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April 1, 2013

Michael Talbot
President
Lost Pines Groundwater Conservation District
908 Loop 230
P.O. Box 1027
Smithville, Texas 78957

Re: Applications by Lower Colorado River Authority for Operating Permits for Wells LCRA SB-1 through LCRA SB-5; Applications by Heart of Texas Suppliers, LP and Mesquite Water Properties, LP for Operating Permits and Transfer Permits for Malish #1 and Malish #2 Wells; Application by Forestar (USA) Real Estate Group, Inc. for Well Registrations, Operating Permits, and Transfer Permits for Well Nos. 1-10.

Mr. Talbot:

On behalf of Environmental Stewardship, I am submitting these comments regarding the applications of Forestar (USA) Real Estate Group, Inc., Lower Colorado River Authority, and Heart of Texas Suppliers, LP for Operating Permits and Transfer Permits. Environmental Stewardship is a non-profit corporation and the owner of real property located in Bastrop County.

In processing these applications, Lost Pines Groundwater Conservation District (LPGCD or District) has not complied with the requirements of Texas Water Code § 36.113(d). This provision of the Water Code requires that the District consider certain factors when granting a permit. As discussed below, the District has not considered these factors in a manner that would support issuance of the requested permits.

The District has not considered whether the proposed use of water unreasonably affects existing permit holders as required by Texas Water Code § 36.113(d)(2).

Pursuant to Texas Water Code § 36.113(d)(2), the District is required to consider whether the use of water authorized by a proposed permit would unreasonably affect existing groundwater users. The March 20, 2013 memoranda of Joe Cooper constitute the

only documents by which the District has explained its analysis of the applications thus far. These memoranda fail to identify which existing permits are the most vulnerable to impacts by the proposed permits, how those potentially vulnerable permits would be impacted, or any logic to support a determination that the impact will not be unreasonable. The memoranda for the Heart of Texas and LCRA permits make absolutely no mention of existing wells or permits. The memorandum for the Forestar permit mentions in passing that there are no permitted or registered Simsboro wells within 5,000 feet of the proposed well locations, but this memo fails to determine the location of the existing wells most likely to be impacted, and fails to address the impact of the proposed use on those wells. Given the amount of pumping involved in these proposed permits, and the breadth of the drawdowns that will be caused, the proposed permits will unquestionably impact numerous existing permit holders. Since the District has not considered these impacts, the District has failed to consider a factor which the Legislature has required it to consider. Thus, any decision to issue the permits would be arbitrary and capricious."

In considering the impact of the proposed water uses the District should account for impacts that these uses may have upon permits to withdraw surface water. Without having meaningfully considered the impact of the proposed uses upon the Colorado River or the Brazos River, the District has not meaningfully considered the impact of the proposed permits upon authorizations to withdraw water from those surface water resources. As previously discussed during the desired future conditions appeal process, many surface water rights holders depend upon these streams, and any reduction in the underflow into these streams from the groundwater has the potential to adversely impact surface water permits.¹

The District has not considered whether the proposed use of water is consistent with the District's approved management plan.

Mr. Cooper's Memoranda contain a subject heading related to consistency of the proposed uses with the District's management plan, but he has provided no analysis of this issue whatsoever. Instead, these memoranda merely assert that "The proposed use is not inconsistent with the District Management Plan." These memoranda offer no explanation of what the District's management plan requires of the proposed permits, nor how the proposed permits meet these requirements. This bare assertion does not demonstrate consideration of the issue as required by the Texas Water Code.

¹ See Attachments 1, 2, and 3 to this letter, addressing likely impacts of increased groundwater withdrawals upon surface water rights in the Colorado and Brazos River Basins.

The District has not meaningfully considered whether the proposed use of water unreasonably affects surface water resources.

Pursuant to Texas Water Code § 36.113(d)(2), the District is required to consider whether the proposed use of water unreasonably affects existing surface water resources. In addressing this issue, Mr. Cooper's memoranda offer four allegations:

- (1) The Groundwater Availability Model (GAM) is not a good tool to effectively evaluate impacts to surface water within the district based on the application provided;
- (2) The majority of the flow in the Colorado River is controlled by the release of water from the Highland Lakes;
- (3) The applications are located a great distance from the Colorado River, so the applications will likely have little impact on the flow of the Colorado River; and
- (4) There is no evidence that the applications will impact smaller streams and rivers.

These assertions fail to demonstrate a reasoned consideration of the impact of the applications on either the Colorado River, or other surface water resources as required by statute.

Throwing your hands in the air does not constitute reasoned consideration of an issue. Yet, this is essentially the position taken by Mr. Cooper in saying that the GAM does not provide a good tool to effectively evaluate impacts to surface water within the district based on the applications before him. By statute, the District bears a *duty* to consider such impacts. If the GAM is not a good tool for this purpose, then the District bears a duty to find a tool that enables a meaningful consideration. If more detailed information would allow the GAM to be used, then the District bears a duty to develop this information, either through its own efforts or by requiring that an application include such information. There is a substantial body of scientific literature and evidence on this issue that the District has not bothered to identify or consider. To be clear, lamenting the perceived deficiencies of the GAM is an attempt to dodge the issue – it is not a means of considering the issue.

Nor does saying that supplies from the Highland Lakes control the quantity of water in the Colorado River constitute reasoned consideration of this issue. The reliability of the Colorado River as a surface water resource critically depends on the quantity of underflow from the groundwater into the River. If that underflow is reduced or eliminated due to the proposed pumping, then surface water users and riverine wildlife become more dependent upon water from the Highland Lakes. To blithely say that it is acceptable to ruin the value of the Colorado River as a natural resource because the District believes that the Highland Lakes can repair the consequent damage does not constitute an analysis

of the impacts of the proposed pumping on the Colorado River itself as a natural resource.

Furthermore, to baldly assert that the permits will have no impact on the Colorado River due the distance from the wells to the Colorado River does not constitute reasoned consideration of the issue. Merely saying this does not make it true. The courts have previously rejected such conclusory reasoning by an administrative agency, as in the case of *City of Waco v. Texas Commission on Environmental Quality*. Moreover, the memoranda themselves conclude that the permits will induce aquifer drawdowns throughout the District, including the area of the Colorado River.

Even if the District could demonstrate the consideration of potential impacts upon the Colorado River, the District has failed to demonstrate meaningful consideration of impacts upon other surface water resources. The memorandum for the LCRA permit specifically acknowledges that most of the drawdown from the authorized wells is near Lake Bastrop. Yet, no analysis has been provided regarding how Lake Bastrop will be impacted by these proposed wells. With regard to other surface water resources, the memoranda merely state that "there is no evidence that the applications will impact smaller streams and rivers." Without identifying the streams and rivers most vulnerable to an impact by the proposed wells, the District cannot possibly consider the impact upon those surface water resources. Moreover, this statement reflects an effort by the District to bury its head in the sand more than an effort to consider the issue. Has the District made any effort whatsoever to obtain information regarding potentially impacted streams and rivers, or has the District made any effort to require that the applicant develop such information? An applicant properly bears the burden to demonstrate that the requested permit should be granted. To observe the absence of evidence on a question does not establish that this burden has been met.

The District has not considered whether reasonable diligence will be used to protect groundwater quality.

In evaluating whether each applicant has agreed that reasonable diligence will be used to protect existing groundwater quality, Mr. Cooper's memoranda merely parrot the language of the statute. No explanation has been provided as to how each applicant intends to protect groundwater quality, or how these efforts constitute reasonable diligence. The mere recitation of statutory language does not demonstrate a reasoned consideration of this factor.

The District has not considered whether the application conforms with the District's Rules.

At Rule 5.2.C(1), the District's rules provide that the Board shall consider whether the application conforms with the requirements prescribed by the District Rules. In

setting forth his evaluation of whether the applications conform with the District Rules, Mr. Cooper's memoranda merely state that each application is "Administratively Complete." No analysis or evaluation of substantive compliance with the District's rules is offered whatsoever. Conformance with the District's rules properly requires more than a mere finding that an application is administratively complete. Having considered no analysis of the *substantive* requirements of the District's rules, and how the applications meet these *substantive* requirements, the District has failed to consider whether the applications conform to all applicable requirements of the District's Rules. In this manner, the District has failed to follow its own rules in considering the applications, thereby rendering any decision to grant the applications arbitrary and capricious.

Prior to granting the permits, the District should take steps to facilitate the implementation of adaptive management strategies.

A decision on the pending permit applications constitutes only one step in the management and conservation of the affected groundwater. Prior to issuing these permits, the District should take steps to ensure that it can evaluate the impacts of the permits, and retain the District's ability to make adjustments in the future in light of drought conditions, and an improved understanding of the impacted groundwater system.

To this end, Environmental Stewardship urges the District to reconsider a resolution previously tabled at the District's June 16, 2010 meeting that commits the District to take reasonable steps to establish monitoring and enforce its management plan as needed to ensure effective implementation of the District's management plan, including the consideration of the interaction between surface water and groundwater. Furthermore, Environmental Stewardship encourages the District to more clearly preserve its adaptive management options in the terms of the proposed permits. To this end, the District should make clear in each permit the adjustments which may be made as the result of future production limits adopted by the District. Environmental Stewardship specifically asks that the following language be added to this provision in each permit: "The adoption of such production limits may result in a significant reduction in the rate or annual withdrawal amount authorized under this permit, possibly to exceed a 50% reduction." Of course, the District already has the authority to make such reductions, but given that the aggregate pumping allowed by existing and pending permits totals more than four times the modeled available groundwater for the Simsboro aquifer, it is appropriate to place each permittee on clear notice that pumping may be significantly reduced in the future in light of the limited water available.

Environmental Stewardship encourages the District to apply its financial resources towards a better understanding of the types of technical issues raised by these permits, in order to determine any necessary adjustments in the District's groundwater management strategies. The application of even a portion of the District's current financial reserves towards this purpose would help to provide a sound technical basis for the District's

decisions, thereby furthering the District's mission and reducing the likelihood of litigation. Should the District have an interest in working cooperatively in such technical studies, Environmental Stewardship would be willing to attempt to provide funding to supplement funding provided by the District.

Conclusion

For these reasons, Environmental Stewardship asks that the District table action and return these permit applications to the General Manager so that adequate information may be developed to enable a meaningful consideration of the issues relevant to each application, including the impacts of the proposed uses upon existing permits and surface water resources. It would be arbitrary and capricious for the District to move forward to issue the permits without taking such action to adequately address the issues raised above. Environmental Stewardship further asks that the District consider and adopt the attached resolution, and that the District add language in each permit to clarify its authority to adjust the production limits contained in each permit in light of future District production limits. Environmental Stewardship asks that the District consider this letter, and the issues raised herein, during its April 17th meeting prior to consideration of the permits addressed by this letter.

Respectfully Submitted,



Eric Allmon
Counsel for Environmental Stewardship

cc: Billy Sherrill, *Vice President, LPGCD Board of Directors*
Doug Prinz, *Secretary-Treasurer, LPGCD Board of Directors*
David Fleming, *Member, LPGCD Board of Directors*
Carl Steinbach, *Member, LPGCD Board of Directors*
Ken Daughtry, *Member, LPGCD Board of Directors*
Keith Hansberger, *Member, LPGCD Board of Directors*
Michael Simmang, *Member, LPGCD Board of Directors*
Alice Darnell, *Member, LPGCD Board of Directors*
Travis McPhaul, *Member, LPGCD Board of Directors*
Joe Cooper, *General Manager, LPGCD*
Jim Tatten, *Assistant General Manager, LPGCD*
Robin Melvin, *General Counsel, LPGCD*
The Hon. Paul Pape, *Bastrop County Judge*
The Hon. Paul Fischer, *Lee County Judge*

ATTACHMENT 1

Number of Water Rights Negatively Impacted with 25,000 ac-ft/yr removed				
Ac-Ft/Yr Range:	>500	100-500	1-10	<1
No. Water Rights impacted:	4	11	228	890
Average Ac-Ft/Yr Impacted:	3,271	2,421	889	231
				TOTAL
				1,158
				7,356

Average % Reduced:	>= 4%	3.0-3.9%	2.0-2.9%	1.0-1.99%	<1.0%	TOTAL
No. Reduced:	2	8	25	237	879	1,151

- USING ONLY WRID WITH 0 TARGET CHANGE (UNCOMPLICATED WATER RIGHTS)
DOES NOT CONSIDER WATER RIGHT RECORDS THAT HAD NO CHANGE OR POSITIVE CHANGE

FLOW to Bay (avg, ac-ft/yr 1940-1998)

	<u>Average</u>	<u>Change</u>
BASELINE (TCEQ R3)	876,591	
With 25,000 af/y reduction in nat flow at Bastrop	860,395	-16,196
With 40,000 af/y reduction in nat flow at Bastrop	855,069	-21,522

ATTACHMENT 2

Colorado River Water Rights

Number of Water Rights Negatively Impacted with 40,000 ac-ft/yr removed					
Ac-Ft/Yr Range:	>500	100-500	10-100	1-10	<1
No. impacted:	5	14	34	303	798
Average Ac-Ft/Yr Impacted:	5,383	3,161	1,245	800	237
					TOTAL
					1,154
					10,826

Average % Reduced:	>= 4%	3.0-3.9%	2.0-2.9%	1.0-1.99%	<1.0%
No. Reduced:	16	10	116	473	547
					TOTAL
					1,162

- TCEQ WAM Run 3 for Colorado River with 1401 Water Rights (1940-1998)

- Flow Adjustment Record was used to reduce naturalized flow at Bastrop by 40,000 ac-ft/yr

- Comparing Volume Reliability Indexes

* **Uncommitted Highland Lakes Water Right was adjusted -6,500 ac-ft/yr to avoid taking lakes to zero**

* **Freshwater inflows to Matagorda Bay are reduced 21,522 ac-ft/yr.**

USING ONLY WRID WITH 0 TARGET CHANGE (UNCOMPLICATED WATER RIGHTS)

DOES NOT CONSIDER WATER RIGHT RECORDS THAT HAD NO CHANGE OR POSITIVE CHANGE

Scenario Impact on Bay

FLOW to Matagorda Bay (avg, ac-ft/yr 1940-1998)

	Average	Change
BASELINE (TCEQ R3)	876,591	
With 25,000 af/y reduction in nat flow at Bastrop	860,395	-16,196
With 40,000 af/y reduction in nat flow at Bastrop	855,069	-21,522

ATTACHMENT 3

Brazos River Water Rights

Number of Water Rights Negatively Impacted with 265,700 ac-ft/yr removed					
Ac-Ft/Yr Range:	>1000	100-999	10-99	1-9.9	<1
No. impacted:	7	27	126	273	451
Average Ac-Ft/Yr Impacted:	17,044	7,151	3,910	916	147
					TOTAL
					884
					29,168

Average % Reduced:	>= 10 %	5.0-9.9%	2.0-4.9%	1.0-1.9%	<1.0%
No. Reduced:	6	159	191	182	355
					TOTAL
					893

- TCEQ WAM Run 3 for Brazos River with 1307 Water Rights (1940-1997)
- Flow Adjustment Record was used to reduce naturalized flow at Hearn by 265,700 ac-ft/yr
- Comparing Volume Reliability Indexes
- **No changes were made to any water rights records**

USING ONLY WRID WITH 0 TARGET CHANGE (UNCOMPLICATED WATER RIGHTS)
DOES NOT CONSIDER WATER RIGHT RECORDS THAT HAD NO CHANGE OR POSITIVE CHANGE

ATTACHMENT 4

DRAFT

RESOLUTION

**A RESOLUTION TO PROTECT THE CARRIZO-WILCOX AQUIFER & COLORADO RIVER
GROUNDWATER–SURFACE WATER RELATIONSHIP
IN THE DESIRED FUTURE CONDITIONS OF
GROUNDWATER MANAGEMENT AREA-12**

WHEREAS, the Carrizo-Wilcox Major Aquifer and the Colorado River are important natural water resources to the ecology, citizens and economic viability of the Lost Pines Region; and

WHEREAS, the groundwater conservation districts of Groundwater Management Area 12 (collectively GMA-12) are required by Sec. 36.108. Water Code to work jointly to adopt desired future conditions for each aquifer within their jurisdictions; and

WHEREAS, Texas Parks and Wildlife Department, the National Wildlife Federation, Lone Star Chapter of the Sierra Club, Environmental Defense Fund, and Environmental Stewardship have urged that the five groundwater conservation districts in the GMA-12 protect the groundwater – surface water relationship between the Carrizo-Wilcox Major Aquifer and the Colorado and Brazos rivers, and their associated streams and springs; and

WHEREAS, the citizens of Bastrop County in Opportunity Bastrop County, an initiative of the Bastrop County Commissioners' Court recognize the importance of the groundwater and surface water resources to the near- and long-term future of our region (adopted by the Court on December 10, 2007 and by the city of Smithville on May 13, 2008); and

WHEREAS, the environmental goal of Opportunity Bastrop County is to retain and enhance the rural character of Bastrop County while encouraging growth that is in balance with human and environmental needs, both today and in the future; and

WHEREAS, the Colorado River gains water from the Simsboro and other aquifers formations as it passes through Bastrop County^{1,2,3}; and

WHEREAS, the Colorado Regional Water Planning Group (Region K), which includes Bastrop County, has predicted that with currently planned groundwater pumping in the region³ the Colorado River will become a "losing river" by 2050; and

WHEREAS, the Colorado Regional Water Planning Group (Region K), passed a resolution in support of sustainable management of the groundwater resources of the region discouraging over-pumping of the aquifers³; and

WHEREAS, the Carrizo-Wilcox Aquifer is an artesian aquifer, and that artesian pressure creates springs and seeps that provide surface water outflows; and

WHEREAS, there are a number of State, Regional, County, and local government and public stakeholder organizations that are charged with protecting these resources for today and the future including the Lower Colorado Regional Water Planning Group, the Lower Colorado River Authority, the Lost Pines Groundwater Conservation District, and county and city governments; and

WHEREAS, the Lost Pines Groundwater Conservation District Board of Directors desire that these important groundwater and surface water resources be protected from unintended impacts to the extent reasonably available within the context of the laws, regulations, and codes of the State of Texas.

NOW, THEREFORE, BE IT RESOLVED THAT:

The Lost Pines Groundwater Conservation District, in accordance with the parameters of its' enabling legislation, shall take all reasonable actions necessary to establish monitoring and enforce the requirements of its management plan, to ensure that the desired future conditions established by the District which include consideration of the interaction between groundwater and surface water are maintained for the citizens of Bastrop and Lee Counties.

ADOPTED, ORDERED AND ENTERED OF RECORD IN THE MINUTES

This _____ day of _____, 2010.

**Requested additional language to be included in the
Desired Future Conditions for
Groundwater Management Area 12**

Protective Groundwater-Surface Water Safeguards – Having considered the water needs of Central Texas and the potential water available from the aquifers under the jurisdiction of the Lost Pines Groundwater Conservation District (LPGCD) within Groundwater Management Area 12 (GMA-12), and in consideration of the potential irreversible changes that might result from implementation of the desired future conditions described herein, the LPGCD is committed to investigating and installing a monitoring program in the District that will provide an early warning of potential unintended impacts to the Colorado River, streams and springs within Bastrop and Lee counties.

Realizing the social, economic and ecological value of these surface water resources to Bastrop and Lee counties, it is important that these resources be monitored in order to detect significant changes in the historical groundwater – surface water relationships that might have unintended adverse impacts. Historical records¹ and recent studies² indicate that the Colorado River has been, and remains, a gaining river as it passes through the river segment associated with the Carrizo-Wilcox aquifer group, especially the Simsboro outcrop. The historical low-flow studies conducted by the USGS¹ in 1918 and flow-duration curve generated by Dalton¹ in 2003 indicate that these groundwater formations contribute a volume of water that approximates 25,000 acre-feet per year to the Colorado River (26,100 acre-feet per year was used to calibrate the Carrizo-Wilcox groundwater availability model). The Lower Colorado Regional Water Planning Group (Region K) estimates that over-pumping of these aquifers could cause this historical relationship to change from a “gaining” to a “losing” river by 2050³, and recent GAM studies⁴ of the region have shown a recent decline in surface water outflows. It is reasonable and prudent therefore that the District take appropriate actions to monitor and protect against such impacts should they start to occur.

Monitoring of the groundwater–surface water relationship of the Colorado River and the Gulf Coast aquifer has been accomplished in the coastal portion of the basin providing a model for a potential monitoring project. The LCRA-SAWS^{5,6,7} Water Project developed and implemented such a program in Wharton and Matagorda counties where the river is associated with the Gulf Coast Aquifer. Such a project, where shallow wells are placed in close proximity to existing river and stream gage stations, would likely provide an adequate means of monitoring this relationship. The information gained would likewise be helpful in guiding remedial actions should they be needed in order to protect the integrity of the aquifers and surface waters. Therefore, the LPGCD will evaluate this program and determine whether it would be suitable for our segment of the basin and, if appropriate, install a similar system in the region.

Action levels are an important element of any program that is designed to provide early warning along with an opportunity to take remedial actions to prevent unintended impacts from occurring. As such, the District will set action levels that are linked to management actions to be taken in the event the action levels are met. These action levels and management actions will be incorporated into the management plans and rules of the District. These action levels and management practices will be a part of the District's ongoing adaptive management practices that can be adjusted as experience is gained in monitoring and studying the groundwater-surface water relationship.

1. Dutton, Alan R., Bob Harden, Jean-Philippe Nicot, and David O'Rourke. February 2003. Groundwater Availability Model for the Central Part of the Carrizo-Wilcox Aquifer in Texas, Appendix B – Surface Water- Groundwater Interaction in the Central Carrizo-Wilcox Aquifer.

2. Saunders, Geoffrey P. June 2009. Low-Flow Gain-Loss Study of the Colorado River in Bastrop County, Texas.

3. Lower Colorado Regional Water Planning Group. January 2006. Adopted Region “K” Water Plan for the Lower Colorado Regional Water Planning Group.

4. Hutchinson, Bill. November 18, 2009. Presentation to the Lost Pines Groundwater Conservation District Board: Joint Planning in Groundwater Management Area 12.

5. LSWP Groundwater for Agriculture Team: URS Corporation, Baer Engineering and Environmental Consulting, Inc. June 2006. Shallow Monitoring Well Installation Wharton and Matagorda Counties, Texas.

6. LSWP Groundwater for Agriculture Team: URS Corporation, Baer Engineering and Environmental Consulting, Inc. March 2008. Monitoring Data Report from April 2006 to December 2007 for the LSWP Shallow Wells Installed in Wharton and Matagorda Counties, Texas.

7. URS Corporation, INTERA, and Baer Engineering and Consulting. April 2009. Development of the LCRB Groundwater Flow Model for the Chicot and Evangeline Aquifers in Colorado, Wharton, and Matagorda Counties.