEF CLERKS OFFICE

Re: Lower Colorado River Authority Application No. 14-5434E to Amend
Certificate of Adjudication No. 14-5434, as Amended

Dear Ms. Castafiuella:

The City of Austin ("City") requests a contested case hearing on the application of the Lower Colorado River Authority ("LCRA") for an amendment to Certificate of Adjudication No. 14-5434, as amended. The City can be reached by mailing or faxing correspondence to my address/fax number on this letterhead and by telephone to my direct number, 512/494-3611.

Applicant seeks to amend Certificate of Adjudication No. 14-5434 to add additional diversion points both upstream and downstream of the existing diversion point. LCRA also seeks to divert and use the water from anywhere on the perimeter of Town Lake, Lake Austin, and Lake Travis, posing a particular concern to the City of Austin's ability to keep diverting and using its own water resources.

The City is a municipal corporation that owns, operates, and maintains facilities for providing electric power and potable water service to its many citizens. As such, the City enjoys its own water rights and all of those water rights have diversion points located between the LCRA's existing diversion point and the diversion points LCRA seeks to add in this permit application.

The City has a personal justiciable interest that would be affected by the amendment to Certificate of Adjudication No. 14-5434 announced in the Texas Commission on Environmental Quality's ("TCEQ") Public Notice issued May 22, 2003. The Certificate currently includes, among other things, authorization for LCRA to divert up to 133,000 acre-feet of water per annum from a specific point on the Colorado River at a maximum rate of 600 cfs for irrigation of 32,000 acres of land within the "Garwood Service Area" in Colorado and Wharton Counties, as well as for municipal and industrial purposes

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LaDonna Castañuela, Chief Clerk

June 23, 2003

Page 2

anywhere within Travis, Bastrop, Fayette, Colorado, Wharton, and Matagorda Counties, in the Colorado, Lavaca, Guadalupe, and Brazos River Basins, and the Colorado-Lavaca and Brazos-Colorado Coastal Basins. The Certificate has a time priority of November 1, 1900.

The proposed amendment would dramatically impact hydrological conditions in the Colorado Basin—especially the area in and around Austin—by adding countless diversion points hundreds of miles upstream of the existing diversion point, at Town Lake, Lake Austin and Lake Travis. If granted, this amendment would permit the LCRA additional diversion points that bypass all the City's existing diversion points in the Basin while maintaining the 1900 priority date.

The TCEQ's well-established policy is that diversion points added or changed upstream automatically become junior in time priority to all of the water rights with diversion points between the existing and proposed diversion points. This policy stems from the "first in time, first in right" concept, a bedrock tenet in Texas water law. In abrogation of this policy, however, the LCRA now seeks an exemption from that time priority, insisting instead that LCRA's time priority at these additional new diversion points remain November 1, 1900.

In order for the LCRA to maintain the November 1, 1900 priority date, the City would have to subordinate its rights to the LCRA at every single diversion point the City owns in the Colorado Basin. The City's existing water rights will be substantially injured by this subordination because it will adversely affect the City's ability to divert water. In addition, such subordination decreases the value of the City's water rights.

Moving LCRA's diversion points upstream could alter hydrological conditions and injure City's water rights in at least the following ways:

- (a) Reduced Colorado River flows at Austin could require the City's current return flows be used to maintain instream flows and bay and estuary needs.
- (b) Reduced Colorado River flows at Austin could, under extreme conditions, force City wastewater discharges into noncompliance.
- (c) By diverting water, and possibly other flows from Highland Lakes with the same 1900 priority dates, the City's run-of-river rights will be adversely impacted.



LaDonna Castañuela, Chief Clerk
June 23, 2003
Page 3

The City's water right under Certificate of Adjudication 14-5471, as amended, has a priority date of June 27, 1914. When the Fayette Power Project Point was added to the City's Certificate of Adjudication 14-5471 on July 30, 1999, however, one of the stated conditions was that the City's right at that point, in accordance with TCEQ policy, be junior in time priority to all the existing water rights (as of January 28, 1999) with diversion points in the watershed between the existing diversion point and the requested diversion points. As a matter of policy, fairness, and equal protection, the LCRA must be held to the same fundamental standards of fairness.

Please schedule this hearing request for a Commission meeting and advise me of the time and date of the meeting.

Very truly yours,

Bracewell & Patterson, L.L.P.

A handwritten signature in black ink, appearing to read 'Kenneth Ramirez', with a long horizontal flourish extending to the right.

Kenneth Ramirez

KR/jcb

cc: *(Via Facsimile and Regular Mail)*
Toby Hammett Futrell, City Manager
Joe Canales, Deputy City Manager
Andrew Covar, Assistant Director, Water & Wastewater Utility
Michael Sullivan, Ph.D.

LAW OFFICES OF
BOOTH, AHRENS & WERKENTHIN, P.C.

A PROFESSIONAL CORPORATION
515 CONGRESS AVENUE, SUITE 1515
AUSTIN, TEXAS 78701-3503
512 / 472-3263 • FAX 512 / 473-2609

MICHAEL J. BOOTH
CAROLYN AHRENS
FRED B. WERKENTHIN, JR.
ROSS RICHARD-CROW
WIL GALLOWAY

June 23, 2003

Hand Delivery

LaDonna Castañuela, Chief Clerk
Office of the Chief Clerk
Texas Natural Resources
Conservation Commission
P.O. Box 13807, MC-105
Austin, Texas 78711-3087

**Re: Water Rights Application No. 14-5434E (Lower Colorado River Authority);
Request of STP Nuclear Operating Co. for Contested Case Hearing**

Dear Ms. Castañuela:

By this letter, STP Nuclear Operating Co. ("STPNOC") requests a contested case hearing regarding Lower Colorado River Authority's ("LCRA") Water Rights Application No. 14-5434E. STPNOC makes this request in its capacity as the operator of the South Texas Project ("STP") on its own behalf and on behalf of the four "STP Owners": (1) Texas Genco, LP.; (2) the City of Austin; (3) the City of San Antonio, acting by and through its City Public Service Board; and (4) AEP Texas Central Company.

Protestant Information:

STP Nuclear Operating Company
ATTN: R. A. Gangluff
P.O. Box 289
Wadsworth, Texas 77483
(361) 972-7879

c/o Carolyn Ahrens
Booth, Ahrens & Werkenthin, P.C.
515 Congress Avenue, Suite 1515
Austin, Texas 78701
(512) 472-3263
(512) 473-2609 (fax)
carolyn@baw.com

H OPA
JUN 24 2003
BY Jay
26878
WR
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
JUN 23 PM 4:03
CHIEF CLERKS OFFICE

RP

STPNOC is a Texas non-profit corporation created and financed by the STP Owners to maintain and operate the STP electric generating facilities in Matagorda County, Texas. STP facilities use water for cooling as a necessary component of the power generation process.

STPNOC succeeds Houston Lighting & Power Co. ("HL&P") as the operator of STP on behalf of and as agent for the STP Owners. In 1974, HL&P was Project Manager of STP and filed an application for water rights that was accepted for filing by the Texas Commission on Environmental Quality's ("TCEQ") predecessor agency. Proceedings on that application resulted in the STP Owners acquiring water rights for STP under Water Rights Permit No. 3233, superseded by Certificate of Adjudication No. 14-5437. In 1976, HL&P also entered into a water supply contract with LCRA ("Contract") on behalf of the STP Owners and a Partial Assignment and Transfer of Water Permit between HL&P, City of San Antonio, Central Power & Light, City of Austin, and LCRA ("Partial Assignment"). The Contract and Partial Assignment include reversion and termination provisions. Contractual Permit No. CP-237 also was issued by the TNRCC's predecessor agency for the STP Owners.

Considered together, the documents listed above authorize, for supply of water to STP, the diversion of 102,000 acre-feet of water per annum from the Colorado River in Matagorda County for industrial purposes, including development of power by means other than hydroelectric. Water rights for STP include a special condition related to diversion of flows in excess of a percentage of flow at the diversion point. The ability to divert and use water for STP also is particularly affected by water quality at the diversion point. Two off-channel impoundments adjacent to the Colorado River are authorized for STP, and recirculation of water is authorized. Consumptive use of up to 80,125 acre-feet of water per annum is authorized.

To secure water supply for STP beyond the STP Owners' current commitments from LCRA, STPNOC has filed Water Rights Application No. 14-5437A with the TCEQ, also relevant to use of water from the lower Colorado River. That application, which has been declared administratively complete, and the water rights and documents discussed above are matters of record with the TCEQ.

Applicant Information:

Lower Colorado River Authority
P.O. Box 220
Austin, Texas 78767

STPNOC's Standing to Protest:

Based on the proceedings on Water Use Permit No. 3233 for STP and other information available regarding water supply in the lower Colorado River Basin, STPNOC believes that granting LCRA's application may impact STPNOC and the STP Owners' interests in ways not common to the general public. This is true as to STPNOC's current water supply and interests as well as to the interests arising under STPNOC's pending water-rights application.

STPNOC believes that granting LCRA's Application No. 14-5434E alone and / or taken in conjunction with LCRA's other pending applications, may impact STPNOC and the STP

STP Nuclear Operating Co.
Request for Hearing/App. No. 14-5434E
Page 2 of 5

Owner's present rights under Certificate of Adjudication No. 14-5437, Contractual Permit No. CP-327 and under the Contract and Partial Assignment identified above in this request. LCRA's application seeks authorization to add numerous additional diversion points both far upstream and downstream on the Colorado River, in six or more counties, additional diversion authority from anywhere on the perimeter of three or more upstream lakes, and the right to retain original priority.

The changes in diversion currently proposed to facilitate more extensive use of water in distant locations, and the improper "piece-mealing" of the proposed and previous amendments of LCRA's existing water right to change purpose and area of use, separately and together, constitute a significant expansion of the underlying water right. The conversion of irrigation-use water rights, including water rights that were not historically perfected, to non-irrigation use and the transfer of such use to new and distant places significantly injures STPNOC's and the STP Owners' rights and interests. To the extent it is argued that such changes are authorized by amendments to the Water Code subsequent to the granting of water rights for STP, those amendments of the Water Code and such application would be unconstitutional and constitute a taking of the STP Owners' property.

Without regard to the injury to the STP Owners and STPNOC from the change of purpose and place of use, or by violation of contract, injury also may be anticipated from the addition of diversion points themselves. STPNOC's rights may be directly affected by interference with diversions of water for the STP, by a reduction in water available for diversion, including consideration of the instream-flow restrictions on diversion for STPNOC. STPNOC also is concerned regarding, and may be impacted by, a reduction in flow necessary to maintain acceptable water quality, and particularly salinity levels, at STPNOC's diversion facilities.

The current application also proposes to convert run-of-the river water rights to stored water rights, an additional expansion of use that creates adverse impact on other water rights and on the environment of greater magnitude than if the water right was exercised under the terms and conditions of the water right as they exist today.

Any interruption of dependable water of acceptable quality for STP would have adverse consequences for the supply of power to the STP Owners and the customers they serve. The supply of power at a reasonable cost from STP is necessary to support economic growth and protect the living standards of the citizens in the area that STPNOC serves. To impair the use of water needed for electric generation would be adverse to the public welfare. An interruption of dependable water supply for STP also would adversely affect the STP Owners' investments related to STP's facilities. In these respects and others, granting LCRA's Application would directly affect the legal rights, duties, privileges, powers and economic interests of STPNOC and the STP Owners, who are dependent on the Colorado River for present and future water supplies for STP.

Each of the STP Owners and STPNOC are affected persons with personal justiciable interests in the matters put at issue by LCRA's Application that are not common to the general public and have standing to make this request as contemplated in TEX. WATER CODE ANN. §5.115 (Vernon

2000) and 30 TEX. ADMIN. CODE §55.256(a) (West 2001).¹ See also 30 TEX. ADMIN. CODE §55.256(c) (West 2001) (for determining who is an affected person, all relevant factors should be considered, including but not limited to whether the interest claimed is one protected by the law under which the application will be considered, the relationship between the interests claimed and the application, the likely impact of granting the application on the health, safety, and use of property of the person, the likely impact of granting the application on use of the impacted natural resource by the person, and, for governmental entities, their statutory authority over or interest in the issues relevant to the application). Those STP Owners that are governmental entities (the City of Austin and the City of San Antonio, acting by and through its City Public Service Board) also have the kind of responsibility, authority and interest in the issues relevant to the application that is contemplated of affected persons under TNRCC Rules, 30 TEX. ADMIN. CODE §55.256(b) (West 2001) (“Governmental entities, including local governments and public agencies, with authority under state law over issues contemplated by that application may be considered affected persons”).

Location and Distance of Water Rights from the Proposed Activity:

STPNOC’s diversion point in Matagorda County is a matter of record with the agency for purposes of determining proximity to the numerous additional diversion points that LCRA proposes. However, STPNOC also notes that one of the proposed diversion points under LCRA’s application is STPNOC’s own diversion point. Water also is proposed to be diverted above STPNOC’s diversion point but below the point at which water would be released under contract for delivery to STP such that contract deliveries must pass the increased diversions that LCRA’s application proposes.

Conditions in Proposed Permit which may Satisfy Protestant’s Concerns:

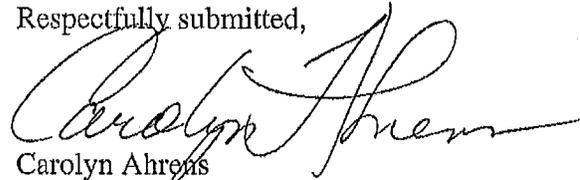
At this time, no draft permit amendment has been prepared, and the TCEQ staff have not yet performed the hydrologic and environmental analyses necessary for the STPNOC to determine whether or not there are terms and provisions that would satisfy STPNOC’s concerns regarding the impact of the proposed amendment. If LCRA’s application is to be granted in any respect, however, an acceptable accounting procedure will need to be imposed to assure that no impacts to STPNOC’s rights and interests occur, including its rights to water provided under contract. STPNOC also proposes that consideration be given to consolidating consideration of LCRA’s proposed amendment of water rights with its application to appropriate additional state water, which STPNOC also has protested. Concurrently with this request for contested-case hearing, STPNOC will remain amenable to a negotiated settlement of its protest.

¹ See also *Heat Energy Advanced Tech., Inc. v. West Dallas Coalition for Envtl. Justice*, 962 S.W.2d 288 (Tex. App.—Austin 1998, writ den’d) (the standard regarding affected persons does not require that a party show it will ultimately prevail on the merits, but simply that it potentially will suffer harm or have a justiciable interest that will be affected); *Texas Rivers Protection Ass’n v. Texas Natural Resource Conservation Comm’n*, 910 S.W.2d 147, 151 (Tex. App.—Austin 1995, writ den’d) (“the right to participate in proceedings is construed quite liberally to encourage varying points of view”).

Conclusion:

In consideration of the matters outlined above, STPNOC asks that this request be processed expeditiously and that the TCEQ convene a contested-case hearing regarding LCRA's application.

Respectfully submitted,



Carolyn Ahrens

LAW OFFICES OF BOOTH, AHRENS
& WERKENTHIN, P.C.

515 Congress Avenue, Suite 1515

Austin, Texas 78701

(512) 472-3262 (phone)

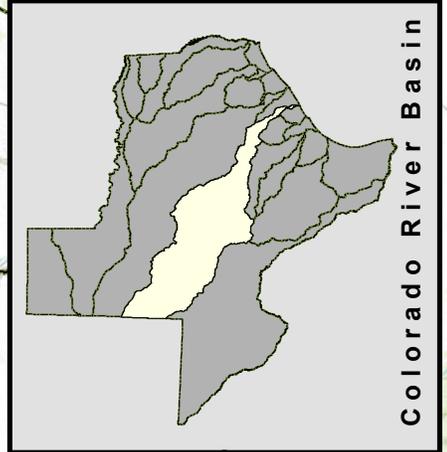
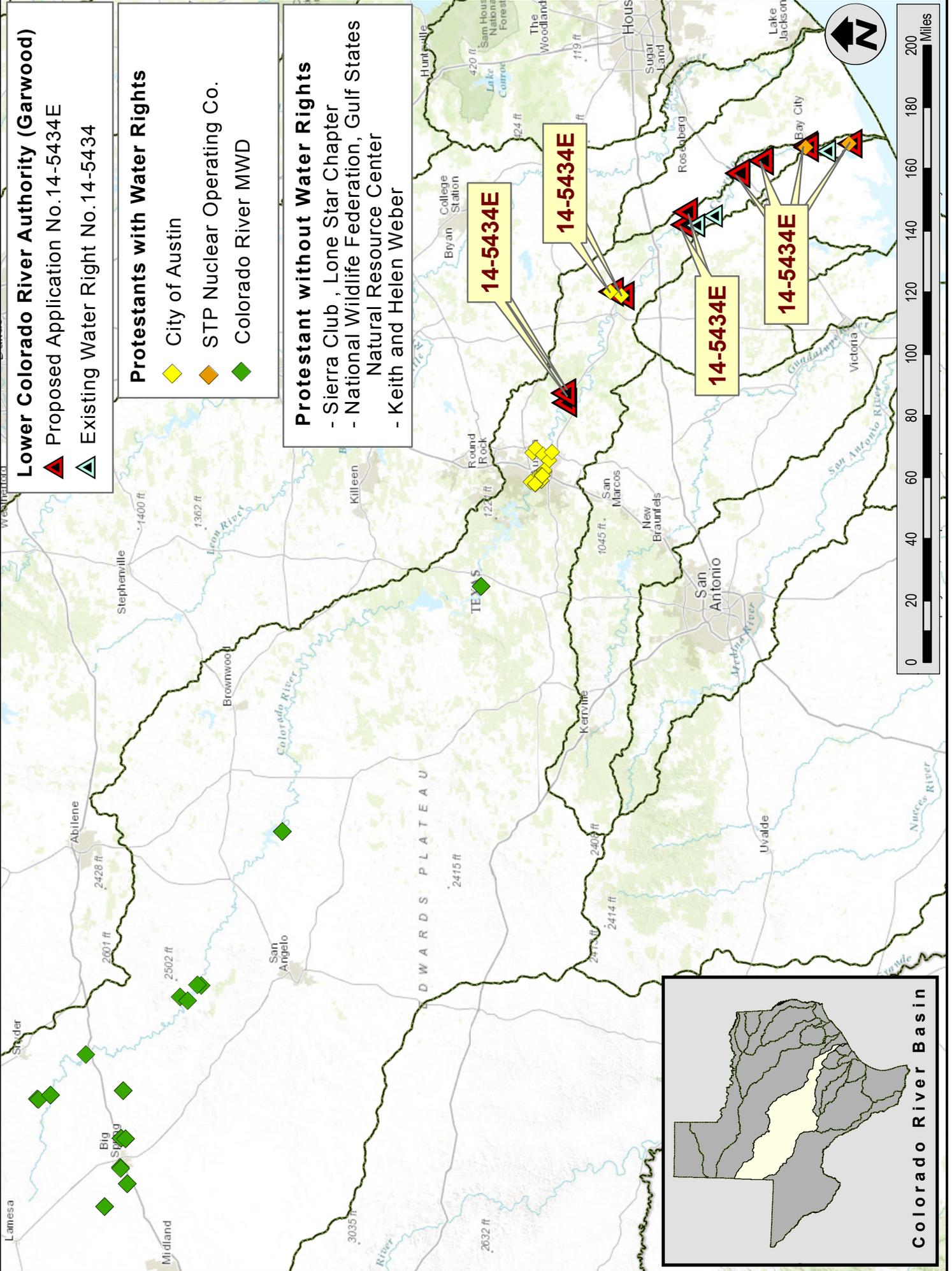
(512) 473-2609 (facsimile)

Attachment B
Map of LCRA's New Diversion Points and
Hearing Requestors' Diversion Points

Lower Colorado River Authority (Garwood)
▲ Proposed Application No.14-5434E
▲ Existing Water Right No.14-5434

Protestants with Water Rights
◆ City of Austin
◆ STP Nuclear Operating Co.
◆ Colorado River MWD

Protestant without Water Rights
- Sierra Club , Lone Star Chapter
- National Wildlife Federation, Gulf States Natural Resource Center
- Keith and Helen Weber



Colorado River Basin