

Jon Niermann, *Chairman*
Emily Lindley, *Commissioner*
Bobby Janecka, *Commissioner*
Kelly Keel, *Executive Director*



Garrett T. Arthur, *Public Interest Counsel*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

February 1, 2024

Laurie Gharis, Chief Clerk
Texas Commission on Environmental Quality
Office of the Chief Clerk (MC-105)
P.O. Box 13087
Austin, Texas 78711-3087

**RE: IN THE MATTER OF THE MOTION TO OVERTURN THE EXECUTIVE
DIRECTOR'S AMENDMENT OF CERTIFICATE OF ADJUDICATION
NO. 14-5434 (AMENDMENT NO. 14-5434G) HELD BY THE
LOWER COLORADO RIVER AUTHORITY
TCEQ DOCKET NO. 2024-0078-WR**

Dear Ms. Gharis:

Enclosed for filing is the Office of Public Interest Counsel's Response to Motion to Overturn in the above-entitled matter.

Sincerely,


Eli Martinez, Senior Attorney
Assistant Public Interest Counsel

cc: Service List

TCEQ DOCKET NO. 2024-0078-WR

IN THE MATTER OF THE MOTION	§	BEFORE THE TEXAS
TO OVERTURN THE EXECUTIVE	§	
DIRECTOR'S AMENDMENT OF	§	
CERTIFICATE OF ADJUDICATION	§	COMMISSION ON
NO. 14-5434 (AMENDMENT 14-5434G)	§	
HELD BY THE LOWER COLORADO	§	
RIVER AUTHORITY	§	ENVIRONMENTAL QUALITY

OFFICE OF PUBLIC INTEREST COUNSEL'S RESPONSE TO
MOTION TO OVERTURN

TO THE HONORABLE COMMISSIONERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

The Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (TCEQ or the Commission) responds to the above-captioned Motion to Overturn as follows:

I. INTRODUCTION

Garwood Irrigation Company, LLC (Garwood or Movant) is the successor to Garwood Irrigation Company, previous owner of Certificate of Adjudication (COA) 14-5434C, which was issued to Garwood on October 13, 1998. TCEQ recently issued COA 14-5434G, which is an amendment to COA 14-5434C. Movant subsequently discovered a potential defect in the amended COA for which they seek relief. On January 16, 2024, Garwood filed a motion with the TCEQ requesting that the Commission correct or clarify Certificate 14-5434G to demonstrate that no instream flow requirements apply to diversions of water from the Colorado River at the Canal System Diversion Point or any other

diversion point downstream. Movant states that there was never an intent by any party to impose instream flow restrictions on diversions at and downstream of the existing diversion point, authorized under Certificate 14-5434C, and the proposed correction would more clearly effectuate that intent and prevent unintended misinterpretations in the enforcement of its terms. Garwood suggests this action could be accomplished by withdrawal and issuance of a corrected Certificate nunc pro tunc, or the Commission could overturn the issuance of Certificate 14-5434G for correction/clarification.

Based on a review of the motion and applicable legal provisions, OPIC finds that the relief sought is reasonable, does not impact the protectiveness of the originally articulated permit, and effectuates a useful clarification to Special Condition 4.E. OPIC therefore recommends that the motion be granted.

II. PROCEDURAL ISSUES

Title 30, Texas Administrative Code (TAC), Chapter 50 Subchapter G, addresses authority delegated to the ED and specifies applications for which the ED may take action on behalf of the Commission. Specifically included in these provisions are water rights matters. Where an application has not been formally contested, or is ineligible for formal challenge, Subchapter G contains a provision allowing the applicant, public interest counsel or other person the opportunity to file a motion to overturn (MTO) the ED's action on an application.¹

¹ 30 TAC § 50.139.

An MTO must be filed within 23 days after notice of approval of the application has been mailed² unless general counsel, by written order, extends the period of time for filing motions.³ Because the TCEQ mailed the order on December 21, 2023 the period to file a motion to overturn closed on January 16, 2024. Garwood's motion was timely filed on January 16, 2024, and OPIC therefore finds that Movant has the right to seek Commission review of the ED's approval, in addition to any rights of judicial review.

III. DISCUSSION

On December 15, 2023, the TCEQ issued COA 14-5434G, which is an amendment to the portion of COA 14-5434 that Lower Colorado River Authority (LCRA) acquired from the Garwood Irrigation Company in 1999. The portion acquired by LCRA was designated COA 14-5434C. That water right has a single diversion point located at the intake for LCRA's Garwood irrigation division, otherwise known as the Canal System Diversion Point. In 2018, the Commission issued an amendment to LCRA's water right, designated as COA 14-5434E. This amendment added diversion points both upstream and downstream of the Canal System Diversion Point and included various special conditions.

In 2023, LCRA submitted an application to amend the water right to allow diversion anywhere within the river segment, as well as the right to divert at the

² 30 TAC § 50.139(b).

³ 30 TAC § 50.139(e).

specific diversion points as previously authorized by COAs 14-5434C and 14-5434E. Certificate 14-5434G was issued as requested by LCRA on December 15, 2023. The special conditions of COA 14-5434G, which include instream flow requirements, were carried forward from COA 14-5434E.

Movant raises concerns with the way the instream flow obligations are described in Special Condition 4.E in COA 14-5434G, which refers to the “Wharton reach” without articulating in Special Condition 4.E an exception for diversions at or below the Canal System Diversion Point. Movant states that both the staff of the TCEQ and LCRA concur that there was no intent to have any in-stream flow conditions apply to diversions at that point. Water diverted at the Canal System Diversion Point by Garwood and its predecessors, and now by LCRA, has been supplied for over 100 years to landowners and rice farmers within what is now referred to as LCRA’s Garwood Division irrigation service area.

Further, Movant argues that Special Condition 4.E must be read in concert with Special Condition 4.B, which makes clear that the instream flow limits only apply upstream of the Canal System Diversion Point. Special Condition 4.B provides:

Diversions of water from the Colorado River downstream of USGS Gage No. 08158000, Colorado River at Austin, Texas, and upstream of the existing diversion point authorized under Certificate of Adjudication No. 14-5434C shall not occur when streamflow is

below the applicable instream flow requirement at the gage immediately downstream of the diversion, as set forth in Paragraphs C.- E. below, which shall apply as follows:...

LCRA responded to Garwood's motion on January 26, 2024, stating they did not intend, nor do they believe, that COA 14-5434E or the nearly identical provisions in COA 14-5434G impose any instream flow requirements at or below the Canal System Diversion Point. LCRA further asserts that this interpretation is supported by the approved Accounting Plan, which imposes no such requirements. Although LCRA believes the addition of the clarification sought by the Motion is unnecessary because the requested clarification to Special Condition 4.E sought by the Motion does not substantively change in any manner LCRA's interpretation of the instream flow obligations under COA 14-5434G, they are ultimately not opposed to the clarification sought by the Motion.

IV. CONCLUSION

The record indicates that the clarification sought by Movant is reasonable, does not impact the protectiveness of the originally articulated permit, and effectuates a useful clarification to Special Condition 4.E. Further, LCRA does not object to the Motion and agrees that the requested change comports with the intent of the amended COA. OPIC therefore recommends that the Commission grant the motion.

Respectfully submitted,

Garrett T. Arthur
Public Interest Counsel

By 
Eli Martinez
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CERTIFICATE OF SERVICE

I hereby certify that on February 1, 2024, the Office of Public Interest Counsel's Response to Motion to Overturn was filed with the Chief Clerk of the TCEQ and a copy was served to all persons listed on the attached mailing list via hand delivery, electronic mail, Inter-Agency Mail or by deposit in the U.S. Mail.


Eli Martinez

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Lower Colorado River Authority
TCEQ Docket No. 2024-0078-WR

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