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Carter P. Smith
Executive Director

December 20, 2010

Ms. LaDonna Castanuela
Office of the Chief Clerk, MC 105
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, TX 78711-3087

Re: SOAH Docket No. 582-08-0689; TCEQ Docket No. 2006-1819-WR; Application of the Lower Colorado River Authority for Water Rights Permit No. 5731

Dear Ms. Castanuela,

Enclosed for filing, please find the original of the Texas Parks and Wildlife Department's Reply to the Texas Commission on Environmental Quality Executive Director's Exceptions to the Proposal for Decision in the above referenced matter.

Should you have any questions, please contact me at (512) 389-8899.

Sincerely,

Colette Barron Bradsby

Colette Barron Bradsby

cc: Parties on the attached Service List

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To manage and conserve the natural and cultural resources of Texas and to provide hunting, fishing and outdoor recreation opportunities for the use and enjoyment of present and future generations.

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

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

TEXAS PARKS AND WILDLIFE DEPARTMENT'S REPLY TO THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY EXECUTIVE DIRECTOR'S EXCEPTIONS TO PROPOSAL FOR DECISION

TO: The Honorable Commissioners Bryan Shaw, Buddy Garcia, and Carlos Rubenstein, and to the Honorable William G. Newchurch, Administrative Law Judge, State Office of Administrative Hearings.

Comes now the Texas Parks and Wildlife Department and files its Reply to the Texas Commission on Environmental Quality Executive Director's Exceptions to the Proposal for Decision in the above referenced matter.

I. Introduction

Texas Parks and Wildlife Department (TPWD) supports the Proposal For Decision and Proposed Order. The Settling Parties, representing a broad array of interests in the Lower Colorado River Basin, committed enormous human and financial resources to craft a new draft permit based upon the best available science and supported by state law and policy. The Texas Commission on Environmental Quality (Commission) Executive Director (ED) has not stated any technical or legal deficiencies in the Proposed Order and Settlement Draft Permit, and therefore, TPWD respectfully recommends the Commission not adopt the ED's Exceptions to the Proposal For Decision (PFD). TPWD requests that the Commission adopt the PFD by the Honorable William G. Newchurch, Administrative Law Judge (ALJ), State Office of Administrative Hearings.

In his Exceptions, the ED broadly outlines the background of this matter but does not include the details necessary to understand how the parties and the ALJ find themselves in this unconventional procedure wherein the ALJ asks the Commission to issue a contested permit without requiring the parties to participate in a full evidentiary hearing. While unusual, the ALJ's actions are intended to bring this matter to a quick resolution and to save the Settling Parties,[1] the Office of Public Interest Counsel, and the

[1] The Settling Parties are the Lower Colorado River Authority, the Coastal Conservation Association, the City of Austin, the Matagorda Bay Foundation, the National Wildlife Federation, and Texas Parks and

ED from the burdens of an unnecessary and expensive contested case hearing. Simply put, the Settling Parties and the ALJ had exhausted their means of requesting and compelling the ED to substantively participate in the resolution of this matter. Confusion regarding Commission policy and perhaps miscommunication between staff and management of the Commission also contributed to the unusual disposition of this contested matter. Even after a pre-hearing conference and the filing of exceptions to the PFD, TPWD cannot discern any technical or legal challenge raised by the ED to the Proposed Order and Settlement Draft Permit.

II. Reply to Exception to Finding of Fact No. 17

TPWD respectfully requests that ED's Exception to Finding of Fact No. 17 be denied. TPWD does not dispute that the ED staff "outlined its concerns with the Settling Parties' changes to the Executive Director's draft permit" at an August 3, 2010 meeting. However, the ED erroneously asserts that the settling parties did not make changes to the settlement draft permit "except for organizational changes." The ED provides no documentation to support this assertion. The lack of documentation of the ED's concerns by the ED has been and remains the primary obstacle to resolution of this matter. In contrast, the Settling Parties have documented their efforts to respond to and engage the ED in negotiation and settlement, and the Lower Colorado River Authority's (LCRA) Reply to the Executive Director's Exceptions to the Proposal For Decision provides some of that documentation. In his Exceptions, the ED does not acknowledge the ED staff's lack of substantive communication with the Settling Parties and instead asks the Commission and ALJ to revise Finding of Fact No. 17 with language that leaves the impression that it is the Settling Parties who were non-responsive to the ED's concerns. In addition to the argument and documentation provided by LCRA, TPWD offers the following details that counter the ED's characterization of events:

1. At the August 3, 2010 meeting with the Settling Parties, the ED provided no written documentation or outline of any issues of concerns. When the ED staff was asked whether it had any substantive concerns about the revised environmental flow special conditions, the staff orally represented that it had none. Staff did indicate a concern with including supporting calculations for the special conditions within the revised permit and asked the parties to consider moving the calculations into a separate accounting plan. At no time did staff assert that the environmental flow special conditions contained any technical or legal deficiencies or that they "go beyond" statutory requirements. As outlined in LCRA's Reply to Exceptions, the Settling Parties revised the Settlement Draft Permit to meet substantive concerns raised by the ED staff and made numerous attempts to elicit any remaining concerns of the ED staff and to draw them into substantive negotiations. The ED staff remained non-responsive, prompting the Settling Parties to take the unusual step of appealing directly to Executive Director Mark Vickery in an October 1, 2010 letter.[2] The letter asked for Mr.

Wildlife Department. The Office of Public Interest Counsel and the STP Nuclear Operating Company do not object to the Settlement Draft Permit agreed to by the Settling Parties.

[2] Attachment A.

Vickery's assistance in getting the ED staff to identify and document remaining issues, and the letter expressed the desire of the Settling Parties to meet with staff to discuss the permit and work toward a mutually acceptable resolution of the matter. Mr. Vickery did not respond to this request, and the ED staff did not identify any remaining issues as requested.[3]

2. Also on October 1, 2010, the Settling Parties filed a Joint Status Report and Request For Pre-Hearing Conference with the ALJ.[4] This pleading contained the Settling Parties' representation and documentation of their efforts to substantively respond to concerns raised orally at the August 3, 2010 meeting. The ED raised no objections to the status report, and the ED did not file a response or status report with the ALJ. At the October 27, 2010 pre-hearing conference, the ED did not state any objection to the Settling Parties' representations in the Joint Status Report. It is difficult to understand why the ED remained silent until filing his December 9, 2010 Exceptions if he disagreed with the representations of the Settling Parties as to substantive efforts to respond to concerns of the ED staff.

3. The ED staff agreed to meet with the parties on October 22, 2010. In an October 21, 2010 email from ED counsel the parties were informed that the ED "has decided to stay with the draft permit and not make any changes."[5] At the October 22, 2010 meeting, the ED repeatedly asserted that ED staff could not and would not identify or discuss any substantive issue or concern with the permit and that staff did not have authority to settle the matter. The staff stated that its hands were tied in this matter by Commission policy that prohibits any third party agreement term, no matter the substance, from being included in a Commission permit. When asked to identify the rule or guidance document that contained such a policy, staff represented that none existed. When the parties requested the ED staff to state its understanding of such a policy in writing so that the parties might attempt to comply with it, the ED counsel replied that she would try to get that. No written statement of this policy was produced. At the October 27, 2010 prehearing conference, the ALJ questioned the ED on the existence and details of this referenced policy, but the ED could provide no details or documentation.

III. Reply to Exception to Finding of Fact No. 23

TPWD respectfully requests that the ED's Exception to Finding of Fact No. 23 be denied. The ED states that the 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." The ED does not define what "go beyond the requirements" means. TPWD is unfamiliar with any legal standard in the Texas Water Code or Texas Administrative Code related to going beyond requirements. If the phrase

[3] An eventual response to the Settling Parties' October 1, 2010 letter to Mark Vickery came from Deputy Director of Legal Services Stephanie Bergeron Perdue in a November 30, 2010 letter. This letter is discussed later in this pleading.
[4] Attachment B.
[5] Attachment C.

is to be interpreted as meaning that the permit imposes additional technical or substantive requirements not contained in Texas Water Code §§ 11.147, 11.150, and 11.152, TPWD disagrees. The cited statutory provisions do not impose "one size fits all" quantitative requirements. Just as all streams, rivers, bays, and estuaries are distinct and unique, the permit conditions necessary to protect those resources are distinct and unique. The ALJ has not found and the ED has not stated that any particular Settlement Draft Permit conditions do not comply with Texas Water Code §§ 11.147, 11.150, and 11.152. The ED does not assert that the best available science was not used to develop and support the permit provisions. The ED does not assert that the special permit conditions fail to maintain beneficial inflows to Matagorda Bay and Estuary and maintain existing instream uses, fish and wildlife habitats, and water quality of the Lower Colorado River as required by Texas Water Code §§ 11.147, 11.150, and 11.152.

If the phrase "go beyond requirements" is to be interpreted as meaning that the Settlement Draft Permit imposes additional enforcement burdens on the Commission that are not contained in Texas Water Code §§ 11.147, 11.150, and 11.152, TPWD disagrees. As provided in its Reply to Exceptions, LCRA is fully capable of complying with the special conditions in the Settlement Draft Permit, and while the calculations supporting the quantitative requirements may be more complicated than in other permits, the Commission's monitoring of compliance with the conditions is not complicated or burdensome. Compliance and monitoring for freshwater inflow protection rely on measuring bay salinity and volumetric inflows. Compliance and monitoring for instream flow protection rely on measuring flows at distinct gaged locations. An accounting plan will be used to record measurements and ensure compliance with permit conditions.

IV. Reply to Exception to Finding of Fact No. 24

TPWD respectfully requests that the ED's Exception to Finding of Fact No. 24 be denied. TPWD does agree that Finding of Fact No. 24 does not enumerate every difference between the Settlement Draft Permit and the ED's Draft Permit, but TPWD believes the finding adequately characterizes the major substantive differences apart from the detailed changes to the special conditions related to the protection of environmental needs and the related restrictions to diversions. Should the ALJ deem them necessary, TPWD does not object to additional findings that enumerate every difference between the Settlement Draft Permit and the ED's Draft Permit.

The ED's proposed new Finding of Fact No. 24 does not accurately characterize the remaining differences between permits. In particular, the ED does not point to any particular language in the Settlement Draft Permit that abridges Commission authority to modify the permit conditions. TPWD agrees with the ED that the Settlement Draft Permit requires TCEQ to consider comments on Accounting Plan changes, but disagrees that it requires TCEQ to do so for *any* Accounting Plan changes. Permit Condition 6.F(ii) requires LCRA to document its consultation with the parties regarding a "proposed accounting plan or any proposed substantive revision thereof" and requires the ED to consider the related comments of the parties to those items. The lack of statutes and rules to govern accounting plans was another obstacle faced by the Settling Parties as

they attempted to address the ED staff recommendation to move certain provisions and calculations into an accounting plan. The Settling Parties were very cautious about removing any permit provision that would jeopardize the implementation or enforcement of the Settlement Draft Permit. The ED staff could not point to any authority over accounting plans or any due process associated with changing accounting plans that gave the parties confidence that the permit would be implemented and enforced as envisioned if certain requirements were moved into a separate accounting plan. Due to the lack of statutes and rules governing the issuance and amendment of accounting plans, Permit Condition 6.F(ii) was drafted in an attempt to allow a measure of due process for interested parties in the event a substantive permit requirement was changed either purposefully or accidentally through the use of a new accounting plan or a substantive accounting plan revision. TPWD addressed this issue with the ED staff in a September 8, 2010 letter but received no questions or follow up from ED staff.[6]

V. Reply to the ED's Third Party Agreements Discussion

In his Exceptions, the ED asks for guidance from the Commission regarding the inclusion of third party settlement agreements in permits. The ED states that his understanding of Commission 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. While still leaving the phrase "go beyond the requirements" undefined, this is the first time the ED has characterized this third party agreement policy as somewhat limited. In previous communications, ED staff asserted that no third party agreements could be included in a permit, and, for that reason, the staff could not point to any substantive errors or deficiencies in the Settlement Draft Permit but had to oppose all of the settlement provisions because they were prohibited third party agreements. This was the position asserted at the October 22, 2010 meeting of the parties and at the October 27, 2010 pre-hearing conference. The ED staff interpretation of the policy effectively negated settlement opportunities. That interpretation seemed to contravene the Commission policy adopted in 30 Texas Administrative Code § 40.1 that encourages resolution and early settlement of all contested matters through voluntary settlement procedures.

Understandably, the ED staff had difficulty reconciling its understanding of Commission policy regarding third party agreements and Commission policy regarding settlements. TPWD is aware of the ED's long-standing practice to encourage and negotiate settlements, and often these settlements require the revision of permit terms. TPWD understands that revised permit terms in settlement agreements must meet all statutory and regulatory requirements. Settlements may also include separate agreements between third parties that are necessary to support the settlement but that do not involve or require Commission authority or enforcement. If this practice equates to the ED staff's new understanding of a limited Commission policy regarding third party agreements, TPWD believes the ED staff has the authority to accept third party agreement terms as long as those are consistent with governing statutes and rules. It is still unclear what the ED refers to as "going beyond" the requirements of statutes and

[6] Attachment D.

rules. If "going beyond" means that the settlement terms are not required by statute, do not involve or require commission authority, and are to be implemented only between third parties, TPWD believes that is consistent with Commission practice. Like the ALJ and other parties, TPWD would appreciate guidance on this issue.

In response to the Settling Parties' October 1, 2010 letter to Executive Director Mark Vickery, after the pre-hearing conference and the filing of the PFD but before the Exceptions were filed, the parties received a November 30, 2010 letter from Stephanie Bergeron Perdue, Deputy Director, Office of Legal Services, Texas Commission on Environmental Quality.[7] That letter stated that "the ED has some reservations with including the terms of a third party settlement agreement in LCRA's water rights permit." No specific policy or policy understanding was referenced and reservations were not identified; rather the letter assured that "any hesitation with this settlement agreement is focused primarily on the policy and precedent of including terms and conditions in a permit when the commission staff has not been afforded an adequate opportunity to review the proposed terms and conditions." The response seems to veer from the October 27, 2010 ED staff position on third party agreements and instead focuses on possible substantive concerns regarding the settlement terms. This letter was startling in that it did not mention the position asserted by ED staff that all third party agreement terms were prohibited from inclusion in permits. This disconnect between staff and executive management may simply be a case of miscommunication; if so, TPWD stands ready to re-engage the ED staff in resolving any substantive concerns of the ED.

Ms. Bergeron Perdue's letter indicates that the ED staff believed it had not been afforded the time and opportunity to review the Settlement Draft Permit terms. However, this may be another instance of miscommunication as TPWD is not aware of any communication by ED staff that more time was needed to review the settlement terms. The ED staff did not request additional information from or additional meetings with the parties and did not ask for an abatement of the SOAH proceedings to allow more time for consideration of the settlement provisions. While TPWD supports the PFD and Proposed Order, TPWD also supports additional discussions with the ED and is hopeful that substantive discussions can lead to the ED's support of the Settlement Draft Permit. If such discussions cannot convene prior to Commission consideration of the PFD, TPWD respectfully joins the ED and the ALJ in requesting guidance from the Commission regarding third party agreement terms in permits.

V. Conclusion

Texas Parks and Wildlife Department supports the Proposal For Decision and the Proposed Order. TPWD respectfully requests the Commission deny the Executive Director's Exceptions to the Proposal for Decision and requests the Commission provide guidance regarding the inclusion of third party agreement terms in permits.

Respectfully submitted,

---

[7] Attachment E.

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of December, 2010, the original of the Texas Parks and Wildlife Department's Reply to the Texas Commission on Environmental Quality Executive Director's Exceptions to the Proposal for Decision was served by electronic transmission upon the Chief Clerk of the Texas Commission on Environmental Quality, and a copy was served upon all persons listed on the attached service list via hand delivery, facsimile transmission, electronic transmission or deposit in the U.S. Mail.

Colette Barron Bradsby

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TCEQ DOCKET NO. 2006-1819-WR

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LCRA
ENERGY • WATER • COMMUNITY SERVICES

October 1, 2010

Mark R. Vickery, P.G., MC-109
Executive Director
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

RE: Lower Colorado River Authority's Water Rights Permit Application No. 5731

Dear Mr. Vickery:

We are writing you on behalf of the Lower Colorado River Authority (LCRA), Texas Parks and Wildlife Department (TPWD), Coastal Conservation Association, Matagorda Bay Foundation, National Wildlife Federation, Sierra Club, and the City of Austin to ask for your assistance in reaching a final resolution regarding the above-referenced permit application.

The abatement of the contested case in this matter before the State Office of Administrative Hearings (SOAH) was allowed to expire on Thursday, September 30, without any resolution between the above-named parties, the STP Nuclear Operating Company[1] (collectively, "the Settling Parties") and the Texas Commission on Environmental Quality (TCEQ) staff. Despite our repeated inquiries and offers to meet with TCEQ staff over the last 2.5 months, we have been unable to obtain any specific information related to staff's remaining issues. Therefore, we would like to request your staff specifically identify in writing the remaining disputed issues and any proposed changes to the parties' proposed draft permit.

The significance of the agreement that the Settling Parties have reached cannot be overstated. This application, which was filed in 1999, was not referred to SOAH until October 2007, after staff finalized its draft proposed permit. Since that time, the Settling Parties engaged in a very concerted effort to resolve concerns related to the application and draft TCEQ permit. In early July of 2010, the Settling Parties reached an agreement as to the appropriate conditions to include in the permit. The process of reaching agreement on the proposed permit involved extensive analyses of various approaches and recent environmental flow studies. The Settling Parties joined in over 100 hours of face-to-face meetings and teleconferences and spent hundreds of additional hours working internally and with their consultants.

The proposed permit includes a specific operational approach that LCRA is confident it can implement. The permit has several inter-related components for meeting the recommended environmental flows, which were developed in reliance on the most recent and best available

[1] Although not a signatory, the STP Nuclear Operating Company has indicated that it has no objection to this letter, and the request for assistance, from the remaining Settling Parties.

science on instream flows and freshwater inflows for the Colorado River basin and Matagorda Bay. The form of Permit as now agreed by the undersigned is consistent with the approach contemplated by Senate Bill 3. While more complex than water rights permits TCEQ has issued in the past, the revised permit represents a package that all of the Settling Parties support. In short, the proposed permit represents a comprehensive, carefully constructed approach that sufficiently addresses environmental and water supply needs.

The parties recognize the complexity of the proposed draft permit and appreciate the time and effort that TCEQ staff initially put into reviewing it when it was provided to them in mid-July. After meeting with TCEQ staff in early August, the Settling Parties provided further suggested revisions to the permit in response to several of the specific concerns raised during that meeting. The Settling Parties were hopeful that TCEQ staff would support the issuance of the revised permit with these changes. Staff's written identification of remaining issues, as requested by this letter, would help all parties address outstanding concerns in a prompt and focused matter, and avoid jeopardizing the existing settlement agreement or the need to resort to formal discovery and contested case processes.

The parties would welcome the opportunity to meet with you and staff at your earliest convenience to discuss the revised draft permit and work toward a mutually acceptable resolution of this matter. If you have any questions, please do not hesitate to contact us.

Sincerely,

Parties to LCRA Application for Permit No. 5731

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Lyn E. Clancy
Attorney for the Lower Colorado River Authority

Robin A. Melvin
Robin A. Melvin w/permission LC
Attorney for the Conservation Alignment

Colette Barron Bradsby
Colette Barron Bradsby w/permission LC
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Ross Crow
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Myron J. Hess w/permission LC
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Attorney for Sierra Club

cc: Robin Smith, Attorney, TCEQ, Environmental Law Division
Blas Coy, Jr., Attorney, TCEQ, Office of Public Interest Counsel
Carolyn Ahrens, Attorney, Representing STP Nuclear Operating Company

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

APPLICATION OF THE LOWER COLORADO RIVER AUTHORITY FOR WATER RIGHTS PERMIT NO. 5731 TO DIVERT, STORE, AND USE WATER FROM THE COLORADO RIVER BASIN

BEFORE THE STATE OFFICE

OF ADMINISTRATIVE HEARINGS

JOINT STATUS REPORT & REQUEST FOR PRE-HEARING CONFERENCE

On behalf of the Lower Colorado River Authority (LCRA), Texas Parks and Wildlife Department (TPWD), Coastal Conservation Association, Matagorda Bay Foundation, National Wildlife Federation, Sierra Club, the City of Austin, and the STP Nuclear Operating Company (collectively, "the Settling Parties"), we are providing an update on the status of this matter.

After two years of detailed negotiations, the Settling Parties reached an agreement to resolve their disputes in this matter. Pursuant to Order #6, this matter was abated through September 30, 2010, to allow the Settling Parties time to determine if the remaining parties, the Texas Commission on Environmental Quality and the Office of Public Interest Counsel (TCEQ and OPIC) could also reach agreement.

The Settling Parties have made numerous attempts to engage the TCEQ in settlement negotiations to identify and resolve any disputed issues. Little progress has been made in this effort. The following provides a brief history of action on this matter since the Settling Parties reached agreement:

(1) The Settling Parties provided a revised draft permit to TCEQ staff on July 16, 2010.

(2) The Settling Parties met with TCEQ staff on August 3, 2010. TCEQ staff requested some specific reorganizational changes and highlighted some technical issues related to water availability under the permit. They also raised some concerns regarding TCEQ's

B

legal authority relative to a few provisions. Finally, some TCEQ staff expressed their discomfort with the increased level of detail and complexity in the permit conditions, relative to other water rights permits that have been issued by TCEQ. No objections were raised regarding the substantive environmental protection provisions in the revised draft permit.

(3) Since the August 3rd meeting, LCRA's technical experts have worked with TCEQ experts to address the water availability issues of concern.

(4) On September 3, the Settling Parties provided TCEQ staff with a new revised draft permit that addressed the reorganizational and technical issues TCEQ staff raised at the August 3rd meeting, and offered to meet with staff to discuss any outstanding legal or other concerns.

(5) Since that time, the only specific communication the parties have received was related to a legal issue, for which the Settling Parties have offered a resolution for staff consideration. The Settling Parties have repeatedly requested that TCEQ identify any remaining issues that should be addressed to achieve settlement and have repeatedly offered to meet with staff for further discussion. While no written communication has been received, a TCEQ representative stated that TCEQ staff still has a number of 'issues' with the permit.

(6) The abatement of this matter at SOAH (pursuant to Order No. 6) expired on September 30, 2010.

Accordingly, to further prompt resolution of this matter, the Settling Parties request that a prehearing conference be scheduled as soon as possible, and that, on or before the date of such conference, the parties be required to file their list of remaining disputed issues and a proposed procedural schedule, or no later than October 29, 2010, if the prehearing conference is scheduled after that date.

Respectfully submitted,

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By: Lyn E. Clancy
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By: Robin A. Melvin
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ATTORNEY FOR THE CONSERVATION ALIGNMENT

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Joint Status Report and Request for Pre-Hearing Conference was served by e-mail transmission followed by first-class U.S. mail on this 1 day of October, 2010, to the persons on the attached Service List.

Lyn E. Clancy

Lyn E. Clancy

SERVICE LIST
LOWER COLORADO RIVER AUTHORITY
TCEQ DOCKET NO. 2006-1819-WR
SOAH DOCKET NO. 582-08-0689

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Colette Barron

From: Robin Smith [RSMITH@tceq.state.tx.us]
Sent: Thursday, October 21, 2010 9:23 AM
To: Carolyn Ahrens; Ross Crow(External); Ben Vaughn; Robin Melvin; Lyn Clancy; Marisa Perales; Myron Hess; Blas Coy; Colette Barron
Cc: Doug Caroom; Emily Rogers; Greg Graml; Tabetha Jaske
Subject: RE: LCRA Excess Flows - with attachment this time.

Lyn and all: The Executive Director has decided to stay with the draft permit and not make any changes. I don't know if you still want to meet to discuss schedule or issues in the hearing? I know we are supposed to come with a proposed schedule. Robin

>>> Lyn Clancy <Lyn.Clancy@LCRA.ORG> 10/20/2010 11:26 PM >>>
With attachment this time. Sorry!
Lyn Clancy
Managing Associate General Counsel
Lower Colorado River Authority
P.O. Box 220
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Ph. 512-473-3378; mobile: 512-636-4036

From: Lyn Clancy
Sent: Wednesday, October 20, 2010 11:25 PM
To: Myron Hess; Colette Barron; Marisa Perales; Carolyn Ahrens; Ross Crow (External); Ben Vaughn; Robin Melvin; blas.coy@tceq.state.tx.us; Smith, Robin
Cc: Greg Graml; Emily Rogers; Doug Caroom; Tabetha Jaske
Subject: RE: LCRA Excess Flows

Counsel for Settling Parties, TCEQ, and OPIC:

In advance of this Friday's meeting, Myron suggested I circulate the revised draft permit that the Settling Parties are asking TCEQ to adopt, which incorporates the revised language the Settling Parties sent to Robin on Sept. 24th regarding reservoir construction/permitting timelines (Special Condition 6.E).

This redline shows changes from the draft as proposed in mid-July. It does not show changes from the original TCEQ draft. I think we can create that document as well if desired. This will take a bit more time, so let us know early tomorrow if you think that is needed.

Thanks,
Lyn

Lyn Clancy
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Bryan W. Shaw, Ph.D., *Chairman*
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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

November 30, 2010

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Re: Lower Colorado River Authority's Water Rights Permit Application No. 5731

Dear Ms. Clancy, Ms. Melvin, Ms. Bradsby, Mr. Crow, Ms. Carter, Mr. Hess, and Ms. Perales:

On behalf of the Executive Director (ED), I am responding to your letter dated October 1, 2010 concerning your client's settlement agreement on the above-referenced permit application. In addition, the ED also received Lower Colorado River Authority's (LCRA) November 4, 2010 correspondence. Finally, the Administrative Law Judge (ALJ) issued his Proposal for Decision (PFD) on November 22, 2010. TCEQ staff are reviewing LCRA's November correspondence and will provide the ED with a briefing on LCRA's correspondence as well as the ALJ's PFD upon concluding their review.

While the ED appreciates the parties' concerns that there was extensive analysis and discussion which required much time and financial resources to agree to these provisions, the ED has some reservations with including the terms of a third party settlement agreement in LCRA's water rights permit. Notwithstanding these concerns and as noted above, agency staff are reviewing LCRA's more detailed explanation of the proposed resulting changes to LCRA's permit as well as the ALJ's PFD.

Please be assured that the agency encourages settlement of contested permit applications and any hesitation with this settlement agreement is focused primarily on the policy and precedent of including terms and conditions in a permit when commission staff have not been afforded an adequate opportunity to review the proposed terms and conditions.

If you have any further questions, please call me at 239-0615 or Robert Martinez, Director, Environmental Law Division, at 239-0681.

Sincerely,

Stephanie Bergeron Perdue
Deputy Director, Office of Legal Services
Texas Commission on Environmental Quality

cc: Robert Martinez, Director, Environmental Law Division, TCEQ

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September 8, 2010

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Carter P. Smith
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Ms. Kellye Rila, Manager
Water Rights Permitting & Availability Section, MC 160
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, TX 78711-3087 ***Via E-mail***

Re: Lower Colorado River Authority (LCRA) Permit No. 5731

Dear Ms. Rila,

Texas Parks and Wildlife Department (TPWD) fully supports the revised draft Permit No. 5731 as provided to you September 3, 2010 by Lyn Clancy, LCRA counsel.

The parties appreciate the guidance and suggestions given by Texas Commission on Environmental Quality (TCEQ) staff at our August 3, 2010 meeting regarding the proposed permit. While TPWD understands the TCEQ staff preference for moving certain conditions and language into a separate accounting plan document, TPWD is concerned that doing so introduces uncertainties related to permit enforcement and amendment procedures in that no statutory authority addresses issuance or amendments of accounting plans. Other parties to this matter also expressed sensitivity to these issues, and ultimately, the settling parties decided that keeping all terms within the four corners of the permit is necessary to avoid uncertainty and to retain the integrity of the parties' settlement. TPWD believes the revised draft permit strikes an appropriate balance by clearly identifying future accounting plan requirements while retaining substantive compliance language in special conditions.

Thank you for your consideration in the matter. Should TCEQ have additional questions, please contact me at (512) 389-8899. TPWD staff and management are also available to meet with you to address any outstanding concerns.

Sincerely,

Colette Barron Bradsby

cc: Parties via E-mail distribution list

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