

2800 JPMorgan Chase Tower, 600 Travis
Houston, TX 77002
Telephone: 713-226-1200
Fax: 713-223-3717
www.lockelord.com

Locke Lord Bissell & Liddell LLP

Attorneys & Counselors

Gerry Pels
Direct Telephone: 713-226-1202
Direct Fax: 713-223-3717
gpels@lockelord.com

CHIEF CLERKS OFFICE

2011 APR - 6 AM 11: 21

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

April 6, 2011

BY HAND

LaDonna Castañuela, Chief Clerk
Texas Commission on Environmental Quality
Office of the Chief Clerk
12100 Park 35 Circle
Austin, Texas 78753

Re: Sandy Creek Energy Associates, LP, et al.; TCEQ Docket No. 2011-0273-MIS-U; Appeal
of Executive Director's Negative Use Determination

Dear Ms. Castanuela:

Please find enclosed for filing an original and seven copies of "Sandy Creek/SCEA's Reply in Support of Appeal of Executive Director's Use Determination for Application 13256" relating to the TCEQ docket number listed above.

If you have any questions, please do not hesitate to contact me at the number or address listed above.

Respectfully submitted,

LOCKE LORD BISSELL & LIDDELL LLP


Gerald J. Pels

Enclosure

LaDonna Castañuela, Chief Clerk
Texas Commission on Environmental Quality
April 6, 2011
Page 2

cc: (Via U.S. Mail)

FAX: 512/239-3311

Sarah Shadburne
LS Power Development, LLC
Two Power Center, 11th Floor
East Brunswick, NJ 08816

Bridget Bohac
TCEQ Office of Public Assistance MC 108
P. O. Box 13087
Austin, TX 78711-3087
512/239-4000
FAX: 512/239-4007

Andrew J. Hahn, Jr.
Chief Appraiser
McLennan County Appraisal District
P. O. Box 2297
Waco, TX 76703-2297
254/752-9864
FAX: 254/752-8225

Kyle Lucas
TCEQ Alternative Dispute
Resolution Program MC 222
P. O. Box 13087
Austin, TX 78711-3087
512/239-0687
FAX: 512/239-4015

Susana M. Hildebrand, P.E.
TCEQ Chief Engineer's Office MC 168
P. O. Box 13087
Austin, TX 78711-3087
512/239-4900
FAX: 512/239-6188

Chance Goodin
TCEQ Chief Engineer's Office MC 206
P. O. Box 13087
Austin, TX 78711-3087
512/239-6335
FAX: 512/239-6188

Robert Martinez
TCEQ Environmental Law Division MC 173
P. O. Box 13087
Austin, TX 78711-3087
512/239-0600
FAX: 512/239-0606

Blas Coy
TCEQ Office of Public Interest Counsel MC 103
P. O. Box 13087
Austin, TX 78711-3087
512/239-6363
FAX: 512/239-6377

Docket Clerk
TCEQ Office of Chief Clerk MC 105
P. O. Box 13087
Austin, TX 78711-3087
512/239-3300

LaDonna Castañuela, Chief Clerk
Texas Commission on Environmental Quality
April 6, 2011
Page 3

bcc: Gerry Pels
James McGuire

**APPEAL OF THE
EXECUTIVE DIRECTOR'S NEGATIVE
USE DETERMINATION ISSUED TO
SANDY CREEK ENERGY
ASSOCIATES, ET AL.

USE DETERMINATION APPLICATION
NO. 13256**

§
§
§
§
§
§
§
§

2011 APR -6 AM 11: 21
**BEFORE THE
CHIEF CLERKS OFFICE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY**

**SANDY CREEK/SCEA REPLY IN SUPPORT OF APPEAL OF EXECUTIVE
DIRECTOR'S USE DETERMINATION FOR APPLICATION 13256**

Pursuant to the briefing schedule issued by the Texas Commission on Environmental Quality ("TCEQ"), Sandy Creek Power Generation Facility/Sandy Creek Energy Associates, L.P., *et al.* ("SCEA") files this reply in support of its appeal of the Executive Director's ("ED") Negative Use Determination for Application 13256, dated January 10, 2011 (the "ED's Negative Use Determination"). As shown below and in the initial appeal, the ED's Negative Use Determination is improper, without support in the record, and is not consistent with precedent and good policy. For these reasons, it should be reversed.

I. INTRODUCTION

In early 2009, SCEA applied for a use determination for pollution control property tax exemption as authorized by Texas Tax Code § 11.31. The pollution control property at issue is a pre-treatment system (the "Reclaimed Water System") installed at the Sandy Creek Power Generation Facility, Riesel, McLennan County, Texas ("Sandy Creek"). The Reclaimed Water System clarifies, disinfects, and neutralizes wastewater received from the Waco Metropolitan Area Regional Sewage System ("WMARSS"). In short, Sandy Creek receives wastewater from WMARSS and treats it for reuse, thereby eliminating the need for "new" water at the facility. Stated simply, the Reclaimed Water System cleans and uses wastewater instead of fresh water.

Absent Sandy Creek's process, millions of gallons of wastewater would be discharged daily, rather than being reused. There can be no doubt that this system or process fits neatly into the definition of "pollution control equipment." As SCEA explained to TCEQ during the application process, the Reclaimed Water System is different than conventional raw water treatment systems which merely use process water from a potable water source or on-site wells typically found at coal plants.¹

On January 11, 2011, SCEA's application was summarily denied in the ED's Negative Use Determination.² The ED's Negative Use Determination included an analysis of only two environmental rules or regulations, one of which was never even cited or relied upon by SCEA. Noting this and other errors, SCEA timely appealed.³ Both the ED and the TCEQ's Office of Public Interest Counsel ("OPIC") subsequently filed response briefs to the appeal – offering essentially the same positions – opposing further, proper consideration of SCEA's application.⁴ The Chief Appraiser for the McLennan County Appraisal District received notice of the appeal, but did not file a brief opposing SCEA's position.

II. ISSUES RAISED IN THIS APPEAL

The issues raised in the ED's Negative Use Determination, SCEA's appeal, and the briefs filed by Opposing Parties are:

- Whether any one or more of the numerous environmental rules or regulations cited by

¹ It is important to note that SCEA's application was measured and conservative. It did not seek to include in its Application those components of raw water treatment systems typically found at coal plants using process water from a potable source or on site wells. For example, components of conventional systems like multi-media filters, reverse osmosis units, mixed bed demineralization equipment, and related tanks and piping were not included in SCEA's application.

² The ED's Negative Use Determination was sent to SCEA on January 10, 2011, approximately two years after SCEA filed its initial application, and only one paragraph was dedicated to the determination. It offers no explanation for the extended period of consideration by the ED.

³ The appeal, timely filed on February 2, 2011, demonstrated that the ED did not properly consider the record in reaching his decision and identified the erroneously analyzed environmental regulation.

⁴ The ED and OPIC are hereinafter collectively referred to as the "Opposing Parties." The brief filed by the ED in response to this appeal is hereinafter referred to as the "ED Brief," and the brief filed by the OPIC in response to this appeal is hereinafter referred to as the "OPIC Brief."

SCEA are met or exceeded by the Reclaimed Water System at Sandy Creek.

- Whether the Reclaimed Water System at Sandy Creek, which reuses wastewater instead of using water from a potable water source or well⁵, is used for pollution control purposes.
- Whether the ED acted arbitrarily or capriciously, or abused his discretion, in issuing a conclusory use determination that (a) failed to consider all of the regulations met or exceeded by SCEA; (b) erroneously considered a regulation not cited by SCEA; and (c) relied upon non-statutory criteria in making the determination.

The following sections answer each of these issues in the affirmative, squarely demonstrating that the negative use determination was erroneous, and make clear that good public policy supports granting SCEA's application.

III. SCEA IDENTIFIED NUMEROUS SPECIFIC AND APPLICABLE ENVIRONMENTAL RULES OR REGULATIONS BEING MET OR EXCEEDED BY THE RECLAIMED WATER SYSTEM

Texas law provides that “[a] person is entitled to an exemption from taxation of all or part of real and personal property that the person owns and that is used wholly or partly as a facility, device, or method for the control of air, water, or land pollution.” Texas Tax Code § 11.31(a).

The term “facility, device, or method for the control of air, water, or land pollution” means:

. . . any structure, building, installation, excavation, machinery, equipment, or device, and any attachment or addition to or reconstruction, replacement, or improvement of that property, that is used, constructed, acquired, or installed wholly or partly *to meet or exceed rules or regulations adopted by any environmental protection agency of the United States, this state, or a political subdivision of this state* for the prevention, monitoring, control, or reduction of air, water, or land pollution.

Texas Tax Code § 11.31(b) (emphasis added).

The Reclaimed Water System is exactly the type of equipment that TCEQ has specifically identified as pollution control equipment eligible for the pollution control property

⁵ While a reclaimed water system that like constructed by SCEA expressly falls into a category of equipment identified in TCEQ guidance as being used for pollution control purposes, the ED inexplicably argues that it does not. *See infra* Section IV.

tax exemption under Texas Tax Code § 11.31.⁶ SCEA noted this and identified environmental rules met or exceeded by the Reclaimed Water System in its application and other information submitted pursuant to TCEQ requests, including Texas Water Code § 11.1271; 30 Texas Administrative Code § 288.3; 30 Texas Administrative Code § 288.7 (including subparts (a)(1) through (a)(3) and (b)); and 30 Texas Administrative Code §§ 210.32-33. Indeed, SCEA submitted a lengthy discussion of how the Reclaimed Water System at Sandy Creek meets or exceeds these specific statutory and regulatory requirements.⁷ The Reclaimed Water System was installed as direct result of Texas environmental rules and regulations, and results in substantial and material environmental benefits both at and around Sandy Creek.

Despite the complete and comprehensive materials SCEA provided to TCEQ in support of its application, Opposing Parties argue that SCEA has not cited definitive rules met or exceeded. As shown below, Opposing Parties' arguments have no basis in the law and must be rejected by the Commission.

A. SCEA's Status as a Water Right's Applicant is Irrelevant to the Use Determination.

Opposing Parties argue that two of the cited environmental rules and regulations, Texas Water Code § 11.1271 and 30 T.A.C. § 288.7, do not apply on the grounds that SCEA "has not identified itself as an applicant for a new or amended water right."⁸ This simplistic argument, however, has no foundation in statutory or regulatory language. Neither the Texas Tax Code § 11.31 nor TCEQ regulations require that SCEA demonstrate that it is an applicant for a new or amended water right.⁹ Texas Water Code § 11.1271 and 30 T. A. C. § 288.7 require completion

⁶ See *id.*

⁷ See ED Brief, Ex. 1 (August 6, 2009 letter from Richard Barton to Minor Hibbs of the TCEQ) at 5-7.

⁸ See ED Brief at 5-7; OPIC Brief at pp. 4-5; see also ED's Negative Use Determination at 1 (denying application on basis that "Sandy Creek has failed to cite an applicable environmental regulation being met or exceeded").

⁹ See *Texas Health Facilities Comm. v. Charter Medical-Dallas, Inc.*, 665 S.W.2d 446, 454 (Tex. 1984) ("Arbitrary and capricious agency action . . . may be found when an agency improperly bases its decision on non-statutory

of a water conservation plan¹⁰ prior to application for a new or amended water right. Indeed, a *completed* plan must be filed with and support the application. Here, SCEA's completion of the Application process would have served no purpose. SCEA completed regulatory analysis under Section 288.7 and concluded that its funding of and construction of the Reclaimed Water System would reduce the consumption of new raw water at the site and also eliminate the need to obtain a direct water right that would have authorized SCEA to appropriate state-owned water from the Brazos River or Lake Austin.¹¹

The ED's argument that SCEA did not apply for a water rights permit becomes a "red herring" when it is considered in light of virtually any typical fact pattern. Take for example, the use of concrete reclaiming equipment that reclaims sand and gravel for reuse. Like the Reclaimed Water System, this is equipment that is specifically listed as qualifying for tax exempt treatment.¹² Clearly, the concrete reclaiming equipment provides environmental benefit by reducing the volume of waste that will need to be disposed. Under the ED's line of reasoning, the facility owner cannot avail itself of the tax exemption unless it had previously applied for a permit to dispose of its waste such as for an onsite landfill. Here, SCEA's reuse of wastewater is "to reduce . . . the amount of new water used in process and make up water . . .".¹³ Thus, the very rule in question stipulates that the use of wastewater be for conservation purposes, which SCEA is satisfying. Obviously, SCEA does not need to be an applicant for a new or amended water right to meet the conservation requirement, just as the facility that installs the concrete

criteria.").

¹⁰ A "water conservation plan" is "a strategy or combination of strategies for reducing the volume of water withdrawn from a water supply source, for reducing the loss or waste of water, for maintaining or improving the efficiency in the use of water, for increasing the recycling and reuse of water, and for preventing the pollution of water." 30 TEX. ADMIN. CODE § 288.1(19).

¹¹ See ED Brief, Ex. 1 (August 6, 2009 letter from Richard Barton to Minor Hibbs of the TCEQ) at 6.

¹² See 30 TEX. ADMIN. CODE § 17.14(a) (Item S-28) (identifying "Concrete Reclaiming Equipment" which "[p]rocesses mixed, unpoured concrete batches to reclaim the sand and gravel for reuse and recycles the water in a closed loop system" as pollution control property).

¹³ See 30 TEX. ADMIN. CODE § 17.14(a) (Item W-58).

reclaiming equipment does not need to seek a landfill permit. SCEA's reuse of wastewater obviates the necessity of a certificate of adjudication, and also the necessity of a water conservation plan. Thus, the Reclaimed Water System not only meets an environmental rule but eliminates the need to obtain the direct water right. It would be difficult to conceive of a more clear example of exceeding a regulatory requirement. That is, SCEA eliminated the necessity of securing authorization to take a valuable state resource, potable water. SCEA described this analysis and conclusion to TCEQ as part of its application.¹⁴

As a direct result of the analysis required under the Texas Water Code and applicable rules, the Reclaimed Water System was installed at Sandy Creek. That the required analysis did not lead to an application for a new or amended water right does not negate the reality that SCEA installed the Reclaimed Water System to meet regulatory requirements. Indeed, such an application would have been in contravention of the burden of proof to show that "no feasible alternative to the proposed appropriation exists and that the requested amount of appropriation is necessary and reasonable for the proposed use."¹⁵

Accordingly, for the reasons described above, Opposing Parties' argument that SCEA must identify itself as an applicant of a new or amended water right lacks merit.

B. SCEA's Contract with the City of Waco Establishes that the Reclaimed Water System is Exceeding Environmental Rules or Regulations.

As part of its showing that the Reclaimed Water System at Sandy Creek meets or exceeds the requirements of 30 T.A.C. § 288.3, SCEA cites an Amendment to the City of Waco's Certificate of Adjudication (the "Amended Certificate") obtained pursuant to SCEA's contract with the City. Opposing Parties claim that SCEA's citing these documents proves environmental

¹⁴ See ED Brief, Ex. 1 (August 6, 2009 letter from Richard Barton to Minor Hibbs of the TCEQ).

¹⁵ See 30 TEX. ADMIN. CODE § 288.7(b).

rules and regulations were not in play.¹⁶ To the contrary, the contract and Amended Certificate were not cited as “requirements” in and of themselves. Instead, they show that the City of Waco and SCEA entered into a contract to potentially provide “new” water for Sandy Creek if WMARSS could not provide sufficient quantities of reusable wastewater. The Amended Certificate, obtained as a requirement of the contract, obligated the City to implement a water conservation plan for industrial or mining use under 30 T.A.C. Code § 288.3.¹⁷ The Reclaimed Water System obviated the need for “new” water at Sandy Creek, and qualifies as a conservation¹⁸ measure to meet and exceed the necessity of SCEA obtaining a certificate of adjudication and the necessity of any party implementing a water conservation plan.¹⁹

Opposing Parties also argue that 30 T.A.C. § 288.3 is informational and not enforceable.²⁰ This is erroneous and irrelevant for the following two reasons. First, the enforceability of environmental rules is not a consideration under the statutory tax exemption for pollution control property pursuant to Texas Tax Code § 11.31 or the associated TCEQ regulations. Consequently, an inquiry into the enforceability of environmental rules or regulations is not properly part of the ED’s analysis of an applicant’s entitlement to the tax

¹⁶ See ED Brief at 5-6; OPIC Brief at 4.

¹⁷ See ED Brief, Ex. 2 (Amendment to Certificate of Adjudication No. 12-2315C) at p. 3-4 (noting that the Amended Certificate is “issued subject to the Rules of the [TCEQ]” and that “owner or contract customer must submit an industrial/mining water conservation plan to comply with [30 T.A.C.] § 288.3”).

¹⁸ “Conservation” is “those practices, techniques, and technologies that will reduce the consumption of water . . . or increase the recycling or reuse of water so that a water supply is made available for future or alternative uses.” Texas Water Code § 11.002(8)(B). Accordingly, the Reclaimed Water System results in conservation under the statutory definition of the term.

¹⁹ A close reading of 30 Tex. Tax Code § 11.31 reveals that it does not specifically require that to qualify for tax exempt status the regulation being met or exceeded be that which applicant is subject. While in this case SCEA is subject to regulation and is meeting or exceeding such requirements, to the extent a regulation applies to WMARSS and SCEA’s contractually agreed use and installation enables WMARSS to meet or exceed a regulation, then the negative use determination was improper for that reason.

²⁰ See ED Brief at 5-6 (stating that goals in water conservation plan “are not enforceable”); OPIC Brief at pp. 4 (“This is a requirement to provide information in a water conservation plan, not a requirement to install specific equipment.”).

exemption.²¹ Second, only one subsection of 30 T.A.C. § 288.3 (the five-year and ten-year targets for water conservation) is characterized as “not enforceable.”²² The remaining subsections of the rule, including a requirement for “application of state-of-the-art equipment and/or process modifications to improve water use efficiency” and “any other water conservation practice, method, or technique which the user shows to be appropriate,” is not so characterized by the regulation.²³ The bottom line is that Section 288.3 is a regulation adopted by the TCEQ pursuant to state administrative procedures. Accordingly, meeting or exceeding that rules is a valid basis for a positive use determination under Section 11.31.

C. Environmental Rules and Regulations in Chapter 210 Apply to Both Sandy Creek and the City of Waco.

Finally, the ED argues that 30 T.A.C. §§ 210.32-33 constitute environmental rules or requirements applicable to the City of Waco, not SCEA. Importantly, the Opposing Parties do not even contest that these environmental rules and requirements are met or exceeded by the Reclaimed Water System. 30 T.A.C. § 210.32 sets out uses for Type I and Type II reclaimed water, and 30 T.A.C. § 210.33 describes numeric water quality limitations for Type I and II reclaimed water uses. The ED’s argument in this regard is contradicted by the rules themselves, which specifically state that “this subchapter applies to the reclaimed water producer, the reclaimed water provider *and the reclaimed water user.*”²⁴ The Reclaimed Water System treats all Type II effluent to Type I standards, meeting or exceeding these regulations as well as Limitation I(e) of the City of Waco’s Authorization for Reclaimed Water.²⁵ Limitation I(e) places responsibility on either “the user or provider, as appropriate.” Accordingly, the ED’s

²¹ See *Charter Medical-Dallas*, 665 S.W.2d at 454.

²² See 30 TEX. ADMIN. CODE § 210.288.3(a)(3).

²³ See *id.* §§ 210.288.3(a)(6)-(7).

²⁴ See *id.* § 210.31 (emphasis added).

²⁵ See ED Brief, Ex. 1 (City of Waco’s Authorization for Reclaimed Water, approved October 15, 2004) at pp. 5-7.

statement that “Sandy Creek is not required to meet the Type II standards” is without basis in law and actually supports SCEA’s position that the Reclaimed Water System meets or exceeds requirements. Under applicable rules, SCEA is required only to treat to Type I standards that wastewater which will be used for fire prevention.²⁶ The Reclaimed Water System, however, treats all wastewater to the more stringent Type I standard. This is yet another environmental requirement that is met or exceeded, as the Type I standard is more stringent than the Type II standard.²⁷

For the foregoing reasons, Opposing Parties’ arguments regarding the environmental rules and regulations cited by SCEA have no merit. Accordingly, the ED improperly denied the application for pollution property tax exemption for the Reclaimed Water System.

IV. THE RECLAIMED WATER SYSTEM IS USED FOR POLLUTION CONTROL PURPOSES

Sandy Creek requires an estimated 8,788 gallons of process water per minute, and those needs are met by the Reclaimed Water System. The Reclaimed Water System eliminates the need for new water to be used as process water at Sandy Creek. Nevertheless, the ED complains that the Reclaimed Water System at Sandy Creek is ineligible because it “does not control air, water, or land pollution” and is “used solely for product collection or for production.”²⁸ This position is contradicted by the very TCEQ guidance the ED attached to his brief. This TCEQ guidance includes a list of equipment and categories that the ED has already determined to be “used either wholly or partly for pollution control purposes.”²⁹ Item W-58 on that list includes

²⁶ 30 TEX. ADMIN. CODE § 210.32.

²⁷ TCEQ regulations specify standards for Type I and Type II uses in the form of numerical parameter limits for potential contaminants such as bacteria, BOD, and turbidity. The Type I standards are lower for these contaminants than the Type II standards. See 30 TEX. ADMIN. CODE § 210.33 (e.g., the Type I limit for Fecal coliform or *E. coli* is 20 CFU/100 ml (30-day geometric mean), whereas the Type II limit is 200 CFU/100 ml (30-day geometric mean)).

²⁸ ED Brief at 9.

²⁹ See ED Brief, Ex. 4 (September 1, 2009 TCEQ guidance document titled “Property Tax Exemptions for Pollution Control Property”) at pp. 31-45.

“Water Recycling Systems” that “. . . reuse wastewater or use grey water or storm water in order to reduce the amount of a facility’s discharge or the amount of new water used as process or make-up water.”³⁰

As stated above, the Reclaimed Water System at Sandy Creek not just reduces, but *eliminates* the need for large amount of new water that would otherwise be required at Sandy Creek. All of the process water used at Sandy Creek is reused wastewater. The Reclaimed Water System is exactly for the type of “Water Recycling System” that has been determined to be used for pollution control purposes by the ED in TCEQ guidance. It is disingenuous, arbitrary, and capricious for the ED to now claim that the Water Recycling System installed by Sandy Creek is not used for pollution control purposes when his guidance documents state otherwise. Accordingly, the ED’s argument that the Reclaimed Water System at Sandy Creek is not used for pollution control purposes is without merit.

V. THE ED’S NEGATIVE USE DETERMINATION IS ARBITRARY AND CAPRICIOUS AND REPRESENTS AN ABUSE OF DISCRETION

The errors in the ED’s negative use determination represent a procedural defect that cannot be cured by any briefing of the Opposing Parties. In the initial appeal, SCEA noted that it appeared that the ED had considered only a fraction of the environmental rules and regulations prior to issuing the ED’s Negative Use Determination. Moreover, for one the ED apparently reviewed and considered the wrong rule.³¹ Indeed, the OPIC Brief notes the ED “failed to discern” between Texas Water Code § 11.1271 and Texas Water Code § 11.1272.³²

Neither the ED nor the OPIC attempt to explain this failure in the ED’s Negative Use

³⁰ *Id.* at p. 39.

³¹ The ED’s Negative Use Determination was issued nearly two years after SCEA’s application. Given (a) the length of time for consideration by the ED; and (b) the limited detail and analysis in the ED’s Negative Use Determination, it is unreasonable for the ED to conduct and complete only a partial review, including a focus on the wrong statute.

³² OPIC Brief at 3; *see also* ED Brief at 4.

Determination, or how a new determination is not necessary given this glaring error. Instead, the Opposing Parties filed briefs supporting the ED's Negative Use Determination despite the error. The Opposing Parties' briefs are based upon a determination that is so flawed as to be fatal, and there is no reasonable basis for the Commission to support it. Stated simply, the TCEQ cited the wrong rules as a basis to deny SCEA's application. This reasoning and error are pervasive in the ED's Negative Use Determination, leaving the TCEQ without justification for its decision. SCEA's application must be remanded with instructions to consider the correct environmental rules and regulations and to base the subsequent decision on statutory criteria.

VI. THE CURRENT STATE OF TEXAS WATER RESOURCES EXEMPLIFIES THE STRONG PUBLIC POLICY SUPPORTING SCEA'S APPLICATION

The current status of Texas water supplies demonstrates just why the value in SCEA's Reclaimed Water System outweighs any public detriment caused by loss tax revenue. At this moment, approximately 79% of Texas is suffering "severe" drought conditions, and nearly the entire state is under "moderate" drought conditions.³³ The worst drought in 44 years is impacting Texas farmers and ranchers. Crop fields are in poor condition, and cattle herds are being reduced.³⁴ The McLennan County Commissioners Court initiated a burn ban on August 24, 2010, noting that "these dry, windy conditions are projected to continue, with no reasonable expectation of significant, appreciable rainfall expected in the near future."³⁵ People and agricultural and farming businesses – including those in McLennan County – are suffering, and that suffering would only be exacerbated if groundwater or surface water was being consumed when wastewater could be so utilized.

³³ See U.S. Drought Monitor, Texas, dated March 29, 2011, by the U.S. Department of Agriculture (*available at* http://www.drought.unl.edu/dm/pdfs/tx_dm.pdf).

³⁴ See <http://www.bloomberg.com/news/2011-03-24/worst-texas-drought-in-44-years-eroding-wheat-beef-supply-as-food-rallies.html>.

³⁵ See <http://www.co.mclennan.tx.us/commis/0810burnban.pdf>.

There is immense economic value in reusing and recycling water that would otherwise be wasted. The current water supply for the State of Texas will not meet demand over the next 50 years.³⁶ Water reuse is an increasingly important water management strategy, and many regional planning groups are relying increasingly on water conservation measures such as recycling and reuse.³⁷ By implementing the Reclaimed Water System, Sandy Creek saves over 12.6 million gallons per day of “new” water for irrigation or other potable purposes. This results in clear environmental and public welfare benefits and the need for water conservation cannot be more acute than it is today, during a crippling drought.

VII. CONCLUSION

As shown above, SCEA has demonstrated that environmental rules and regulations are being met or exceeded by the Reclaimed Water System, and that there is no merit to the ED’s argument that the Reclaimed Water System is not a pollution control property. Additionally, the ED’s Negative Use Determination is so flawed and without support in the record that it must be reversed and remanded for reconsideration by the ED with instructions to consider the correct environmental rules and regulations and to base the subsequent decision on statutory criteria. In closing, SCEA asserts that the Reclaimed Water System is precisely the type of equipment that should qualify as pollution control property, especially in light of the conservation and other environmental benefits to Sandy Creek and the surrounding area.

³⁶ See “An Assessment of Water Conservation in Texas Prepared for the 80th Texas Legislature,” Texas Water Development Board and Texas State Soil and Water Conservation Board, December 2006 (*available at* http://www.twdb.state.tx.us/publications/reports/TWDBTSSWCB_80th.pdf).

³⁷ See *id.*

Respectfully Submitted,

LOCKE LORD BISSELL & LIDDELL LLP

 *by LFW w/ permission*

Gerald J. Pels

State Bar No. 15732885

2800 JP Morgan Chase Tower, 600 Travis
Houston, Texas 77002

Telephone: (713) 226-1402

Facsimile: (713) 229-2513

ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I hereby certify that on April 6, 2011, an original and seven copies of the foregoing document was filed with the Texas Commission on Environmental Quality's Office of the Chief Clerk, and a complete copy was transmitted by U.S. mail to all persons on the mailing list attached to the briefing schedule.

 *by LFW w/ permission*