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

Dear Docket Clerks:

Please accept for filing in the above-referenced dockets the attached City of Austin's Response to Exceptions to Proposal for Decision and Proposed Order.

If you have any questions, please do not hesitate to call.

Respectfully submitted,

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THE CITY OF AUSTIN

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

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

**CITY OF AUSTIN'S RESPONSE TO EXCEPTIONS
TO PROPOSAL FOR DECISION AND PROPOSED ORDER**

This Response to Exceptions addresses key issues raised by various parties in their Exceptions to the Proposal for Decision and Proposed Order. This Response first addresses the Colorado Water Issues Committee's (CWIC) Exceptions, which basically urge the Commission to totally reject the findings and conclusions proposed by the Administrative Law Judges (ALJs) tasked with hearing evidence in this matter. Secondly, the City will respond to LCRA's Exceptions, not opposing a number of their proposed changes to specific findings of fact. Finally, the City will respond to select arguments in the Executive Director's Exceptions. To the extent that these exceptions and argument are joined by other parties, that will be noted

I. RESPONSE TO CWIC EXCEPTIONS¹

A. The Commission Should Reject CWIC's Suggestion that an Emergency Order be Issued with No Trigger Level.²

While CWIC's suggestion that the Commission issue an Emergency Order with no trigger level may seem appealing in its simplicity, it should be rejected because it (1) would strip away key findings of fact; (2) ignore the factual and scientific evidence; (3) set the stage for further disputes, requiring utility staff to divert time and resources away from emergency drought response efforts; and (4) inevitably lead to another rush to establish the "appropriate" emergency response next spring. Each of these will be addressed in turn.

¹ Working under extraordinary time constraints, the City is responding to only select portions of CWIC's Exceptions. By not addressing an Exception, the City is not waiving its right to oppose it.

² Likewise, the City refutes Clive Runnells d/b/a AP Ranch's Exceptions in their entirety. The Exceptions misconstrue the evidence to urge the Commission to set no trigger level.

1. Removing the Trigger Level Would Strip Away Essential Findings of Fact.

The ALJs note that removing the trigger would result in stripping away essential findings of fact.³ In effect it would gut the order of key provisions. In response, CWIC suggests removing- key findings supported by the evidence. CWIC would like to delete findings, not based on lack of evidence, but simply because these facts do not support what CWIC desires. Ignoring evidence and omitting findings of fact to reach a desired result is a dubious and potentially dangerous means of decision making. In fact, Texas Government Code, Section 2003.047(m), the Commission must base any amendment to the proposal for decision or the findings of fact "based solely on the record made before the administrative.

2. Removing the Trigger Level Ignores Factual and Scientific Evidence.

The City urges the Commission to adopt the ALJ's proposed trigger level, which is aligned with the science and the facts. The ALJs found that the scientific and factual evidence support their recommended 1.4 MAF trigger. The decision to recommend a 1.4 MAF trigger is based on numerous findings that the current situation poses an imminent threat to human health and safety and that this threat continues to be imminent as the drought continues and that the drought is expected to continue into next year.⁴ This decision, among other things, provides clarity for the remainder of this year. If there is no trigger what happens in 120 days? In 2012, the lakes had a modest refill just below 1.1 MAF. Based on evidence showing the subsequent precipitous drop in lake levels in 2012, the PFD expressly recognizes that the trigger needs to be higher in order to avoid a repeat of th at scenario.⁵ Without any trigger, however, once the lakes experience any level of refill, irrigators may demand a release despite what modeling and practical experience have shown. The Commission then will be faced with this entire process again, and under those circumstances will have to make a decision on the trigger level. Delaying setting a trigger level is not the answer; the Commission has all the scientific and factual evidence on which to base a 1.4 MAF trigger level.

³ Proposal for Decision (PFD) pp. 33-34

⁴ PFD pp. 3 and 22; Proposed Findings of Fact (FOF) 30a

⁵ PFD pp. 22, 29

3. No Trigger Would Set the Stage for Further Disputes, Requiring Utility Staff to Divert Time and Resources Away from Emergency Drought Response Efforts.

LCRA's firm customer utilities need time to deal with the emergency conditions caused by the continuing drought. Each time that the continuing drought requires emergency action by the Commission, staff and resources are diverted from their essential tasks of ensuring water supply to their customers. The enormous amount of time spent on this matter just since November has hampered these efforts—diverting staff time and other resources from developing emergency responses to drought conditions. These responses include seeking alternative supplies, moving intakes, and managing system impacts. No trigger level will afford no certainty to these utilities and will likely require additional Commission hearings. A 1.4 MAF trigger, which is properly protective of municipal supply, however, will afford them the time to return to their essential tasks of responding to the drought, at least for the next several months. The Order should be issued in a manner that it will not be re-litigated again in just a few months.

4. Ordering No Trigger Level Today Will Inevitably Lead to Another Rush to Establish the "Appropriate" Emergency Response Next Spring.

The “no trigger” approach suggests the Commission base the decision on what they think will happen in the next few days rather than on a reasoned evaluation of the scientific and factual evidence. Having no trigger level would establish an uncertain and negative approach for next year should drought persist. It is foreseeable that there will be demands and pressure for a process that involves waiting until just before March 1, suggesting the Commission try to suddenly make a decision the week before. While it is to the credit of the ALJs and the parties that they were able to garner and present such evidence within a few days, it is certainly not the desired approach.⁶ Critical decisions of this nature regarding the water supply for over a million people, need to be made in advance based on science and modeling. By taking the no trigger

⁶ CWIC complains about not receiving critical evidence until the day of the evidentiary hearing. CWIC Exceptions pp. 20-21. In fact, these hardships were shared by all in the interest of expediency. For example, at 5:37 the ALJs asked the parties to determine whether they could cut witnesses. HOM Transcript p. 312 ln 10. Because of the strict deadline set by the Commission, the ALJs necessarily made rulings and the parties made concessions that hampered the full presentation of evidence and argument. See Order No. 1, Section IV which required parties to submit proposed orders before hearing any evidence.

approach, the Commission will have lost this opportunity to look at potential impacts from this decision going two or three years out, and setting standards based on model results.

It is easy to imagine many scenarios where it would be difficult if not impossible for the Commission to make a last minute call with no trigger in place.. Science and modeling done with sufficient time in advance needs to be the basis. The water supply for a million people needs this reliability and a reliable process. It's easy to imagine circumstances where a no-trigger approach would be very messy, inconclusive and lead to more disagreements—not less.

Going with no trigger order sets the stage for more heated contests at the time of renewal or the next time an emergency order is needed, which if approached properly would require some trigger to be set again. Finally, the no-trigger approach proposed by CWIC in effect implies that the trigger is the current combined storage, so it is not a no-trigger approach and it sets a dangerously low trigger.⁷

B. Contrary to CWIC's Assertion to the Contrary, the Commission Has the Authority to Modify the Proposed Trigger Higher than 1.1 MAF

Several parties have asserted in their Exceptions that the Commission does not have the authority to set a trigger higher than the 1.1 MAF in LCRA's application for emergency relief⁸ but none have cited to any statutory or case law to support this position. CWIC argues that the Commission is constrained due to a lack of notice. The City disagrees as discussed below.

1. Proper Notice Was Provided that the Commission Intended to Affirm, Modify, or Set Aside the Executive Director's Emergency Order

CWIC's argument must fail because the Commission provided notice that the Executive Director's Emergency Order could be modified pursuant to Texas Water Code section 11.139. Thus the notice was not only that the Commission would consider a 1.1 MAF trigger, but instead it was notice that such a proposed trigger could be modified. Thus notice was provided of the

⁷CWIC makes much of the, Austin Water Utility Director's response to questioning on the subject. HOM Transcript 280: 7 – 12. This statement simply indicated, however, the City's initial interest in the concept prior to having the opportunity to fully reflect on all the ramifications of such an order. The City has since considered and rejected the concept, as described in these Responses to Exceptions.

⁸ CWIC Exceptions p. 2; OPIC Exceptions p. 3; NWF Exceptions p. 2. In fact, Judge Newchurch gave a similar opinion during the Commission agenda. See Attachment A, an unofficial transcript of the February 12, 2014 agenda covering the discussion between the Commissioners and Judge Newchurch. Clearly, Judge Newchurch changed his position after hearing the evidence and argument of counsel during the course of the evidentiary hearing. See Attachment A.

proposed trigger and whatever modifications the Commission might deem necessary, including adjusting the trigger up or down. In fact, the ED's recommended 1.4 MAF trigger is mentioned in the January 31, 2014 Notice of a Hearing to Consider the LCRA's Request for an Emergency Amendment to Its Water Management Plan as the level of combined storage at which 172,000 AF of interruptible stored water plus 20% losses would be released. Thus the recommended 1.4 MAF trigger was certainly within the realm of possible modifications to be considered by the Commission.⁹

While under certain circumstances a failure of proper notice can be considered as a due process issue, the Texas Supreme Court has held that "[w]hat process is due is measured by a flexible standard that depends on the practical requirements of the circumstances." *Univ. of Texas Med. Sch. at Houston v. Than*, 901 S.W.2d 926, 930 (Tex. 1995). The practical requirements of the current circumstances are fully informed by the emergency nature of these proceedings.

No one involved in the process over the last several months could miss the very extensive discussion of the 1.4 MAF trigger and request by firm customers for this level of protection backed by modeling. There is a practical aspect to notice as to whether there was notice in fact. The LCRA Board considered whether to request emergency relief last fall. Modeling with a 1.4 MAF was presented to the LCRA Board by LCRA staff in October 2013. The 1.4 MAF trigger was included in dozens and dozens of comments at the November 2013 LCRA Board meeting. The City of Austin's comments concerning the 1.4 MAF trigger submitted to LCRA, were also submitted to the Executive Director prior to issuance of his Emergency Order. Again, they were attached to the City's written comments prior to the Commission's February 12, 2014 agenda. Thus, the parties in the evidentiary hearing had ample notice that 1.4 MAF would likely be a considered modification to the Executive Director's Order.

⁹ Additionally, the City of Austin submitted extensive comments to the LCRA Board prior to its vote to espouse a 1.1 MAF trigger; these comments were provided to the Executive Director prior to his issuance of the Emergency Order; and the City requested the 1.4 MAF trigger in its written comments to the Commission prior to the February 12, 2014 hearing. All of these were public records and all of the parties to this proceeding either received copies prior to the evidentiary hearing or otherwise had access to them. More importantly, parties to this matter participated in the LCRA Board proceeding during which the City presented its arguments in this regard, so a modification to 1.4 MAF should have been seen as a possible modification.

2. Under Due Process Standards, Notice was Sufficient for Modifying the Order to a 1.4 MAF Trigger

While under certain circumstances a failure of proper notice can be considered as a due process issue, the Texas Supreme Court has held that “[w]hat process is due is measured by a flexible standard that depends on the practical requirements of the circumstances.” Univ. of Texas Med. Sch. at Houston v. Than, 901 S.W.2d 926, 930 (Tex. 1995). (*UT Medical School Case*) "At a minimum, due process requires notice and an opportunity to be heard at a meaningful time and in a meaningful manner." *Hartford Cas. Ins. Co. v. State*, 159 S.W.3d 212, 216-17 (Tex. App. 2005) citing *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976); *Perry v. Del Rio*, 67 S.W.3d 85, 92 (Tex.2001); and *University of Tex. Med. Sch. at Houston*, 901 S.W.2d at 930.

The practical requirements of the current circumstances are fully informed by the emergency nature of these proceedings. The Commission is responding to an emergency condition and the practical requirements are that Commission must have the latitude to take necessary emergency measures.

The *UT Medical School Case* held:

This flexible standard includes three factors: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. [citations omitted]

UT Medical School Case, 901 S.W.2d 926, 930 (Tex. 1995)

Beginning with the first factor for determining due process, regarding the private interest that will be affected by the official action, an assessment of the irrigators' interest must consider the facts. -The irrigators have no water right permits and at this date, most have no contract. When they do have a water supply contract, most irrigators have at best, an annual contract for interruptible supply. Further, this order concerns interruption in an emergency condition—interruptible customers, should they have a contract, certainly do not have a right to an

uninterrupted supply and especially do not have a right to interruptible supply in emergency conditions.

Regarding the second factor - the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards - the irrigators were well aware of the request for a 1.4 MAF trigger by affected parties who do have property interest that would be seriously affected by the *lack* of an order. There is no value gained by CWIC or any party of putting the 1.4 MAF trigger in the notice as they were already aware of this proposal.

Finally, the government has an interest in addressing an emergency condition and protecting public health and safety from an imminent threat.

Applying these factors to the case at hand suggests that a flexible standard should be applied that recognizes that some relief other than what was requested by LCRA may be considered and granted by the Commission. The emergency nature of the situation calls for flexibility for the Commission to take emergency actions it deems necessary even if varying to some degree from what was in the notice.

In sum, due process requirements have been satisfied by the fact that CWIC and other interested persons received notice that the Commission could *modify* the order and that a key aspect of that assessment was the determination that an emergency condition exists which presents an imminent the threat to public health and safety. That necessarily informs the public that the Commission will modify the Order in the manner it deems necessary to address any emergency condition it determines exists and will adequately address any imminent threat to public health and safety.

3. Section 11.139 Contains no Limit on How the Commission May Modify an Emergency Authorization.

The notice provided pursuant to section 11.139, contains no limit on the modifications the Commission may make to an emergency order. Notice of a hearing under section 11.139, therefore, serves as notice that any element of the Executive Director's Emergency Order could be modified including modifying the trigger up or down. This comports with the Commissioners' own understanding that it could be modified either up or down.¹⁰

¹⁰ See Attachment A at p. 5

4. In Addition to Legal Standards, Common Sense Suggests that the Commission Must Have Flexibility to Take Emergency Action to Protect Public Health and Safety.

The entire notice issue raised by CWIC must be considered in context to the fact that this is an emergency order.¹¹ Again the Commission has given notice that it may affirm, *modify* or set aside the Order under Texas Water Code §11.139. CWIC's argument regarding notice presumes that the Commission, in the course of the hearing could make a determination based on the facts and the science that a certain action such as raising the trigger is necessary to address the emergency condition, but that the Commission's hands would be tied entirely by the relief the applicant requested or an order signed by the ED or the notice. Even if the facts, science and common sense show what was requested by the applicant, signed by the ED and noticed by the Commission is insufficient and even very dangerous to public health and safety the Commission could do nothing different—even under their statutory emergency authorization authority. This completely defies common sense.

B. CWIC Claims That the Order Goes Too Far When In Fact Evidence Shows and the ALJs Agree That it Did Not Go Far Enough.

CWIC claims that the Executive Director's Order overreaches and goes beyond what is necessary. Certainly the ED's Order does not overreach. The ED's proposed 1.1 MAF, as the evidence demonstrated and the ALJs agreed, in fact does not go far enough. Modeling depicts that in a continuation of the current drought hydrology lake storage would fall below 700,000 AF by October of this year—a level at which utilities are already experiencing health and safety threats to their systems.

In addition, the ALJs recognized that a refill to a level close to 1.1 MAF in May 2012 did not keep combined storage from nearly falling to 600,000 AF in September 2013, even with the cutoff of most interruptible stored water releases.¹² As explained in the City's Exceptions to the PFD, that rather than going beyond what is necessary, the 1.4 MAF provides protection from

¹¹ Other parties make similar arguments about the Commission's authority to modify the Executive Director's Order to increase the trigger level. Although none are based on a notice - due process argument, the City's response applies equally to those arguments. CWIC Exceptions p. 2; OPIC Exceptions p. 3; NWF Exceptions p. 2.

¹² Proposal for Decision at p. 19 and Proposed FOF No. 51.

scenarios like what occurred in 2011- where storage fell rapidly from 1.53 MAF on March 1 to around 745,000 AF by October. CWIC argues that concerns of continuing record low levels are based on unlikely scenarios. LCRA modeling evidence, however, demonstrates that over a two year period from 2011 to 2013 the actual storage repeatedly fell to very low levels and that earlier modeling had predicted such circumstances were extremely unlikely to occur. Thus, evidence shows that past modeling based on old data, did not predict what ultimately occurred in 2011 to 2013. The ALJs relied on new modeling using recent data from the exceptionally low inflows of the recent years.

C. CWIC's Opposition to Limits on Maximum Usage is Ill Founded.

CWIC disparages any plan or emergency order that places limits on maximum usage, referring to the Executive Director's Ordering Provisions 1 b, c, d and e as "caps."¹³ The irrigators take this position despite the fact that open supply created an untenable situation in 2011.¹⁴ Further, if the amount that will be released is unknown, it cannot be modeled. Without modeling, the impact of such a release cannot be determined. Thus an upper limit set in the Order is essential. The irrigators' refusal to acknowledge the multi-year effects of the massive releases of stored water for their use, makes their position that less supportable. At the start of the irrigation season in 2011, the lake levels were high, but 3 years later the lakes are still suffering the effects due to the 2011 release from storage during record low inflows to provide an open supply of water to the interruptible customers. The idea of releasing unlimited amounts when lakes are full assumes a refill within a short time—that cannot be assumed with the kind of hydrology the basin has recently been experiencing.

II. RESPONSE TO LCRA'S EXCEPTIONS¹⁵

The City urges the Commission to adopt the ALJs' Proposal for Decision and Proposed Order without revision.

¹³ CWIC Exception 20 at p. 16.

¹⁴ HOM Transcript 274: 7 – 275:3.

¹⁵ The City is responding to only select portions of LCRA's Exceptions. By not addressing an Exception, the City is not waiving its right to oppose it.

A. The City Does Not Oppose Some of the Changes Proposed in LCRA's Exceptions.

In the event, however, that the Commission decides to make changes based on the LCRA's Exceptions, the City of Austin does not oppose the following proposed changes to the ALJs' proposed order. In deciding not to oppose these proposed changes, the City has determined that they would not contravene Texas Government Code section 2003.047(m), because the findings of fact are "based solely on the record made before the administrative law judge." The City of Austin does not oppose LCRA's proposed changes to Findings of Fact 2a, 7, 23, 30d, 30e, 31b, 31c, 36, and 42; Conclusion of Law 7; and Ordering Provisions 2a and 7.

B. With Certain Modifications, the City Would Not Oppose Other LCRA Proposed Changes to Findings of Fact.

With certain modifications as discussed below, the City of Austin can accept LCRA's proposed changes to Findings of Fact 13c, 30a, 30f, 45a, 49a, and 49c.

1. Response to LCRA's Exception to Finding of Fact No. 13c

The City would not oppose LCRA's proposed modification to Finding of Fact No. 13c if the phrase "within the 12 months" is replaced with the phrase "as soon as the next 12 months." It is unscientific and illogical to find that an imminent threat to public health and safety exists if a model shows an interruptible stored water supply release could cause a drought worse than the drought of record (DWDR) within 12 months, but not if it shows a DWDR could be triggered after that. The salient point is whether a declaration of a DWDR is attributable to the release of interruptible stored water, regardless of the period used. To draw a line in the sand at 12 months makes no sense.

Changing LCRA's proposed text to read, "as soon as the next 12 months," would allow the Commission flexibility to consider model results that may show a DWDR being triggered by an interruptible stored water release in a time period longer than 12 months, but where such prospective triggering of the DWDR is associated with a proposed release of interruptible stored water. The City's proposed change simply leaves open for the Commission the consideration of other time frames that may be appropriate when assessing whether a release poses an imminent threat to public health and safety or implicates other section 11.139 factors.

2. Response to LCRA's Exception to Finding of Fact No. 30a

The City would not oppose LCRA's proposed change to Finding of Fact No. 30a, only with further modification. The City recommends that LCRA's inserted phrase "under the exceptional circumstances presented by this drought" be changed to state: "under the circumstances presented by this drought." Also the City suggests the addition of the phrase "and possibly other circumstances that may be determined in the future." The City's modeling shows that it is not just under exceptional drought circumstances that an 850,000 AF trigger would not be protective enough of health and human safety.

Both the City's period of record modeling (WAM CRM simulations that assume 1940-2013 range of hydrologic conditions are possible for 2014-2016) and the drought persistence modeling (WAM CRM simulations that assume 2008-2013 range of hydrologic conditions persists for 2014-2016) show that a release of interruptible stored water at 850,000 AF in either Exceptional Drought or Drought Conditions would trigger a DWDR in a matter of months. In the City's models for a release at 850,000 AF, the 90% exceedance line (termed in LCRA's models as "Drought Conditions") and the 98.5% exceedance line (termed in LCRA's models as "Exceptional Drought" for the 99% exceedance line) cross below the 600,000 AF level within a very close timeframe in the summer of 2014.¹⁶ So it is not just in Exceptional Drought that the 850,000 AF trigger presents an imminent threat to public health and safety.

The City's suggested addition of the phrase "and possibly other circumstances that may be determined in the future" seeks to address the following situation. It is possible that at the time the assessment is being made whether to allow a future release at 850,000 AF, which could possibly occur later this year, conditions which are neither Exceptional Drought or Drought Conditions may nonetheless present an imminent threat to public health and safety with such a release. The City's suggested modification would also address its concern that LCRA's phrase, even with the proposed modification by the City, would set a precedent as to what can be considered in assessing threats to public health and safety.

¹⁶ Exhibit LCRA-6a: Dec. 10, 2013 Affidavit of Ron Anderson, Att. 3, Figure 1.

3. Response to LCRA's Exception to Finding of Fact No. 30f

The modeling and testimony provided in evidence supports the 1.4 MAF trigger¹⁷ entirely independent of the 2010 LCRA Water Management Plan (2010 WMP) provision cited in Finding of Fact No. 30f. In its exception, LCRA mischaracterizes the 2010 WMP by stating, "Moreover, the current WMP provides discretion to the LCRA to determine whether a different storage level in lieu of 1.4 million acre-feet may be appropriate." The LCRA Board does not have unfettered discretion under the WMP as this sentence would suggest. Specifically, the 2010 WMP states, "Prior to declaring a drought worse than the drought of record, LCRA will re-evaluate this threshold level to determine if a more accurate conservation storage level in lieu of 1.4 million acre-feet can be determined."¹⁸ This standard suggests that a scientific analysis must be conducted by LCRA that supports any proposed change rather than suggesting the change is discretionary and may be influenced by many other factors that may or may not be scientifically supported. This provision was written prior to the exceptional drought hydrology that has occurred since. The City doubts that a scientific analysis using recent hydrological data would support lowering this 1.4 MAF refill trigger.

The City would not oppose changes to Finding of Fact No. 30f as long as the additional change is made as follows: "Moreover, the current WMP provides that prior to declaring a drought worse than the drought of record, LCRA will re-evaluate this threshold level to determine if a more accurate conservation storage level in lieu of 1.4 million acre-feet can be determined."

4. Response to LCRA's Exception to Finding of Fact No. 45a

With regard to LCRA's suggestion to insert the word "exceptionally" prior to "low inflows" in Finding of Fact 45a, it is not accurate that only exceptionally low inflows would cause combined storage to fall below 600,000 AF by the summer of 2014 with a release of interruptible stored water. The City would not oppose LCRA's modifications as long as they were modified further as follows: Delete "exceptionally" in the first sentence; change the phrase "sometime in the summer of 2015" to read "as early as April 2015." This change is supported by LCRA's modeling¹⁹ as noted on page 14 of its Exceptions, where it says that with a refill to 1.1

¹⁷ HOM Transcript at pp. 321-343 (Direct testimony of Richard Hoffpauir) and Exhibits COA-8, COA-9, COA-12, and COA-14 through COA-18.

¹⁸ LCRA 2010 WMP, p. 4-34. Exhibit COA-5.

¹⁹ Exhibit LCRA-6A at ¶ 14.1.

MAF, its modeling shows that the risk of triggering a DWDR “is delayed to April 2014 [sic]²⁰ at the earliest.”

For consistency, in the third sentence after “1.4 million AF,” insert the phrase “releases of 125,000 AF are made and exceptionally low inflows persist.” Also, the following sentence should be added: “For the 1.4 MAF trigger, a release of approximately 200,000 AF, which includes releases to Garwood, plus an additional anticipated 20% in losses, as contemplated in both the ED’s Order and the PFD for the 1.4 MAF trigger, would result in combined storage falling below 600,000 AF sooner.” If these changes are made to LCRA's exception to Finding 45a, the City would not oppose it.

5. Response to LCRA’s Exception to Finding of Fact No. 49a

The City would not oppose LCRA’s proposed changes to the first sentence of Finding 49 as long as the second sentence is not deleted. The second sentence is supported by the evidence and is the primary point of this Finding—that adjustments to raw water intakes may not be possible in a very short time frame.

6. Response to LCRA’s Exception to Finding of Fact No. 49c

The City would not oppose LCRA's recommended changes to Finding 49c as long as the phrase “within the next 12 months,” is modified to read “as soon as the next 12 months.”

C. The City Opposes Certain of the LCRA's Proposed Changes to Findings of Fact.

As explained below, the City opposes the LCRA’s proposed modifications to Finding of Facts 30c, 30g, and 49b.

1. Response to LCRA’s Exception to Finding of Fact No. 30c

The City disagrees with the LCRA’s rationale for changing Finding of Fact No. 30c. LCRA does not and cannot assert the modification is needed because the information is not factual, but just that the Finding is not consistent with LCRA’s application for a 1.1 MAF trigger. Whether a fact is consistent with LCRA’s application is not a criteria for assessing a fact. In this instance the fact that “a trigger level of 1.4 million AF is necessary to avoid a rapid return to emergency levels” is supported by evidence in the record that a 1.1 MAF trigger would

²⁰ This should be 2015.

result in such a rapid return to emergency levels under a persistence of current drought conditions and thus this FOF should remain unaltered.

2. Response to LCRA’s Exception to Finding of Fact No. 30g

Finding of Fact 30g clarifies that the 2010 WMP requires a 1.4 MAF refill when a DWDR has been declared. Finding 30g is relevant to the ALJs' recommendation to use a 1.4 MAF trigger. The City opposes deleting this Finding. The City believes that the 1.4 MAF trigger is supported entirely independent of this 2010 WMP provision by the modeling and testimony provided in evidence.

3. Response to LCRA’s Exception to Finding of Fact No. 49b

The changes LCRA proposes to Finding of Fact 49b does not accurately reflect the testimony of the firm customers' expert witness about the risks to firm customers' raw water intakes from using a 1.1 MAF trigger in the Order. Therefore, the City suggests keeping FOF 49b as is.

D. Response to LCRA’s Proposed Conclusion of Law 1b

The City strongly opposes LCRA’s proposed modification to Conclusion of Law 1b. Through its Exception to Conclusion of Law 1b, LCRA asks the Commission to interpret LCRA’s contractual obligations to firm customers. The City does not believe such an interpretation is appropriate in the context of this emergency order hearing process.

With LCRA’s proposed modification, the phrase does not accurately reflect what is stated in LCRA’s permits and in TCEQ Orders regarding the WMP. The insertion of the phrase “reasonable” is entirely unacceptable to the City as it subjects the City’s contract with LCRA to broad and undefined reinterpretation by LCRA.

LCRA’s WMP requires that “LCRA cannot invoke mandatory curtailments of firm water demand unless a particular drought event is determined to be more severe than the Drought of Record or some other water emergency that drastically reduces the available firm water supply.”²¹ LCRA’s WMP further requires that “All uses of interruptible stored water will be totally cutoff prior to and during any mandatory pro rata curtailment of firm stored water

²¹ Exhibit COA-11. LCRA WMP p. 4-32.

supplies.”²² LCRA and the City of Austin, as of yet, do not agree on how these requirements are met when mandatory drought restrictions are placed on LCRA’s firm customers. This Conclusion of Law should not be used to further LCRA’s interpretation of its obligation under the WMP and its contracts with firm water customers.

Because the statement is an important finding with regard to what trigger is appropriate, the City would accept inclusion of the finding with the following addition: “Because firm customers of LCRA and LCRA may have different interpretations under what circumstances and to what extent LCRA may impose drought restrictions, among other possible differences, this Order does not attempt to interpret this requirement in a manner that favors either LCRA’s or firm customers’ interpretation.”

E. The City Opposes Adoption of a 1.1 MAF Trigger

The City opposes LCRA's position on Ordering Provision No. 1 in the ALJ’s Proposed Order. The record supports a trigger of 1.4 MAF and the Commission should approve Ordering Provision No. 1 as proposed by the ALJs based on the scientific and factual evidence in the record. As found by the ALJs, this level of protection of municipal water supply is needed to address the imminent threat to public health and safety posed by current and expected near term future conditions of the Highland Lakes.²³

²² Exhibit COA-11. LCRA WMP p. 4-32.

²³ PFD p. 2, 20; Proposed FOF 13c.

III. RESPONSE TO THE EXECUTIVE DIRECTOR'S EXCEPTIONS

A. The City Disagrees that the Commission Should Set a 1.1 MAF Trigger

The City does not disagree that the Executive Director's Order took a reasonable approach in setting a 1.1 MAF trigger level, and certainly support it as a better alternative than those supported by CWIC and others.²⁴ This does not mean, however, that it is the correct approach under the circumstances. Based on evidence of recent and current drought hydrology in the Highland Lakes,²⁵ the ALJs correctly concluded that a refill to 1.1 MAF is too modest.²⁶ The evidence showed that if current conditions return after a modest refill to 1.1 MAF and interruptible stored water is released, it would threaten to drive storage below emergency levels in a relatively short time.²⁷ Besides the modeling results, the ALJs had only to look to recent experience with a similar refill in 2012 and consider what would have occurred if interruptible stored water releases had been authorized after that refill. Therefore, the City urges the Commission to adopt the ALJs' Proposed Order as submitted.

B. While the Emergency Order Does Not Set Precedent, the Pending Full WMP Amendment May Independently Reach Similar Conclusions.²⁸

The City of Austin, like other parties, agrees that the Order itself should not set a precedent for the pending full WMP amendments, however, it is critically important that this general principle not be taken too far. The pending full WMP amendments will involve the analysis of the same permit conditions and the same emergency levels with the same consequences to firm customers; will use most, if not all, of the same data; and some of the modeling tools will be similar. There will inevitably be significant overlap in the technical and legal analysis of the pending full WMP amendments and this emergency order. That the emergency order does not set a precedent for the pending full WMP amendments does not mean that LCRA, TCEQ, or other parties cannot proceed with a separate but sometimes overlapping or

²⁴ CWIC Exceptions pp. 5 and 11, NWF Exceptions p. 3, Runnels Exceptions p. 2.

²⁵ Exhibit LCRA-8; Exhibit COA- 3; Tr. at 187-229 (specifically 194-195, 211-213, 216), 240-321, 321-361.

²⁶ Proposal for Decision p. 23 and Proposed FOF 30d.

²⁷ Exhibit LCRA-8; Exhibit COA- 3; Tr. at 187-229 (specifically 194-195, 211-213, 216), 240-321, 321-361.

²⁸ The City is responding to only select portions of the ED's Exceptions. By not addressing an Exception, the City is not waiving its right to oppose it.

similar analysis if required by that permit amendment application. It simply means that the decisions in this emergency order are not conclusive of the analysis performed for the pending full WMP amendments. The pending full WMP amendment process may arrive independently at some similar conclusions or approaches to issues and those conclusions or approaches should not be disregarded if, as a result of an independent process, they turn out to be similar to any of the conclusions made or approaches taken in this emergency order and the process for analyzing it.

C. City's Response to ED's Finding of Fact No. 2

In general, the City does not object to the Executive Director's proposed changes to Finding of Fact No. 2, however the City seeks further clarification to avoid misinterpretation. The City requests the addition of a sentence stating, "Amendments to the WMP do not amend the permit conditions in LCRA's water rights, particularly those concerning firm and interruptible water supply."

D. City's Response to ED's Finding of Fact No. 30a

Based on the ED's request, the City offers the following clarification to FOF 30a.

The interruptible stored water release of approximately 120,000 AF plus another 20% for losses would have been much greater than the relatively small amount needed for storage to rise above 850,000 AF (about 3000 AF in 2012 and 28,000 AF in 2013) and thus the sizable releases would have outweighed the small gains in storage, resulting in the reservoirs falling significantly lower in 2013 than the 637,000 AF level that was reached on September 19, 2013.

E. City's Response to ED's Finding of Fact No. 30b

The City is not the only party that modeled a release at 850,000 AF. LCRA's model of such data reached the same conclusion as stated in Finding of Fact 30b. Therefore, both the City and LCRA's models should be mentioned. The City requests that TCEQ's proposed modification inserting "the City of Austin's Drought Model results" be further modified to state, "the City of Austin's and LCRA's Drought Model results."

F. City's Response to ED's Finding of Fact No. 30c

The City disagrees with the ED's proposed modifications to FOF No. 30c and believes the record of the hearing supports the 1.4 MAF trigger. See City's Response to LCRA's proposed modifications to FOF 30c, above.

G. City's Response to ED's Finding of Fact 30f

If the Commission is inclined to revise Finding 30F, the City believes that LCRA's version of FOF 30f as modified by these Responses, provides the best re-statement of this FOF.

H. City's Response to ED's Finding of Fact 41a, 42f and 42g.

Because the ED's exceptions and proposed modifications to these three Findings are similar, the City responds to these together. The City agrees that conservation and drought contingency measures are for the public welfare and for this reason the City has invested heavily in its conservation efforts and has taken a leadership role in imposing drought measures. The record reflects the City's conservation and drought efforts and the savings achieved by those measures.

That there are utility system impacts from lower flows in times of drought do not affect the City's strong commitment to conservation and drought measures, but the City seeks recognition that management decisions regarding the release of interruptible water supplies during emergency drought conditions, if not properly made, can exacerbate already existing system challenges and these systems impacts can threaten public health and safety. The City of Austin works diligently to manage these impacts but the additional strain that large interruptible releases could place on these efforts cannot be ignored and these system impacts are rightfully included in these Findings of Fact for this reason.²⁹

I. City's Response to ED's FOF 49b

See the City of Austin's response to LCRA's exception for 49b, above.

J. The City Supports ED's Order Provision No. 4

The City supports Ordering Provision No. 4 and the ED's analysis of this provision.

PRAYER

For the reasons set out above and in the City of Austin's Exceptions to the Administrative Law Judges' Proposal for Decision and Proposed Order, the City requests the Commission as follows:

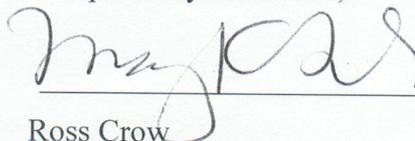
²⁹ Likewise, the City urges the Commission to reject Clive Runells d/b/a AP Ranch's exceptions to Findings of Fact 42e, g, and I; and CWIC's exceptions to Findings of Fact 42a - c and 42e - h.

1. Adopt the Administrative Law Judges' Proposal for Decision and issue the Emergency Order proposed by the Judges, which affirms in part and modifies in part the Executive Director's Emergency Order and deny the Exceptions filed by the Office of Public Interest Counsel, CWIC, AP Ranch, the National Wildlife Federation, the Executive Director, and LCRA, to the extent that they differ from the City's request as stated in this Prayer.

In the alternative:

2. Adopt the Proposal for Decision and issue the proposed Emergency Order, modified as to assessment of transcript costs as proposed by the LCRA and deny the Exceptions filed by the Office of Public Interest Counsel, CWIC, AP Ranch, the National Wildlife Federation, the Executive Director, and LCRA, to the extent that they differ from the City's request as stated in this Prayer.

Respectfully submitted,



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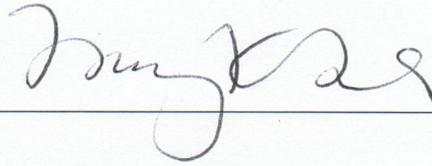
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CERTIFICATE OF SERVICE

I certify that the foregoing "City of Austin's Exceptions to the Administrative Law Judges' Proposal for Decision and Proposed Order" was transmitted via email to each of the parties on the attached mailing list and electronically filed with the TCEQ and SOAH docket clerks on Monday, February 25, 2014 before 5:00 p.m..

(See attached service list)



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