SOAH DOCKET NO. 582-14-2123
TCEQ DOCKET NO. 2014-0124-WR

APPLICATION OF THE LOWER	§	**BEFORE THE STATE OFFICE**
	§	
COLORADO RIVER AUTHORITY	§	**OF**
	§	
FOR EMERGENCY AUTHORIZATION	§	**ADMINISTRATIVE HEARINGS**

NATIONAL WILDLIFE FEDERATION'S EXCEPTIONS TO THE PROPOSAL FOR DECISION

In accordance with directions from the Administrative Law Judges and the General Counsel, the National Wildlife Federation (NWF) hereby files its exceptions to the Proposal for Decision (PFD) in this matter.

Introduction:
NWF does not take issue with the issuance of an emergency order preventing releases of interruptible stored water for irrigation for the Gulf Coast, Pierce Ranch, and Lakeside operations this spring. The ongoing drought and current lake storage levels support that result. The simple reality, supported in the record but not directly acknowledged in the PFD, is that, because there is no reasonable expectation of large inflows to the reservoirs before 11:59 pm on March 1, 2014, any of the various storage level triggers considered will accomplish that outcome and the lower trigger levels are feasible practicable alternatives to the recommended relief.

Because there are certain aspects of the specific proposed order and PFD that are unjustified and inconsistent with the Texas Water Code, NWF notes the following exceptions. NWF would initially acknowledge that the Administrative Law Judges, like the parties, are operating on a very expedited basis and have done a commendable job of conducting a hearing under these difficult circumstances. The expedited process has, however, minimized the opportunity for careful briefing and consideration of the significant factual and legal issues raised in this proceeding.

Finding of Fact 2a:
NWF excepts to the characterization of the text of proposed Finding of Fact 2a as a Finding of Fact rather than a Conclusion of Law or Ordering Provision. That text is consistent with LCRA's stipulation that it is not seeking to change its environmental flow obligations, as stated in proposed Finding of Fact 1a, and no evidence was adduced to support such a change. Accordingly, the text of FOF 2a should be included in the order. However, it is properly included as an Ordering Provision, or at least as a Conclusion of Law, because it provides a legal determination of the effect of the order rather than a characterization of fact. Accordingly, NWF requests that the text of proposed Finding of Fact 2a be included in the order as Ordering Provision 2a or, alternatively, as Conclusion of Law 9.

Relief Exceeding Scope of Application:
NWF excepts to the recommendation for the granting of relief greater than that applied for by the Lower Colorado River Authority in its application for an emergency order and to specific accompanying findings of fact, conclusions of law, and ordering provisions.[1] Water Code Section 11.139 (b) expressly requires a sworn application that must include "a description of the action sought" and information to support the requested action. As provided in Section 11.139 (c), the Commission may "grant" an emergency authorization only if it finds that the applicant's statements made under Section 11.139 (b) are correct. That limits the available relief to no more than the relief sought in the sworn application, which is a trigger level of 1.1 million acre-feet. The term "grant" also is used in Section 11.134 in describing the Commission's potential actions in response to an application for a water right. It simply is not consistent with Section 11.139 for the Commission to "grant" relief that the application does not seek or support. Nothing in Section 11.139 suggests that the Commission has jurisdiction to grant relief beyond that requested in the sworn application.

Section 11.139 (e) does provide that, at the hearing to consider an emergency authorization initially granted without a hearing, the Commission shall "affirm, modify, or set aside" the emergency authorization. Unquestionably, "modify" is a broad term that could include an increase in relief over that included in an initial emergency authorization. So, if an initial emergency authorization—such as the type granted by the Executive Director in this instance—included less relief than requested in the application, the Commission would have authority to modify the initial authorization by increasing the relief granted up to the level requested. However, when, as here, the initial authorization granted all of the relief requested in the application, the term "modify" is not reasonably interpreted as expanding the scope of relief beyond that authorized in Sections 11.139 (b) and (c).

The Administrative Law Judges, in discussing the issue of the allowable scope of relief, acknowledge the potential question of absence of notice to potentially affected persons if Section 11.139 is interpreted as authorizing the Commission to grant relief beyond that requested in the application. That is, if relief granted exceeds what the application, including supporting materials, seeks, how is a potentially affected person to know if their interests are at significant risk? The ALJs note, at p. 20 of the PFD, that, because Section 11.139 (c) authorizes the Commission to grant emergency authorizations without notice, the absence of notice to potentially affected persons should not operate as a constraint on granting relief beyond the scope of the application. However, that analysis does not acknowledge the requirements of Sections 11.139 (d) and (g). Section 11.139 (d) expressly requires a hearing within no more than 20 days if an emergency authorization is initially granted without a hearing and Section 11.139 (g) requires notice, although not in strict compliance with routine notice requirements, for any such hearing. Thus, the Legislature has not dispensed with requirements for a potentially affected person to be able to determine how they might be affected by reviewing the application, including the supporting materials, and has not authorized relief beyond that requested in the application.

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[1] These include Findings of Fact Nos. 30b, 30c, 45a, 49b; Conclusions of Law 2 and 6; and Ordering Provisions 1 and 5.

Another reason that the recommended trigger level of 1.4 million acre-feet is not supported is that Section 11.139 (a) authorizes emergency relief only to the extent that "there are no feasible practicable alternatives to the emergency authorization." (Emphasis added.) Although NWF acknowledges that an emergency authorization sufficient to prevent releases of interruptible stored water to the three irrigation districts has been justified, the specific authorization recommended in the PFD—to use a trigger level of 1.4 million acre-feet—has not been justified because the uncontroverted evidence shows that lower—feasible practicable alternative—trigger levels also would prevent the releases. The reference in Section 11.139 (a) to the absence of alternatives to "the" emergency authorization serves as an acknowledgement that the scope of the authorization must be considered in evaluating the availability of alternatives. Under the facts established by the evidence at the hearing, a trigger level of 850,000 or 1.1 million acre-feet is a feasible practicable alternative to the authorization of a trigger level of 1.4 million acre-feet. There is no evidence to support a prediction that lake levels will even begin to approach 850,000 or 1.1 million acre-feet by 11:59 pm on March 1, 2014: the uncontroverted evidence, in the form of the testimony of LCRA meteorologist Bob Rose responding to a question from Mike Booth, indicates that there is no reasonable likelihood of reaching 850,000 acre-feet by that deadline.

Conclusion of Law 5:

NWF also excepts to Conclusion of Law 5 to the extent that it characterizes LCRA's burden of proof as only extending to the obligation to prove that "an" emergency order should be granted. An applicant for an emergency order has the burden of demonstrating not only that an emergency order should be granted but also that the actual emergency order requested should be granted. The language of Section 11.139 (a) and (b) requires no less. That burden is acknowledged in Section 295.91 (1) of the Commission's rules, which requires an applicant for an emergency authorization under Section 11.139 to provide information to support, among other things, the finding that "there are no feasible practicable alternatives to the emergency authorization." (Emphasis added.) Although that rule may be directed primarily at a subset of Section 11.139 authorizations, the requirement for an applicant to demonstrate it has met the burden of proof under Section 11.139 (a) and (b) applies equally to any application pursuant to Section 11.139.

Ordering Provision 4:

NWF excepts to the proposal, in Ordering Provision 4, for automatic renewal of the emergency order for an additional 60 days. The practical effect of such an automatic renewal is to convert the initial term of the emergency order from 120 days to 180 days. That is inconsistent with Section 11.139 of the Water Code. The language of Section 11.139 (a) is quite clear in requiring a subsequent, separate consideration of a renewal of an emergency order.

Conclusion:

The relevant issue here is not what trigger level might be appropriate under a different set of facts or with a different date for assessing lake levels. That critically important, longer-term inquiry needs to happen soon, but this is not the appropriate venue. The disquieting reality is that a trigger level of 1.1 or 1.4 million acre-feet will not delay the time when lake storage reaches 600,000 acre-feet by a single minute longer than a trigger level of 850,000 acre-feet in the absence of sufficient inflows into the lakes

by 11:59 pm on March 1, 2014, to result in releases of interruptible water. NWF sincerely wishes that there were some reasonable basis for hope or dispute about the potential for such inflows occurring, but, as the record indicates, there is not.

NWF supports the granting of emergency relief that is within the scope of the sworn application, including supplemental materials, filed by LCRA and that is needed to prevent the release of stored interruptible water for irrigation for the Gulf Coast, Pierce Ranch, and Lakeside operations under the current circumstances.

Respectfully submitted,

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CERTIFICATE OF SERVICE

By my signature below, I certify that I sent, on February 24, 2013, a true and correct copy of the foregoing National Wildlife Federation's Exceptions to the Proposal for Decision, which was filed with the State Office of Administrative Hearings and the Chief Clerk of the Texas Commission on Environmental Quality, by electronic mail to the parties on the service list reproduced below:

/S/ Myron K. Hess

Myron K. Hess

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