

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

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

**CONSERVATION ALIGNMENT'S
REPLY TO EXECUTIVE DIRECTOR'S EXCEPTIONS
TO PROPOSAL FOR DECISION AND PROPOSED ORDER**

In July 2010, after more than two years of technical study and negotiations, the Lower Colorado River Authority (LCRA), the Texas Parks & Wildlife Department (TPWD), and the Conservation Alignment (the National Wildlife Federation, the Sierra Club, the Matagorda Bay Foundation, and the Coastal Conservation Association) agreed on a Settlement Draft Permit No. 5731.

The Settlement Draft Permit includes revisions to the environmental flow conditions in TCEQ staff's 2006 draft permit. The revised conditions, which are based on the latest technical studies—the Lower Colorado River, Texas Instream Flow Guidelines (Mar. 2008) and Matagorda Bay Health Evaluation (MBHE) (Oct. 2008)—will better protect the health and uses of the Colorado River and Matagorda Bay by:

- Increasing the instantaneous flows at the Wharton gage that must be met before LCRA may divert to average base flows in the Instream Flow Guidelines;
- Providing seasonal bay inflows that must be met before LCRA may divert, as recommended in the Matagorda Bay Health Evaluation (MBHE);
- Providing a salinity “fail-safe” that halts most diversions when sustained low inflows have increased salinity in the bay to detrimentally high levels;

- Requiring an accounting plan that tracks streamflows and salinities at existing gages and stations to verify compliance with permit conditions; and
- Requiring collection of salinity data that can be used to adjust the seasonal inflow criteria in the future.

Other Settlement Draft Permit revisions modify or clarify TCEQ staff's 2006 draft permit conditions relating to diversion points and rates, water conservation, a riparian management plan, and the permitting and construction of off-channel reservoirs.

All parties to this proceeding, except the Executive Director (ED), support or do not oppose the Settlement Draft Permit. The ALJ has proposed that the Commission issue Settlement Draft Permit. The ED's Exceptions do not specifically identify any Settlement Draft Permit conditions that the ED opposes. Instead, the ED seems to oppose all changes to TCEQ staff's 2006 draft permit, but in particular the revised environmental flow conditions, because, it claims, Commission policy says "third-party agreements" that "go beyond" Water Code requirements "should not be included in a permit."

The Conservation Alignment urges the Commission to adopt the ALJ's proposed Order and issue Settlement Draft Permit No. 5731. If the Commission has the policy the ED describes, it should not apply in this case. The Settlement Draft Permit provisions are revisions to TCEQ staff's 2006 draft permit, not side agreements. They do not "go beyond" statutory requirements. They do not address extraneous issues. They are squarely within the Commission's statutory authority to maintain instream uses and beneficial inflows to bays and estuaries. The relative complexity of some Settlement Draft Permit conditions is entirely appropriate for a permit authorizing the diversion of, essentially, the last 853,000 acre-feet per year of available water in the lower Colorado

River. The ED's apparent concerns about difficulty in enforcing the revised conditions or their effect on the Commission's discretion are unfounded.

BACKGROUND

In 1999, the LCRA filed an application for Permit No. 5731. Individual members of the Conservation Alignment requested a contested case hearing on the application. In 2006, TCEQ staff prepared a draft Permit No. 5731. The Commission referred LCRA's application to SOAH for a contested case hearing on September 19, 2007.

On April 25, 2008, after the parties had submitted lists of disputed issues, the SOAH ALJ granted an unopposed motion for continuance to allow LCRA to discuss settlement with TPWD and the Conservation Alignment. The Commission rules encourage settlement of contested matters: "It is the commission's policy to encourage the resolution and early settlement of all contested matters through voluntary settlement procedures. It is the affirmative responsibility of each commission employee to effectuate this policy." 30 TEX. ADMIN. CODE § 40.1.

LCRA, TPWD and Conservation Alignment experts and attorneys spent hundreds, if not thousands, of hours reviewing post-2006 studies of lower Colorado River instream flows and freshwater inflows to Matagorda Bay and modeling the impact of the study's results on LCRA's proposed appropriation. Drafts of the Instream Flow Guidelines and MBHE reports were available for public comment in 2007. The final reports were issued in March and October 2008, respectively.

The result of the parties' extensive review and negotiations was the Settlement Draft Permit, which revises the TCEQ staff's draft permit. The parties provided the

Settlement Draft to TCEQ staff in July 2010. TCEQ staff has said it opposes at least some aspects of the salinity provisions, or opposes their inclusion in the permit rather than in the accounting plan, but has refused to identify any other provisions it opposes.

REPLY TO EXCEPTIONS

I. The Settlement Draft Permit's Freshwater Inflow Provisions Are Within the Commission's Statutory Authority and Should Be Adopted.

Seasonal freshwater inflow and salinity conditions (Section 6.C(ii)). TCEQ staff's 2006 draft permit includes a permit condition that allows LCRA to divert if monthly "Target Freshwater Inflow" requirements in LCRA's Water Management Plan (WMP) are met. Settlement Draft Permit revisions to that provision adopt seasonal freshwater inflow recommendations from the 2008 MBHE.

The Commission's January 2010 order amending LCRA's WMP expressly recognized that the 2008 MBHE includes "credible and extensive scientific information" that should be used in developing new lower Colorado River freshwater inflow criteria. The Settlement Draft Permit accomplishes that goal now and directly, for a new appropriation subject to adjustment under Water Code § 11.147(e-1), rather than indirectly through future amendments to freshwater inflow requirements in the WMP, which governs LCRA's operation of the Highland Lakes under other, existing permits.

The 2008 MBHE freshwater inflow recommendations are based on modeling that predicts that a certain amount of freshwater inflows at certain times will result in bay salinities that maximize productivity. Unfortunately, modeling and the real world do not always agree. The Settlement Draft Permit provides a fail-safe against that potential

disconnect by prohibiting diversions when salinity increases to very high levels, even when the seasonal inflow requirements are being met—a straight-forward recognition that estuarine organisms live in the real world and need real protection. At the same time, the Settlement Draft Permit permits diversions when salinities are very low or flows are very high, even if seasonal inflow targets are not being met.

The Settlement Draft Permit’s seasonal freshwater inflow and salinity conditions do not “go beyond” Water Code requirements. The Water Code provides that the Commission “shall include in [a] permit [within 200 river miles of the coast] any conditions necessary to maintain *beneficial inflows* to any affected bay and estuary system, to the extent practicable when considering all public interests.” TEX. WATER CODE § 11.147(b) (emphasis added). “*Beneficial inflows*” are defined as a “*salinity, nutrient, and sediment loading regime adequate to maintain an ecologically sound environment in the receiving bay and estuary system.*” *Id.* § 11.147 (emphasis added). In determining beneficial inflow requirements, the Commission shall consider “the need for periodic freshwater inflows to supply nutrients and *modify salinity* to preserve the sound environment of the bay or estuary, using any available information, including ... *studies considered by the commission to be reliable.*” *Id.* § 11.147(c)(1) (emphasis added).

The Settlement Draft Permit seasonal inflow criteria and salinity conditions clearly fall within these requirements. They provide “periodic freshwater inflows to ... modify salinity” based on a reliable study—the 2008 MBHE.

Accounting plan (Section 6.F). The Executive Director seems to be concerned that calculations required by the Settlement Draft Permit’s seasonal inflow and salinity

conditions are too complicated to enforce. They are not. The Settlement Draft Permit requires LCRA to prepare an accounting plan that tracks the necessary streamflows and salinities at existing gages and stations. The accounting plan must include the formulas necessary to calculate whether and how much LCRA can divert based on the measurements, and LCRA will perform the calculations. The ED can determine whether the accounting plan contains the appropriate formulas and produces the correct results, because the ED must approve the accounting plan and any modifications to it.

The required accounting plan may be more complex than some in other water rights permits. But it is not much, if any, more complex than the accounting plans required for diversions from multi-reservoir systems or for permits that authorize the diversion of state water, return flows, and transported groundwater. And it is not complex in relation to the authorization being granted—the right to divert 853,514 acre-feet of water per year, virtually all the unappropriated in the lower Colorado River, into off-channel reservoirs with a maximum combined impoundment of 500,000 acre-feet.

The Executive Director also appears to have some unidentified concern about the fact that the Settlement Draft Permit allows the parties to comment on the accounting plan. The Settlement Draft Permit requires LCRA to seek comments from other parties and submit them to the ED. The goal is to ensure that LCRA considers other perspectives in developing the plan, which will play an important role in the implementation of permit terms, and that the ED is aware of those other perspectives when acting on the plan. But the power to approve or disapprove the accounting plan remains solely with the ED.

Adjustments to seasonal inflow criteria (Sections 6.C(v), 6.H). The Settlement Draft Permit requires LCRA to collect salinity and streamflow information and to perform a “Salinity Analysis” every ten years using that information. The Salinity Analysis compares salinity predictions on which the inflow quantities in the Permit are based and actual measured salinities. The Settlement Draft Permit allows TCEQ to use the Salinity Analysis to adjust the seasonal inflow criteria so that they better provide predicted salinities.

The Executive Director appears to be concerned that these provisions limit the Commission’s authority to adjust the seasonal inflow criteria. But these provisions are *in addition to* TCEQ’s authority to reopen environmental flow conditions under Water Code Section 11.147(e-1). TCEQ staff’s draft permit does not include the re-opener provision Section 11.147(e-1) requires, but the Settlement Draft Permit does (Section 6.I).

II. The Settlement Draft Permit’s Instream Flow Provisions Are Within the Commission’s Statutory Authority and Should Be Adopted.

Instream Flow Requirements (Section 6.A). TCEQ staff’s 2006 draft permit included a condition requiring “target” instream flows to be met at the Wharton and Columbus gages before LCRA diverts. The Settlement Draft Permit’s revised condition increases the instream flows required at the Wharton gage, and deletes the requirement at the Columbus gage because there are no diversion points upstream of the Columbus gage. It is not clear from the Exceptions whether the ED specifically objects to either change.

The TCEQ staff’s target flows were from a 1992 study. The Settlement Draft Permit’s instream flows are the “base average flows” from the 2008 Instream Flow

Guidelines. The Commission's January 2010 order amending LCRA's WMP also found that the 2008 Instream Flow Guidelines includes "credible ... scientific information" that should be used in developing new instream flow requirements. The Settlement Draft Permit accomplishes that goal for this new appropriation.

The Settlement Draft Permit instream flow condition does not "go beyond" Water Code requirements. The Water Code requires the Commission to "include in a permit, to the extent practicable when considering all public interests, those conditions considered by the commission necessary to maintain existing instream uses and water quality" and "fish and wildlife habitat." TEX. WATER CODE § 11.147(d), (e). That is exactly what the Settlement Draft Permit condition does, based on the latest credible studies.

Channel maintenance flows (Section 6.B). TCEQ staff's draft permit includes a provision intended to limit diversions during certain high flow events. The Settlement Draft Permit attempts to clarify the provision, not modify it. It is not clear from the Exceptions whether the Executive Director objects to the clarification.

III. The Other Revisions in the Settlement Draft Permit Should Be Approved.

The Settlement Draft Permit contains other revisions to the TCEQ staff's 2006 draft permit. It is not clear whether the Executive Director specifically objects to any of these revisions. Each should be adopted.

Diversion points and rate (Section 3). The Settlement Draft Permit decreases the number of diversion points from nine or five, and decreases the maximum combined diversion rate from 40,000 cfs to 10,000 cfs. An applicant's agreement to decrease the number of diversion points or the diversion rate cannot be characterized as "going

beyond” statutory requirements. Limitations on diversion points and rates are standard permit conditions, not side agreements. It is not clear whether the Executive Director opposes these revisions.

Water conservation (Section 4). The Settlement Draft Permit strengthens and clarifies TCEQ staff’s draft permit condition on water conservation requirements. Water conservation requirements should be included in a permit, not in a side agreement, and the Settlement Draft Permit revisions do not “go beyond” the Commission’s authority over water conservation plans. *See* TEX. WATER CODE § 11.1271. It is not clear if the Executive Director opposes these revisions.

Riparian Management Plan (Section 6.D). The Settlement Draft Permit clarifies the scope of the riparian management plan required by a condition in TCEQ staff’s draft permit. Clarification of a condition already in TCEQ staff’s draft permit cannot be a side agreement or “go beyond” statutory requirements. It is not clear if the Executive Director has any specific objections to these revisions.

Reservoir Permitting (Section 6.E). A condition in TCEQ staff’s draft permit required LCRA to apply for and receive authorization for specific off-channel reservoirs before it diverts, but did not set an application deadline. The Settlement Draft Permit requires LCRA to apply within 10 years from the issuance of the Permit or seek an extension of time to apply. It also clarifies that the application for such authorization is an application to amend Permit No. 5731 requiring notice and an opportunity for hearing. A deadline to make an application to the Commission cannot be in a side agreement. The

settling parties have previously revised this Settlement Draft Permit condition to address TCEQ staff concerns, but it is not clear whether the ED still objects to it.

The Settlement Draft Permit also revises a TCEQ staff draft permit condition on intake structure requirements and allows LCRA to address those requirements when it applies for an amendment to authorize a specific off-channel reservoir. The location of a diversion structure can be an important consideration in determining what requirements are appropriate. Again, application requirements cannot be in a side agreement. It is not clear whether the Executive Director opposes this revision.

IV. Approving the Settlement Permit Draft Will Encourage Settlements.

LCRA, TPWD, and the Conservation Alignment spent years negotiating the Settlement Draft Permit. It was a shock when TCEQ staff took the position that Commission policy prohibits it from agreeing to *any* changes in its 2006 permit draft. TCEQ staff apparently believes that Commission policy prohibits them from agreeing to change the freshwater inflow conditions or instream flow conditions based on technical studies completed after it prepared its draft permit in 2006. TCEQ staff apparently believes that Commission policy even prohibits them from agreeing to changes in the language of the 2006 draft permit conditions intended to clarify them.

Instead, TCEQ staff argues, a contested case must be held on all permit issues. Before the ALJ, TCEQ staff opposed the settling parties' motion to narrow the issues by requiring TCEQ staff to identify the specific portions of the Settlement Draft Permit to which it objected, apparently on the ground that its failure to dispute a Settlement Draft Permit condition would be tantamount to a forbidden agreement to it.

A Commission policy that prohibits TCEQ staff from agreeing to *any* revisions to its proposed permit conditions, for *any* reason, would certainly discourage settlements. A significant incentive to settle—avoidance of a protracted contested case hearing—would no longer exist. Settling parties would be required to participate in a contested case hearing, in which all issues are in dispute, just as if they had not reached agreement.

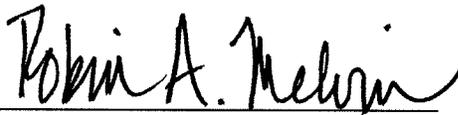
By approving the Settlement Draft Permit, the Commission can clarify that TCEQ staff can agree to revise the conditions in draft permit to resolve the parties' disputes over whether the conditions meet Water Code requirements. This clarification will decrease the number of contested case hearings, or at least narrow the issues in those hearings, saving the resources of the parties and the Commission.

CONCLUSION

The Conservation Alignment respectfully requests that the Commission issue the proposed Order adopting the Settlement Draft Permit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing has been served by first class mail and electronic mail on this the 20th day of December, 2010, to:

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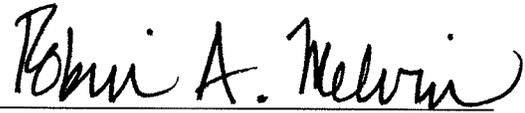
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A handwritten signature in black ink that reads "Robin A. Melvin". The signature is written in a cursive style with a large initial "R" and a long, sweeping underline.

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