

Bryan W. Shaw, Ph.D., P.E., *Chairman*
Toby Baker, *Commissioner*
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Richard A. Hyde, P.E., *Executive Director*



Blas J. Coy, Jr., *Public Interest Counsel*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

February 24, 2014

Bridget Bohac, Chief Clerk
Texas Commission on Environmental Quality
Office of the Chief Clerk (MC-105)
P.O. Box 13087
Austin, Texas 78711-3087

Re: **LOWER COLORADO RIVER AUTHORITY**
SOAH DOCKET NO. 582-14-2123
TCEQ DOCKET NO. 2014-0124-WR

Dear Ms. Bohac:

Enclosed for filing is the Office of Public Interest Counsel's Exceptions to the Proposal for Decision in the above-entitled matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Blas J. Coy, Jr.", written over a circular stamp or mark.

Blas J. Coy, Jr.
Public Interest Counsel

cc: Mailing List

Enclosure

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

**APPLICATION OF THE LOWER
COLORADO RIVER AUTHORITY
FOR EMERGENCY
AUTHORIZATION**

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**BEFORE THE
STATE OFFICE OF
ADMINISTRATIVE HEARINGS**

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S EXCEPTIONS TO THE
PROPOSAL FOR DECISION**

To the Honorable William G. Newchurch and Travis Vickrey:

The Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (Commission or TCEQ) files Exceptions to the Proposal for Decision and respectfully shows the following.

I. Introduction

On December 10, 2013, the Lower Colorado River Authority (LCRA) applied to the TCEQ for emergency authorization to deviate from its 2010 Water Management Plan (WMP). The subject matter of the application concerns firm water releases for municipal customers and interruptible water releases for downstream irrigators from two of the LCRA's water storage reservoirs: Lake Travis and Lake Buchanan. Specifically, the LCRA seeks to increase the stored water release trigger for interruptible customers, from 850,000 acre-feet (AF) to 1.1 million AF and staggered, limited releases at higher reservoir levels. The LCRA seeks this temporary modification to the 2010 WMP to avert declaring a Drought Worse than the Drought of Record.

On January 27, 2014, the TCEQ Executive Director (ED) granted the LCRA's emergency authorization request. Pursuant to Texas Water Code § 11.139, the TCEQ Commissioners considered the LCRA's emergency order at their February 12, 2014 meeting. The

Commissioners referred the matter to the State Office of Administrative Hearings (SOAH) in response to hearing requests from protestants. Judge William G. Newchurch and Judge Travis Vickrey (ALJs, Judges) presided over the hearing on February 17, 2014.

On February 21, 2014, Judge Newchurch and Judge Vickrey issued a Proposal for Decision (PFD) to be considered by the Commissioners at their February 26, 2014 meeting. We strongly support paragraphs 1a and 2a of the PFD regarding protection of environmental flows. However, we recommend that paragraph 2a be moved to the ordering provisions to clarify ambiguity as it is not a finding of fact, rather, a directive that environmental flows will not be affected. Further, we take exception to: (1) the 1.4 million AF trigger level lacking staggered releases, and (2) the automatic renewal provision.

II. Applicable Law

Section 11.139 of the Texas Water Code gives the TCEQ authority to grant emergency orders to holders of permits, certified filings, or certificates of adjudication. Authorization regarding environmental flows is set out in § 11.148. Orders may be granted for 120 days, with or without a notice and a hearing, by the TCEQ Commissioners or the ED with later review by the Commissioners. Section 11.139 gives the TCEQ discretion to renew emergency orders for up sixty days. Emergency order authority exists where there are conditions that pose an imminent threat to public health and safety, there are no feasible alternatives to the emergency authorization, and notice is given to the governor.

III. Discussion

The Judges concluded that “emergency conditions exists which present an imminent threat to public health and safety and which override the necessity to comply with established statutory procedures and there are no feasible or practicable alternatives to the emergency authorization.” PFD at 2. The Judges were persuaded by LCRA, the City of Austin, the Central Texas Water Coalition, and the Highland Lakes Firm Water Customer Cooperative in finding that an emergency order is necessary to avert an imminent threat to public health and safety. PFD at 19. We agree with this finding, but take issue with two of the proposed emergency order conditions.

A. 1.4 Million AF Trigger Level

We support a 1.1 million AF trigger level, as requested by LCRA and approved by the ED. The PFD sets out a 1.4 million AF trigger for the cessation of interruptible water releases and limited releases to 172,000 AF if combined reservoir levels are at or above 1.4 million AF. PFD at 36. The Judges were specifically persuaded by evidence showing how volatile combined reservoir levels could pose a risk to the water supply of nearly a million people. PFD at 20–21. While the LCRA petitioned for a 1.1 million AF cessation trigger level for interruptible water, the Judges found that no law limits their ability to set the trigger at a higher amount, and even if there were, § 11.139 allows the TCEQ to set such an amount in emergency situations. We respectfully disagree with the ALJ’s conclusion and asks the Commission to apply the staggered levels petitioned for by the LCRA.

The ALJ’s interpretation of § 11.139 is correct; the Commissioners have authority to modify an emergency order granted by the ED. While a 1.4 million AF trigger level is protective of public health and safety, the LCRA has shown, and the ED agreed, that a 1.1 million AF

trigger level is also protective of public health and safety. Setting a trigger level any higher than 1.1 million AF impinges on interruptible water customers' ability to receive reservoir releases, even when public health and safety are protected. Further, testimony during the SOAH hearing revealed that no reservoir releases could occur at current conditions for any of the proposed trigger levels: 850,000 AF, 1.1 million AF, or 1.4 million AF. Transcript at 525-27. We recommend that Commission adopt the 1.1 million AF trigger because it is protective of public health and safety, and, the LCRA can apply for a modification to the emergency order if conditions change.

B. Automatic Renewal of the Emergency Order

We do not support the automatic renewal condition. The Judges recommend that the emergency order be automatically renewed for sixty days and provide that no interruptible water releases be made if the combined reservoir level is below 1.4 million AF, and, limit releases to 172,000 AF if combined reservoir levels are at or above 1.4 million AF. PFD at 36. The LCRA did not ask for an automatic sixty-day extension in its application or during the hearing. Issuance of the emergency order does not impinge on the LCRA's ability to come before the Commission in the future for emergency relief. Further, the automatic renewal proposed by the Judges offer the Commission no opportunity to review the order if conditions change. We recommend that the Commission strike the automatic renewal provision and allow the emergency order to expire on its own terms, 120 days after its issuance.

IV. Conclusion

We strongly support the PFD terms extricating environmental flows from the LCRA's emergency relief sought. Further, we support a 1.1 million AF trigger for cessation of interruptible water because it is protective of public health and safety. Lastly, we do not support

automatic renewal of the emergency order because it limits the Commission's ability to evaluate changed conditions.

Respectfully submitted,



Blas J. Coy

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CERTIFICATE OF SERVICE

I hereby certify that on February 24, 2014, the original and seven copies of the Office of Public Interest Counsel's Exceptions to the Proposal for Decision were filed with the Chief Clerk of the TCEQ, a copy was filed with the Docket Clerk of the State Office of Administrative Hearings, and a copy was served to all persons listed on the attached mailing list via hand delivery, facsimile transmission, Inter-Agency Mail, electronic mail, or by deposit in the U.S. Mail.



Blas J. Coy

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

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