

**SOAH DOCKET NO. 582-08-0689
TCEQ DOCKET NO. 2006-1819-WR**

APPLICATION OF THE LOWER	§	BEFORE THE STATE OFFICE
COLORADO RIVER AUTHORITY	§	
FOR WATER RIGHTS PERMIT	§	OF
NO. 5731 TO DIVERT, STORE,	§	
AND USE WATER FROM THE	§	
COLORADO RIVER BASIN	§	ADMINISTRATIVE HEARINGS

**LOWER COLORADO RIVER AUTHORITY’S REPLY TO
THE EXECUTIVE DIRECTOR’S EXCEPTIONS TO PROPOSAL FOR DECISION**

COMES NOW, the Lower Colorado River Authority (LCRA), the Applicant in the above-referenced matter, and respectfully requests that the Commission issue the proposed Order and grant the Settlement Draft Permit No. 5731 (“Settlement Draft Permit”). In support of this request, LCRA offers the following:

INTRODUCTION

The Administrative Law Judge (ALJ) candidly notes that the Proposal for Decision (PFD) is “unconventional.” (PFD at 3). It recommends that the Commission consider issuance of a contested permit without having an evidentiary hearing to explore the contested issues. Unconventional though it may be, LCRA urges the Commission to examine the issues presented by the PFD and the Executive Director’s Response and Exceptions to Proposal for Decision and Proposed Order (“ED’s Exceptions”) and issue Permit No. 5731 as recommended by the ALJ.¹

According to the PFD, the Executive Director does not contend that the Settlement Draft Permit, agreed to by all other parties (“Settling Parties”), would violate any applicable statute or rule. Instead, as the PFD notes, the Executive Director objects that: (a) the Settlement Draft

¹ The fact that Judge Newchurch is the Administrative Law Judge Team Leader for Natural Resources at SOAH perhaps accounts for his willingness to unconventionally cut directly to the crux of the current dispute and present the issue to the Commission for resolution.

Permit is contrary to Commission policy; and (b) it would be complicated to administer. (PFD at 2). These are the grounds presented by the Executive Director for objecting to the Settlement Draft Permit at the conference held on October 27, 2010; no legal or factual grounds were presented as objections to the Settlement Draft Permit.

The ED's Exceptions follow this line of argument, expanding somewhat by (a) suggesting that the Settlement Draft Permit may go beyond the Commission's policy regarding third-party agreements and requesting guidance regarding that policy,² (b) objecting to Commission approval of Findings of Fact and Conclusions of Law in the absence of an evidentiary hearing, and (c) presenting specific objections to the ALJ's proposed findings and conclusions.

ARGUMENT AND AUTHORITIES

Each of these three issues raised by the Executive Director is addressed below. The first issue, regarding the Commission's concerns regarding third-party agreements, is by far the most significant. Neither the absence of an evidentiary record nor the content of specific findings and conclusions are matters of great import if the Commission's decision is not appealed, and the Executive Director will (and must) abide by the Commission's decision.

The Commission's Settlement Policy

LCRA understands the Commission may have concerns regarding incorporation of permit conditions that arise from settlements in three areas: (1) whether the permit conditions are within the statutory authority of TCEQ; (2) whether the permit conditions are actually enforceable or place an undue burden on the Commission staff to enforce; and (3) whether the permit conditions create unintended consequences for other applicants or impose a "false

² It is unclear to LCRA how the Commission can be expected to provide such guidance without the ED identifying specific provisions of the Settlement Draft Permit and outlining some explanation or argument regarding how those provisions might go beyond statutory or regulatory requirements.

measurement” that sets a precedent for other applicants or permittees.³ The Settlement Draft Permit does not, in LCRA’s view, run afoul of any of these issues.⁴ More importantly, it advances the Commission’s policy of encouraging “the resolution and early settlement of all contested matters through voluntary settlement procedures.” 30 TEX. ADMIN. CODE § 40.1.

(1) *Statutory (and Regulatory) Authority*

Although the Executive Director did not initially contend that provisions of the Settlement Draft Permit violate any applicable statute or rule (*see* PFD at 2), he apparently does so now, arguing that the Settlement Draft Permit’s environmental flow permit conditions “go beyond” the requirements of Texas Water Code §§ 11.147, 11.150, and 11.152. (ED’s Exceptions at 3). In making this argument, the Executive Director is completely incorrect.

Texas Water Code § 11.147 is the primary statutory provision regarding the Commission’s obligation to assess the impacts of water right permits on the State’s bays and estuaries and on instream uses. It allows the Commission to include in a new water right permit “conditions considered necessary” to maintain instream uses and to maintain beneficial inflows to bays and estuaries. These are precisely the areas addressed by Special Condition 6.A (Instream Flow Criteria) and Special Condition 6.C (Beneficial Inflow Criteria) of the Settlement Draft Permit. Special Condition 6.B of the Settlement Draft Permit, like Special Condition 6.B of the ED’s Draft Permit, addresses peak or channel maintenance flows; it also relates to flows for instream uses.

³ In the absence of any written policy or rule, LCRA’s understanding is based upon review of the Commission’s discussion of these issues during its December 9, 2009 agenda.

⁴ Attached as “Exhibit 1” hereto is a provision by provision comparison of the Settlement Draft Permit and the ED’s Draft Permit. It was prepared by LCRA staff and has been previously provided to the Executive Director.

Texas Water Code §§ 11.150 and 11.152 relate to the impacts of a water right permit on water quality and instream fish and wildlife habitats, both of which are specifically listed as considerations by § 11.147 and appropriately addressed by special conditions in a water right permit.

In light of the broad authority granted to the Commission under § 11.147, it cannot be seriously argued that the Settlement Draft Permit's environmental flow conditions are beyond the Commission's authority to require. Therefore, it seems that the Executive Director's argument must be that the Commission should not consider these special conditions to be necessary after consideration of the various factors required under § 11.147. However, the Executive Director has yet to explain why that should be the case. Nor, examining the three special conditions primarily at issue, is a basis for objection evident.

As explained in Exhibit 1, Special Condition 6.A of the Settlement Draft Permit, like its counterpart in the ED's Draft Permit, provides instream flow values, which have been updated for the Wharton gage based on new site-specific studies. It also deletes requirements for the Columbus gage because no diversion points are authorized above the Columbus gage under the Settlement Draft Permit.

Special Condition 6.B of the Settlement Draft Permit, regarding peak flow or channel maintenance events, is completely comparable to Special Condition 6.B of the ED's Draft Permit. It reflects the same 27,000 cfs flow criteria at Columbus, but has been redrafted to more clearly define the permittee's obligations.

Special Condition 6.C of the Settlement Draft Permit addresses beneficial inflows to Matagorda Bay. It is based upon extensive new scientific work reflected in the Matagorda Bay Health Evaluation completed in 2008; its provisions are more complex than the simple

volumetric inflow requirement contained in the ED's Draft Permit. The Settlement Draft Permit's special condition includes a volumetric inflow requirement (Seasonal Inflow Criteria) that must be satisfied prior to diversion, specifying required quantities of freshwater inflow that vary depending upon the season. The Settlement Draft Permit also includes a salinity "failsafe" that prevents diversions if measured salinity is above a certain threshold. Additionally, bay salinity levels are tracked over time and if the cumulative departure from desired salinity levels is too great, the seasonal inflow criteria are suspended, preventing LCRA from making diversions that would otherwise be allowed under the seasonal inflow criteria. Two exceptions allow diversion regardless of the satisfaction of the seasonal inflow criteria: (a) when salinities in the bay are extremely low (and additional freshwater inflows are not needed); and (b) during high flow pulses (when large quantities of freshwater inflow are headed to the bay and estuary system). While Special Condition 6.C is more complex than beneficial inflow requirements previously imposed by the Executive Director, it cannot seriously be argued that it goes beyond the permissible scope of Texas Water Code § 11.147. If anything, special conditions that use both bay salinity and volumetric inflows to restrict diversions under some circumstances ties more directly to bay health than a simple volumetric inflow requirement.

(2) *Burden of Enforcement*

Although some of the special conditions of the Settlement Draft Permit, particularly Special Condition 6.C, are more complex than what is typically found in water right permits, the enforcement burden for the Executive Director is not appreciably greater. The burden will be on LCRA to develop an accounting plan to track inflows and salinity levels (current and cumulative) to demonstrate that diversions are being made only when all applicable special conditions are satisfied. Verifying compliance and enforcement will simply be a matter of

checking the electronically available accounting system required by Special Condition 6.F. of the Settlement Draft Permit.

Certainly the Executive Director's initial review and approval of the accounting plan will be more complex than would be necessary for approval of an accounting plan that simply tracks inflows. In LCRA's view, however, this is not an "undue" burden. If anything, it is a burden with which the other parties to this proceeding will be happy to assist.

(3) *Unintended Consequences*

Of the three issues addressed under the Commission's settlement policy, only this one is potentially problematic. While the Settlement Draft Permit would not be the first water right permit issued by TCEQ in which beneficial inflow requirements are partially determined by salinity conditions,⁵ it might be argued that it would nevertheless "raise the bar" for beneficial inflow requirements, making the incorporation of salinity requirements a consideration in future permits. LCRA would make two responses to this argument.

First, the likelihood that similar permit conditions could be developed for other bays and estuary systems is low because the information necessary to develop such requirements is not generally available. The 2008 Matagorda Bay Health Evaluation went further than any prior study of Texas bays and estuaries in developing information on the relationships involved in a health bay and estuary ecosystem. Such information is simply not available for other Texas bay and estuary systems.

Second, incorporation of salinity as a criterion and development of more complex beneficial inflow requirements is not simply the product of third-party negotiations; it is the product of having better science and better information available. As such information becomes available in the future for other bay and estuary systems, TCEQ will likely be expected to (and

⁵ See Exhibit 1, footnote 5.

may be required to, in connection with the SB 3 environmental flow process) take advantage of such information to formulate more meaningful and effective special conditions for new water right permits to protect beneficial inflows needed by our bay and estuary systems.

The Absence of an Evidentiary Record

Contrary to the Executive Director's assertion, there is an evidentiary record in this case, albeit not an extensive record like what typically exists after a full contested case hearing has been concluded. However, the evidentiary record is a non-issue. The Executive Director has not presented any factual issues regarding the adequacy or necessity of provisions of the Settlement Draft Permit; instead, he has raised policy issues regarding the Commission's third-party settlement policy – issues for which there is no factual dispute. Certainly the absence of a complete evidentiary record would be a legitimate and serious basis for appealing an adverse Commission decision in normal circumstances. In this case, however, if the Commission determines to issue the Settlement Draft Permit, it will not be adverse to any party. The Executive Director will have received the clarification he requested and all other parties support issuance of the Settlement Draft Permit.

Specific Objections to Proposed Findings and Conclusions

The Executive Director specifically excepts to Findings of Fact 17, 23, and 24 and requests that the Commission amend these provisions. LCRA respectfully requests that the Executive Director's specific exceptions to these findings be rejected and that the proposed Order be adopted without changes.

(1) Finding of Fact No. 17

LCRA respectfully disagrees with the assertions of the Executive Director that the Settling Parties left unaddressed any of the specific substantive concerns that the Executive

Director made known to the parties. LCRA and the other Settling Parties did more than simply reorganize the permit in response to the concerns identified by TCEQ staff at the August 3, 2010 meeting among the parties and the Executive Director. To suggest otherwise is simply misleading and inaccurate. As documented by Exhibit 2, LCRA and the other Settling Parties responded to TCEQ staff's substantive concerns regarding the reliability of the water right and the Commission's legal authority over various provisions in the permit generally concerning extensions of time and permit cancellation.⁶ At the August 3rd meeting, the Settling Parties also understood the Executive Director to suggest some non-substantive reorganization of the permit, which the Settling Parties accommodated. However, as more fully explained by Exhibit 1, the Settling Parties could not simply relocate provisions to a separate accounting plan or third-party agreement.

(2) *Finding of Fact No. 23*

LCRA disagrees with the Executive Director's proposal that this finding be deleted or that it be modified to state that the requirements "go beyond the requirements of the Water Code." The Executive Director has not offered any explanation as to how the provisions of the Settlement Draft Permit "go beyond" the requirements of the Water Code. And, as previously explained, they do not.

⁶ "Exhibit 2" attached hereto includes copies of (a) an August 4, 2010 email from counsel for LCRA to the Executive Director's staff, documenting issues discussed and items for action following the initial meeting between staff and the Settling Parties, (b) September 2, 2010 correspondence from LCRA documenting results of LCRA's analysis of several of the action items from the prior meeting; and (c) proposed changes to Special Condition 6.E provided to the Executive Director in response to concerns regarding the Commission's legal authority. These documents represent only a snapshot of the repeated efforts of the Settling Parties over the last 4 1/2 months to elicit specific information from the Executive Director regarding his substantive concerns with the Settlement Draft Permit and to address those concerns wherever possible without jeopardizing the settlement among this diverse group of parties.

(3) *Finding of Fact No. 24*

LCRA disagrees with the Executive Director's proposed changes to this finding because they are unnecessary and incorrect. The finding of fact is not an attempt to list *every* way the Settlement Draft Permit differs from the ED's Draft Permit; it merely highlights a few key provisions. The two additional findings recommended by the Executive Director state that the Settlement Draft Permit "(e) includes environmental conditions that require extensive and complex salinity calculations and limits the TCEQ's ability to change the Season Inflow Criteria or the salinity calculations, and (f) contains provisions requiring TCEQ to consider comments when making any Accounting Plan changes."

In this regard, the Executive Director's proposed finding represents a fundamental misunderstanding of how the Settlement Draft Permit is designed to work within the Commission's authority. The Settlement Draft Permit includes specific requirements for LCRA to measure and track salinity conditions in the Bay and provide that information to TCEQ. At that point, the permit recognizes TCEQ's authority to consider that information and determine whether or not certain modifications to the inflow criteria would be appropriate. In fact, the Settlement Draft Permit would allow the adjustments made in response to this specific information to be greater than those contemplated by Senate Bill 3/House Bill 3 (SB 3/HB 3), which authority might not otherwise exist absent this specific permit language. Moreover, nothing in the Settlement Draft Permit prevents the Commission from adjusting the inflow criteria to the full extent authorized by SB 3/HB 3. TEX. WATER CODE § 11.147. Nor is the Executive Director's ability to initiate involuntary permit amendments in any way curtailed. *Cf.* 30 TAC § 297.61.

Regarding the accounting plan, the Executive Director appears to contend that the public comment process included in the Settlement Draft Permit, which is intended to allow for the interested parties to make comments if they believe proposed accounting plan changes would represent a substantive amendment to the permit. However, TCEQ would maintain full decision-making authority. It is hard to see how this simple stated requirement is overly burdensome.

The Executive Director's other suggested changes to the proposed finding have been previously addressed in discussion above regarding the Commission's Settlement Policy.

CONCLUSION

This Commission has consistently encouraged parties to develop negotiated solutions to contested issues as a preferable alternative to expensive and time-consuming litigation at SOAH. That is exactly what the Settling Parties have accomplished after extended and challenging negotiations. LCRA respectfully requests that the Commission clarify its settlement policy as requested by the Executive Director, deny the Executive Director's general and specific exceptions, and issue the ALJ's proposed Order granting the Settlement Draft Permit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Lower Colorado River Authority's Response to the Executive Director's Exceptions to Proposal for Decision was served by e-mail transmission followed by first-class U.S. mail on this 20th day of December, 2010, to the persons on the attached Service List.


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Exhibit 1

LCRA's Water Rights Application No. 5731
Comparison of Settlement Draft Permit to Executive Director Draft Permit
Prepared by LCRA - November 3, 2010

Diversion Points

References: Executive Director (ED) Draft Permit: Section 3.A.; Settlement Draft Permit: Section 3.A.

Changes - Summary & Rationale: The Settlement Draft Permit reduces the number of diversion points from nine to five. The diversion points that have been removed include diversion points associated with the STP Nuclear Operating Company, and a diversion point on Eagle Lake. The permit should accurately reflect the points at which LCRA will be authorized to divert water under this permit.

Maximum Diversion Rate

References: ED Draft Permit: Section 3.B.; Settlement Draft Permit: Section 3.B.

Changes - Summary & Rationale: The Settlement Draft Permit reduces the maximum combined diversion rate from 40,000 cfs to 10,000 cfs. The lower diversion rate could theoretically make additional unappropriated water available to some types of subsequent permit applicants. A side agreement whereby LCRA would voluntarily limit diversion rates would not have this effect.

Water Conservation

References: ED Draft Permit: Section 3.B.; Settlement Draft Permit: Section 3.B.

Summary of & Rationale for Changes: The Settlement Draft Permit is largely intended to strengthen and clarify LCRA's obligations regarding water conservation, and make the language more enforceable. The Settlement Draft Permit specifically clarifies LCRA's obligation to include practices and technologies designed to achieve a level of efficiency equal or greater to the level provided for in LCRA's most recent water conservation plan and are within TCEQ's authority to require.

Instream Flow

References: ED Draft Permit: Section 6.A.; Settlement Draft Permit: Section 6.A.

Changes - Summary & Rationale: The Settlement Draft Permit simply updates the ED Draft Permit with values that reflect more recent studies and clarifies how measurement of the requirement would occur, so as to make it more clearly enforceable. Whereas the ED Draft Permit used "target" instream flow values based on a 1992 study, the Settlement Draft Permit uses the comparable "base average" values from a 2008 study¹ completed in accordance with the National Instream Flow Program approach adopted by the state resource agencies. The Settlement Draft Permit removes requirements for the Columbus gage because there are no diversion points upstream of the Columbus gage. If the conditions from the Settlement Draft Permit were relegated to a side agreement instead of a permit issued by TCEQ, instream flows at these levels could not be protected against diversion by junior water rights holders.

¹ March 31, 2008, *Lower Colorado River, Texas Instream Flow Guideline, Colorado River Flow Relationships to Aquatic Habitat and State Threatened Species: Blue Sucker*, available at:
http://www.lcra.org/library/media/public/docs/lswp/findings/BIO_LSWP_IFguidelines_FINAL.pdf

Channel Maintenance (Pulse Flows)

References: ED Draft Permit: Section 6.B.; Settlement Draft Permit: Section 6.B.

Changes - Summary & Rationale: Although this type of special condition is certainly not one that has been typically included by TCEQ in water rights permits, the Settlement Draft Permit simply reflects an attempt to clarify, and not modify, the language in the original ED Draft permit.

Bay Inflow Criteria – Seasonal Inflow Criteria

References: ED Draft Permit: Section 6.C.; Settlement Draft Permit: Section 6.C.(ii)(a)

Changes - Summary & Rationale: The Settlement Draft Permit replaces a monthly inflow criteria with seasonal criteria that were derived from the most protective criteria developed as part of a 2008 Matagorda Bay Health study.² That study and the proposed permit criteria were developed with considerable involvement and input from recognized statewide experts on environmental flows issues, including three individuals appointed to the Texas Environmental Flows Science Advisory Committee. The ED Draft Permit incorporates by reference any “Target” freshwater inflow criteria that might be included in the LCRA’s Water Management Plan (WMP).³ Today, those criteria are based on a 1996 study. This approach attempts to build in an ‘adaptive management’ component⁴ by allowing the requirements in this permit to change over time as LCRA’s WMP might change. However, this reference creates a potential conflict should the WMP be modified in the future to incorporate the newest bay health studies, which do not include a monthly ‘Target’ requirement. Indeed, LCRA is in the process of effectuating a January 2010 TCEQ Order requiring LCRA to update the WMP in part to reflect these new studies.

The Settlement Draft Permit also replaces the ‘catch and release’ approach of the ED Draft Permit with an operational approach that is much more workable and has fewer potential adverse impacts. The ED Draft Permit’s criteria allow LCRA to pump as much water as possible into the off-channel reservoir(s), subject only to the instream flow requirements. Then, at the end of each month, if the monthly bay inflow target were not met, LCRA must release all the water diverted back into the river. While this “catch and release” concept works for LCRA’s operation of its on-channel reservoirs, Lakes Travis and Buchanan, it is unworkable for off-channel reservoirs due to the significant additional expense of constructing and operating facilities to comply with this requirement. Furthermore, the ED Draft Permit approach would have the bulk of the inflow entering the bay over a short period at the beginning of each month, instead of allowing the inflows to be more widely distributed throughout the month under the Settlement Draft Permit. By comparison, the Settlement Draft Permit imposes a pumping criteria based on measured inflows from the preceding 60 days. If the seasonal 60-day inflow has been met, LCRA can divert.

Because of the significant operational differences between the two approaches, there is no way that LCRA could implement the Settlement Draft Permit approach to seasonal criteria *and* comply with the requirement contained in the ED Draft Permit. Moreover, even if these inconsistencies could be resolved, if the conditions from the Settlement Draft Permit were relegated to a side agreement instead

² December 2008, *Matagorda Bay Inflow Criteria (Colorado River) – Matagorda Bay Health Evaluation* available at: http://www.lcra.org/library/media/public/docs/lswp/findings/MBHE_Inflow_Criteria_FINAL_Dec_08.pdf.

³ LCRA’s Water Management Plan governs LCRA’s operation of Lakes Travis and Buchanan, including criteria for providing water from these lakes for instream flows and freshwater inflows.

⁴ The Settlement Draft Permit includes a different approach to Adaptive Management provision, which is discussed in more detail below.

of the permit issued by TCEQ, bay inflows could not be protected against diversion by junior water rights holders.

Bay Inflow Criteria – High Flow Events

References: ED Draft Permit: NONE; Settlement Draft Permit: Section 6.C.(iv)

Changes - Summary & Rationale: The Settlement Draft Permit allows LCRA to divert during certain high-flow events when bay salinity drops to very low levels and bay health would not be impacted. This ‘high flow scalping’ approach is similar to that used by the Commission in a water rights permit issued to LCRA and STP Nuclear Operating Company. Because this condition would allow LCRA to divert at times that might be inconsistent with the seasonal criteria, it cannot be relegated to a side agreement or LCRA would risk violation of its permit.

Bay Inflow Criteria – Salinity Conditions

References: ED Draft Permit: NONE; Settlement Draft Permit: Section 6.C.(ii)(a), 6.C.(ii)(b), and 6.C.(iii)

Changes - Summary & Rationale: The Settlement Draft Permit incorporates a number of special conditions that would adjust LCRA’s ability to pump based on bay salinity. First, when salinity drops to very low levels, LCRA is allowed to divert regardless of whether the seasonal inflow criteria are satisfied. Second, if salinity exceeds levels that are significantly higher than expected, LCRA would stop diverting even if seasonal inflow criteria are met. Finally, to address concerns regarding the bay recovery after a prolonged drought, the Settlement Draft Permit incorporates a metric whereby LCRA would track salinity at two monitoring stations and restrict its diversions if salinity exceeds certain levels for a prolonged period of time and only resume normal diversions when bay inflows increase or salinity conditions improve substantially. Incorporation of a permit condition based on salinity is not without precedent in TCEQ water rights permitting.⁵ If the conditions from the Settlement Draft Permit were relegated to a side agreement instead of the permit issued by TCEQ, the bay inflows needed to help satisfy these conditions could not be protected against diversion by junior water rights holders.

Adaptive Management & Monitoring

References: ED Draft Permit: Section 6.C; Settlement Draft Permit: Section 6.C.(v), 6.H, & 6.I.

Changes - Summary & Rationale: As mentioned above, the ED Draft Permit included automatically-adjusting seasonal inflow criteria that depend on assumed changes to bay inflow requirements in the LCRA Water Management Plan. It also did not include the statutory reopener language required by with Texas Water Code § 11.147. The Settlement Draft Permit not only adds this required reopener language, it also includes a requirement that LCRA monitor specific bay salinity conditions, many of which it already monitors today. Depending on the results of this monitoring and analysis, the Settlement Draft Permit would allow but not require TCEQ to make limited adjustments to the Season Inflow Criteria in the permit. Study and evaluation of bay health, and subsequent adjustment to inflow requirements, is something TCEQ has required in the past as part of LCRA’s Water Management Plan.

Riparian Management Plan

References: ED Draft Permit: Section 6.E., Settlement Draft Permit: Section 6.D.

Changes - Summary & Rationale: Although this type of special condition is certainly not one that has been typically included by TCEQ in water rights permits, the Settlement Draft Permit only seeks

⁵ See Special Condition 4.b.(iii), Permit No. 5259, issued to Public Utilities Board of Brownsville.

changes to clarify the scope of the required plan, such that LCRA is only required to develop a plan for lands owned by LCRA, rather than all public lands along the river.

Intake Structure Requirements

References: ED Draft Permit: Section 6.D.; Settlement Draft Permit: Section 6.E.(ii).

Changes - Summary & Rationale: The Settlement Draft Permit proposes changes that would allow the specific intake requirements to be determined at the time LCRA files an amendment application to permit a specific reservoir, whereas the ED Draft Permit includes specific requirements that may be unnecessary or unreasonable in a case-specific situation.

Reservoir Permitting

References: ED Draft Permit: Section 6.G.; Settlement Draft Permit: Section 6.E.

Changes - Summary & Rationale: Neither the ED Draft Permit nor the Settlement Draft Permit authorize a specific reservoir to be constructed but instead require that LCRA file an application to amend the permit to add specific authorization at that time. The Settlement Draft Permit adds time limits on when LCRA must file this amendment application, confirms the anticipated procedures that will apply to such requests in terms of notice and opportunity for hearing, and specifically acknowledges the types of issues that may need to be considered as part of that application (such as intake requirements).

Accounting Plan

References: ED Draft Permit: Section 6.H.; Settlement Draft Permit: Section 6.F.

Changes - Summary & Rationale: Consistent with recent TCEQ practice, both draft permits contain requirements for LCRA to develop and maintain a daily accounting plan that is reviewed and approved by the Executive Director. The requirement in the Settlement Draft Permit modifies the requirement to include very specific requirements regarding the types of data that must be included and tracked in the daily accounting plan to verify compliance with the various special conditions related to environmental flows. TCEQ will be able to readily verify LCRA's compliance with the permit conditions by a review of the daily accounting plan LCRA is required to maintain. In the absence of established TCEQ rules regarding accounting plans, the Settlement Draft Permit attempts to provide more detail regarding the process for amending an accounting plan. It requires LCRA to consult with the Settling Parties on any changes and provide that input for consideration by TCEQ when LCRA seeks to amend an accounting plan. Moreover, it attempts to document what the Settling Parties understand is already TCEQ practice of evaluating, in advance, whether any proposed changes to the accounting plan require LCRA to file an application to amend the permit.

Exhibit 2(a)

From: Lyn Clancy [Lyn.Clancy@LCRA.ORG]
Sent: Wednesday, August 04, 2010 10:37 AM
To: 'Kellye Rila'
Cc: 'Kathy Alexander'; Greg Graml; James Kowis; 'Ben Vaughn'; 'marisa@lf-lawfirm.com'; 'Jennifer Walker'; 'Dan Opdyke'; 'Myron Hess'; 'Colette Barron'; 'David Bradsby'; 'Carolyn Ahrens'; Ross Crow (External); 'Fox, Jeff'; Bryan Cook; RJBlandes@pbsj.com; 'Kirk Kennedy'; 'Ronald L. Ellis'; IDelgado@tceq.state.tx.us; 'SSwanson@tceq.state.tx.us'; 'GEasley@tceq.state.tx.us'; 'Robin Smith'; Tabetha Jaske
Subject: Follow up from yesterday's meeting on Application No. 5731

Dear Kellye,

Thanks to you and your staff for meeting with all of us yesterday regarding the proposed changes to the draft permit for unappropriated flows. We all recognize the complexity of the request and the settlement and appreciate the time and effort that TCEQ staff has put into reviewing it to this point. As a follow up to the meeting, and to keep up the momentum, I thought it might be helpful to summarize the action items I had in my notes for the various attendees.

- (1) Regarding reliability of permit
 - a. LCRA will evaluate TCEQ staff concerns regarding the viability of a project under the revised draft permit. (prior to meeting in Item (3))
 - b. TCEQ staff will give further consideration to the issues raised during the meeting regarding the appropriate standards for this application (prior to meeting in Item (3))
- (2) LCRA will evaluate TCEQ staff concerns regarding maximum diversion amounts from river and reservoir (prior to meeting in Item (3)).
- (3) LCRA will schedule a follow-up meeting with TCEQ staff (perhaps a technical meeting) for mid-August to address (1) & (2) and will try to provide additional information in advance of such meeting.
- (4) Regarding transferring portions of permit conditions, esp. calculation specifics, to a preliminary accounting plan to be approved as part of this permit
 - a. Parties will consider whether this or some other approach might be acceptable to simplify permit
 - b. TCEQ staff will consider whether this is a 'deal breaker' if not removed from permit
- (5) LCRA and parties will work on revisions to the draft permit to address:
 - a. Placing all accounting plan requirements in a single section
 - b. Placing all requirements related to beneficial inflows, including the section for adaptive management that is specific to beneficial inflows, into a single section
 - c. Adding more specific cross-references to subsections of the permit
 - d. Placing SB3 reopener language in a stand alone section
 - e. Drafting relevant 'whereas' clauses to reflect settlement of the parties and changes to permit based on settlement

(6) TCEQ staff will meet with regional staff to get feedback on draft permit and relay any feedback or further issues to LCRA and other parties

(7) TCEQ staff will give further consideration to (and hopefully suggest alternative language, if warranted):

- a. TCEQ's legal authority as it relates to reservoir construction – i.e. setting time limits for applying for authorization for a specific reservoir, imposing forfeiture for lack of application or cancelling permit
- b. The permissive character ("may" adjust) of TCEQ's authority to adjust the beneficial inflow requirements in the permit, based on the adaptive management monitoring data
- c. The wording of the accounting plan language related to: (1) considering comments from the parties; and (2) determining whether a particular change to the accounting plan requires an application to amend the right

(8) TCEQ staff will provide a written response regarding the need to have special conditions related to return flows, as requested by Ross Crow.

I haven't established proposed timelines for any of these items except for Items 1-3, but am mindful that the abatement was only extended until the end of September. With that in mind, I would hope we can make considerable progress over the next month on these issues and welcome your input on establishing some firmer timelines for these various actions items. As a negotiating group, we found it helpful to get some regular meetings on the calendar well in advance, which helped guide completion of various action items. If you think that is a good idea, I can get Tabettha to coordinate with the negotiating parties to identify some open dates in August and September that we can send to you or Iliana.

Please let me know if I have misstated anything, need to clarify anything, or if I am missing anything. I've also copied all of the attendees, so if they have something different or additional, I hope they will chime in!

Regards,
Lyn

Lyn Clancy
Managing Associate General Counsel
Lower Colorado River Authority
Ph. 512-473-3378
lyn.clancy@lcra.org

Exhibit 2(b)



Kellye Rila
Manager, Water Rights Permitting & Availability
TCEQ, MC-160

Via E-Mail

RE: LCRA's Application No. 5731, Follow-up to Aug. 3, 2010 meeting

Dear Kellye,

As a follow-up to our meeting with TCEQ staff in early August regarding LCRA's permit request for unappropriated flows, I am pleased to report that we have made considerable progress on a number of items that I would like to share with you.

(1) Reliability of off-channel reservoir diversions: Regarding the reliability of diversions from the off-channel reservoir under the proposed permit, in reviewing the modeling, we have shared with Kathy Alexander of your staff our discovery of a bug in the WRAP model. With a fix to the model, the monthly WAM reliability statistics are as follows:

% of Years 100% of Max. Authorized Annual Diversion Satisfied – 28.8%
% of Years >75% of Max. Authorized Annual Diversion Satisfied – 42.4%
% of Months 100% of Monthly Demands Fully Satisfied – 47.9%
% of Max. Authorized Annual Diversion Satisfied on Average – 49.5%

Of course, because the monthly WAM does not reflect several of the daily special conditions that would allow LCRA to make additional scalping diversions during periods of very high flow, the actual reliabilities are expected to be higher than this. Further, as we have previously indicated, LCRA has every intent to use the water captured in this reservoir, not as a sole source of supply, but as part of the total amount of supply that LCRA has to make available to its customers. When combined with LCRA's water rights from the Highland Lakes and significant downstream senior run-of-river water rights, the supply of water captured in the off-channel reservoir can provide significant benefit to LCRA's overall operation – for example, reducing (substantially, in some years) the amount of stored water in Lakes Travis and Buchanan that must be released to help meet our interruptible irrigation and firm industrial customers' needs in the lower basin, or even to satisfy downstream environmental flow needs. To the extent this permit can be used to meet LCRA's downstream water needs, more water can be retained in Lakes Travis and Buchanan to provide supplies during drought periods. Hence, the reliability of this permit alone is not as important as the benefit of the permit is to LCRA in meeting its customers' needs in the most efficient way possible.

It is our understanding that TCEQ staff no longer has concerns regarding the reliability of the diversions from the off-channel reservoir under the proposed permit. However, if you or your staff needs further information, please let us know.

- (2) Maximum river diversion: LCRA understands that TCEQ staff has concerns that the monthly WAM model indicates a maximum annual diversion from the river that is less than the amount requested. LCRA believes that reducing the maximum authorized annual diversion to the amount reflected in the WAM would artificially constrain LCRA's diversions when, depending on reservoir operations, actual demand, and the weather patterns, considerably more water could be diverted, particularly during periods of very high flow and low reservoir storage. Whereas the WAM simulation indicates a *calendar* year maximum river diversion of 694,896 acre-feet, the maximum 12-month total river diversions is 798,289 acre-feet, which supports the notion that a higher river diversion is clearly possible. LCRA appreciates that the WAM, given its reliance on the historic pattern of flow and the need to establish a specific demand pattern on the reservoir and other water rights in the basin, could necessarily limit the estimated amount of unappropriated water. In recognition of these competing issues, LCRA would consider as a special condition in the permit that LCRA be authorized to divert the full requested annual amount, subject to a limitation on LCRA's ability to make a priority call on river flows in excess of the estimated WAM maximum annual river diversion.
- (3) Reorganization of Permit: The attached document attempts to address all of the concerns identified by TCEQ staff related to the organizational structure and flow of the draft permit. To that end:
- a. All accounting plan requirements have been relocated to a single section and specific calculations have been identified as accounting plan requirements. The parties understand that TCEQ staff has some interest in removing altogether some of the more detailed calculations and instead including them in an accounting plan document that would be subject to TCEQ staff review and approval prior to the issuance of the permit itself. After lengthy discussions with the Conservation Alignment and Texas Parks & Wildlife Department regarding this issue, we are not offering any additional changes at this time. Significant interest remains in retaining in the permit the essential terms and conditions of our agreement, some of which include the methods by which certain calculations are to be made. By retaining within the permit itself the essential elements of the agreement the parties worked so very hard to reach over the last two and a half years, LCRA understands this revised proposed permit continues to reflect an approach that the protesting parties can support.
 - b. All requirements related to beneficial inflows, including the section for adaptive management that is specific to beneficial inflows, have been placed in a single section

- c. More cross-references have been added, specifically with regard to the accounting plan requirements. In addition, the numbering conventions have been made uniform throughout the permit.
 - d. The SB3 reopener language, along with a section addressing treatment of voluntary adaptive management, is now contained in a separately headed reopener section.
 - e. We have added some 'whereas' clauses to reflect that the permit represents numerous conditions resulting from a settlement of the parties.
- (4) TCEQ Authority. At our meeting in early August, TCEQ staff identified a few areas of potential concern related to TCEQ's legal authority or obligations under the draft permit. These related to:
- a. TCEQ's legal authority as it relates to reservoir construction -- i.e. setting time limits for applying for authorization for a specific reservoir, imposing forfeiture for lack of application or cancelling permit
 - b. The permissive character ("may" adjust) of TCEQ's authority to adjust the beneficial inflow requirements in the permit, based on the adaptive management monitoring data
 - c. The wording of the accounting plan language related to: (1) considering comments from the parties; and (2) determining whether a particular change to the accounting plan requires an application to amend the right.

It was our understanding that TCEQ would give further consideration to these issues and, if warranted, provide us with suggested language. In the absence of such suggestions, we hope staff has concluded none are warranted.

As previously acknowledged we recognize the complexity of the proposed permit and appreciate the time and effort that TCEQ staff has put into reviewing it. We are equally mindful of the impending expiration of our abatement at the end of September and hope that the proposed modifications to the permit that we have discussed in this letter can provide TCEQ staff with sufficient comfort to support the issuance of the permit. If concerns remain, we would welcome the opportunity to meet with you and your management at your earliest convenience. I can be reached at (512) 473-3378.

Regards,



Lyn Clancy

Managing Associate General Counsel
Lower Colorado River Authority

Cc: See Email Distribution List
Attachment: Redline Permit

Exhibit 2(c)

E. Reservoir Permitting and Construction.

- (i) Within ten (10) years of the initial issuance of this permit, and Prior to diversion of water from the Colorado River pursuant to this permit or impoundment in the off-channel reservoir(s) authorized under this permit, Permittee shall apply for an amendment to this permit to either: (a) authorizing specific off-channel reservoir(s); or (b) extend the time for filing an amendment to authorize specific off-channel reservoir(s) as set forth in this section.
- (ii) Any amendment to authorize specific off-channel reservoir(s) Such amendment shall address, among other relevant issues, reasonable measures to minimize impacts to aquatic resources due to entrainment and impingement; mitigation requirements pursuant to Section 11.152, Tex. Water Code; and issues related to the impacts, if any, to water quality or instream flows of any tributaries to the Colorado River affected by the proposed reservoir(s). At the time these reservoirs are permitted, time limitations for the commencement and completion of construction will be applied.
- (iii) Any application to amend this permit to extend the deadline for filing an amendment to authorize specific off-channel reservoir(s) shall set forth the justification for why: (a) the amendment to extend the time should be granted; and (b) why the permit should not be cancelled.
- (iv) If Permittee has not applied for an amendment to this permit under Special Condition 6.E.(i) above within the specified deadline, Permittee shall forfeit the permit. ~~ten (10) years of the initial issuance of this permit, Permittee shall apply for an extension of time to apply for such amendment, setting forth the justification for why the extension should be granted and why the permit should not be forfeited. In the absence of the timely filing of an application for such an amendment or extension of time on or before ten (10) years from the issuance of this permit, the permit shall be forfeited.~~
- (v) Any application for an amendment or an extension of time as described in this special condition shall require public notice and an opportunity to request a contested case hearing. If the Commission denies such an application for an amendment or an extension of time, the Commission may also concurrently determine whether to initiate cancellation proceedings under Texas Water Code, Chapter 11, Subchapter E for all or part of the permit. ~~shall also concurrently determine if the permit should be forfeited, in whole or in part.~~