

**SOAH DOCKET NO. 952-19-0705**

<b>APPLICATIONS OF LOWER COLORADO RIVER AUTHORITY FOR OPERATING AND TRANSFER PERMITS FOR EIGHT WELLS IN BASTROP COUNTY, TEXAS</b>	<b>§ § § § §</b>	<b>BEFORE THE LOST PINES GROUNDWATER CONSERVATION DISTRICT</b>
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**RECHARGE WATER, LP'S RESPONSE TO LCRA'S MOTION FOR REHEARING**

TO THE BOARD OF DIRECTORS OF LOST PINES GROUNDWATER CONSERVATION DISTRICT:

Recharge Water, LP ("Recharge") files this Response to the Lower Colorado River Authority's ("LCRA") Motion for Rehearing in accordance with the Lost Pines Groundwater Conservation District's (the "District") counsel's direction to the parties to provide additional briefing on the rehearing issues by March 10, 2022. In support of this Response, Recharge shows the following:

**I. SUMMARY OF RESPONSE**

The Lower Colorado River Authority ("LCRA") failed to meet its burden of proof in this proceeding. As applicant, LCRA was obligated to prove, among other things, that its applications for 25,000 acre-feet per year from a well field along the GLR property line:

- 1) do not unreasonably affect existing permit holders;<sup>1</sup> and
- 2) minimize as far as practicable the drawdown of the water table or the reduction of artesian pressure or lessen interference between wells.<sup>2</sup>

LCRA's obligation to prove its compliance with these legal standards was the subject of both prefiled testimony and extensive testimony and documentary evidence during the hearing on the merits. Yet, the original Proposal For Decision ("Original PFD") contains virtually no citations

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<sup>1</sup> TEX. WATER CODE § 36.113(d)(2).

<sup>2</sup> District Rule 5.2(d)(9).

to any of the six days of live testimony and numerous hearing exhibits conclusively establishing LCRA has not met these legal requirements.

In the Original PFD, the Administrative Law Judges (“ALJs”) ignored all testimony and evidence conclusively establishing that there is *no record evidence* supporting LCRA’s compliance with these two key requirements. There is *no record evidence* supporting production of 25,000 acre-feet per from the GLR site. There is *no record evidence* on local impacts to nearby landowners and permittees to support LCRA’s burden to establish that its applications do not unreasonably affect existing permits holders as required by Texas Water Code section 36.113(d)(2). There is *no record evidence* demonstrating that LCRA made *any* effort to minimize as far as practicable the drawdown of the water table or the reduction of artesian pressure or lessen interference between wells are required by District Rule 5.2(d)(9). In fact, the evidence conclusively establishes the *exact opposite* of what LCRA is required to prove before obtaining a permit for 25,000 acre-feet—the evidence conclusively establishes that LCRA made no effort to minimize local impacts and interference.

The Original PFD does not address critical legal deficiencies. These “no evidence” defects in LCRA’s case are legal insufficiency issues and do not involve “re-weighing” the evidence. On these critical issues there is *no evidence*. In this regard, legal sufficiency of evidence is distinct from weighing of the evidence as discussed in LCRA’s Motion for Rehearing. There is no weighing of evidence when the record contains no evidence of a vital fact. Legally insufficient evidence warranting reversal is found if there is a complete absence of evidence of a vital fact or the evidence conclusively establishes the exact opposite of the vital fact<sup>3</sup>—both are found in this

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<sup>3</sup> *BMLA, Inc. v. Jordan*, No. 01-19-00568-CV, 2021 WL 5364771, at \*4 (Tex. App. Nov. 18, 2021) (not yet selected for publication).

case. These legal insufficiencies were wholly ignored by the ALJs, which constitute an improper interpretation or application of law, rules, written policies, or prior administrative decisions.

The ALJs also improperly interpreted or applied the law, rules, written policies, or prior administrative decision by relying on untenable legal positions. The ALJs concluded that compliance with the District’s minimum well spacing requirement and special conditions regarding monitoring and phasing requirements and singling out and curtailing large permittee production are adequate to address impacts. The inclusion of these special conditions has no bearing on the uncontroverted evidence establishing that LCRA’s well field was not designed to minimize drawdown, interference, and local impacts and that its own pre-application expert predicted desaturation of the aquifer and severe well interference at far lower production levels than 25,000 acre-feet per year. The ALJs’ position has no support in Texas law, and effectively eliminates an applicant’s obligation to avoid unreasonable impacts and minimize drawdown and interference, in direct contradiction to Chapter 36 and District rules. Eliminating legal requirements from a statute or the District’s rules likewise constitutes an improper application or interpretation of the applicable law, rules, written policies, or prior administrative decisions—not “weighing” or “re-weighing” evidence.

In response to LCRA’s failure to meet its burden of proof and the ALJs’ improper application or interpretation of applicable law, rules, written policies, or prior administrative decisions, the Lost Pines Groundwater Conservation District’s (“District”) Board of Directors (the “Board”) modified the Original PFD (“Final Decision”) to interpret and apply the law and rules in this case. The Board’s modifications to the Original PFD in its Final Decision primarily include the limitation of pumping to 8,000 acre-feet and elimination of phased in additional production. These modifications reflect an interpretation and application of the law and rules to the facts in

this case, which require LCRA to prove its applications do not unreasonably affect existing permit holders and minimize drawdown, pressure reduction and well interference. Because there was no record evidence that LCRA met these two legal requirements for the 25,000 acre-feet per year requested by LCRA, the Board was justified in denying the additional phases above 8,000 acre-feet initial phase. Because the Board concluded that 8,000 acre-feet is the maximum level of production at which LCRA can satisfy the statutory requirements and meet its burden of proof, phasing conditions necessarily had to be eliminated. In reality, because of the “no evidence” deficiencies outlined above, the Board would have been justified in denying LCRA’s application altogether.

## II. ARGUMENT

### A. **Point of Error 1: Because the Board has Authority to Correct Errors of Law, the Board Did Not Err When It Rejected or Modified Parts of the Original PFD.**

The Board has express statutory authority to change a finding of fact or conclusion of law or vacate or modify the Original PFD if the ALJs did not properly apply or interpret applicable law or the District’s rules.<sup>4</sup> As discussed in the introduction, the ALJs did not properly apply or interpret law and the District’s rules warranting changes to the findings, conclusions, and the Original PFD.

LCRA admits that the Board has authority under Texas Water Code Section 36.4165 to change the Original PFD if the ALJs improperly applied or interpreted applicable law or rules.<sup>5</sup> LCRA merely contends the Board erred because it failed to “affirmatively conclude” that the ALJs improperly applied or interpreted the law. Section 36.4165 only requires the Board to “determine” that the ALJs did not properly apply or interpret the law or rules. Unlike Section 2001.058(e) of

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<sup>4</sup> TEX. WATER CODE § 36.4165(b)(1).

<sup>5</sup> LCRA’s Motion for Rehearing, p. 4.

the Administrative Procedure Act, Section 36.4165 of the Texas Water Code does not require the Board to state in writing its specific reason and legal basis for changes made to a proposal for decision.<sup>6</sup>

**B. Point of Error 2:**

Recharge takes no position on this point of error.

**C. Point of Error 3: Because There Is No Evidence on Critical Issues for which LCRA has the Burden of Proof to Support Its Application to Produce 25,000 Acre-Feet, the Board Did Not Err by Eliminating Phasing beyond the Initial 8,000 Acre-Feet.**

As applicant, LCRA has a mandatory duty to adduce evidence on certain key statutory issues involving the local impacts caused by its project. LCRA chose to not introduce evidence on these key local impacts issues that directly harm Recharge as the closest permitted well. The Original PFD did not even reference or address the hearing transcript or exhibits admitted at the hearing on these key “no evidence” issues. As discussed below, interpreting and applying law and rules in a manner that ignores no evidence legal insufficiencies and negates essential statutory elements or application requirements is improper and an error of law.

**1. There is no evidence that LCRA’s proposed wellfield will not unreasonably affect existing permit holders.**

As applicant, LCRA has a mandatory duty to demonstrate that its proposed well field will not unreasonably affect existing permit holders. Recharge is the nearest permit holder affected by LCRA’s application. LCRA put on *no evidence* concerning the impact of its well field on Recharge or other local permit holders. The Original PFD makes no reference to the record evidence adduced at hearing establishing conclusively that LCRA’s permit applications gave no consideration whatsoever to minimizing interference or other unreasonable impacts on existing

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<sup>6</sup> Compare TEX. GOV’T CODE § 2001.058(e) (“The agency shall state in writing the specific reason and legal basis for a change made under this subsection”), and TEX. WATER CODE § 36.4165 (excluding a requirement to state in writing the specific reason and legal basis for a change).

permit holders.<sup>7</sup> LCRA corporate witness Mr. Hofmann admitted that the well field siting on the edge of the GLR property was *not* recommended by any expert or LCRA employee, and LCRA hydrogeology expert witness Dr. Young admitted that he had no involvement in well field design.<sup>8</sup> The only evidence regarding its origin is that it was designed prior to LCRA's purchase of the water rights and in the absence of any hydrologic study.<sup>9</sup> The Original PFD makes no finding or reference regarding the harmful design of LCRA's proposed well-field that concentrates its wells along the property line, thereby *maximizing* the impact on Recharge's permitted well locations and other nearby wells. This is an error of law.

The Original PFD similarly does not address the evidence showing: (1) the well field design was "unconventional"<sup>10</sup>; (2) LCRA's request to pack 8 wells onto less than 1,800 acres—whether intentional or not—maximized drawdown, reduction of artesian pressure and interference on Recharge's permitted wells<sup>11</sup> (rather than minimized); and (3) the refusal by LCRA's expert to admit unreasonable impacts under any hypothetical so long as there was compliance with the District's spacing rules including a hypothetical where the well field of large production wells was designed to completely surround an existing well resulting in significant interference with the existing well.<sup>12</sup> Similarly, the Original PFD simply does not address, much less reconcile, LCRA's

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<sup>7</sup> The PFD interprets District Rule 5.2(d)(9) to mean that "as far as practicable" does not apply to the lessening of interference between wells. Recharge submits that this interpretation is too narrow, and that the logical interpretation of the District's rule is to apply the requirement to every element in the rule. Regardless of the correct interpretation of the District rule, the record evidence shows that LCRA did *nothing* to lessen interference with Recharge's nearest wells much less lessen interference as far as practicable. In fact, because the uncontroverted record demonstrates that LCRA designed its well field to *maximize* interference by concentrating all of the wells along the property line (instead of spreading them out), there is no evidence of any attempt to lessen interference let alone enough evidence to demonstrate that the "lessen interference" requirement has been met.

<sup>8</sup> Tr. at 179:21 – 180.8; 491:12-23.

<sup>9</sup> See Brown Ex. 38 (LCRA Aug. 24, 2014 correspondence to U.S. Fish and Wildlife Service re: LCRA's Proposed Groundwater Well) at LCRA-GLR010596.

<sup>10</sup> Tr. at 1217.

<sup>11</sup> Recharge Ex. 13; see Recharge Ex. B (Thornhill Direct) at 42:12 – 43:7 (describing LCRA's well-field configuration).

<sup>12</sup> Tr. at 549:6 – 551:24. Under this reasoning, there can never be an unreasonable impact so long as the spacing requirements are met.

hearing testimony, in which Mr. Hofmann and Dr. Young conceded no interference analysis had been performed on Recharge's wells,<sup>13</sup> or LCRA's admission that it did no testing on the GLR site.<sup>14</sup> LCRA adduced no evidence on these statutory and District rule requirements. LCRA's failure to adduce evidence on these issues, and the failure to address these issues in the Original PFD, is an error of law.

**2. There is no evidence that LCRA's proposed applications minimize as far as practicable the drawdown of the water table or reduction of artesian pressure or lessen interference between wells.**

LCRA has a mandatory duty as applicant to demonstrate that its proposed well field will minimize, as far as practicable, the reduction of artesian pressure—and lessen interference between wells. Recharge is the nearest permit holder affected by LCRA's application. Again, LCRA put on *no evidence* concerning the impact of its well field on Recharge or other local permit holders. The Original PFD concludes that LCRA could rely *entirely* on the GAM for analyzing local impacts from LCRA's proposed 25,000 acre-feet per year of groundwater production. This is an error of law. There are two fundamental reasons why the GAM cannot be used to evaluate the local impacts required by Rule 5.2(d)(2) and (d)(9) and the similar provisions in Texas Water Code 36.113(f) and 36.116(a) governing permitting and regulation of production.

*First*, the GAM is a *regional* model. It was not designed to model *local* impacts such as well interference and local reduction of artesian pressure. It is too "coarse" to measure local impacts because each grid cell in the GAM in the area of the GLR is *one square mile*. The GAM Final Report plainly states in its qualifications that it should not be used to evaluate local impacts:

Section 7.3: Limitations of Model Applicability. The purpose of the TWDB Groundwater Availability Modeling Program is the development of models to determine how regional water availability is

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<sup>13</sup> Tr. at 189: 16-21; 534:11-18.

<sup>14</sup> Tr. at 63:4-18; 174:1-7.

affected on a large scale by water resource development. Except for the area near the Colorado and Brazos rivers alluvium, the model was developed at a grid scale of one square mile. *At this scale, models are not capable of predicting aquifer responses at specific points, such as at a particular well. The groundwater availability models are accurate at the scale of tens of miles, which is adequate for understanding groundwater availability at the regional scale. . . . Questions regarding local drawdown to a well should be based upon analytical solutions such as TTim (Bakker, 2013), or a modification of the groundwater availability model that includes a refined numerical grid.*<sup>15</sup>

The lead author of the GAM Final Report was LCRA witness Dr. Young. In his own words, Dr. Young explicitly says that the GAM cannot be used the way LCRA and Dr. Young used it here. It is “not capable of predicting aquifer responses at specific points, such as a particular well.” This issue was the subject of extensive cross-examination and later briefing by several of the parties, yet this glaring oversight is not addressed in the Original PFD, which is an error of both policy and law—both of which the District was authorized to correct.

*Second*, in addition to being a regional model incapable of predicting local impacts “at specific points,” the GAM’s usage here is doubly flawed because the underlying assumptions in the model are wrong for GLR. Because the GAM is a large-scale regional model, it does not provide site-specific, measured data for every grid cell. Instead, the GAM relies on *assumptions* of local conditions for key model parameters. One such critical model parameter is transmissivity—which is the measure of how quickly the aquifer allows groundwater to migrate through the aquifer. The more quickly groundwater migrates, the more transmissive the aquifer is said to be. In this case, the GAM incorporates assumptions about model parameters for each grid square—which are each one square mile on and around GLR. But those GAM assumptions can be wrong and, in this case, they plainly were. Record evidence of site-specific data for the GLR

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<sup>15</sup> Aqua Ex. 10 at Section 7.3 (emphasis added).



tract *conclusively* showed the transmissivity values of the GAM (whether old or new) to be wildly incorrect—and in a manner harmful to Recharge and other local well owners. The 2010 LBJ Guyton report on the Aqua well on the GLR property, which was not addressed in the Original PFD, showed transmissivity values of *approximately half* those assumed in the GAM, which will likely **more than double the drawdown** shown by LCRA’s GAM runs.<sup>16</sup> The District’s own expert confirmed this relationship between transmissivity and drawdown.<sup>17</sup>

The flaws in LCRA’s approach are fatal to its application for 25,000 acre-feet per year. As applicant, LCRA had the burden of proof to demonstrate that its applications will not cause unreasonable impacts and minimizes drawdown, pressure reduction and well interference. LCRA relied exclusively on the regional GAM to model local impacts of its proposed groundwater production when the GAM itself explicitly states that the GAM cannot be used for that purpose. LCRA compounded that error by not correcting the plainly incorrect assumptions for transmissivity in the GAM which more than doubles the local impacts. Although these matters were addressed thoroughly on cross-examination at the hearing, and in post-hearing briefing, the Original PFD does not address these deficiencies in LCRA’s applications, which is an error of law.

**3. There is no evidence supporting 25,000 acre-feet of annual production from the GLR site.**

Given the known flaws in the GAM inputs for the GLR tract, there is no evidence to support LCRA’s applied-for 25,000 acre-feet of annual GLR production.<sup>18</sup> Mr. Hofmann was unaware of any study supporting its requested production volumes.<sup>19</sup> Record evidence suggested less than

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<sup>16</sup> Tr. at 1670:3-13.

<sup>17</sup> Tr. at 1647: 4-16.

<sup>18</sup> The only document even referencing 25,000 acre-feet, LCRA Ex. 72, was acknowledged by LCRA to make no reference as to whether the volume was studied or reasonable. Tr. at 225:2-11.

<sup>19</sup> Tr. at 174:16-21.

6,500 acre-feet from the entire tract,<sup>20</sup> 7,000 acre-feet,<sup>21</sup> and the potential for 10,000 acre-feet.<sup>22</sup> When pushed to run calculations at a higher production amount,<sup>23</sup> LCRA's pre-application expert determined that 20,000 acre-feet would cause *desaturation* of the Simsboro aquifer even when assuming low well interference.<sup>24</sup> The General Manager's expert did not examine whether 25,000 acre-feet of GLR production was reasonable or even feasible.<sup>25</sup> Yet the PFD simply does not address this record evidence. In response to Recharge's argument that LCRA began with a production goal and reverse-engineered its case to achieve that goal while ignoring inconvenient evidence showing that 25,000 acre-feet of annual production from an 1,800-acre site known to have far lower transmissivity than reflected in the GAM, the PFD observes that "the ALJs decline to read anything sinister into LCRA's decision to change experts."<sup>26</sup> This misses the point. Regardless of LCRA's motivation, LCRA failed to meet its burden of proof because no evidence supports 25,000 acre-feet of production.

LCRA's failure to meet its burden of proof dictates that LCRA's applied-for production volume be either denied outright, or at least reduced substantially, absent the imposition of adequate mitigation, which is exactly what the Board did in the Final Decision. The Board's decision to not grant the 25,000 acre-feet sought by LCRA was not error. LCRA's failure to adduce evidence in support that requested amount mandated that it not obtain a permit for that amount. In fact, the Board could have appropriately denied the LCRA's application altogether because of the failure to produce evidence on critical local impact issues discussed above.

#### **D. Point of Error 4 through Point of Error 7**

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<sup>20</sup> Aqua Ex. 2 (Fleming Direct) at 14:3-13.

<sup>21</sup> Recharge Ex. 23 at 4; Tr. at 327:24 – 328:2.

<sup>22</sup> Brown Ex. 31 at 6.

<sup>23</sup> Brown Ex. 34.

<sup>24</sup> Brown Ex. 36.

<sup>25</sup> Tr. at 1219:7 – 1221:20.

<sup>26</sup> PFD at 5.

Recharge takes no position on these points of error.

**E. Point of Error 8: LCRA’s Current Position That All Large Permit Requests Should be Treated Similarly and LCRA was Treated Differently in Comparison Contradicts LCRA’s Prior Position and, in any event, Ignores LCRA’s Failure to Produce Evidence on Key Local Impact Issues.**

LCRA has conveniently changed its position on fair and impartial treatment when it serves itself. LCRA contends that failing to include special conditions on phasing in LCRA’s permits constitutes “prejudicial treatment” of LCRA because the District issued similar special conditions in Recharge and Gatehouse’s (previously Forestar) permits.<sup>27</sup> Basically, LCRA is now arguing that all “large permit operation and transport requests” should be treated similarly, and it is arbitrary and capricious for LCRA to be treated differently.

When Recharge argued for fair and impartial treatment of all similarly situated permit holders during this proceeding and post hearing briefing,<sup>28</sup> LCRA argued that those special conditions were part of a settlement, and therefore, did not constitute District policy requiring application to all similarly situated applicants.<sup>29</sup> Now, LCRA is arguing the exact opposite—phasing *must* be included in LCRA’s permits because “Recharge and Gatehouse operating permits included similar special conditions on phasing...”<sup>30</sup> LCRA’s solely self-serving change in position should be rejected. The Board should not include phasing in LCRA’s permits because LCRA produced no evidence in support of its burden of proof on the critical local impact issues regarding Recharge and other local permitted (as discussed above) as required by law and District rules. Put another way, the existence of phasing in Recharge’s permits reflects the weight of evidence in Recharge’s permit applications and contested case hearing. That evidence from Recharge’s permit

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<sup>27</sup> LCRA Motion for Rehearing, p. 9.

<sup>28</sup> See, e.g., Recharge’s Closing Argument, pp. 24-35 (Dec. 20, 2019).

<sup>29</sup> See, e.g., LCRA’s Post-Hearing Reply to Closing Arguments, pp. 47-48 (Jan. 31, 2020).

<sup>30</sup> LCRA Motion for Rehearing, p. 9.

proceeding cannot be used as a substitute for LCRA's failure to produce evidence on key evidentiary points such as the local impacts on Recharge and other local permit holders.

**F. Point of Error 9**

Recharge takes no position on this point of error.

**IV. CONCLUSION AND PRAYER**

Protestant Recharge Water, LP respectfully requests that the Board deny LCRA's Motion for Rehearing on the grounds discussed herein. Recharge further requests that it be granted all such other relief to which it has shown itself to be entitled.

**Respectfully submitted,**

**TERRILL & WALDROP**

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## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served as indicated on March 10, 2022 to the following:

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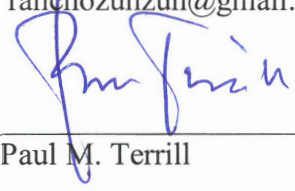
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