



February 25, 2014

Ms. Bridget Bohac, Chief Clerk
Office of the Chief Clerk, MC105
TCEQ
P.O. Box 13087
Austin, TX 78711-3087

Re: SOAH Docket No. 582-14-2123; TCEQ Docket No. 2014-0124-WR
Lower Colorado River Authority's Application for Emergency Authorization
related to its Water Management Plan

Dear Ms. Bohac:

Enclosed for filing are one original and seven (7) copies of the Lower Colorado River Authority's Reply to Exceptions to the Proposal for Decision and Order in the above-entitled matter.

Sincerely,

A handwritten signature in blue ink that reads "Lyn Clancy". The signature is written in a cursive, flowing style.

Lyn Clancy
Managing Associate General Counsel & Senior Water Policy Advisor

cc: Parties on attached Service List
Barham Richard, TCEQ, Office of General Counsel

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

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

**LCRA’S REPLY TO EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGES’
PROPOSAL FOR DECISION AND ORDER**

TO THE HONORABLE ADMINISTRATIVE LAW JUDGES:

COMES NOW, the Lower Colorado River Authority (“LCRA”), Applicant in the above styled and docketed hearing before the Texas Commission on Environmental Quality (“TCEQ” or “Commission”) and the State Office of Administrative Hearings (“SOAH”) regarding LCRA’s Application for Emergency Authorization and respectfully files this reply to the various exceptions filed by the other parties to this case. LCRA urges the Commission to adopt an Emergency Order, with modifications as proposed by LCRA in its Exceptions filed on February 24, 2014. Moreover, in most cases, LCRA believes that the changes suggested by other parties’ exceptions are either unnecessary, not supported by the testimony or evidence, or not supported by law. In support thereof, LCRA argues as follows:

I. REPLY TO EXCEPTIONS OF THE TCEQ EXECUTIVE DIRECTOR (ED)

A. ED’s Exception to Finding of Fact No. 2

LCRA agrees with the ED’s proposed amendment to Finding of Fact No. 2.

B. ED’s Exception to Finding of Fact No. 30a

LCRA agrees with the ED that this Finding of Fact is somewhat confusing. LCRA has made some suggested edits, reflected in its Exceptions, but offers the following further

modifications in italics below to help clarify this finding:

30a. A trigger level of 850,000 AF combined storage, below which there would be no interruptible stored water released to Lakeside, Gulf Coast or Pierce Ranch is not protective of human health and safety under the exceptional circumstances presented by this drought. This level was set in the 2012 and 2013 emergency orders, if storage had crested just above the 850,000 AF level in either 2012 or 2013 by March 1, triggering a release, the lakes would have subsequently fallen well below emergency levels in 2013 triggering a critical water situation. The March 1, 2012 combined storage was 847,000 AF and on March 1, 2013 was 822,000 AF. The interruptible stored water release *that would have been allowed under the 2012 or 2013 emergency orders if storage had been over 850,000 AF on March 1* would have been *at least 125,000 AF plus conveyance losses, much greater than the relatively small amount to get storage above 850,000 AF* and thus *such releases* would have taken the reservoirs significantly lower in 2013 than the 637,000 AF level that was reached on September 19, 2013.

C. ED's Exception to Finding of Fact No. 30b

LCRA agrees with the ED's recommendation.

D. ED's Exception to Finding of Fact No. 30c

LCRA agrees with the ED's recommendation, which should be incorporated along with the proposed edits that LCRA filed as part of its Exceptions, such that Finding of Fact No. 30c would now read:

30c. At 1.1 million AF, with a continuation of the current hydrology, lake storage ~~could~~ drop to 600,000 AF no sooner than spring 2015. ~~within approximately a year to emergency levels and continue downward from there. Therefore, a trigger level of 1.4 million AF is necessary to avoid a rapid return to emergency levels.~~

E. ED's Exception to Finding of Fact No. 30f

Although LCRA agrees with the ED that the Proposed Order does not accurately reflect the conditions in the 2010 Water Management Plan for cancellation of curtailment, LCRA has provided suggested edits that it believes are more complete and accurate than those offered by the ED and thus urges adoption of LCRA's proposed edits.

F. ED's Exceptions to Finding of Fact No. 41a, 42f & 42g

The ED appropriately notes that water conservation plans and drought contingency plans

are required of LCRA's firm customers and, at their heart, help protect public welfare by requiring users of state water to manage the water responsibly not only during drought but at all times. Tex. Water Code §§ 11.1271 & 11.1272. LCRA generally shares the ED's concerns that the Proposed Order's significant reliance on municipal utilities' operational difficulties resulting from water use reductions arising from implementation of these state-required plans may be inappropriate, if those facts alone were the sole support of the findings of threat to human health and safety. LCRA understands that the Proposed Order as a whole, however, relies on these findings to conclude that further decline in storage resulting from large irrigation releases could serve to exacerbate these conditions. Accordingly, LCRA recommends the Commission retain these findings in its Order.

G. ED's Exception to Finding of Fact No. 49b

LCRA has also proposed changes to Finding of Fact No. 49b, largely for the same reasons offered by the ED. If the Commission is inclined to adopt the ED's proposed modifications, LCRA would offer further edits as indicated in italics below:

49b. ~~An emergency order setting forth a trigger of 1.1 million AF is not a sufficient alternative at this time because of the prolonged nature and persistence of the drought and the fact that the lakes have not recovered from this drought.~~ If combined storage of the lakes recovers to 1.1 million AF on March 1 and severe drought conditions return, analysis shows that combined storage would not fall ~~could fall~~ to 600,000 AF for at least 12 to 18 months. This trigger level is sufficient for this emergency order in light of the prolonged nature and persistence of the drought. ~~before the end of the first crop irrigation season in 2015 and before most firm water customers having raw water intakes on Lake Travis can make adjustments to their raw water intake structures (if such adjustments are even feasible or practicable), requiring declaration of a DWDR.~~

H. ED's Comments Regarding Ordering Provision No. 4

LCRA did not specifically seek an automatic renewal provision in its application, but agrees with the ED that the statute supports such a provision, particularly when specific criteria are set forth under which such renewal could occur. An automatic renewal provision clearly serves interests of efficiency, yet LCRA appreciates that, in the context of emergency relief, the

Commission may want more frequent review to ensure that changed conditions do not warrant termination or further modification of the order. LCRA also notes that Ordering Provision No. 4 should be modified to include a 1.1 MAF trigger to match the 1.1 MAF trigger that LCRA recommends for Ordering Provision 1.

II. REPLY TO EXCEPTIONS OF THE TCEQ OFFICE OF PUBLIC INTEREST COUNSEL (OPIC)

A. OPIC’s Exceptions to Finding of Fact No. 2a

LCRA agrees with OPIC that Finding of Fact No. 2a should be an ordering provision and has made similar recommendations in its Exceptions. *See* LCRA Exceptions at 2.

B. OPIC’s Exceptions to 1.4 MAF Trigger

LCRA appreciates OPIC’s support of LCRA’s application and request for a curtailment trigger of 1.1 MAF as sufficient to protect public health and safety in the context of this exceptional drought. As OPIC accurately notes, LCRA may always seek modification to the order if conditions change. However, as noted in LCRA’s response to CWIC’s Exceptions, LCRA believes the Commission has the ability under Water Code §11.139 to select a curtailment trigger that is higher than the value that LCRA sought.

C. OPIC’s Exceptions to Ordering Provision No. 4

LCRA did not specifically seek an automatic renewal provision in its application, but agrees with the ED that the statute supports such a provision, particularly when specific criteria are set forth under which such renewal could occur. LCRA also notes that Ordering Provision No. 4 should be modified to include a 1.1 MAF trigger to match the 1.1 MAF trigger that LCRA recommends for Ordering Provision 1.

III. REPLY TO EXCEPTIONS OF THE CENTRAL TEXAS WATER COALITION (CTWC)

A. CTWC's Proposed New Finding of Fact No. 31d.

LCRA is not opposed to addition of this new proposed finding of fact. However, LCRA is concerned that this and other findings related to certain lake elevations may be relied upon in future proceedings to support arguments that LCRA is obligated to maintain Lake Travis above a particular minimum lake level at all times, which as addressed in LCRA's Exceptions, is not a current requirement of its contracts with firm customers. *See* LCRA's Exceptions at 14 (citing Highland Ex. C at 4-5 ¶ G, Ex. D at 5-6 ¶¶ 4 & 6). Moreover, establishment of a minimum operating level in LCRA's water supply reservoirs would significantly impair the combined firm yield of the lakes and reduce water availability for *all* LCRA customers, including firm customers.

B. CTWC's Proposed New Finding of Fact No. 32a.

LCRA agrees that CTWC's evidence supports a finding that the Pedernales Fire Department has experienced difficulties in accessing water supply from Lake Travis. As with CTWC's proposed new Finding of Fact No. 31d, LCRA is concerned that CTWC's proposed new finding and other findings related to certain lake elevations may be relied upon in future proceedings to argue that LCRA must maintain the lakes above a particular minimum lake level at all times so that fire departments can access the water. Required minimum lake levels would significantly impair the combined firm yield of the lakes and reduce water availability for *all* LCRA customers, including firm customers.

C. CTWC's Comments on Ordering Provision No. 2 and Conclusion of Law No. 8

LCRA agrees with CTWC that Ordering Provision No. 2 could be stricken from the order without affecting the emergency relief, since TCEQ does not have jurisdiction to interpret the requirements of the Garwood contract. *See, e.g., City of San Antonio v. BSR Water Co.*, 190

SW3d 747, 756-57 (Tex. App. – San Antonio 2005, no pet.) Moreover, LCRA is amenable to the clarification offered to Conclusion of Law No. 8.

IV. REPLY TO EXCEPTIONS OF THE HIGHLAND LAKES FIRM WATER CUSTOMER COOPERATIVE (HIGHLAND) AND CITY OF AUSTIN (AUSTIN)

A. Highland and Austin’s Proposed Modification to Ordering Provision No. 2

LCRA urges the Commission to reject the proposed changes to Ordering Provision No. 2 offered by Highland and supported by the City of Austin. The undisputed record evidence is that Garwood Irrigation Company (Garwood) and LCRA have an ongoing dispute over the terms and conditions of their contract. PFD at 31, Testimony of Ryan Rowney at Tr. at 56-57. No party to the hearing pursued cross-examination to learn more information regarding this contract or the nature of the dispute, yet the parties nevertheless propose modifications that would essentially have the Commission impose its own interpretation of the contract. Interpretation of contractual obligations are not within the Commission’s jurisdiction. *See, e.g., BSR Water Co.*, 190 at 756-57. If anything, as suggested by CTWC, it would be more appropriate for this ordering provision to be stricken altogether.

V. REPLY TO EXCEPTIONS OF COLORADO WATER ISSUES COMMITTEE (CWIC)

A. CWIC’s Exceptions to a 1.4 MAF Trigger

CWIC, AP Ranch, and NWF all argue that the Commission either lacks authority or simply should not consider granting relief that “exceeds” what was in LCRA’s application and thus urges the Commission to reject the Proposed Order to the extent that it establishes a curtailment trigger for interruptible supply that is higher (1.4 MAF) than that proposed by LCRA (1.1 MAF).

CWIC argues that WMP emergency relief that would *increase* water in storage for firm customers and potentially *reduce* water available for irrigation is “beyond” or “exceeds” what

LCRA requested yet ignores the fact that a lower trigger that would potentially *increase* water to irrigators and *reduce* water in storage for firm customers is similarly “beyond” or “exceeds” what LCRA requested. All curtailment triggers under consideration – 850,000 AF, 1.1 MAF, and 1.4 MAF – change the manner in which LCRA is authorized to use the *same* amount of water it has always had under its water rights for Lakes Buchanan and Travis – no more, no less. CWIC’s arguments regarding the appropriateness of raising the curtailment trigger above that which LCRA sought are not limited to the emergency relief under consideration. Instead, if successful, this same argument would prevent the Commission from modifying any curtailment curves in LCRA’s Water Management Plan unless those changes give *more* water to irrigated agriculture than sought by LCRA in any particular requested revision to the WMP. This interpretation would appear to require the Commission to deny any application it decides does not establish a restrictive enough curtailment curve, opening up the possibility for repeated and unnecessary contested case hearings. Moreover, it would seem contrary to the authority of the Commission, on its own motion, to initiate amendments to LCRA’s Water Management Plan LCRA Ex. 1, Attachment E at 17 ¶ 1.a., 1989 Texas Water Commission Order Approving Lower Colorado River Authority’s Water Management Plan and Amending Certificates of Adjudication Nos. 14-5478 and 14-5482.

While it is true that the Commission will not typically grant a water rights permit that authorizes the applicant to appropriate more water than originally sought by the applicant without, at minimum, requiring the applicant to republish notice, these limitations are in place primarily to ensure that an opportunity for due process is afforded so those who might be affected are given the opportunity to participate. Even then, however, caselaw suggests that notice of a water rights application is still adequate even if it does not cover all of the possible changes that might arise during the course of a contested proceeding. *Chocolate Bayou Water Co. & Sand Supply v. Tex.*

Natural Resource Conservation Comm'n, 124 S.W.3d 844, 851 (Tex. App. — Austin 2003, pet. denied). Because the Commission's notice in this proceeding advised the public that it would consider whether to "affirm, **modify**, or set aside" the Executive Director's order, potentially affected parties received adequate notice under this standard. City of Austin, Ex. A. Further, none of the parties who actively participated in the 15+ hour evidentiary hearing on February 17th can credibly argue that they were denied due process or that they were caught unaware of the other parties' position that a higher trigger might be appropriate. All participated not only in the public meeting before the Commission on February 12th, and most also attended the public meetings held by the LCRA Board during which these various positions were offered. And, moreover, nothing in Texas Water Code §11.139 guarantees that a full-blown contested case hearing be afforded to satisfy due process concerns.¹ 30 Texas Admin. Code § 295.174.CWIC also ignores the fact that the Commission processes different water rights applications very differently. An application for a new appropriation, for example, requires different public notice and technical review than amendments to a water right, particularly when the amendment does not involve an increase in the amount of water authorized to be diverted or the authorized rate of diversion. *See, generally*, 30 Tex. Admin. Code Ch. 295, Subchapter C. These types of water rights amendments are often processed without *any* public notice. In this case, Section 11.139 gives the Commission broad discretion to determine the appropriate level of notice. Tex. Water Code § 11.139(g); 30 Tex. Admin. Code § 295.156. LCRA's application to temporarily amend its WMP on an emergency

¹ Contrary to CWIC's representation that no other hearing request was filed, LCRA's interpreted the City of Austin's comments filed with the Chief Clerk a conditional request for a hearing, advocating modification of the trigger upwards to 1.4 MAF, in the event any other hearing requests were granted. Letter from Greg Meszaros, City of Austin Water Utility Director, filed with Bridget Bohac, TCEQ Chief Clerk dated Feb. 11, 2014.

basis involves no increased appropriation of water, yet mailed notice was provided to each and every water right holder in the basin and ample public notice was provided to other potentially affected interests through both LCRA's and TCEQ's website.

B. CWIC's Proposal for a "No Trigger" Alternative

LCRA does not dispute that a "no trigger" alternative that simply prohibits releases of stored water for most irrigation would have the same practical, operational effect as any of the triggers offered for consideration. LCRA will not provide interruptible stored water under any of the alternatives. However, the statutory availability of a 60-day extension (automatic or not) is virtually eliminated with this approach because the specific facts CWIC suggests would support an order *now* would *necessarily* be different in 120 days, thus increasing the potential for another resource-intensive, contentious, evidentiary hearing. The implication offered by some (*e.g.*, AP Ranch's Exceptions at 2) that this concern is moot because no surface water will be requested if surface water is not available for first crop during the first 120 days is controverted by evidence that irrigators could start a crop on groundwater and could theoretically seek to convert to surface water if available or might plant first crop after May 26, 2014, which occurred in LCRA's Garwood division last year. Testimony of Ryan Rowney, Tr. at 92-93, 98, 279.

LCRA appreciates that CWIC's proposal was intended to be more nuanced than may be reflected in the hearing record and that CWIC did not necessarily intend to reduce the emergency order to a handful of minimal findings. However, CWIC's general proposal would appear to suggest that the Commission can, and should, entirely ignore evidence of imminent risk to human health and safety, however credible, that was offered at the February 17th hearing. Time is now of the essence – LCRA needs a decision from the Commission before irrigation season begins – and an ambiguous order just delays resolution of many of the issues CWIC itself raised in its original

briefs.

C. CWIC’s Specific Exceptions

With regard to CWIC’s specific Exceptions in support of a “no trigger” or 850,000 AF trigger, LCRA responds as follows:

1. CWIC’s Exception to PFD, p. 3

LCRA disagrees with CWIC’s assertion that LCRA was attempting to permanently modify the WMP with this application. Although LCRA requested an order that would “never” revert to the 2010 WMP during the term of the order, that is a far cry from a permanent amendment to the WMP. It is also an appropriate response to this exceptional drought. That LCRA sought to modify the trigger in this year’s emergency requests from those sought in prior years is similarly an appropriate adjustment to reflect that conditions have not and are not projected to improve and, thus, greater protections for firm supply (at the expense of interruptible supply) is warranted.

2. CWIC’s Exception to Finding of Fact No. 49c

LCRA disagrees with CWIC’s exception and urges the Commission to adopt LCRA’s proposed changes to Finding of Fact No. 49c. *See* LCRA’s Exceptions at 13-15.

3. CWIC’s Exception to PFD, pp. 33-34

LCRA generally objects to any proposed changes to either the Executive Director’s Order or the ALJ’s Proposed Order that would adopt a “no trigger” approach. LCRA does not object, however, to the proposed changes offered by CWIC on p. 7 of CWIC’s Exceptions as they relate to the original ED’s Order, Findings of Fact Nos. 49 and 51, nor to the addition of the new finding of fact offered by CWIC on page 7 of CWIC’s Exceptions. LCRA does not, however, believe these modifications are necessary, particularly if the Commission adopts modifications consistent with LCRA’s Exceptions.

4. CWIC's Exception to PFD, pp. 20-21

With the exception of the modifications to Findings of Fact that LCRA has proposed to clarify the significance of the modeling used to evaluate various alternatives that LCRA has already identified in its own Exceptions to the PFD, *see* LCRA's Exceptions at 6-7, 11-12, LCRA believes the ALJs properly considered and weighed the expert evidence to conclude that establishing a curtailment trigger of 850,000 AF presented too great of a risk to human health and safety in light of the persistence and exceptional circumstances of this drought.

5. CWIC's Exception to Finding of Fact No. 2

LCRA supports the proposed modifications to Finding of Fact No. 2 offered by the ED in its Exceptions, as discussed above, and urges the Commission to reject CWIC's Exception.

6. CWIC's Exception to Finding of No. 8

LCRA disagrees with CWIC's suggested modification to the table in Finding of Fact No. 8. What happens at a combined storage of 325,000 AF is decidedly not relevant under the current circumstances because the basin is facing Drought Worse than Drought of Record (DWDR) conditions, which under the 2010 WMP, would require cutoff of interruptible stored water at 600,000 AF – well before storage falls to 325,000 AF. LCRA Ex. 6A, ¶ 8, 9, 13, 14; LCRA Ex. 6C, ¶ 5.²

² Although CWIC does not ask for changes to other findings in this particular exception, LCRA feels compelled to respond to other evidence it nevertheless suggests were improperly ignored by the judges in this case. For example, CWIC argues that evidence supports a conclusion that significant amounts of run-of-river supply could be available to finish a crop if stored water were cut-off midseason; however, there was controverting evidence that the bulk of the run-of-river supply in 2011 was actually used within the Garwood Irrigation division, which benefits from the most senior of LCRA's run-of-river water rights, such that only very limited supply would likely be available to Gulf Coast or Lakeside farmers. Tr. at 52, 53, Rowney, LCRA Ex. 5C. In addition, LCRA fully appreciates that there are significant economic impacts to CWIC's members as a result of this drought and that CWIC is frustrated that these impacts are not considered as part of the evaluation of practicable alternatives.

7. CWIC's Exception to Finding of Fact No. 13a

LCRA generally agrees with CWIC that storage is influenced by firm demands and evaporation.

8. CWIC's Exception to Finding of Fact No. 13c

LCRA has proposed modifications to this Finding of Fact as part of its Exceptions. LCRA disagrees with CWIC that the nature and extent of its obligations to firm customers under LCRA's water rights is not relevant in this proceeding; however, LCRA agrees that the last phrase in this finding could be eliminated without eliminating the necessary support for this order. *See* LCRA's Exceptions at 3-5.

9. CWIC's Exception to Finding of Fact No. 30a

LCRA agrees that further modification of Finding of Fact No. 30a is warranted and has made recommended changes as part of its Exceptions that provides a similar qualification to that proposed by CWIC. LCRA urges adoption of LCRA's proposed changes. *See* LCRA's Exceptions at 6.

10. CWIC's Exception to Finding of Fact No. 30c

LCRA agrees that further modification of Finding of Fact No. 30c is warranted and has made recommended changes as part of its Exceptions that addresses similar concerns to those raised by CWIC. LCRA urges adoption of LCRA's proposed changes. *See* LCRA's Exceptions

Respectfully, however, LCRA does not understand how these impacts are any more relevant to any of the alternative forms of curtailment triggers that CWIC has offered in this case, as none would eliminate or alleviate the impacts of a water supply cutoff. Rather, at most, CWIC's alternatives would have the Commission impose additional impacts on firm customers apparently to share more of the pain. Nothing in Section 11.139, however, requires such a result. LCRA's Supplemental Brief in Support of Emergency Relief at 11-12.

at 6-7.

11. CWIC's Exception to Finding of Fact No. 30f & 30g

LCRA agrees that further modification of Finding of Fact Nos. 30f & 30g are warranted. LCRA urges adoption of LCRA's proposed changes, which would modify 30f and strike 30g. *See* LCRA's Exceptions at 8-9.

12. CWIC's Exception to Finding of Fact No. 42a & 42b

The drought response and water conservation efforts of LCRA's customers, in compliance with the water conservation and drought contingency plans they must have as part of their contracts with LCRA, are relevant to demonstrating the "steps made by the applicant [and its customers] to develop and implement water conservation and drought contingency plans[,]” as required by the Commission's rules for applications filed pursuant to Texas Water Code §11.139. 30 Tex. Admin. Code § 295.91(3). Accordingly, the Commission should reject CWIC's request to strike these findings.

13. CWIC's Exception to Finding of Fact No. 42c & 48a

LCRA disagrees with CWIC. Particularly regarding Finding of Fact No. 42c, the timing required for developing alternative supplies is relevant to whether there are reasonable and practicable alternatives to the relief sought.

14. CWIC's Exception to Finding of Fact No. 42e, 42f, 42g, 42h

LCRA believes these findings support the ultimate conclusion that serious health and safety risks arise in during exceptional drought, which will be exacerbated if municipal supplies are curtailed. *See also* Sections I.F. (LCRA's Reply to the ED's Exceptions) and Section VII.A. (LCRA's Reply to AP Ranch's Exceptions).

15. CWIC's Exception to Conclusion of Law No. 1b

LCRA has proposed a simple modification to this Conclusion of Law and urges adoption thereof. *See* LCRA's Exceptions at 15-16.

16. CWIC's Exception to PFD Explanation of Findings of Fact Nos. 31a-c

LCRA proposed modifications to Findings of Fact Nos. 31b and 31c and urges adoption thereof. LCRA is concerned that these findings may lead some to erroneously conclude that LCRA is required to maintain water levels for customer intakes, which is not the case. *See* LCRA's Exceptions at 10-11.

17. CWIC's Exception to Finding of Fact No. 49b

LCRA has proposed a modification to Finding of Fact No. 49b based on LCRA's requested trigger level of 1.1 MAF. *See* LCRA's Exceptions at 13-15. LCRA does not agree with all of CWIC's concerns regarding this finding and instead urges adoption of LCRA's proposed modifications.

18. CWIC's Exception to Finding of Fact No. 49c

As noted under the response to CWIC under Item 2 above, LCRA urges the Commission to adopt LCRA's proposed changes to Finding of Fact No. 49c.

19. CWIC's Exception to PFD Discussion p. 32

LCRA agrees that it will have to provide variances from curtailment on a case-by-case basis for health and human safety and that it will give credit against the 20% curtailment to some customers who have already achieved significant water savings. However, LCRA does not believe these facts would alter the conclusion that NWF's or AP Ranch's requested modifications to the order are not necessary or appropriate. Accordingly, LCRA urges the Commission to reject CWIC's Exceptions.

20. CWIC's Exception to Ordering Provision No. 1

LCRA urges adoption of its proposed modification to Ordering Provision 1, consistent with a 1.1 MAF curtailment trigger. *See* LCRA's Exceptions at 18-19.

21. CWIC's Exception to Ordering Provision No. 4

LCRA did not specifically seek an automatic renewal provision in its application, but agrees with the ED that the statute supports such a provision, particularly when specific criteria are set forth under which such renewal could occur. LCRA also notes that Ordering Provision No. 4 should be modified to include a 1.1 MAF trigger to match the 1.1 MAF trigger that LCRA recommends for Ordering Provision 1.

D. CWIC's Other Legal Arguments

CWIC has resurrected a number of other legal arguments throughout its Exceptions that it made in its original hearing request and as part of the hearing on the merits. Responses to many of these arguments were fully briefed by LCRA in its Supplemental Brief, which was filed with the Chief Clerk and SOAH last week and, for convenience, is attached hereto.

**VI. REPLY TO EXCEPTIONS OF THE
NATIONAL WILDLIFE FEDERATION (NWF)**

A. NWF's Exceptions to Finding of Fact No. 2a

LCRA agrees with NWF's recommendation, consistent with LCRA's own exceptions. *See* LCRA's Exceptions at 20.

B. NWF's Exceptions to 1.4 MAF Trigger

As further discussed under LCRA's responses to CWIC's exceptions, above, LCRA disagrees with NWF's assertion that the Commission cannot issue an order that "exceeds" the relief sought by LCRA in its application. As outlined in its Exceptions, LCRA believes that 1.1 MAF is the appropriate trigger.

C. NWF's Exception to Conclusion of Law No. 5

NWF excepts to Conclusion of Law 5 to the extent that it may be read to mean that LCRA's burden of proof only extends to the obligation to demonstrate that "an" emergency order should be granted, as opposed to an obligation to demonstrate that "the" emergency order should be granted. LCRA's does not share NWF's concern.

D. NWF's Exception to Ordering Provision No. 4

LCRA did not specifically seek an automatic renewal provision in its application, but agrees with the ED that the statute supports such a provision, particularly when specific criteria are set forth under which such renewal could occur. LCRA also notes that Ordering Provision No. 4 should be modified to include a 1.1 MAF trigger to match the 1.1 MAF trigger that LCRA recommends for Ordering Provision 1.

VII. REPLY TO EXCEPTIONS OF AP RANCH

A. AP Ranch Exception to Findings of Fact Nos. 41a, 42f, 42g, & 42i

AP Ranch excepts to several findings on the grounds that the conditions described in these findings either do not support a finding of a credible threat to public health and safety. Except to the extent that the ED has raised concerns shared by LCRA regarding important public welfare benefits offered by water conservation and drought contingency plans, as discussed above, LCRA believes the evidence discussed in these findings supports a conclusion that the very real operational issues and other concerns that LCRA's firm water customers have been facing are likely to be exacerbated by imminent irrigation releases if emergency relief is not granted and thus support the issuance of an order in this case.

B. AP Ranch Exception to 1.4 MAF trigger, including Findings of Fact Nos. 30c, 49b & Ordering Provision 1a, 1b & 4

LCRA agrees that many findings related to the appropriate trigger should be modified as discussed in LCRA's Exceptions. LCRA recommended modifications to Finding 30c and 49b and Ordering Provision 1. *See* LCRA's Exceptions at 6-7, 13-15, 18-20. LCRA did not specifically seek an automatic renewal provision in its application, but agrees with the ED that the statute supports such a provision, particularly when specific criteria are set forth under which such renewal could occur.

IV. SUMMARY AND CONCLUSIONS

For the reasons set forth above, LCRA urges that the Commission modify the order consistent with LCRA's Exceptions to Proposal for Decision and Order as well as those Exceptions with which LCRA concurs as noted above.

Respectfully submitted,

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By: 
Lyn E. Clancy

**ATTORNEYS FOR THE LOWER COLORADO
RIVER AUTHORITY**

CERTIFICATE OF SERVICE

I hereby certify that on February 25, 2014, seven true and correct copies of the Lower Colorado River Authority's Reply to Exceptions to the Proposal for Decision and Order were filed with the Chief Clerk of the Texas Commission on Environmental Quality; and were also served by electronic filing with the Chief Clerk of the Texas Commission on Environmental Quality and the State Office of Administrative Hearings. In addition, a copy was served by e-mail transmission to the persons on the attached Service List.



Lyn E. Clancy

SERVICE LIST

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

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LCRA's Supplemental Brief
(as filed with TCEQ and
SOAH)

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

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

**LCRA’S SUPPLEMENTAL BRIEF ON THE MERITS AND RESPONSE TO MOTION
TO MODIFY OR OVERTURN AND PROPOSED ORDER**

As part of its request for emergency relief under Texas Water Code §11.139, the Lower Colorado River Authority (LCRA) filed a brief in support of its application with accompanying affidavits and other exhibits. LCRA has filed that brief, with accompanying exhibits and subsequent supplemental filings made with TCEQ, with the Administrative Law Judges in this case. This supplemental brief responds to relevant legal issues that have been raised in the hearing request filed by the Colorado Water Issues Committee (CWIC) and other parties to this matter. For the reasons set forth below and in its prior briefing, LCRA urges rejection of CWIC’s request to modify or set aside the order and instead requests affirmation of the Executive Director’s Emergency Order, with modifications as included in the attached proposed order.

I. THE EMERGENCY ORDER IS FACT SPECIFIC AND DOES NOT ESTABLISH A PRECEDENT FOR THE WATER MANAGEMENT PLAN

Emergency relief is unique and fact specific. Here, LCRA seeks relief from the imminent required release of upwards of 200,000 acre-feet from Lakes Travis and Buchanan for irrigated agriculture while an unprecedented drought continues to ravage this region and threaten the water security for over a million residents and industries, including power generators. The Commissioners made clear that they will – appropriately – make their decision based on the specific facts of the case before them. Excerpt Tr., TCEQ Agenda, Feb. 12, 2014, at p. 17, lines

16-31, p. 18, lines 7-11; LCRA urges the Administrative Law Judges to refrain from allowing CWIC and other parties to this case the opportunity to litigate many issues that are at the heart of the dispute in a pending matter involving ordinary amendments to LCRA's 2010 Water Management Plan (WMP) but, in practical reality, have no bearing whatsoever on whether stored water should be released *this year*. There is little disagreement, if any, over whether suspension of such irrigation releases would be appropriate under the current facts, but concern by many parties that whatever relief is provided will be forever cemented in the pending amendments to the WMP and govern LCRA's regular operations. LCRA does not seek to set such precedent and clearly set forth as the basis for its application the unique and unprecedented emergency drought conditions that exist today. *See generally* LCRA's Brief and Attachments in Support of Application for Emergency Authorization (filed December 10, 2013). While the hydrology of the last few years certainly needs to be incorporated and considered in the TCEQ's evaluation of the pending WMP amendments, how that hydrology will or should affect the curtailment curves that govern LCRA's regular lake operations is not before the Commission in *this* application. Litigating the myriad issues involved in the pending WMP would be inappropriate and, in light of the expedited nature of this proceeding, deprive the parties of the appropriate level of due process that should be afforded them in that proceeding.

II. THE FACTS APPLIED TO THE LAW SUPPORT LCRA'S APPLICATION

LCRA filed its application pursuant to Texas Water Code § 11.139(a), seeking a temporary amendment of its Water Management Plan, Permit No. 5838. Pursuant to this statute, the Commission may issue an Emergency Order amending an existing permit after notice to the governor for not more than 120 days if it finds that:

- (1) an emergency condition exists;

- (2) which presents an imminent threat to the public health and safety, and
- (3) which overrides the necessity to comply with established statutory procedures,
- (4) and there are no feasible practicable alternatives to the emergency authorization.

Such emergency action may be renewed once for not longer than 60 days.

A. An Emergency Condition Exists.

The drought gripping the lower Colorado River basin indisputably presents an emergency condition. Moreover, as demonstrated at the preliminary hearing held on February, 12, 2014, there is no dispute among the parties that following LCRA's 2010 WMP in the context of these unprecedented drought conditions also presents an emergency condition that warrants relief from the strict requirements in the 2010 WMP regarding releases of interruptible stored water for irrigated agriculture. *See* Preliminary Hearing Transcript at p. 29, lines 21-25 through p. 30, lines 1-5.

Though many would like to lay blame and argue that LCRA or LCRA's customers could have saved more water or acted differently to avert the emergency condition, *how* the current storage conditions of LCRA's reservoirs came to be is not relevant to determining whether an emergency exists or whether relief is necessary.

B. The Emergency Condition Presents An Imminent Threat to Public Health and Safety.

The relief requested in LCRA's application is required to address an imminent threat to the health and safety of Central Texans. Years of prolonged drought, with little or no inflows into Lakes Travis and Buchanan, have substantially depleted lake levels to the point that the ability to meet public health and safety needs will be threatened if LCRA cannot obtain relief from mandatory releases required under the 2010 WMP.

1. A release of water for irrigation that will endanger human health is an imminent threat.

The imminent threat is that the release of water to interruptible agricultural irrigators under the 2010 WMP this year will cause the lake levels to diminish further to the point of endangering public health. As seen in the Supplemental Affidavit of Ron Anderson dated February 7, 2014, there is a 58% chance of the lake storage levels falling below 600,000 acre-feet triggering a declaration of Drought Worse than Drought of Record (DWDR) by this summer if releases are made to interruptible irrigators in LCRA's Gulf Coast and Lakeside divisions and Pierce Ranch. The lake levels, once depleted to extremely low storage levels, cannot be restored within the near future without a drastic and unpredictable change in the weather. The fact that actual harm to the health and safety of citizens reliant on the LCRA for water has not yet occurred, and may not be expected to occur the moment that lake levels drop below 600,000 acre-feet or a DWDR declaration is issued, does not impact the imminent nature of the threat. Rather, the threat to the public's health and safety is "imminent" where, as here, the conditions required for the occurrence of the harm have ripened, irrespective of when or whether the harm actually occurs.

The releases under the 2010 WMP, compounded by continuing drought, evaporation, and record low absence of inflows, are the conditions that will deplete the water supply needed to meet the public's health and safety needs. The continued threat to the water supply, as outlined in the affidavits of LCRA's witnesses, presents an "imminent threat" that is not, and should not be, predicated on a finding that the threatened harm (i.e. the deprivation of water for drinking, sanitation and power) will occur immediately. It is the fact that the conditions will cause the threatened harm without a further necessary step or trigger that renders the threat an "imminent" one.

There is limited caselaw offering guidance to us on this issue. Courts assessing the existence of an “imminent” threat have appropriately focused on the existence of circumstances causing the anticipated harm and not the timing for when it is expected to occur. For example, in *Thumann v. Harris County*, 2002 Tex.App. LEXIS 8792 (Tex.App.—Houston [14th Dist.] Dec. 12, 2002, no pet.), the appellate court upheld injunctive relief entered against a recycling business to redress violations of the Texas Solid Waste Disposal Act. Applying a state regulation forbidding solid waste facility operations that present an “imminent threat” of discharge of municipal solid waste into or adjacent to surface or ground waters, the appellate court noted ample evidence in the record that the degradation of unprocessed wood over time emits various contaminants that can enter both surface and ground water. Just as the potential for contamination through degradation of material over time can constitute an “imminent threat,” so does the continuing decline of water that is occurring and, in all likelihood, is expected to continue to occur.

Similarly, in *Cox v. City of Dallas*, 256 F.3d 281 (5th Cir. 2001), homeowners sued the city of Dallas for alleged violations of the Resource Conservation and Recovery Act, 42 U.S.C. 6901, et seq., relating to two open garbage dumps operated by the city. Considering the statutory language contemplating an “imminent and substantial endangerment to health or the environment,” the 5th Circuit determined that an “imminent” threat was sufficiently demonstrated through, among other things, the risk of contamination of ground and surface water as old waste decomposed and ground cover settled over substantial time.

Applying the same statute in *Dague v. City of Burlington*, the federal appellate court explained that “[a] finding of “imminency” does not require a showing that actual harm will occur immediately so long as the risk of threatened harm is present.” 935 F.2d 1343, 1356 (2nd Cir.

1991). Instead, imminence in that context refers “to the nature of the threat rather than identification of the time when the endangerment initially arose.” *Id.* Accordingly, “an ‘imminent hazard’ may be declared at any point in a chain of events which may ultimately result in harm to the public.” *Id.*

Likewise, the nature of the threat in this instance – the loss of water needed to meet public health and safety needs – is real, existing, and thus “imminent.” The irretrievable loss of substantial quantities of water to interruptible agricultural irrigators significantly exacerbates an already perilous situation. LCRA should not have to wait until actual harm to the public is sustained, or it reaches the very precipice of harm to the public, before taking action. *See Environmental Defense Fund v. EPA*, 465 F.2d 528 (D.C. Cir. 1972) (recognizing a necessity for avoiding “any approach to the term “imminent hazard” ... that restricts it to a concept of crisis. It is enough if there is substantial likelihood that serious harm will be experienced during the year or two required in any realistic projection of the administrative process.”). Rather, LCRA’s application should be granted as a means for containing the existing, “imminent threat” to the diminishing water supply that is available for the public’s health and safety needs.

2. The health and safety of central Texans is at risk.

The threat is squarely directed at the ability to meet the most basic needs of Central Texans who are dependent on the lakes for the water required for hydration, hygiene, sanitation, the provision of electric power, and other fundamental needs. This is not an issue of convenience or of impact on recreational, aesthetic or economic interests, as portrayed by CWIC and others who oppose the application, seeking a lower trigger. The continued depletion of the lake levels to elevations lower than raw water intakes impairs the operation of potable water systems that draw from the lakes, and may render them inoperable altogether. *See* LCRA’s Brief and Attachments in

Support of Application for Emergency Authorization (filed December 10, 2013), Attachment K at 5-6 (Affidavit of Ryan Rowney). Lower lake levels have significantly diminished groundwater wells relied upon heavily for residential customers' daily needs. *Id.*

Lake storage has dropped as much as 200,000 acre-feet in less than six months, even without significant releases for irrigation. *See* LCRA's Brief and Attachments in Support of Application for Emergency Authorization (filed December 10, 2013), Attachment J; LCRA's supplemental affidavits filed in support of LCRA's application (filed Jan. 23, 2014); LCRA's Letter Brief and supplemental attachments filed in support of application (filed Feb. 10, 2014) (Affidavits of Ron Anderson). The pace with which lake storage can drop poses a substantial risk to firm customers who face even greater curtailments should the drought continue, which at this time, appears likely. The required curtailments will result in reduced water supply to power plants, threatening their ability to generate electricity. Finally, customers would be required to save more than the initial twenty percent under DWDR, municipal customers are likely to be forced to take drought response measures that result in the cutback of water for indoor use, clearly a public health and safety risk. *See* LCRA's Brief and Attachments in Support of Application for Emergency Authorization (filed December 10, 2013), Attachment N (Affidavit of Nora Mullarkey Miller). The health and safety risks are further highlighted by the evidence presented on behalf of Austin, the Central Texas Water Coalition, and the Highland Lakes Firm Water Customer Cooperative.

While careful management of the lakes can help to mitigate the threat to public health and safety, even a slight risk of the deprivation of water needed for such critical uses compels the relief sought by LCRA. It is very important to realize that storage can drop precipitously even without any releases for interruptible agricultural irrigators, and there are no significant and continuous

improvements to the prevailing weather patterns anticipated. Releases of interruptible water under the extreme drought conditions we have today would put in peril the water storage levels needed to protect the public health and safety of Central Texans.

C. Ordinary Established Procedures Are Overridden by the Emergency Condition.

LCRA has provided ample evidence to support the conclusion of the Executive Director that established procedures for amending water rights or obtaining new rights will not allow the emergency condition to be addressed in a timely manner. Development of alternative supplies through acquisition of new water rights or amendments to existing water rights presents a high level of regulatory uncertainty and requires a lengthy permitting process – often years -- if not obtained on an emergency basis. *See* Affidavit of David Wheelock. If CWIC were truly interested in obtaining a more thorough hearing on the merits of *this* case, instead of litigating issues more relevant to the pending amendments to the WMP, it could have filed a hearing request more than two days before the Commission considered this matter, allowing the Commission time to request briefing on the issues raised by CWIC to determine if there were really any relevant facts in dispute that would affect the outcome for this year, instead of filing a request for a full-blown contested case hearing over the next nine months with an “interim” order with their desired trigger.

D. There are No Feasible Practicable Alternatives to the Emergency Authorization.

While the parties seem to generally agree that some sort of relief is necessary to avoid the threat presented by this drought, there is considerable disagreement on the appropriate remedy. At its heart, this case is about what level of residual risk is appropriate when responding to an emergency of the magnitude that this current drought presents. CWIC appears to contend that LCRA has requested relief that eliminates too much risk. However, the evidence supports a

conclusion that, because of nature of the risk involved – threat to water supply for human needs in the face of an unprecedented drought that shows no sign of ending – LCRA appropriately determined (and the Executive Director agreed) that it was appropriate and necessary to minimize the risk over the next year by establishing a trigger for irrigation releases at 1.1 million acre-feet of storage on March 1. *See generally* Testimony of Bob Rose, Ryan Rowney, David Wheelock, & Nora Mullarkey Miller; LCRA’s Brief and Attachments in Support of Application for Emergency Authorization (filed December 10, 2013), Attachments K, L, M, & N; LCRA’s Letter Brief and supplemental attachments filed in support of application (filed Feb. 10, 2014) (Affidavits of Bob Rose and Ryan Rowney).

CWIC also asserts that LCRA has overstated the risk. But LCRA’s experts have offered credible evidence, in the form of historical data, analyses and scientific modeling, that: (1) irrigation releases this year if the storage trigger is set at 850,000 acre-feet of storage present a significant risk of reaching DWDR this summer; (2) over the last few years, even when irrigation releases were substantially curtailed under prior orders, the lakes have declined in storage by more than 200,000 acre-feet in less than six months; (3) if the drought does not break, storage will continue to decline at a rate that will endanger water supply for human needs before alternative supplies can be secured, intakes extended, or other drought responses implemented.

Contrary to CWIC’s argument, LCRA is not required to identify and evaluate and refute *every possible alternative* as infeasible and impracticable. Texas courts have generally given considerable deference to a governing body’s determination that there are no feasible alternatives. *See Block House Mun. Util. Dist. v. City of Leander*, 291 S.W.3d 537 (Tex.App. —Austin 2009, no pet.) (declining to review a city’s determination under Tex. Parks & Wildlife Code § 26.001 that there was no feasible and prudent alternative to the use or taking of parkland absent a showing

that the city acted fraudulently, in bad faith, or arbitrarily and capriciously.) LCRA has provided ample evidence that it explored a range of alternatives to the relief sought and its experts, who have decades of experience between them in managing and developing water supplies, concluded that none of the alternatives appropriately addressed the threats presented at the level of appropriate risk in light of the conditions presented by this drought. Moreover, although CWIC makes the argument that economics cannot be considered when evaluating what alternatives are feasible and practicable, it is clear from the agency's rules that affordability is a factor to be appropriately considered. 30 Tex. Admin. Code §§ 291.17(b) ("Feasible, practicable alternatives include, but are not limited to, the implementation of water conservation and drought contingency measures or the purchase of water or water rights, at a *reasonable and affordable* price to the applicant.") There is nothing arbitrary or capricious about LCRA's determination of feasible and practicable alternative or the Executive Director's acceptance of LCRA's evidence on this point.

CWIC asserts – erroneously – that, by seeking a trigger of 1.1 million acre-feet, LCRA is illegally seeking to prevent the beneficial use of water. This entirely ignores, however, that storage of water for future use is clearly authorized by state law and LCRA's water rights. "[S]tate water may be appropriated, *stored*, or diverted for" various beneficial purposes, including the purposes for which LCRA seeks to preserve its supply for firm customers. Tex. Water Code § 11.023 (emphasis added).¹ LCRA is not seeking to preserve (or "recover") water in Lakes Buchanan and Travis for any other purpose than to allow that water to continue to serve the municipal, domestic, and industrial needs of its firm customers should this drought persist and

¹ The legislature had also recognized the value of preserving water that has been lawfully stored in reservoirs during drought emergencies by confirming that TCEQ has no authority to order the release of such water in response to a priority call. *See* Tex. Water Code § 11.053(b)(6).

while LCRA and its customers take additional steps to add water supply, implement more stringent drought restrictions to achieve water savings, and pray for rain.

III. LCRA’S REQUESTED RELIEF IS CONSISTENT WITH THE TEXAS WATER CODE AND LCRA’S WATER RIGHTS

In arguing that LCRA should be required to curtail firm customers who have long-term contracts by the same percentage as potential interruptible customers who desire an annual contract, CWIC has fundamentally mischaracterized LCRA’s application for emergency relief and the nature of LCRA’s obligation to provide water supply for irrigators within its Gulf Coast and Lakeside divisions and to Pierce Ranch. CWIC weaves a curious argument that would have the Commission entirely ignore its emergency powers and instead grant irrigators rights they don’t have today by improperly relying on CWIC’s erroneous interpretation of a statute that actually lends support to LCRA’s request.

Contrary to CWIC’s claims, irrigators within the LCRA’s Gulf Coast and Lakeside irrigation divisions have no entitlement that is superior or equal to that of LCRA’s firm customers. Unlike LCRA’s firm customers who have long-term contracts, these irrigators obtain contracts from LCRA on a year-to-year basis and only when LCRA has water available for that purpose under the terms and conditions of LCRA’s WMP.² Simply put, through a temporary emergency amendment to the WMP, LCRA is seeking a determination from the TCEQ that water for that purpose is not available this year. And nothing in Texas Water Code § 11.039 prevents LCRA from seeking that determination. Nor do sections 11.038 or 11.039 command that LCRA provide to irrigators water to which they have no entitlement. If LCRA does not have sufficient

² While Pierce Ranch has a long-term contract, its supply of stored water is limited to that available under the WMP as it may be amended, including through this emergency application.

interruptible stored water available for annual contracts because it must be kept in storage during this drought to meet its contractual obligations to firm customers, then LCRA cannot be forced to supply that water under Texas Water Code § 11.038 (even if the interruptible customers could pay the reasonable costs of providing that supply).

Since the adjudication of LCRA’s water rights for Lakes Travis and Buchanan, the priority claims for stored water by LCRA’s firm customers over those of downstream irrigation has been acknowledged and implemented through the LCRA WMP. LCRA’s water rights and the court order adjudicating those rights specify that “LCRA shall interrupt or curtail the supply of water... pursuant to commitments that are specifically subject to interruption or curtailment, the extent necessary to allow LCRA to satisfy all demand for water under such certificate pursuant to all firm, uninterruptible water commitments.” *See* LCRA’s Brief and Attachments in Support of Application for Emergency Authorization (filed December 10, 2013), Attachments C-F (Modified Findings and Conclusions defining LCRA’s Water Rights with Respect to the Highland Lakes (Attached to the Final Judgment and Decree, Cause No. 115,414-A-1 In the District Court of Bell County Texas, April 20, 1988, Lake Buchanan: Findings 19(f) and 25(g); Conclusion 4(g); Lake Travis: Findings 26(f) and 32(g); Conclusion 6(g)).³ The WMP has long-recognized that reaching 600,000 acre-feet of storage, when combined with extremely low inflows and at lengthy drought poses a significant risk to the reliability of firm customers’ water supply. *See, e.g.*, LCRA’s Brief

³ Though not relevant to the decision before the Commission in this proceeding, LCRA feels compelled to respond to the City of Austin’s interpretation of this obligation in its filings. Taken to its extreme, this interpretation would mean that LCRA could *never* release water for irrigated agriculture because, unless the lakes are full and lake inflows equal or exceed the releases, any release moves you closer to a DWDR declaration. This is clearly an untenable interpretation of the conditions in LCRA’s water rights, which recognize that LCRA can contract to supply interruptible water and require an operations plan be developed to address the conditions under which such supply can be provided.

and Attachments in Support of Application for Emergency Authorization (filed December 10, 2013), at 6-7 and Attachment E (LCRA's 2010 WMP, at pp. 4-32 through 4-34). Those conditions require LCRA to declare a Drought Worse than Drought of Record (DWDR) and immediately impose curtailment on its firm customers and prevent further releases for irrigated agriculture until the drought ends and lake storage has recovered well above the trigger point sought in LCRA's application. *Id.*

Indeed, the main purpose of the 2010 WMP and all of its predecessors, has been to ensure that releases of stored water for agriculture only occur when such releases are not expected to jeopardize the reliability and accessibility of water supplies needed to meet the reasonable demands of LCRA's firm customers. *See* LCRA's Brief and Attachments in Support of Application for Emergency Authorization (filed December 10, 2013), at 4-6. Because it is undisputed that the hydrology experienced over the last several years is not included in any of the modeling contained in the 2010 WMP and thus does not protect against that very real possibility, and because of the severity and persistence of the ongoing drought, LCRA's application for emergency relief seeks to honor that obligation by avoiding that exact circumstance for at least twelve months.

Only once LCRA has determined how much water is available for each of its customer classes, firm and interruptible, are the requirements of Texas Water Code § 11.039 triggered. When limited amounts of supply are available for irrigation, LCRA's WMP and its Drought Contingency Plan provides for the manner in which that water is to be allocated between the four downstream irrigation operations and within each division, consistent with Section 11.039. *See* LCRA's Brief and Attachments in Support of Application for Emergency Authorization (filed December 10, 2013), at 6-10, and Attachment E (LCRA's 2010 WMP, at pp. 4-15 through 4-18

and 4-27 through 4-30). Similarly, LCRA has a TCEQ-approved curtailment plan for firm customers that addresses how curtailment will be implemented in the event a Drought Worse than Drought of Record is declared and water is not available to meet all of its firm customers' reasonable demands. *See* LCRA's Brief and Attachments in Support of Application for Emergency Authorization (filed December 10, 2013) at 10 & Attachment H. Prior to such declaration, however, firm customers are entitled by contract to use a reasonable amount of water without shortage, subject to reasonable regulations.

CWIC also misapplies TCEQ's approach to the priority calls in the Brazos River basin to the situation at hand to argue that cities and industries with firm contracts that have superior claims to water over irrigators should nevertheless be required to implement more dramatic drought response measures than required by the Drought Contingency Plans they have adopted consistent with 30 Tex. Admin. Code ch. 288 and the requirements of their contracts with LCRA. The TCEQ's curtailment of water rights in the Brazos River basin involved a priority call by a senior water right – Dow – on upstream water rights where, in some cases, TCEQ allowed municipalities and power plants with *junior* water rights to continue to divert on condition that they provide information detailing the need and reasons why they should be allowed to continue to divert notwithstanding their junior priority. *See* TCEQ Order Suspending Water Rights on the Brazos River (Nov. 19, 2012) (<http://www.tceq.state.tx.us/assets/public/response/drought/water-right-letters/11-19-12brazos-suspension-order.pdf>); TCEQ Order Modifying an Order Suspending Water Rights on the Brazos Basin (Jan. 15, 2013) (available at <http://www.tceq.state.tx.us/assets/public/response/drought/water-right-letters/01-15-13Brazos-muni.pdf>). These orders were issued pursuant to Texas Water Code § 11.053, which expressly provides that any order suspending water rights takes into consideration the efforts of the affected

water rights (there, the cities and power generators with junior water rights) to develop and implement their required water conservation and drought contingency plans.

In contrast, LCRA's request does not involve a senior call under the prior appropriation doctrine and Texas Water Code § 11.053 does not apply. Rather, LCRA's request involves LCRA's obligations under its own water rights, the WMP, and its contracts. If anything, LCRA's obligation during this exceptional drought is, first and foremost, to the cities and industries that pay a firm rate for water supply. Only when LCRA has water available in excess of what it needs to meet the reasonable municipal and industrial demands of its firm customers without shortage in a repeat of a Drought of Record can it make water available to irrigation.

Make no mistake, however. LCRA does not diminish the importance of drought response of its firm customers. As demonstrated by the evidence presented by LCRA witness Nora Mullarkey Miller, many of LCRA's firm customers have implemented and continue to pursue measures to save water supply during this drought. *See* LCRA's Brief and Attachments in Support of Application for Emergency Authorization (filed December 10, 2013) at Attachment N. This evidence is corroborated by the testimony presented by witnesses on behalf of Austin and the Highland Lakes Firm Water Customer Cooperative.

IV. LCRA'S INTERRUPTIBLE USERS ARE NOT ENTITLED TO PAYMENT

LCRA's request for emergency relief, if granted, does not trigger any requirement for LCRA to compensate users of interruptible stored water who do not receive water under the terms of the order. LCRA's request was filed under Texas Water Code § 11.139 and is properly evaluated under the subsections (a)-(g) of that statute. Nothing about LCRA's request triggers the involuntary transfer of a water right, and consequent payment, as might be required by subsections (h)-(j). The irrigators potentially affected by LCRA's requested relief are not water rights holders;

they obtain water via contracts with LCRA pursuant to the terms and conditions of LCRA's water rights for lakes Travis and Buchanan and the WMP when that water is available for that purpose. In this case, LCRA is seeking a temporary amendment to the WMP to affirm that water is not available for that purposes in light of the prolonged and unprecedented drought and the risks that poses to the availability of critical water supplies for its firm customers.

V. LCRA'S APPLICATION DOES NOT SEEK TO AMEND ITS OBLIGATIONS TO SUPPLY WATER FOR INSTREAM FLOWS OR ENVIRONMENTAL FLOWS

Some parties have raised concerns that the Emergency Order issued by the Executive Director indirectly affects LCRA's obligations to provide interruptible stored water from Lakes Travis and Buchanan for instream flow and freshwater inflows purposes. The Resolution adopted by the LCRA Board did not authorize and LCRA has not requested authorization to reduce the amount of water provided from these lakes specifically for instream flow and freshwater inflow purposes below the levels required, in the absence of an emergency order, in the 2010 WMP. *See* Attachment B to LCRA's Brief and Attachments in Support of Application for Emergency Authorization (filed December 10, 2013).

VI. CONCLUSION

Based on the foregoing arguments, in addition to the LCRA's original brief, and evidence submitted in this case, LCRA requests that the Executive Director's order be affirmed with minimal modifications consistent with LCRA's proposed order attached hereto.

Respectfully submitted,

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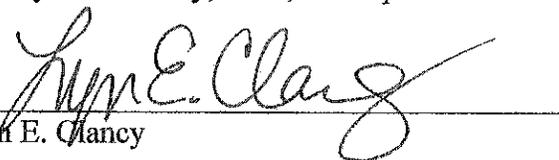
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Lower Colorado River Authority's Supplemental Brief on the Merits and Response to Motion to Modify or Overturn and Proposed Order was served by e-mail transmission on this 17th day of February, 2014, to the persons on the attached Service List.


Lyn E. Clancy

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LCRA'S PROPOSED ORDER

AN ORDER affirming, with modification,
an Emergency Order granted by the Executive Director
to the Lower Colorado River Authority; SOAH Docket No.
582-14-2123, TCEQ Docket No. 2014-0124-WR

On February 12, 2014, the Texas Commission on Environmental Quality ("TCEQ") or ("Commission") considered whether to affirm, modify, or set aside an Emergency Order issued by the Executive Director to the Lower Colorado River Authority ("LCRA") to amend its 2010 Water Management Plan for curtailment of interruptible stored water. The Executive Director issued the Emergency Order on January 27, 2014 after providing notice to the Governor on January 23, 2013. Notice of this hearing to affirm, modify, or set aside the Emergency Order was mailed to all water right holders in the Colorado River Basin more than ten days before the hearing. The Commission referred the hearing to the State Office of Administrative Hearings for the naming of parties and an expedited evidentiary hearing. The Administrative Law Judge issued a Proposal for Decision on February 21, 2014, recommending that the Commission find that the Executive Director appropriately issued the Emergency Order and that the requirements for an Emergency Order in Tex. Water Code § 11.139 have been satisfied, but recommending certain modifications to the Emergency Order. The Commission agrees with the recommendations contained in the Proposal for Decision and revises Findings of Facts 2, 6, 13, 14, 25, 30 and 46 and adds two new Findings of Fact and one Conclusion of Law consistent with the Proposal for Decision.

NOW, THEREFORE, BE IT ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY THAT:

The Emergency Order, attached hereto as Exhibit A and incorporated into this Order by reference, is affirmed, but modified as follows:

- a. The last sentence of Finding of Fact No. 2 is revised to read, "By court order, LCRA developed a reservoir operations plan or Water Management Plan (WMP), Permit 5838, currently dated 2010, which is required by these certificates."
- b. The first sentence of Finding of Fact No. 6 is revised to read, "As established in the 2010 WMP, until firm demand equals the combined firm yield, LCRA can supply water for irrigated agriculture on an interruptible basis."
- c. The second sentence of Finding of Fact No. 13 is revised to read, "On February 1, 2014, the combined storage was 764,000 AF or 38% full."
- d. Finding of Fact No. 14 is amended to add the following sentence, "January 2014 inflows of 11,763 AF were the lowest since the 1950s."

- e. The second sentence of Finding of Fact No. 25 is revised to read, "The proclamation has been renewed monthly, most recently on February 14, 2014, and includes nearly every county bordering or that contributes inflow to the Highland Lakes."
- f. Insert an additional Finding of Fact after Finding of Fact No. 29 that reads, "Curtailments that would occur if combined storage drops substantially will result in reduced water supply to power plants, threatening their ability to generate electricity. Because LCRA's firm water customers would be required to cut back substantially if the drought persists under a DWDR declaration, municipal customers are likely to be forced to institute drought response measures that would include restrictions on indoor water use, resulting in threats to public health and safety."
- g. Finding of Fact No. 30 is revised to read, "Based on recent lake levels and the forecast, there is a chance of reaching conditions triggering a declaration of DWDR as soon as May 2014 and greater than a one in two chance by late August."
- h. Finding of Fact No. 46 is amended to insert the following sentence after the first sentence, "In 2013, LCRA supplied about 1,000 AF to such customers under such temporary permits."
- i. Insert an additional Finding of Fact which reads, "LCRA has not requested authorization to reduce the amount of water provided from lakes Buchanan and Travis specifically for instream flow and freshwater inflow purposes below the levels required, in the absence of an emergency order, in the 2010 WMP."
- j. Insert an additional Conclusion of Law after Conclusion of Law No. 4 that reads, "By entering this order, the Commission is not construing in any way either the 1987 Agreement or the 1998 Purchase Agreement between LCRA and Garwood Irrigation Company. Nothing in this Order shall be considered or construed in any way to support one construction or another of the 1987 Agreement and the 1998 Purchase Agreement between LCRA and Garwood Irrigation Company."

Issue date:

TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

Bryan W. Shaw, Ph.D., Chairman