

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

APPLICATION OF THE	§	BEFORE THE
LOWER COLORADO RIVER	§	TEXAS COMMISSION
AUTHORITY TO AMEND	§	ON
PERMIT NO. 5731	§	ENVIRONMENTAL QUALITY
	§	

**EXECUTIVE DIRECTOR’S RESPONSE AND EXCEPTIONS TO PROPOSAL
FOR DECISION AND PROPOSED ORDER**

The Executive Director of the Texas Commission on Environmental Quality (TCEQ or Commission) files this response and exceptions to the Proposal for Decision (PFD) and the proposed Order in this matter. The Executive Director requests guidance from the Commission generally on its policy concerning the inclusion of third party agreements into permits, and specifically on the inclusion of this settlement agreement into the draft permit.

The Executive Director will refer to the draft permit prepared by TCEQ staff as the “Executive Director’s draft permit” and refer to the draft permit containing the provisions from the other parties’ settlement as the “settlement draft permit.”

BACKGROUND

The Lower Colorado River Authority (LCRA) filed this application on March 31, 1999, and the Executive Director declared it administratively complete on February 28, 2001. In 2006, TCEQ staff prepared the Executive Director’s draft permit for this application which would authorize the LCRA to impound up to 500,000 acre feet of water in off-channel reservoirs within Colorado, Wharton, and Matagorda Counties. LCRA would also have the right to divert not to exceed 853,514 acre feet of water from nine diversion points for storage in these reservoirs, and to subsequently divert a maximum of 327,591 acre feet of water from the reservoirs for use in LCRA’s service area for municipal, industrial, and agricultural purposes. There are several special conditions, including provisions for environmental protection.

The case was contested and referred to the State Office of Administrative Hearings (SOAH) on September 19, 2007. A preliminary hearing was held on December 3, 2007, and a schedule was set. The Administrative Law Judge (ALJ) granted an uncontested continuance on April 25, 2008, to allow LCRA to attempt settlement with the remaining parties. The Executive Director received the settlement draft permit on July 16, 2010. The Executive Director’s staff met with the settling parties on August 3, 2010, at which time staff outlined its concerns with the settlement draft permit. On September 3, 2010, the settling parties submitted a revised proposed draft permit that did not address the Executive

Director's substantive concerns but did address some organizational issues. The settling parties stated that they wished to retain the specifics of their settlement agreement within the permit.

The last continuance expired on September 30, 2010. At that time the Executive Director informed the parties that it could not agree to the parties' settlement draft permit. The parties requested a prehearing conference which was held on October 27, 2010. The Judge stated at the prehearing conference that he intended to issue this PFD, which he did on November 19, 2010.

THIRD PARTY AGREEMENTS

The Executive Director's understanding of the Commission's policy is that third party agreements that include provisions that go beyond the requirements of the applicable statutes and rules should not be included in a permit. The applicant and other parties may agree to more stringent requirements that go beyond the statutory and rule requirements, and may enforce those third party agreements in court.

The Executive Director respectfully requests guidance from the Commission on its policy regarding the inclusion of third party settlement agreements in permits. If the Commission's policy is that third party settlement agreements can be incorporated into permits under certain circumstances, the Executive Director respectfully requests guidance on whether this settlement agreement should be included in the permit.

GENERAL EXCEPTIONS

The Executive Director excepts to the Draft Order because the ALJ should not recommend Findings of Fact and Conclusions of Law when there is no evidentiary record on which to base these findings and conclusions, unless all parties have agreed to the findings and conclusions. The settlement draft permit adds extensive provisions to the Executive Director's draft permit. In the absence of agreement of all parties, the ALJ has no basis on which to find that the settlement agreement provisions should be added to the draft permit without hearing evidence concerning these provisions. No evidence was presented at the prehearing conference.

SPECIFIC EXCEPTIONS

If the Commission decides to issue the proposed Order, the Executive Director respectfully requests the Commission's consideration of the Executive Director's exceptions to the following Findings of Fact proposed by the ALJ:

Proposed Finding of Fact No. 17:

17. After several attempts to engage the ED's staff in settlement negotiations to identify and resolve any disputed issues, on October 1, 2010, the Settling Parties indicated that little progress had been made and thus requested that a prehearing conference be scheduled.

This finding is incomplete because it does not include the fact that the Executive Director's staff met with all the parties on August 3, 2010, and outlined its concerns with the Settling Parties' changes to the Executive Director's draft permit. The settling parties did not make changes to the settlement draft permit based on the Executive Director's concerns except for organizational changes.

The Executive Director recommends that the Finding of Fact be reworded to state:

17. The settling parties met with the Executive Director's staff on August 3, 2010, at which time the Executive Director's staff discussed their concerns with the settlement draft permit. The settling parties did not make changes to the settlement draft permit based on the Executive Director's concerns except for organizational changes. On October 1, 2010, the Settling Parties indicated that little progress had been made and thus requested that a prehearing conference be scheduled.

Proposed Finding of Fact No. 23.

23. The primary substantive differences between the ED's Draft Permit No. 5731 and the Settlement Draft Permit No. 5731 relate to environmental flow permit conditions developed pursuant to Tex. Water Code Ann. §§ 11.147, 11.150, and 11.152.

This finding is incorrect because the added provisions in the Settlement Draft Permit go beyond the requirements of Tex. Water Code Ann. §§ 11.147, 11.150, and 11.152. This finding should be deleted or a finding should be made that the provisions go beyond the requirements of the Water Code.

Proposed Finding of Fact No. 24:

24. The Settlement Draft Permit No. 5731 also differs from the ED's Draft Permit No. 5731 in that the Settlement Draft Permit No. 5731: (a) reduces the number of authorized diversion points from nine to five; (b) decreases the maximum combined rate of diversion from 40,000 cubic feet per second (cfs) to 10,000 cfs; (c) includes additional water conservation requirements; and (d) includes additional off-channel reservoir permitting and construction requirements.

This Finding is incomplete. The Executive Director recommends adding language to Finding of Fact No. 24 stating that the Settlement Draft Permit contains provisions requiring extensive salinity calculations, provisions that would limit the TCEQ's ability to change the Seasonal Inflow Criteria or the salinity calculations, and provisions requiring the TCEQ to consider comments on any Accounting Plan changes.

The Executive Director recommends that Finding of Fact No. 24 contain the following additional language:

24. The Settlement Draft Permit No. 5731 differs from the ED's Draft Permit No. 5731 in that the Settlement Draft Permit No. 5731: (a) reduces the number of authorized diversion points from nine to five; (b) decreases the maximum combined rate of diversion from 40,000 cubic feet per second (cfs) to 10,000 cfs; (c) includes additional water conservation requirements; (d) includes additional off-channel reservoir permitting and construction requirements.; (e) includes environmental conditions that require extensive and complex salinity calculations and limits the TCEQ's ability to change the Seasonal Inflow Criteria or the salinity calculations, and (f) contains provisions requiring the TCEQ to consider comments when making any Accounting Plan changes.

CONCLUSION

The Executive Director respectfully requests guidance from the Commission on its policy concerning the inclusion of third party agreements into permits and how that policy applies to the LCRA's application.

Respectfully submitted,

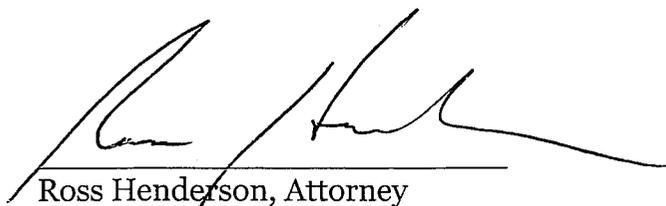
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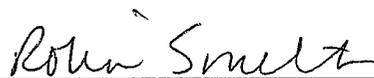


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REPRESENTING THE EXECUTIVE
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CERTIFICATE OF SERVICE

I hereby certify that on December 9, 2010, the "Executive Director's Response and Exceptions to Proposal for Decision and Proposed Order" was filed with the Chief Clerk of the Texas Commission on Environmental Quality.



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