SOAH DOCKET NO. 952-19-0705

APPLICATION OF LOWER COLORADO RIVER AUTHORITY FOR OPERATING AND TRANSPORT PERMITS FOR EIGHT WELLS IN BASTROP COUNTY, TEXAS	**§ § § § § §**	**BEFORE THE LOST PINES GROUNDWATER CONSERVATION DISTRICT**

ENVIRONMENTAL STEWARDSHIP'S REPLY TO LCRA'S MOTION FOR REHEARING

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

Environmental Stewardship submits this Reply to LCRA's Motion for Rehearing in this matter regarding the Application of Lower Colorado River Authority ("LCRA") for operating and transport permits for eight wells in Bastrop County, Texas. For support, Environmental Stewardship offers the following:

I. Introduction

On November 22, 2021, LCRA submitted a Motion for Rehearing regarding the above-referenced matter. By letter dated January 19, 2022, Environmental Stewardship submitted a brief response to LCRA's Motion. At the February 16, 2022 regular board meeting, a majority of the Lost Pines Groundwater Conservation District (the "District") Board voted to grant LCRA's Motion for Rehearing.

The District's Special Counsel advised the parties to submit replies to LCRA's Motion for Rehearing by March 10, 2022—focusing on the issues raised in LCRA's motion. Environmental Stewardship incorporates by reference the arguments submitted in its January 19, 2022 letter brief, which is attached to this Motion. *See* Appendix A. In addition, Environmental Stewardship offers the following arguments in response to LCRA's Motion for Rehearing. More specifically, Environmental Stewardship responds to those arguments in the Motion concerning the requirement that LCRA monitor impacts of its groundwater pumping on surface water resources.

For the reasons described below, Environmental Stewardship maintains that this requirement should be maintained, if the Board elects to grant LCRA operating permits. Further, Environmental Stewardship agrees with and supports the arguments submitted by the Brown Landowners regarding the decision to limit LCRA's permitted pumping to 8,000 acre-feet per year.

II. The ALJs recommended monitoring surface water resources, based on the evidence presented.

By its First Point of Error, LCRA argues that the District did not have the authority to revise the findings and conclusions and the Proposal for Decision ("PFD") in the manner that it did, citing Texas Water Code Section 36.4165. LCRA did not, however, specifically identify the revised findings, conclusions, and sections of the PFD about which it complains. In any event, for the reasons explained in the City of Elgin's and Aqua WSC's reply and in the General Manager's Reply to LCRA's Motion for Rehearing, Environmental Stewardship agrees that LCRA's arguments on this point are without merit.

Furthermore, Environmental Stewardship offers that with regard to the requirement that LCRA monitor impacts of its groundwater pumping on surface water resources, this requirement was recommended by the Administrative Law Judges ("ALJs") in their PFD. Thus, the District's Final Decision with regard to the surface water monitoring requirement was consistent with the ALJs' recommendation in their PFD.

III. The District properly determined that LCRA's permit should be limited to 8,000 acre-feet per year.

LCRA complains, by its Point of Error Number 3, that the District erred by limiting LCRA's authorized production to 8,000 acre-feet per year, because this contradicts the ALJs' finding that the requested 25,000 acre-feet per year would not have unreasonable effects.

Environmental Stewardship agrees with and supports the arguments presented by the Brown Landowners and Aqua WSC and the City of Elgin in response to this issue.

Further, as explained by the GM in his Reply to the Motion for Rehearing, the changes made by the District to certain findings and conclusions were consistent with the

District's decision to authorize production in the amount of 8,000 acre-feet per year. The changes were not substantive, but rather, they explained the District's ultimate decision.

Finally, Environmental Stewardship points out that the PFD supports the District's decision to limit the amount of groundwater that LCRA is authorized to produce. In their PFD, the ALJs explained that "the GAMs show potential impacts to surface water resources caused by LCRA and District-wide pumping."[1] This supports the District's decision to limit the amount of groundwater that LCRA is authorized to produce.

IV. The surface water monitoring requirement does not render LCRA's permit more "restrictive."

By its Point of Error 4, LCRA argues that the requirement to monitor impacts on surface water resources renders its permit more "restrictive" than existing, in-district permits.

LCRA does not identify or explain with any specificity how a requirement to monitor impacts on surface water resources renders its permit more restrictive than other existing permits. Surface water monitoring does not "restrict" the quantity of water that LCRA is authorized to pump. It merely requires LCRA to provide tools to measure the impacts of its pumping on surface water resources. As explained in the attached Appendix, evidence in the record supports this requirement, which was proposed by the ALJs in their PFD and adopted by the District.

V. The District is authorized to require surface water monitoring in any permit issued to LCRA.

By Point of Error 7, LCRA argues that the District is not authorized to require surface water monitoring, and that such a requirement is unsupported by the evidence in this case. LCRA fails to cite any legal authority in support of its argument that the District may not impose surface water monitoring.

As recognized by the GM in his reply to LCRA's Motion for Rehearing, the surface water monitoring requirement is consistent with and supported by the Board's governing

[1] PFD, p. 54.

statutes. Section 36.113(d)(2) of the Water Code requires that before granting or denying a permit, the District shall consider whether "the proposed use of water unreasonably affects existing groundwater and surface water resources or existing permit holders." Tex. Water Code § 36.113(d)(2). The surface water monitoring requirement implements this legislative directive.

In addition, the surface water monitoring requirement is supported by evidence in the record, developed during the SOAH administrative hearing. That evidence revealed that LCRA's proposed pumping is likely to impact surface water resources, based on the best available science—the "new" GAM, which considers the impacts of LCRA's proposed pumping, in the context of existing conditions.

No party disputed that the GAM was the best available science for assessing impacts on surface water resources resulting from LCRA's proposed pumping. In fact, LCRA's expert consultant relied on the same model as did Environmental Stewardship's and the GM's expert witnesses to evaluate predicted impacts on surface water resources as a result of LCRA's proposed pumping. And the 3 parties' experts reached similar results. The results are summarized well by the GM's testifying expert, Dr. Hutchison: "The results of my analysis are clear that the model predicts impacts to the surface water system as a result of the proposed LCRA pumping."[2] While the impacts could not be quantified with any specificity, experts for these 3 parties (LCRA, the GM, and Environmental Stewardship) all agreed that the GAM demonstrated, qualitatively, that LCRA's proposed pumping would have impacts on surface water resources. According to Dr. Hutchison, "It is unreasonable to summarily dismiss the potential for impact [on surface water resources]."[3]

Even Dr. Young, who testified on behalf of LCRA, admitted that his modeling simulations showed that LCRA's pumping would eventually cause the Colorado to become

[2] Dr. Hutchison's prefiled testimony, p. 26, ll. 4-5.

[3] Dr. Hutchison's prefiled testimony, p. 26, ll. 8-9.

a losing stream.[4] And according to Dr. Young, when a stream goes from a gaining stream to a losing stream, the impact on the stream may be considered unreasonable.[5]

LCRA suggests that the predicted surface water impacts caused by its proposed pumping should have been modeled in some other manner—in a manner that disregards existing conditions. But LCRA failed to identify any other available scientific tool that would better predict surface water impacts caused by its proposed pumping. All parties relied on the new GAM—the best available science, here—for purposes of qualitatively assessing whether LCRA's proposed pumping would unreasonably impact surface water resources. While the new GAM could not quantify the expected impacts, it clearly predicted that some impacts on surface water resources could be expected as a result of LCRA's proposed pumping. And as Mr. Trungale (the only expert witness with the credentials to opine on the reasonableness of the predicted impacts)[6] explained, the predicted impacts on surface water resources should be considered "unreasonable."[7]

This evidence is more than sufficient to support the ALJs' recommendation and the District's decision to require surface water monitoring as a condition of the permit issued to LCRA. Even if the District limits production to 8,000 acre-feet per year, the District is well within its statutory authority to include a surface water monitoring requirement to ensure protection of surface water resources from any unreasonable impacts caused by LCRA's pumping.[8] LCRA bore the burden of proof in this case, and it simply failed to demonstrate that no unreasonable impacts would be caused by its proposed pumping.

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[4] Ex. LCRA-28 (Prefiled Testimony of Dr. Young), p. 41.

[5] Ex. LCRA-28, p. 40, ll. 7-10.

[6] Dr. Young, who testified on behalf of LCRA, admitted that he is "not an expert to determine [whether] the impact would be an unreasonable impact on the river,"Tr. V. 2, p. 459, ll. 17-19, and that he does "not have the qualifications to determine what that substantial change [to surface water flows] would be." Tr. v. 2, p. 458, ll. 1-6.

[7] *See* Trungale prefiled testimony, p. 12.

[8] As Dr. Hutchison explained in his prefiled testimony: "Future monitoring of groundwater levels once [sic] Phase 1 of the pumping will provide some degree of insight as to the potential for surface water impacts." Ex. GM-11, p. 32. The surface water monitoring requirement for the proposed 8,000 acre-feet of pumping attempts to accomplish what Dr. Hutchison intended.

Finally, LCRA maintains that the surface water monitoring requirement is vague and unclear. While Environmental Stewardship disagrees with this argument and maintains that the surface water monitoring requirement is sufficiently clear to allow for implementation, Environmental Stewardship offers that the District could provide additional clarity, if it so chooses, based on the evidence in the record.

Environmental Stewardship provided evidence in the record demonstrating how such a Surface Water-Groundwater (SW-GW) monitoring plan could be designed and implemented.[9] In fact, Section 4.1.4 of the document cited in ES exhibit 301, describes a method that was used by LCRA during the LCRA-SAWS Project to monitor the impacts of groundwater pumping on the Colorado River in the lower basin.[10] This should provide some guidance for the District (and for LCRA) for purposes of the surface water monitoring requirement. So long as the permit includes a requirement that LCRA must assess, via its monitoring well system, impacts on surface water resources, Environmental Stewardship is confident that the requirement can be successfully enforced and implemented by the District.

CONCLUSION & PRAYER

Assessing impacts of groundwater pumping on surface water resources is a statutory and District rule requirement. *See* Tex. Water Code § 36.113(d)(2). As described above, the evidence presented during the SOAH hearing demonstrated that LCRA's proposed pumping is predicted to have an impact on surface water resources. The extent of the impact remains unclear. Thus, the District was well within its authority to require monitoring of surface water impacts caused by LCRA's pumping, as proposed by the ALJs in their PFD. Thus, Environmental Stewardship urges the District to maintain this requirement in any permit issued to LCRA, regardless of the amount of groundwater LCRA is authorized to produce.

[9] Ex. ES-300.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of Environmental Stewardship's Reply to LCRA's Motion for Rehearing was served on all parties listed below on March 10, 2022.

/s/ Marisa Perales
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Appendix A

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January 19, 2022

Gregory Ellis, Special Counsel for
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Via email: greg@gmellis.law

Re: Motion for Rehearing filed by Lower Colorado River Authority in the matter of *Application of Lower Colorado River Authority for Operating and Transport Permits for Eight Wells in Bastrop County, Texas*; SOAH Docket No. 952-19-0705

Dear Mr. Ellis:

As you know, my firm represents Environmental Stewardship, a party in the above-referenced matter. On behalf of Environmental Stewardship, I submit this brief response to the arguments raised in LCRA's Motion for Rehearing, filed November 22, 2021. More specifically, by this letter, Environmental Stewardship will address, briefly, the arguments raised by LCRA concerning the requirement that LCRA monitor impacts of its groundwater pumping on surface water resources—a requirement that was recommended by the Administrative Law Judges ("ALJs") in their Proposal for Decision ("PFD") in this matter and that was ultimately included in the Board's final decision in this matter. For the reasons listed below, Environmental Stewardship urges the Board to overrule or deny LCRA's Motion for Rehearing.

First, the surface water monitoring requirement is consistent with and supported by the Board's governing statutes. Section 36.113(d)(2) of the Water Code requires that before granting or denying a permit, the District shall consider whether "the proposed use of water unreasonably affects existing groundwater and surface water resources or existing permit holders." Tex. Water Code § 36.113(d)(2). Having considered that "the GAMs show potential impacts to surface water resources caused by LCRA and District-wide pumping," the ALJs recommended that "any monitoring well system must include

monitoring wells that could monitor effects on surface water resources."[1] The Board agreed, as was within their discretion.

Second, the surface water monitoring requirement is supported by evidence in the record, developed during the SOAH administrative hearing. That evidence revealed that LCRA's proposed pumping is likely to impact surface water resources, based on the best available science—the "new" GAM.

No party disputed that the GAM was the best available science for assessing impacts on surface water resources resulting from LCRA's proposed pumping. In fact, LCRA's expert consultant relied on the same model as did Environmental Stewardship's and the GM's expert witnesses to evaluate predicted impacts on surface water resources as a result of LCRA's proposed pumping. And the 3 parties' experts reached similar results. The results are summarized well by the GM's testifying expert, Dr. Hutchison: "The results of my analysis are clear that the model predicts impacts to the surface water system as a result of the proposed LCRA pumping."[2] While the impacts could not be quantified with any specificity, experts for these 3 parties (LCRA, the GM, and Environmental Stewardship) all agreed that the GAM demonstrated, qualitatively, that LCRA's proposed pumping would have impacts on surface water resources. According to Dr. Hutchison, "It is unreasonable to summarily dismiss the potential for impact [on surface water resources]."[3]

Further, Environmental Stewardship is the only party that presented an expert regarding the reasonableness of the impacts on surface water, as predicted by the GAM.[4] And that expert witness, Mr. Trungale, opined that LCRA's proposed pumping would result in unreasonable impacts to surface water resources.[5]

This evidence is more than sufficient to support the ALJs' recommendation and the District's decision to require surface water monitoring as a condition of the permit issued to LCRA.

Finally, Environmental Stewardship offers that LCRA did not agree to the surface water monitoring requirement included as a condition to the permits; this was a

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[1] PFD, p. 54.

[2] Dr. Hutchison's prefiled testimony, p. 26, ll. 4-5.

[3] Dr. Hutchison's prefiled testimony, p. 26, ll. 8-9.

[4] Dr. Young, who testified on behalf of LCRA, admitted that he is "not an expert to determine [whether] the impact would be an unreasonable impact on the river," Tr. V. 2, p. 459, ll. 17-19, and that he does "not have the qualifications to determine what that substantial change [to surface water flows] would be." Tr. v. 2, p. 458, ll. 1-6.

[5] *See* Trungale prefiled testimony, p. 6.

requirement recommended by the ALJs in their PFD—a requirement that LCRA objected to in its exceptions.[6] LCRA argues, in point of error 6 of its motion for rehearing, that the District erred by including a monitoring well agreement as a condition of the permits, because LCRA did not acquiesce to the inclusion of such a requirement absent the phased-in approach to pumping proposed in the draft permits, totaling 25,000 acre/feet per year. To be clear, LCRA never acquiesced to the surface water monitoring requirement, which the ALJs recommended be included in the monitoring well agreement. Thus, this requirement was never based on the acquiescence or agreement of LCRA.

For the reasons described above, Environmental Stewardship urges the District to deny LCRA's motion for rehearing, particularly the issues that complain about the special condition requiring LCRA to monitor impacts of its pumping on surface water resources. Environmental Stewardship reserves the right to submit additional substantive arguments and comments in response to LCRA's motion for rehearing, should the District request such a response or consider taking action on LCRA's motion for rehearing.

Respectfully submitted,
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CC: Attached service list.

[6] *See* LCRA's Exceptions to the PFD, pp. 2-3.

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