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## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

April 4, 2014

Richard Hyde, Executive Director  
Texas Commission on Environmental Quality  
P.O. Box 13087, MC 100  
Austin, Texas 78711-3087

Re: Application of the Lower Colorado River Authority for Emergency Reduction of Instream Flow Requirements Under its Water Management Plan For Lakes Buchanan and Travis (Permit 5838)

Dear Mr. Hyde:

On March 21, 2014, the Lower Colorado River Authority (LCRA) filed its Application for Emergency Reduction of Instream Flow Requirements Under its Water Management Plan For Lakes Buchanan and Travis (Permit 5838), pursuant to Texas Water Code (TWC) §§ 5.506, 11.139, or 11.148. As required by 30 Texas Administrative Code (TAC) Ch. 35.101(e), the Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (TCEQ or Commission) received notice that the Executive Director (ED) of the TCEQ will consider LCRA's application on April 15, 2014. OPIC submits the following comments on LCRA's Application pursuant to 30 TAC Ch. 35.101(f) and TCEQ's letter dated March 27, 2014.

The OPIC supports the LCRA's application and requests consideration of the additional provisions below.

### **LCRA's application.**

The LCRA asks the ED of the TCEQ to allow the LCRA to deviate from its 2010 Water Management Plan (2010 WMP). As per the 2010 WMP, LCRA's annual total releases for environmental needs are determined on January 1 of each year -- this includes general

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environmental flows and flows dedicated to species conservation. This aids the LCRA in accounting for dryer and wetter years. However, the LCRA has found that the 2014 adjustment is inadequate for effective management of the Highland Lakes (Lake Buchanan and Lake Travis). Under its 2010 WMP, LCRA would be required to release up to 21,000 acre-feet (AF) from the Highland Lakes by the end of May 2014.<sup>1</sup> Specifically, the 2010 WMP requires the LCRA to provide instream flows for the state-threatened Blue Sucker Fish (*cytleptus elongates*) at 500 cubic feet per second (cfs) in the Colorado River between Bastrop and Eagle Lake for a continuous period of not less than six weeks from March through May.<sup>2</sup> The LCRA seeks to reduce instream flows for this purpose to 300 cfs, which the LCRA estimates will prevent the release of about 17,000 AF from the Highland Lakes.<sup>3</sup> LCRA only makes stored water releases to meet instream flow requirements when releases for other, downstream obligations are insufficient to meet instream flow requirements.<sup>4</sup>

The Blue Sucker is listed as a state-threatened species and its habitat includes the Colorado River. Blue Suckers inhabit relatively deep, high-velocity rapids over firm substrates.<sup>5</sup> Reservoir construction, which diminishes the availability of high-velocity rapids, has contributed to a decline in the Blue Sucker population.<sup>6</sup> Current drought conditions along the Colorado River also threaten to diminish the Blue Sucker's habitat. A 1992 study determined that the Blue Sucker needs 500 cfs during its spawning period.<sup>7</sup> This amount was later confirmed by a study specific to the Colorado River in 2008 conducted by BIO-WEST.<sup>8</sup> The 2008 BIO-WEST study also found that a 300 cfs level – with a combination of other varying flows creating a comprehensive instream flow regime – would preserve 86% of the Blue Sucker's available spawning habitat.<sup>9</sup> The LCRA is not proposing a comprehensive instream flow regime. While the 2008 BIO-WEST study supports 300 cfs with additional unaccounted flows, the LCRA's

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<sup>1</sup> Lower Colorado River Authority Application for Emergency Reduction of the Instream Flow Requirements Under its Water Management Plan for Lakes Buchanan and Travis (Permit 5838) (LCRA Application) 2 (Apr. 21, 2014).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at 2, 10.

<sup>4</sup> *Id.* at 6.

<sup>5</sup> Blue Sucker Life history Studies Summary Report – Colorado River Flow Relationships to Aquatic Habitat and State Threatened Species: Blue Sucker 1-1, BIO-WEST Oct. 2007. (BIO-WEST Study).

<sup>6</sup> *Id.*

<sup>7</sup> Letter from Carter Smith, Executive Director, Texas Parks and Wildlife Department (TPWD), to Richard Hyde, Executive Director, TCEQ, Re: Application of the Lower Colorado River Authority for Emergency Reduction of the Instream Flow Requirements Under its Water Management Plan for Lakes Buchanan and Travis (Permit 5838) 2 (Mar. 28, 2014) (TPWD Comments), (citing to 1992 study from Mosier and Ray).

<sup>8</sup> BIO-WEST Study.

<sup>9</sup> TPWD Comments, at 4. (citing BIO-WEST Study, Table 4.9).

application proposes 300 cfs in total flows.<sup>10</sup> The effect of LCRA's 300 cfs total flow on the Blue Sucker has not been studied. However, the TPWD reports that recent conditions approximate 300 cfs and are appropriate for the Blue Sucker to spawn this year.<sup>11</sup> LCRA has not previously sought emergency relief to curtail environmental flows, including flows for the Blue Sucker.<sup>12</sup>

The ED has discretion to grant emergency relief where the holder of a water right seeks to suspend conditions relating to beneficial inflows to bays and estuaries and instream uses during an emergency.<sup>13</sup> Under 30 TAC § 35.101(b), the ED may approve the application if the ED finds that an emergency exists and there is no feasible, practicable alternative to the suspension. The applicant has the burden of demonstrating that available water supplies have been reduced or impaired to such an extent that imminent peril to the public health, safety, or welfare exists. 30 TAC § 35.101(k) lists factors that must be considered in determining whether feasible, practicable alternatives exist to the suspension of water right conditions, including the applicant's efforts to curtail water use not essential for the protection of the public health, safety, and welfare.<sup>14</sup>

**Emergency conditions exist that pose a threat to the public health, safety, and welfare and override the necessity to comply with general procedures and criteria for changing the conditions in a water right.**

Deteriorating drought conditions have prompted LCRA to file this application. Combined reservoir levels at the Highland Lakes on March 19, 2014 were at 757,000 AF – that is 38% full.<sup>15</sup> Over one million people along the banks of the Colorado River depend on this water.<sup>16</sup> The LCRA has averted declaring a Drought Worse than Drought of Record (DWDR) through a series of emergency actions. A DWDR declaration implements 2010 WMP emergency conditions that deviate from the emergency orders LCRA has obtained. To declare a DWDR, three criteria must be met:

- (1) Duration of drought is more than 24 months, which is determined by counting the number of consecutive months since both Lakes Buchanan and Travis were last full;

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<sup>10</sup> TPWD Comment, at 5.

<sup>11</sup> TPWD Comments, at 5.

<sup>12</sup> LCRA Application, at 2.

<sup>13</sup> 30 TAC Ch. 35.101(a).

<sup>14</sup> 30 TAC Ch. 35.101(k)(3).

<sup>15</sup> LCRA Application, at 2.

<sup>16</sup> *Id.* at 3.

- (2) Inflows to the lakes are less than inflows during the Drought of Record; and
- (3) Lakes Buchanan and Travis combined storage has less than 600,000 AF of water.<sup>17</sup>

Current conditions satisfy the first two requirements; the LCRA seeks to prevent lake levels from dropping below 600,000 AF. LCRA projects that that storage may drop below 600,000 AF as early as June 2014 and result in a declaration of a DWDR.<sup>18</sup> If this were to occur, LCRA firm customers would be required to cut water use by 20 percent. The LCRA estimates that the emergency relief sought in this application will not avert a DWDR declaration, but will postpone it.<sup>19</sup>

LCRA has previously sought and received emergency relief from the 2010 WMP resulting in the cutoff of interruptible stored water from the Highland Lakes to most downstream irrigation customers for 2012, 2013, and 2014. Currently, the LCRA is operating under an emergency order set to expire on May 26, 2014.<sup>20</sup> The emergency relief requested by the LCRA does not seek to extend this emergency order as allowed by TWC § 11.139(a). Environmental flows are not within the scope of the current emergency order.<sup>21</sup> Further, LCRA has not previously sought relief from the environmental flow conditions in the 2010 WMP and is prompted to do so now only in light of worsening drought conditions. These facts clearly support the existence of emergency conditions.<sup>22</sup>

**There are no feasible, practicable alternative to the suspension.**

LCRA concluded that reducing instream flow requirements for the Blue Sucker is necessary to ensure that LCRA can continue to meet critical human needs and that no immediate feasible or practicable alternative to emergency relief exists. LCRA's application notes that it has already taken a number of steps to preserve its water supply during current drought conditions and is currently evaluating other short-term and long-term alternatives to address emergency conditions, but that such alternatives will take time to implement. These alternatives

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<sup>17</sup> 2010 WMP 4-34.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 10.

<sup>20</sup> LCRA Feb. 27, 2014 Emergency Order (LCRA Emergency Order), Ordering Provisions ¶ 4, 17.

<sup>21</sup> *Id.* at ¶ 7, 18.

<sup>22</sup> In addition to the record established by Administrative Law Judge William Newchurch during the hearing on LCRA's February 2014 Emergency Order – most of the one million people who rely on LCRA for water do not have readily accessible alternatives. LCRA cites that conditions have deteriorated since the February 2014 emergency order. LCRA Application, at 10.

are described in the application.<sup>23</sup> LCRA has concluded that most of the alternatives discussed would take years to develop and that none of them would replace the volume of water that LCRA would be required to release if its current application for emergency relief is denied. Therefore, LCRA asserts that there are no immediate feasible or practicable alternatives to the emergency order it seeks. However, the February 2014 emergency order identifies alternatives LCRA's current application does not elaborate on.

One alternative identified in the February 2014 emergency order that could garner partial relief is to amend "downstream run of river rights to allow diversion for new uses and at new locations."<sup>24</sup> Another alternative that could provide the LCRA with comprehensive relief is to amend the 2010 WMP.<sup>25</sup> The LCRA's application to amend its 2010 WMP is currently under review by the ED.<sup>26</sup>

OPIC finds that LCRA has made a *prima facie* showing in its application that an emergency exists and that there is a lack of meaningful, feasible, and practicable alternatives to the relief requested.

**OPIC's recommendation to the ED.**

LCRA faces difficult choices in striking a balance between upstream and downstream needs. These choices involve issues not only of law and fact, but also challenging issues of policy which OPIC recognizes weigh heavily on LCRA when evaluating options in this time of severe drought. OPIC appreciates the recent collaboration between the LCRA and the Texas Parks and Wildlife Department to undertake a new three-year study on the conservation needs of the Blue Sucker.<sup>27</sup>

After weighing the available information, OPIC recommends that the ED issue an emergency order to reduce the instream flow requirements for the Blue Sucker from 500 cfs to 300 cfs in the Colorado River between Bastrop and Eagle Lake during the Blue Sucker's spawning period, a period of no less than six weeks between March and May of 2014. OPIC further recommends that the ED clarify that the LCRA will release stored water for the Blue Sucker to total 300 cfs in the event that any other releases for unrelated downstream uses are

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<sup>23</sup> LCRA Application, Attachment C, Affidavit of David Wheelock, at 3.

<sup>24</sup> LCRA Emergency Order, Alternatives ¶ 67, 11.

<sup>25</sup> *Id.* at ¶ 70, 12.

<sup>26</sup> *Id.*

<sup>27</sup> TPWD Comments, at 2.

reduced or suspended. Further, OPIC also recommends that the order require that, in the event the LCRA secures the downstream river rights identified as an alternative in the February 2014 emergency order,<sup>28</sup> LCRA report this development to the ED.

OPIC also notes that the emergency relief requested by LCRA exceeds emergency measures in the 2010 WMP. Under the 2010 WMP and with a DWDR declaration, the LCRA would be allowed to reduce instream flows to the Blue Sucker only by 20%, from 500 cfs to 400 cfs. Reducing instream flows from 500 cfs to 300 cfs constitutes a 40 % reduction. While OPIC supports LCRA's application, OPIC notes that this type of inconsistency with the 2010 WMP is illustrative of the urgency with which amendments to the 2010 WMP must occur.

OPIC appreciates the opportunity to submit these comments.

Respectfully submitted,



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<sup>28</sup> LCRA Emergency Order, Alternatives ¶ 67, 11.