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**

BROWN LANDOWNER'S RESPONSE TO LOWER COLORADO RIVER AUTHORITY'S MOTION FOR REHEARING

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

COMES NOW, the Brown Landowners' (Landowners') and file this Response to the Lower Colorado River Authority's (LCRA) Motion for Rehearing and as to the LCRA's points of error respond as follow:

I. Point of Error 1: The LCRA contends that the District erred when it changed the Final Decision andits Findings and Conclusions in violation of Texas Water Code § 36.4165.

LCRA fails to identify with particularity which findings of fact or conclusion that are subject to this point of error No. 1. Nor has the LCRA set forth the evidentiary or legal ruling claimed to be in error. TX. Gov.'t Code 2001.146(g), 30TAC 80.272.

The Board did not change the findings of fact or conclusions of law. It exercised its discretion and statutory authority to issue operating and transport permits to LCRA.

II. Point of Error 2: The LCRA contends that the Board erred by violating the Open Meetings Act when it made its decision to reject the PFD's recommendation to grant LCRA's Permits.

This argument is ludicrous and hypocritical. Governing boards regularly meet in Executive Session and then take action, in public session, on controversial issues without

revealing the rationale discussed in the Executive Session. For example, the LCRA governing board does so on a regular basis, as demonstrated in the *Minutes from the LCRA Board of Directors, December 14, 2021, p 35*:

> *The Board next took up Agenda Item 10 – Amendments to the Highland Lakes Dredge and Fill Ordinance.*
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> *General Manager Phil Wilson, Executive Vice President of Water John B. Hofmann and Director of Strategic Water Initiatives Lauren Graber, presented for consideration the staff recommendation, described in Agenda Item 10 [attached hereto as Exhibit H], that the Board approve amendments to the Highland Lakes Dredge and Fill Ordinance to limit the scope of Tier III Commercial Dredge and Fill Activities based on considerations related to navigation, critical infrastructure, public safety and water supply needs. [The amended ordinance will become effective Jan. 1, 2022.]*
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> *The following speakers addressed the Board on Agenda Item 10: Virgil Yanta, in support of Save Lake LBJ and members of homeowners associations in Kingsland; Laura Patterson, Save Lake LBJ; Sharon Moore, Save Lake LBJ Board member; and Phil Zeigler, Save Lake LBJ.*
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> *Staff responded to various questions from the Board throughout the discussion on Agenda Item 10.*
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> *Chair Timmerman declared the meeting to be in executive session at 2:47 p.m., pursuant to sections 551.071, 551.072, 551.074, 551.076, 551.086, 551.089 and 418.183(f) of the Texas Government Code. Executive session ended, and Chair Timmerman declared the meeting to be in public session at 3:09 p.m.*
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> *21-82 After discussion, upon motion by Director Allen, seconded by Director Yeary, the Board unanimously approved amendments to the Highland Lakes Dredge and Fill Ordinance to limit the scope of Tier III Commercial Dredge and Fill Activities based on considerations related to navigation, critical infrastructure, public safety and water supply needs [The amended ordinance will become effective Jan. 1, 2022], as recommended by staff in Agenda Item 10, by a vote of 14 to 0.*

III. Point of Error 3: The LCRA contends that the District erred by limiting LCRA's authorized production to 8,000 acre-feet per year and eliminating phased-in increases in production of up to 25,000 acre-feet per year.

Texas Water Code § 36.4165 clearly authorizes the Board to make changes to the final proposal of the ALJ(s) when warranted.

Texas Water Code § 36.1132 requires that the Board issue permits based on Modeled Available Groundwater (MAG) and long-term conditions in achieving the applicable desired future conditions. That is what the board did here.

The initial LPGCD hydrological review of the LCRA permit application details factors, absent exempt pumping, that the Board is required to consider in issuing permits under Texas Water Code § 36.1132.

> *The Modeled Available Groundwater (MAG) for the Simsboro Aquifer in the District is 32,246 ac-ft/yr in 2020 and 30,843 ac-ft/yr in 2060. The total permitted pumpage in the Simsboro Aquifer is currently 89,021 ac-ft/yr. However, the estimated recent production under these permits has been approximately 13,000 to 17,000 ac-ft/yr. The proposed production of 25,000 ac-ft/yr in this application is greater than difference between the MAG and what is currently being produced under existing permits.*
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> *[LCRA Review- Final- 20180406.docm; p6]*

Issuing a permit to produce 8,000 A/F/Y of groundwater is consistent with the ALJ's findings that such amount would not result in unreasonable impacts and is consistent with the desired future condition.

IV. Point of Error 4: The LCRA contends that the District erred when it violated Texas Water Code § 36.122(c) by imposing more restrictive permit conditions in the Permits thanit has imposed on existing in-district permittees.

The LCRA objects to (1) construction and maintenance of a Monitoring Well System and well monitoring agreement; (2) tools to monitor surface water; (3) submitting monitoring data before a permit renewal; and (4) conducting a 36-hour pump test on each well drilled before

production and contends that these conditions were applied to discriminate the LCRA because LCRA intends to transport water out of the District.

The LCRA provides no evidence that these conditions are in any way related to the LCRA application for transport permits. Each of the conditions, except for surface water monitoring, have been included in previous LPGCD permits. There is no language in any LPGCD permits stating that special conditions are contingent on whether a permittee's beneficial use of water is in-district or for transport out of the district.

V. Point of Error 5: The LCRA contends that the District erred by including Special Condition (3) in theOperating Permits in violation of Texas Water Code § 36.1145.

The LCRA argues that Special Condition (3) only applies if the LCRA receives a permit with "phased-in production of the full 25,000 acre-feet/year." The LPGCD should require Special Condition (3) for any phased-in production. If the LCRA accepts the 8,000 acre-feet/year with no phased-in production, then Special Condition (3) does not appear relevant.

This is not an issue if the LCRA's representation to the Board and ALJs that no unreasonable impacts will occur are correct. LCRA apparently is not confident in those representations and testimony.

VI. Point of Error 6: The LCRA contends that the District erred by requiring LCRA to enter into a monitoring well agreement and to construct and maintain a Monitoring WellSystem.

The LCRA objects to Special Condition (1), a monitoring well agreement that requires the construction and maintenance of a Monitoring Well System. The LCRA contends that the agency's former agreement to Special Condition (1) was contingent on receiving a permit for 25,000 acre-feet/year.

The LCRA fails to provide any evidence that acceptance of permit special conditions was contingent on receiving a permit for 25,000 acre-feet/year. There is no language in the permit

application or testimony from LCRA witnesses stating that the LCRA will not accept special conditions for an operating permit of less than 25,000 acre-feet/year.

To the contrary, in the Supplemental Information attached to the LCRA applications for operating and transport permits, the LCRA states:

> *"LCRA further expects and accepts that special conditions similar to those included in other recent large permits, such as those related to monitoring aquifer conditions and impacts of pumping, also will be included in LCRA's permits."*

Furthermore, this argument contradicts sworn testimony by LCRA Vice President for Water, John Hofmann, in the final statement of the 6-day in-person SOAH hearing. Mr. Hofmann stated:

> *"We're going to be compliant with whatever the conditions are, even the ones that we may not appreciate now or in favor of -- be in favor of now. Whenever we get a permit, we will be in compliance with our permit."*
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> *[Transcript 952-19-0705_LCRA_V6_102219; pgs 1696-1697]*

VII. Point of Error 7: The LCRA contends that the District erred by requiring LCRA to monitor surface water.

Landowners support the position and argument of Environmental Stewardship.

VIII. Point of Error 8: The LCRA contends that the District erred when it treated LCRA's applications different than how the District has treated other large permit operation and transport requests.

The LCRA contends that the LPGCD Board arbitrarily issued operating and transport permits for less than the application request. The LCRA is incorrect. The transport permit was issued for 25,000 acre-feet/year.

The LCRA contends that the LPGCD Board discriminated against the LCRA by awarding an operating permit for a lesser amount, and that this is inconsistent with the amounts awarded in the Recharge and Gatehouse operating permits.

Again, the LCRA is incorrect. The LPGCD did not award the full amounts requested by Recharge or Gatehouse. The LCRA knows this to be the case, because discovery documents clearly show that the LCRA staff were fully aware that LPGCD historically awarded an amount for less than a permit application. The LCRA employed R. W. Harden & Associates to inquire what Recharge and Gatehouse requested in their applications and the amounts awarded by the LPGCD Board.

Mr. Wier, witness for Brown Landowners, studied and testified to the email threads between LCRA staff Glenda Champagne, David Wheelock, and consultant RW Harden & Associates. The emails show that David Wheelock increased the amount in the LCRA application after learning that Gatehouse was awarded 63% of their request and Recharge 82%.

> *"...and then they asked Mr. Harden to call Mr. Thornhill and say -- because it's in the emails that you read through. Says, ask -- ask -- it says, "You can talk to Recharge and you can talk to Forestar and -- and -- or you can call Mr. Thornhill and say how did they decide to come up with the numbers they came up with?" And he writes back and he says, "Well, you know, they asked for this, but they got this. And they asked for this amount, but they got this amount."*
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> *And then Mr. David Wheelock with the LCRA, he looks at that information and he says okay. Because up until now, for six months they've been negotiating 15, 20; 15, 20. Then when he looks at the numbers and sees that Recharge and End Op -- or Recharge and Forestar they got 60 percent and 80 percent of what they asked for, all of a sudden he says, "Let's go for 25." Okay. So they are asking for 25 in the hopes that they are going to get 10. I don't know. I don't know. But that's what all the discovery that I've read."*
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> *[952-19-0705_LCRA_V4_101819; p 982]*

Mr. Wier's testimony was unchallenged by the LCRA. The ALJ(s) characterized his testimony as "*a non-expert landowner."* [*19-0705 Exceptions Letter by ALJs; p 2*] but they cannot ignore it. His uncontroverted testimony was permissible under the Texas Rules of Evidence in demonstrating his personal knowledge of documents that were admitted into the

record and which he had personally reviewed. Mr. Wier did not offer an impermissible "opinion" as a lay witness on those documents under Rule 701. While he was not offered as an expert witness, under Texas Rule of Evidence 701, he was entitled to offer a lay opinion to determine a fact issue – all of which was not only uncontroverted but unchallenged.

IX. Point of Error 9: The LCRA contends that the District erred when it failed to grant the Operating and Transport Permits as recommended by the ALJs, as modified by LCRA's exceptions, which correct unworkable and unlawful permit conditions.

The LCRA contends that the LPGCD Board is acting arbitrarily and capriciously if the Board fails to award the LCRA their full request along with a list of exceptions the LCRA deems unnecessary. This is simply the immature argument of a toddler, "You are not fair, because I did not get what I want!"

The LCRA has presents no evidence that the LPGCD Board has acted without due diligence and strict adherence to the law.

X. Conclusion

For these reasons, the Brown Landowners' respectfully request that the Board deny the LCRA's Motion for Rehearing.

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CERTIFICATE OF SERVICE

I hereby certify by my signature below that on the **10th** day of **March** 2022, a true and correct copy of the above and foregoing document was forwarded via email or First-Class Mail to the parties on the attached Service List.

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