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**Re: SOAH DOCKET NO. 582-14-2123
TCEQ DOCKET NO. 2014-0124-WR
Application of Lower Colorado River Authority for Emergency Authorization**

Dear Docket Clerks:

Please accept for filing in the above-referenced dockets the attached Response to Exceptions to the Administrative Law Judges' Proposal for Decision and Proposed Order filed by the Highland Lakes Firm Water Customer Cooperative.

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

Respectfully submitted,

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

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

HIGHLAND LAKES FIRM WATER CUSTOMER COOPERATIVE'S
RESPONSE TO EXCEPTIONS TO THE HEARING EXAMINERS' PROPOSAL FOR
DECISION AND PROPOSED ORDER

COMES NOW, Highland Lakes Firm Water Customer Cooperative (**Highland**) and files this its Response to Exceptions to the Hearing Examiners' Proposal for Decision (**PFD**) and Proposed Order in the above-styled and referenced matter. This Response first addresses two issues that have been raised in more than one of the parties' Exceptions. This Response next addresses some of the specific Exceptions raised by the parties.

I. The Commission has the authority to modify the emergency order issued by the Executive Director to set a trigger level higher than the initial trigger level applied for by LCRA in its application. (Response to Exceptions filed by CWIC, National Wildlife Federation (NWF), Runnells/AP Ranch (by joinder in NWF's Exceptions))

Pursuant to its authority in Texas Water Code § 11.139 and 30 Tex. Admin. Code § 295.174, and at the request of CWIC, the Commission granted a hearing on the question of whether to affirm, modify, or set aside the emergency order issued by the Executive Director. Two Administrative Law Judges (**ALJs**) conducted a 16-hour hearing involving ten different parties on a very compressed time schedule. Having been granted a hearing and after fully participating in that hearing, CWIC, NWF and Runnells/AP Ranch now complain that the Commission has no authority to consider the great weight of evidence adduced at the hearing supporting the ALJs' recommendation that the trigger level be raised to 1.4 MAF, but may instead only set a trigger level no higher than the *initial* 1.1 MAF trigger level sought by LCRA in its original application. (As is discussed in more detail below, LCRA's application (LCRA Exhibit A) and the notice of hearing (City of Austin Exhibit A) both describe four different trigger levels ranging from 1.1 MAF to 1.4 MAF. The opposing parties selectively focus only on the initial trigger level of 1.1 MAF.) For the reasons explained below, these arguments are without merit, and the ALJs correctly determined that the Commission can set a trigger level at 1.4 MAF.

A. Texas Water Code § 11.139(e) expressly allows the Commission to modify an emergency ordered by the Executive Director.

Texas Water Code § 11.139(e) authorizes the Commission to “affirm, *modify*, or set aside the emergency authorization” issued by the Executive Director. The statute contains no restrictions on the ability of the Commission to modify the Executive Director’s order, nor do the Commission’s rules. The only limitation on the Commission’s discretion in modifying an order issued by the Executive Director after a hearing held by the ALJs is that the modification be based on evidence in the record. See Tex. Gov’t Code § 2002.047(m) (“...the commission shall consider the proposal for decision prepared by the administrative law judge, the exceptions of the parties, and the briefs and argument of the parties. The commission may amend the proposal for decision, including any finding of fact, but *any such amendment thereto and order shall be based solely on the record made before the administrative law judge. Any such amendment by the commission shall be accompanied by an explanation of the basis of the amendment. . . .*”) (emphasis added.)

The broad scope of the Commission’s authority under Section 11.139(e) to modify an emergency order initially issued by the Executive Director is appropriate when, as in this case, the Commission has directed that a hearing be held on whether to affirm, modify or set aside the Executive Director’s emergency authorization, and at that hearing all interested persons present were admitted as parties, allowed to introduce written and oral testimony, and provided with an opportunity to cross examine witnesses. When a hearing has been held by an ALJ, the Government Code mandates that the Commission consider the proposal for decision, exceptions of the parties, and briefs and arguments of the parties. *Id.* Contrary to the assertions by NWF and Runnells/AP Ranch, the Commission cannot disregard everything in the record except the relief proposed by the applicant. To conclude otherwise would run afoul of the Government Code and mean that the hearing served no purpose. The assertion by NWF and Runnells/AP Ranch that the Commission has no authority to grant relief different from the relief sought by the applicant if the Executive Director has initially granted such relief is quite a tortured reading of the statute. In essence, NWF and Runnells/AP Ranch argue that the Commission’s actions under Section 11.139(e) are limited by Section 11.139(b)(4), but that reading would strip Section 11.139(e) of meaning. As stated above, it would lead to the absurd conclusion that Commission has no authority under Section 11.139 to modify orders issued by the Executive Director that grant the relief requested in the application. It would also lead to the conclusion that the Commission can only consider orders that are denied by the Executive Director, or that do not grant precisely the relief requested in the application. And taken to its logical conclusion, the opponents’ position would lead to the conclusion the Commission also cannot grant less relief than is requested in an application, but CWIC and NWF conveniently

omit discussion of this corollary to their argument as they press the Commission to set the trigger substantially lower than 1.1 MAF. At any rate, the assertions by CWIC, NWF and Runnells/AP Ranch lead to nonsensical conclusions and are at odds with the plain language of the statute allowing the Commission to affirm, modify or set aside *any* emergency authorizations issued by the Executive Director.

NWF's and Runnells/AP Ranch's assertion that "Section 11.139(a) authorizes the emergency relief *only to the extent that* 'there are no feasible practicable alternatives to the emergency authorization'" is also misreading of the statute. The statute does NOT contain the italicized verbiage and insertion of the verbiage cannot be implied from the statute. CWIC and OPIC seem to also believe that the statute requires the Commission to address only the most minimal emergency conditions imaginable, and that position is not supported by the statute. The fact is that the legislature expressly authorized the Commission to modify the Executive Director's order and it is free to do so in this instance since the modifications recommended by the ALJ are fully supported by the record and ample due process has been provided.

B. The cases cited by CWIC in its "Brief Regarding Limitations of Application and Notice" and its Exceptions are not germane or dispositive.¹

CWIC asserts in its Brief Regarding Limitations of Application and Notice (which it refers to in its Exceptions) that "principles of due process" deprive the Commission of authority to set the trigger level higher than 1.1 MAF because due process requires parties to an administrative hearing process to "know in advance what the parameters of the outcome of the hearing will be." See CWIC Brief, at 3. This is a misstatement of the courts' holdings in the cases cited by CWIC. None of the cases cited by CWIC support CWIC's contention as stated in its Brief and all of them are legally and factually distinguishable from these proceedings. The cases cited by CWIC primarily involve challenges to notice on the grounds that the notice did not inform the appellants of the charges against them making it impossible for them to fully and adequately provide a defense. Some also involve more egregious errors such as (1) ex parte consultations, (2) arriving at a final result on grounds other than those presented at the hearing; (3) making a decision first and then crafting new findings of fact not based on the record; and (4) failing to comply with statutes and rules pertaining to changes to an ALJ's findings of fact and conclusions of law.) None of these cases are similar to the present case and are not controlling.

¹ NWF and Runnells/AP Ranch do not cite any legal authority in support of their position.

In its Exceptions CWIC asserts that the it would be “overreaching” and an “abuse of its statutory authority” for the Commission to exercise its powers to do anything other than address the most minimal risk scenario that could possibly be conceived of. OPIC, NWF and Runells/AP Ranch also seem to take this position, but none of them cite any legal authority for it. CWIC refers the Commission to cases that address an agency’s *implied* authority, not its *express* authority. The Commission’s actions in this proceeding are not grounded in implied authority. In this case, the legislature has granted the Commission the *express* statutory authority to **modify** the Executive Director’s order. Ironically, several of the same cases cited by CWIC do stand for the proposition that, “When the Legislature *expressly* confers a power on an agency, it also impliedly *intends that the agency have whatever powers are reasonably necessary to fulfill its express functions or duties.*” *CenterPoint Energy Entex v. R.R. Comm’n of Tex.*, 208 S.W.3d 608, 615-616 (Tex. App. – Austin 2006, pet. dismiss’d), citing *Texas Natural Res. Conservation Comm’n v. Lakeshore Util. Co.*, 164 S.W.3d 368, 377-378 (Tex. 2005). Indeed.

C. There is controlling caselaw on point and it supports the Commission’s authority to set a trigger level higher at 1.4 MAF.

Although none of the cases cited by CWIC are relevant or supportive of the positions asserted by CWIC, there is judicial precedent and guidance on this point. In *Chocolate Bayou Water Company and Sand Supply v. Texas Natural Resource Conservation Commission*, 124 S.W. 2d 844 (Tex. App. – Austin 2003, pets. den.) the court considered whether the Commission’s notice of a water rights permit amendment application was defective and deprived appellants of the right to a contested case hearing. The notice of application stated that stream flow requirements would be measured at a specific gage. The draft permit contained a provision measuring stream flow at a different gage located thirty miles upstream. On reviewing the draft permit and noticing the change in stream flow monitoring location, appellants filed requests for a contested case hearing alleging that the new location was not protective of their senior rights. Appellants complained that the notice of permit amendment was defective because it described a permit that differed materially from the permit that the Commission issued, and that their reliance on the notice of application induced them into believing that they could not be adversely affected by the application and prevented them from timely requesting a contested case hearing. The court rejected the appellants’ contention and found that they had sufficient notice that their interests were at risk. The court found that the notice was intended to apprise the public that an application had been filed, but was not intended to fully apprise potentially affected parties of the specifics of the proposed permit. *Chocolate Bayou*, 124 S.W. 2d at 851. With regard to Sandy Creek, the court found that the underlying application and supporting materials (to which both appellants had access) was sufficient to put Sandy Creek on notice that its water rights could be adversely affected since it referenced a lower stream flow restriction

than Sandy Creek's restriction, which should have alerted Sandy Creek that the proposed permit would allow the permittee to divert more water than Sandy Creek was allowed to divert. With regard to Chocolate Bayou, the court found that Chocolate Bayou admitted that its water rights would only be protected if the permit contained stream flow restrictions far higher than what the application and its supporting materials proposed. Therefore, the court determined that Chocolate Bayou was also put on notice by the application and its supporting materials that its water rights were in jeopardy. Basically, the court ruled that the appellants had received all the notice that was due but failed to timely act to protect their interests.

The present case is analogous to *Chocolate Bayou*. In this case, LCRA's application included several triggers well above the trigger of 850,000 AF sought by CWIC, putting CWIC in substantially the same position as Chocolate Bayou and Sandy Supply. Specifically, the application and the notice both included a sliding scale of trigger points at or above which releases to downstream agricultural interests could be curtailed, **including a trigger of 1.4 MAF**. See LCRA Exhibit A at p. 22. Just to be clear, the trigger of 1.4 MAF was not pulled out of the air by Highlands, the City of Austin, or CTWC. **It is included as one of the progressive triggers requested by LCRA in its application and is in the notice.** Granted, it is the highest trigger mentioned, but no person can say that they were not on notice that one of trigger levels being considered was 1.4 MAF.

Even if a trigger of 1.4 MAF was not included in the application and the notice, the parties complaining were on notice that the relief sought included an initial trigger of 1.1 MAF. An initial trigger of 1.1 MAF is substantially higher than CWIC, NWF and Runnells/AP Ranch had already determined might harm their interests. Applying the rationale of *Chocolate Bayou* to the facts at hand it is clear that CWIC, NWF and Runnells/AP Ranch had sufficient notice that their interests might be harmed by the LCRA application and that case compels the conclusion that the notice was not defective and does not impose a limit on the permit terms. In this case, LCRA's application clearly stated the various trigger levels sought (including a 1.4 MAF trigger level) and included documents attesting to past trigger levels – both lower and higher – previously ordered. Notice was issued which fairly advised all parties of the consideration of an emergency order in which the curtailment trigger could be adjusted, and the application materials were readily available for review. A hearing has been provided and the ALJs have issued a detailed PFD based on evidence adduced at that hearing. The Commission has the authority to set the trigger level at 1.4 MAF and should do so, as recommended by the ALJs.²

² LCRA's counsel, Lyn Clancy, concurs that the Chocolate Bayou case controls in this case and defeats arguments pertaining to notice. See Tr. At 580, ll. 18-22 ("I would call your attention to the Chocolate Bayou case, and I could provide that cite on the issue of whether the parties here had adequate notice that the order might be modified. . .I think that addresses it and defeats CWIC's claim.")

II. A “no trigger” order is inappropriate at this juncture and is not sufficient to address the emergency.

Around midnight, in a closing statement made after a 16-hour marathon hearing held at its request, CWIC requested consideration of “alternative” findings of fact and conclusions of law that would allegedly support an order that halts all releases of stored water from the Highland Lakes for the duration of the emergency order, *i.e.*, a number-neutral, “no-trigger” order. (See Tr. at p. 569, l. 23 - .570- l. 18 and Tr. at p. 570, l. 13 - .571- l. 10, C. Ahrens). CWIC’s attorneys did not comply with Order No. 1 and timely provide all parties with copies of findings of fact and conclusions of law on this “alternative proposal,” and ALJ declined to extend the deadline to accommodate CWIC. However, the ALJ did allow CWIC to make an oral motion or an oral proposal, which, as can be seen from the PFD and CWIC’s Exceptions, is confusing and inappropriate at this juncture.

Assuming the proposal is not a concerted effort to undermine the hearing process ordered by the Commission, the proposal cannot be supported for several reasons. First, CWIC’s modifications to the Executive Director’s proposed findings (not to be confused with the ALJ’s proposed findings, which CWIC has not taken the time to interlineate to address this “alternate proposal”) are not “neutral.” The proposed modification of Executive Director Finding of Fact No. 49, for example, would delete the portion of the finding stating that a trigger of 850,000 AF “is not a reasonable 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.” How is deletion of a finding that expressly states that a trigger of 850,000 AF is not a reasonable alternative “neutral?” It isn’t. It would just eliminate a fact finding unfavorable to CWIC.

Second, inclusion of new finding of fact and ordering provisions that prohibit release of stored water to interruptible downstream customers for the duration of the order based on “the *expectation* that the lakes will not recover significantly before March 1, 2014 at 11:59 p.m.” does not accomplish the same purpose as and is a poor substitute for the ordering provisions proposed by the ALJ. It may have the same *result* (depending on the weather), but it does not accomplish the same *purpose*. In referring this matter to hearing, the Commission clearly stated that it was interested in ascertaining more information about the appropriateness of various trigger levels. In short order, all of the parties prepared and presented evidence and conducted cross examination on the topic of trigger levels. CWIC now asks to be able to disregard the evidence garnered at that hearing and to not address the very issue that the Commission

directed be addressed at the hearing. Such a position is wholly inappropriate at this juncture and renders the hearing process meaningless.

Third, CWIC's proposal does not provide any certainty as to what factors the Commission might consider in renewing the emergency order. What would an applicant seeking renewal of the emergency order be expected to show as grounds for renewal when the only bases for the order are two facts that will not change over time. As proposed by CWIC, the ultimate facts supporting the ordering provision are that (1) the combined storage was 764,000 AF on February 1, 2014; and (2) there is "an expectation that the lakes will not recover before March 1, 2014." The conditions existing on February 1, 2014 are the conditions on February 1, 2014 and will not change. They are what they are. Similarly, the conditions on March 1, 2014 will also not change (to the extent they are relevant under CWIC's proposal). They will be whatever they will be. Since the ultimate findings of fact supporting the ordering provision proposed by CWIC will not change over time, what information will be used to determine whether the order should be extended for another 60 days? Section 11.139(a) expressly contemplates that renewals for an additional 60 days can be granted, but if the order does not rooted in factors that can be re-evaluated over the course of time, there is no basis for considering whether to renew the order. If CWIC's alternative proposal stands, CWIC should have no objection to an automatic renewal provision or, for that matter, to a combined storage curtailment trigger of 764,000 AF. Although such a reading is reasonable, is probably not CWIC's intent, and it does demonstrate the complications associated with attempting to decide by not deciding.

In lieu of CWIC's "alternative" proposal of a no-trigger order, the Commission has the chance to bring some certainty to the process by pegging its decision to a factor that is variable but is also objectively determinable – combined storage levels. Pegging the trigger level to a variable but readily ascertainable factor allows all affected persons to reasonably determine what criteria the Commission would consider for renewal. All parties are understandably skittish about creating long-term precedent in setting trigger levels with this emergency order, but at the very least the parties have a right to know what conditions might be grounds for renewal.

The ALJs' proposed order is also crafted so that the possibility of automatic renewal if conditions persist is predictable and fair. There is no reason to rehear in less than 120 days the same issues that have just been heard when there is a fair and reasonable alternative that allows automatic renewal to be linked to combined storage levels on a specified date. The automatic renewal provision would save tremendous resources, while being both fair and expedient.

III. RESPONSES TO EXCEPTIONIONS

Findings of Fact:

PFD, Page 3 (probably is meant to be page 2) – CWIC objects to the ALJ’s statement that in the PFD that “CWIC believes the trigger level should be 850,000 AF” because it does not explain the basis of CWIC’s position. The ALJ has no duty to state the reasons for CWIC’s position. However, the statement should probably be qualified because during the course of these proceedings, CWIC has changed its position and now argues (perhaps in the alternative, although it is not entirely clear), that all releases from storage should be curtailed for the duration of an emergency order regardless of combined storage levels. See CWIC Exceptions at pp. 7-8 and Tr. at p. 569, l. 23 - .570- l. 18 and Tr. at p. 570, l. 13 - .571- l. 10. For that reason, the PFD should be modified to add a sentence at the end of the third full paragraph on page 2 to the effect that, “At the conclusion of the hearing, CWIC also put forward an oral proposal which is discussed in Section VII.C.1 of the PFD.”

PFD, Pages 20-21 – CWIC objects to the statements in the PFD that “CWIC contends that even a 1.1 million AF trigger level, and certainly a 1.4 level, is irrational because it assumes very high inflows followed by an immediate and precipitous reduction to extremely low inflows. The steep climb from approximately 750,000 AF in January 2012, to 1.037 million AF on May 22, 2012, followed by [a] steep drop to 637,000 on September 19, 2013, dramatically illustrates that such wild swings can occur in Central Texas in the midst of this historic drought. The Emergency Order should be crafted to deal with that possibility in order to reduce the threat to public health and safety.” CWIC objects to these statements on the grounds that they are not supported by stochastic modeling. However, much of the affidavit from CWIC’s modeler was stricken as inadmissible, and the bits that were admitted are discredited by other testimony demonstrating that, regardless of the results of any modeling, the reality is that for the past three years the conditions that allegedly have a statistically 0% chance of occurring (according to CWIC’s expert’s testimony), have in fact occurred in each of the past three years. See Tr. at p. 122, ll. 4 – 23 (R. Anderson); p. 551, ll. 4 – 23 (A. Archer). CWIC’s exception to this portion of the PFD should be denied.

PFD Pages 33-34 – CWIC objects to the ALJ’s discussion of its “alternative proposal.” This is discussed in more detail above.

FOF 2 – CWIC and the Executive Director object to language describing the relationship between the WMP and LCRA’s certificates of adjudication. The ALJ has modified the finding to state that the WMP is “required by” rather than “part of” LCRA’s certificates of adjudication.

The WMP is certainly “required by” LCRA’s certificates of adjudication and the finding as modified is not incorrect.

FOF 7 – LCRA requests that this finding be updated with information for 2013 from the supplemental affidavit and testimony of Ryan Rowney. Highland has no objection to revising FOF 7 as requested by LCRA.

FOF 8 – CWIC objects to this finding, but it was not identified as a disputed finding in the preliminary hearing or one that LCRA indicated it would update with more current information based on its supplemental affidavits.

FOF 13a – CWIC objects to this finding apparently because it was proposed by the City of Austin, but it is not incorrect as written and CWIC’s exception should be denied.

FOF 13c – CWIC objects to the last phrase in this paragraph as a “gratuitous legal interpretation” and that the reference to its source is unclear and/or not part of the record. The phrase is based on *In re The Exceptions of the Lower Colorado River Authority and the City of Austin to the Adjudication of Water Rights in the Lower Colorado River Segment of the Colorado River Basin*, No. 115, 414-A-1 (264th Dist. Ct., Bell County, Tex. April 20, 1988). That order adopts amendments to LCRA’s certificates of adjudication and is in the record at LCRA Exhibit A, Attachment F. The specific portions of the order supporting FOF 13c are at Finding #25(g) and Conclusion of Law 4(g)(Lake Buchanan) and Finding # 32(g) and Conclusion of Law # 6(g) (Lake Travis). The provisions state that “LCRA **shall** interrupt or curtail the supply of water under [the permits for Lakes Buchanan and Travis] pursuant to commitments that are specifically subject to interruption or curtailment to the extent necessary to satisfy all demands for water under such permits pursuant to all firm, uninterruptible commitments.” CWIC’s exception to this FOF should be denied. LCRA also objects to this finding on the grounds that it might be construed as precluding any releases for interruptible water in the future, but the statement is accurate as written and would not be accurate if revised as LCRA proposes. LCRA’s duties to its firm water customers do not change with the weather and the certificate of adjudication, as amended, and all prior commission orders relating to the WMP continue to govern. *See* LCRA Exhibit A, Attachment E.

For different reasons, LCRA also excepts to FOF 13c and seeks to add language to the effect that a trigger of 1.1 MAF is only appropriate to keep combined storage from dipping to 600,000 AF within 12 months due to circumstances presented by this particular drought. Highlands believes that delaying conditions under which releases of interruptible stored water

could drive storage to 600,000 AF is an accurate interpretation of LCRA's obligations all the time, and cannot support inclusion of the qualifying or limiting language suggested by LCRA.

FOF 23 – LCRA objects to this finding on the grounds that there may be a difference between the LCRA Board's declaration of a DWDR and actually experiencing a DWDR. That is probably true and Highlands has no objection to FOF 23 as modified by LCRA.

FOF 30a and 30c – Various parties object to these findings and suggest striking them altogether or making revisions intended to qualify and limit the applicability of the findings that triggers of 850,000 AF and 1.1 MAF are not sufficient. For example, without a trace of irony CWIC asserts FOF 30a is speculative (with regard to what might have happened in the past had various triggers been set), but in the next breath asks the Commission to issue an emergency order based on predictive modeling that has been shown to be an unreliable predictor of future conditions. LCRA's objection to these findings are that they are not tied to this particular drought period, and LCRA desires to limit the scope and import of these findings and remove all references to a trigger of 1.4 MAF. Runnells/AP Ranch glibly asserts that at 1.4 MF the lakes are 70% full and all is well. Nothing could be farther from the truth, and to make that assertion is to ignore the very reason for this proceeding. The testimony showed that combined storage was about 1.5 MAF in 2011 just before LCRA released approximately 433,000 AF of stored water for interruptible water customers. (Tr. at p. 82, ll. 13-16) The testimony also showed that inflows before and after that release were chronically low, and that the resulting low combined storage level is presently causing emergency conditions that present an imminent threat to the public health and safety. A trigger level of 1.4 MAF is not "unsupportable;" to the contrary; it is probably not high enough when inflows are so drastically low. Highlands' opposition to any trigger level lower than 1.4 MAF is, unfortunately, based not on mere speculation but is grounded in actual experience gained during 2011. The preponderance of the evidence in the record supports a trigger of 1.4 MAF, not a trigger of either 850,000 AF or 1.1 MAF, and the findings are correct and should not be deleted or revised.

FOF 30d, 30e – Highlands has no objection to the minor clarifications suggested by LCRA in these findings of fact.

FOF 30f–LCRA and Highlands propose the addition of language to clarify LCRA's process for cancelling a DWDR under the current WMP. If clarification is needed on this point, Highlands recommends that the finding track the 2010 WMP precisely on this point and not be paraphrased.

FOF 30g – LCRA proposes to delete the finding that 14 MAF is the refill level under the current WMP when a DWDR has been declared. Highland concurs with the City of Austin’s position on this exception.

FOFs 31b and 31c – LCRA suggests that language be added to these findings to clarify that the dates set forth therein are the earliest dates predicted by LCRA that the intakes listed in those findings will become inoperable. However, that is not quite what the testimony indicated. The testimony on this topic was that those dates are the dates that the intakes would “start to become inoperable” based on the information 60-month 5-year elevation forecast performed monthly by LCRA. The findings as drafted are not inaccurate, but if they are revised they should be revised to more closely track the testimony, which was that “...the raw water intakes owned and operated by the following LCRA’s firm water customers on Lake Travis are projected to start to become inoperable on the following dates:.....”

FOF 36 – LCRA proposes to change the phrase “Rule” to “Chapter” and Highlands has no objection to that proposed change.

FOF 42 – Highlands has objected to this finding and proposed alternate language. LCRA has also objected and proposed different alternate language. The changes suggested by both Highlands and LCRA should be made, so that the finding would be modified as follows:

The LCRA Board approved a no more than once per week watering restriction that allegedly would take effect in March 2014 if combined storage is below 1.1 million AF and interruptible stored water to the Gulf Coast and Lakeside irrigation divisions and Pierce Ranch has been cut off. LCRA has not requested TCEQ approval of this action, the TCEQ has never published notice of its intent to consider this action, and this order does not address such action.

FOFs 41a, 42a, 42b, 42c, 42e, 42f, and 42g – Various parties object to these findings. These findings demonstrate the emergency conditions that exist which present an imminent threat to public health and safety. Some parties object to these findings on the grounds that the threats described in these findings are related to measures taken by firm water customers under their drought contingency plans and assert that implementation of drought contingency plans can never cause threats to public health and safety in the form of short term water utility operational difficulties coupled with the long term planning difficulties associated with redesigning and reconstructing infrastructure to anticipate future conditions. Highland begs to differ as such can certainly be the case in an exceptional drought, as the uncontroverted testimony showed. Further, the objections ignore the fact that it is the imprudent releases of

stored water implementation that has prematurely triggered implementation of drought contingency plans. Finally, Runnells/AP Ranch's position on these findings is incorrect because it asserts that the decline in combined storage between May 2012 and September 2013 was entirely due to demands of firm water customers. That statement ignores the considerable uncontroverted testimony regarding the chronically low inflows experienced during that same time period, being the fifth and second lowest in recorded history. These exceptions should be denied.

FOF 42i – Runnells/AP Ranch objects to this finding, but the undisputed testimony from LCRA, Highlands, the City of Austin, and CTWC was that severely limiting or cutting off all outdoor watering caused threats to health and safety related to fire risk, defensible space, dusty conditions, and physical injuries on playing fields. Runnells offered no testimony that contradicted that testimony nor did any other party. This exception should be denied.

FOF 45 – Highland concurs with the City of Austin's position on the exceptions to this finding.

FOFs 49a – 49c –All of those findings relate to the insufficiency of the 1.1 MAF as it relates to firm water supply customers with very long term firm water contracts. These findings also specifically reference the effect of various trigger levels on firm water customers that have intake structures located on Lake Travis. LCRA's application and the Executive Director's original order heavily focused on the effect on interruptible water customers of setting the trigger at 1.1 MAF, and seemed designed to "kick the can down the road" on an annual basis because most interruptible water supply contracts for irrigation are only annual contracts. With that limited focus on annual irrigation contracts, LCRA choose a trigger of 1.1 MAF to as a signal to the rice farmers that there would probably be no release of water from storage for their purposes. But that myopic focus ignores the situation that many firm water customers holding long term contracts for municipal water supply purposes are in. These findings go at least some way toward shifting the focus of lake management from one keenly attuned to the demands of annual interruptible contract water holders, and toward a more balanced approach that also considers the needs of municipalities and other water utilities that rely on long term firm water contracts for municipal water supplies. These findings are particularly important given that the original order issued by the Executive Director made only a passing mention of the effect of a 1.1 MAF trigger on firm water customers that have intakes on Lake Austin, and that reference was focused primarily on the raw water intakes owned and/or operated by LCRA. However, as the testimony at the hearing from other firm water customers overwhelming showed, there is tremendous difference to firm water customers in selecting a trigger of 1.1 MAF and 1.4 MAF, and that difference is not rooted in a simplistic "more is better" stance. Instead, as the testimony showed, despite their best efforts, some firm water customers are engaged in a race

against time to make changes to their raw water intake structures. These are not trivial projects. Testimony showed that these projects can involve work that takes a very long time, including work to identifying a location where deep water can be accessed, acquiring access rights which may involve a lengthy condemnation process, securing a power supply from the appropriate electric utility provider including running of new overhead powerlines and transformers, design, permitting from the TCEQ, LCRA and perhaps the Army Corps of Engineers and US Fish and Wildlife Service and others, and then construction . (Tr. at p. 547, l. 13 – 548, l. 24, A. Archer). Mr. Archer testified that he has been working with two of the Highlands’ member entities, Cedar Park and Leander, on the joint project owned by them under as the Brushy Creek Regional Utility Authority since 1998, and that the project is not scheduled to be complete until 2021. (Tr. p. 555, l. 23 – p. 556, l. 14, A Archer). Mr. Archer also testified that the cost of that project was “upwards of \$200 million.” (Tr. p. 555, l. 10-11, A. Archer). Why LCRA would advocate a trigger that is predicted to cause combined storage to drop to DWDR levels in any time frame is puzzling and problematic, but it certainly cannot be said that 1.1 MAF is sufficient to protect LCRA’s firm water customers.

FOF 49c –This finding states that “An interruptible stored water curtailment trigger should be set to avert, rather than create, conditions that could require declaration of a DWDR.” CWIC’s assertion that none of the triggers considered in this proceeding will create a condition that could require declaration of a DWDR may or may not be correct since it is not yet March 1, 2014, but does not change the fact that triggers should be set to avert, rather than create, conditions that could require declaration of a DWDR. CWIC’s assertion that the triggers were all evaluated for, among other things, the date that a DWDR could be declared if the trigger were in effect also does not change the accuracy of the finding as stated. In fact, it underscores its accuracy. LCRA’s contention that the latter part of this finding be modified to clarify that a trigger should be set to avert conditions that could require declaration of a DWDR “as a result of releases of interruptible stored water” is a welcome acknowledgement of LCRA’s obligations and that phrase should be included. However, LCRA’s duties do not change with the weather or the passage of time so LCRA’s other modifications to this finding should not be accepted.

Conclusions of Law

COL #1(b) – LCRA’s recommended change to this conclusion of law would fundamentally change LCRA’s contractual obligations to its firm water customers and must be rejected. LCRA’s recommended change is to insert a vague but limiting qualification allowing LCRA to meet only “reasonable” firm water customer demands. The purposeful injection of an element of uncertainty into LCRA’s obligations and the seeming transfer to LCRA of the sole authority to determine what demands are “reasonable” is not acceptable. Further, the change

recommended by LCRA is directly contrary to the Commission's 1989 WMP order. See LCRA Exhibit A, Attachment E, FOF # 81, page 15. Also, LCRA and Highlands also have different opinions on LCRA's ability to unilaterally impose water conservation measures and/or drought conservation measures and those disputes are not part of this proceeding and neither party's position should be affected by it. LCRA's recommended changes to COL #1(b) should be rejected.

COL #7: Highlands has no objection to LCRA's recommended apportionment of the costs of preparing a transcript from the February 17, 2013 hearing.

Ordering Provisions:

OP# 1: All of the exceptions to this ordering provision number 1 should be rejected and the Commission should approve the ALJ's Ordering Provision No. 1.

NEW OP #2a: Highlands does not object to the recommendation several parties that FOF 2a should be deleted and its content moved to become new Ordering Provision 2a.

OP# 4: As explained in more detail at the end of Section II above, Highlands believes that the Commission has the authority to include an automatic renewal provision such as the one included in Ordering Provision 4, and concurs with the Executive Director's position on this provision. As recommended by the ALJ, the renewal provision establishes an objective criteria that can be reevaluated in 120 days without the need for an extensive re-hashing of the issues just heard. Although important, these proceedings are very expensive and time consuming and any efficiency that can be injected into the process, even for 60 days, is welcome.

For the reasons set forth above, and as consistent with Highland's Exceptions to the PFD filed in this case, Highlands urges the Commission to make rulings the Exceptions consistent with this Response, and to enter an order with the modifications to the ALJs' PFD and Proposed Order recommended by Highlands in its Exceptions previously filed in this matter.

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CERTIFICATE OF SERVICE

I certify that the foregoing “Highland Lakes Firm Water Customer Cooperative’s Response to 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.

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