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Vic McWherter, Public Interest Counsel

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

August 15, 2016

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

**RE: LOWER COLORADO RIVER AUTHORITY
TCEQ DOCKET NO. 2016-0531-WR**

Dear Ms. Bohac:

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

Sincerely,

A handwritten signature in cursive script that reads "Eli Martinez".

Eli Martinez, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

TCEQ DOCKET NO. 2016-0531-WR

APPLICATION BY THE LOWER	§	BEFORE THE
COLORADO RIVER AUTHORITY	§	TEXAS COMMISSION ON
TO AMEND CERTIFICATE OF	§	ENVIRONMENTAL QUALITY
ADJUDICATION NO. 5434	§	

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

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

COMES NOW, the Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (Commission or TCEQ) and files this Response to Hearing Requests in the above-referenced matter. OPIC recommends granting the requests for a contested case hearing filed by: the STP Nuclear Operating Co. (STPNOC) and the City of Austin. OPIC recommends the Commission deny the requests submitted by the Colorado River Municipal Water District (CRMWD) and Keith and Helen Weber. Although OPIC cannot currently recommend approval of the requests submitted by the National Wildlife Federation (NWF) and Sierra Club, if the information requested below is submitted in a reply by August 29, 2016, OPIC may also recommend granting their hearing requests.

In support of its recommendation OPIC respectfully submits the following:

I. INTRODUCTION

The Lower Colorado River Authority (LCRA or Applicant) has applied to amend Certificate of Adjudication No. 14-5434 by adding additional diversion points both upstream and downstream of the existing diversion point authorized in Certificate of Adjudication No. 14-5434 on the Colorado River. These additional diversion points are: two diversion points in Bastrop

County on the Colorado River and Spicer Creek authorized in Certificate of Adjudication No. 14-5473; two diversion points in Fayette County on the Colorado River and Cedar Creek authorized in Certificate of Adjudication No. 14-5474; three diversion points authorized from reservoirs on the Colorado River in Wharton and Matagorda County in Certificate of Adjudication No. 14-5476; two diversion points (one from a reservoir) in Colorado County and on the Colorado River authorized in Certificate of Adjudication No. 14-5475; one diversion point located in Wharton County on the Colorado River authorized by Certificate of Adjudication No. 14-5477; and one diversion point in Matagorda County on the Colorado River authorized by Certificate of Adjudication No. 14-5437.

LCRA also seeks to divert and use the water from anywhere on the perimeter of Lady Bird Lake (formerly known as Town Lake) and Lake Austin, authorized by Certificate of Adjudication No. 14-5471, and Lake Travis, authorized by Certificate of Adjudication 14-5482. Water diverted from reservoirs will not be diverted from storage in the reservoirs. LCRA currently owns a portion of Certificate of Adjudication No. 14-5434, which authorizes the Owner 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 for municipal, industrial, and agricultural purposes in Colorado, Wharton, Travis, Bastrop, Fayette, and Matagorda Counties within 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.

The LCRA's application was declared administratively complete and accepted for filing

with the Office of the Chief Clerk on February 5, 2003. On May 22, 2003, the TCEQ Chief Clerk mailed notice to all navigation districts in the basin as well as all holders of certified filings, permits and claims of water rights. The deadline to request a contested case hearing was June 23, 2003.

II. REQUIREMENTS OF APPLICABLE LAW

A. Requirements to Obtain Affected Person Status

This application was declared administratively complete after September 1, 1999, and is subject to Chapter 55, Subchapter G, sections 55.250 - 55.256. According to these rules, an “affected person” must submit a timely contested case hearing request in writing and in compliance with Commission requirements for making a request.¹ In addition, the request must identify the person’s personal justiciable interest affected by the application, including a brief, specific explanation regarding “the requestor’s location and distance relative to the activity that is the subject of the application and how and why the requestor believes he or she will be affected by the activity in a manner not common to the members of the general public.”²

An “affected person” is one “who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application” in a manner not common to members of the general public.³ Relevant factors considered in determining a person’s affected person status include:

- (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

¹ 30 TEX. ADMIN. CODE (“TAC”) §§ 55.251 *et seq.* and 30 TAC § 295.171.

² 30 TAC § 55.251(c)(2).

³ 30 TAC § 55.256(a). “This standard does not require parties to show that they will ultimately prevail on the merits; it simply requires them to show that they will potentially suffer harm or have a justiciable interest that will be affected.” *United Copper v. TNRCC*, 17 S.W.3d 797, 803 (Tex.App. - Austin 2000).

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 the 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.⁴

A contested case hearing should be granted if an affected person's hearing request meets all requirements of applicable law. A request for hearing shall be granted if the request is made by the applicant or the executive director.⁵ The Commission may also refer an application to the State Office of Administrative Hearings if the Commission determines that a hearing would be in the public interest.⁶

A group or association may request a contested case hearing only if the group or association meets all of the following requirements:

- (1) one or more members of the group or association would otherwise have standing to request a hearing in their own right;
- (2) the interests the group or association seeks to protect are germane to the organization's purpose; and
- (3) neither the claim asserted nor the relief requested requires the participation of the individual members in the case.⁷

B. Requirements for a Water Use Permit

Section 11.022 of the Texas Water Code (TWC) provides that "the right to the use of state water may be acquired by appropriation in the manner and for the purposes provided in this chapter." Section 11.134(b) provides in pertinent part that the Commission shall grant an

⁴ 30 TAC § 55.256(c).

⁵ 30 TAC § 55.255(b)1

⁶ 30 TAC § 55.255(c).

⁷ 30 TAC § 55.252(a).

application to use state water only if:

- (2) unappropriated water is available in the source of supply;
- (3) the proposed appropriation:
 - (A) is intended for a beneficial use
 - (B) does not impair existing water rights or vested riparian rights;
 - (C) is not detrimental to the public welfare;
 - (D) considers the assessments performed under Sections 11.147(d) and (e) and Sections 11.150, 11.151, and 11.152;
 - (E) addresses a water supply need in a manner that is consistent with the state water plan and the relevant approved regional water plan for any area in which the proposed appropriation is located, unless the commission determines that conditions warrant waiver of this requirement; . . .

Section 11.147(d) of the Water Code also requires the Commission to consider the effect of a proposed permit on existing instream uses and water quality.

III. DISCUSSION

A. Determination of Affected Persons

a. STP Nuclear Operating Co.

On June 23, 2003, a hearing request was submitted by the STP Nuclear Operating Co. (STPNOC), on behalf of itself and the four South Texas Project 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. 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.

The Commission may grant an application only when the proposed use will not impair

existing water rights.⁸ STPNOC is concerned that granting the pending application could impact SPTNOC and the STP owners' present rights under Certificate of Adjudication No. 14-5437 by direct interference with diversions, a reduction in water available for diversion, including consideration of instream-flow restriction on diversions for STPNOC. Further, STPNOC is concerned about a possible reduction in flow necessary to maintain acceptable water quality, and particularly salinity levels, at STPNOC's diversion facilities. A reduction of dependable water of acceptable quality could have adverse consequences for the supply of power to the STP owners and the customers they serve.

The Executive Director (ED) created a map in this matter which indicates that STPNOC's water rights are indeed located along the Colorado River downstream of the proposed diversions. In fact, one of the proposed diversion points under LCRA's application is STPNOC's own diversion points. As an existing water rights holder, STPNOC has a personal justiciable interests under Texas Water Code §11.134(b)(3)(B). OPIC therefore recommends that STPNOC be determined an affected person and that the Commission grant its request for a contested case hearing case hearing.

b. The City of Austin

On July 23, 2008, the City of Austin (Austin or the City) submitted a hearing requested in this matter. The City is a municipal corporation that owns, operates, and maintains facilities for providing electric power and potable water service to its citizens. The City owns multiple water rights, each of which have diversion points between the LCRA's existing diversion point and diversion points LCRA seeks to add in this permit application. The City is concerned that the proposed application could alter hydrological conditions and injure the City's water rights in the

⁸ TWC § 11.134(b)(3)(B).

following ways:

1. Reduced Colorado River flows at Austin could require the City's current return flows be used to maintain instream flow and bay and estuary needs;
2. Reduced Colorado River flows at Austin could force City wastewater discharges into noncompliance; and
3. By diverting water, and possible other flows from Highland Lakes with the same 1900 priority dates, the City's run-of-river rights may be adversely impacted.

The Executive Director (ED) created a map in this matter which indicates that the City's water rights are indeed located along the Colorado River downstream of the proposed diversions. As an existing water rights holder, the city of Austin has a personal justiciable interest under Texas Water Code §11.134(b)(3)(B). OPIC therefore recommends that the City be determined an affected person and that the Commission grant its request for a contested case hearing case hearing.

c. National Wildlife Federation

On June 23, 2003, Myron Hess, on behalf of the National Wildlife Federation (NWF), submitted a hearing request in this matter. NWF indicates that it is a national, non-profit organization dedicated to protecting the ecosystems that are most critical to native wildlife in America. NWF's members are dedicated to protecting fish and wildlife resources and the right of people to use and enjoy those resources.

NWF is concerned that the proposed permit could significantly reduce flows into the Colorado watershed which could impact water quality and adversely affect fish and wildlife resources. Further, NWF is concerned the that the application has the potential to significantly affect the assumptions underlying the Water Management Plan for the Lower Colorado Basin

and leave fish and wildlife resources inadequately protected.

While OPIC finds that the interests NWF seeks to protect are germane to the organization's purpose, its hearing request did not identify one or more members of the group or association who would otherwise have standing to request a hearing in their own right as required by 30 TAC §55.252(a)(1). At this time, OPIC therefore cannot recommend that the Commission grant NWF's hearing request. However, 30 TAC §55.252(b) authorizes OPIC to request an explanation of how a group or association meets the requirements of subsection §55.252(a). If NWF provides such an explanation by the reply deadline of August 29, 2016, OPIC may reconsider its recommendation.

d. Sierra Club

On June 23, 2003, Ken Kramer, on behalf of the Sierra Club, submitted a hearing request in this matter. Sierra Club indicates that it is a national, non-profit organization dedicated to protecting natural resources and the right of people to use and enjoy those resources. Sierra Club's members share the goals of protecting fish and wildlife.

Sierra Club is concerned that the proposed permit could significantly reduce flows into the Colorado watershed which could impact water quality and adversely affect fish and wildlife resources. Further, Sierra Club is concerned that the application has the potential to significantly affect the assumptions underlying the Water Management Plan for the Lower Colorado Basin and leave fish and wildlife resources inadequately protected.

While OPIC finds that the interests Sierra Club seeks to protect are germane to the organization's purpose, its hearing request did not identify one or more members of the group or association who would otherwise have standing to request a hearing in their own right as required by 30 TAC §55.252(a)(1). At this time, OPIC therefore cannot recommend that the

Commission grant Sierra Club's hearing request. However, 30 TAC §55.252(b) authorizes OPIC to request an explanation of how a group or association meets the requirements of subsection §55.252(a). If NWF provides such an explanation by the reply deadline of August 29, 2016, OPIC may reconsider its recommendation.

e. Colorado River Municipal Water District

On June 23, 2003, the Colorado River Municipal Water District (CRMWD), submitted a hearing request in this matter. The CRMWD is a political subdivision of the state 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 right 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. 10-1008A; and O.H. Ivie Reservoir, under Permit No. 3676.

CRMWD is concerned that, without the inclusion of special conditions, adding upstream diversion points as proposed in the permit amendment could affect their water rights. The Executive Director (ED) created a map in these proceedings which indicates that CRMWD does not own any water rights downstream of the proposed diversion points in LCRA's application. CRMWD indicates that they have an agreement with LCRA concerning Certificate of Adjudication No. 14-5434 whereby CRMWD is not required 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." CRMWD's water rights are all upstream of LCRA's proposed new diversion points, and OPIC finds that a private contract provision entered into between LCRA and CRMWD is not an interest that is protected by the law under which the application will be considered. OPIC

therefore recommends the Commission deny CRMWD's request.

f. Keith and Helen Weber

The Chief Clerk received a timely request from Gwendolyn Webb on behalf of Keith and Helen Weber for a contested case hearing on June 24, 2003. The Webers argue that the proposed permit may pose an adverse impact to the pending application submitted by the Webers for their own water right. Assuming, *arguendo*, that a pending application confers a right sufficient to base standing for a contested case hearing, the application submitted by the Webers has been withdrawn in the years that followed notice of LCRA's application. OPIC therefore recommends the Commission deny this request for hearing.

IV. CONCLUSION

OPIC respectfully recommends that the Commission grant the hearing requests of the STP Nuclear Operating Co. (STPNOC) and the City of Austin. OPIC recommends the Commission deny the requests submitted by the Colorado River Municipal Water District (CRMWD) and Keith and Helen Weber. Although OPIC cannot currently recommend approval of the requests submitted by the National Wildlife Federation (NWF) and Sierra Club, if the information requested is submitted in a reply by August 29, 2016, OPIC may also recommend granting their hearing requests. Based on the foregoing, OPIC respectfully requests that the Commission refer this matter to SOAH for a contested case hearing.

Respectfully submitted,

Vic McWherter
Public Interest Counsel



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CERTIFICATE OF SERVICE

I hereby certify that on August 15, 2016, the original and seven true and correct copies of the Office of the Public Counsel's Response to Hearing Requests were filed with the Chief Clerk of the TCEQ and a copy was served to all persons listed on the attached mailing list via hand delivery, facsimile transmission, Inter-Agency Mail or by deposit in the U.S. Mail.



Eli Martinez

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TCEQ DOCKET NO. 2016-0531-WR

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