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ADMINISTRATIVE HEARINGS  
Jessie Harbin, CLERK

# State Office of Administrative Hearings

Kristofer S. Monson  
Chief Administrative Law Judge

July 20, 2020

Natasha J. Martin  
Re Client: Lost Pines Groundwater Conservation District  
Graves Dougherty Hearon & Moody, P.C.  
401 Congress Ave., Suite 2200  
Austin, TX 78701

VIA E-FILE TEXAS

**RE: Docket No. 952-19-0705; Application of Lower Colorado River Authority for Operating and Transport Permits for Eight Wells in Bastrop County, Texas**

Dear Ms. Martin:

The parties filed exceptions and replies to the Proposal for Decision (PFD) in this matter. In response to the exceptions, the Administrative Law Judges (ALJs) recommend making some changes to the PFD. Many other requests for changes will be denied.

The parties repeat many of the arguments they made in closing. Because these arguments have already been addressed in the PFD, the ALJs do not recommend any changes be made in response to these arguments and decline to address them in detail in this letter. These arguments include:

- The General Manager (GM)'s arguments regarding binding commitments for use of the water (Finding of Fact 54);<sup>1</sup>
- The GM's arguments concerning a bed-and-banks permit and waste (Findings of Fact 77-81 and Conclusions of Law 11-13);
- Aqua and Elgin's arguments relating to the role of the GAM and which GAM should be used (Findings of Fact 26-28);

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<sup>1</sup> The GM argues that in Conclusions of Law 13c and 13d, the ALJs conclude that monitoring wells substitute for binding contracts. The ALJs made no such conclusion; the ALJs suggest that any confusion is the result of changes to subsection numbers that resulted from deleting the subsection on binding commitments.

- Aqua and Elgin’s exceptions relating to modeled available groundwater, the Special Conditions, and the District’s duty to manage total groundwater production on a long-term basis to achieve the applicable DFC. (Findings of Fact 36-37);
- Lower Colorado River Authority (LCRA)’s objections to the inclusion of the phasing formula and whether the relevant DFC should be the DFC in place at the time of the requested increase in pumping (Findings of Fact 55-57); and
- Environmental Stewardship’s requests that the PFD be revised to make violations of monitoring well agreement enforceable permit violations (Finding of Fact 66).

### General Arguments

Several of the parties filed exceptions that do not address specific findings of fact or conclusions of law. The ALJs will first address those exceptions.

In their exceptions, the Brown Landowners express their disagreement with the ALJs’ factual findings and their determination of expert credibility and request that the entire PFD be withdrawn. The Brown Landowners would have the ALJs rely on a memo by an expert who was hired by LCRA but who did not testify and was not available for cross examination and on the testimony of a non-expert landowner. The ALJs explained their reasoning in the PFD and will decline to withdraw the PFD, as the Brown Landowners request.

Aqua and Elgin jointly filed exceptions, some of which are discussed above and below. These exceptions assert that the PFD reflects “permitting by rule.” The PFD addresses the various factors that went into the analysis, which the ALJs do not believe reflects permitting by rule.

In its exceptions, Recharge largely reurges its closing arguments about the relevant legal standard and about whether LCRA met its burden of proof. The ALJs disagree, for the reasons set out in the PFD. Also for the reasons set out in the PFD, the ALJs decline to find that the District has the authority to require a mitigation fund, as Recharge argues.

Environmental Stewardship requests specific changes to the draft permit to ensure the monitoring well agreement is enforceable. Specifically, Environmental Stewardship requests that parties be allowed to participate in the permit renewal process to evaluate impacts to surface water and would like an opportunity to provide comments on the monitoring well agreement relating to surface water monitoring. The ALJs have found that LCRA has met its burden to show its pumping alone (through all phases) will not have unreasonable impacts to surface water and that was not a basis to deny the permit. The requirement for surface water monitoring wells is to make sure the District can meet its responsibility of protecting surface water from cumulative impacts. Therefore, there is no basis to require or allow further participation on LCRA’s impacts to surface water.

Environmental Stewardship also requests that monitoring well data be made publicly accessible. The ALJs find that this is a policy decision for the District that is outside the scope of this hearing and will not make a recommendation based on this exception.

Environmental Stewardship additionally ask that the findings and conclusions acknowledge that environmental flow targets and the frequency with which they are met provide relevant, reliable, and useful data that should be considered in determining whether proposed groundwater pumping will unreasonably impact surface water resources. This issue was specifically addressed in the PFD, and the ALJs will not address it further.

### **Other Exceptions**

The ALJs will address some of the parties' arguments to specific statements within the PFD, and to findings of fact and conclusions of law.

LCRA argues that there is no basis in the record for a statement on page 31 of the PFD that, in the future, up to half of LCRA's groundwater pumping under the permit may be sourced by surface water. The ALJs note that the same statement is supported in footnote 94 with a citation to GM Exhibit 13. The statement is supported in the record and the ALJs make no revisions to the statement.

LCRA also requests that Finding of Fact Nos. 47-50 each be revised by adding "Under the Revised Draft Operating Permits" so not be in conflict with Finding of Fact No. 54. The ALJs make no revisions based on this comment because Finding of Fact No. 46 makes it clear that Findings of Fact Nos. 47-50 are referring to the Revised Draft Operating Permit.

Although Aqua and Elgin argue that Conclusion of Law 6 is misleading and not helpful, the ALJs note that it restates the law and will not recommend amending it.

### **Recommended Changes**

The ALJs agree, however, that the following changes should be made to the findings of fact and conclusions of law:

Finding of Fact 3: The last sentence of Finding of Fact 3 should be amended to read "The water was to be used for all beneficial uses under Chapter 36 of the Texas Water Code."

Finding of Fact 6: Finding of Fact 6 should be amended as follows to clarify that LCRA objected to the draft operation permit provisions: "Several persons disagreed with the issuance of the Draft Permits, and LCRA challenged some of the Draft Operation and Transport Permit provisions."

Finding of Fact 10: The ALJs agree with Elgin that this Finding of Fact No. 10 should be amended to reflect that Elgin has permits issued by the Lost Pines Groundwater Conservation District. This Finding should be amended to read as follows:

Elgin has a retail public utility that provides retail water utility service within its certificated service area. The city, which is located in the greater Austin area, expects continued and rapid growth. Elgin has four wells, permitted by the District, that are all partially or wholly completed within the Simsboro Formation. Two of Elgin's wells are in the outcrop area of the Simsboro Formation, with the wells screened partially in both the Simsboro and Hooper Formations. Its other two wells are located in the downdip and are entirely screened within the Simsboro Formation

Finding of Fact 38: The word "greater" should be deleted.

Finding of Fact 48: The word "which" and the comma preceding it should be deleted.

Finding of Fact 52: The word "demonstrated" should be replaced with "demonstrate."

Finding of Fact 57: The ALJs agree with the GM that a correction should be made to the citation in Finding of Fact 57. The reference should be to Special Condition (3)(e)(iii), not (ii).

Finding of Fact 58: The ALJs agree with the GM that a correction should be made to Finding of Fact 58. The reference should be to Special Condition 5, not to Special Condition 7.

Finding of Fact 60: After further reflection, the ALJs agree with LCRA, the GM, and Recharge that Finding of Fact 60 should be removed as potentially in conflict with Texas Water Code §36.114(b).

Additionally, the ALJs agree with the GM that certain findings of fact, listed in the GM's attachment A as Findings of Fact Nos. 38-41 should be added. These are:

38. The TWDB executive administrator's estimate of the current and projected amount of the groundwater produced under exemptions granted by District Rules and Texas Water Code §36.117 is a factor for the District to consider when reviewing an application and managing the DFC.

39. The amount of groundwater authorized under permits previously issued by the District is a factor for the District to consider when reviewing an application and managing the DFC.

40. A reasonable estimate of the amount of groundwater that is actually produced under permits issued by the District is a factor for the District to consider when reviewing an application and managing the DFC.

41. Yearly precipitation and production patterns are factors for the District to consider when reviewing an application and managing the DFC.

Conclusion of Law 3: The word “drilling” should be replaced with “production.”

Conclusion of Law 13e. Both the GM and LCRA argue that Conclusion of Law No. 13e should be modified to remove “monitoring well system” because it improperly inserts surface water monitoring into the groundwater formula. The ALJs agree and make the District GM’s proposed revisions to Conclusion of Law No. 13e:<sup>2</sup>

That a monitoring well agreement entered into between LCRA and the District shall include wells, gauges, or any scientifically supported tool to monitor surface water.

The ALJs make the corresponding change to the PFD on the last paragraph of page 54 as follows:

The ALJs find that, in light of the fact that the GAMs show potential impacts to surface water resources caused by LCRA and District-wide pumping, ~~any monitoring well system~~ the monitoring well agreement between LCRA and the District must include monitoring wells that could monitor effects on surface water resources. ~~Thus, the ALJs recommend amending the definition of “Monitoring Well System” contained in Special Condition (4)(a) in the Revised Draft Operating Permit to require that a monitoring well system must monitor such effects.~~

Conclusion of Law 13f should be deleted, consistent with Finding of Fact 60, above.

Sincerely,



Rebecca S. Smith  
Administrative Law Judge



ROSS HENDERSON  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS

cc: All parties of record

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<sup>2</sup> The ALJs reject LCRA’s additional argument that Finding of Fact Nos. 31 and 32 and Conclusion of Law No. 13e should be removed because it should not have to solely bear the burden to have surface water monitoring wells.